Session Report

Session Title: Getting serious about grand corruption – How to scale up enforcement

Date & Time: Wednesday, 07.12.2022, 1 pm- 3.30 pm GMT -5

Report prepared by: Karen Hussmann, International Council, Transparency International (TI)

Moderated by: Angela Reitmaier, Representative with UNCAC Coalition, Transparency International (TI) Germany

Panellists:

- Gillian Dell - Head of Conventions and Global Advocacy Lead, Transparency International
- Jose Ugaz - International Council, Transparency International
- Philippe Jaeglé - French Financial Prosecutor
- Guillaume Hézard - French Judicial Police, Central Anti-Corruption
- Naomi Roht-Arriaza - President, Due Process of Law Foundation (DPLF) and Professor of Law, University of California (UC), Hastings Law School
- Helen Taylor - Spotlight on Corruption, UK
- David Ugolor – ANEEJ, Nigeria

Share the thematic focus of the session, it's purpose and corruption risks?

International discussions on grand corruption are gaining dynamism and in view of the seriousness of the problem, the great harm it causes, and widespread impunity, the topic of this workshop is: how to scale up enforcement and how to ensure victims' rights are considered.

The issue is particularly topical given that the governments of Canada, Netherlands and Ecuador have recently developed recommendations for an anticorruption court or other regional / supra-national mechanisms to investigate grand corruption

Summary of panellists' contributions & discussion points (please be as detailed as possible)

Part 1: The challenges to enforcement against grand corruption

Gillian Dell - Head of Conventions and Global Advocacy Lead, Transparency International

Moderator's question: Why is it not sufficient to have corruption definitions in our legal codes? Why do we need a new definition on grand corruption?

Gillian presented a brief summary of the main arguments why a legal definition for grand corruption is important and what is needed to strengthen anticorruption (AC) systems. The proposal of Transparency International includes the following:

- High level, large scale corruption – or grand corruption- has become an increasing problem causing more harm;
- Perpetrators enjoy impunity;
- There is political interference in the work of enforcement agencies, including those investigating the laundering of proceeds of corruption.
- As a basis for addressing grand corruption, it is important to have a legal definition which would include the following: involving a high-level official(s), corruption on a large scale, covering more than one single corrupt action i.e. a scheme and causing great harm. It should cover a wide range of offences, namely all the offences in UNCAC. Grand corruption would be a serious crime and the aim would be to ensure that there is no impunity. (The speaker read out the TI legal definition)
- The definition is not for the sake of having a definition but would be the basis for the introduction of special national enforcement measures for grand corruption cases, including:
    - ✓ Universal jurisdiction
    - ✓ Unlimited or long statutes of limitation
    - ✓ Minimal immunities
- The definition can also provide a basis for introducing international measures and structures to achieve better enforcement such as
    - ✓ A mechanism for coordination among jurisdictions for investigations and prosecutions
    - ✓ A mechanism for providing technical and financial support to countries willing to investigate but with limited funds or capacity – possibly including introduction of a body like CICIG at a country's request
    - ✓ A mechanism for introducing international or regional tribunals in national courts or in regional human rights courts
    - ✓ Protection of rights of victims through a victims' ombudsperson and a mechanism for giving standing to non-state victims' representatives
    - ✓ Regional or global mechanisms for the management of confiscated assets
- It is important to pursue and achieve national measures and expanded

international structures to address impunity

Jose Ugaz - International Council, Transparency International
Question from the moderator: What prompted TI to focus on grand corruption?
Back in 2012 – 2014, when TI started to work on grand corruption, there were a few cases of grand corruption but they could be counted on two hands. Grand and transnational grand corruption cases were not such an extensive problem in the past, despite a lot of corruption in many countries. But TI was aware that grand corruption cases were coming up more and more in a globalized world. TI explored how to work in this area, including discussions about whether cases could be presented to the International Criminal Court (ICC).
A consultant suggested that grand corruption be treated as an aggravating issue by the ICC. Then there was a workshop with in 2015 with experts to review initial proposals for a definition of grand corruption. This was followed by systematic work on this subject, including a campaign to unmask the corrupt in order to raise awareness about grand corruption. The UK Summit and other international fora were used to further advance the ideas. It is amazing to see how much this has advanced in the course of 6 years.

Two words should be in the centre of discussion of grand corruption:
- Grand corruption is an issue of POWER
- Grand corruption is about IMPACT in HUMAN RIGHTS.

Although the AC community may be divided about whether there should be a special definition for grand corruption, the distinguishing element of power makes the difference.

It is not necessarily an issue of vast amounts of money, it is about violating human rights, taking away lives, dignity, health, etc.

Peru is a good example, in this very moment: the President attempted a coup d'etat, but is now in prison. He is subject to several active investigations of corruption, and several dozens more cases are pending.

The problem is that national judicial systems are not always capable of addressing grand corruption, they are also permeated by systemic corruption, and the corrupt can contract the best lawyers, etc. This is why supra-national bodies are important. There are different models or mechanisms that can serve as reference/inspiration:
- International Commission against Impunity in Guatemala (CICIG). The results were amazing. It started in 2006 and the results were so good that the government dismantled the CICIG. It demonstrated that it is possible to make a difference against grand corruption
  - ✓ Honduras also established a similar body which met the same fate as CICIG
  - ✓ Ecuador tried the same and also El Salvador but did not progress
  - ✓ Honduras again tries now to re-establish such a mechanism.
- Anticorruption court in Ukraine

  - Lot of international support → very interesting results
- The proposal to create an international AC court
  - ✓ Passionate discussions of supporters and detractors
  - ✓ Judge Wolf is advocating strongly and some countries support the idea
  - ✓ But many people believe that it would be a distraction
  - ✓ Many governments would not be willing to sign off to the initiative

Message: We need additional political will to fight grand corruption. AC and anti–impunity initiatives face a big challenge since they depend on national political will. We have to be innovative to address these challenges.

Philippe Jaeglé – French Financial Prosecutor
Moderator's question: What have been the obstacles to the investigation and prosecution of grand corruption?

With regard to this question, in France everybody thinks immediately about the Objang case relating to Equatorial Guinea.
There are two possibilities for going after corrupt behaviours:

i) Go after ill-gotten gains of high-level public officials involved in grand corruption
ii) Go after companies involved in corrupting high-level public officials abroad to get important contracts

1. In France, some important mechanisms to do this include dedicated institutions to address high level corruption
   a. French AC agency (focused on prevention)
   b. Police office focussed on investigation
   c. National financial prosecution office

2. If you want to be successful you have to be strategic and focus on serious corruption cases

3. In France, exposure of corruption cases is helped by
   - ✓ Whistle blower protection
   - ✓ The ability of private organizations which are involved to file a complaint on behalf of victims – this can lead to an investigation. This was used by TI France which started the Objang case
   - ✓ Limitations periods for cases – only start to run when the investigation starts, not when the action took place. This allows more time for the actual investigation.
   - ✓ Partial reversal of the burden of proof in money laundering cases - this is very useful. It means that prosecutors do not have to prove that involved actors had the will to hide money (e.g. in offshore companies).

Guillaume Hézard – French Judicial Police
Moderator's question: What is special about the French Judicial Police and how have its features helped in AC cases?

Back in 2010 – France was terrible in fighting corruption and got bad reviews from GRECO. A huge scandal – not corruption but a tax case (the Minister of Budget hid large amounts of ill-gotten assets in Switzerland and Singapore) - helped to advance the fight against corruption and the institutional arrangements:. This included creation of the corruption prevention entity, the High Authority of Declaration of Public Life, the Prosecutor and, since 2013, in the National Police there is a central office against corruption, tax crime and financial crime. These crimes are all linked and need to be seen and investigated together.

The above-mentioned office in the National Police has 85 agents, more than 200 investigations, more than 80 cases of corruption. It investigates SERIOUS tax crime; bribery and corruption; election financing and other offences.

Corruption is a form of organized crime, involves several people, to hide and launder profits of corruptions. The Office does not only target the corrupt but also the enablers – who earn profit from helping the corrupt. For this, relevant investigation tools are used, including surveillance, undercover agents, and others. Also, intelligence work is enhanced, both nationally and internationally. Seizing and freezing criminal assets is crucial. And this needs to be done as quckly as possible.

The Office tries to be pragmatic, engages in joint investigation teams, opens mirror cases – based on tips from abroad, encourages companies to report themselves and fosters the approach that a good deal is better than a lawsuit – deferred prosecution agreements.

Part 2: Recognising rights of victims and victims redress

Naomi Roht-Arriaza –President, Due Process of Law Foundation (DPLF) and Professor of Law, University of California (UC) Hastings Law School

Naomi got involved in AC work because whatever she did in human rights was always related to impunity; and impunity was always related to corruption. From working on human rights cases with links to corruption there are some lessons learned:

- If states can be pushed to do something about corruption, this is so because they are pushed by civil society or victims. Otherwise the pressures are not strong enough. But even captured states can have pockets of integrity.
- There are opportunistic moments, when it is possible to move forward. Even in difficult circumstances there are openings, but then they close again sometimes fast.
- Civil society and victims groups can help mobilize people and pressure. They can help prosecutors to stay honest and on track (prosecutors are at risk not only due to potential corruption incentives but also due to too much work).
- Victims are often not interested in money, they are interested in justice and

truth telling. It is much more reparation than compensation.

- Putting victims at the centre puts a face to the problem, changes the narrative. There needs to be a much clearer story and with clear identification of harm.

Common issues to include the perspective of victims into AC proceedings:

- Who is a victim?
  - ✓ Is the victim just the state? There is a bit of international law, UN declaration of basic principles for victims that can be used (looking at collective harm, not only individual harm).
- Can causation be shown in complex cases?
  - ✓ Sometimes it is possible to show harm to individuals or the general public
  - ✓ In other cases, there are diffuse interests affected and in those cases some countries have provisions that allow CSOs to represent victims.
- Sometimes it is too complex to figure out damages, too hard to show amounts. But it is possible to use the mechanisms of other collective damage cases. There are also often many victims, but these problems too can be alleviated through mechanisms like a common representative.
- The more complex the case, the harder it is to get redress. But at the same time, in high-level corruption cases there is more need for redress.

Helen Taylor - Spotlight on Corruption, UK

Helen previously worked with the Commission on State Capture, Corruption and Fraud in South Africa. She now leads Spotlight on Corruption's court monitoring programme, which includes tracking grand corruption cases in the UK courts - eg. Glencore which she presented in the workshop.

The Glencore bribery scandal is an international case involving longstanding allegations of corruption that culminated in a global co-ordinated resolution with US and UK prosecutors. In the UK, Glencore pleaded guilty to paying more than $28 million in bribes to secure highly lucrative oil contracts across 5 different African countries. The court found that corruption was endemic in the company's West African operations and was sustained over years, with blatant, organized and huge bribery. The seriousness is reflected in the court imposing significant financial penalties of £280 million.

One could think that it is a success example of enforcement in a grand corruption case – but there is a sting in the tail of this case: no compensation was awarded to the victims of Glencore's corruption. No victims were heard or represented in court, and no compensation was sought by the UK prosecutors. There was no recognition of the full harm caused by bribery in this case.

The court held that third parties cannot intervene in a criminal trial on behalf of victims. The case law in the UK allows compensation only for clear and quantifiable loss, not harm caused in a complex case like the Glencore one. Victims have to rely completely on prosecutors, with very limited understanding of harm. This leaves victims at the mercy of their own governments to launch separate legal proceedings for redress which is very expensive in the UK.

Spotlight has been working with civil society partners to advocate for reforms regarding compensation for victims in general and the Glencore case in particular. Glencore also settled with the DRC for US$180 million. This shows that harmed states are becoming perhaps more assertive in requesting redress, but it is troubling that very little is known publicly about the details of this agreement.

Open issues of the case include:

- Clear accountability gap – no officials who received bribes are named
- Requests for mutual legal assistance may not be made by affected states.

Top questions emerging from the lessons learned:

- Who are the victims and how can they be heard? We need to embrace a more inclusive definition of victims, and develop mechanisms to ensure they are heard and included early on in an investigation.
- How should the harms of grand corruption be assessed and quantified (tools and methods to assess harms)? We need to develop a broad definition of "harm" which captures the social damage and collective harms of grand corruption.
- How should compensations be returned? Grand corruption poses specific challenges given the risk of re-corruption. Transparent and accountable returns to ensure that real victims will benefit.

David Ugolor, ANEEJ, Nigeria
He works on return of the Abacha assets.

The question of power is crucial. When Abacha money from Swiss banks was returned, millions of the poor people in the country benefitted.

In the case of Glencore: the UK and US authorities have found corrupt behaviour.

The money of fines should go to the poor and the victims in the country. So the question is who is the victim. If the government is not clean – then it is important to look for a mechanism to channel the money to the poor.

The second issue is impunity: Nigerian officials involved are top government officials. Corruption impacts democratic systems. With the presence of grand corruption more and more people are in poverty. But the current AC architecture is failing the poor. The US and UK governments refuse to reveal the Nigerian public officials involved in the case. This is why the issue is about power. Enablers are Western banks that keep the money. Western governments protect the companies.

Civil society needs to build coalitions to challenge the current narrative, otherwise there will be no progress. It is clear who the victims are: the poor of the countries and they need to be given a voice.

Questions and comments from the floor with answers from the panel

Q: In the case of Russian oligarchs whose money is frozen in many countries there can be a dilemma in the future: US$ 1.3 trillion. Should this money go to Ukrainians who have suffered from the attack of corrupt regime or to the millions of Russians who have also suffered from the money being stolen? Should there be a priority? Who would define this?
A: This is a difficult question: the origin of the proceeds is from Russian victims – but there are also Ukrainian victims. The harm needs to be analysed. The harm to Ukrainians is not directly from corrupt activities. Technically it might be clearer to allocate the funds to Russians, but it could be fair to split the money.

Q: FIFA has claimed to be a victim and claimed money back from the individual members of FIFA who have been sentenced. What happens if an organization claims money from their own individuals?
A: Those involved in bribes should not benefit from compensation. This should be clear, as otherwise you would encourage impunity.

Q: In the Gambia an ex-president pilfered US$ 1 billion. At the time it was more looked at victims of HR violations not so much financial crimes. How to make the link?
A: This is one of the cases where HR and AC activists should talk to each other more. In certain cases, a truth commission should also talk about corruption. This could be a good first step. And it is important to clarify what reparation would mean in such a case. There is a lot of overlap of corruption and HR victims. And perpetrators are usually the same. Think about the two things together – not in separated way.

Q: Was there a victim centred approach in CICIG? Would it have been more legitimate if there had been one? Could the model be replicated in other countries?
A: CICIG did a lot of very good things. Worked with local prosecutors, through and with local prosecutors. More could have been done to work with victims. The mandate would have allowed this, as it was focussed on both HR and corruption. CSOs could have been more active in pushing CICIG to have more connections to victims. People were so happy that something happened, but some constructive self-criticism should also go to civil society.

Main outcomes of session (include quotes/highlights and interesting questions from the floor)

Part 1: The challenges to enforcement against grand corruption

A legal definition of grand corruption is important because: i) It will be the basis for the introduction of special national measures; and ii) it will help to introduce international measures and structures.

AC and anti–impunity initiatives have a big challenge as they depend on national political will. This is why, additional political will to fight grand corruption needs to be generated through innovative and creative approaches, building on lessons

learned from CICIG, Ukraine AC court and the proposal for an international AC court.

There are two interesting possibilities to go after the corrupt involved in grand corruption: i) go after ill-gotten gains of high-level public officials; ii) go after companies involved in corrupting high-level public officials abroad. France does not have much of the former, so focuses on the latter. It is crucial to have dedicated institutions to address high level corruption; to be strategic and focus on serious corruption cases; and get some procedural issues right to detect and start to investigate grand corruption cases (including: whistle blower protection; the possibility of CSOs to file a complaint on behalf of victims, and the partial reversal of burden of proof in money laundering).

Grand corruption is a form of organized crime, involves several people, to hide and launder profits of corruptions. The National Police Office does not only target the corrupt but also the enablers – who earn profit from helping the corrupt.

Part 2: Recognising rights of victims and victims redress

Human rights investigations are always related to impunity and impunity is always related to corruption. If states can be pushed to do something about corruption, this is because they are pushed by civil society or victims, and opportunities for this can open even in difficult circumstances, but then they close again sometimes fast. Civil society and victims groups can help mobilize people and pressure.

Victims are often not interested in money, they are interested in justice and truth telling. It is much more reparation than compensation. Putting victims at the centre puts a face to the problem, changes the narrative.

Questions emerging from lessons learned to work with victims of corruption:

- Who are the victims and how can they be heard?
- How to include victims from the start of investigations?
- How should the harms of grand corruption be assessed and quantified (tools and methods to assess harms)?
- Can causation be shown in complex cases? The more complex the case, the harder it is to get redress. But at the same time, in high-level corruption cases there is more need for redress.
- How should compensations be returned? Grand corruption poses specific challenges. Transparent and accountable returns to ensure that real victims will benefit.

When corruption is discovered, the poor in the countries where corruption happened need to be compensated and the money recovered or paid in fines needs to go their benefit and development in country. But currently in the Glencore case, Western governments (US and UK) protect their banks, companies and do not reveal the names of involved Nigerian public officials.

Key recommendations for the future and concrete follow-up actions

What is the highest priority for special measures to address grand corruption?

Advance on the legal definition and special national and international measures. Some of the measures are very interconnected: Universal jurisdiction is high priority to address unwillingness and impunity. But if immunities and statutes of limitation and other barriers persist then it does not work. A package of mutually reinforcing measures is needed.

Supra-national bodies are key to help investigate grand corruption given that national judicial systems are not always capable of addressing grand corruption due to capture and/or permeation of corruption in their own structures. Grand corruption is a crime of POWER. Models to learn from and to use as inspirations include: the International Commission against Impunity in Guatemala (CICIG) and MACCIH from Honduras; the Anticorruption court in Ukraine; and the proposal to create an international AC court.

Sufficient resources need to be given by the state to the institutions that fight against corruption. A legal framework without well-resourced entities does not work.

In some Western countries where there are not so many grand corruption cases, but the corruptors, who like to buy grand mansions, work should focus on these areas, as well as the enablers to make it more difficult for corrupt people to hide and use their ill-gotten gains.

The UNCAC Coalition has a new data base on national laws on how victims are able to participate in grand corruption cases. This should be widely used and added to. It is a useful tool.

It is crucial to bring the two parts together: enforcement and victims. But the process needs to be reimagined. It should not be sequential but rather involve hearing victims from the outset and pursue an integral approach. CORRUPTION IS NOT A VICTIMLESS CRIME!!

It is important to look at results of bribery cases. If the money goes to the victims it will also help address development, climate change challenges, adaptation.

Rapporteur's name and date submitted

Karen Hussmann, 18.01.2023