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# Prosecuting Corruption in Kenya, Uganda and South Africa

## – A legal analysis for action in the field of development cooperation –


**A study conducted by**

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# EXECUTIVE SUMMARY

This study analyses criminal prosecution of corruption in three countries, namely Kenya, South Africa and Uganda. Its objectives are to evaluate the legal framework and empirical reality of anti-corruption prosecutions in the three countries; to understand the obstacles and enabling conditions of successful criminal prosecutions; and to identify potentials for technical assistance in general and German bilateral cooperation more specifically. Methodologically, the study is based on a desk study, complemented by interviews with in-country experts.

This study was commissioned in 2021 by an organization specializing in development cooperation services for internal purposes. The evaluation of the study for its original purpose has now been completed. The (political) framework conditions in the countries analysed at the time the study was conducted have changed to some extent since then. Nevertheless, the authors have decided to publish the study in its original form without incorporating more recent developments and on the basis of the data available at the time. The reason for this is that the situations in the countries analysed – Kenya, South Africa and Uganda –, are virtually paradigmatic for various stages of development of anti-corruption efforts, especially at the time this study was conducted. In particular, the value of this study lies in its function as an analytical blueprint for states that are at a comparable stage in their anti-corruption efforts to the states studied at the time.

The key findings of this study can be summarized as follows: Effective criminal prosecution is inhibited by a range of legal-institutional, social and political factors. The main obstacles result from the political system: Corruption among political elites is not only a pervasive problem in its own right, but also a major obstacle to effective criminal prosecution of high-, mid- and low-level corruption. To support criminal prosecution of corruption, three interdependent sets of problems must be addressed: Lack of political commitment and democratic accountability in the political system; problems of capacity and independence in the criminal justice system; and lack of awareness and access to justice among citizens.

The study makes country-specific recommendations of how to address these problems and concludes with general recommendations regarding the role of criminal prosecutions in anti-corruption reforms.

With regard to the examined countries, the study finds that:

- Uganda must focus on further building political commitment to prosecute corruption and enhancing the integrity and independence of the justice system, while capacity development should focus on preparing change agents for future reforms.
- In Kenya, a tentative political commitment to prosecute corruption seems to be emerging, which opens a window of opportunity for tackling capacity constraints at specific points in the criminal justice system.
- South Africa had already seized favourable political conditions to improve its capacity for prosecuting corruption but must now rebuild integrity and capacity after a regressive political phase.

With regard to anti-corruption approaches in general, the study names the following strategic priorities and makes specific recommendations of how to achieve them:

- strengthen political commitment to and democratic accountability for combating and prosecuting corruption;
- strengthen access to justice for victims of corruption and empowerment of civil society, especially with regard to human-rights relevant social sectors and vulnerable groups;
- support the development of capacity to prosecute corruption at the weakest links of the chain of prosecution in situations where the integrity and independence of relevant institutions is ensured.

# TABLE OF CONTENTS

# ACRONYMS

| | |
|---|---|
| AA | Auswärtiges Amt (Germany) |
| ACA | Anti-Corruption Act (Uganda) |
| ACCU | Anti-Corruption Coalition Uganda |
| ACECA | Anti-Corruption and Economic Crimes Act 2003 (Kenya) |
| ACD | Anti-Corruption Division (Uganda High Court) |
| ACIMC | Anti-Corruption Inter-Ministerial Committee (South Africa) |
| AfriCOG | Africa Centre for Open Governance |
| AFU | Asset Forfeiture Unit (South Africa) |
| ANC | African National Congress (South Africa) |
| AUCAC | African Union Convention Against Corruption |
| BMJV | Bundesministerium der Justiz und für Verbraucherschutz (Germany) |
| BMWi | Bundesministerium für Wirtschaft und Energie (Germany) |
| CPI | Corruption Perceptions Index by Transparency International |
| CSO | Civil Society Organization |
| CW | Corruption Watch (TI-chapter South Africa) |
| DOJ & CD | Department of Justice and Constitutional Development (South Africa) |
| DPCI | Directorate for Priority Crime Investigation – “Hawks” (South Africa) |
| DPP | Director of Public Prosecution (Uganda; Kenya) |
| DSO | Directorate of Special Operations – “Scorpions” (South Africa) |
| EABI | East African Bribery Index |
| EACC | Ethics and Anti-Corruption Commission (Kenya) |
| IEBC | Independent Electoral and Boundaries Commission (Kenya) |
| IG | Inspectorate of Government (Uganda) |
| IGG | Inspector General of Government (Uganda – chairperson of IG) |
| IPID | Independent Police Investigative Directorate (South Africa) |
| IRG | Gesetz über die Internationale Rechtshilfe in Strafsachen (Germany) |
| ISS | Institute for Security Studies |
| JLOS | Justice Law and Order Sector (Uganda) |
| KAS | Konrad-Adenauer-Stiftung |
| LASPNET | Legal Aid Providers Network (Uganda) |
| LCA | Leadership Code Act (Uganda) |
| MLA | Mutual Legal Assistance |

| | |
|---|---|
| NACCSC | National Anti-Corruption Campaign Steering Committee (Kenya) |
| NACS | National Anti-Corruption Strategy (Uganda) |
| NCBC | Non-conviction-based confiscation/forfeiture |
| NDP | National Development Plan (South Africa) |
| NDPP | National Director of Public Prosecutions (South Africa) |
| NPA | National Prosecution Authority (South Africa) |
| NPS | National Police Service (Kenya) |
| ODPP | Office of the Public Prosecutor (Kenya) |
| OECD-Con | Organisation for Economic Cooperation and Development – Convention on Combating Bribery |
| PDA | Protected Disclosures Act (South Africa) |
| POCA | Prevention of Organised Crime Act (South Africa) |
| POCAMLA | Proceeds of Crime and Anti-Money Laundering Act 2003 (Kenya) |
| PPDA | Public Procurement and Disposal of Public Assets Authority (Uganda) |
| PPADA | Public Procurement and Asset Disposal Act 2016 (Kenya) |
| PRECCA | Prevention and Combating of Corrupt Activities Act 2004 (South Africa) |
| RiVASt | Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten |
| SHACU | State-House Anti-Corruption Unit (Uganda) |
| SADC-Protocol | Southern African Development Community – Protocol Against Corruption 2001 |
| SAPS | South African Police Service |
| SCCU | Special Commercial Crimes Unit (South Africa) |
| SDG | Sustainable Development Goals (enshrined in UN General Assembly – Res. A/RES/70/1 “Agenda 2030”) |
| SIU | Special Investigating Unit (South Africa) |
| SRVG | Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte ausländischer politisch exponierter Personen (Switzerland) |
| TI | Transparency International |
| UNCAC | United Nations Convention Against Corruption |
| UPF | Uganda Police Force |
| WEF | World Economic Forum |
| WPA | Witness Protection Act (South Africa) |

# I. INTRODUCTION

Successful criminal investigations of corruption cases and subsequent prosecutions are traditionally seen as key to strengthening societal consensus on corruption and its harmful effects. Sanctions in criminal law act as a deterrent for the individual and reinforce values and norms opposing corruption. To support this approach, international legal instruments such as the United Nations Convention Against Corruption (UNCAC) provide detailed obligations and guidance for States Parties to reform their criminal justice system accordingly. The related UNCAC Implementation Review Mechanism provides an additional framework for identifying needs and supporting further reform, including the analysis of potential legislative gaps. Consequently, in the last two decades many countries have made considerable progress in terms of their legal and institutional framework to fight corruption.

However, despite this encouraging development, questions remain, especially regarding high-level corruption. Observers note that too often, corruption crimes committed by senior officials and politically exposed persons remain unpunished. This has led civil society and activists, but also state actors, to call for an "end to impunity". Ending Impunity thus means successful criminal prosecution of corruption regardless of the position of the accused, and a criminal procedure free from undue interference. The enforcement of existing legal frameworks and the closing of a perceived implementation gap in relation to those frameworks is crucial.

Against this background, this study analyses criminal prosecution of corruption in three countries, namely Kenya, South Africa and Uganda. While past reform efforts have focused on improving the legislative framework for criminal justice responses to corruption, the number of actual prosecutions and convictions remains relatively low. Given this situation, the study has three objectives: to evaluate the legal framework and empirical reality of anti-corruption prosecutions in the three countries; to understand the obstacles and enabling conditions of successful criminal prosecutions; and to identify entry points and potentials for technical assistance and development cooperation in the three countries. The focus of the study is thus limited to the criminal justice system, and it does not address non-criminal aspects of anti-corruption unless they are directly related to criminal prosecutions.

The research design is based on a desk study, complemented by expert interviews. While reliable information on legal frameworks is readily available, the availability, validity and

reliability of empirical studies on corruption and its criminal prosecution varies from country to country. After a review of existing literature, we conducted a total of nine interviews with anti-corruption practitioners in the three countries. The interviewees were selected by the client of the study in consultation with the authors of this study. The interviewees did not form a representative sample but made it possible to triangulate findings from the literature review, validate existing data, identify gaps in the empirical literature, and discuss potentials based on in-country expert judgement.

This research design sought to capture the significant gap between "law on the book" and "law in action" that characterizes criminal prosecution of corruptions in all three countries, albeit to different degrees. While legal frameworks have improved considerably over the past years, the core problem in all three countries is the lack of enforcement and effective criminal prosecutions. This "implementation gap" is caused by a range of legal-institutional, social and political factors. The main finding in this regard is that in all three countries, the enforcement deficits are ultimately a problem of the political system: Corruption among political elites is not only a pervasive problem in its own right, but also a major obstacle to effective criminal prosecution of high-, mid- and low-level corruption. Effective enforcement action depends on the political commitment to effectively prosecute corruption.

To support criminal prosecution of corruption, development cooperation must thus address three interdependent sets of problems: Lack of political commitment and democratic accountability in the political system; lack of capacity and independence in the criminal justice system; and lack of awareness and access to justice among citizens. Technical assistance can support enforcement institutions in developing capacity to prosecute corruption, but capacity development must be embedded in a broader strategy that also builds on political commitment and empowers citizens to fight corruption.

# II. CRIMINAL CORRUPTION: DEFINITION, CRIMINOLOGY, STRATEGY

## 1. DEFINING CORRUPTION

The question "what is corruption?" is an unsettled issue in literature and practice.[1] Yet, in order to analyse criminal prosecution of *corruption* it is necessary to determine the subject of the survey and thus define corruption for the purposes of this study. With regard to the study's key argument – namely that endemic corruption in the countries analysed ultimately is a problem of the political system – in the following we will be referring to a definition that enables to focus on the distortive and undermining effects of corruption on democratically legitimized state action and good governance.

Broad sociological definitions such as *„abuse of entrusted power for private gain"*[2] do not fulfil the needs of this study. As this type of catch all-definition encompasses a broad variety of criminologically distinct offenses (such as *bribery*, *fraud, theft, blackmail, embezzlement, money laundering, abuse of office, illicit enrichment, police-violence, nepotism*), it lacks the required analytical precision. On the other hand, narrow, legal-doctrinal definitions which equate corruption simply with the crime of bribery may be precise and in accordance with common parlance. However, they do not capture the whole picture of a dysfunctional state administration plagued by the criminal selfishness of its agents.

For the abovementioned reasons this study strikes a balance between the broad and narrow approach by defining corruption as a set of offenses that form concentric circles:

- Inner circle: core of corruption, i.e. the selling of a specific decision by a decision-maker that is legally wrong (*bribery; vote-buying*)
- Second circle: preliminary stages, such as *trading with influence* and *granting/accepting of undue gratifications*
- Third circle: phenomenologically related crimes (e.g. *extortion; collusive bidding*) and typical criminal „by-products" of bribery (e.g. *breach of trust, embezzlement, enrichment through abuse of office* and *illicit enrichment*).

[1] The spectrum in literature and practice varies between broad, sociological definitions narrow, legal-doctrinal definitions. A comprehensive overview is given by Graeff/Rabel (2019); Zimmermann (2018), pp. 61-128.

[2] Commonly used in practice, e.g., by Transparency International (TI), World Bank; BMZ-Strategiepapier 4/2012 – Antikorruption.

This approach is compatible with most of the empirical studies but allows leaving aside offenses, which – though being corruption in terms of the broad definition – do not have much in common with the crime of bribery from a criminological point of view (e.g. *theft*, *fraud*, *violent blackmailing, tax evasion, money laundering* or "abuse of office" through police violence against peaceful protestors).

## 2. BASIC CRIMINOLOGICAL ASSUMPTIONS

The basic criminological assumption of this study is that serious and consistent criminal prosecutions reduce corruption. Yet, in some cases, the factors that cause corruption also inhibit prosecutions of corruption, and vice versa. To understand the reasons why criminal prosecutions of corruption fail or succeed, we thus need to understand the criminological factors that cause corruption in the first place.

There is no monocausal explanation as to why people act corruptly. Instead, general factors that influence the overall level of corruption within a society (such as democratic accountability of decision-makers, absence of economic distress, social habits)[3] interact with specific factors that lead to individual cases of corruption. Individual cases of corruption have different forms and causes. Basic criminological and motivational differences are captured especially by the distinction between grand and petty corruption:

- Grand corruption refers to bribery involving high-level decision makers such as top government-officials (e.g. ministers) on the taking-side, selling e.g. decisions with regard to armament-deals or mining-rights, and economically powerful legal entities on the giving-side (e.g. international companies). It is usually driven by the motivation of the actors to maximise (enormous) individual profits. Its causes are thus a lack of accountability combined with monetary greed.[4] Since corruption is frequently a matter of rational choice,[5] grand corruption-actors are likely to act on the basis of a cost-benefit-assessment, calculating the individual gain and risks of their

[3] See Westen (2012), pp. 84 ff.; Hoven (2018), pp. 217–236 both with further references.

[4] Zimmermann (2018), pp. 376-383.

[5] See Hoven (2018), pp. 340 ff. with further references.

(illegal) activities.[6] At the same time, high-level corruption is a major impediment to corruption prosecutions in the first place, which require political independence to be successful.

- Petty corruption (or: street level corruption) refers to everyday abuse of entrusted power by public officials (namely extorting bribes and similar practices) in their interactions with ordinary citizens, who are trying to access basic goods or services in places like hospitals, schools, police departments and similar agencies. It is often driven by necessity on both sides: the giving side tends to be victim of extortion, because s/he otherwise would not receive the (often crucial) service they are entitled to in time; the taking side also frequently acts out of necessity when the state fails to pay adequate salaries for officials. This type of perpetrator may be well aware of the fact that corruption is a lose-lose-game, negatively affecting the interests of (almost) everyone in the long run; but s/he simply cannot afford to comply with anti-corruption provisions even if willing to.[7]
- Electoral corruption: This specific type of corruption is a link between grand and petty corruption. In theory, elections are the only accountability tool that directly enables ordinary citizens to vote a government perceived as corrupt out of office. In practice, this mechanism becomes dysfunctional, inter alia, with large-scale vote buying, clientelism and dependence on political donors. It fuels further political corruption and campaign finance violations, as vote-buying politicians need money to finance the expenses of their election campaign.[8]

[6] See Rabl (2019), p. 79 with further references.

[7] See esp. Persson/Rothstein/Teorell (2013), pp. 458 ff.; also see Zimmermann (2018), pp. 295 f.

[8] Cernicky/Tödtling (2019), p. 3.

**Box 1: State Capture**

The **concept of "state capture"** was developed to analyse and explain the persistency of grand corruption.[9] It has been applied, inter alia, to the situation in Kenya[10] and South Africa[11]. The concept is based on the observation that small elites take over political power and clandestinely plunder the public treasury for private gain under the disguise of democratically legitimized rule.

The **mechanics of state capture** involve corruptive collusion between companies (often owned by members of the ruling elite) and public authorities such as procurement (led by personnel appointed by the ruling elite). Oversight (e.g. through audit offices) and law enforcement (police; prosecutors) are undermined, as the high ranks of these institutions become occupied with incompetent personnel that is (economically) linked with the ruling elite. Democratic accountability-mechanisms (e.g. the possibility of voting out of government) are weakened through large-scale vote-buying and the election monitoring authorities (led by minions appointed by the ruling elite) turning a blind eye.[12]

The state capture-concept *en passant* explains why the incompetently led prosecution authorities fail in tackling **petty corruption** with integrity. Besides, it illustrates the danger of anti-corruption-campaigns being misused as a weapon against emerging political opposition.

**Strategies to undo state capture** necessarily aim at creating political will and commitment at the top of the state. They involve different measures and actors:

- Internal pressure: Raising awareness within the society (e.g. by free press reporting on grand corruption cases; CSO-campaigns)[13]
- External pressure: Create incentives through repressive legal measures (such as asset freezing, travelling bans, and – in serious cases – international criminal prosecution[14])
- Preparing for change: Once changes are in the looming (via change of mind within an existing administration, elections, or revolution), credible institutions must be ready to step up the fight against corruption from within. Preparation of these institutions requires adequate equipment (state of the art laws and skilled personnel).

[9] An overview is provided by the anthology Meirotti/Masterson (2018).

[10] Maina (2019).

[11] Public Protector of South Africa (2016).

[12] For a special emphasis on this aspect see Akinduro/Masterson (2018), pp. 59 ff.

[13] February (2019), pp. 3 ff.

[14] Cf. Maina (2019), pp. 48 ff.; Goldstone/Rotberg (2018); Hoven (2018), pp. 552 ff.

Once corruption has become an everyday experience for all members of a society and thus turns endemic, even democratic countries get trapped in a vicious circle of corruption that is characterized by a specific lack of trust:[15]

- Negatively affected citizens do not report corruption, as they expect that the (corrupt) police will not help.
- Individual police officers will not help, because they are either corrupt or they expect their superiors to be corrupt and thus unwilling to investigate (or both).
- High-level officials in the prosecutorial authorities do not press for corruption investigations, because they are either corrupt or they expect the political leaders to be (grandly) corrupt themselves and thus not interested in strong authorities investigating corruption.
- Political leaders get re-elected despite being corrupt with the help of vote buying.[16] Votes are sold by ordinary citizens, who have experienced that selling decisions is normal and seize the opportunity to sell their own decision to politicians.[17]

Breaking this self-perpetuating cycle of corruption requires co-ordinated and mutually re-enforcing interventions at all neuralgic points of the cycle. **Interventions in the criminal justice system alone will not have sustainable impact if they are not embedded in a favourable political and societal context, and vice versa.**

## 3. A STRATEGY FOR SUPPORTING ANTI-CORRUPTION REFORMS

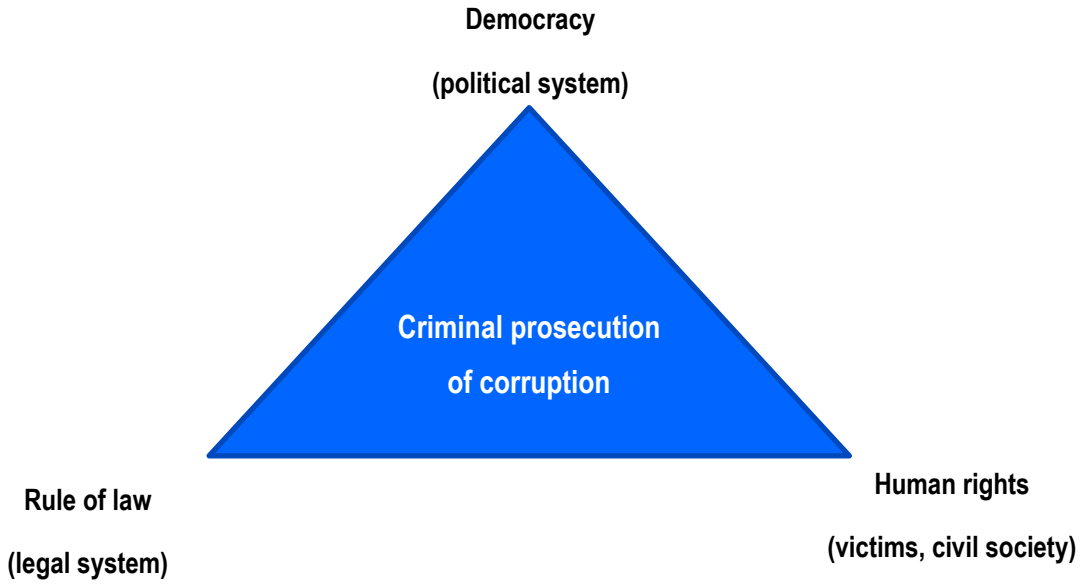
External support for criminal prosecution of corruption must thus be embedded in a broader process of socio-political change and be adapted to the respective conditions in the political system, the legal system, and civil society. To assess these framework conditions, an anti-corruption strategy must take into account three core values of development policy, namely

[15] Zimmermann (2018), pp. 207 ff.

[16] Bigambo (2016), pp. 7, 10.

[17] See Kramon (2013); Justesen/Mazetti (2017).

democracy, rule of law, and human rights.[18] The approach can be summarized and visualized in the form of a triangle that represents the mutual interrelationships:




## A) DEMOCRACY AND THE POLITICAL SYSTEM

The political system plays a central role in the self-reinforcing cycle of grand and petty corruption. Any sustainable anti-corruption strategy that involves criminal prosecutions thus depends crucially on the *tone from the top*, i.e. political leaders who credibly reject and visibly fight corrupt behaviour. Prosecutorial authorities cannot operate effectively, at least in the long run, in a manner that is inconsistent with the will of those with political power.[19] In endemically corrupt systems "the fish rots from the head down" – i.e. prosecutorial agencies become themselves corrupted.[20] Political elites have a prototypical function in terms of corruptibility, teaching the people the "rules of the game"; if the elites do not start breaking the vicious circle by standing up for the fight against corruption, no one will. Thus, any anti-corruption efforts that narrowly focus on prosecuting petty corruption will fail or remain unsustainable.[21]

[18] See generally on the normative framework for development cooperation, Dann (2013).

[19] See Maina (2019) pp. 6 ff., pointing out the collusion between nominally independent high ranking-officials in the authorities selling their discretion to the government which appointed them in the first place.

[20] Persson/Rothstein/Teorell (2013), p. 462 with further reference.

[21] Persson/Rothstein/Teorell (2013), pp. 465 f.

A long-term, sustainable anti-corruption strategy needs to build political incentives, commitment and coalitions to genuinely fight corruption. To do so, it needs to take into account the mutual interrelationships between corruption and democracy. Democracy provides mechanisms against corruption: electoral accountability, parliamentary oversight, transparency, free press, public opinion, citizen advocacy. At the same time, corruption compromises these mechanisms of democratic accountability through vote buying, campaign and party finance, legislative corruption, patronage systems that de-facto limit electoral choice.[22] Any sustainable anti-corruption strategy must seek to reinforce mechanisms of democratic accountability. This reinforcement can include criminal justice instruments, such as criminalization and prosecution of vote buying, illegal party finance and legislative corruption, ineligibility for public office as a sanction etc. The ultimate goal is to enable citizens to hold officials to account for acting corruptly themselves or for not effectively fighting corruption – in/through democratic elections and processes.

## B) RULE OF LAW AND THE LEGAL SYSTEM

Anti-corruption efforts require an adequate legal toolkit: It is necessary to increase the costs of being corrupt by increasing the risk of getting sanctioned for corrupt behaviour (as opposed to a state of impunity).[23] This requires non-criminal legal prevention-strategies (e.g. monitoring systems[24] and transparent procurement regulations[25]), but also provisions comprehensively criminalizing and adequately sanctioning corrupt behaviour (including deterrent sentences and the possibility to asset forfeiture). The legal toolkit must be put into practice by effective and independent prosecutorial authorities enforcing the named provisions, subject to non-corrupt leadership with integrity. Weak institutional capacity, including budget, staffing and technical expertise, is a major obstacle to effective prosecutions. But in addition, commitment to basic tenets of the rule of law, especially integrity and independence of the criminal justice system, remains an essential pre-condition for a criminal anti-corruption strategy.

[22] See Zimmermann (2019), pp. 311 f., 601 ff.

[23] This is common sense, see, e.g., Hanna/Bishop/Nadel/Scheffler/Durlacher (2011), p. 49; Zimmermann (2018), pp. 296 ff.

[24] Hanna/Bishop/Nadel/Scheffler/Durlacher (2011), pp. 30 ff.

[25] For a detailed analysis of procurement regulations in subsahara-Africa see Westen (2012).

In the absence of integrity and/or independence of the justice system, external support for criminal prosecutions risks being ineffective or politically instrumentalized as a tool of "lawfare" against the opposition, which harms democratic development.

### C) HUMAN RIGHTS, ACCESS TO JUSTICE AND CIVIL SOCIETY

A human rights-based approach to anti-corruption emphasizes that corruption is not a "victimless" crime but harms primary target groups of development cooperation, namely those that depend most on the integrity and effectiveness of state services. Ineffective prosecutions amount to a denial of justice for victims of corruption. It also highlights the active agency of citizens in resisting, reporting and combating corruption and mounting political pressure for change. An anti-corruption strategy in the criminal justice sector should thus adopt a pragmatic human rights-based approach focused on improving access to justice for victims of corruption, empowering civil society advocacy and enhancing public awareness, especially among vulnerable groups.[26] In situations of state capture, empowering victims and civil society is also a viable alternative to direct support for criminal justice systems and may help build necessary political will first.[27]

## 4. ANALYTICAL FRAMEWORK FOR COUNTRY STUDIES

The foregoing criminological and developmental considerations inform the analytical framework for the country studies in the following parts. The analysis will thus proceed in three steps: Step 1 will assess the legal framework on paper against international standards. Step 2 will demonstrate enforcement gaps in empirical reality and analyse the reasons for underenforcement with regard to the political system and democracy, the legal system and rule of law, and civil society and human rights. Step 3 ponders how these obstacles translate into deficits in the chain of criminal prosecution and identifies potentials for improvement with external support. Each country study concludes with a summary and country-specific

[26] On the relationship between corruption and human rights generally, see Peters (2016); Gathii (2009); Davis (2019).

[27] Cf. Maina (2019), pp. 43–45.

recommendations. The overall conclusion in part VI. draws general lessons and makes general recommendations both for the political level and the technical assistance delivered by various stakeholders.

## A) LAW ON THE BOOKS: THE LEGAL FRAMEWORK

In a first step, the country studies analyse the legal framework for corruption prosecutions. This framework comprises three levels of law-making:

- International obligations, especially ratification of the UNCAC; the African Union Convention against Corruption, (AUCAC), the Organisation for Economic Co-operation and Development-Convention on bribery (OECD-Convention).[28]
- Constitutional law, especially independence of the judiciary, functionality of prosecutorial and watchdog institutions, constitutional protection of anti-corruption activism, where relevant for criminal prosecutions (freedom of speech, press, assembly, association).
- National legislation: provisions in the penal code, code of criminal procedure, procurement regulations, other specialized legislation.

## B) LAW IN ACTION: THE EMPIRICAL REALITY OF CORRUPTION AND OBSTACLES TO ENFORCEMENT

In a second step, the country studies consider the empirical reality of corruption and the obstacles to enforcement of existing legal frameworks. In practice, there is a stark discrepancy between law on the books and legal reality in all three countries studied here. The legal framework alone does not give a realistic picture of the situation on the ground because its enforcement remains deficient in practice. Empirical data on corruption shows comparably low numbers of successful prosecutions with high levels of corruption in all three countries. State-of-

[28] The OECD-Convention on Combating Bribery of Foreign Public Officials in International Business Transactions can be ratified even by non-members of the OECD via accession to the Working Group on Bribery, see Pieth (2014), p. 28.

the-art instruments within the chain of prosecution fail to work properly in practice (implementation gap).

The discrepancy between law on the books and the law in action is a crucial challenge for anti-corruption efforts. The main reasons for this discrepancy relate back to the factors identified above, namely deficiencies in the political and democratic framework, rule of law and human rights. They include impractical provisions; lack of enforcement capacity/resources; power asymmetries between victims and perpetrators, esp. in petty corruption; history/tradition of systematic corruption/state capture within the state administration (path dependency); undue political influence on corruption investigations/political instrumentalization; frequent granting of amnesties; general culture of non-compliance with law. The country studies will thus use the triangle of democracy, rule of law and human rights as an analytical tool to understand the phenomenology of corruption and causes of enforcement deficits in each context.

## C) THE CHAIN OF CRIMINAL PROSECUTION

In the third step, the analysis focuses on specific problems and potentials in the criminal chain of prosecution. Criminal prosecution is part of a larger chain of anti-corruption efforts that begin with prevention and non-criminal means. Within criminal measures, there are five stages of prosecution, which will be analysed in detail with respect to the three countries under study:

Stage 1 - Reporting suspicion: The largest obstacle for prosecuting corruption is that suspect behaviour is not reported to competent authorities in the first place. Without knowledge about corruptive schemes, investigation cannot be initiated. Additionally, a low-threshold possibility to report suspicion bears a human rights-dimension – for it might be the only way for victims of (extortive) petty corruption to gain access to justice. The reporting behaviour is, inter alia, influenced by legal determinants including practical possibilities for citizens to report suspicion, conditions of access to justice, and a reliable protection of witnesses, whistleblowers, and civil society activists and media reporting about corruption cases.

Stage 2 - Criminal investigation and prosecution: Once suspect behaviour has been reported to competent authorities, the rule of law demands criminal investigation and prosecution with integrity. In fact, this stage of criminal prosecution hinges on procedural and institutional factors.

- Procedural factors include problems of evidence-gathering (e.g. in cultures of orality corruption leaves no paper trail), the division of investigation powers (do anti-corruption units have their own investigation powers, or do they need to rely on ordinary police?), and the discretionary powers with regard to the dispensing/termination of proceedings.
- Institutional factors are the distribution of competences (multiple authorities with overlapping/conflicting competencies may lead to inefficiency; effective legal control by supervisory authority?) and the quality of cooperation (e.g. between police investigation and criminal prosecution), matters of independence (personal, professional and financial), skills/expertise, and the scarcity of resources.

Stage 3 - Criminal trial: When a case comes to court for a criminal trial, similar considerations apply with regard to procedural aspects (e.g. burden of proof; transparency of proceedings? discretionary powers with regard to the abatement of action?) and institutional factors (independence? competency? scarcity of resources? possibility of appeals procedures? relationship of lower to higher courts in these respects? imbalance between grand corruption suspects with expensive legal counsel and ordinary judges etc.).

Stage 4 - Enforcement of sentence: If a perpetrator has been convicted, the enforcement of his/her sentence still depends on a range of procedural and institutional factors (e.g. independence of the competent authority; possibility of probation; competency for granting pardon).

Along the way: Forfeiture/asset recovery: In current research, asset recovery is considered a key factor to tackle motivation for grand corruption: Given the fact that grand corruption is

driven by greed and its perpetrators act on the basis of a cost-benefit-assessment, confiscation of proceeds significantly reduces incentives and the financial means to act corruptly.[29] Thus, in all stages of the prosecution questions arise with respect to national regulations of recovery of assets obtained through corrupt behaviour (e.g. is forfeiture mandatory? possibility of non-conviction-based confiscation? enforcement-capacities?). Since proceeds obtained through grand corruption often are hidden away in foreign bank accounts or money-laundered into, inter alia, European-based real estate, aspects of international legal assistance (e.g. use of tools for transnational asset recovery as provided in the United Nations Convention Against Corruption) become relevant. Ideally, recovered assets are returned to the "victim state".[30]

[29] Marstaller/Zimmermann (2018), pp. 26 f. with further reference.

[30] Ölçer (2019), p. 570.

# III. UGANDA COUNTRY REPORT: PREPARING FOR CHANGE

With few exceptions, Uganda's anti-corruption provisions on the books are largely in accordance with international standards (section 1 below). In practice, however, it appears the country suffers from endemic grand and petty corruption, rooted in clientelistic practices and patronage systems seemingly reaching the very top of the political system (section 2). This translates into serious deficiencies in the chain of criminal prosecution (section 3): The prosecuting authorities struggle with (in)dependence from corrupt political actors, overlapping competencies, and institutional bottlenecks, especially in the judiciary. In these circumstances, recommendations for external actors focus on building political will to take anti-corruption seriously and on preparing change agents to seize future windows of opportunity (section 4).

## 1. LEGAL FRAMEWORK

Uganda has ratified the two *international instruments* relevant to its anti-corruption framework, namely the United Nations Convention Against Corruption (UNCAC) and the African Union Convention Against Corruption (both since 2004). Apart from an extradition agreement inherited from colonial times, there is no treaty on mutual legal assistance in criminal matters between Uganda and Germany.[31] The UNCAC contains provisions on mutual legal assistance in corruption- and asset recovery-cases, but Germany has not enacted legislation that implements these provisions into the Gesetz über die Internationale Rechtshilfe in Strafsachen (IRG – Act on Mutual Legal Assistance in Criminal Matters); it is unclear whether the treaty alone does provide a sufficient legal basis for mutual legal assistance.[32] Yet, from the German side it is technically possible to render ad hoc-mutual legal assistance (i.e. on a case-by-case-basis without a treaty basis), even if the reciprocity rule is not met.[33]

[31] See BMJ, RiVASt-Anlage II, Uganda (22 October 2009 – https://www.bmjv.de/SharedDocs/Downloads/DE/Service/RiVaSt/Uganda.pdf?__blob=publicationFile&v=2).

[32] The official explanatory memorandum is vague and contradictory in this point, cf. Bundestagsdrucksache 18/2138, p. 89 (http://dip21.bundestag.de/dip21/btd/18/021/1802138.pdf), referring to Bundestagsdrucksache 15/5150, p. 81 (https://dserver.bundestag.de/btd/15/051/1505150.pdf).

[33] See Hackner (2020), § 76 IRG mn. 1. But German prosecutors are generally unwilling to render legal assistance to African countries in corruption cases due to bad cooperation-experiences with different African states, cf. Hoven (2018), pp. 419 ff.

Uganda's *constitution* (enacted 1995, significantly revised 2005) addresses anti-corruption efforts directly or indirectly in several provisions:

- it calls for accountability of state officials: "All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices" (national objective of state policy Art. 26(iii));
- it imposes a duty upon citizens to combat corruption (Art. 17(i));
- it charges the Inspectorate of Government (IG) "to eliminate and foster the elimination of corruption, abuse of authority and of public office" (Art. 225(1)(b)), with the IG being functionally and financially independent (Art. 227, 229) and entrusted with special investigative powers (Art. 230);
- it guarantees independence of the judiciary (Art. 128), and
- it enshrines the people's right to free and fair elections (Art. 69(1)) and mandates an independent Electoral Commission to oversee the election principles (Art. 60, 61).

*National legislation* on preventing/prosecuting corruption is largely up to date.[34] The criminal law-provisions on corruption-crimes enshrined in the Anti-Corruption Act (ACA – enacted 2009, amended 2015 with regard to mandatory asset forfeiture in corruption cases and a rebuttable presumption of illegality in Art. 63a comply with international standards as recommended by the UNCAC; they allow for sufficient sentencing as well as forfeiture of criminal proceeds in corruption cases. However, with regard to the confiscation of proceeds, some authors criticize significant shortcomings.[35] Additional criminally sanctioned prohibitions (e.g. with regard to accepting gifts) are embedded in the Leadership Code Act (LCA 2002). Vote buying is considered a crime pursuant to Art. 68 Parliamentary Election Act 2005 and Art. 64 of the Presidential Elections Act 2005. Modern procurement regulations which are considered to be in accordance with international standards have entered into force in 2003 (Public

[34] An overview can be found in UPF (2017), pp. 21-28.

[35] Cf. Akurut (2015), pp. 4 f.

Procurement and Disposal of Public Assets Act).[36] Informers and witnesses can apply for (physical) protection according to the Whistleblowers Protection Act 2010. However, the legal framework for political financing is inadequate.[37] The Political Parties and Organisations Act 2005 does not clearly address the issue of party-financing (except the prohibition to receive money from foreign or terrorist organizations). It is unclear whether a conviction for corruption can disqualify for public office.

*Institutional competences* for anti-corruption prosecutions are distributed among the following agencies: Investigations are carried out by the Uganda Police Force (UPF). The regular prosecutorial institution is the Director of Public Prosecutions (DPP). In addition to that, the independent Inspectorate of Government (IG) has, inter alia, powers to investigate, prosecute or cause prosecution, make orders and give directions during investigations of corruption cases. Besides, the newly founded presidential State House Anti-Corruption Unit (SHACU) – operating on a vague legal basis[38] – is involved in the criminal investigation of corruption cases. Criminal corruption cases are in first instance tried before the specialized Anti-Corruption Division (ACD) at the High Court. The Electoral Commission (EC) has the mandate to organize, conduct, oversee and supervise regular, free and fair elections, to educate voters and to determine election complaints.

In addition to that, the Justice Law and Order Sector (JLOS), a government body consisting of 18 institutions with mandates of administering justice and maintaining law and order, is *inter alia* mandated to develop and implement an Anti-Corruption Strategy (anchored in the broader National Anti-Corruption Strategy).[39]

The *conclusion* is that the material legal framework ("law in the books") seems to be mostly state-of-the-art, with exceptions as to political financing and penalization of corruptive donations to political parties and/or candidates.

[36] Cf. Martini (2013), p. 5.

[37] Cf. Martini (2013), p. 4.

[38] The SHACU operates under the president and derives its authority from Art. 99 of the Ugandan Constitution ("executive authority of Uganda"). Though it does not have a legal mandate and formal powers to investigate, prosecute or cause prosecution, according to media coverage the SHACU is responsibly involved in performing raids, arrests etc.

[39] The current strategy dates 2012. For an assessment of the implementation see LASPNET (2019).

## 2. EMPIRICAL REALITY AND OBSTACLES TO ENFORCEMENT

Corruption has been systemic and endemic in Uganda and seen as one of the greatest obstacles to the country's economic development as well as to the provision of quality public services.[40] Uganda scores 28 of 100 possible points in Transparency International's 2019 Corruption Perceptions Index, globally ranking no. 137 of 180 examined states.

### A) GRAND CORRUPTION, POLITICAL SYSTEM AND DEMOCRACY

Uganda has been governed by President Museveni since 1986 (even though since 2005 the constitution allows for opposition parties). Corruption and nepotism have been endemic during that time, and some argue that the political system of the current presidentship presents a typical example of advanced state capture. The state capture-typical features of institutionalized corruptive business-political linkages are described for Uganda in great detail by different authors.[41] Democratic competition appears to be distorted by the kind of systematic political corruption that is a typical feature of state capture: It is reported that members of parliament are frequently bribed,[42] and vote-buying in direct elections is commonplace.[43] Thus, the right to democratic participation is undermined and political accountability via voting corrupt politicians out of office is illusionary.

Against this backdrop, an unsurprising lack of political will to tackle corruption decisively has been noted.[44] On the positive side, since 2018 there has been some remarkable anti-corruption rhetoric by the president and some highly publicized efforts by the newly established presidential Anti-Corruption Unit (SHACU) to fight grand corruption, e.g. some district officials and five directors of the Bank of Uganda being arrested following allegations of corruption.[45]

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[40] Martini (2013), p. 1; GAN (2017) Amundsen (2006), p. 2.

[41] See, e.g., Amundsen (2006), pp. 12 f.; Golooba-Mutebi (2018), pp. 9 ff.

[42] Cf. Golooba-Mutebi (2018), p. 11.

[43] According to an Afrobarometer-survey 19% of the respondents reported having been offered money or a gift in return for their vote during the 2011 elections, Martini (2013), p. 3 with further reference. Also see AfriMAP (2015), p. 83.

[44] AfriMAP (2015), pp. 81, 104; TI (2015), pp. 35 f.

[45] See, e.g., the following news reports: N.N. (14 June 2019 – https://eagle.co.ug/2019/06/14/state-house-anti-corruption-unit-raids-bank-of-uganda-arrests-five-directors.html); Kasozi (26 January 2020 – https://allafrica.com/stories/202001270514.html); Opolot (1 October 2019 –

Some of our interview partners were of the opinion that this indicates an emerging political commitment to seriously combat corruption. Most other observers, however, believe that this is not a serious effort but merely political "show", perhaps directed selectively against political opponents of the president. This view is supported by three empirical facts: First, president Museveni had announced "zero tolerance towards corruption" policies before but did not deliver on that promise in the past.[46] Secondly, the newly formed presidential SHACU is not independent: The SHACU is headed by the president's former personal private secretary, and directly acting under the supervision of the State House. Thirdly, the political leadership has referred to other anti-corruption entities, namely the IG, as manned with "problematic" people he calls "weevils"[47], and there appear to have been high-level political interference in specific IG investigations.[48] In sum, if a political commitment to combat corruption is emerging, it is likely to improve conditions for prosecuting low- and mid-level corruption, but much less for high-level corruption.

## B) PETTY CORRUPTION, CIVIL SOCIETY AND HUMAN RIGHTS

Regarding petty corruption, ordinary citizens frequently report experiences of demands of bribes by public officials.[49] Petty corruption in Uganda often appears as a form of extorting bribery, e.g. policemen often demand bribes (without any specific reason). Also it can be viewed as a human rights issue, since petty corruption in Uganda negatively affects the quality of and access to health and education service;[50] for instance, according to Afrobarometer (2012), 10% of parents report having to pay bribes to get a place for their children in a primary school. For ordinary citizens, weak enforcement of anti-corruption laws amounts to a denial of access to justice, since institutions such as the police, prosecutor or judiciary are seen as

https://www.pmldaily.com/news/2019/10/panic-as-state-house-anti-corruption-unit-probe-moroto-district-officials.html).

[46] See, e.g., Chêne (2009), p. 2.

[47] Ampurire (10 December 2018 – https://www.softpower.ug/museveni-launches-anti-corruption-unit-lt-col-nakalema-appointed-head/).

[48] HRW (2013), pp. 38 f.

[49] EABI (2017), p. 34.

[50] See Martini (2013), p. 5; HRW (2013), pp. 17 f.

corrupted themselves and thus not trustworthy, while independent institutions with integrity (esp. IG) are perceived as unable to provide a stimulus for real change.

With regard to the awareness of corruption as a (moral and legal) wrong, empirical findings are ambivalent. On the one hand, petty corruption and vote buying are – according to our interview partners – considered to be "part of the life" and "normal behaviour". This is corroborated by reports about illegal payments to minor public officials often happening in full public.[51] Our interview partners pointed out that citizens do not (fully) understand that there is a causal connection between widespread corruption and the hardships they experience in everyday life (such as poverty, bad roads, insufficient water supply etc.).[52] The same has been observed with regard to electoral bribery.

On the other hand, there is some indication that citizens see corruption as a wrong, being harmful to the common good: 20% of the citizens that did not report a corruption incident gave "I was a beneficiary"[53] as a reason, which indicates a sense of wrongdoing. Regarding grand corruption, politicians (including the president himself) try to benefit from a "tough-on-corruption" image, implying that citizens are likely to cheer because corruption is commonly seen as something bad.

Finally, there have been instances of successful political mobilization against corruption, for instance in the "Black Monday" protest movement against corruption and theft of public resources.[54] There are active civil society organizations such as Anti-Corruption Coalition Uganda (ACCU) that provide platforms for integrity advocacy. Whether these movements and Civil Society Organizations (CSOs) already have the capacity to effectively improve conditions for prosecuting corruption remains an open question. Our interview partners had different opinions on this question.

[51] Martini (2013), p. 2.

[52] Also see TI (2015), pp. 39 f.

[53] EABI (2017), p. 38.

[54] See, e.g., Martini (2013), p. 9; Segawa (16 December 2019 – https://web.archive.org/web/20200809235326/https:/www.softpower.ug/civil-society-relaunches-black-monday-campaign-to-award-corrupt-officials/).

## C) RULE OF LAW, LEGAL SYSTEM AND ANTI-CORRUPTION AGENCIES

The criminal justice system fails to combat corruption effectively.[55] The analysis suggests that the prevailing state of endemic grand corruption in Uganda means that institutions tasked with investigation and prosecution of corruption are likely to be dysfunctional if the head of that authority is politically appointed or politically dependent. Institutions appear to lack capacity to carry out effective investigations, and politically sensitive cases are often not prosecuted seriously or with integrity. When politically independent authorities attempt to prosecute cases with integrity, there seems a high risk of undue political interference aiming at curtailing its competencies, ill-equipping the official machinery, intimidating its decision-makers or otherwise weakening the performance.

The integrity of the Uganda police force is very low: According to the East African Bribery Index 2017 there is a 67%-likelihood of encountering bribery within the police.[56] Criminal corruption investigations are the task of the Inspectorate of Government (IG). IG has frequently been the target of political interference when making progress on politically sensitive cases that involve high rank-members of the governing party.[57] Its prosecutors report personal threats and intimidation in all types of cases.[58] With regard to prosecuting mid- and low-level corruption, IG is more effective according to some observers, but experts also emphasize important capacity constraints and backlogs of cases in this category of cases. With regard to the independent Electoral Commission (EC), no serious efforts to effectively fight electoral corruption can be observed. According to media reports, the presidential Anti-Corruption Unit has launched investigations into the EC itself on the grounds of alleged corruption, suggesting to replace its members with cadres of the ruling party.[59]

[55] Detailed analysis provided by HRW (2013).

[56] EABI (2017), pp. 34 f. (prevalence: 39,5 %, perceived impact 45,4%; average Size of bribe: 16 US-$ (p. 55)). Also see JLOS (2017), p. 43.

[57] AfriMAP (2015), p. 102.

[58] HRW (2013), pp. 39 f.

[59] Kafeero (30 June 2019 – https://www.monitor.co.ug/News/National/Electoral-Commission-massive-staff-shake-up/688334-5176662-9uw25wz/index.html).

The Judiciary is considered to be independent from other branches,[60] but at the same time as highly corrupt: according to the East African Bribery Index 2017 there is a 66%-likelihood of encountering bribery within the judiciary.[61] This concerns especially the lower courts[62], but anti-corruption activists and lawyers also voice serious concerns about bribery and political interference (often through political clientelism) alike in the prosecution of corruption cases at the specialized Anti-Corruption Division (ACD) at the High Court.[63]

**Box 2: Can petty corruption be prosecuted effectively without fighting grand corruption?**

The case of Uganda raises a salient question for anti-corruption reforms involving the justice sector in general: Can the criminal justice system effectively prosecute endemic petty corruption while grand (political) corruption at the top persists? The answer to this question is important because it determines whether strengthening criminal prosecution capacity of anti-corruption agencies makes sense in the absence of political commitment to tackle corruption among the political leadership.

In theory, it might be a rational strategy for political leaders to seriously combat low- and mid-level corruption, while at the same time enriching themselves by acts of grand corruption. For external development partners, a "petty-corruption-only strategy" would also have benefits: It is easier to implement (compared with building political commitment to tackle grand corruption), it specifically focusses on the type of corruption that usually affects the citizens directly, and it ideally leads to bottom-up pressure on the political elite to tackle corruption in the long run.

In practice, however, research on combating corruption in Africa does not provide any empirical evidence that such a petty-corruption-only strategy has been successfully implemented in the past. Both the academic literature and most of our interview partners converge on the need for political leaders to commit to combat corruption. The example of Rwanda – one of the very few African countries consistently showing low rates of

[60] BTI-Transformation Index 2020 on Uganda, p. 12. (7 out of 10 points) (https://www.bti-project.org/content/en/downloads/reports/country_report_2020_UGA.pdf).

[61] EABI (2017), pp. 34 f. (prevalence: 37,1%, perceived impact 42,6%; average Size of bribe: 81 US-$ (p. 54)).

[62] See Martini (2013), p. 8. A thorough analysis of corrupt practices at Uganda's magistrates courts is provided by ACCU (2014).

[63] Schütte (2016), p. 3; HRW (2013), pp. 36 ff.; TI (2015), pp. 28 f.

corruption[64] – specifically demonstrates this point: Rwanda has successfully reduced low- and mid-level corruption, but this goes hand with comparably low levels of grand corruption. In Rwanda, the key to eliminate (petty) corruption as a normalised practice has been state-led institutional reform, backed by a strong political commitment to fight any kind of corruption.[65] Prerequisites to this have been a strong code of conduct and removal of corruptive cadres in the ruling political party[66] and the absence of state capture-like practices amongst the political decision-makers.[67] Thus, the empirical evidence suggests that solely focussing on prosecuting petty corruption without concurrently aiming at the roots of protracted (state capture-style) grand corruption is unlikely to have more sustainable impacts than other, non-criminal measures focused e.g. on prevention, transparency, administrative reform and public awareness. This, however, would be a potential object for further empirical studies, for instance in randomized controlled trials that compare different types of criminal and non-criminal interventions.

## 3. THE CHAIN OF CRIMINAL PROSECUTION: WEAKNESSES AND POTENTIALS

Against the background, the ability of Ugandan authorities to enforce criminal anti-corruption laws is relatively weak across all stages of the chain of criminal prosecution when compared with the other countries studied here.

### A) REPORTING SUSPICION

On the first stage of the chain of criminal prosecution, the percentage of reported cases is extremely low. According to the EABI, an overwhelming majority of 94% did not report

[64] Rwanda scores 53 of 100 possible points in Transparency International's 2019 Corruption Perception Index, ranking no. 51 of 180 (ranked between Malta [54 points] and Italy [53 points]), with only three sub-Saharan states scoring better (Seychelles [66 p.], Botswana [61 p.], and Cabo Verde [58 p.]).

[65] Baez Camargo/Gatwa (2018), pp. 10 f. with further references.

[66] Baez Camargo/Gatwa (2018), pp. 8 f. and 17 f.

[67] According to different scholars, there is no evidence of direct corruptly profit by individual members of Rwanda's ruling elite, Baez Camargo/Gatwa (2018), p. 22; Booth/Golooba-Mutebi (2012), p. 403. Even though there are close links between business and politics in Rwanda, some indications for incidents of political corruption, and allegations that law enforcement is aimed only at minor offenses and low-level public official while "big fish" are not prosecuted (for this discussion see Baez Camargo/Gatwa (2018), p. 27 with further references), this type of grand corruption is in any case way below the state capture level.

encountered bribery. The reasons bespeak deep mistrust towards the authorities: 29% naming as reason "I knew no action would be taken even if reported", 18% "I did not know where to report to".[68] According to various reports, intimidation of, or violence against, informers frequently occurs.[69] Additionally, with regard to the Inspectorate of Government (IG) offices (who have the mandate to receive complaints), there is a problem of physical access, since the 14 regional offices are located at a distance from each other. Citizens can anonymously submit suspicion through online forms on the websites of IG[70] and the SHACU[71], but according to some consulted experts, many citizens do not make use of this. Others emphasize that the SHACU call centre has received 60.000 complaints in its first year, while the number of complaints received by IG went down from 10.000 to 8.000 in the same period. Regarding the commonplace problem of vote-buying, there is no indication that the Electoral Commission (EC) reports complaints in a significant manner. There are limitations to effective whistle-blowing.[72] Some experts suggest that whistle-blowing laws may have been used as tools to target the opposition or critics of the government.

Measures to improve reporting behaviour would need to address the major lack of trust in government institutions. Under present political conditions, public awareness campaigns or work with government institutions perceived as corrupt are unlikely to significantly increase trust. An alternative might be to rely on informal and civil society-led avenues to access to justice and low-threshold legal support services provided by civil society organizations. Besides, all decriminalization of the giving side in extortive bribery cases might also enhance willingness to report petty corruption but may have the undesirable effect of reinforcing the perception that such behaviour is morally acceptable. Concerning vote-buying, decriminalization of the taking-side could not only incentivise the giving side to refrain from these practices in the long run,[73] but also facilitate the willingness to report about incidents of electoral

[68] EABI (2017), p. 38.

[69] HRW (2013), pp. 39 f. Also see Persson/Rothstein/Teorell (2013), pp. 459 f. There is no indication that informers have in fact access to the rights enshrined in the Whistleblowers Protection Act.

[70] https://www.igg.go.ug/complaints/.

[71] https://reportcorruption.go.ug/landing/.

[72] Gumisiriza P & Mukobi R. Effectiveness of anti-corruption measures in Uganda, Rule of Law and Anti-Corruption Center Journal 2019:2.8. https://doi.org/10.5339/rolacc.2019.8.

[73] The only successful approach to reduce vote buying in Uganda did not involve the advice to voters to refuse offered bribes, but the idea to take the money and secretly vote for whom they really please anyway (thereby making the bribing voters unprofitable for candidates), Blattman/Larreguy/Marx/Reid (2019). Yet, this

bribery. Nevertheless, this would probably have a counterproductive effect, as the prohibition to take electoral bribes is of high symbolic value[74] and the decriminalization of violations of this prohibition might thwart efforts of "regular" voter education.

In sum, it might be worthwhile to further consider measures to strengthen the capacity of civil society organizations to improve the conditions for reporting criminal corruption. A first step in this direction would be a careful assessment of the relevant CSOs, which is beyond the scope of this study. In the meantime, providers of technical assistance and bilateral cooperation stakeholders should proactively consider the importance of reporting channels in their project design and implementation, if that is not the case yet.

## B) CRIMINAL INVESTIGATION

The key state institutions in the process of investigating and prosecution corruption are the Uganda Police Force (UPF), the Director of Public Prosecutions (DPP), the Inspectorate of Government (IG), and the newly established presidential State-House Anti-Corruption Unit (SHACU), which refers most cases to other institutions. Out of these four, only the IG is considered to be working independently to some degree.[75] UPF, DPP and IG have raised concerns about not being adequately equipped.[76] The overall prosecutorial performance of these three institutions is rather low, with approx. 100 cases per year brought to the Anti-Corruption Division (ACD) by the IG (conviction rate: 60%) and some more by the UPF/DPP (conviction rate: 75%).[77] More important than the sheer numbers is the fact all of these institutions are accused of "letting the big fish swim". The reasons vary: As outlined above, UPF and DPP are rather unwilling to focus on grand corruption cases, while the work of the IG in that matter appears politically sabotaged, inter alia through overlapping mandates with the DPP[78] and the SHACU.

approach is legally problematic, as it technically involves incitement to criminal vote-buying.

[74] Zimmermann (2011), p. 988.

[75] For a detailed analysis of the independency and the prosecutorial powers of the IG see AfriMAP (2015), pp. 86 f., 90 f.

[76] As of 2015, the IGG employed 16 prosecutors, the DPP 10, Schütte (2016), p. 2. Regarding underfunding of the IG see the data in AfriMAP (2015), pp. 94-99.

[77] Schütte (2016), p. 2. Figures regarding the SHACU are not available yet.

[78] HRW (2013), pp. 31 f.; AfriMAP (2015), pp. 91 f.

Capacities and performance of the prosecution agencies obviously need improvement. Assuming that some political commitment to combat mid- and low-level corruption is indeed emerging, capacity development might thus have a positive impact. Due to its relative independence in mid- and low-level cases, the IG might be a suitable partner institution for capacity development measures. However, such measures carry risks that would have to be carefully evaluated: First, improving the performance of the IG is likely to lead to more unprocessed cases and backlog in the courts, and there is an increased risk of corruption during the trial phase (see below). Secondly, it is likely that politically sensitive cases would be interfered with or be taken over by the SHACU. The questions whether these risks can be managed in a capacity-building project would require a careful in-country assessment, which is beyond the scope of this study.

Even without such an assessment, there are other options for supporting IG: Firstly, an initial step of support might focus on preparing individual change agents within the IG for a future leadership role in criminal anti-corruption once political conditions become more favourable, e.g. through individualized training and building networks of anti-corruption officials and activists in the region. Secondly, institutional capacity development might focus on improving those investigative capabilities that are also a precondition for non-criminal sanctions mechanism, such as disciplinary action against public officials. To that end, cooperation between the IG and other institutions like the Civil Service Commission might be improved, but a detailed examination of such non-criminal measures is beyond the scope of this study.

### C) CRIMINAL TRIALS

Trials in corruption cases are mainly brought before the Anti-Corruption Division (ACD) at the High Court.[79] The anti-corruption performance of this court is reportedly average at best, with serious problems in terms of integrity (see above), slow proceedings,[80] staff gaps,[81] and a backlog of some hundred cases.[82] The same is reported with regard to the Court of Appeals,

[79] Schütte (2016), pp. 1 f.

[80] Average time elapsed from case filing to verdict at first instance: 1 year.

[81] LASPNET (2019), p. 16.

[82] See Schütte (2016), pp. 2 f.

which does not have a specialized anti-corruption division and suffers from backlog, inter alia due to the defendants' excessive use of complaints, references and appeals without legal filter to restrict these legal instruments to cases with merits or other forms of expediting.[83] With regard to adequate sentencing, no reliable data is available (ACD-decisions are not routinely published or otherwise accessible). According to a consulted expert, sentences in specific cases are extremely timid. Besides, apparently there is no sanction of disqualification of people convicted of corruption for public office.[84]

The low performance of the courts in corruption cases is not simply related to a lack of specific expertise in dealing with the complexity of financial crimes. First and foremost, independence and work ethos seem to be the main challenges. Thus, if at all, measures to improve the judicial capacity have to put emphasis on general legal training, upskilling, integrity and judicial ethics.

## D) ENFORCEMENT OF SENTENCES AND ASSET RECOVERY

Regarding the actual execution of sentences, no reliable data is available.[85] Despite being mandatory in corruption cases, the legal tools for asset recovery do not seem to be applied successfully; in the second half-year of 2018 only assets amounting to 449.609.951 UGX (approx. 107.000 EUR),[86] in the first half-year of 2019 assets amounting to 618.549.714 UGX (approx. 147.000 EUR)[87] have been confiscated.

Performance in relation to asset recovery leaves considerable room for improvement. That comes as no surprise, since there are only modest results at the prior stages of prosecution: without successful prosecution, asset recovery, which is in many cases a sheer by-product of criminal convictions, cannot be achieved on a large scale. At present, the only way to confiscate proceeds of Uganda-based grand corruption is by asset recovery via inter-/transnational

[83] See Schütte (2016), p. 4.

[84] Art. 30(7) UNCAC merely requires state parties to "consider establishing procedures for the disqualification" from holding public office. Hence, this provision is not mandatory.

[85] See IG (2019), p. 22 https://www.igg.go.ug/static/files/publications/IGG_Report_to_Parliament_July_-_December_2018.pdf.

[86] IG (2019), p. 22.

[87] IG (2020), p. 21.

criminal prosecution or non-conviction based confiscation under special foreign national legislation. A good example for the latter are specific provisions enshrined in the Swiss "Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte ausländischer politisch exponierter Personen" (SRVG 2015), enabling the confiscation of assets suspected to be illicitly gained through grand corruption in foreign countries.[88] However, German criminal law (as the law of most European countries) lacks specific provisions like the Swiss rules. A detailed assessment of asset recovery provisions and practice is however beyond the scope of this study.

## 4. SUMMARY AND COUNTRY-SPECIFIC RECOMMENDATIONS

Uganda seemingly represents a case of advanced state capture, in which framework conditions for criminal prosecutions of corruption are unfavourable. The political will and the implementation of effective reforms will remain insufficient unless the current government (which has recently been confirmed in office in an allegedly unfair election[89]) takes bold steps to seriously tackle corruption at all levels. In this context, attempts at improving the capacity of the criminal justice system to prosecute corruption at the institutional level are not likely to have a sustainable impact, or even risk to be counterproductive. Hence, development partners should focus on building political commitment for criminal prosecution and on preparing change agents for future reforms in the criminal justice sector. Fostering political commitment requires not only emphasis on anti-corruption issues in the political dialogue, but also the determined use of other policy instruments. Several interviewees pointed to the positive effects of withholding visa for foreign travel from members of the political elite, in cases where there is reason to believe that they are implicated in grand corruption. This leads to the following recommendations for governmental policy stakeholders and providers of technical assistance:

[88] Details are provided by Meyer (2016).

[89] See, e.g., the HRW-report "Uganda: Elections Marred by Violence" (https://www.hrw.org/news/2021/01/21/uganda-elections-marred-violence). The constitutional age limit cap for the presidency had been cancelled in 2018.

At the political and policy level, development partners should

1. *Use political dialogue and political leverage to acknowledge, and to incentivize genuine political commitment to combat, corruption*; stress the importance of free media and civil society in the fight against corruption;

2. *Explore further the potential of cross-sectoral policy coherence, inter-ministerial coordination in response to corrupt actors and systems.* Political responses can combine non-traditional policy instruments with anti-corruption efforts, e.g. trade and investment promotion instruments, visa (denial) policies, and targeted support to investigations into transnational corruption cases and asset freezes;

3. *Focus on the transnational dimensions of criminal corruption, and strengthen relevant legal bases and enforcement capacity both in Uganda and in other jurisdictions involved such as Germany,* e.g. regarding mutual legal assistance, transnational investigations and asset recovery.

Providers of technical assistance and development partners should

1. *Ensure that all programmes and projects in all sectors include heightened safeguards against corruption*; anti-corruption approaches should be further mainstreamed in programmes in Uganda, and the serious risk of endemic corruption should inform project design and implementation at all stages; measures should include, at a minimum, low-threshold project-based reporting channels, whistleblowing facilities, active transparency and public awareness measures;

2. *Explore further the potential for projects supporting non-state and transnational actors in combating criminal corruption*, such as developing capacity of national advocacy organizations or fostering transnational networks of civil society organizations and business associations that enable the exchange of best practices in integrity and anti-corruption;

3. *Focus capacity development on preparing individual change agents within the criminal justice system and civil society for taking a leadership role in prosecuting corruption when political conditions improve*. Where support is extended to develop institutional capacity within the criminal justice system, this should also include improved cooperation with non-criminal

sanctions mechanisms and should carefully assess and mitigate independence and integrity risks;

4. *Strengthen the capacity of non-state actors to improve the conditions for criminal prosecutions, especially reporting behaviour*; this includes Ugandan civil society actors, social movements and independent specialists who can advocate for criminal anti-corruption measures and implement them when the political context is more favourable;

5. *Build networks of change agents across state, non-state and transnational institutions*, capacity building at individual level for identified state agents, especially from the Inspectorate of Government (IG); support regional networks of anti-corruption practitioners, strengthen transnational actors' commitment to combat corruption, including transnational corporations, investors and sector-wide initiatives (such as the Extractive Industries Transparency Initiative or the Equator Principles).

# IV. KENYA COUNTRY REPORT: SEIZING THE WINDOW OF OPPORTUNITY

For the most part, Kenya's new anti-corruption laws are exemplary (section 1). In practice, a long phase of state capture (and executive dominance) has entrenched corruption in the state apparatus and seriously compromised the ability of anti-corruption institutions to enforce the legal framework (section 2). More recently, this unfavourable political context seems to be changing for the better as some political will to tackle corruption is emerging in the second and final term of the Kenyatta presidency. This presents active civil society actors and external partners with a window of opportunity to raise public awareness and pressure regarding corruption and to address certain bottlenecks in the chain of criminal prosecution (section 3). Development partners should seize this window of opportunity and substantially support the development of anti-corruption capacity in Kenya's criminal justice system (section 4).

## 1. LEGAL FRAMEWORK

Kenya is a party to the relevant *international instruments*, namely the UNCAC (since 2003) and the African Union Convention Against Corruption (AUCAC) (since 2007). In addition to an extradition agreement inherited from colonial times, Kenya and Germany have agreed upon rendering mutual legal assistance (MLA) in criminal matters on the grounds of the reciprocity rule.[90] The agreement is old, plain simple and does in no way compare to the elaborated provisions on mutual legal assistance in corruptions cases as provided by modern anti-corruption conventions. The UNCAC itself with its numerous self-executing provisions on mutual legal assistance in corruption- and asset recovery-cases cannot operate as a direct treaty between these two countries, because both the Kenyan[91] and the German legal systems require implementing national legislation. But given the (political/prosecutorial) will, the 1971 MLA-agreement could be used as legal basis to indirectly apply the UNCAC-provisions.

[90] BMJ, RiVASt-Anlage II, Kenia (September 2013 – https://www.bmjv.de/SharedDocs/Downloads/DE/Service/RiVaSt/Kenia.pdf?__blob=publicationFile&v=2). The MLA-agreement dates 19 May 1971.

[91] Cf. Boister (2019), p. 427 fn. 25.

Its new *constitution* (enacted 2010) addresses anti-corruption directly and indirectly in several provisions; it

- calls for integrity and accountability of state officials, demanding objectivity and impartiality in decision making, ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices (Art. 73);
- guarantees judicial independence (Art. 160);
- requires the National Police Service (NPS) to prevent corruption and promote and practice transparency and accountability (Art. 244(b));
- demands corruption-free elections (Art. 81(e)(ii));
- prohibits political parties to engage in bribery or other forms of corruption (Art. 91), and
- orders the parliament to establish an independent Ethics and Anti-Corruption Commission (EACC) (Art. 79).

*National legislation* is up to international standards:[92] The criminal law-provisions on corruption crimes enshrined in the Anti-Corruption and Economic Crimes Act (ACECA 2003; supplemented by the Bribery Act 2016) comply with international standards as recommended by the UNCAC;[93] they allow for sufficient sentencing as well as forfeiture of illicit or unexplained assets.[94] Art. 65 ACECA, which deals with the protection of informers, is relatively weak and does not provide for physical protection; with regard to whistle-blowers on acts of bribery, this deficiency, however, is rectified through Sec. 21 of the Bribery Act 2016. The crime of vote-buying during an election period is comprehensively penalised in Sec. 9 of the Election Offences Act 2016[95] (with the loss of eligibility for five years as part of the penalty). Regarding illegal financing of political parties/campaigns, substantial parts of the Election Campaign Financing Act 2013 (containing criminal offenses) have not effectively entered into force yet on

[92] For a detailed analysis see AfriMAP (2015), pp. 17 ff.

[93] The procedural aspects as laid down in the Criminal Procedure Code (revised 2012); they give no specific cause for complaints with regard to the rule of law.

[94] Regarding to the crime of money laundering, the provisions of the POCAMLA (revised 2018) apply.

[95] Though two interview partners reported that this provision only applies on the actual polling day, and thus is routinely circumvented, the law itself does not provide for such limitation regarding to bribery.

rather formal grounds.[96] Procurement regulations have undergone major improvements lately (Public Procurement and Asset Disposal Act [PPADA] revised 2016) and are also in accordance with modern international standards.[97]

*Institutional competences* for anti-corruption prosecutions are distributed among the following agencies: Investigations are carried out by the National Police. The regular prosecutorial institution is the Director of Public Prosecutions (DPP). In addition to that, the Ethics and Anti-Corruption Commission (EACC) – an independent body established under Section 3(1) of the Ethics and Anti-Corruption Commission Act (2011) – has powers to conduct investigations in cases of corrupt malpractice. Responsibility for conducting and supervising referenda and elections (including voter education and observation of elections) lies with the Independent Electoral and Boundaries Commission (IEBC). Criminal corruption cases are at first instance tried before specialized Magistrates courts.

Furthermore, the National Anti-Corruption Campaign Steering Committee (NACCSC), a body administratively under the Office of the Attorney General & Department of Justice, is supposed to strategically implement and coordinate a "zero tolerance to corruption"-policy. One of its functions is to "establish a strategic framework for the nationwide campaign against corruption".

*In sum*, the legal framework is mostly state of the art, with few exceptions as to the penalization of corruptive donations to political parties.

## 2. EMPIRICAL REALITY AND OBSTACLES TO ENFORCEMENT

According to empirical research, corruption is one of the most important problems Kenya is facing today:[98] Kenya scores 28 of 100 possible points in Transparency International's 2019 Corruption Perceptions Index, globally ranking no. 137 of 180 examined countries; -0.31 on a

[96] The act empowers the Independent Electoral and Boundaries Commission (IEBC) to make rules for purposes of administration of the Act and to regulate management, expenditure and accountability in respect of election-campaign funds during election and referendum campaigns, and for related purposes. However, the process of developing such regulations to implement the Act has stalled beyond the 2017 elections. An overview on all of Kenya's Electoral Laws is provided by TI (2018).

[97] Cf. EACC (2015). For a comprehensive analysis see Westen (2012), pp. 100 ff.

[98] Lövkrona (2019), p. 27. Also see NACCSC (2017), p. 9.

scale from -2.50 to +2.50 in the World Bank Institute's 2017 Control of Corruption Index; 5.61 of 10 possible points in the European Research Centre for Anti-Corruption and State-Building's 2017 Index of Public Integrity.

## A) GRAND CORRUPTION, POLITICAL SYSTEM AND DEMOCRACY

At the least since the 1970s, Kenya has frequently been shaken by major grand corruption cases involving parts of the country's political elite,[99] most recently the Goldenberg- (1991/2), Anglo Leasing- (2003) and the Eurobond-Scandals (2013). Different analyses convincingly conclude that Kenya must be regarded as a case of advanced state capture.[100] The chain of democratic legitimacy is heavily distorted by the kind of systematic political corruption that is a typical feature of state capture. The levels of campaign financing indicate that the race for political offices is often motivated by profit[101] and direct elections are corruptly influenced by large-scale vote-buying.[102] Experts also emphasize that campaign costs make candidates for political office susceptible to influence from their donors and financiers. Thus, the right to democratic participation is undermined and holding corrupt officials to account through elections is difficult.

Since 2018, however, the political context seems to be changing for the better and political will to fight corruption is increasing. There has been remarkable anti-corruption rhetoric by the president ("war on graft") and highly publicized efforts to fight grand corruption. A former minister of finance has been indicted and taken into custody following allegations of corruption.[103] Political observers are divided on whether this is a genuine change in policy, or just "show" and/or an attempt to weaken political opponents.[104] On the one hand, even cautious observers tend to believe in president Kenyatta's change of mind: With his presidency finally

[99] Maina (2019), pp. 12 ff.

[100] AfriMAP (2015), p. 43.

[101] AfriMAP (2015), p. 7; also see *ibid*., p. 47.

[102] See Bigambo (2016).

[103] See, e.g., Spiegel-online: „Staatsanwalt in Kenia klagt Finanzminister an und lässt ihn verhaften" (22 July 2019 – https://www.spiegel.de/politik/ausland/kenia-staatsanwalt-klagt-finanzminister-an-und-laesst-ihn-verhaften-a-1278423.html).

[104] Cernicky/Tödtling (2019), pp. 1, 3 f.

coming to an end in 2022, a sustainable push-back of corruption in Kenya would ensure a positive legacy. On the other hand, even a genuine change in policy will run up against entrenched interests connected to the old system. The president himself, who is one of the richest businesspersons in Africa,[105] and his extended family reportedly owe their wealth to the current state capture conditions extending from the regime of his father President Jomo Kenyatta. Furthermore, the new anti-corruption strategy has not yet achieved any "real" prosecutorial success in terms of convicting Kenyatta-related high-profile individuals. Under these circumstances, a genuine prosecution effort will require a broad-based political push for change that goes beyond presidential initiatives and is sustained by society at large.

## B) PETTY CORRUPTION, CIVIL SOCIETY AND HUMAN RIGHTS

Regarding petty corruption, citizens frequently report demands of bribes by public officials. This is in accordance with the above outlined theoretical assumptions regarding state capture: large scale political corruption also means wide-spread petty corruption. Inter alia, public education and health services in Kenya are often inaccessible to those unwilling to pay extortive bribes.[106] Therefore, this type of petty corruption is often described as violation of fundamental human rights, as it leads to deprivation of fundamental needs such as schooling and healthcare. But the same holds true for specific cases of grand corruption in the procurement sector, as paradigmatic demonstrated by a case reported by an interview partner: in a procurement project involving the import of ten mobile clinics supposed to be delivered to low-income areas, the equitable price of approx. 10 MM Shillings was inflated tenfold due to a corruption scheme. That means that without corruption, 100 instead of ten mobile clinics could have been purchased for the same amount of money to improve the medical situation for disadvantaged groups.

There is strong indication that most citizens see corruption as a wrong, being harmful to the common good. Politicians seem to benefit from advocating anti-corruption, and arrests in high-profile corruption cases usually cause big media excitement. It is suggested by experts that corrupt elites fear public pressure produced by local voices with integrity. On the other

[105] https://www.forbes.com/lists/2011/89/africa-billionaires-11_Uhuru-Kenyatta_FO2Q.html.

[106] AfriMAP (2015), p. 7.

hand, suspects in corruption cases bribe journalists or otherwise influence the (mostly non-independent)[107] media in order to avoid reputation-damaging coverage. In relation to petty corruption, 22% of the citizens that did not report a witnessed corruption incident give the reason "I was a beneficiary" (indicating a sense of wrongdoing). As to vote-buying, the majority of voters is aware that electoral bribery is an offense and punishable by law.[108]

Sustained anti-corruption advocacy is provided by numerous well-organized CSOs such as the Kenyan chapter of Transparency International (encouraging corruption victims to come forward with corruption-related complaints through their four Advocacy and Legal Advisory Centres),[109] Ni Sisi! (creating spaces for dialogue and feedback from community groups, structures and networks) or AfriCOG (inter alia fostering investigative journalism).

## C) RULE OF LAW, LEGAL SYSTEM AND ANTI-CORRUPTION AGENCIES

The prevailing state of endemic grand corruption in Kenya also affects the institutions tasked with investigation and prosecution of corruption. While there have been improvements over the past decade and some grand corruption schemes have come to light, there remains a high risk of undue political influence aiming at curtailing competencies, ill-equipping the official machinery or intimidating its decision-makers. The Ethics and Anti-Corruption Commission (EACC), established in 2011[110] has frequently been the target of political destabilisation when making progress on politically sensitive cases that involve members of the governing party.[111] The selection procedures of its former chairmen have been dubious.[112] With regard to the Independent Electoral and Boundaries Commission (IEBC), little efforts to effectively fight electoral corruption and similar malpractice can be observed.[113] The integrity of the Kenyan

[107] According to an interview partner, the major media houses in Kenya are in fact owned by politicians.

[108] Bigambo (2016), p. 65.

[109] See https://tikenya.org/legal-advice/.

[110] The EACC's predecessor-bodies – the Kenya Anti-Corruption Authority (KACA, established 1997) and the Kenya Anti-Corruption Commission (KACC, established in 2003) – operated on a very low performance level, inter alia due to political intrigues regarding their directorships, see Basel Institute (2012), pp. 66-70.

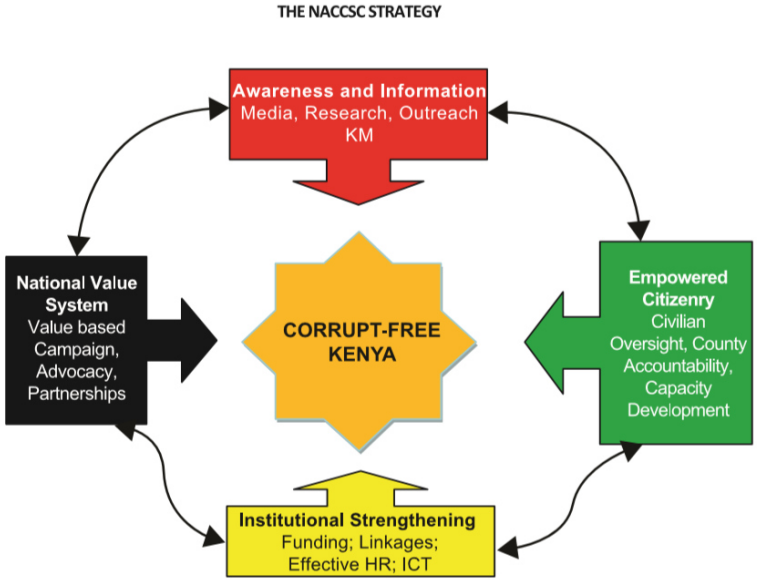
[111] AfriMAP (2015), p. 23.

[112] AfriMAP (2015), p. 28 with further reference.

[113] Cf. Maina (2019), p. 29: no barring of corrupt candidates the EACC recommended to declare ineligible. In fact, the IEBC has been accused of systematic corruption and misappropriation itself in connection with

police is very low: According to the East African Bribery Index (EABI) 2017 there is a 69%-likelihood of encountering bribery within the police.[114] The judiciary is also known for being relatively corrupt:[115] The EABI 2017 shows there is a 48%-likelihood of encountering bribery within the judiciary.[116]

The „Strategic Plan 2016-2021“, a national anti-corruption strategy developed by the National Anti-Corruption Campaign Steering Committee (NACCSC) and supposed to effectively implement a “zero tolerance to corruption”-policy, dates 2016. It contains convincing approaches following best practice-examples, as depicted on page 27 of the Plan:




However, the Strategic Plan remains superficial in many respects and lacks the analytical depth and preciseness of e.g. the South African equivalent. Nevertheless, it appears promising to support the NACCSC in its efforts to further update and implement the national anti-corruption strategy.

procuring electoral equipment in 2018, see AfriCOG (16 March 2018 – https://africog.org/iebc-anatomy-of-a-cash-cow-with-serial-abortions-and-indiscretions/).

[114] EABI (2017), pp. 52 f. (prevalence: 41,6 %, perceived impact 42,6%, average size of bribe: 95 US-$).

[115] Maina (2019), pp. 37 ff.

[116] EABI (2017), pp. 52 f. (prevalence: 17,7%, perceived impact 23,3%, average Size of bribe: 135 US-$).

## 3. THE CHAIN OF CRIMINAL PROSECUTION: WEAKNESSES AND POTENTIALS

The ability of Kenya's authorities to enforce anti-corruption laws suffers from weak capacities and political interference, but there are also promising developments and potentials on which external support can build.

### A) REPORTING SUSPICION

On the first stage of the chain of criminal prosecution, the percentage of reported cases is extremely low.[117] This unwillingness mainly results from mistrust towards authorities whose heads are perceived as corrupt. An overwhelming 94% of surveyed citizens did not report encountered bribery. 24% named as reason "I knew no action would be taken even if reported", 22% "I did not know where to report to".[118] According to the experts consulted for this study, intimidation of or violence against informers does not seem to be a major problem;[119] besides, whistle-blowers can anonymously submit suspicions via an online whistleblowing-system (supported by the German development cooperation),[120] easily accessible through the professionally made Ethics and Anti-Corruption Commission-website.[121] Office holders are legally required to report corruption they witness (Art. 14 Bribery Act), but there is no empirical data on the practical effects of this provision.

The present political situation is favourable to make a decisive push to increase reporting and to promote access to justice for victims of corruption through low-threshold legal aid and support to civil society advocacy. It may be worthwhile to assess the potential of innovative public awareness campaigns, e.g. through TV shows or in social media, to capitalize on the new tone from the top. It may further be useful to focus public awareness and access to justice measures

[117] This also applies to witnessed corruption with respect to the judiciary. E.g., in 2017/18 only 71 complaints were filed at the Office of the Judiciary Ombudsman, State of the Judiciary and the Administration of Justice (2018), p. 13.

[118] EABI (2017), p. 19.

[119] Though it remains unclear, if informers have in fact access to the whistle-blower protection rights pursuant to Art. 21 Bribery Act.

[120] AfriMAP (2015), pp. 8, 11 ff.

[121] https://eacc.go.ke/default/ – as opposed to the makeshift-looking NACCSC-website http://naccsc.go.ke/index.php/what-we-do/research-advocacy with its corruption-reporting function being out of order for weeks on the date of writing (14 May 2020).

on human rights relevant social sectors with high visibility, e.g. the health sector in the context of the current pandemic. To incentivize reporting of corruption, it should also be considered to conditionally decriminalize the giving side in case of (extortive) petty corruption in cases where victims proactively report the official and testify against him.[122]

## B) CRIMINAL INVESTIGATION

Investigations are conducted by the National Police Service (NPS), the Director of Public Prosecutions (DPP) and the Ethics and Anti-Corruption Commission (EACC). All three institutions complain about not being adequately equipped.[123] The anti-corruption performance of both the Police and the DPP is reported to be poor, for "only small fry get caught", whilst other cases are terminated by nolle-prosequi (unwillingness to pursue) and flimsy acquittals.[124] The more independent EACC seems to perform better in terms of independence,[125] but is also accused of "sloppiness";[126] however the EACC does only have investigative but no prosecutorial powers and thus needs to rely on external prosecutors for prosecution.[127] It is reported that the crucial interface between the EACC and the DPP provided challenges, and that indeed DPP was unable to suitably pursue cases handed over for prosecution by the EACC. However, it is suggested that due to the implementation of a joint case file management system in 2014 and a change in DPP leadership in 2018 the working relationship has improved significantly.

Regarding the commonplace practice of electoral bribery, it appears that no real efforts to prosecute this have been undertaken.[128] Under present conditions, it appears sensible to start a systematic push for improving institutional capacity to prosecute corruption, beginning with an update of the national anti-corruption strategy. This strategy should also analyse the

[122] Cf. Dufwenberg/Spangnolo (2015). E.g., the Italian criminal code differentiates between ordinary corruption and extortive corruption, in which the giving side in case of demanded bribes is considered as victim, not as a colluding offender, cf. Zimmermann (2018), p. 111 fn. 372 with further reference.

[123] With regard to the DPP see, e.g., ODPP (2016), p. 11; Judiciary of Kenya (2019), p. 322.

[124] Maina (2019), p. 34.

[125] See AfriMAP (2015), pp. 20 ff.

[126] Maina (2019), pp. 35 f.

[127] AfriMAP (2015), p. 36.

[128] Bigambo (2016), p. 66. The author concludes (*ibid*., p. 68) that punishment for the giving as well as the receiving end would result in a deterrent effect leading to refraining from vote-buying.

specific capacity development needs and thus indicate potential entry points for external support. It may be a promising measure, for instance, to institutionalize further professional training for the personnel of those institutions that seem to be willing to enforce anticorruption laws, notably the EACC.

## C) CRIMINAL TRIALS

Trials in corruption cases are brought before the Specialized Magistrates courts, and appeals to a special division, Anti-Corruption and Economic Crimes Division of the High Court at Nairobi.[129] The anti-corruption performance of the courts is average, with a very low number of pending cases in 2018 (Magistrate Court: 114 cases, High Court: 242[130]). There is an increasing backlog especially at the Magistrates Courts.[131] The reasons are likely to be twofold: unwillingness (expert quote: "judiciary is filled through patronage"[132]) and lack of human resources. Though the number of "specialized" magistrates[133] has been raised recently, there seems to be a significant lack of trained judges and personnel. In-country observers also point out that court proceeding take excessively long. Some experts complain about lenient sentencing, sometimes even "dramatically reduced on appeal" which could also be an indicator of deficiencies in investigation and prosecution of the cases. It cannot be established whether the backlog at the specialized Magistrate Courts emerges due to a lack of judicial manpower or rather a lack of the necessary legal skills within the judiciary. A national anti-corruption strategy should assess the constraints and conceptualize the necessary capacity development measures at the institutional level. Deficits in legal skills, for instance, can be remedied by upskilling the relevant personnel of the magistrate courts through training courses carried out by experienced trainers.[134]

[129] Office of the Attorney General and Department of Justice (15 December 2016 – https://web.archive.org/web/20170114091646/https://www.statelaw.go.ke/anti-corruption-courts-launched/).

[130] Judiciary of Kenya (2019), pp. 282 ff.

[131] See Judiciary of Kenya (2019), p. 456 with figures.

[132] Also cf. Maina (2019), p. 37 with further reference.

[133] The "specialization" is only as far as the fact that they are mandated to exclusively hear corruption and economic crimes cases. They are not "specialized" in the sense of being subject matter experts.

[134] Specific tailor-made trainings are offered by various institutions such as, e.g., the Austrian-based International Anti-Corruption Academy (https://www.iaca.int/).

### D) ENFORCEMENT OF SENTENCES AND ASSET RECOVERY

Regarding the actual execution of sentences, no major shortcomings were observed. Concerning asset recovery, in the financial year 2018/19 the Ethics and Anti-Corruption Commission (EACC) through court proceedings and out-of-court settlements recovered public assets amounting to 27,5 MM EUR[135] – which is less than in recent years (almost 200 MM in the years 2011–2013).[136] In both cases, the sum of recovered assets appears to be tiny compared to the size of the problem of grand corruption in Kenya.

Especially with regard to asset recovery, there seems to be significant potential in European countries to improve the instruments for cooperation and rendering of mutual legal assistance. As to the mutual legal assistance relationship between Kenya and Germany, the necessary legal tools are available (see above). However, to effectively make use of them in asset recovery cases, two things are needed: (1) prosecutorial and political will, and (2) special skills in matters of the legally and technically very difficult area of international asset recovery. Concerning the necessary upskilling of Kenyan personnel, specialized organizations such as the Basel Institute on Governance offer professional training courses.

## 4. SUMMARY AND COUNTRY-SPECIFIC RECOMMENDATIONS

After a long period of state capture, a tentative political commitment to anti-corruption seems to be emerging among parts of Kenya's political leadership. This opens a window of opportunity for building anti-corruption capacity and tackling capacity constraints at specific points in the criminal justice system. Stepping up investment in development of anti-corruption capacity would also send a strong political signal that development partners value and support the emerging political commitment to fighting corruption, which should be emphasized in political dialogue. Further measures to consolidate this political commitment should include additional incentives beyond development policy, as contemplated above in the case of Uganda.

[135] EACC (2019), p. 2.

[136] AfriMAP (2015), p. 42.

At the political and policy level, development partners should

1. *Use political dialogue and political leverage to consolidate and to further promote commitment to combat corruption*; political leverage should include inter-ministerial coordination to align non-development policy instruments with anti-corruption efforts (see Uganda); continue to emphasize the role of civil society and free media in the political dialogue;

2. *Address transnational dimensions of criminal corruption*, including by improving domestic conditions for mutual legal assistance facilitating transnational investigations and asset recovery;

3. *Consider supporting measures to unlock democratic accountability mechanisms*, e.g. in the area of integrity of elections, legislative processes and parliamentary oversight; enhancing political incentives may also include support to voter education and/or support improving the legal framework for election corruption, campaign and party finance.

Providers of technical assistance and development partners should

1. *Focus strategies on capacity development in prosecuting corruption at systemic and institutional levels,* namely by assisting the updating and implementation of the national anti-corruption strategy and by developing institutional capacity in the criminal justice sector, e.g. strengthen investigative capacities, inter-agency coordination, and removing bottlenecks in the judiciary, building of regional networks of anti-corruption practitioners, supporting business initiatives and commitment to integrity and transparency;

2. *Focus on access to justice for victims, public awareness and empowerment of civil society advocacy, especially with regard to vulnerable groups and human rights relevant social sectors*; this includes enhancing victims' low-threshold access to justice and procedural rights, conditional decriminalization of victims in extortive bribery, supporting low-threshold legal advice and civil society advocacy; and prioritizing approaches in human rights relevant social sectors, in particular education and health;

3. *Explore further the potential for projects supporting state and non-actors in combating criminal corruption*, such as further developing capacity of national advocacy organizations or fostering transnational networks of civil society organizations and business associations that enable the exchange of best practices in integrity and anti-corruption.

# V. SOUTH AFRICA COUNTRY REPORT: REBUILDING INTEGRITY

South Africa's anti-corruption laws mostly comply with international standards (section 1). In practice, political institutions are recovering from a decade marked by spreading state capture practices that have also affected the integrity and effectiveness of anti-corruption agencies (section 2). The broad effort to rebuild integrity can rely on a relatively strong judicial system and active civil society and allows for targeted improvements in the chain of criminal investigation, prosecution and adjudication of corruption cases (section 3). Development partners can support this recovery process through capacity development and improved international cooperation (section 4).

## 1. LEGAL FRAMEWORK

South Africa is party to relevant international instruments, including the Southern African Development Community-Protocol (SADC-Protocol, since 2001), UNCAC (since 2003), African Union Convention Against Corruption (AUCAC, 2005) and the OECD Anti-Bribery-Convention (2007). Apart from an extradition agreement, there is no treaty on mutual legal assistance in criminal matters between South Africa and Germany.[137] Neither the UNCAC nor the OECD-Convention with its self-executing provisions on mutual legal assistance in corruption and asset recovery cases can operate as a direct legal basis for mutual legal assistance between these two countries, because the German legal system requires implementing national legislation.[138] The *constitution* of 1996 directly and indirectly addresses anti-corruption in several provisions; it

[137] See BMJ, RiVASt-Anlage II, Südafrika (22 October 2009 – https://www.bmjv.de/SharedDocs/Downloads/DE/Service/RiVaSt/Suedafrika.pdf?__blob=publicationFile&v=4).

[138] However, from the German side it is possible to render ad hoc-mutual legal assistance without a treaty basis, even if the reciprocity rule is not met (see Hackner (2020), mn. 1 and, specifically regarding the OECD-convention, Bundestagsdrucksache 13/10428, p. 21 – http://dipbt.bundestag.de/dip21/btd/13/104/1310428.pdf). But German prosecutors are generally unwilling to render legal assistance to African countries in corruption cases due to bad cooperation-experiences with different African states, cf. Hoven (2018), pp. 419 ff.

- guarantees judicial independence (Art. 165(2)),
- establishes the impartiality, transparency, and accountability as principles governing public administration (Art. 195),
- mandates an independent Public Protector to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper (Art. 182), and
- mandates an independent Electoral Commission to ensure that elections are free and fair (Art. 190(1)(a)).

The constitutional court has repeatedly strengthened the authority and independence of anti-corruption authorities. It held that the constitution must be interpreted in line with international norms against corruption, namely the SADC-Protocol and the OECD-Convention, and requires the maintenance of an independent anti-corruption unit.[139]

*National legislation* on preventing/prosecuting corruption is mostly adequate:[140] The criminal law provisions on corruption crimes, mainly enshrined in the Prevention and Combating of Corrupt Activities Act (PRECCA 2004), broadly criminalize corruption and comply with international standards.[141] They allow for sufficient sentencing, investigations in respect of possession of property disproportionate to a person's known sources of income ("lifestyle audits") as well as forfeiture of illicit asset.[142] The different laws with regard to procurement regulations (mainly the Public Finance Management Act 1999, the Preferential Procurement Policy Framework Act 2000 and Sec. 28 PRECCA) seem to be "strong" (according to an interview partner) and in accordance with modern international standards.[143] They include, inter alia, an obligation to maintain a register of corrupt suppliers prohibited from doing business with the public sector. The protection of whistle-blowers is possible pursuant to the Witness

[139] Constitutional Court of South Africa, Case CCT 48/10 [2011] ZACC 6, para. 214 (Glenister-Judgment 17 March 2011 – http://www.saflii.org/za/cases/ZACC/2011/6.html) and cases CCT 07/14, CCT 09/14) [2014] ZACC 32, para. 9 *et passim* (Suzman Foundation-Judgment 27 November 2014 – http://www.saflii.org/za/cases/ZACC/2014/32.html).

[140] A „quick reference guide" is provided by Corruption Watch (2019), Corruption and the Law in South Africa. For a brief overview also see NPA (2019), pp. 14 ff.

[141] The procedural aspects as laid down in the Criminal Procedure Act (1977); they give no specific cause for complaints with regard to the rule of law.

[142] With regard to organized crime and money laundering, the provisions of the POCA (1998) apply.

[143] But see ACIMC (2016), Diagnostic Report, p. 62, which criticises politicians having a too big level of discretion to appoint and manage senior staff.

Protection Act 1998 (WPA, amended 2007 in order to include PRECCA-Crimes), supplemented by the Protected Disclosures Act 2000 (PDA; amended 2015)[144] and sec. 159 of the Companies Act (2008)[145]. In addition to the domestic legal framework, under the guidance of the Anti-Corruption Inter-Ministerial Committee (ACIMC, a body established 2014), a National Anti-Corruption Strategy is currently being developed; while comprehensive preparatory work has already been published, the final paper is announced for mid-2020.[146]

The loss of ability to hold public office and be elected does not seem to be a possible sanction for corruption crimes.[147] There are no regulations concerning illegal financing of political parties/campaigns.[148] The Political Party Funding Act 2018 (including criminal offences) is not yet in force due to unclear political obstruction.[149]

South Africa's prosecution architecture follows a multi-agency approach. The key institutions are

- the South African Police Service (SAPS) and their semi-independent sub-unit Directorate for Priority Crime Investigation (DPCI, specializes on investigating organized crime and corruption),[150] both controlled by an independent oversight body (Independent Police Investigative Directorate – IPID)[151],
- the National Prosecution Authority (NPA) and their sub-units Special Commercial Crimes Unit (SCCU, dealing with complex organized commercial crime) and Asset Forfeiture Unit (AFU),
- the Special Investigating Unit (SIU), an independent body for the purpose of combatting corruption in cases of serious malpractices in connection with the administration

[144] For more details on WPA and PDA see ACIMC (2016), Diagnostic Report, pp. 21, 26 f.

[145] For this provision see CW (2015), p. 17.

[146] CW (2020), p. 6; also see Government Media Statement (14 September 2019 – https://www.gcis.gov.za/newsroom/media-releases/south-africa-ready-consolidate-its-national-anti-corruption-strategy).

[147] Cf. ISS/CW (2019), p. 6, urging political parties to include ineligibility-provisions in their codes of conduct.

[148] Cf. ACIMC (2016), Diagnostic Report, p. 71.

[149] Cf. CW (2020), p. 6.

[150] See ACIMC (2016), Diagnostic Report, p. 32.

[151] ACIMC (2016), Diagnostic Report, p. 34; Basel Institute (2012), pp. 42 f.

of state institutions,[152] and

- the independent Public Protector, an oversight body with a general public reputation of independence and capacity,[153] though the incumbent head recently raised doubts as to her integrity.[154]

*In conclusion*, the legal framework is mostly well developed, with few exceptions as to the penalization of corruptive donations to political parties and the additional penalty of ineligibility/loss of ability to hold public office for corruption-convicts.

## 2. EMPIRICAL REALITY AND OBSTACLES TO ENFORCEMENT

Corruption is endemic in some sectors[155] and generally a serious problem in South Africa: The country scores 44 of 100 possible points in Transparency International's 2019 Corruption Perceptions Index, globally ranking no. 70 of 180 examined countries; nearly half of its citizens believe that government officials are corrupt.[156]

### A) GRAND CORRUPTION, POLITICAL SYSTEM AND DEMOCRACY

It is generally understood that under National Party rule between 1970s and 1994, patterns of patronage and grand corruption evolved[157], illustrated by the emergence of "tenderpreneurs" in public procurement. After the African National Congress (ANC) took over the government, democratic accountability improved, old patronage structures were dismantled, and anti-corruption agencies strengthened. However, it appears that under the one-party rule of the ANC, new systems of patronage emerged and worsened during the Zuma presidency 2009-2018. This resulted in some major grand corruption scandals involving high ranking government officials including President Zuma and former national police chief Selebi. Different

[152] ACIMC (2016), Diagnostic Report, p. 33; Basel Institute (2012), pp. 47 ff.

[153] ACIMC (2016), Discussion Document, p. 13.

[154] See, e.g., Fihlani (22 July 2019 – https://www.bbc.com/news/world-africa-49073603).

[155] ACIMC (2016), Diagnostic Report, p. 73; Bruce (2014), pp. 15 ff.

[156] Pring/Vrushi (2019), p. 53.

[157] ACIMC (2016), Diagnostic Report, p. 5; van Vuuren (2006), pp. 37 ff.

analyses – including a report of the Public Protector which led to the ongoing enquiries of the "Zondo-commission" – convincingly conclude that during the Zuma administration grand corruption began to reach the level of state capture.[158] However, the core of the democratic system stayed intact: despite some reports about vote buying[159] and illicit financial flows in ANC party financing, the outcome of the 2019 general elections is regarded as a "final warning shot" for the ANC to seriously engage in the combat against corruption.

Since president Ramaphosa took office in 2018, observers note positive developments.[160] These include the removal of corrupt Zuma-loyalists and their replacement by staff of integrity and competence. Judging by words and action, there is strong indication that important parts of the new administration are willing to engage in the combat against corruption. This assessment is further corroborated by the fact that state publications highlight the importance of civil society actors such as Corruption Watch and their importance for the process of empowering citizens in the combat against corruption.[161] This new push for anti-corruption must overcome the resistance of the remaining old guard within the ANC and state institutions.

## B) PETTY CORRUPTION, CIVIL SOCIETY AND HUMAN RIGHTS

Regarding petty corruption, citizens frequently report experiences of demands of bribes by public officials: In 2019, 18% of the users of public services reported they paid a bribe in the previous 12 months.[162] Namely the police is considered to be corrupt, even at senior levels; citizens often report traffic police demanding bribes.[163] Similar observations relate to public services. Access to education[164] and health[165] are sometimes barred to those unwilling to pay extortive bribes. Therefore, this type of petty corruption is not only described as a waste of

[158] Public Protector (2016); Martin/Solomon (2016), pp. 21 ff.

[159] Smillie (20 April 2019 – https://www.iol.co.za/news/politics/elections2019-research-reveals-how-parties-buy-votes-21632422).

[160] See, e.g., ISS/CW (2019), pp. 4, 52; CW (2020), p. 6.

[161] See, e.g., ACIMC (2016), Discussion Document, pp. 6 f., 16 and 21.

[162] Pring/Vrushi (2019), p. 14.

[163] ACIMC (2016), Diagnostic Report, pp. 9 f.; CW (2020), p. 44.

[164] ACIMC (2016), Diagnostic Report, p. 15.

[165] CW (2020), p. 38.

elsewhere needed resources,[166] but as violation of fundamental human rights,[167] as it leads to deprivation of fundamental needs such as schooling and healthcare.

There is strong indication that the majority of citizens regards corruption as a wrong, being harmful to the individual victims and to the common good alike. Besides the condemning language of media coverage on corruption cases, a striking indicator is the fact that the incumbent ANC governing party came out of the 2019 general elections with a significantly reduced majority, partly because of the obvious complicity of its erstwhile leadership in grand corruption.[168]

## C) RULE OF LAW, LEGAL SYSTEM AND ANTI-CORRUPTION AUTHORITIES

Due to the recent period of emerging state capture, the integrity and capacity of authorities tasked with the investigation and prosecution of corruption has been compromised. There are numerous reports on "inappropriate political interference that impacted negatively on independence",[169] "improper conduct by members of the [National Prosecution Authority-] leadership"[170] and "the political manipulation of criminal justice agencies"[171] in the past. Independent institutions that successfully investigated allegations of grand corruption were disbanded: The police unit Directorate of Special Operations (DSO, dubbed "Scorpions") was replaced by the Directorate for Priority Crime Investigation (DPCI, dubbed "Hawks"), which was designed as a mere subunit of the SAPS and thus being under political control.[172] Within other organizations, independent-minded staff was purged and replaced by corrupt loyalties. Subsequently, the performance of prosecutorial actors deteriorated measurably, e.g. the number of arrests and convictions by the DPCI decreased constantly between 2010 and 2015; in 2016

[166] ACIMC (2016), Diagnostic Report, pp. 18 f.

[167] CW (2020), p. 9.

[168] Cf. CW (2020), p. 5.

[169] NPA (without year), Lawyers for the People, p. 3.

[170] NPA (2019), p. 12.

[171] ISS/CW (2019), front page *et passim*.

[172] Detailed analysis provided by Lewis/Stenning (2012), pp. 11 ff.; Berning/Montesh (2012), pp. 3 ff.; Basel Institute (2012), pp. 37 ff. However, the constitutional court later forced the legislator to provide for the DPCI's independence from politics.

no prosecutions of senior officials or politicians and their associated business partners were recorded at all.[173]

Even though the political will to tackle corruption meanwhile has changed, the institutions are still in weak shape today, since they have not effectively been maintained in the past.[174] In terms of funding and human resources the National Prosecution Authority (NPA) remains underequipped, and the vacancy rate stands at 20%. Another central issue of concern relates to incompetent second-tier personnel within the prosecution authorities appointed during the state capture period and still holding office (since transparent appointment and removal procedures are missing). In contrast, there is general agreement that the courts have held up well during the period of state capture and remain relatively independent and effective. The judiciary's strong stance against high-level corruption is epitomized by the constitutional courts' judgement against President Zuma in the Nkandla corruption case, which ultimately precipitated Zuma's demise by the ANC.[175]

## 3. THE CHAIN OF CRIMINAL PROSECUTION: WEAKNESSES AND POTENTIALS

### A) REPORTING SUSPICION

The number or percentage of reported cases is unknown. Though public office holders are obliged to report corruption (Art. 34 Prevention and Combating of Corrupt Activities Act), it is likely that most of the witnessed cases are not officially reported, for the police itself is perceived as demoralized and corrupt. Besides, companies often fail to report corrupt activity as a result of the stigma attached to admitting control and governance failures.[176] Yet, there is reason to believe that people care, as Corruption Watch has received almost 4.000 whistleblower reports in 2019.[177] South Africa stands out as one of few countries where a majority of

[173] ACIMC (2016), Diagnostic Report, pp. 41 f.

[174] ACIMC (2016), Discussion Document, p. 14.

[175] Calland (2017), pp. 367 ff.

[176] ACIMC (2016), Discussion Document, p. 13.

[177] CW (2020), p. 22.

the citizens (57%) thinks that ordinary people can make a difference in the fight against corruption.[178]

Probably the main challenge to reporting is the public perception of the police as being ineffective and being corrupt themselves. Capacity- and credibility-building within the police force thus require nothing less than a comprehensive police reform. A promising recommendation to start with is to amend the South African Police Service-employment regulations to provide that all appointments must follow a clearly defined selection process oriented towards ensuring that the most suitable candidates are appointed and that provisions authorising direct political interference in appointments and promotions be repealed.[179] As in Kenya, it should be considered to support additional public awareness and access to justice measures on human rights relevant social sectors with high visibility, such as the health system in the context of the current pandemic.

## B) CRIMINAL INVESTIGATION

The performance of investigatory institutions regarding the fight against corruption is uneven. On the plus side, there is the reduction of undue political interference. However, the police is still perceived as highly corrupt (with regard at least to its lower ranks) and heavily underresourced. With regard to the main prosecution agency National Prosecution Authority (NPA), the achieved conviction rate in 2018/19 in indicted corruption cases is very high (94%), but the overall numbers are not (approx. 350 convictions in total).[180] The main reasons for the latter are likely to be: Unclear and overlapping jurisdictions between NPA, the Special Commercial Crimes Unit (SCCU), the Special Investigation Unit (SIU) and other institutions, insufficient use of the Prevention and Combating of Corrupt Activities Act-provisions due to lack of training on how to investigate and prosecute complex bribery crimes,[181] remnants of the old regime within its ranks and the severe lack of adequate funding and skilled personnel.[182]

[178] Pring/Vrushi (2019), p. 53.

[179] As recommended by CW/ISS (2019), pp. 55 f.

[180] NPA (2019), pp. 25 f.; DOJ & CD (2019), p. 13.

[181] ACIMC (2016), Discussion Document, p. 13.

[182] NPA (2019), pp. 12, 69, 106 („lack of budget very serious problem"), 109 (21% vacancy rate); TI (2020),

The improvement of the performance of prosecution authorities – especially the NPA – in complex corruption cases requires upskilling in relation to the implementation of the Prevention and Combating of Corrupt Activities Act. External support in the shape of capacity building and training for prosecutors should be considered, but South African authorities should take the lead in needs assessments and donor coordination in this regard. Due to the existing capacities, South Africa is the only studied country that might present favourable conditions for embedding experts and potential twinning formats (in German Development Cooperation structures e.g. "CIM experts"). External support might also support structural reforms aiming at making administrative appointments and processes more resilient against future attempts at state capture, in case political conditions deteriorate. Among the three countries studied, South Africa also presents the most favourable conditions for supporting reform and enforcement of the framework for party funding and campaign finance.

## C) CRIMINAL TRIALS

The Courts are perceived as independent and strong.[183] They are widely regarded as having resisted the state capture-era and deal well with corruption cases brought before them (conviction rate: 94%). Sentencing even in high-profile cases is adequate.[184] No particular action is recommended in this regard.

## D) ENFORCEMENT OF SENTENCES AND ASSET RECOVERY

Regarding the actual execution of sentences, no shortcomings were observed. Concerning asset recovery, for the financial year 2018/19 the Asset Forfeiture Unit (AFU) has completed almost 500 forfeiture cases with a value of approx. 160 MM EUR.[185] Despite the fact that the planned target was about twice as much,[186] this considerable value indicates a comparatively high performance of the AFU.

p. 107.

[183] See WEF (2019), p. 519; GAN (2018).

[184] NPA (2019), p. 50 with examples.

[185] NPA (2019), p. 87; DOJ & CD (2019), p. 127.

[186] The official data differ at this point, see *ibid*.

## 4. SUMMARY AND COUNTRY-SPECIFIC RECOMMENDATIONS

After its transition to democracy, South Africa had seized favourable political conditions to improve its capacity for prosecuting corruption but must now rebuild integrity after a regressive political phase. The challenge is now to use and maintain the current political momentum and rebuild sustainable institutional capacity. The case of South Africa also demonstrates that even where countries make progress in the criminal prosecution of corruption, relevant agencies remain vulnerable to political backlash and dependent on continuous political, judicial and public support. This lesson should inform external support strategies, which need to place particular emphasis on the sustainability of reform and the resilience of institutional capacity.

Development partners and providers of technical assistance should

1. *Support the implementation of the national anti-corruption strategy through capacity development*, including in the field of criminal justice, e.g. through enhancing prosecutorial capacity for complex corruption cases, improving and managing human resources in anti-corruption investigations and prosecutions, and generalized training for implementation of the PRECCAct;

2. *Support the strengthening of access to justice for victims of corruption and civil society advocacy* in cooperation with a ministry open to a human rights-based approach (possibly the Ministry of Justice), promoting low-threshold legal advice, civil society advocacy and mobilization, access to information activism;

3. *Monitor and support national efforts to combat grand corruption,* e.g. through assistance to the implementation of recommendations forthcoming by the national state capture commission, and/or support to the reform of political finance, especially the implementation of the Political Party Finance Act 2018.

# VI. CONCLUSIONS AND RECOMMENDATIONS

## 1. Conclusions from the country studies

***1.1. Legal frameworks:*** In all three countries under study, the legal framework has improved over the past decade, partly as response to international commitments and as a result of external support by development partners. By and large, the law on the books complies with international standards, with some punctual deficits related to safeguarding the integrity of mechanisms to enable political accountability (criminalization of vote buying/ illegal campaign financing). Besides, regulations with the purpose of fostering reporting of corruption leave room for improvement (e.g. whistle-blower protection and de-criminalization in specific cases of extortive bribery).

***1.2. Core problems and potentials for criminal prosecutions:*** In all three countries, the lack of successful criminal prosecution of corruption is closely related to the serious underenforcement of existing legal frameworks. This problem has three main causes:

a) *Grand corruption and lack of political will.* Grand corruption remains a key issue as such, a cause of petty corruption, and a key obstacle to the effective, independent and even-handed enforcement of anti-corruption law. Democratic accountability mechanisms that potentially create bottom-up pressure for anti-corruption efforts are not functioning well in Uganda, not very effectively in Kenya, and with limited effectiveness in South Africa.

b) *Lack of awareness, trust and access to justice among victims and civil society* leads to significant underreporting of corruption at the first stage of the chain of criminal prosecution. This problem is most pronounced in Uganda and Kenya, but also occurs in South Africa.

c) *The independence, integrity and capacity of prosecuting institutions* is compromised due to periods of state capture, political interference, selectiveness of prosecutions and lack of resources. Despite improvements, lack of technical capacity remains a problem at different stages of the chain of prosecution: at investigation stage in South Africa, at prosecution and adjudication in Kenya, and at all stages in Uganda. Lack of capacity in the justice sector is also related to non-merit based appointments, which often occur as part of patronage relationships, and clientelist and ethnic networks.

These problems affect the three countries to different degrees, and they thus represent different types of countries at different stages of the anti-corruption effort. This requires different strategic responses in each context:

- Uganda must focus on building political commitment to prosecute corruption and enhancing the integrity and independence of the justice system. Capacity development should focus on preparing change agents for leading future reforms.
- In Kenya, a tentative political commitment to prosecute corruption seems to be emerging, which opens a window of opportunity for tackling capacity constraints at specific points in the criminal justice system.
- South Africa had already seized favourable political conditions to improve its capacity for prosecuting corruption but must now rebuild integrity and capacity after a regressive political phase.

The conclusions can be summarized in the following simplified, schematic table:

| | Uganda | Kenya | South Africa |
|---|---|---|---|
| **Political system** | Advanced state capture, perceived low commitment and democratic accountability for anti-corruption | State capture, but emerging commitment to anti-corruption, democratic accountability increasing | Regressive phase but commitment to anti-corruption now restored, democratic accountability increasing |
| **Legal system** | Low capacity and weak rule of law | Capacity constraints and institutional bottlenecks in prosecution and judiciary | Capacity constraints in prosecution, effective judiciary |
| **Civil society** | Low levels of reporting, trust and awareness, some potential in criminal justice sector and civil society organizations | Low levels of reporting and trust, emerging awareness, active civil society | Low levels of reporting and trust, relatively high awareness, active and competent civil society |

| | | | |
|---|---|---|---|
| **Paradigm for cooperation and technical assistance** | Prepare for change | Seize window of opportunity | Rebuild integrity sustainably |
| **Summary of country specific recommendations (see in detail country reports, section 4).** | Focus on building political commitment; take cautious steps to improve enforcement that focus on individual change agents, civil society and transnational actors | Develop national anti-corruption strategy and institutional prosecution capacity; enhance access to justice and health sector integrity; consolidate political commitment | Support implementation of national anti-corruption strategy through institutional capacity building, enhance access to justice, police reform, social sector integrity |

**2. General recommendations for a strategy on criminal prosecution of corruption**

From the core problem identified in the country studies, we can deduct general recommendations. These can inform an overall strategy for supporting criminal prosecution of corruption in comparable contexts, and guide development partners and providers of technical assistance:

***2.1. Prioritize building political commitment to and democratic accountability for combating and prosecuting corruption***

- All actors should
    - Ensure that national anti-corruption strategies take into account the attitude of political elites to criminally prosecuting corruption. The impact of external support for criminal prosecution of corruption crucially depends on political will and support among national elites. If such political commitment is absent, it must first be built and incentivized before criminal justice reforms can have a sustainable impact. Criminal prosecutions present a particular risk of political instrumentalization.
    - Ensure that anti-corruption strategies also focus on generating domestic

pressures and incentives to combat and prosecute corruption, especially by unlocking and reinforcing democratic accountability mechanisms. This requires, inter alia, attention to public awareness and in particular free media (investigative journalism), civil society advocacy, issues of election corruption, vote buying, campaign finance, political party donations, and the integrity of legislative process and parliamentary oversight.

- Ensure that development partners consider strategies to enhance international incentives and pressure for political elites to commit to combating and prosecuting grand and petty corruption. This requires strategic alignment of tools in development policy with other policy areas.

- <u>At policy level, stakeholders should</u>
  - Adopt an integrated, context-sensitive strategy to support criminal prosecutions of corruption: This should be only one tool in a broader strategy and be limited to contexts where a necessary minimum of political will and rule of law is ensured. The focus of any approach should be on actual enforcement of existing criminal provisions though capacity development at appropriate levels.
  - Use political dialogue to incentivize genuine political commitment to combat corruption.
  - Seek to improve policy coherence and inter-ministerial coordination in response to corrupt actors and systems. Political responses can combine non-traditional policy instruments with anti-corruption efforts, e.g. trade and investment promotion instruments, visa (denial) policies, and targeted support to investigations into transnational corruption cases and asset freezes.
  - Seek to further improve alignment of anti-corruption policy in external relations within the EU and OECD and enhance dialogue with new and emerging donors on these matters (especially China).
  - Focus on transnational dimensions of criminal corruption (see below recommendation 5).

- Providers of technical assistance should
    - Consider further the potential synergies between promoting democratic processes and anti-corruption measures in existing and new programmes and projects.
    - Explore further the potential for projects supporting non-state and transnational actors in combating criminal corruption.

### *2.3. Prioritize access to justice for victims of corruption and empowerment of civil society, especially with regard to human-rights relevant social sectors and vulnerable groups*

- All actors should
    - Ensure that the benefits of an anti-corruption approach focussing on the criminal justice sector and criminal prosecution of corruption reach the primary target groups, and especially vulnerable groups such as low-income households, women, children, minorities and other groups which particularly depend on government services and/or are at a risk of discrimination.
    - Use access to justice as a framework for developing and implementing a human rights-based anti-corruption strategy against corruption, aligning this strategy with current global development goals, in particular SDG 16 of the UN Agenda 2030.
    - Prioritize addressing underreporting of corruption by victims and public authorities, which is among the weakest link at the first stage of the chain of prosecuting? corruption and must thus be tackled alongside any reforms within the criminal justice sector.
    - Harness the potential of active civil society organisations, citizen advocacy and social movements against corruption.

- At policy level, stakeholders should
    - Consider measures that strengthen access to justice and reporting of corruption cases, emphasizing access to justice in advice for national anti-corruption strategies, improving low-threshold legal advice, enhancing victims' right, protecting complainants and whistle-blowers etc.; improve cooperation between

non-criminal institutions and criminal prosecution units in terms of reporting, e.g. procurement authorities, human rights commissions etc.; depending on context, decriminalizing the giving side in petty corruption cases may also improve access to justice and reporting behaviour.

- Consider measures that focus public awareness and prosecutorial resources on forms of corruption that impede the realization of human rights in social sectors, especially healthcare, education, sanitation, water and nutrition.
- Support measures that build public awareness and increase bottom-up pressure on political elites, e.g. by developing capacity for anti-corruption advocacy and independent investigative journalism related to criminal prosecutions of corruption, integrity of and level playing field for businesses.

- Providers of technical assistance should
  - Take into account the links between corruption and human rights in project delivery, and in further project development and design.
  - Explore further the potential for projects supporting non-state actors in combating criminal corruption, such as developing capacity of national advocacy organizations and business associations that enable the exchange of best practices in integrity and anti-corruption.

### *2.4. Support the development of capacity to prosecute corruption at the weakest links of the chain of prosecution in situations where the integrity and independence of relevant institutions is ensured*

- All actors should
  - Ensure that anti-corruption approaches take into account and monitor the preconditions for effective enforcement and potential political instrumentalization of prosecutions; where integrity and independence of prosecutorial agencies and minimum standards in rule of law are not ensured, these preconditions must be addressed first before capacity can be strengthened.
  - Ensure that approaches identify and address the weakest links in the chain of criminal prosecution. As all elements of the chain of prosecution are mutually

dependent, the weakest element of the chain determines the overall success of prosecutions.

- At policy level, stakeholders should
    - Support systemic development of enforcement capacity where political commitment to anti-corruption exists, especially through supporting development and implementation of national anti-corruption strategies.
    - Support development of enforcement capacity at the institutional and individual level where political commitment exists and institutional independence and integrity are guaranteed, prioritizing institutions that represent weakest links in the chain of prosecution as well as inter-agency cooperation.
    - Support capacity of in civil society and among identified change agents in state institutions where preconditions within the criminal justice sector are not met.
    - Under any circumstances, support measures that focus on the timely conclusion of anti-corruption prosecutions, without compromising the due process in prosecutions and trials.

### *2.5. Prioritize international cooperation, mutual legal assistance and asset recovery to fight transnational corruption and related money laundering*

- All actors should
    - Ensure that anti-corruption approaches systematically addresses the transnational dimension and forms, causes and consequences of corruption, and of grand corruption in particular.

- At policy level, stakeholders should
    - Assess and work to improve, where necessary, legal bases for mutual legal assistance; this may require conclusion of updated, state-of-the-art bilateral mutual legal assistance agreements.

- Assess and work to improve, where necessary, legal bases for asset recovery at EU level, and consider best practice for both asset recovery and return, e.g. the Swiss asset recovery regulation and models for asset return.
- Support, where applicable, capacity development regarding mutual legal assistance, transnational (financial) investigations and cross-border asset recovery in both jurisdictions, i.e. the one requesting MLA as well as the receiving state, e.g. Germany.
- Build and support regional networks of anti-corruption practitioners, strengthen transnational actors' commitment to combat corruption, including transnational corporations, investors and sector-wide initiatives (such as the Extractive Industries Transparency Initiative or the Equator Principles).
- Support development of capacity among transnational corporations and business associations to prevent and combat corruption, e.g. through corporate integrity departments and codes of conduct.

- <u>Providers of technical assistance should</u>
  - Explore further the potential for projects supporting transnational networks in combating criminal corruption, e.g. civil society and business networks that enable the exchange of best practices in integrity and anti-corruption.
  - Explore further the potential cross-sectoral and inter-ministerial coordination with regard to transnational anti-corruption prosecutions; this might include a new component in existing sector programmes, e.g. the one anti-corruption and integrity or on illicit financial flows.

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