

The UNCAC and judicial corruption: Requirements and avenues for reform

An independent and impartial justice system underpins the effective implementation of the United Nations Convention against Corruption (UNCAC). Where it does not exist, pliant prosecutors, judges, and court staff may ignore criminal acts of corruption or have them improperly dismissed. Biased appointments, promotions, and disciplinary processes mean that justice sector staff may be ill-equipped to handle complex cases, including those involving corruption. The UNCAC's unique provisions for international cooperation on a wide range of law enforcement matters especially rely on clean, effective judiciaries in the respective states.

Given the centrality of the judiciary for a range of anti-corruption measures required by the UNCAC, ensuring that the judiciary is up to the task should be a primary concern of State Parties to the Convention – as well as their donor partners. The UNCAC itself, in Article 11, includes the requirement to 'take measures to **strengthen integrity** and **prevent corruption** in the judiciary'. This Brief outlines the key requirements of, and considerations for, implementing Article 11.

The problem: Corruption in the judiciary

Corruption in the courts is perceived as a major problem worldwide: the most recent Corruption Barometer published by Transparency International (TI 2009) indicates that nearly half of the respondents across the world consider the judiciary to be corrupt, and petty bribes paid in connection with a legal process seem to be on the rise. Corruption may take many guises in and around the courtroom: bribery, extortion, influence peddling, and nepotism are the main forms that people encounter. Different patterns emerge in different places. In Nigeria, for example, surveys show that corruption facilitates the destruction of evidence and speedier hearings. In Jordan, the dominant concern is that judges' rulings may be influenced by family or tribal affiliations. The drivers of corruption include executive interference, social pressure, lack of citizen voice, low salaries, ignorance of relevant laws, and poor management.

The **consequences** of judicial corruption are as diverse as its forms: the most obvious impact, of course, is the corrosion of the rule of law. Not only

do powerful criminals escape sanction, but ordinary citizens, particularly the poor, are denied effective access to justice. TI Bangladesh found in a 2005 household survey that two thirds of respondents who had used lower level courts paid average bribes of around \$108 per case – about a quarter of the average annual income (TI 2007). One can only imagine the number of people who would have turned to the courts to settle disputes if these irregular charges were not expected. Corruption also reduces the quality of justice. Poorly trained judges, prosecutors and court staff may be employed and promoted in exchange for bribes or favours. Economically, a corrupt judiciary is presumed to dissuade investors and inhibit trade. And politically, executive interference in high profile cases erodes citizens' faith in the government. Recently, for example, the world witnessed President Musharraf of Pakistan dramatically lose support following his dismissal of a Supreme Court judge who resisted political pressure.

In the broader governance context, corruption in the judiciary undermines the effectiveness of other institutions. For example, an anti-corruption commission that relies on an attorney general's office to prosecute sensitive cases will be foiled if that office is tainted by corruption. Asset recovery cases may collapse if the local judiciary 'chooses' not to trace, freeze, seize, or confiscate the assets in question. Law enforcement efforts may be stymied by prosecutors who decline to investigate criminal conduct due to

political pressure or personal interests, or by judges who dismiss evidence for similar reasons.

Less commonly considered consequences include environmental degradation and compromised state security. In Indonesia, for example, major enforcement operations against illegal timber smuggling have resulted in few convictions, and those who were imprisoned were released after a short time. Advocates argue that corruption of the police, judges and prison officials undermines good-faith efforts to rein in the country's timber tycoons. In terms of state security, low levels of judicial integrity, measured largely by the World Bank's 'rule of law' indicators, are found to correlate strongly with high levels of organized crime, including terrorist activities.¹

In search of solutions: The scope of Article 11

Recognizing the importance of a clean judiciary for the enforcement of sanctions against corruption, UNCAC requires that State Parties take preventive measures to improve integrity and reduce corruption in the court system, which covers judges and court personnel. In its second paragraph, Article 11 also urges States Parties to apply similar standards to the prosecution, where that service is constituted separately from the judicial branch. However, when considering the target institutions, it is important to remember two things. First, any measures taken to implement Article 11 depend on a **broad range of actors**: if the security services do not function, or if police, lawyers or prison officials are corrupt, the integrity of courts – and people's motivation to address the problem – will be compromised. As a prosecutor in the Palestinian Territories told U4, "I have had a hand grenade thrown at me. Why should we be the only ones doing something about corruption?"

Second, legal disputes in any country are resolved through a variety of organs and processes, most of which fall outside the formal systems. This is particularly relevant in developing countries where non-state systems (such as traditional justice systems, paralegals and victim support groups) handle the vast majority of cases. In many developing countries, over 80% of the population seek justice through informal means at the community level. Although the Convention does not address these systems explicitly, it can be argued under human rights law that State Parties should ensure non-discrimination in the provision of justice, no matter what channels are used. Hence, the actual measures taken to realize the Convention's requirements in Article 11 depend very much upon a wide array of institutions, systems, and individuals in any given setting.

Assessing integrity and corruption: Where to start?

As the Convention's language implies, integrity and the absence of corruption are distinct yet related objectives. While State Parties agree about the meaning of corruption – at least about the kinds of acts that can be described as corrupt – the term 'integrity' is less concrete.² Not all shady behaviour exhibited by a judge, after all, is corrupt, and notions of what is appropriate will vary from place to place. It is helpful then to focus the concept of public integrity on objective aspects that have the strongest relationship to corruption. In the context of the judiciary, this means that integrity encompasses **independence** from external (political) influence and **accountability** of the court system to users and the general public.

To satisfy Article 11 requirements, State Parties must analyse both the **types and scope of corruption** as well as the underlying conditions that allow corruption to occur – in essence, institutional weaknesses related to a lack of independence and accountability. As numerous commentators have explained, corruption's illicit nature makes it extremely hard to measure. However, it is possible at least to get a sense of the extent and forms of judicial corruption present in a given country. Surveys can assess the perceptions and personal experience of lawyers, judges, court users, and the general public. Even a simple question about bribery can identify the stages of the judicial process which are most vulnerable to abuse.

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In terms of broader system analysis, USAID, ABA/

CEELI, the Council of Europe, the Vera Institute and others have developed comprehensive tools to map justice sector policies and practices. Transparency International's Diagnostic Checklist for Assessing Safeguards against Judicial Corruption has a slightly narrower focus, setting out system requirements for preventing corruption and the responsibilities of actors involved (including donors and civil society). Global Integrity's judicial accountability indicators cover similar ground. Specific topics include the appointment process of judges; transparency of decision making, as well as disciplinary procedures; conflict of interest regulations; and the accessibility of asset declarations filled out by national judges.

These indicators reflect a growing consensus on what independence and accountability in the justice sector require. This consensus is facilitated by the development of international standards,

by UN bodies as well as by justice sector actors themselves. **The United Nations Basic Principles on Independence of the Judiciary**, for example, provides for security of tenure and fair appointment and promotions procedures for judges. **The Bangalore Principles** (2002), were drafted by a group of high court judges to increase integrity in their profession. Among

other things, they prohibit judges from accepting bribes or hearing cases in which family members are parties or lawyers. Although not legally binding *per se*, these principles have been accepted in countries with diverse legal traditions and therefore are an important reference for reformers.

Approaches to implementing Article 11

Addressing the weaknesses identified in corruption surveys and assessments of justice sector integrity is far from a simple exercise. The record of donor-funded ‘rule of law’ reforms does not present the most encouraging picture for practitioners. As one analyst notes (Hammergren 2000), ‘For a variety of reasons, ranging from the difficulty of defining them and their highly political nature to our own ignorance as to how to proceed, internal and external reformers have tended to shy away from the more qualitative aspects of judicial performance. In doing so, they run the risk of producing superficially modern, but otherwise unsatisfactory organizations in their wake.’ Commonly advocated interventions such as increasing salaries and streamlining structures do not offer a silver bullet solution for reducing corruption. Furthermore, unintended consequences can arise through the implementation of toolbox solutions. Improving the efficiency of corrupt courts, as shown in Egypt during the 1990s, may perversely entrench unequal access to justice.

Based on an evaluation of needs and contextual constraints, stakeholders in the justice system may design interventions that explicitly or implicitly target the problem of corruption. Roughly speaking, such interventions focus on **legislative change**, **institutional strengthening**, and **structural changes to enhance independence and accountability**. They may be implemented directly with public officials or through the work of civil society.

New or revised legislation

Reducing judicial corruption requires an appropriate legal framework. New laws or amendments may be needed to regulate the appointment and conduct of members of the judiciary. Likewise, laws that provide immunity for members of the judiciary may need to be modified. While such immunity strengthens the independence of the judiciary by protecting its members against malicious prosecution, it should be limited in time and scope (to ‘functional immunity’). In addition, conflicts of interest regulations, income and asset disclosure laws, and ethical codes should apply to the judiciary as well as other public officials.

Institutional strengthening

Increasing the effectiveness of courts can reduce both the incentives and opportunities for judicial corruption. Measures that typically fall within the ambit of ‘institutional strengthening’ include:

- Introducing information and communication technologies, including case management systems;
- Publishing and disseminating judicial decisions;
- Raising salaries;
- Strengthening legal education, including on anti-corruption;

- Providing training to judges and other court staff;
- Supporting professional associations (lawyer and judge associations);
- Developing ethics regimes and standards for justice sector employees;
- Enhancing citizen awareness of rights and court procedures; and
- Establishing complaints mechanisms for reporting corruption.

Evaluations of judicial reform suggest that sometimes simple interventions can have significant effects. For example, in Nigeria, a complaints system consisting of complaints boxes and review committees was widely perceived to be the most useful measure in a complicated programme of judicial reform (TI 2007). On the other hand, two interventions that enjoy perhaps the broadest appeal among practitioners – namely training (‘capacity building’) and salary increases – are extremely difficult to implement successfully. In Nigeria and Ghana, for example, donors funded training for court stenographers to speed up court processes. Because this was done without other measures to secure positions and salaries, many of these stenographers simply left their jobs for better ones as soon as they could. Such experience suggest that training can only improve performance if accompanying measures, such as providing people incentives to remain in the job and use their new skills, are also in place (Piron 2006). A similar word of caution applies to increasing salaries. Experience addressing corruption within other public sectors shows that corruption may continue to thrive even when pay rates and working conditions improve.⁴ In a situation where there is high demand for corrupt services, it is unrealistic to expect that higher wages alone will offset incentives for bribery. Salary increases need to be linked to a credible threat of sanctions for non-compliance, including through institutional control mechanisms.

Structural changes to enhance independence and accountability

Judicial independence is compromised when the executive appoints or promotes his cronies to the bench, or rewards judges who make ‘correct’ decisions with perks like land, houses, cars, or special office equipment. Measures that may enhance independence include providing budgetary authority, ensuring long-term employment (most experts advocate 10-12 years), and establishing judicial councils to select, promote and discipline judges. Yet here too, it is difficult to strike the right balance. Whether independence furthers broader integrity objectives depends on the interests and values of the political leadership. For example, in Indonesia, observers claim that a judicial independence law simply insulated the institution from oversight, with ‘business as usual’ the outcome in most courts. On the other hand, as lessons from Latin America illustrate, placing the responsibility for judicial oversight with a judicial council can have the perverse effect of increasing interference from external actors. **Transparency measures**, such as publishing information about court

activities (including annual reports, judicial budgets, decisions) enhance accountability and strengthen the judiciary against politicised attacks.

Beyond Article 11: Other UNCAC anchors for increasing judicial integrity

The UNCAC recognizes that reform efforts are not confined to direct interventions targeting individual institutions. In the case of increasing judicial integrity, other relevant measures covered in the Convention include Article 8 (codes of conduct, asset declarations and other measures for improving public ethics) and Article 10 (enhancing transparency of the public administration). Article 13, which requires State Parties to engage civil society in addressing corruption, can also be invoked by domestic advocates and donors to leverage greater involvement in the field of justice sector reform. Relevant actors within civil society can range from human rights NGOs, to research institutes and universities, private sector organizations, to the media and bar associations, among others. The range of activities to which they typically contribute include:

- Research and diagnostics;
- Advocacy with respect to policies and laws;
- Monitoring of individual court cases (including corruption cases) and judicial appointments;
- Public interest litigation;
- Training judicial officials; and
- Public awareness campaigns.

Technical assistance to the judiciary: final considerations

Donor-supported efforts to reduce corruption in the courts have traditionally been embedded in 'rule of law' programmes, involving a different set of actors than those typically engaged in anti-corruption. Some basic lessons learned may be useful to keep in mind for the purposes of UNCAC implementation-related technical assistance:

- International legal experts engaged as advisors to judicial reforms are often relatively inexperienced when it comes to development aid. They are therefore less well equipped to consider national ownership issues than the typical governance advisor. Reformers need to understand the incentives of the actors involved and have a baseline knowledge of how a given system operates (What kinds of cases do the courts receive? Who is involved?). 'Plugging in' people as mentors for short periods of time in

change-resistant institutions is unlikely to have any sustainable effect.

- Justice is a sector, not a specific institution. As such, effective reforms depend on an approach that recognizes the interdependence of different justice and security agencies, not only the courts.
- And finally, where institutions are weak, they often lack capacity to manage and monitor the implementation of reforms. This is particularly true in the justice sector, with its typically slim managerial structure. Therefore, donors should consider strengthening the agencies' ability to collect and communicate data relevant to the reform process. External actors in civil society may be well-placed to assist with both the diagnostic and monitoring functions. ■

Related U4 Resources

Armytage, L (2009) "Monitoring Judicial Integrity: Lessons for Implementing UNCAC Article 11", *U4 Issue Paper 2009:12*.

U4's Judicial Corruption Theme Page:
<http://www.u4.no/justice>

References

Hammergren, L (2002) "Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs", paper prepared for Transparency International's 9th International Anti-Corruption Conference, Durban.
<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf>

Piron, L-H (2006) "Time to Learn, Time to Act in Africa" in Carothers T, (ed.): *Promoting the Rule of Law Abroad. In Search of Knowledge*, Washington D.C.: Carnegie Endowment for International Peace, pp 275-300.

Transparency International (2007) *Global Corruption Report 2007: Corruption in Judicial Systems*, Cambridge: Cambridge University Press.

Endnotes

¹ See U4 Expert Answer, *Organised crime and corruption*:
<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=171>

² Global Integrity, a leading research NGO, helpfully describes public sector integrity as 'a holistic concept that champions the public interest over the personal and refers to mechanisms that promote government honesty, openness, accountability, responsiveness and transparency.'

³ See <http://www.u4.no/themes/justice> for a list of relevant international standards.

⁴ See, for example, Odd-Helge Fjeldstad's work on revenue authorities in Tanzania and Uganda:
<http://www.cmi.no/staff/?odd-fjeldstad#publications>