

# CRIMINAL JUSTICE RESPONSE TO CORRUPTION

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## I. INTRODUCTION

### A. Brief Overview

South Sudan gained its independence from Sudan on 9 July 2011, after a long civil war in Sudan between the government of the Republic of Sudan and then southern-based rebel group, the Sudan People's Liberation Movement/Army (SPLM/A). The warring parties reached an agreement titled the Comprehensive Peace Agreement (CPA). The peace agreement was successfully mediated by the Intergovernmental Authority on Devolvement (IGAD). The CPA guaranteed, among other rights, the right of southern Sudanese to a right of self-determination,<sup>1</sup> in which they choose, either to vote for unity of Sudan or vote for separation of Sudan, after the end of interim period six years. In a referendum held in January 2011, Southern Sudanese overwhelmingly voted for separation by 99 per cent to form an independent state. After independence, South Sudan approved the transitional constitution that created a legal framework for the country and that would transform it from an autonomous region to an independent state. Under the constitution, South Sudan adopted a decentralized system of government,<sup>2</sup> which provides three levels of government: national government level, sitting in the capital city of Juba, headed by the president; state levels of government headed by a governor, sitting in each state capital city (South Sudan has ten states and three administrative areas); and local government levels within the states headed by a commissioner.

The national government level has three pillars of government: the national legislature (comprised of the National Legislative Assembly and the Council of States), the executive and the judiciary. In contrast, each state government and local government have only two organs: the state legislative assembly and the executive.

### B. Definition of Corruption

Efforts have been exerted by many scholars, researchers, economists and many others to define corruption. As a result, many definitions around the globe have been reached so far. Corruption has been defined as a form of dishonesty or a criminal offence which is undertaken by a person or an organization which is interested in a position of authority, in order to acquire illicit benefits or abuse power for one's personal gain. Corruption may involve many activities which include bribery, peddling influence and embezzlement.<sup>3</sup> Stephan D. Morris,<sup>4</sup> a professor of politics, wrote that political corruption is the illegitimate use of public power to benefit a private interest. Economist Ian Senior defined corruption as an action to secretly provide a good or a service to a third party to influence certain actions which benefit the corrupt, a third party or both in which the corrupt agent has authority.<sup>5</sup> The World Bank economist Daniel Kaufmann extended the concept to include "legal corruption" in which power is abused within the confines of the law – as those with power often have the ability to make laws for their protection.<sup>6</sup>

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<sup>1</sup> The Comprehensive Peace Agreement (CPA).

<sup>2</sup> The Transitional Constitution of South Sudan, 2011.

<sup>3</sup> En.m.wikipedia.org

<sup>4</sup> Morris, S.D. (1991), *Corruption and Politics in Contemporary Mexico*. University of Alabama Press, Tuscaloosa.

<sup>5</sup> Senior, I. (2006), *Corruption – The world 's big C.*, Institute of Economic Affairs, London.

<sup>6</sup> Kaufmann, Daniel; Vicente, Pedro (2005). "legal protection" (PDF). world bank. Archived from the original (PDF) on 5 May 2015.

## II. EFFORTS TO COMBAT CORRUPTION

The Constitution of South Sudan, 2011, provided for the establishment of an independent Anti-Corruption Commission with the functions to protect public property, investigate and prosecute only cases of corruption and combat administrative malpractice in public institutions.<sup>7</sup> The Commission is mandated to prevent and combat corruption at all levels of government and institutions as well as to direct and provide oversight for all persons holding constitutional posts and senior public officers to make declaration of their income, assets and liabilities.<sup>8</sup> The Anti-Corruption Commission Act, 2009, that was enacted during the then autonomous regional Government of Southern Sudan (GOSS), has mandated the South Sudan Anti-Corruption Commission (SSACC) to investigate and prosecute alleged cases of corruption in collaboration and coordination with the Ministry of Justice and Constitutional Affairs (MoJCA). However, the Commission had been criticized by a large number of South Sudanese of not doing enough to combat the rampant corruption in the country by taking a serious and significant step towards investigation and prosecution of corruption-related cases.

The president of the republic had declared a fight against corruption on many occasions. Practically, in 2012, he revealed that corrupt government officials had stolen an estimated \$4 billion from public funds; he sent a letter to 75 officials and individuals close to the government officials to return the stolen money and offered them amnesty should they return the stolen money. \$60 million has been recovered or returned to the government.<sup>9</sup>

Corruption in South Sudan – for some government officials – seemed to be a common practice that official keep doing on regular basis as long as he or she holds that particular position. The money being stolen or embezzled from public funds ended up in foreign bank accounts or spent on purchasing properties in foreign countries, especially East African countries neighbouring South Sudan. The government had made a call for global support to recover assets stolen by South Sudanese government officials and individuals associated with them.

South Sudan, in fulfilment of its international commitments to join hands with the international community in the fight against corruption, has acceded to the United Nations Convention Against Corruption (UNCAC) and has enacted the Anti-Corruption Commission Act, 2006, and the Anti-Money Laundering and Counter Terrorist financing Act, 2012. It also established an Independent Commission to tackle and take the lead in fighting against corruption in the country. Efforts are under way to enact domestic legislation, such as an Asset Recovery Act, Mutual Legal Assistance (MLA) and Extradition Act, and other relevant legislation, to form a legal basis for cooperation with other counties in areas of collecting and exchanging information, provision of evidence obtained by other jurisdictions, to assist in criminal investigations, prosecution of corruption offences and more especially on matters related to identification, tracing, freezing, seizing, confiscating and recovering proceeds of corruption.

## III. INVESTIGATIONS IN SOUTH SUDAN

Criminal investigations in South Sudan are governed by the Code of Criminal Procedures Act, 2008. The Act vests investigative powers in the Police under the supervision of Public Prosecution Attorneys. The Act also gives investigative powers to Public Prosecution Attorneys or Magistrates to complete the investigation him- or herself, where necessity requires.<sup>10</sup>

### A. The Investigation of Corruption Offences

Investigation of cases/offences related to corruption is the responsibility of the Anti-Corruption Commission, to initiate the investigations on alleged corruption that occurred or are about to occur. In doing so, and as a matter of collecting evidence, the commission can search bank accounts held by the suspects.

<sup>7</sup> The Constitution of South Sudan, 2011.

<sup>8</sup> South Sudan Ant-Corruption Commission Act, 2009.

<sup>9</sup> BBC.co.uk/news/June 2012

<sup>10</sup> The Code of Criminal Procedures Act, 2008.

South Sudan's Anti-Corruption Commission Act, 2009 states that:

the commission shall have the power to investigate any allegation, facts, conditions, practices or matters, including the search of bank accounts and other assets of spouses, children and others in a domestic relationship, which it considers necessary or proper to determine whether any person is engaged in or about to commit corruption.

If the commission has reasonable suspicion that a corruption offence has been committed or is about to be committed, the commission shall form an Inquiry/Investigation Committee headed by a member of the Commission and shall designate competent officers to investigate the case.<sup>11</sup>

1. The Investigation Reports

The investigation committee prepares, compiles and submits a final report to the Commission showing: (a) The facts determined by the Investigation Committee; and (b) The findings and recommendations of the Investigation Committee. In the event that the findings of the report of the Investigation Committee recommend prosecution, the case which was the subject matter of the investigation shall be referred to the Ministry of Justice and Constitutional Affairs for prosecution.<sup>12</sup>

2. Identifying and Tracing Proceeds

Under the Anti-Money Laundering and Counter Terrorist Financing Act, 2012, the Financial Intelligence Unit (FIU) is mandated to receive and analyse reports of suspicious transactions from reporting persons (banks, financial institutions, accountants, cash dealers and customs officers among others). If the FIU has reasonable grounds to suspect that the transaction involves money-laundering or embezzlement of public funds or any other related offences, it shall disseminate the report to the appropriate law enforcement agency to take appropriate legal action.<sup>13</sup> The FIU also can give instruction to any reporting person to take appropriate steps to facilitate inspections of suspicious transactions that involve funds or property that are proceeds of crime. The reporting persons are protected under the above-mentioned law, which states clearly that:

Notwithstanding any other written law, no action, suit or other proceeding shall lie against a reporting person, or any director, officer, employee or representative of the reporting person, on grounds of breach of banking or professional secrecy or by reason of any loss resulting from an investigation, prosecution, or other legal action taken against any person, following a report or information transmitted in good faith under this chapter, whether or not the suspicion proves to be well founded.<sup>14</sup>

Acquiring and analysing objective evidence like documents, bank records, data stored in electronic devices, is an essential process when investigating cases of money-laundering, embezzlement of public funds or any corruption related offences. It sheds light on the truth of how the acts were committed and the motive of the offenders and their associates in the commission of the crime.

The investigation process in South Sudan requires the suspect to attend the investigation. In situations where the suspect is in another jurisdiction, he/she has to be extradited to attend the investigations. The witnesses are always summoned to come and provide truthful testimonies on subject matter of investigation during pre-trial investigation and subsequent trial. The witnesses and their immediate dependents are provided protection from harm or danger as a result of their testimony. However, South Sudan did not enact legislation to regulate compulsory systems to testify under subpoena, but the penalties for perjury and obstruction of justice are regulated under the Penal Code Act, 2008.

The legal framework on criminalization of money-laundering in South Sudan is governed by the Act of parliament legislation titled Anti-Money Laundering and Counter terrorist Financing Act, 2012. It criminalized acts of money-laundering and provided penalties therefor. Moreover, the predicate offences under the Anti-

<sup>11</sup> South Sudan Anti- Corruption Commission Act, 2009.

<sup>12</sup> South Sudan Ant- Corruption Commission Act, 2009.

<sup>13</sup> Anti-Money Laundering and Counter Terrorist Financing Act, 2012.

<sup>14</sup> Anti-Money Laundering and Counter Terrorist Financing Act,2012 Chapter IV.

Money Laundering Act include but are not limited to: any dealing which amounts to illicit drug trafficking under legislation related to narcotic drugs and psychotropic substances, terrorism including terrorist financing, participating in an organized criminal group and racketeering, trafficking in human beings and smuggling immigrants, illicit arms trafficking, sexual exploitation including sexual exploitation of children, armed robbery, kidnapping, smuggling forgery and corrupt practices among others.<sup>15</sup>

In carrying out investigations, it is mandatory to cooperate and coordinate – where necessity requires – with other investigative authorities being a governmental or a private institution as long as that would serve the interests of justice.

### 3. Case Study (1): Government of South Sudan v. John Agau and Others

This case started when the president of the Republic issued an order in June 2015 suspending top officials in his office accusing them of corruption.<sup>16</sup> Investigations were conducted and revealed that 16 officials were involved in corruption in the office of the president. The matter was referred to the High Court for trial. The Court established that the suspects jointly misappropriated public funds, abused their power and positions, forged the signature of the president on financial forms and official documents, counterfeited stamps and seals of the office of the president and other government institutions for the purpose of cheating and misappropriating of public funds. The court sentenced them to life imprisonment for stealing \$14 million and 30 million South Sudanese pounds,<sup>17</sup> seventeen (17) vehicles and other exhibits related to the case were confiscated. In the subsequent appeals, the supreme court ordered acquittal of six suspects as innocent including the former chief administrator in the office of the president.

### 4. Accurate and Expeditious Freezing, Seizing and Confiscation

Freezing or seizing of assets involves temporarily prohibiting the transfer, conversion, disposition or movement of assets or temporarily assuming custody or control of assets on the basis of an order issued by a court or other competent authority.<sup>18</sup> Freezing is an action that temporarily suspends rights over the asset, e.g.<sup>19</sup> applying to freeze a bank account. Seizure is an action to temporarily restrain an asset or put it into the custody of the government and may apply to physical assets such as a vehicle. These measures are used to temporarily prevent the movement of assets pending the outcome. Confiscation of assets is a permanent deprivation of assets by order of a court or other competent authority. Confiscation (or asset forfeiture) is used after the final outcome of the case, as it is a final measure that stops the criminal from accessing assets obtained from a crime.<sup>20</sup> In order to be able to successfully conduct criminal investigations and to ensure that assets are secured throughout the investigations, it is important that the investigation agencies can freeze or seize such assets for the duration of investigation and criminal procedure.

Non-conviction-based confiscation has been seen as an alternative confiscation tool by many countries around the globe, especially in developing counties (particularly African countries), and it has been implemented with different levels of success. NCB asset forfeiture provides an effective avenue for confiscation in situations where it is not possible to obtain a criminal conviction – whether the defendant is dead, unknown, missing or immune from prosecution, or in cases where the statute of limitations prevents prosecution. It benefits from the lower evidentiary threshold required to obtain a confiscation order, when compared to proceedings designed to determine criminal liability.<sup>21</sup>

### 5. Case Study (2): The Case of Dura Saga

Dura is a South Sudanese name for Sorghum, in 2008 the National Ministry of Finance and Economic Planning of Southern Sudan, gave more than 290 companies/traders contracts to deliver dura to the States,<sup>22</sup> in a move to eradicate the hunger that people were suffering. The state governments were expected to receive dura from the companies/traders and then write a letter upon receipt to the national ministry of

<sup>15</sup> Ant-Money Laundering and Counter Terrorist Financing Act, 2012. Chapter I.

<sup>16</sup> [https://sudantribune.com>article 5...](https://sudantribune.com>article%205...)

<sup>17</sup> [http://www.aa.com.tr>africa>16](http://www.aa.com.tr>africa%2016)

<sup>18</sup> <http://www.oecd-illibrary.org>sites>

<sup>19</sup> Fighting Text crime -The Ten Global Principles, Second Edition.

<sup>20</sup> Fighting Text Crime -The Ten Global Principals, Second Edition. Principal 4.

<sup>21</sup> [https://knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture\\_2022pdf](https://knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture_2022pdf)

<sup>22</sup> [http://en.m.wikipedia.org/corruption\\_in\\_south\\_sudan](http://en.m.wikipedia.org/corruption_in_south_sudan)

finance to confirm the delivery of the dura. However, the companies/traders falsely claimed to have delivered dura to destination (state). The state governments lied to the national ministry of finance that the dura had been delivered. Then, the ministry approved payment for the goods that had not actually been delivered. The government of South Sudan paid millions of dollars for undelivered dura.<sup>23</sup> The committee was formed to investigate the matter. Unfortunately, the investigations into the case of dura were unsuccessful.

## **B. International Cooperation**

### 1. Identifying and Tracing Proceeds

Asset recovery refers to the process whereby an investigator tracks, identifies and locates proceeds of crime. Asset tracing can be conducted by a number of parties, including law enforcement authorities, prosecutors, investigating magistrates, private investigators or interested parties in private civil actions. The investigators trace assets for the purpose of freezing and seizing them, so that these assets can be confiscated through a judicial order and returned to the victims of crime.<sup>24</sup>

### 2. Utilization of Suspicious Transaction Reports from Financial Intelligence Units

Under the Anti-Money Laundering and Counter Terrorist Financing Act, 2012, the Financial Intelligence Unit (FIU) have a duty to receive and analyse reports of suspicious transactions from reporting persons. If the FIU has reasonable grounds to suspect that the transaction involves money-laundering or embezzlement of public funds or any other related offences, it shall disseminate the report to the appropriate law enforcement agency to take appropriate legal action.<sup>25</sup> Thus, suspicious transaction reports from financial intelligence are essential in fighting crimes of money-laundering and identifying and tracing of proceeds of corruption.

### 3. Utilization of Interpol (ICPO)

South Sudan is a member of the International Criminal Police Organization, and by virtue of being a member, it can get benefits from the services that are rendered to member states, including cooperation between law enforcement agencies and secure exchange of information, especially in the area of apprehension of culprits who commit crimes in South Sudan and make their way to other jurisdictions around the globe.

### 4. Mutual Legal Assistance (MLA)

Mutual Legal Assistance in criminal matters is a process by which states seek and provide assistance to other states in serving of judicial documents and gathering evidence for use in criminal cases.<sup>26</sup> South Sudan has neither acceded to a Mutual Legal Assistance Treaty nor enacted domestic legislation on Mutual Legal Assistance (MLA). However, the country is applying the principle of reciprocity following the diplomatic channels when applying for mutual legal assistance and extradition. In the absence of an MLA law, the practice in South Sudan is that the Director of Public Prosecution (DPP) checks and verifies compliance and implements all outgoing requests to requested states and incoming requests from requesting states. The DPP ensures that all mutual legal assistance requests, including requests related to money-laundering and terrorist financing, are processed and executed without delay in a timely manner. All requests have to go through diplomatic channels. There is no agreed or adopted exemplar request for mutual legal assistance in the office of the DPP. However, the essential requirements include: the name of the central authority; summary of the facts relevant and statement of the relevant laws; purpose of the request and nature of the assistance sought; and other useful information.

## **C. Asset Recovery**

Asset recovery refers to the process by which the proceeds of corruption transferred abroad are recovered and repatriated to the country from which they were taken or to rightful owners.<sup>27</sup> UNCAC provides for direct recovery of assets, whereby a foreign state is able to initiate a civil action in a foreign jurisdiction to establish title and ownership of property.<sup>28</sup> It means that courts should be able to order compensation or damages to a foreign state and recognize them as legitimate owners of property.

<sup>23</sup> <http://www.voafrica.com/amp/south-sudan-probe-sorghum-dura-saga-corruption>

<sup>24</sup> <http://eucrim.eu/articles/tracking-and-tracing-stolen-assets-foreign-jurisddictions/>

<sup>25</sup> Anti-money laundering and Counter Terrorist Financing Act, 2012.

<sup>26</sup> <http://www.unodc.org>

<sup>27</sup> UNCAC, Chapter V.

<sup>28</sup> UNCAC, Article 53.

1. Legal Framework

South Sudan has no domestic legislation on asset recovery, yet the country applies the best practices and principles under the United Nations Convention Against Corruption (UNCAC) and other similar international treaties and conventions. Currently, the Directorate of Public Prosecutions of the Ministry of Justice and Constitutional Affairs is using *The Asset Recovery Handbook, A Guide for Practitioners*, as a guide on all legal matters related to asset recovery. Efforts are underway to enact domestic legislation on asset recovery and mutual legal assistance and extradition in South Sudan.

#### **IV. CHALLENGES FACED IN FIGHTING CORRUPTION**

The challenges that South Sudan is facing in fighting against corruption could be summarized as follows:

- (i) Continued rebellion and conflicts;
- (ii) Lack of political will;
- (iii) Political instability;
- (iv) Political influence on the Judiciary;
- (v) Lack of integrity, accountability and transparency;
- (vi) Lack of tough domestic legislation on corruption; and
- (vii) Fear of rebellion if corrupt politicians/officials are prosecuted.

#### **V. PROPOSED POSSIBLE SOLUTIONS FOR SOUTH SUDAN**

Corruption is a global problem that all countries of the world have to confront. However, the solutions can only be home grown.<sup>29</sup> The solutions that South Sudan needs to adopt to make fighting against corruption meaningful, in my humble view, is to have sincere political will. The politicians regardless of their political affiliations must show commitment and join hands with the president, in his declared commitment and readiness in fighting corruption. In addition to that, South Sudan needs to restore peace and stability, the country has suffered from war, conflict and rebellions from different groups against the government. Starting from the Heglig crisis boundary war over oil-rich regions between South Sudan's Unity and Sudan's South Kordofan States, coming to internal senseless wars and conflicts of 2013 and 2016 between armed rebel groups known as Sudan People's Liberation Movement/Army (SPLM/A) and other groups on one side and the government of South Sudan on the other side. The wars and conflicts and continued rebellion affected South Sudan economically and formed fertile soil for corruption to prevail in the country. Moreover, there is an urgent need to enact tough domestic legislation on corruption offences and make necessary amendments to the existing laws, establish and strengthen the institutions mandated to take the lead in the fight against corruption. There is a need also to prioritize accountability and transparency when handling or managing public funds. Furthermore, the government must ensure the independence of the Judiciary and create a conducive environment in which the judiciary can perform its judicial functions without being subject to any form of duress, pressure or influence from politicians, any other persons or institutions and give justice a chance to prevail. Thus, South Sudan can enjoy the fruits of the fight against corruption.

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<sup>29</sup> Johnny Saverio Ayiik, former Deputy Chairperson of the Anti-Corruption Commission.