

CRIMINAL JUSTICE RESPONSE TO CORRUPTION IN SOUTH SUDAN

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I. INTRODUCTION

This paper is prepared in response to the requirement of the Japan International Cooperation Agency “JICA” Knowledge Co-Creation Program on the Criminal Justice Response to Corruption. The main theme for the programme is “Effective Anti-Corruption Enforcement and Public-Private and International Cooperation”. The objective of the programme is to share information and experiences of the participants respective criminal justice systems with the view to understanding and appreciating success stories as well as challenges encountered. Participants are therefore required to respond to specific questions posed. This paper is therefore customized to address the questions in the order of their appearance in the pages mentioned above. The paper will conclude with a brief summary of the measures South Sudan is putting in place to overcome challenges and make its fight against corruption robust and sustainable.

However, the paper will begin by giving a brief account of the institutional and legal framework within which corruption is fought in South Sudan. It is believed that this will help the reader in appreciating the strengths and weaknesses of anti-corruption measures in operation in South Sudan. Effectiveness and efficiency of efforts geared at anti-corruption are to a large extent a product of the institutional arrangement in place and the legal framework that governs their operations.

II. INSTITUTIONAL AND LEGAL FRAMEWORK

The South Sudan Anti-Corruption Commission (SSACC) was established under the Interim Constitution of Southern Sudan¹ “ICSS” 2005. Article 147 of ICSS provided for the establishment of an independent and impartial body to be known as “Southern Sudan Anti-Corruption Commission”.

Under ICSS, SSACC’s mandate² was to:

- *protect public property;*
- *investigate cases of corruption in both the public and private sectors;*
- *combat administrative malpractices and;*
- *to administer assets AND liabilities declarations of senior public service officials pursuant to Article 121 of ICSS.*

Giving effect to this constitutional provision, the president of the then-Government of Southern Sudan “GOSS” on June 2006 issued a presidential decree appointing the commission,³ comprising of the chairperson, deputy chairperson and three commissioners. As there was no law in place as guidance, the Commission embarked on developing legislation to address issues of corruption offences, sanctions as well as establish the matters, among others. The idea was to adopt legislation which would be both comprehensive and effective in addressing the vice of corruption. Four years down the line, and after a protracted wait and delay, the Commission settled on the Anti-Corruption Commission Act, 2009.

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¹Post-conflict constitution and a product of the Comprehensive Peace Agreement between the then-Government of Sudan and rebel movement known as Sudan People’s Liberation Movement/Army “SPLM/A”.

²Article 148 (1) inclusive of ICSS.

³The Commission is the policy-making body of SSACC. Apart from the Commission, there is Management headed by the Executive Director.

Under this Act, no corruption offences were created as envisaged by the draft bill. Only some sections of the Penal Code Act, 2008 were carved out and assigned to the jurisdiction of the Commission⁴. The Code of Criminal Procedures Act, 2008 as well as the Code of Evidence Act, 2006 remained unchanged. Matters of procedure and evidence relating to corruption cases are to be determined on the basis of these two pieces of legislation. This proved to be challenging considering that the means and methods of perpetrating corruption have drastically changed, rendering conventional measures of combating crimes obsolete and inefficient. The few attempts made under Section 27 of SSACC Act to relax procedures and evidentiary requirements added little or no value at all to the measures available to the Commission in addressing corruption in its various manifestations. Tasking SSACC with investigations and assigning prosecution of the same to a different agency compounded the challenges faced by the Commission.

To address some of these challenges the Commission advocated for reforms to the legal framework with the view of achieving effectiveness and efficiency in its methods of work. The review of the constitution after independence came in handy for the Commission. Its efforts culminated in the addition of prosecutorial powers to the existing mandate⁵

To operationalize the new mandate and address the challenges it had faced under the previous legal dispensation, SSACC developed a bill⁶ and pushed it forward for enactment. The Bill is currently with the Ministry of Justice undergoing review and scrutiny before being transmitted for adoption and enactment.

The Bill is in essence an amalgamation of pieces of legislation. It is divided into parts with each part dedicated to address a different aspect of the Bill. Issues of establishment, corruption and financial crimes, whistle-blowers and witness protection, evidence and procedures, prosecution of corruption crimes and adequate investigative powers have been addressed with elaboration. The Bill benefited from wide consultations among different stakeholders inside⁷ and outside the country⁸. It tried to adopt and adapt international best practices in curbing corruption. It is yet to be seen how the Bill will pass the test of enactment.

III. UNCAC APPLICATION IN SOUTH SUDAN

South Sudan acceded⁹ to the United Nations Convention Against Corruption “UNCAC” in November, 2013. UNCAC entered into force for South Sudan on 22 February 2015¹⁰. However, South Sudan is yet to carry out necessary formalities to ensure compliance with its obligations under this convention. A self-assessment exercise to identify gaps and adopt measures of addressing same is still under consideration. A multi-disciplinary task force is envisioned to be established soon to carry out a gap analysis exercise and recommend appropriate legal, institutional and administrative reforms necessary to meet South Sudan’s obligations under UNCAC.

IV. CORRUPTION DETECTION MECHANISMS

In generating corruption reports SSACC adopts a variety of approaches. These include face-to-face reporting¹¹, statutory reports by public officials¹², open media sources¹³, official reports¹⁴, official databases¹⁵, anonymous reporting, intelligence production, complaint boxes and inter-agency information sharing.

⁴See the definition of Corruption under Section 5 of SSACC Act, 2009.

⁵Article 144(1)(b) of the Transitional Constitution of the Republic of South Sudan, 2011 (TCRSS).

⁶South Sudan Anti-Corruption Corruption Bill, 2011.

⁷Governmental agencies as well as civil society organizations.

⁸Some sisterly countries and UNODC.

⁹South Sudan Instrument of Accession, dated 27 November, 2013.

¹⁰United Nations Secretary General letter number: C.N.65.2015.TREATIES-XVIII.14 (Depository Notification), dated 26 January 2015

¹¹There are “Corruption Reporting Guidelines” to guide the prospective corruption reporters on what and how to report corruption allegations.

¹²The “Duty to Report” Section 34 of SSACC Act, 2009 obligates public officials who have knowledge of corrupt practices to report the same to the Commission. Failure to report constitutes an offence punishable with imprisonment, fine or both.

¹³Including newspapers and social media.

¹⁴Such as audit report and periodic institutional reports produced by public and private agencies.

A person who reports a proven corrupt practice to the Commission is immune from any prosecution arising from that report¹⁶. However, if the corruption report turned out to be false, frivolous or groundless, then the person making such a report commits an offence and shall, on conviction, be sentenced to imprisonment, fine or both¹⁷.

As per SSACC experience, corruption complaints raised through face-to-face interaction seem to carry the day in terms of volume. This is made possible in part because of the widespread geographical scope of SSACC. SSACC is present in each and every capital town of the ten states of South Sudan. Just to give an example, in 2010 sixty-six corruption allegations were reported to the Commission. Out of this number, 51 (77%) cases were reported face-to-face¹⁸.

V. WHISTLE-BLOWERS AND WITNESS PROTECTION MEASURES

To safeguard and cushion informers and witnesses of corruption practices from reprisals, the SSACC Act has adopted a provision clothing this category with immunity from actions or proceedings against them, disciplinary actions included, provided they acted in good faith¹⁹. This sounds simple and straightforward. However, in practice it sounds different. In a practical example of this provision SSACC found itself helpless with little or no guidance. A public servant reported a case to SSACC which the later believed to have been made in good faith. One way or the other the person against which the report was filed and who happened to be the direct supervisor of the reporter unveiled the identity of the reporter. He took disciplinary measures against the reporter. SSACC believed that the charges against the reporter were concocted just to punish him for having reported to the Commission. With this conviction in mind, SSACC wrote to the supervisor asking him to reverse the action taken against the reporter, but to no avail. With no guidance regarding the binding effect of its decisions in such a situation SSACC watched helplessly while the reporter regrettably suffered under the weight of stiff sanctions imposed upon him in what he and SSACC believed to be retaliation. SSACC needs to seal such loopholes by legislative reform or adopting policies and innovative measures to counteract such and similar challenges.

Section 47 empowered the Commission to make such rules and regulations as may be necessary for the effective and efficient implementation of the provisions of the SSACC Act. It is envisaged that this will enable the Commission to fill in the gaps that are left under this Act. Practical matters such as physical security of the informers and witnesses as well as relocation and change of identity, if the need be, are part of the bigger picture contemplated under these arrangements.

However, as is the case with most if not all matters under the SSACC Act, these provisions are yet to be tested through case law. Lack of vibrancy in challenging the Commission's acts and omissions coupled with lack of dedicated corruption adjudication tribunals partly contributes to this state of affairs²⁰.

VI. INVESTIGATION TECHNIQUES

Investigation of corruption offences in South Sudan follows the normal criminal procedures. The use of special investigative techniques is constrained by both legal parameters and technical capacity of the agencies involved in the fight against corruption.

In terms of the legal framework SSACC Act gives little guidance on the use of innovative techniques such as wiretapping, bugging, undercover operations and computer software. There is no specific mention of the use of such measures in the SSACC Act. However, Section 27(1) of this Act gave Chairs of an Investigation Committee latitude in deciding the manner of conduct of investigation of corruption allegations.

¹⁵ Examples include the assets and liabilities declaration database, official registries such as the registry of land titles and the companies registry.

¹⁶ Section 34 (2) of SSACC Act, 2009.

¹⁷ Section 34 (4) of SSACC Act, 2009.

¹⁸ Source: South Sudan Anti-Corruption Commission Annual Report 2010.

¹⁹ Section 44 (a) of SSACC Act, 2009.

²⁰ Corruption offences are treated like any other criminal offences in terms of criminal procedures. There are no special provisions. The Code of Criminal Procedures Act, 2008 applies in all cases of corruption investigation, prosecution and adjudication.

This discretion is subject to fairness and cost effectiveness as shall be directed by rules and regulations under this Act²¹.

In the absence of specific rules for investigation, Section 8 of the Code of Criminal Procedures Act, 2008 “CCPA” mandates the use of its provisions in the conduct of investigations. Under the CCPA, intrusive measures against privacy and property are strictly regulated. A warrant is required from either the Public Prosecutions Attorney or a judge in the absence of the Public Prosecutions Attorney. If the prescribed procedures are followed and a chain of custody is observed, the evidence acquired through such techniques is admissible.

Proactive measures of investigation such as sting operations are vital in disrupting corruption and exposing it. Section 25 of the SSACC Act gives it the power to initiate proactive investigations if it “...has a reasonable suspicion that a corruption offense has been or is about to be committed...” Although there is no specific mention of certain measures, the Commission has always employed sting operations as part of its available tools to investigate corruption. Unfortunately, the cases in which this tool was used were resolved administratively. Again it is yet to be known how the courts will react to their use.

Wisdom dictates that “prevention is better than cure”. With this in mind SSACC has always strived to catch up if not be ahead of corruption perpetrators. Corruption has developed in nature and means of its commission. ‘Traditional’ ways of combating it are rendered less and less effective with the passage of time. SSACC is therefore committed to adopting the international best practices that have proven tough on corruption. Sting operations and controlled delivery are among the options on the table.

Technical arrangements pose a great challenge. SSACC is ill equipped to make proper use of the measures which require high-tech capacity. Relevant equipment and appropriate training are lacking, and this funnels into poor-quality and delayed investigations. SSACC experience with investigation of corruption offences has shown that there still is a big space ahead to cover before ushering in quality and timely investigations. The time frame of instigating corruption cases ranges depending on the complexity of the case and availability of pertinent resources. Some cases have taken less than a month to complete while others took more than a year.

To overcome this SSACC had invested in personnel and institutional capacity building in addition to legislative reforms. Study tours and exposure of its staff to the international best practices is one of the tools SSACC has adopted to inform its actions and legal framework. This training opportunity comes at an opportune time for SSACC. It is believed that the knowledge acquired from such a high-level gathering of academicians and practitioners with a wide range of knowledge and experience would enrich SSACC’s endeavour to better position itself in the fight against corruption.

VII. PROSECUTION OF CORRUPTION AND RELATED CASES

Under ICSS and the SSACC Act the Director of Public Prosecutions in the Ministry undertakes the prosecution of corruption cases investigated by SSACC. These two laws are silent regarding the role of the Commission in the prosecution of cases it investigated. In case of absence of the Prosecution Attorney, the Police are assigned by Section 183 of the CCPA to conduct prosecution.

Public Prosecutions Attorneys enjoy great latitude in bringing or sustaining prosecutions. Section 217 of the CCPA empowers the prosecution to withdraw charges when it considers that there are no sufficient grounds. More so, practice has shown that the Minister of Justice enjoys discretion transcending the availability of sufficient evidence to make prosecution of the accused more likely than not. In some cases, the Minister of Justice has withheld his intervention or indeed carried on with prosecution when he is of the opinion that public interest so dictates. This far-reaching discretion with limited or no check and balance. More interestingly SSACC invoked public interest to ask the President of the Republic to stop prosecution against a person accused of corruption.

²¹ Section 47 gives the Commission the power to make rules and regulations for the efficient and effective implementation of the Act. But so far no rules and regulations have been adopted by the Commission.

With the new legal dispensation under ICSS, SSACC is entrusted with prosecution of corruption cases. In the pending enabling act, SSACC tried to address practical issues it faced including matters of discretion in prosecution. Indeed, in preparation SSACC has developed a prosecution policy highlighting its stand on the same. The official adoption of the Prosecution Manual which incorporates this policy is just awaiting the enactment of the Bill.

Production of concrete data has always been a challenge. This is partly because prosecution of corruption cases under the current legal framework rests with the office of the Director of Public Prosecutions (DPP). Experience of the cases so far submitted by SSACC to the office of the DPP suggests that SSACC has no role to play after submitting the case. This has made it almost impossible to know whether its recommendations for prosecution have been accepted or rejected by the DPP. More so, there are no mechanisms in place to enable SSACC to update its records of cases submitted to the DPP office.

The CCPA provides for immunity for accomplices in cases exclusively triable by the High Court or punishable by imprisonment for a term which may extend to seven years. Section 199 of the act under review determines the Public Prosecutions Attorney to be the relevant authority to tender the pardon. The finding as to whether the accused has complied with the terms of the pardon is an exclusive prerogative of the Court trying the case. In case of affirmative compliance, the accused may be acquitted.

Plea bargaining is not yet an option for prosecutors under the existing criminal justice legal framework. It will need a serious construction of the legal framework to argue for plea bargaining. However, the good news is that plea bargaining is one of the tools the Bill has suggested for prosecution of corruption. It is premature at this stage to discuss how it will play out in practice as the Bill is still being considered for enactment. With the strong political will demonstrated by the leadership of the country and wide support for the effective combating of corruption from the general masses and civil society organizations as well as the development partners, hopes are high that this time around South Sudan may have a strong legal framework to effectively and efficiently fight corruption.

VIII. TRIAL PROCEDURES IN CORRUPTION CASES

South Sudan is largely a common law jurisdiction; its trial system is adversarial. It is not quite clear though how this dispensation affects speedy trials. However, many other factors have a negative bearing on the time it takes to determine a case before the criminal courts in South Sudan. Chief among these are: the huge case load, limited number of judges and limited training, especially training on adjudication of corruption case. As a remedy SSACC in its Strategic Plan has provided for training of judges²² as part of capacity building for the staff, institutions and agencies engaged in combating corruption.

CCPA dictates a certain threshold of evidence to prevail in criminal cases. Section 6(b) of this Act stipulates that "every accused person is presumed innocent until his or her guilt is proved beyond any reasonable doubt". This has made it extremely difficult to obtain convictions in corruption cases as methods of perpetrating corruption have outmatched the traditional investigative techniques. The new measures introduced by the Bill are partly meant to increase the rate of conviction through relaxing the evidentiary threshold, especially in non-conviction-based asset recovery and an explained asset forfeiture.

Trial procedures for criminal cases including corruption adjudication are arranged in a way to identify issues and ascertain evidence in support of the charges being preferred against the suspect. It is imperative to charge suspects before arraignment in courts of law. This is only possible through weighing evidence and ensure prospects of conviction before venturing into trial. All these procedures are done at the investigations stage under the guidance of the Public Prosecutions Attorney.

The importance of witnesses in successful anti-corruption cases cannot be underestimated. With this in mind the relevant legal framework in the country has attempted to create an environment conducive for willful and effective engagement for persons who have witnessed or taken part in corruption. Blanket immunity is found in Section 44 of the SSACC Act, which shields informers and witnesses from legal actions or proceedings. On a practical note, anonymous reporting is acceptable and encouraged. However,

²² South Sudan Anti-Corruption Strategic Plan: Key Objective 2(7)(h).

the potential of these measures is underutilized. Lack of elaborate guidance as well as non-availability of material resources to support these measures, stands as an obstacle in the face of their potential.

IX. GOOD PRACTICES

It is a widely held conviction that corruption leaves no stone unturned in its quest to control each and every possible resource of the community. In a baseline corruption survey conducted by SSACC in 2010 it was never a surprise for the findings to reveal that corruption is prevalent and that no sector of the economy or section of the community is immune from its scourge. More so, the anti-corruption model adopted by South Sudan is a multi-agency model under which different aspects of the fight against corruption are assigned to different agencies. In South Sudan, no one agency controls the fight against corruption. However, SSACC plays a central role in streamlining efforts and synergizing plans and actions geared towards it. To discharge this role SSACC has made it a Strategic target to forge partnership working with all the stakeholders and role players domestically and beyond our borders²³. At the top of these stakeholders is the private sector. SSACC acknowledges that the private sector can act as passive or active agents of corruption, or they can ensure healthy competition based on ethical criteria making them a determining factor in the pursuit of effective anti-corruption policies. With this in mind SSACC has actively engaged the private sector in an awareness creation programme as well as building their capacity to tackle corruption in their back yards. Moreover, SSACC has in the Bill introduced debarment and the liability of legal persons for acts of corruption. These measures are meant to instill integrity in the business community and enlisting it in the combat of corruption.

To compliment these measures SSACC is set to rejuvenate its engagement with the civil society. Fortunately, more and more entities are showing interest in the fight against corruption. Monitoring public transactions and naming and shaming is one of such area. It is no longer a business as usual for businesses to indulge in corruption, especially in public contracts. A new and keen eye is watching over.

As proceeds of corruption often find their way outside the country, South Sudan has been active in joining hands with its global partners in ridding corruption of its benefits and ensuring perpetrators of corruption have no safe haven to hide. On this note SSACC has been proactive in pursuing all avenues of cooperation at the international level. It extended and received assistance using different tools of cooperation. Chief among these is agency-to-agency cooperation, diplomatic channels and using regional and international networks²⁴. Recently, and through informal cooperation, South Sudan was able to freeze and later on through diplomatic channels retrieve about \$8 million.

Despite these success stories, SSACC is still far from utilizing the potential offered by the other avenues of cooperation. Bilateral and multilateral conventions and domestic mutual legal assistance legislation are but some of the instruments that SSACC needs to consider exploring.

X. EVALUATION AND RECOMMENDATIONS

By way of summary, it is fair to conclude that the criminal justice system in South Sudan still has a long distance to cover before achieving effectiveness in combating corruption. In the context of the current legal and institutional arrangements, corruption is hard to detect and punish. The mandate to combat corruption is scattered among a number of agencies with limited investigative and prosecutorial powers and is poorly equipped to effectively address corruption. Most importantly mechanisms to coordinate and streamline actions are either ineffective or, to put it mildly, not made use of. Each agency seems to be working in isolation from the others. This is true for SSACC, the Ministry of Justice, the Police as well as the Financial Intelligence Unit (FIU) and the rest of the agencies with the mandate to combat corruption in one way or the other. This fact has mutilated anti-corruption interventions.

To add salt to the injury, proper mechanisms in terms of legal and policy frameworks to cultivate and sustain public-private partnership on the one hand and between domestic and international partners on the other hand are still in their infancy stage. Corruption is continuously evolving and mutating, attacking

²³ South Sudan Strategy, 2010: Strategic Goal no 5, page 38.

²⁴ SSACC is an active member of IAACA EAAACA and its offspring, ARIN EA, just to mention a few examples.

every individual person, country or section of the community. Going after it alone without support and action from others makes it difficult if not impossible to bring under control. Sadly enough this seems to be how corruption is being tackled in South Sudan.

To overcome some of these challenges an overhaul of the criminal justice system in respect of the way it tackles corruption is strongly called for. Measures to consider include:

- Corruption methods are diverse and ever changing. It is therefore imperative to be innovative in the measures of addressing it. Fortunately, enough international good practices are there as guidance. In the context of South Sudan corruption is treated ordinarily. This has to change. It is time to acknowledge that corruption is a special crime with huge, devastating effect on different aspects of life. Legislative measures must be put in place to deal with all its manifestations, forms and effects. Corruption should not pay. Rather it should inflict harm on those who perpetrate it. With this in mind South Sudan should consider expanding the criminalization of corruption. New offences should be created to seal much if not all possible loopholes in the current legislation. Examples include criminalizing illicit enrichment.
- Make corruption easy to detect, investigate and prosecute. Measures that should be considered include relaxing the evidentiary threshold, giving the law enforcement agencies relevant powers to collect evidence and preserve the value of criminal assets. The current SSACC falls short of enabling the Commission to arrest suspects, seize evidence and present or make ex-party application with the view of preventing the suspect from dissipating assets if he or she catches wind or in one way or the other is alerted on investigations.
- Invest in capacity building for staff and institutions involved in combating corruption.
- Corruption touches everyone. Absolutely it affects all, individuals and sections of sections of the community. It is far reaching in devastation. International borders are no barrier to corruption. Joint and collective efforts internally and regionally are therefore vital if controlling corruption is something to go by. The current legal and policy framework in South Sudan fall short of robustly tackling corruption. National mutual legal assistance legislation, acceding to relevant regional and international instruments, and joining more anti-corruption networks domestically, regionally and internationally.

List of References: *25

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2. Reporting Corruption: Operational Guidelines, published by SSACC, 2010.
3. South Sudan Anti-Corruption Action Plan, 2010–2014, South Sudan Anti-Corruption Commission, 2010.
4. South Sudan Anti-Corruption Commission Act, 2009, Laws of South Sudan.
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7. The Code of Evidence Act, 2006, Laws of South Sudan.
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9. The Transitional Constitution of the Republic of South Sudan, 2011.
10. The Penal Code Act, 2008, Laws of South Sudan.

²⁵ Laws mentioned herein are accessible at the South Sudan Ministry of Justice website.