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Can UNCAC address grand corruption?

A political economy analysis of the UN Convention against Corruption and its implementation in three countries

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Abstract

The political economies of many developing countries are characterised by varying degrees of patronage and state capture, a reality that has far-reaching implications for measures addressing corruption. Political strategies in such contexts often include maintaining political and economic power through personalised relations and seeking to influence political decisions for the benefit of an individual or group. Gaining and retaining power within these systems is a resource-intensive process, and corruption is a common way to sustain extensive power networks.

This report asks whether this insight has found its way into one of the most important current anti-corruption instruments, the United Nations Convention against Corruption (UNCAC). Analysis of the Convention itself and implementation efforts in Bangladesh, Indonesia and Kenya suggest that UNCAC is only partly suited to address the political nature of corruption, especially if not complemented by further reform measures.

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Executive Summary

The political economies of many developing countries are characterised by varying degrees of patronage and state capture, a reality that has far-reaching implications for measures addressing corruption. Political strategies in such contexts often include maintaining political and economic power through personalised relations and seeking to influence political decisions for the benefit of an individual or group. Gaining and retaining power within these systems is a resource-intensive process, and corruption is a common way to sustain extensive power networks.

This report asks whether this insight has found its way into one of the most important current anti-corruption instruments, the United Nations Convention against Corruption (UNCAC). The research comprised two analytical steps: (a) a political economy analysis of UNCAC itself, and (b) an exploration of how UNCAC has been implemented at the country level through UNCAC-related assessments (gap analyses, self-assessment checklists, and pilot review mechanisms) designed to inform reform efforts in Bangladesh, Indonesia, and Kenya.

The role of corruption in political economy

In highlighting key findings within partner countries, early political economy analysis (PEA) syntheses by the UK Department for International Development (DFID) identified **corruption** and **elite capture** of power and resources as among the most prevalent obstacles to change. In what North and colleagues describe as “limited access orders”, powerful elites in a majority of countries form “dominant coalitions” to overcome political disorder. This is done by limiting access to resources and decision making, allowing the extraction of rents and their redistribution to participating elites through patron-client networks (North et al. 2007). In looking at a range of country PEAs, one can identify a number of ways in which such dominant coalitions exert influence over formal institutions or processes that should in principle hold the powerful in check.

Highly personalised relationships and patron-client networks are at the heart of dominant-coalition power systems. In order to gain control of public resources, elites seeking power organise **capture of the bureaucracy by the dominant coalition**. The **legislature is often indirectly controlled by the dominant coalition** as well, compromising its independent policy-making and oversight functions. Closely linked to this in many countries is **the dominant coalition’s influence over electoral processes**, through, for example, presidential appointment of heads and members of electoral commissions, tampering with voter registration and vote counts during elections, or using public funds and equipment for party campaigns. Many of these practices can only survive in the absence of the rule of law. Thus, many developing countries are likely to witness **executive influence over the judiciary and other oversight institutions** (such as anti-corruption agencies, supreme audit institutions, ombudsmen, and human rights commissions). This may be done, for example, through top-level appointments, by controlling budget allocations, etc. Legislation **curtailing civil society and media freedom** has the same objective of limiting oversight. State capture by economic interests is also not uncommon. The **lines between politics and business are blurred** in many countries, with elites extensively pursuing business interests for the purpose of personal advancement or to fulfil clientelistic obligations.¹

¹ It is important to recognise that such patterns are not consistently present in all developing countries, nor are they exclusive to the developing world. However, in some countries they are sufficiently pervasive as to create a power base that is either outside formal state institutions or systematically distorts these institutions to serve particular private interests.

UNCAC and political economy

Because of the high level at which dominant coalitions exercise their influence, we consider political and grand corruption of prime interest for this study. Many UNCAC signatories demonstrate the characteristics of limited access political systems, and therefore it is of interest to examine the extent to which UNCAC is able to overcome the engrained and political nature of corruption in limited access orders. The questions we set out to answer are:

- To what extent can UNCAC address grand and political corruption as arguably the most significant types of corruption within limited access orders?
- Does the Convention provide an entry point for the more substantial and systemic reforms necessary to improve broad governance performance?

Without positive answers to these questions, it is likely that reforms in many countries will fail to reduce corruption levels due to the activities of vested elite interests.

Looking at the Convention from a political economy perspective

UNCAC has been criticised for its weaknesses, especially with respect to political corruption, private sector corruption, and asset recovery. In particular, the initial failure of the states to agree on a review mechanism prompted many to question UNCAC's potential impact and to attribute its weaknesses to a lack of political will to reform on the part of governments in the global South. However, the picture is more complex.

UNCAC does address grand corruption by recognizing that the problem of corruption is not limited to bribery and by affirming the determination of states "to prevent, detect and deter [...] the international transfer of illicitly acquired assets" (UNCAC preamble). UNCAC also applies a broad definition of public officials (the principal subjects of many of its offences), explicitly including high-level civil servants, politicians, and members of the judiciary, whether appointed or elected.

However, although the Convention offers detailed provisions in key areas to address corruption, its limitations in addressing the political nature of corruption must be recognised. While the principles of transparency, accountability, integrity, and sound management of public affairs, needed to promote a fairer and more effective public sector, are woven throughout the preamble and the chapter on prevention, UNCAC says little about mechanisms that would help to enforce such principles. It does not provide for essential mechanisms (such as appeals systems) that could make administrative decision making more rule-based. UNCAC also offers little that could contribute to shielding the independence of the legislature or electoral processes from particularistic and personal interests. Its provisions on political corruption are weak.

The capture of the judiciary by the dominant coalition is a crucial concern for UNCAC, since arguably none of its provisions will be effective if they are not enforced through mechanisms such as judicial sanctions. But an independent justice system with its own integrity is mentioned only in general terms. With respect to other oversight institutions or actors, the Convention strongly recommends the establishment of independent anti-corruption bodies, although it does not specify clearly how they might be institutionalised. The role of civil society as well as, indirectly, of the media as oversight actors is considered essential, but is described only in general terms. UNCAC does contain a number of provisions that deal with the private sector, especially with conflicts of interest when a public official is involved in both the private and the public sector, including politics. All criminal offences apply to public officials (including staff of public enterprises) as natural persons, but also to legal persons (such as companies), which would mean a major breakthrough in trying to hold corrupt companies to account. However, many such measures are only proposed rather than mandated. In addition, a majority of UNCAC provisions are weakened by leaving implementation subject to domestic law.

What are the political dynamics of corruption in the three countries studied, and how do UNCAC-related assessments and reforms relate to these dynamics?

Since the true potential and limitations of UNCAC will only emerge when it is implemented in a country context, we take a more detailed look at three countries: Bangladesh, Indonesia, and Kenya. These countries have been chosen, first of all, because we expected some if not most of the political economy patterns described above to be found there. Second, and more importantly, these three countries have made particular efforts in the last few years to implement or prepare for implementation of UNCAC by conducting UNCAC-related assessments.

Despite historical, demographic, and political differences among the countries, these three cases reveal some common patterns with respect to the political dynamics of corruption, which are relevant for UNCAC implementation:

- Patronage networks are prevalent in all three countries. These are embedded in complex socio-political dynamics that are fuelled by and also produce corruption. UNCAC, which concentrates on formal rather than informal mechanisms, is in many ways inadequate to address the complexity of such predominantly informal relationships.
- All three country cases show both an adaptation of patron-client systems to new political environments after democratisation and a continuation of limited access orders (through strong executives) despite democratisation. UNCAC and its related assessment tools do not explicitly take into account such country-specific political considerations.
- In all these situations, oversight institutions, and particularly the judiciary, have been kept weak or made complicit, so that corrupt behaviour goes unpunished.
- All three countries' gap analyses found a comparatively solid institutional and legal anti-corruption framework. Most gaps that were identified relate to the enforcement of rules rather than to their quality.
- The Indonesia case study provides interesting insights into the use of several UNCAC-related assessments in combination. While the gap analysis to some extent acknowledged the political economy of corruption, the pilot review, which had more potential for such analysis, actually provided less. The self-assessment checklist clearly was not designed to consider this context.
- UNCAC tends to be perceived as a privileged international agreement, thus furthering a tendency to neglect national priorities.
- UNCAC is not very specific about the role of oversight institutions. Its focus on governments, especially executives, as the primary actors in anti-corruption reform makes it especially weak in addressing institutions for checks and balances, such as the judicial and legislative branch.
- The Convention's two main weaknesses relate to the minimal, non-mandatory quality of its provisions on the integrity and independence of the judiciary and on political party financing. In all three countries studied, strong measures in these two areas are direly needed to counter political economy barriers to anti-corruption reform.

The Convention's potential to address elite capture and inform national-level reform

Corruption in many countries, including our three case-study countries, is part of a larger political system aimed at gaining and maintaining access to power and resources. Since the primary objective of UNCAC is to contribute to the prevention and combating of corruption, the Convention does not explicitly address these larger dynamics. Thus it does not offer specific measures concerning state formation, checks and balances, state-citizen relations, fundamental democratic rights, and elite incentives.

It is true that UNCAC cannot take account of the myriad of different country contexts, and a convention is also inevitably limited by the need to reach international consensus. However, this paper argues that the Convention has a critical weakness in that it does not sufficiently address the nexus between power relations and corruption clearly, such as by addressing political and electoral corruption in a more detailed way and by making more provisions mandatory. The provisions for review mechanisms suffer from the same weakness, not taking into account the political and socio-economic dynamics surrounding anti-corruption reform, through mechanisms such as multi-stakeholder consultations.

The Convention challenges the vested interests of dominant coalitions by criminalising the corrupt activities that sustain their systems. But a major problem remains, in that it is precisely those dominant elites who are largely in charge of ensuring implementation. The fact that UNCAC is a government-driven and government-owned convention, which also implicates politicians and public officials at all levels, poses difficult barriers to genuine implementation and bottom-up reform. The solution must involve other domestic accountability actors in a holistic reform approach, with attention to the weaknesses or biases of these actors as well as those of government officials.

With UNCAC already in place, however, the remedy lies not in trying to improve the text of the Convention but in finding creative ways to apply it as written. UNCAC does promote key anti-corruption reform measures and accountability actors. Even in countries where implementation is less likely, discussion of the Convention within and among States Parties may serve to open up spaces for reformers to manoeuvre. Much will depend on the extent to which UNCAC can expose dominant coalitions to international pressure to comply with its provisions. The Convention's recognition of the international scope of corruption and money laundering is probably its greatest strategic value in this respect.

As the three country cases demonstrate, the Convention has to some degree contributed to stimulating public debate on anti-corruption reform. In all three countries, UNCAC was promoted by new governments eager to show their commitment to act on integrity reform. In each case, UNCAC added international pressure to national reform efforts already underway.

The country cases also show that a review process is far more useful when it is conducted in a participatory manner, that is, involving a broad range of relevant stakeholders, and when the Convention is considered within the context of country reform priorities and ongoing reform efforts. For the review process to avoid becoming an exercise oriented towards external actors (the UN Office on Drugs and Crime and the other reviewing countries), it is essential that States Parties assume their own responsibilities for periodically monitoring the impact of reform. The review mechanisms should specifically encourage this. Political economy analysis can be useful, especially for identifying the risks and challenges to reform implementation.

Finally, the case studies show that UNCAC is only one element in a country's larger governance reform agenda. Its value will depend on how different actors at the domestic and international levels take ownership and combine it with broader reform efforts.

What role for donors?

The limitations of UNCAC discussed above should not be taken as grounds for rejecting the Convention. Once a state has chosen to ratify UNCAC, the Convention becomes an instrument with a degree of legitimacy and ownership in the country. As a consequence, UNCAC can serve as a useful tool for societal stakeholders and external donors engaged in dialogue with governments. Donors, in addition, should consider taking the following steps:

- Promote the enrichment of UNCAC-related assessments with a political economy analysis.
- Encourage the use of political economy analysis tools in their own operations with a view to fostering an understanding among staff that development, in particular anti-corruption reform, is a fundamentally political process rather than purely a technical exercise.
- Seek to compensate for some of the weaknesses of UNCAC by also supporting civil service and political reform processes, as well as enhancing the capacity of all actors in a national integrity system.
- Compensate for the Convention being a government-oriented tool by promoting and supporting the involvement of non-government actors in the formulation and implementation of domestic anti-corruption reform agendas.
- Invest at home in improving implementation of those areas of UNCAC where donor countries can contribute to the strengths of the Convention and improve conditions for anti-corruption efforts in developing countries, such as by improving the capacity for response to mutual legal assistance requests.
- Show more courage in publicly denouncing and sanctioning cases of corruption in partner countries, which will not only benefit the countries but enhance donors' own credibility as well.

Introduction: Rationale for the study

The United Nations Convention against Corruption (UNCAC) is the first binding global agreement on corruption, as well as the most comprehensive. How successful its implementation will be in practice in different countries around the world, however, remains to be seen. Given the highly political nature of corruption, this U4 Report uses a political economy approach to explore the potential impact of UNCAC in and on difficult governance environments.

Political economy analysis is increasingly used in part because of the lack of success, over decades, of conventional development efforts—that is, efforts relying primarily on technical measures while neglecting the importance of social and political contexts. Conventional in this sense is deemed as an overreliance on technical measures and a neglect of the extent to which context and politics matter. This evolution in understandings is particularly visible in the case of perceptions of corruption. In the past, the assumption was too often that corruption is an outcome of individual misbehaviour in the context of weak institutional and legal frameworks, including weak enforcement capacity. It followed that donors tried to address corruption through institutional and legal reforms, as well as through capacity building. As a result of this approach, measures to address corruption were at best prescriptive and were assumed to apply universally, with little variation by country.

Significantly for measures aimed at addressing corruption, the political economies of many developing countries are characterised by varying degrees of patronage and state capture. Political realities in such a context often relate to maintaining political and economic power through personalised relations and influencing political decisions for the private benefit of an individual or group. Gaining and retaining power within these systems is a resource-intensive effort, and corruption is a common way to sustain extensive power networks. “Under these circumstances regimes have little or no interest in implementing an anti-corruption agenda, as the overriding objective of those in power is to remain in power, which takes precedence over the achievement of national development goals [...]. [The] lack of political will to pursue an [anti-corruption] agenda is therefore a rational choice since the existing system is dependent on the continued reproduction of corruption” (Norad 2008, 10).

This report asks whether one of the most important current anti-corruption instruments, the United Nations Convention against Corruption (UNCAC), adequately takes this reality into account. UNCAC includes a wide range of important legal and technical measures to address corruption. To what extent will these provisions, when implemented, have the potential to affect the often systemic and intrinsically political nature of corruption? And given the vested interests of powerful elites and the engrained nature of corruption, is it likely that UNCAC measures will be implemented at all? In approaching these questions, the authors took the following analytical steps:

- We first conducted a political economy analysis of UNCAC. This began with a brief synthesis of corruption-related patterns found by political economy analyses in developing countries. Next, we analysed the Convention’s negotiation process and the intentions behind the drafting of such a comprehensive document, based on a review of relevant literature and consultations with members of delegations who took part in the negotiations. Finally, we turned to the Convention itself to identify key areas and provisions of UNCAC that might be helpful in addressing the political economy of corruption.
- Acknowledging that the true potential and limitations of UNCAC will only emerge when it is implemented in a country context, we also explored the implementation of UNCAC at the country level through three case studies. The analysis first focused on governmental policy intentions using “gap analysis” or compliance reviews. These not only revealed gaps in current local implementation of the Convention, but also raised concerns about prospects for future implementation. Evidence from the reviews was complemented by additional insights from interviews with key resource persons involved in the review processes. This was, in turn, combined with the findings of country-specific political economy analyses, particularly those

addressing relationships between elites, the political system, and corruption. The countries chosen for this exercise were Indonesia, Bangladesh and Kenya, for reasons explained below.

The report is divided into two parts. Part 1 discusses the political economy of UNCAC and presents a synthesis of the country-level analyses, followed by the overall conclusions and recommendations for donors and national reformers.

Part 2 includes three country studies of Bangladesh, Indonesia, and Kenya. These countries were chosen for two reasons. First, we expected some if not most of the political economy patterns described in section 1.1 to be found there. Second, and more importantly, these three countries are known to have taken the initial steps towards implementation of UNCAC (or at least strategic preparation for such implementation).

Each country study begins with a review of country-specific political economy analyses to establish the nature of corruption-related patterns in these settings. In each case, this review confirmed the political nature of corruption in the country. In a second step, we examine UNCAC-related reform efforts. In all three countries these included UNCAC gap analyses, that is, multi-stakeholder consultation processes in which the country's legal and institutional reality is compared to UNCAC requirements, identifying gaps to be covered by future reform. In the cases of Bangladesh and Indonesia, national anti-corruption strategy processes, informed by UNCAC, were available for examination. In all three countries, a review of relevant documents was complemented by interviews with key informants.

Can UNCAC address grand corruption?

A political economy analysis of the UN Convention against Corruption and its implementation in three countries

Part 1: A political economy analysis of UNCAC



1. The role of corruption in political economy

Political economy analysis (PEA) has been increasingly used in the development arena as a tool for better understanding the political and societal factors which both drive and limit development.² “A political economy lens broadens operational considerations beyond technical solutions to include an emphasis on stakeholders, institutions and processes by which policy reform is negotiated and played out in the policy arena” (World Bank 2008, vii). In exploring the political economies of developing countries, many of which are signatories to the United Nations Convention against Corruption (UNCAC), this report highlights the use of corruption as an instrument for reaching political settlements and distributing resources. This provides the basis for evaluating the adequacy of UNCAC provisions for addressing the political nature of corruption. The ultimate objective is to contribute to more effective anti-corruption reform by increasing the recognition and understanding of the political economy of corruption in specific settings.³

In highlighting key findings in partner countries, early PEA syntheses by the UK Department for International Development (DFID) identified **corruption** and **elite capture** of power and resources as among the most prevalent factors inhibiting change (DFID 2005). The role of elites is thus essential in understanding the context of corruption in a majority of states. “Even the most democratic nations are directly governed by an elite of some kind. Between elections, members of the elite exercise a great deal of influence on the political and governmental agenda.” (Hossain and Moore 2002, 1) In the developing world, however, elites play an even more significant role. In what North and colleagues describe as “limited access orders”, powerful elites form “dominant coalitions” in order to overcome political disorder (or violence).⁴ This is done by limiting access to resources and decision making, allowing the extraction and redistribution of rents among participating elites via patron-client networks (North et al. 2007).

Therefore, there is a tacit acceptance of rent seeking and corruption as the glue that holds together these institutions and systems of power. Lines of patronage rely on the transfer of power or resources to sustain the positions of both patrons and clients. This is not to say that all informal networks are bad or corrupt, or that all power bases are necessarily maintained through corruption. A variety of studies points to the overall welfare and stabilizing effects of such networks. However, in many developing countries, elite rent seeking and corruption work together to become the dominant elements in reaching and maintaining political settlements through patron-client networks. In the most damaging cases, corruption becomes predatory and compromises critical state functions (Khan 2006; Johnston 2005).

In looking at a range of country PEAs, one can easily identify patterns in which such dominant coalitions exert influence over the formal institutions and processes that should in principle hold the powerful in check (and by doing so create more open access orders). Such manipulation may take

² Many PEAs are conducted by donors to improve the knowledge base about their partner countries. However, political economy analyses are also carried out by academics, think tanks, and civil society organisations in developing countries themselves.

³ It needs to be acknowledged, of course, that PEAs are not conducted primarily in order to shed light on the context for anti-corruption reform. Donor-commissioned PEAs in particular are frequently aimed at gathering contextual information for use in planning and improving programmes for pro-poor growth and development. However, PEAs can serve as a valuable source of information about opportunities for and constraints to public reform more generally, as well as about the actors involved. In general, such analyses consider the role of corruption in relation to state reform and the political system, providing necessary background and information on the context for UNCAC implementation.

⁴ North et al. (2007) assert that all low- and middle-income countries are “limited access orders”, accounting for 85 percent of today’s global population. Furthermore, limited access orders represent the historical norm and indeed appear to be the default order for societies in general.

place through formal governing institutions (such as the president and cabinet, i.e., the executive) or through informal patron-client relationships.

1.1 Political economy patterns at the domestic level

The following themes are key to understanding how formal and informal relationships affect corruption and UNCAC implementation.

Highly personalised relationships are at the heart of dominant-coalition power systems. Such personalised networks may be based on different affiliations: for example, partisan (e.g., Bangladesh), ethnic (e.g., Kenya), or regional/clan lines (e.g., Georgia), groups affiliated to the military (e.g., Pakistan), or a combination of these (e.g., Indonesia). Personalised relationships secure support for those in power by creating loyalty towards the patron and by infiltrating state institutions with these loyalties. Patrons in turn offer clients access to positions and resources, usually through the public sector. The occurrence of these networks is often linked to a strong, personalised presidential system in which the president himself exercises a role as patron (e.g., Indonesia under Suharto). Such personalised relationships have significant effects upon expectations of accountability and civil society, as many people seek representation through informal lines of patronage rather through formal state structures.

For power-seeking elites, wielding influence through the bureaucracy is a prime means of gaining control of public resources, especially since the public sector constitutes the major source of rents in many developing countries. Therefore, **capture of the bureaucracy by the dominant coalition** is commonly seen in these settings. In Zambia, for example, the bureaucracy became a central element of patronage, leading to overstaffing, poorly considered appointments, and distorted incentives that failed to reward performance (Duncan, Macmillan, and Simutanyi 2003, 48). Cammack (2007) terms such bureaucracies “dysfunctional public services”. In such contexts, even low-level bureaucrats may “privatise the business of dispensing public services”, using public resources to build their own patronage networks (Chabal 2009, 8).

The legislature is often unhealthily dominated by the dominant coalition. Parliaments are described as weak in comparison to the executive; this is often indicative of powerful patrimonial obligations and decision-making powers lying outside of formal institutions (Cammack 2007). The functioning of the legislature may be compromised in various ways, including arbitrary control of parliamentary budgets, influence over parliamentary election processes (e.g., Georgia), and outright bribery of politicians. For instance, Malawi witnessed a blatant example of such dominance in 2009 when the ruling party decided that the opposition leader in parliament would be elected by the whole house rather than by the opposition alone, a practice that was later overruled by the high court. Notably, attempts by the dominant coalition to control or influence the behaviour of opposition parties are often disguised by allegations of corrupt behaviour on the part of their leading members and misinformation about their personal assets (e.g., Indonesia, Kenya).

Intimately linked to power over the legislature in many countries is **the dominant coalition’s influence over electoral processes**—a common way to secure and maintain access to power and resources. Examples include presidential appointment of heads/members of electoral commissions (e.g., Kyrgyzstan, Kenya), tampering with voter registration and vote counts during elections (e.g., Uganda), and vote buying and voter harassment. On the campaign side, political corruption includes the executive’s use of public funds and equipment for party campaigns. As elections are very expensive affairs, they often represent a significant cost to incumbent patrons and parties; especially when financial resources are scarce, this cost is frequently met by abusing public resources or by accepting funds from influential sources (such as powerful entrepreneurs, companies, and even organised crime cartels). Accountability for political action then easily shifts towards those financial contributors, resulting in skewed decisions and policy making by those who are elected to office.

Many of these practices can only survive in the absence of the rule of law. Thus, many developing countries witness extensive **executive influence over the judiciary**. Such influence manifests itself across the spectrum, resulting in notionally independent judiciaries that are, however, hesitant to rule against the government (e.g., Uganda); cuts in and delays to the judiciary's budget; and the unaccountable appointment of judges, prosecutors, heads of police, and attorneys general (e.g., Kenya, Bangladesh, Georgia, and Kyrgyzstan). Naturally, executive control over the judiciary creates legal openings for corruption, from minor acts all the way to outright impunity for grand corruption (e.g., Georgia and, most prominently, Kenya).

In addition to influence over the legislature and the judiciary, it is often common practice to exercise undue **influence over other key oversight institutions**, such as anti-corruption agencies, supreme audit institutions, ombudsmen, and human rights commissions. This is done, for example, by controlling top-level appointments and budget allocations. Legislation **curtailing civil society and media freedom** has a similar objective of limiting oversight.

State capture by economic interests is also not uncommon. The **lines between politics and business are blurred** in many countries, with elites extensively pursuing business interests both for personal advancement and to fulfil patrimonial obligations. There are many instances in which parliamentary adoption of laws and policies serves the particular interests of business groups (e.g., Georgia, Indonesia). In extreme cases, family members of the incumbent president can create economic monopolies (e.g., Indonesia under Suharto and several Central Asian countries).⁵

It is important to recognise that such patterns are not salient in all developing countries, nor are they exclusive to the developing world. Highly personalised relationships and patron-client networks exist in all political systems. However, in some countries they are highly developed, creating a power base that either lies outside of formal state institutions or distorts these institutions to serve particular interests. The extent to which this happens through informal mechanisms varies among countries and can even vary within a country. In many countries, formal and informal structures exist in parallel: the formal state might function according to the rules in certain areas but not in others.⁶ On the other hand, in countries that succeed in making political relationships, institutions, and structures more impersonal, patron-client relationships get pushed to the margins. Executives, parliamentarians, and public officials are then more generally able to align their actions with the public interest.

1.2 Political economy patterns at the international level

Political economy analyses have increasingly recognised that, in addition to domestic factors, international contextual influences have significant effects on elite behaviour, patterns of corruption, and overall levels of development. A DFID White Paper in 2006 proposed a more nuanced interpretation of PEA: as summarized by Moore and Unsworth (2006, 708), "bad governance is often caused or exacerbated by the ways in which poor countries interact with global economic and political forces, powerful richer countries, and large transnational private enterprises."

Recent findings suggest, in fact, that the global political and economic system has created a perverse set of elite incentives that are not conducive to development (Moore and Unsworth 2009). Current

⁵ We are not entering here into the debate on whether patrimonialism linked with the economy is predominantly negative or not. In relation to the economic development of the four "Asian tiger" states of Hong Kong, Singapore, South Korea, and Taiwan, many have argued that rent-seeking behaviour can have positive economic effects if rents are redistributed and reinvested. For the African context, Kelsall et al. (2010) argue that acknowledgement of "developmental patrimonialism" might be more realistic, especially in the early stages of political and economic development, than aiming at impersonal governance and a rigid separation of the public and private spheres. However, they also recognise that the conditions in which true developmental patrimonialism can emerge are fairly rare, and the conditions needed to sustain it even more so.

⁶ As established by Erdmann and Engel (2006) in relation to neopatrimonial states.

research by the Organisation for Economic Co-operation and Development (OECD) cites the influence of key international drivers upon corruption and develops tools to analyse their effect upon elite behaviour. These international drivers include rents and unearned income from natural resource exploitation, development assistance, and foreign investment, as well as opportunities to conceal illicit financial assets by moving them abroad, sometimes by setting up quasi-anonymous accounts in financial centres and electronically transferring money between them with the help of the global financial industry. Such opportunities provide perverse incentives that discourage elites from creating functioning public institutions and bargaining with their populations (in the traditional social contract sense) over taxes, public policy, and economic growth. In short, such international incentives can be seen as perpetuating, or even fuelling, the functionality of informal institutions, personalised networks, and patron-client systems. On the other hand, the OECD research also recognises international drivers that effectively counteract corruption—international instruments such as international anti-corruption and anti-money-laundering agreements, the Extractive Industries Transparency Initiative, and the Kimberley Process, as well as diplomatic tools such as travel restrictions (OECD, forthcoming).

2. UNCAC and political economy

Because of the high level at which dominant coalitions exercise their influence, we consider political and grand corruption to be of prime interest for this study.⁷ The historical primacy of limited access orders suggests that many UNCAC signatories demonstrate such characteristics. Therefore, in examining implementation of the Convention, it is of interest to ask how UNCAC may be able to overcome the engrained and political nature of corruption in limited access orders. The questions we set out to answer are:

- To what extent will UNCAC actually be able to address grand and political corruption, which are arguably the types of corruption that do most to reinforce limited access orders?
- Does the Convention provide an entry point for the more substantial systemic reforms that are necessary to improve broad governance performance?

Unless answers to these questions are found, it is likely that reforms in many countries will fall short of reducing corruption levels because of the continuing power of vested elite interests.

In order to gauge UNCAC's potential to address systemic corruption as a fundamental part of developing countries' political economies, we first need to consider the political economy of the Convention itself. For this, we look back at the negotiations for the Convention, asking who sought to promote and who sought to block different elements of the text. We then examine in more detail the Convention's provisions, considering whether they can provide either legal-technical or systemic remedies for the political economy patterns described above.

2.1 The evolution and content of UNCAC

The origin of UNCAC is linked to the United Nations Convention against Transnational Organised Crime (UNTOC), which was drafted in 1999–2000 and entered into force in late 2003. UNTOC was the first UN convention to address corruption, which figured in two of its provisions. Given UNTOC's focus, however, corruption features specifically as a tool of organised crime, rather than generally. Thus there emerged a common understanding within the General Assembly that there was need for an international legal instrument against corruption itself (Webb 2005). This consensus was also the result of at least a decade of international lobbying and the development of several regional anti-corruption conventions.

The General Assembly set up an Ad Hoc Committee to negotiate UNCAC and instructed it to adopt a comprehensive and multidisciplinary approach.⁸ The Convention was drafted in seven lengthy sessions between January 2002 and October 2003. It was then adopted by the General Assembly and opened for signatures at a high-level conference in Mexico in December 2003. UNCAC entered into force on 14 December 2005, after 30 states had ratified it.

The negotiations to decide on the content of UNCAC were based on 26 draft proposals submitted by 23 different countries at a preparatory meeting in Buenos Aires. While only 58 nations attended this initial meeting, over the ensuing seven sessions and 22 months of negotiations, 129 countries were

⁷ This paper's focus on grand and political corruption does not imply that lower-level types of corruption which UNCAC might well address are harmless or nonexistent. In fact, they often accompany high-level corruption.

⁸ According to Webb, this had to include, among other topics, preventive measures; criminalisation; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange, and analysis of information; and mechanisms for monitoring implementation (Webb 2005: 205).

involved in the discussions (Babu 2006). Naturally, only a few countries had sufficient resources to send staff to all the working groups negotiating the different topical areas. Therefore, many countries had to set priorities in deciding which content areas they would participate in. According to one informant, states would often start with common positions based on their affiliation to regional UN groups.⁹ However, as the negotiations became more specific, individual technical and political interests gained in importance, leading to many transitory alliances on different matters across such established regional groups.

The Convention as it stands today has eight chapters, of which four are related to specific content areas: preventive measures; criminalisation and law enforcement; international cooperation, including mutual legal assistance; and the recovery of stolen assets (UNODC 2004). While the approach to constructing the Convention was comprehensive from the start, **asset recovery** was probably the most prominent element. In fact, prior to the UNCAC negotiations, the General Assembly had already agreed on a resolution to establish a legal instrument on asset recovery to complement the UNCTOC.¹⁰ Thus there was a fair amount of interest in focusing on asset recovery, especially on the part of developing countries, which wanted to see stolen assets recovered from financial centres, most often in the global North. At first these were highly politicised debates, but as emotions became less heated they were conducted on a technical basis. It would therefore not be correct to see negotiations as having taken place primarily between defined blocs of countries (those having lost state assets versus those hosting financial centres). Alliances formed not so much on a regional basis (developing versus developed countries) as on a practical basis of shared interests.¹¹ For instance, the United States was a strong proponent of far-reaching provisions on asset recovery and shared its experiences in that matter with countries like Peru, which was then in the midst of recovering assets from the Montesinos case.¹²

Prevention was lower on the agenda for the Convention negotiators, despite a general consensus that it should form part of an effective anti-corruption agenda. Many countries could focus on only a few content areas, and asset recovery and related mutual legal assistance were deemed more urgent. At the same time, corruption prevention arguably was one of the most diffuse and difficult areas to deal with, as it is harder to establish what prevention entails than to define criminalisation and law enforcement.¹³ It only became clear during the negotiations that the preventive provisions were comprehensive enough to require a chapter of their own.

Probably the most controversial discussions were those dealing with political corruption and party financing. Again, positions were not necessarily shared among countries in the same region or with similar levels of development. For example, a number of European countries (Norway, France, Austria, and the Netherlands) along with several African countries (Benin, Burkina Faso, Cameroon, Senegal, and South Africa) and Russia argued for a much broader, binding rule on party financing than other countries (most prominently, the United States) deemed appropriate. This division highlighted

⁹ For example, the Group of African States, the Asian and Pacific Group, the Group of Latin American and Caribbean States, or the G77, comprising the countries of the developing world.

¹⁰ This was advanced by the government of Nigeria and the Commission on Crime Prevention and Criminal Justice of the UN Economic and Social Council.

¹¹ Meaning the shared interest in retrieving stolen assets and returning them to their rightful owners.

¹² The U.S. position on asset recovery was mentioned in interviews by people who took part in the negotiations for the United States. Vladimiro Montesinos was the head of Peru's secret service and the right-hand man of then president Alberto Fujimori. The revelation that he bribed a member of parliament contributed to Fujimori's downfall. Montesinos was found to be a key figure in a nationwide corrupt network. Peru recovered US\$174 million between 2001 and 2006 from financial centres in the Cayman Islands, Switzerland, and the United States.

¹³ Not until 2009 did the States Parties to the Convention look closely at how to operationalise this part of the treaty. Resolution 3/2 was agreed at the Third Conference of States Parties to the UNCAC in Doha, 9–13 November 2009. The resolution itself recognised the multiplicity and diversity of approaches to preventive measures and called for establishment of an intergovernmental working group on prevention, beginning in 2010.

the vast variety of political systems among States Parties, making more detailed provisions and a stronger consensus impossible to achieve (Webb 2005).

It is interesting that the Convention lacks an explicit definition of corruption. Instead, the Ad Hoc Committee decided to let the **criminal offences** of chapter III stand in for a formal definition. This was mainly because the states could not agree on a single definition (Babu 2006), but it was also thought to leave space for including future forms of corruption. UNCAC calls for a much wider range of offences than other anti-corruption conventions and goes well beyond defining corruption mainly as bribery.¹⁴ However, since only a minority of offences in UNCAC are mandatory, this chapter remains probably the weakest in the Convention. But it would not be accurate to attribute this simply to a lack of commitment on the part of corrupt governments in developing countries. According to an informant, many developed countries were quite hesitant to let themselves be compelled to introduce far-reaching, mandatory offences into their “well-established” legal codes.

In conclusion, the Convention has been criticised for, among other things, not being strong enough on political corruption, private sector corruption, and asset recovery (Webb 2005; Babu 2006). Most of all, the initial failure of the states to agree on a review mechanism prompted many to question UNCAC’s potential impact. Most important to our research question is the analysis of who drove the agendas on different topics in UNCAC. To the extent that it is possible to reconstruct the initial agendas of negotiating states, it seems that weak areas cannot be simply attributed to reform-resistant governments in the South. Transitory alliances were built across conventional cleavages. It is remarkable that such a heterogeneous group of actors involved in such a protracted negotiation process ended up with a quite comprehensive result—even though it was not as forceful as it could be.

In many respects, UNCAC goes further than any previous anti-corruption convention. For example, UNCAC is not limited to petty bribery, but offers a wide range of corruption offences related to grand corruption. Negotiations for the Convention seemed to have benefited significantly from a commonly felt need for international action against corruption. Notably, the United Nations Office on Drugs and Crime (UNODC)—the facilitator of the negotiations, and now the secretariat to the Convention—was described by informants as an impartial and committed negotiator. Nevertheless, most of the UNODC staff who participated in facilitating the negotiations had law enforcement backgrounds, as did many members of the country delegations. This may help explain the overall dominance of provisions on criminalisation and mutual legal assistance over those on prevention.

2.2 Looking at the Convention from a political economy perspective

Moving on from analysis of the origins of UNCAC, this section looks at the Convention itself from a political economy perspective. The aim is to judge the capacity of its provisions to address patron-client systems and the concomitant politicisation and capture of state institutions and accountability processes, as described in section 1.1. Do UNCAC provisions take into account the existence of extensive and high-level corruption that does not stem from imperfect laws and regulations but rather from specific power relations?

The following subsection provides a brief analysis of a number of UNCAC provisions vis-à-vis the patterns described earlier in section 1: personalised relationships; elite capture of public administration; executive influence over the legislature, electoral processes, the judiciary, and other oversight institutions; and the blending of private sector activities with politics.

¹⁴ States parties must criminalise active and passive bribery, embezzlement of public funds, obstruction of justice, and the concealment, conversion, or transfer of criminal proceeds. Offences that should be considered for criminalisation include acceptance of an undue advantage by foreign and international public officials, trading in influence, abuse of function, illicit enrichment, bribery and embezzlement within or among private sector entities, money laundering, and concealment of illicit assets.

Again, it must be acknowledged that the Convention was drafted by a very heterogeneous group of countries, with differing political priorities, in a long process which involved different sets of delegates in many different discussions on sub-items of the Convention. Thus, UNCAC is not the result of a single, unified vision but of complex and often messy political and technical negotiations. It is a consensus-based compilation of measures and ideals following the conventional strategic approach of addressing corruption through prevention, enforcement, public education, sensitisation, and more recently, international cooperation. Most of its value will depend on its interpretation and contextual implementation. However, it is possible to assess some strengths and weaknesses of the Convention from a political economy perspective.

As discussed earlier, a key feature of many developing countries is the interplay between the formal and informal and the role powerful elites in the executive play as key distributors of resources. Such a role usually implies links between corruption and the highest levels of a state. How, then, are grand and political corruption understood and challenged by UNCAC? According to Webster (2008), there are strong indications that UNCAC addresses grand corruption:

- First, by recognizing that the problem of corruption is not limited only to bribery (in this, UNCAC distinguishes itself from other international conventions); and
- Second, via the stated determination of states “to prevent, detect and deter [...] the international transfer of illicitly acquired assets and to strengthen international cooperation in asset recovery” (UNCAC preamble).

The rationale for these determinations is threefold: (a) to extend the notion of corruption to include elements of grand corruption (such as abuse of function, trading in influence and obstruction of justice), (b) to limit the opportunities for corrupt public officials to stash away illicit funds abroad by increasing international cooperation on detecting and preventing such actions, and (c) to limit the gains from corruption and increase the risk in engaging in corrupt behaviour by enabling international expatriation of persons and repatriation of funds based on commonly agreed offences.

Webster’s first point alludes to the criminal offences that are introduced in chapter III of the Convention, several of which have the potential to address high levels of corruption. Unfortunately, of these, only articles relating to the embezzlement, misappropriation, and diversion of both public and private property and funds (Article 17), the laundering of proceeds of crime (Article 23), and the obstruction of justice (Article 25) have been made mandatory. The definition of trading in influence (Article 18), the abuse of functions (Article 19), and illicit enrichment (Article 20) as offences is left optional, weakening UNCAC’s potential to effectively address grand corruption. In addition, UNCAC offers a range of other tools to overcome traditional impediments to effective law enforcement with respect to high-level corruption, such as measures to prevent money laundering (Article 14) and to promote cooperation between law enforcement agencies (Article 37), their cooperation with other institutions (Articles 38 and 39), specific law enforcement cooperation (Articles 48–50), and the identification of “politically exposed persons” or PEPs (Article 52). According to one informant, however, UNCAC negotiators did not sufficiently take into account the fact that corruption is inherently difficult to detect, creating a need for much stronger provisions in the Convention for improving detection and providing proof in court.

Webster’s second element, strengthened asset recovery mechanisms, was described in section 1.2 as one of the major focuses of the UNCAC negotiations. The first provision in the asset recovery chapter directly targets grand corruption by obliging a state “to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates” (Article 52.1). However, the same article only asks states to *consider* “establishing effective financial disclosure systems for appropriate public officials and [providing] for appropriate sanctions for non-compliance” (Article

52.5). This limitation is mainly due to the legal difficulties, in some countries constitutionally based, surrounding asset declaration systems and bank secrecy. Nevertheless, the major provisions of this article are mandatory, providing a robust basis for the recovery of stolen assets.

Article 52 is connected to a broader provision of UNCAC's preventive chapter, asking states "to establish measures and systems requiring public officials to make declarations [...] regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result [...]" (Article 8.5). However, while Article 8.5 is mandatory in principle, it leaves states a loophole, allowing them to apply it only where they deem appropriate and where it does not contradict domestic law. Articles 52.1 and 8.5 are necessary to collect evidence for the offence of illicit enrichment. That offence, however, is not itself mandatory, a fact which seems to weaken the capacity of UNCAC to trace grand corruption schemes. The potential is somewhat stronger when both articles are connected with the offence of money laundering (Article 23), which is mandatory and also useful in addressing grand corruption.

The use of asset recovery to limit elites' gains from corruption is further constrained by numerous political economy issues at the country and international levels (both in states that request the return of assets and in states being requested to return them).¹⁵ According to Pavletic (2009, 14–15), "[t]he entrenched nature of corruption and the fact that many of the most powerful and influential people can also potentially be the most corrupt, significantly increase the cost of the asset recovery measures for all agencies involved. This stands in stark contrast with the shortage of human, technical, and material capacity in the administrative and criminal justice systems." In addition, "institutional and policy changes, which are sometimes necessary to initiate an [asset recovery process], may be opposed by groups/agencies who risk losing their rents or their power in the process of change. Hence, conflicts of interest arise: ministries, prosecution authorities, investigative police, and the judiciary have their own particular institutional goals and interests."

These are some of the political impediments to asset recovery where high-level corruption is involved. There are also a number of technical impediments, which will not be highlighted here.¹⁶ Some would argue that UNCAC works best on these issues when it is combined with the United Nations Convention on Transnational Organized Crime (UNTOC). This was used effectively to gain access to the assets of Nigeria's ex-dictator Sani Abacha by declaring the family a criminal organisation. There are other international tools for fighting money laundering and terrorism that can be used as well.¹⁷ However, the establishment of international cooperation for mutual legal assistance and asset recovery is also limited by other considerations affecting relationships between states, including economic, political, and strategic alliances.

Nevertheless, UNCAC does provide another very important tool in the fight against corruption, in addition to those identified above. The Convention makes public officials the principal subject of many of its provisions, notably those concerning the nature, scope, and structure of criminal offences. The definition of who qualifies as a public official explicitly includes high-level civil servants, politicians, and judiciary personnel, whether appointed or elected, as well as staff of state-owned enterprises.¹⁸ Thus, UNCAC recognises high-level bureaucrats, judges, and politicians as potential

¹⁵ For a thorough political economy analysis of the asset recovery process, see Pavletic (2009).

¹⁶ For more information, see, among other sources, the International Centre for Asset Recovery (ICAR) (<http://www.assetrecovery.org>) and the Stolen Asset Recovery Initiative (StAR) http://www1.worldbank.org/publicsector/star_site/.

¹⁷ An example is the G7 Financial Action Task Force on Money Laundering (FATF).

¹⁸ "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service..." (Article 2.a). Interestingly, legislators in Germany have raised questions about this definition, as they do not perceive themselves to be public officials.

actors in grand corruption. Unfortunately, as will be seen below, the provisions of the Convention provide little specificity on the latter two categories.

Returning to the patterns established in section 1.1, there are several provisions of UNCAC which could contribute to a **depersonalisation of relationships** between actors. Probably the most relevant is Article 7.1, which asks states to apply systems for the recruitment, hiring, retention, promotion, and retirement of civil servants according to merit, equity, and aptitude, with adequate procedures for the selection of individuals for public office. Unfortunately, this provision is not mandatory and applies to higher-level (non-elected) public officials only “where appropriate”. The issue of elected public officials is dealt with in paragraphs 2 and 3 of Article 7, which cover “criteria concerning candidature for and election to public office” and enhancement of “transparency in the funding of candidatures for elected public office”. Both of these provisions also remain optional. The prevention of conflicts of interest (Article 7.4, partly mandatory), the establishment of codes of conduct for public officials (Article 8.1, mandatory), and the mandatory requirement to establish procurement systems based on transparency, competition, and objective criteria (Article 9.1) are other provisions that can help depersonalise relationships. Additionally, Article 8.5 states that public officials should declare their outside activities and assets, albeit only “where appropriate”. The strengthening of watchdog institutions through anti-corruption bodies (Article 6)¹⁹ and the participation of society (Article 13)²⁰ is mandatory, as are supportive provisions that enable such watchdogs to access information on public sector decisions (Article 13.1.b and Article 10, both mandatory, but with detailed sub-measures optional).

As the measures described above mainly refer to the public administration level, they not only contribute to the depersonalisation of relationships but also help **limit the potential of the dominant coalition to capture the administration**. However, while principles of transparency, accountability, integrity, and sound management of public affairs are woven throughout the preamble and preventive chapter of UNCAC, little is said about specific mechanisms that would help enforce such principles. How can one assess whether a code of conduct for public officials has been enforced, for example? Unfortunately, UNCAC does not provide for essential mechanisms to make administrative decision making more rule-based. It does not provide for administrative procedure laws that could make public administration more accountable towards citizens. Appeal systems, such as ombudsman institutions or administrative courts, could enable citizens to obtain redress in case of erroneous administrative decisions.²¹ Administrative sanctions, which could constitute a useful, non-criminal tool to sanction administrative wrongdoing, also are not proactively featured in the Convention, except with respect to the involvement of the private sector in corrupt activities (Article 12.1).²² Thus, whereas UNCAC does

This issue, which is closely linked to the question of the additional functions and income of parliamentarians, has so far prevented Germany from ratifying UNCAC.

¹⁹ There has been debate as to what extent the term “anti-corruption bodies” refers only to specialised anti-corruption agencies. U4 has previously argued that Article 6 should apply more broadly to include other public institutions concerned with corruption prevention, such as the important example of public service commissions. For more information see Hussmann, Hechler, and Peñailillo (2009).

²⁰ Article 13 covers civil society, non-governmental organisations, and community-based organisations. Its mandatory nature unfortunately is diminished by a provision that states need only act within their means to implement it.

²¹ A notable exception is Article 9.1.d, which requires states to address effective systems of domestic review, appeal, and legal recourse in the case of breached procurement rules.

²² Administrative sanctions are usually applied at a lower level than criminal sanctions and thus are easier and cheaper for a state to establish. Article 26 mentions a possible range of criminal, civil, or administrative sanctions for the offences established in the Convention, citing the principle that sanctions need to be effective, proportionate, and dissuasive. However, the *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* (UNODC 2006) seems to suggest non-criminal sanctions as a secondary option where criminal sanctions are difficult to pursue, rather than as a proactive administrative tool. This is reinforced by the fact that only Article 12 on the private sector features the same range of criminal, civil, and administrative sanctions.

promote appropriate measures to reduce administrative corruption, it offers little guidance or pressure for enforcement of these measures. UNCAC mentions well-known remedies for corruption, such as codes of conduct, but it does not identify, promote, or require more substantial accountability.

UNCAC offers little that could help **safeguard the independence of the legislature from particularistic and personal interests**. Indeed, parliaments do not feature in the Convention at all, as negotiators did not want to limit the Convention to one specific political system. The most direct references to legislatures are (a) the definition of a public official in Article 2.a (although elected officials hardly appear in the Convention's provisions), and (b) optional criteria for candidature for office and provisions regarding transparency of candidature and political party financing. As noted above, the question of corruption in political processes was one of the most intensely debated issues throughout the negotiations, and resistance from a number of states led to rather weak requirements in this area. The principal arguments cited the difficulty of applying such measures to a wide variety of political systems and the observation from the experiences of some countries, such as the United States and Germany, that formal regulation of campaign financing is insufficient to deal with the problem (Webb 2005). Whatever the merits of these arguments, the gap left UNCAC unable to effectively address one of the main areas where corruption significantly weakens state institutions and vertical accountability, namely political party financing. The Convention thus lacks any detailed provisions regarding **elite capture of electoral processes**. "Despite the intense public concern about corruption in the political process, no multilateral initiative deals expressly with the financing of political parties" (Webb 2005, 218).

The **capture by the dominant coalition of the judiciary** is a crucial element for UNCAC. Arguably, none of its provisions will be effective if not enforced efficiently by an independent judiciary. Enforcement requires the application of sanctions (whether criminal, civil, or administrative), in which the justice sector plays a central role. Nevertheless, the Convention features corruption in the justice sector only in general terms. Article 11 makes it mandatory for states to strengthen integrity and prevent opportunities for corruption among members of the judiciary. The independence of the judiciary is held up as a principle, as is the commitment of states to adhere to the rule of law.

Nonetheless, there is no specific treatment of how judicial independence can be achieved (e.g., through appointment, salary, or budgetary provisions), except for the option of applying the human resource management provisions of Article 7.1 to judicial personnel (if the latter are considered as "civil servants" or "non-elected public officials"). The legislative guide to UNCAC (UNODC 2006), which provides a detailed legal interpretation of the Convention, mentions the possible linkage of judicial independence with mechanisms of accountability and appointment, which might necessitate reviewing a country's constitution. It also advises applying immunity to members of the judiciary only during their tenure, in order to allow for later investigations. The technical guide to the Convention (UNODC 2009) gives some additional detail, mostly on judicial integrity and to a lesser extent on independence of the judiciary. It also refers to other noteworthy guidance such as the Bangalore Principles of Judicial Conduct.²³ However, all of this is purely advisory. There is no reference to any binding treaty that could ensure judicial independence.

The technical guide to UNCAC does recognise the problem of potential external influence on court processes, but other than calling for transparent procedures for judges' appointments, it says little about how to ensure adequate appointments as well as fair trials. The guide does recommend a

²³ The Bangalore Principles were developed in 2001 by a group of senior judges supported by the UNODC. The principles set out six core values—*independence, impartiality, integrity, equality, propriety, and competence*—and were recommended to states by the Economic and Social Council of the United Nations in 2006. Most importantly, since they were developed by judges themselves, the principles show that the judiciary is not a passive player in achieving integrity. However, "the Bangalore Principles of Judicial Conduct, like other judicial independence standards, are not contained in a binding document under international law" (Mayne 2007: 43). They therefore rely on self-reform by the judiciary, making their actual enforcement a weak spot.

“transparent and publicly known procedure for the assignment of cases to particular judges to combat the actuality or perception of litigant control over the decision maker” (UNODC 2009, 50). However, the implementation of such a procedure is left completely to the judiciary. Effective appeal mechanisms are mentioned only as a side issue.

Article 30 entails a range of provisions which in theory could contribute to limit influence over the judiciary. In this regard, article 30.3 seeks to maximise effectiveness of law enforcement measures by giving discretion to prosecution. 30.5 establishes that sanctions should reflect the gravity of the offense, thus addressing influence that would seek to reduce sentencing e.g. through early release. Consequently, provision 30.7 allows for banning those public officials from office who have been convicted for an offense, an important measure to break the stronghold of established patronage networks and related impunity. However, all of the provisions named here are non-mandatory, thus hampering their potential to restrict political influence.

The most powerful UNCAC provision against corruption in the justice sector is probably the criminalisation of obstruction of justice (Article 25), which is made mandatory. This is also the only article that refers to the possible misconduct of law enforcement personnel, notably the police. Otherwise, these are only covered as part of the provisions referring to public officials and the public sector, despite their important role in law enforcement. Thus, with respect to the judiciary, UNCAC seems to be trapped in a peculiar situation. It is directed at governments, i.e., the executive branch, rather than at the judiciary. It therefore lacks detailed guidance on how to reform the judiciary without running the risk of compromising its independence. This catch-22 situation is illustrated by the former Indonesian anti-corruption strategy Ran-PK, which excluded the judiciary and the parliament because the executive branch, for constitutional reasons, could not make policies for those sectors (Davidsen, Juwono, and Timberman 2006). Mandating reform for other branches in this way would reinforce the dominance of the executive branch. The fear that a legal document such as UNCAC could have such an effect appears somewhat ironic, as in many countries the judiciary is already highly influenced by powerful players, albeit for the wrong reasons.

In regard to **other oversight institutions or actors**, the Convention in Articles 6 and 36 obliges States Parties to establish or maintain anti-corruption bodies in prevention and law enforcement and to grant them the necessary independence. While Article 36 clearly refers to specialised anti-corruption bodies (such as anti-corruption commissions tasked with investigation or specialised prosecution services), it has been argued that Article 6 can be understood to embrace a wider range of institutions, including less specialised institutions that can play a role in anti-corruption reform (Hussmann, Hechler, and Peñailillo 2009).

This interpretation is based on the fact that under Article 6, institutions are mandated to oversee and coordinate the preventive policies laid out in Article 5. These encompass the whole range of preventive activities featured in UNCAC, such as public financial management auditing, public service conduct and human resource management, and procurement. In this context, institutions with oversight function in such areas could also be supreme audit institutions, ombudsmen, public service commissions, and the like. UNCAC leaves room for interpretation of this provision, and thus its practical implementation will be subject to the discretion of each State Party. However, the Convention is firm in insisting on the independence of specialised anti-corruption bodies. The technical guide to UNCAC specifies independence as ideally including elements such as the appointment, tenure, and dismissal of management, adequate financial resources, and staff protection from civil litigation (UNODC 2009, 11). The role of **civil society** and, indirectly, of the **media** as oversight actors is made mandatory in Article 13 (participation of society) and Article 10 (public reporting), respectively.

UNCAC also contains a number of provisions that deal with the private sector, which can aid in detection of conflicts of interest when a public official is involved in both **the private and the public sector**, including politics. All criminal offences apply not only to public officials (including staff of public enterprises) as natural persons, but also to legal persons such as companies. This could mean a

major breakthrough in trying to hold corrupt companies to account. Article 12 of UNCAC deals entirely with “preventing corruption involving the private sector” and specifies that civil, criminal, or administrative sanctions should be applied where appropriate. However, despite its mandatory nature, measures for implementation are merely proposed. These include “measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities,” the “misuse of procedures regulating private entities” (including subsidies and licences), as well as regulations on the “professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement”—all of which are suitable for addressing patron-client networks. UNCAC also contains provisions on criminalising bribery and embezzlement in the private sector (Articles 21 and 22), which are, however, not mandatory. As discussed above, the financing of political candidates and parties (potentially by private companies) is not properly addressed in the Convention.

Notably, the Convention does not provide any guidance on how to ensure the effective and comprehensive respect for the rule of law that is required for its effective implementation. Of course, this is arguably not the task of an anti-corruption convention, yet it seems unsatisfactory that the Convention only promotes the rule of law in principle. Corruption has extremely harmful effects on the rule of law; at the same time, the rule of law is essential for maintaining the criminal provisions and enforcement practices promulgated by the Convention. Rule of law can be understood to mean that “whatever law exists is written down and publicly promulgated [...] and is fairly applied by relevant state institutions” (O’Donnell 2004, 33), making no exception for the powerful. In the case of other international conventions, dealing with this problem might be reasonably left to member states. In the case of UNCAC, however, the rule of law should play a more concrete, integral role, since it is absolutely indispensable to implementation of the core of the Convention. Yet, nowhere does the Convention itself—or its technical and legislative guides—even reference other UN treaties in this regard, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, or the United Nations Basic Principles on the Independence of the Judiciary.

In addition, a majority of UNCAC provisions are weakened by leaving implementation subject to domestic law. Already during the negotiations, “the Chairman of the Ad Hoc Committee expressed his concern about the repeated references in the text of the Convention to its conformity with domestic law: ‘Such references should be the exception rather than the norm, because international law was not meant to be a mere reflection of national laws’” (Webb 2005, 228). Such qualifying clauses might well provide a potential escape route for reluctant governments.

3. UNCAC at the country level: Lessons learned

3.1 What are the political dynamics of corruption in the three countries studied?

The analysis so far has been rather theoretical, based on generalised political economy patterns in a range of countries, as well as on the Convention as a document that is static by its very nature. Acknowledging that the true potential and limitations of UNCAC will only emerge when it is implemented in a country context, we take a more detailed look at three countries: Bangladesh, Indonesia, and Kenya. These countries have been chosen for two reasons. First, we expected some if not most of the political economy patterns described in section 1.1 to be found there. Second, and most importantly, these three countries have made particular efforts in the last few years to implement UNCAC or strategically prepare for its implementation.

Each country study begins with a review of country-specific political economy analyses to establish the nature of corruption-related patterns in these settings. In each case, this review confirmed the political nature of corruption in the country. In a second step, we examine UNCAC-related reform efforts. In all three countries these included UNCAC gap analyses, that is, multi-stakeholder consultation processes in which the country's legal and institutional reality is compared to UNCAC requirements, identifying gaps to be covered by future reform. In the case of Indonesia, additional information on an UNCAC pilot review, including a self-assessment by the Indonesian government, was assessed. In the cases of Bangladesh and Indonesia, national anti-corruption strategy processes, informed by UNCAC, were available for examination. In all three countries, a review of relevant documents was complemented by interviews with key informants.

Despite historical, demographic, and political differences between the countries, these three case studies reveal some common patterns with respect to the political dynamics of corruption. The findings are relevant not only to UNCAC implementation within Bangladesh, Indonesia, and Kenya, but also arguably in other countries with similar contexts:

- Patronage networks and patron-client relationships are prevalent in all three countries. In the case of Bangladesh, the World Bank found patterns common to many countries where institutions are weak: "In these respects Bangladesh power structures differ little from [those] of most other poor countries around the world" (World Bank 2002, 12). While the existence of patronage cannot automatically be equated with corruption, all three case studies show that the blurring of the public-private divide usually does result in specific patterns of corruption. As also illustrated in the case studies, such personal and particularistic relationships, in contrast to rule-based practices, are part and parcel of complex socio-political dynamics that are fuelled by and also produce corruption. Given that it concentrates on the formal rather than the informal, UNCAC is in many ways inadequate to address the complexity of such relationships.
- Many other factors seem to have an amplifying effect on corruption. In all three countries studied, political transformation has taken place over the past few decades. In Indonesia, Suharto's dictatorship was replaced by a multi-party democracy with extensive decentralisation. In Kenya, Moi's one-party state was transformed into a multi-party democracy. In Bangladesh, democratically elected governments have alternated with non-elected governments. Despite the differences between these transformation processes, in all three countries the resulting political instabilities have fundamentally affected the nature of dominant patronage networks. Democratisation has not resulted in elimination of these networks, which are still maintained by various types of corruption, differing according to the regime. In fact, all three country cases show both an adaptation of patron-client systems to new political environments and a continuation of limited access orders (through strong executives) despite democratisation.

- The case studies found that democratisation has the potential to create voids in which elites can increase their illicit access to rents. This is more likely to happen in the early stages of transition, when oversight institutions and citizenship are still weak, or when, as in Indonesia, political and civil service reform has not yet occurred. Also, the cost of electoral campaigning in a multi-party democracy can potentially generate additional incentives for corruption, as observed in Indonesia and Kenya. Shorter tenures as a result of political competition can aggravate the need to recoup campaign expenditures quickly once in office, as in Bangladesh, where the confrontational politics between two major political parties exacerbates this trend, or in Indonesia, where turnover of members of parliament is as high as 70 percent. And finally, the need for coalition building, illustrated in the case studies of Indonesia and Kenya, can increase the levels of corruption as potentially diverse interests must be catered for. This is not to disparage the benefits of democracy. However, these examples show that when analysing corruption and planning for anti-corruption reform, it is essential to consider the stage of political (democratic) development in the country. So far, UNCAC and its related assessment tools do not explicitly take account of such country-specific political analysis. There is therefore a need to consider complementary measures to safeguard against potential pitfalls of democratisation, such as those identified in these case studies.
- There are strong indications in Bangladesh, Indonesia, and Kenya that political and economic elites have been able to capture key processes that allow them to tap public resources, both legally and illegally, for their personal gain and to maintain their grip on power. In Kenya, for example, this led to outright impunity and political violence. In Indonesia, extensive overlap between the public and private sectors has helped fuel this phenomenon, both under Suharto, when the military controlled large parts of the economy, and post-Suharto, when powerful consortiums abuse public functions to safeguard their interests. In all these situations, oversight institutions, and particularly the judiciary, have been kept weak or made complicit so that this behaviour goes unpunished.

The case studies also show that elite capture and politicisation processes vary in their nature and intensity. While the breadth of institutions politicised in Kenya and Bangladesh is similar, the basis for patron-client networks is very different. In Kenya they are based mainly on ethnicity, while they are of a more partisan nature in Bangladesh. As a consequence of power struggles, both countries have experienced political violence. However, these divisions seem to be much more severe and deep-seated in Kenya, where citizens are strongly pressured into political alliances and loyalties. In Indonesia, on the other hand, the friction is between the old (Suharto era) and new establishments, which results in a blurred and difficult-to-analyse political landscape involving a plethora of vested interests.

The patterns we have observed in Bangladesh, Indonesia, and Kenya might or might not be similar to those in other developing countries. However, it is highly likely that in a majority of developing countries some form of dominant coalition unduly influences key state institutions through patron-client networks. In addition, it should be noted that these patterns of politicisation (or partisanisation, as in Bangladesh) and elite capture are not confined to developing countries. Situations similar to those described in the case studies can be found in the political systems and political reality of even the most developed democracies. For example, in many of the latter, it is common practice for the leading party to have a say in appointing presidents, high-level judges, and top public officials. Similarly, it is sometimes difficult to distinguish between what is described as state capture in this paper and high-level lobbying activities in Europe or the United States. The lines are far from clear, and all countries have to deal with such phenomena. However, developing countries often lack minimal accountability safeguards, and the consequences of corruption and rent seeking may be much more severe.

3.2 How do UNCAC-related assessments and reforms relate to these political dynamics?

The case studies explored the ability of UNCAC-induced reform processes and UNCAC assessment tools to adequately respond to the political complexity of corruption in the three countries. In essence, the question was how UNCAC is implemented by actors on the ground, as well as whether it offers a lens to identify key reform gaps and formulate appropriate reform strategies. The following points are noteworthy:

- Gap analyses in all three countries found a comparatively solid institutional and legal anti-corruption framework. Most gaps that were identified relate to enforcement rather than to the quality of rules, although some legislative amendments were found necessary in all three countries. The political dynamics hindering anti-corruption reform in Bangladesh, Indonesia, and Kenya as presented above are largely responsible for this major implementation gap. However, with some exceptions, the primarily legal and institutional measures proposed by UNCAC are ill equipped to cope with this challenge, as it is of a political rather than legal nature. The Bangladesh case, for example, shows that there is little evidence that UNCAC has been the trigger for the type of fundamental accountability reform needed. It remains to be seen whether it can serve to sustain reform.
- While there is variance between the gap analyses, all of them show severe deficiencies in addressing political realities. Hardly any mention is made of how to prioritise reform in light of these realities, nor is it specified how the political context might hinder UNCAC-related reforms. For example, while the Indonesia and Bangladesh gap analyses acknowledge the problem of enforcement caused by weak judiciaries, they make vague recommendations or none at all about how to remedy this. In all three case studies, the national strategies that resulted from the UNCAC gap analyses do not fare much better in addressing these issues. Nor do they deal with what is likely a lack of commitment to implementation.
- The Indonesia case study provides interesting insights into the combined use of several UNCAC-related assessments, notably the self-assessment checklist,²⁴ the report under the pilot review programme,²⁵ and the gap analysis. Each assessment has a slightly different purpose, with the self-assessment looking primarily at achievements and the gap analysis focusing mainly on the gaps, and the pilot review somewhere in between. While the gap analysis acknowledged some aspects of the political economy of corruption in Indonesia, the pilot review did less in this regard, despite having more potential. The self-assessment checklist, by contrast, clearly is not designed to consider context. In fact, its focus on achievements rather than gaps can easily be misleading, as was the case in Indonesia. It is worrying that a country can go through several such assessments and still end up with an unfinished roadmap for reform.
- The Bangladesh case illustrates one danger for the review processes, namely, becoming preoccupied with the reform options offered by UNCAC and neglecting the country context. This is not to imply that the authors of this gap analysis were unaware of the problems in the country. In fact, information for all three gap analyses was gathered by local resource persons, including through stakeholder consultations. However, because of the priority given to

²⁴ The self-assessment checklist is a computer-based tool which States Parties are required to use to evaluate UNCAC compliance. The information from this exercise is used as a basis for external scrutiny by other States Parties through the implementation review mechanism. For more information see <http://www.unodc.org/unodc/en/treaties/CAC/self-assessment.html>.

²⁵ The pilot review programme, carried out with voluntary participation by a number of States Parties, sought to demonstrate a feasible review mechanism based on the self-assessment checklist. The pilot exercise took place between 2007 and 2009. For more information see <http://www.unodc.org/unodc/en/treaties/CAC/pilot-review.html>.

UNCAC and its provisions as an international agreement, there is a tendency to neglect national priorities. This leads to another problem: the duplication or even multiplication of anti-corruption institutions and reforms without distinguishing clear roles and priorities. This phenomenon, which can be seen most clearly in Kenya, is partly due to the complexity of coordinating anti-corruption reforms in a strategic and coherent manner. But it has the dubious result of creating a multitude of conflicting or mutually neutralising institutions that may even shield corrupt activities instead of preventing and sanctioning them. This situation also hinders the identification of priority areas for technical assistance.

- UNCAC is not very specific when it comes to oversight institutions. For example, it is left up to the States Parties to decide what form preventive anti-corruption bodies might take (Article 6). The Indonesian and Kenyan gap analyses both refer to a broad range of oversight institutions, such as supreme audit institutions, judicial commissions, public service commissions, and so on. These are to a large extent neglected by UNCAC, as well as in the self-assessment checklist and the pilot review mechanism. This is the case despite the key role these institutions play in harnessing some of the political dynamics of anti-corruption efforts identified in this report, as observed in the Indonesia and Kenya case studies. UNCAC in fact suffers from its singular focus on governments as actors in anti-corruption reform. This shows in the inadequate attention given to the justice sector, with the only rationale offered being the notion that governments as the principal implementers of the Convention should not interfere too much in an independent judiciary.²⁶ However, this falls short of a comprehensive anti-corruption approach in which many national integrity institutions hold each other to account.
- As noted in section 1.3 in relation to the political economy of corruption, the Convention's two main weaknesses relate to the minimal and non-mandatory coverage of the integrity and independence of the judiciary, on the one hand, and of political party financing, on the other hand. In all three countries studied here, strong measures in these two areas are direly needed to counter political economy barriers to anti-corruption reform. As a consequence, a complete anti-corruption reform agenda requires complementary analysis and policy processes that go beyond the elements defined by UNCAC. A national anti-corruption strategy principally informed by UNCAC, as is the case in Indonesia, runs the risk of omitting these important reform areas.
- The cases of Indonesia and, to an even larger extent, Bangladesh show that national stakeholders are partly aware of these weaknesses. Thus, the gap analysis in Bangladesh was only the first step in formulating a comprehensive reform agenda. This process eventually culminated in the development of a national integrity strategy which covers a broader range of reform measures and stakeholders, going beyond mere anti-corruption reform, and also refers to political actors and oversight institutions. However, the reform efforts informed by the UNCAC gap analysis are primarily of a technical and legalistic character.

²⁶ When Indonesia embarked on its national anti-corruption strategy known as Ran-PK, the government opted to exclude the judiciary and the legislature. It claimed that for constitutional reasons, it would be inappropriate to impose reforms on these branches and thus possibly infringe on their independence. However, such an approach leaves a critical void in a national anti-corruption approach and in a government's ability to implement coherent policies. For more information, see Davidsen, Juwono, and Timberman (2006).

4. Opportunities and constraints of UNCAC as a driver and catalyst of political change

4.1 The Convention's potential to address elite capture

We have seen that corruption in many countries, including our three case studies, is part of a larger political scheme for gaining and maintaining access to power and resources. Because the primary objective of UNCAC is to contribute to preventing and combating corruption, it does not address these larger schemes explicitly. Thus it does not contain specific measures dealing with processes of state formation, checks and balances, state-citizen relations, principal democratic rights, and elite incentives.

It is true that UNCAC cannot take account of the myriad of country contexts, and a convention is also inevitably limited by the need to reach international consensus. However, this report argues that the Convention could have addressed the nexus between power relations and corruption more clearly, such as by addressing political and electoral corruption in a more detailed way and by making more provisions mandatory. In addition, the provisions for review mechanisms could have taken into account the political and socio-economic dynamics surrounding anti-corruption reform, through mechanisms such as multi-stakeholder consultations.

Our political economy analysis of UNCAC indicates that the Convention, with its preventive and criminal provisions, provides a basis on which some elements of grand corruption could be addressed. UNCAC in fact provides a quite comprehensive view of areas that might be involved in grand corruption schemes: notably, it addresses public officials (including high-level bureaucrats and politicians), the private sector, and the international cooperation necessary to recover assets and fugitives. However, important provisions on criminal offences, asset recovery, and political corruption are arguably not strong enough nor clearly defined.

Thus, our preliminary conclusion is that UNCAC has just enough breadth, depth, and leverage to make corrupt elites uneasy, but perhaps little more than this, as the Convention leaves considerable scope for undermining effective enforcement at the country level. With a strong focus on technical anti-corruption measures but significant weaknesses in providing for the more structural and potentially constitutional checks and balances of a national integrity system—most notably, independence of the judiciary and legislature—UNCAC has important limitations.

Given its consensual genesis, however, the Convention necessarily took the form of a legalistic, generic, and above all prescriptive convention that leaves open the question of context-specific implementation. UNCAC represents a rule-based and legalistic approach to tackling corruption. While recognising UNCAC's achievements, PEA findings suggest that the power-holding dominant coalitions of many developing countries are unlikely to respond to this approach as hoped. Although many developing countries have already put in place most of the formal institutions associated with open access orders, the dominant coalitions manage to bend them in order to generate rents and retain their hold on power (North et al. 2007). It is true that the Convention challenges the vested interests of dominant coalitions by criminalising corrupt activities that sustain their systems. However, it is exactly those dominant elites, who ironically participated in the negotiation of the Convention, who are largely in charge of ensuring the implementation, enforcement, and monitoring of reform. This is what Pavletic (2009) and others refer to as the commitment problem. Given the prevalence of informal power structures and the relationship between elite capture and corruption, these political economies

face fundamental challenges in implementing the Convention, and the Convention's stunted implementation appears inevitable.²⁷

Nevertheless, it is not productive to speculate about what UNCAC could look like in an ideal scenario. The current text is the result of what the international community achieved in a series of difficult negotiations, and it is unlikely that anything better could have been negotiated then, or could be even today. In addition, as we can see with many countries, the primary concern should not be devising more perfect rules, but actually applying those that are already available. UNCAC clearly is an extensive international instrument capable of informing anti-corruption reform. It promotes key anti-corruption reform measures and accountability actors. Even if implementation in some countries is less likely, then at least discussion within and among States Parties may serve to open up spaces for reformers to manoeuvre.²⁸ The Convention is a collective anti-corruption flagship, pioneering in its scope and underpinned by an unprecedented international consensus on the negative impact of corruption upon societies. Previously mentioned findings by the OECD (forthcoming) support the need for collective international action, given the magnitude of perverse international drivers and the interaction of these with domestic political economies. But in the end it is up to local and international actors to take the Convention further and complement it with existing tools.

Much will depend on the extent to which UNCAC can expose dominant coalitions to international pressure to comply. Probably of most value here is the Convention's recognition of the international scope of corruption and money laundering. Today dominant coalitions sustain their privilege in large part by using international markets for business and finance (Hossain and Moore 2002; North et al. 2007). Thus, increasing pressure through UNCAC to better regulate financial institutions, centres, and transactions, as well as detecting those who abuse these systems to hide their assets, might serve domestic reform efforts. This in turn can aid in opening up limited access orders and allowing competing elites or reform-minded members of the dominant coalition to champion reform. Elites are far from being a monolithic and static bloc. They too have to adapt to political, social, and economic realities. In this context, it is worth noting some additional international initiatives that could assist in triggering national dynamics.²⁹ In playing to the international community's strengths, these supply-side instruments utilise persuasive capacities and offer coordinated, diplomatic, and economic bargaining powers to compensate for previously perverse elite incentives. Using the example of the FLEGT (Forest Law Enforcement, Governance and Trade) instrument of the European Union, Moore and Unsworth (2006) suggest that regulated trade can induce specific sectors to police themselves.

4.2 The Convention's potential to inform national-level reform

What can we learn from analysing the potential contribution of UNCAC to national anti-corruption reform in specific countries? As the three case studies show, the Convention has to some degree

²⁷ 'Lex Simulata' is Webb's (2005: 221) term for "a legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied." This appears an apt description of what might happen to implementation of the Convention. Many countries at some time will formally comply by inscribing the Convention's central tenets into domestic law, but enforcement is likely to remain weak.

²⁸ For example, with the help of the Programme on Governance in the Arab Region (POGAR) of the United Nations Development Programme, a regional Arab Anti-Corruption and Integrity Network (ACINET) was set up that brings together governmental bodies to exchange experiences on anti-corruption reform. Much of the work is aligned with UNCAC requirements and assessments. According to participants, the network has managed to stimulate dialogue in a region so far not known for being particularly open to change.

²⁹ Such instruments, all of which aim primarily at the supply side of corruption and more specifically elite incentives, include the European Union's Forest Law Enforcement, Governance and Trade instrument (FLEGT), the Extractive Industries Transparency Initiative (EITI), and the Kimberley Process, among other examples. For further information see <http://www.ec.europa.eu>, <http://www.kimberleyprocess.com>, and <http://www.eitransparency.org>.

contributed to embedding the issue of anti-corruption reform in public debate. In all three countries, UNCAC was taken up by new governments wanting to show a commitment to act on integrity reform. In Indonesia, this led to the Convention being used as key guidance for domestic policy processes in the area of anti-corruption. In Bangladesh, national stakeholders were well aware of reform needs and gaps, and the process of developing a national integrity strategy included but also went beyond the areas addressed by UNCAC. In this case, UNCAC added international pressure to a national reform drive that was already underway. In Kenya, the UNCAC gap analysis informed some key reform processes, including the drafting of the new constitution.

Unfortunately, in all three countries the initial reform drive informed or triggered by UNCAC has waned under the influence of political economy factors identified in this study. These include, for example, the weakening of political leadership in Indonesia and lack of political commitment in Bangladesh (despite a comfortable two-thirds majority of the leading party in parliament) and in Kenya (despite the anti-corruption election campaign by the Rainbow Coalition under Kibaki in 2002). Additional factors were constraints related to coalition governments (in Indonesia and in Kenya with the current political settlement) and competing policy agendas, such as the maintenance of economic power bases and particularistic electoral loyalties. It would seem that UNCAC has not been able to overcome the political economy of anti-corruption reform in these countries. As section 1.3 has shown, this is partly because the Convention itself is not as strong as it could be in key areas, especially with regard to grand and political corruption. UNCAC also limits itself too much to a technical, legalistic anti-corruption approach while neglecting informal structures. We must ask whether an international convention can serve as more than a legal tool with limited abilities to address the political dynamics of corruption. It remains to be seen how UNCAC will fare in other countries.

A more general conclusion that can be drawn from the analysis in the previous sections is that the Convention is comparatively weak when it comes to enforcement tools. Mechanisms to hold a government and its public administration accountable with respect to enforcement of the measures promulgated by the Convention are largely missing. Indeed, traditional accountability mechanisms are almost absent from the Convention. It does not address the role of national parliaments and legislators, refers only briefly to the judiciary, and makes no explicit mention of other oversight institutions. The only exception is in relation to civil society and citizens. However, even here the Convention remains vague about their role, except to say that they contribute to the fight against corruption.

The fact that UNCAC is a government-driven and government-owned convention which also implicates politicians and public officials on all levels poses difficult problems for genuine implementation and bottom-up reform. Other domestic accountability actors need to be considered and brought into a holistic reform approach, with attention to weaknesses or biases that could prevent them from fulfilling their responsibilities. The general assumption that parliamentary and civic engagement is automatically conducive to integrity reform, for example, is problematic. In practice, especially in developing countries, parliament and civil society do not necessarily feature the civic and independent qualities conventionally ascribed to them.

It is essential to consider the need for balance among different accountability actors and mechanisms in a country. Lack of accountability due to weakened checks and balances is at the heart of governance problems in the countries studied. Broader reform is a key precondition for successful implementation of the Convention. As one informant eloquently put it:

The Convention does not have sufficient underlying principles of good governance that would ensure transparency, accountability, and sound management of public resources at country level; rather, the principles of the Convention are incapable in themselves of ensuring good governance. The process of implementation at country level would require a generous dose of political will to actualise what we know as good governance. In other words, it is possible for a country to claim it has complied with all the measures required by the Convention and still have bad governance. The political nature of corruption is particularly problematic in

developing countries because the corrupt persons are in positions of leadership and law enforcement, and this has not been addressed at all by the Convention.

The Convention is broadly concerned with all major dimensions of good governance—accountability, transparency, participation, rule of law, and government effectiveness (Rahman 2007). However, only the issues of transparency (e.g., through provisions on asset declaration, public reporting, open procurement, and recruitment) and government effectiveness (e.g., through provisions on public financial management and audit) are addressed in a meaningful way. Unless mechanisms for accountability and public participation are implemented, and the rule of law is enforced in practice, a national anti-corruption drive will have little success.

Generally speaking, it seems that the most valuable aspect of the Convention may be its provisions for mutual legal assistance (MLA).³⁰ As this is new to many countries, the guidance provided by UNCAC can assist them in setting up the corresponding legislative provisions. The recognition within UNCAC of the international dimension of corruption and money laundering might then increase international pressure for stronger regulation of financial centres, making it harder to hide stolen money. Even then, however, as illustrated by the current deadlock between Singapore and Indonesia on a bilateral MLA treaty, the political-economic dynamics of a country can hinder any progress that goes beyond amending legislation.

The effectiveness of this aspect of the Convention will depend to a great degree on the extent and forms of international pressure that are brought to bear. Much thus depends on the quality of the review mechanisms through which this pressure is exercised. The country case studies indicate that the usefulness of the review process increases considerably when it is conducted in a participatory manner, involving a broad range of relevant stakeholders, and when it looks at the Convention in relation to country reform priorities and ongoing reform. In this context, it is important to evaluate whether the review succeeds in getting the government to reinforce its commitment and enforce anti-corruption policy and legislation, or whether it is limited only to checking that all the relevant laws are in place.

To ensure that the review does not become an exercise oriented exclusively towards external actors (UNODC and the other countries involved in the review), it is essential that States Parties focus more closely on their own responsibilities to periodically monitor reform impact (as required in, for instance, Article 5) and that the review mechanism encourage this. Indonesia has a comprehensive and UNCAC-compliant national anti-corruption strategy that features its own implementation and monitoring mechanisms; it will therefore be an interesting test case when it participates in the second year of the first round of reviews. Finally, the review process should assess improvement not only in the institutional quality of governance, but also in the quality of the interface between state and citizens, as well as the civic quality of behavioural changes among the citizens (see Rahman 2007). Political economy analysis might be useful, especially in identifying risks for reform implementation. However, here too, third parties should be involved in conducting such analyses.

There are three final points that are important to consider when looking at international treaties. First, what works in one country might not work in another country. Thus, apart from highlighting some potential areas for reform complementary to UNCAC, we refrain from advising on specific reform agendas. Second, one tends to forget how much time is needed for the comprehensive institutionalisation of reform processes, including the strengthening of key accountability actors, as can be seen in the history of developed countries. Finally, the case studies show that UNCAC is likely to be one component of a country's larger reform agenda for better governance. The Convention

³⁰ Critics would argue that the Convention is not strong enough to remove obstacles to such assistance. Especially for cases involving PEPs who come from the governments themselves, it is highly likely that transnational cases and requests will not be pursued with the necessary rigor.

should not be understood as a magic bullet against corruption. Its value will depend on how different actors at the domestic and international levels take ownership of it. It also can only work effectively when implemented in conjunction and coordination with related and potentially broader reform efforts.³¹

³¹ For example, in Indonesia anti-corruption reform can only be effective when preceded or accompanied by comprehensive civil service reforms. However, the anti-corruption community often defines civil service reform in very narrow terms and wrongly believes that it is essentially synonymous with anti-corruption reform. As a consequence, key stakeholders, including donors, fail to acknowledge and address the interdependence of the two reform agendas.

5. What role for donors?

The limitations of UNCAC discussed above should not discourage states or other stakeholders from working with the Convention. Once a state has chosen to ratify the Convention, it becomes an instrument with a degree of legitimacy and ownership in the country. As a consequence, UNCAC can serve as a useful tool for societal stakeholders and external donors engaged in dialogue with governments. It has been well established that the Convention, through international and domestically developed assessment tools, can help identify reform needs and corresponding needs for technical assistance. Donors can support these initiatives, for example the gap analyses, the UNCAC review mechanism, and national reform dialogues emanating from them. All this has been previously documented in detail.³²

In light of the new research available, donors should also consider the following steps:

- Promote the enrichment of UNCAC-related assessments with a political economy analysis. This does not have to be a separate initiative from the donor side (as in donor assessments). It can, for example, be added to the gap analysis instrument or any national anti-corruption/integrity strategy in form of a risk assessment for the reforms suggested.
- Encourage the use of political economy analysis tools in their own operations with a view to fostering an understanding among staff that development, and in particular anti-corruption reform, is a fundamentally political process rather than a purely technical matter and can only succeed if its political, social, and economic context is taken into account.
- Seek to compensate for some of the weaknesses of UNCAC identified in the previous section by supporting civil service and political reform processes, such as electoral or constitutional reforms, judicial independence reforms, political party capacity development, appeal and redress mechanisms for citizens, and by enhancing the capacity of all actors in a national integrity system. Donors are doing this to some extent already, but an additional accountability/anti-corruption lens could be considered. Complementing legislative measures with broader governance reform efforts would contribute to overcoming the current narrow understanding of what constitutes technical assistance under the Convention and would help strengthen the understanding among all stakeholders that anti-corruption reform is not a purely technical issue but is highly interrelated with a range of other reform endeavours.
- Compensate for the Convention being a government-oriented tool (primarily focused on executive actions) by promoting a balance of power and the involvement of non-executive actors (such as parliaments, the judiciary, civil society, the media, academia, and the private sector) in the formulation and implementation of domestic anti-corruption reform agendas. For example, in the case of Bangladesh, donors are said to be among the few stakeholders able to help create a nonpartisan space for manoeuvre for local actors in what is otherwise a fiercely politicised environment (Duncan and Williams 2010).
- Invest at home in improving implementation of those areas of UNCAC where donor countries can contribute to the strengths of the Convention and improve conditions for anti-corruption efforts in developing countries, for example, by improving the capacity for response to mutual legal assistance requests.

³² Several U4 publications on UNCAC (especially *UNCAC in a Nutshell*) are available at <http://www.u4.no/themes/uncac/main.cfm>.

- Be more assertive in acting upon known corruption cases. Donors can enhance their own credibility by showing more courage in publicly denouncing and sanctioning cases of corruption. In addition, given the weak leverage that civil society and democratic procedures have over government in many countries, donors are sometimes the only (or certainly among the few) actors who can seek to enforce governmental accountability. Since accountability should not be directed only or principally towards external actors, donors should also take steps to strengthen the capacity of domestic actors to fill this gap.

This political economy analysis of UNCAC has shown that the realities framing corruption are complex and dynamic. The availability of a comprehensive international convention like UNCAC makes it tempting to forget the importance of being attentive to local context. Donors should begin by understanding local power relations better and taking them into account when cooperating with partners, whether these partners are “committed” or “unwilling” governments, elites, civil society organisations, or other stakeholders. It is also important to keep in mind that political systems consist of many different actors and that commitment varies both among the actors involved and over time, depending on the twists and turns of policy implementation.

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Can UNCAC address grand corruption?

A political economy analysis of the UN Convention against Corruption and its implementation in three countries

Part 2: Country case studies of Bangladesh, Indonesia and Kenya



7. Bangladesh

A Political Economy Analysis of UNCAC Implementation in Bangladesh

By Hannes Hechler

7.1 Introduction

As a 2002 World Bank report aptly stated, “Bangladesh is a country of paradoxes.” The report noted that Bangladesh is “a homogenous nation with a rich culture, yet it remains one of the poorest nations in the world. Located in a region ravaged by natural disasters [...], it is nonetheless very close to achieving self-sufficiency in food and has succeeded in steadily improving per capita income and most of the basic measures of welfare” (World Bank 2002, 1). Indeed, the country in recent years has had an average economic growth rate of 5–6 percent, and income equality, as measured by the Gini coefficient, is similar to that of highly developed countries. Bangladesh has achieved these results despite political instability, weak rule of law, and corruption. In fact, as one informant put it, Bangladesh could be even better off in social and economic terms if it were not for corruption, which poses major risks to the sustainability of these achievements.

Corruption is widely recognised to be a major problem in Bangladesh. In Transparency International’s Corruption Perceptions Index, Bangladesh featured as the most corrupt country for five consecutive years (2001–2005). Political actors in the country have recognised the problem as essential and have attempted to address it. Nevertheless, corruption remains pervasive and systemic, posing a huge threat to the development of the country.

How does corruption in Bangladesh relate to the socio-political dynamics described in part 1 of this report? There are clear indications of elite capture and patronage: “The political history of Bangladesh reveals the degree of control over public resources as the most critical factor determining political behaviour of interacting political actors. [...] Pervasive patronage penetrates other political actors (bureaucracy, military, business interests, professional interest groups and oversight institutions) in a bid to build a rent-seeking coalition between the political parties and those actors” (IGS 2009b, xvi). Corruption features prominently within such rent- and power-seeking schemes. For example, a sample of corruption cases studied by Transparency International Bangladesh in 2007 describes political influence as part of the corruption problem in the power sector (Khan, Rasheduzzman, and Nahar 2007) and the port of Chittagong (Mahmud and Rossette 2007). As these constitute the “heart of the economy of Bangladesh”, corruption in these sectors has severe economic consequences for the public purse and for the population.

The following sections explore how these socio-political realities in Bangladesh affect the different public institutions and accountability structures described in part 1 of this study, namely the bureaucracy, legislature, judiciary, electoral processes, and business sector. This case study then assesses how these challenges are recognised by UNCAC in UNCAC-related compliance assessments (the gap analysis) and taken up in reforms suggested subsequently. For the case study, we consider political economy analyses done by local and international academics, donors, and civil society organisations, as well as interviews with key informants.

7.2 Key findings of political economy analyses in Bangladesh

7.2.1 The nature of politics in Bangladesh

Bangladesh is still a fairly young state, having only gained independence from Pakistan in 1971. The constitution of 1972 established Bangladesh as a parliamentary democracy. However, the following years were marked by political turmoil, several coups d'état, and both legitimised and non-legitimised military governments, with the result that political elites never internalised the constitution (Lewis and Hossain 2008).

Although many different political parties exist, Bangladesh essentially lacks political pluralism. Overall, politics in Bangladesh today is characterised by a high level of centralism and confrontation, based on personalities interested in economic gain rather than on public issues. The programmes of the parties are hardly distinguishable (Iftekharuzzaman 2010). This is facilitated by the emergence of two dominant political parties, the Bangladesh Nationalist Party (BNP) and the Awami League (AL), which compete fiercely for control of the country, and by a winner-take-all electoral system that marginalises the opposition. Political conflict centres on capturing power and then preventing the opposition from regaining it:

Confrontational politics in Bangladesh could be generally described through the frameworks of patron-client relationship and mobilisation politics. The winning party uses patronage to establish a relationship of loyalty and allegiance with the state institutions and within the party itself. On the other hand, mobilisation politics—usually a tool for protests—has been the strategy of the losing party. As a result, the party in power searches for loyalists within the bureaucracy and other state institutions to counterbalance the impact of the mobilisation organised by the opposition party. This, again, leads to massive politicisation of state institutions, especially the bureaucracy. (IGS 2009b, 12)

The use of patron-client relationships to secure these goals is both enabled by and reflected in the authoritarian way in which political parties generally are run and organised. Almost all parties lack internal democracy, with decision-making power over finances, nominations, and so on concentrated in the chairperson. Few checks and balances exist for heads of parties, whether in the form of boards, regular councils, or grassroots party organisation. From the regulatory side, there are no requirements for forming political parties or for ensuring transparency in their financial procedures and funding. Practices of growing concern are the sale of nominations for parliamentary seats and nominations along dynastic lines (Iftekharuzzaman 2010; Bangladesh PCA 2008; IGS 2009b). As the parties are concerned with achieving a “monopoly of legitimacy”, government performance and policy alternatives are not all that important in the political discourse (Iftekharuzzaman 2010). All this indicates a low level of formal institutionalisation of political parties. Party competition in Bangladesh is also distinguished by the fact that almost all societal and economic institutions, including professional groups, student organisations, and trade unions, are divided along party lines (Duncan and Williams 2010). Among the few institutions that have largely managed to avoid party alignment are the army, some non-governmental organisations (NGOs), and donors.

It should be stressed that while patron-client relationships are at the heart of the social fabric of Bangladesh's society, they are not entirely negative. Many of the social achievements mentioned above were made possible by the safety nets provided through such relationships. This is particularly the case for the poor, for whom relations to rich patrons can be instrumental in determining survival and upward mobility (Devine, Camfield, and Gough 2008). However, in the hands of elites, patron-client relationships are also used as a political tool:

The government developed a patron-client relationship where the central elites acted as patrons for their clients—the rural elites; the rural elites then became patrons for the rural masses. It has been observed that this patron-client structure has always been

exploited for partisan ends and local government reforms were directed to bring into confidence the rural elites either to legitimize the government or to exercise political control over the rural population. In return, the rural elites were allowed to engage in private accumulation and corruption from government-sponsored development programs undertaken by the local government officers. (Bangladesh PCA 2008, 35)

The result is an environment in which patron-client relationships become both a reason and a substitute for weak public institutions. Against a backdrop of mounting economic and demographic pressures, the erosion of traditional social controls creates ample space for such parallel systems of accountability, which have come to determine public policy making and reform chances to a great extent. “The outcome, put bluntly, is a society where ‘musclepower’ generally takes the place of the rule of law” (World Bank 2002, 12).

7.3 Politicisation of the bureaucracy

A prime focus of the ruling government has been to secure its own power base by capturing the bureaucracy. Admittedly, political reshuffling at the top levels of public administration is a common feature of even the most firmly established democracies. In a highly confrontational context such as Bangladesh, moreover, there are legitimate reasons for not wanting opposition-friendly bureaucrats in key positions, where they could hinder implementation of priority policies. However, the increase in forced retirements of non-party supporters and in so-called “contractual appointments” to top up the bureaucracy with partisans shows a worrisome level of politicisation.³³ Although the large majority of public officials can still be considered apolitical, the trend towards greater politicisation has led to apathy and to a decline in the quality of public service (IGS 2009b).

The politicisation of the bureaucracy is facilitated by its elaborate structure, with 29 levels; by unclear and to some extent discriminatory rules for promotion; and by the lack of a civil service act that might protect bureaucrats from outside influence. Lewis and Hossain (2008) have shown that this politicisation reaches down even to the local level, where party networks are becoming increasingly relevant for accessing development resources. However, party allegiances may shift as local leaders need to balance party allegiances with other local interests.

The consequences of this politicisation are severe. They include not only the likelihood of unqualified persons entering key positions, but also an inflated and inefficient bureaucracy. With partisan persons in key, high-level positions, decision making in the bureaucracy as a whole is influenced for the worse: “This [politicisation] has primarily involved greater interference by politicians in the everyday work of the bureaucrats, frequently having to divert resources or to use influence for corrupt purposes” (IGS 2009b, 20).

7.4 Executive dominance over the legislature

The parliamentary system in Bangladesh is based on the Westminster system, with formal provision for holding the executive to account. This includes the opportunity for individual members of parliament (MPs) to direct questions to ministers, request discussion, and make statements on matters of public importance; scrutinise, amend, or reject bills; and raise motions of no-confidence. In institutional terms, the constitution and the rules of procedure for parliament foresee the formation of standing and specialised committees. However, a combination of factors has allowed the executive to wield great influence over parliament, leaving the legislature as a rubber-stamp institution that is unable to fulfil its accountability role. The country’s high dependence on international development

³³ The awarding of extra contracts is one way of creating new public service positions and staffing them with individuals outside the usual career path. In 2001, the government appointed 978 “officers on special duty”, a position without regular responsibilities that is essentially a financial reward (Netherlands MFA 2008).

assistance, which gives donor organisations considerable influence over policy direction, has also contributed to this lack of institutionalisation (Lewis and Hossain 2008).

While the constitution is strong on parliamentary accountability, it also has loopholes. Article 70 stipulates that MPs who vote against the party that nominated them shall vacate their seats. This provision is potentially a powerful tool to force alignment with party interests as defined by the leader. Over successive governments, parliament has been drained of its influence, and several amendments to the constitution have crippled its role.³⁴ Even since the reinstatement of democracy in 1991, some of these amendments allow continuing undemocratic rule. Particularly noteworthy is the practice of ruling by president's ordinance, which is still being used to bypass parliament when enacting new laws and regulations. This process usually does not allow for much discussion in parliament, often fast-tracking the measure or bypassing existing rules.

As a result, the executive has almost full control over the making of law and policy, a situation which is referred to as "parliamentary autocracy". The effects are described as follows:

- parliamentary accountability mechanisms fail to work properly;
- major policy decisions are taken outside of parliament and rarely discussed within;
- combined with majority vote, the opposition has basically no voice; and
- without discussion, politicians fail to interpret the laws properly (IGS 2009b).

The incompleteness of existing rules is cleverly used by the party in power to exert influence over the system. For example, there are no explicit criteria for the appointment of committee chairs and members, leaving selection to the discretion of the party chief. Information and invitations to sessions are often handed out very late. There are no performance reviews of MPs. Major parties are increasingly nominating businessmen for parliament, encouraging the prioritisation of private over public needs. "This negative role played by the political parties has a clear implication for parliamentary democracy. As the parties are more concerned about taking control over all the institutions and utilising public resources for party loyalists, they tend to neglect the role of the Parliament. On the contrary, a dysfunctional Parliament is what suits their purpose..." (IGS 2009b, 49)

7.5 Executive influence over electoral processes

The evidence on executive influence in Bangladeshi elections is mixed. Generally, elections in recent years have been rated as relatively free and fair. However, there are instances of undue influence, especially at the local level. The buying of votes has been observed during some elections, particularly in poor communities, but NGO awareness-raising programmes have helped to counteract this to some extent. However, in order to secure a power base across the different state levels, ruling parties often chose to have direct control over local government action. This has implied efforts to determine the outcome of local elections, such as by rigging the ballot, intimidating voters, and otherwise manipulating the process.

At the national level, suspicions of electoral fraud resulted in public riots and led to one of the most decisive events in Bangladesh's recent political history: the installation of an interim caretaker government in 2006, with the mandate of preparing the country for fair elections.³⁵ Until 2007, the

³⁴ According to the *Power and Change Analysis* (Netherlands MFA 2008), 14 amendments have been made to the constitution, of which only one or two comply with democratic principles.

³⁵ The institution of a caretaker government (CTG), a unique feature of the Bangladeshi constitution, was introduced in 1996 as a response to the highly confrontational politics and frequent contestation of elections. The

Bangladesh Election Commission operated under the office of the prime minister, leading to executive influence mainly through staff selection.³⁶ Thus, “according to available information, five out of 10 Chief Election Commissioners (CEC) and 10 out of 19 Election Commissioners (EC) could not complete their full terms. Most of the CECs and ECs were forced to retire prematurely for their allegedly partisan behaviour or lack of credibility. It is interesting to note that they were however not tried before the Supreme Judicial Council for their alleged misconduct” (IGS 2009b, 75).

As described below, the caretaker government initiated key reforms in the Election Commission. However, there were allegations of corruption in the 2008 parliamentary elections, leading many to question the impact of these reforms (Ahmed 2008).

7.6 Politicisation of the judiciary

An independent and effective judiciary evidently posed a threat to the increasing “patriarchy” of ruling parties after the 1991 return to multi-party democracy. Thus, the informal strategy has included restricting the judiciary’s powers and its ability to exert effective checks and balances. “Control of the lower courts and law enforcement agencies became the mechanism for denying the opposition space in the political realm, while the drive to control the superior courts came from a desire to curb their potential as a restraint on Executive power” (IGS 2009b, 54). Such control could be exercised in several ways.

The 1971 constitution originally provided for the president to appoint the chief justice of the Supreme Court, and with his advice the other Supreme Court judges. This rule was formally revoked in 1975, but the chief justice, based on convention, continued to be consulted until 1994, when the government broke with tradition and appointed new judges without consultation. Today, it is effectively the prime minister who decides on the appointment of Supreme Court judges. Even though he or she sometimes follows the convention of asking for the chief justice’s approval, even this safeguard is ineffective when a partisan occupies the position of chief justice. The appointment of the chief justice has gained considerable importance since he or she is the chief advisor to the interim caretaker government. The party that appointed the chief justice is thus seen as being in a position to influence decisions made by the interim government, especially regarding preparations for future elections.

In cases where the chief justice has been close to the ruling party, it has also been the practice for him to facilitate politicisation through the allocation of cases to “appropriate” regime-friendly judges. In addition, very loose criteria for the appointment of judges and low pay for this office have made the appointment of unqualified partisans more likely, resulting in a scarcity of qualified judges and some questionable judgements. On occasion, the judiciary itself has not appeared as a role model when its own integrity has come under scrutiny. Under the Contempt of Court Act, courts filed charges against journalists who reported on judicial corruption and politicisation of the judiciary (IGS 2009b).

A fourth amendment to the constitution in 1975 also brought the subordinate courts under the control of the executive. Administrative staff have often been appointed to fulfil judiciary functions, up to the level of magistrate. For instance, “magistrates are responsible for a variety of non-legal duties, such as collecting taxes and overseeing government property” (Laskar 2007, 180), as they are employed by ministries.

Finally, other law enforcement institutions, such as public prosecutors and police, are also subject to strong influence by politicians and elites (IGS 2009a).

CTG is meant to be formed by an advisory board of respected figures headed by the former chief justice. Its mandate is to prepare the country for free and fair elections. The normal duration is set at three months, although the last CTG stayed in power 18 months because of the severe governance issues inhibiting fair elections.

³⁶ While it is formally the president who appoints members of the commission, he does so on advice of the prime minister. In any case, the president himself is appointed by the ruling party.

Improving the separation between the executive and the judiciary has been a topic of political debate in Bangladesh for decades, and has been included in election pledges by the political parties. In 1999, in a historic judgment, the Supreme Court ruled on the unconstitutionality of mixing judicial services with other civil administrative services, confirming the functional separation of the judiciary. However, no subsequent government has shown the political will to implement the recommended changes, despite preparatory efforts by two nonpartisan caretaker governments.

7.7 Blurred lines between politics and business (conflicts of interest)

The relationship between business and politics in Bangladesh is aptly described as follows: “In terms of ownership of the nation’s assets and their distribution, it is widely recognised that Bangladesh is largely in the hands of powerful economic elites that have overlapped, at one time or another, with its political elites. The same families, the same regional collaborators, the same members of social circles effectively turn up whenever one examines the make-up of the inner circles of society” (Bangladesh PCA 2008, 10).

The result of this interaction is that permits, licences, loans,³⁷ and government contracts are granted along political lines, not according to formal criteria. This means that many companies, in order to stay in business, need to have political affiliations, a relationship that becomes mutually profitable as businesses are expected to pay protection money, share profits, and make contributions to party finances. Certainly, not all companies are involved in such political games, and there are even signs that the private sector is often forced into this patron-client relationship, which therefore is not fully symbiotic. There is no hard evidence of large-scale capture of the policy-making process by business elites for private interest. However, increasing tendency for businessmen to sit in the parliament indicates growing the influence of business in politics (TPP/BDI 2010). It is also estimated that more than 90 percent of MPs have personal business interests on the side (Bangladesh PCA 2008).

7.8 Reform areas relevant to corruption emerging from political economy analysis

Political and grand corruption in Bangladesh are both a means and a result of a patron-client system, facilitated by loopholes in the accountability system. Therefore, the political economy analyses consulted, when recommending reform, do not for the most part refer to pure anti-corruption measures.³⁸ Instead, they take a broader view of the country’s political situation, with a focus on accountability and state responsiveness to citizens’ demands. Three broad causes for poor political governance emerge from these analyses: (a) the design of state institutions, (b) the clientelist nature of politics, and (c) the confrontational nature of politics. “Several factors—structural, behavioural and political—account for the deviant behaviour of political parties and politicians. There is, however, no best way to overcome the dysfunctional consequences of the ‘winner takes all’ system that has evolved in Bangladesh. What is needed most are measures to hold those exercising political power accountable. The traditional mechanisms used to ensure accountability do not seem to work properly, not because of numerous inherent defects, but mostly because of the absence of an ‘enabling environment’ caused by different structural factors. There is an urgent need for major changes in the way(s) power is acquired and exercised” (IGS 2009b, 6).

The proposed reforms are thought to improve accountability and thus reduce the opportunities for corruption. The following reform areas emerge³⁹:

³⁷ The Bangladeshi banking system is largely in government hands.

³⁸ Referring mainly to the *Power and Change* (Netherlands MFA 2008) and *State of Governance* (IGS 2009b) analyses cited throughout the text.

³⁹ Based on IGS (2009a, 2009b, 2010a, 2010b), and Netherlands MFA (2008).

- Achieving **qualitative changes in the electoral system**, e.g., by ensuring internal and external accountability of the Election Commission and by establishing rules for the registration of political parties and candidates (for example, on financial disclosure).
- **Strengthening intra-party accountability**, e.g., by establishing rules for the registration of political parties and party internal democracy. Such rules could apply to, inter alia, the funding base of a party, its internal decision-making and accountability structures, and enforcement of the existing lid on campaign finances, with possible provisions for the state to share electioneering costs.
- **Balancing parliament-executive relations** by improving parliamentary accountability functions. In order to achieve this, issue-based parliamentary debates need to be promoted, allowing for coalitions between opposition and government backbenchers. A revision of the rules of procedure of the parliament could, for instance, provide for regular unscheduled debates on government policies and better regulate the appointment of committee chairs and members. Article 70 of the constitution, which impedes deviating votes by ruling party MPs, should only apply to “no-confidence motions” and budget decisions. Some even propose a change towards a proportional electoral system (IGS 2009a).
- **Improving accountability and effectiveness of oversight institutions**, including the Election Commission, the Anti-Corruption Commission, the Auditor General, the Public Service Commission, and most importantly the judiciary. This can be done by ensuring uniform and transparent appointments especially in leadership positions, as well as by reducing dependence on the executive for financial and human resources. For some of these institutions, delinking the salaries from the government salary system might be indicated.
- **Professionalising and depoliticising the bureaucracy**, e.g., by revising or establishing regulations and criteria on appointment, career development, transfer, and retirement; by enforcing the government’s conduct rules for civil servants at all levels; and by downsizing the civil service while ensuring adequate salaries. A general lack of transparency on decision making is seen as a key enabler of corruption, a situation that is linked to the absence of legislation on the access and right to information.
- The **democratisation of local government** and the depoliticisation of local government institutions is another key reform area recommended in order to allow the local level to escape the unhealthy grip of confrontational politics.
- **Building a stronger media and civil society** is seen as essential to create awareness and marshal public opinion against confrontational politics.

Political economy analysis also points to several interesting features of Bangladeshi society and political culture, which are cornerstones for any future state-building reforms.

First, the population displays a strong sense of national identity and belief in the rule of law. The frequency and abruptness of political changes in Bangladesh’s history may actually be an indicator of this: “There is a constitution, with corresponding formal institutions and checks and balances. When they are not enforced or when access to justice is denied, the people react as a society” (Bangladesh PCA 2008, 10). However, the relationship between citizens and the state has deteriorated in recent decades, as has the reputation of the judiciary as guarantor for the rule of law. “Since 1991 the people of Bangladesh have been asserting their voices, changing their representatives to ensure change in government. But democracy has remained confined to periodic elections and good governance a matter of luck” (Hasan 2010).

Second, the patron-client system, which is at the heart of the governance problem, is based on partisanship. In the absence of an effective state, these patron-client relationships function as safety nets for large parts of the population. This safety function needs to be considered, and substitute mechanisms found—for instance, the introduction of a functioning welfare system—if one is to reduce the reliance on informal patron-client systems. This might be easier in Bangladesh, where patron-

client relationships predominantly serve political and economic purposes, than in countries where such relationships are built on much stronger social and ascriptive affiliations such as shared regional, clan, ethnic, or kinship identities. In Bangladesh, “identity politics, whether derived from ethnicity or religion, are not central” (Duncan and Williams 2010, 10).

Third, the demographic distribution in Bangladesh is becoming younger and increasingly urban. Provided with adequate education and support, those masses could become drivers of social and political change (Bangladesh PCA 2008). Changes among the large population of poor people support this possibility. Rahman (2007, 7) notes:

One of the lesser told stories from Bangladesh is the personality revolution which the poor have undergone, more assertive, pro-active towards opportunities, clearer on life-goals. While the social reality may not have lost many of its oppressive features, the poor men and women of rural and urban Bangladesh are new protagonists on the scene and societal outcomes are very much open. Governance discussion will be seriously off the mark unless it engages with such potentialities.

Much can also be expected from a new generation of leaders emerging from the post-1971 era with a different understanding of democratic values and nationhood.⁴⁰

Fourth, in Bangladesh emerges an increasingly diverse business class which is more dependent on improved public service delivery than on patronage (TPP/BDI 2010).

Finally, the military, especially in recent years, has maintained a relatively balanced, non-political role and has managed to act in an appeasing and conciliating way. Much of this is linked to its role in supporting the caretaker governments.

Many of the above developments suggest that economic and social development contributes to a change in the nature of patronage, making it more heterogenous and thus leaving citizens greater room for choices.

7.9 The status of reform at the time of the UNCAC gap analysis

The last caretaker government, which was in charge for the unusually long period of two years between January 2007 and December 2008, was essentially nonpartisan and tried to address many of the reforms described above.⁴¹ As a result, the reform landscape at present looks rather promising. The Global Integrity Report of 2008, by the Washington, DC-based organisation Global Integrity, identified several key areas of good quality or progress (as indicated by the arrows towards the right side of the scale in Box 1). The reform agenda of the CTG is said to have been informed to large extent by its ties to the international community and dominant international policy perceptions (Khan 2010).

⁴⁰ This, according to one informant, is the case not only for Bangladesh, but also for other countries in the region, which creates high hopes for the future.

⁴¹ Although the caretaker government itself was considered nonpartisan, there are allegations that its first chief advisor was influenced by one of the major political parties. After a series of seemingly partisan nominations to the Election Commission led to public protests, he was forced to resign.

With the interim caretaker government in power, the fight against corruption, especially in the political sphere, was declared high priority. The Anti-Corruption Commission (ACC) was seen as a key tool; its rules and structure were strengthened and its human resources increased. Special ordinances supported ACC activities, which were widely publicised to allow scrutiny. In early 2007, the ACC was already investigating a long list of top political and business figures, including the leaders of the two major parties. Under no previous government had the ACC even come close to being as effective and functional; indeed, it had been described as underperforming and politically curtailed. Despite this progress, the interim government has also been criticised for limiting essential individual and constitutional rights during its tenure, many of which were linked to the anti-corruption drive. Allegedly, 440,000 people were arrested during the first year of emergency rule, only half of them on the basis of official arrest warrants. The anti-corruption drive turned into a witch hunt, while the caretaker government tried to process the large numbers of people arrested by installing special courts closed to the public (ICG 2008).

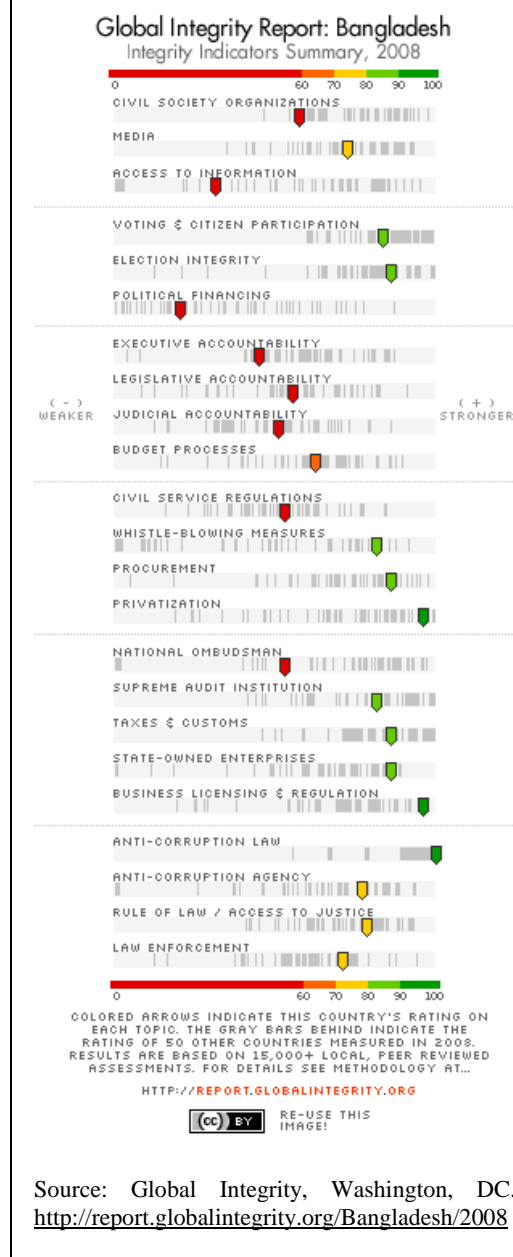
The anti-corruption drive of the caretaker government also included accession to UNCAC,⁴² as well as the subsequent development of the UNCAC compliance and gap analysis, which will be analysed in the next section. Based on these processes, a National Integrity Strategy was drafted.

The caretaker government reformed the Public Service Commission (PSC) and appointed a majority of new members. The PSC then set out to introduce new recruitment and promotion rules in 2008. Citizen service charters were introduced in ministries and departments to improve their responsiveness to citizens. However, an attempt to reform the public service retirement regulations did not succeed.

The caretaker government also strengthened the self-sufficiency of local government vis-à-vis the central government in terms of administrative, financial (including revenue raising), and human resource issues. The attempt to depoliticise local government by making successful candidates resign their party membership after election, however, did not succeed.

⁴² Since Bangladesh was not among the original signatory states to the Convention, it had to accede in order to become a State Party. The credit for taking this step should not go entirely to the interim government. National stakeholders, most importantly from civil society, had lobbied for years for Bangladesh to join the Convention. The caretaker government provided a window of opportunity and sufficient political commitment to approve this step.

Box 1



Source: Global Integrity, Washington, DC.
<http://report.globalintegrity.org/Bangladesh/2008>

Judicial reforms aimed at the separation of the judiciary from the executive. The caretaker government established the Supreme Judicial Commission to deal with appointments to the Supreme Court. The mandate of this commission, however, ran out in early 2008 when the ordinance for its establishment expired, leaving the issues surrounding judicial appointments again unresolved.⁴³ These formal changes did not have immediate effects on practice, as there were no judgments against the interests of the caretaker government during its tenure (IGS 2009b).

In preparing for the next parliamentary elections, one of the main aims of the caretaker government was to reform electoral processes. The Election Commission was restructured by giving it an independent secretariat and appointing new leadership. Voter identity cards and new regulations on political party registration were introduced. The latter included, for example, the requirements that grassroots party units have a voice in the nomination of parliamentary candidates, that parties hold regular intra-party elections, and that candidates disclose information on personal qualifications and income. The Election Commission was given the power to cancel an individual's candidature if necessary. The parties had generally complied with these rules by the time of the parliamentary elections in December 2008. While some observers caution that such reforms may not be sustainable under future political regimes, there will be continuing pressures for internal party reform.

7.10 Key findings of the UNCAC gap analysis in light of the political economy analyses

Shortly after its accession to UNCAC in February 2007, the then interim government of Bangladesh formed an inter-ministerial committee, led by the Ministry of Law, Justice and Parliamentary Affairs, and assigned it the task of conducting a compliance and gap analysis. The goals were to examine the compliance of national law with UNCAC requirements, identify key challenges for UNCAC implementation, and increase knowledge of the Convention within Bangladesh. The committee decided to focus on the following priority areas as particularly relevant to Bangladesh: preventive anti-corruption policies and bodies (UNCAC Articles 5 and 6), public sector integrity (Articles 7 and 8), public procurement and public financial management (Article 9), enforcement issues related to existing criminal laws (Articles 15–25 and 30–40), international cooperation (Articles 43–50), and asset recovery (Articles 14, 23, and 51–59).⁴⁴ The analysis was conducted between October 2007 and January 2008 and included various stakeholders from public institutions, academia, the private sector, and the donor community. The government presented an update in July 2008, covering new reforms in the areas originally selected as well as the following new focus areas to complete the picture: public reporting (Article 10), participation of society (Article 13), prevention of money laundering (Article 14), criminal record (Article 41), jurisdiction (Article 42), international cooperation (Article 43), special investigative techniques (Article 50), and the general provision for asset recovery (Article 51) (GOB 2008).

How do the chosen priority areas and their findings relate to the characteristics of Bangladesh's political economy as discussed in section 1? In the following, we point to relevant areas of the gap analysis that show a broader understanding of what anti-corruption reform needs to imply in Bangladesh, as well as areas where the gap analysis (or UNCAC requirements, for that matter) seemingly falls short of fully grasping the political context of corruption in Bangladesh.

In analysing the country's compliance with the requirement to develop and maintain effective **policies to prevent corruption** (Article 5), the gap analysis points to a collection of anti-corruption legislation and then refers to the 2008 National Integrity Strategy (NIS), which takes a more strategic approach to preventing corruption. The NIS is intended to address corruption holistically, provide a vision for

⁴³ Apparently the ordinance became ineffective, since it was not placed before the new parliament in time (IGS 2010b).

⁴⁴ These priority areas were identified by key stakeholders in an orientation workshop.

improving governance, strengthen internal controls of state institutions, and encourage citizen-owned accountability mechanisms. The gap analysis also points to key reforms already undertaken by the interim government in this regard, namely the separation of the judiciary from the executive and the reforms and leadership changes in the Anti-Corruption Commission, the Public Service Commission, and the Election Commission. Based on these findings, it seems that a number of important steps have been taken, and attempts are being made to develop a strategic approach to the fight against corruption. However, none of this activity seems to have been induced by UNCAC.

The assessment of **anti-corruption bodies** (Article 6) rightly points to the existence of the ACC and its establishing legislation. The analysis refers to its independence. Unfortunately, no reference is made to the reasons for its weak performance prior to the changes in leadership and practices under the caretaker government. Such an analysis would most likely help prevent such failures in the future. Also, no other oversight body is referred to, other than a proposed regulatory reform commission intended to promote changes in administrative rules to make them more commerce-friendly. U4 has argued elsewhere that Article 6 can be understood to include additional bodies tasked with regulating or overseeing corruption prevention elements in public service, such as a public service commission or auditor general (Hussmann, Hechler, and Peñailillo 2009). The absence of any reference to such other bodies as possibilities indicates that this meaning of Article 6 is still not widely understood and applied in Bangladesh.

With regard to **public sector integrity** (Article 7.1), the gap analysis lists a number of regulations relevant to civil service recruitment. However, the report also acknowledges:

While there is a strong regulatory regime in place with regard to these issues, recruitment and promotion practices of public officials have come under criticism from time to time. Questions have been raised whether recruitment, hiring and promotion have been based on merit, equity, and aptitude. The PSC [Public Service Commission] being the principal recruiter of the civil service has often drawn attention to itself and its image as a constitutional body has at times been compromised with the cancellation of examinations and assertions of political affiliation in recruitments. (GOB 2008, 29)

The analysis mentions the caretaker government's reforms to strengthen the PSC, especially the change in leadership and the process of modernising the civil service examination system. Nevertheless, the authors see a "pressing need to oversee the implementation mechanisms of these reforms for its sustainability" and recommend increasing the independence and efficiency of the civil service through financial autonomy and enhanced training. Disciplinary actions for non-compliance are also recommended, as is the establishment of a permanent pay commission to determine salary scales. This would arguably reduce incentives for corruption and uncertainty in career planning. Unfortunately, no mention is made of the patterns of politicisation specific to Bangladesh, such as infiltrating the bureaucracy with partisans through contractual appointments, the practice of forced retirement, and inflating the civil service, described in section 1.

It is interesting and positive to note that the authors of the gap analysis do not distinguish between mandatory and optional requirements. Thus, the optional UNCAC requirements regarding the **election of public officials and transparent party funding** (Articles 7.2 and 7.3) are treated as mandatory, which highlights their relevance in the Bangladeshi context. The analysis points to various reform measures proposed for the Representation of the People Order, 1972, then still under discussion with the political parties. Those measures included the requirement to register political parties and to clarify which candidates can be excluded from standing for election (e.g., loan defaulters, officials retired less than three years, defaulters on service bills, and multiple candidacies in several constituencies). Candidates are also required to disclose information on their academic qualifications, pending criminal proceedings, record of criminal cases, sources of income, assets, liabilities, and loans. Transparency of funding is also covered, with proposals that the Election Commission declare election expenditures and ban funding from foreign sources. It is mentioned that the Election Commission was equipped

with an independent secretariat, but its role in strengthening the commission remains unclear. There is unfortunately no clear analysis of a more sustainable, nonpartisan appointment system for the chair of the commission. As with earlier actions, these reform efforts seem to have been initiated without reference to the Convention.

The **declaration by public officials of their assets**, income, outside employment, etc., as optionally demanded in Article 8.5 is also considered as mandatory by the gap analysis. Regulations in Bangladesh already require such declarations at the time of recruitment and annually after that. This yearly update, however, is not systematically practiced, and this was identified as an area of concern. The Ministry of Finance apparently has issued an administrative order to strengthen compliance. The gap analysis recommends modification of the legislation to include modern instruments, such as electronic forms, as well as the definition of ceiling amounts for assets that can reasonably be held by public officials. A comprehensive civil service rule drafted at the time of review was expected to cover some of these aspects. The analysis recognises the relevance of asset declarations for the detection of corruption. However, it does not specify which levels of public officials should be subject to this requirement, nor how the accuracy of such declarations can be verified. This is especially critical given the extensive business interests of many MPs, as mentioned earlier.

Sanctions for non-compliance by public officials with civil service rules, particularly codes of conduct, as specified in Article 8.6, are said to be covered by discipline and appeal rules for civil servants. The gap analysis, however, does not say how well these mechanisms work, nor how often and at which levels (administrative, civil, or criminal) sanctions are being applied. The analysis recognises that sanctions can be only part of the solution, with incentives and rewards for better performance also needed.

On the **management of public finances** (Article 9.2), the gap analysis stresses the role of the auditor general and the parliament's Public Accounts Committee in scrutinising the national budget. Unfortunately, it does not discuss past experiences with executive dominance over those two bodies or the weak role of the parliament at present. This evades the issue of parliamentary accountability, including the voting pressures on MPs (Article 70 of the constitution), which is a major problem for the Bangladeshi political economy. The interim government is lauded for its inclusive budget process, but there is no indication that the consultation of stakeholders in budget negotiations has been institutionalised as a model for future governments to follow.

Transparency is viewed by the gap analysis as a necessary value for democracy. In this context, the interim government's ordinance calling for a right-to-information act to be drafted is seen as achieving compliance with UNCAC's Article 10 on **public reporting**. The draft act being discussed at the time of the gap analysis included a requirement for regular reporting by state institutions, as well as the establishment of an information commission. The gap analysis suggests that the exceptions to public reporting requirements (e.g., for reasons of sovereignty and national security) provided by the draft act should be reduced and that the proposed commission should have the status of an "institution of accountability". Meanwhile the act has been passed.

Regarding **criminal offences** featured by UNCAC, the gap analysis assesses the Bangladeshi penal system as meeting good standards. Reference is made to the Prevention of Corruption Act of 1947 and the Penal Code, dating back to 1860. Both include notions of corruption that go beyond bribery. However, the analysis also shows that these are rarely used in prosecution. "This reflects that less attention is being paid to bringing the acts of embezzlement, misappropriation or other diversion of property in the private sector to justice. Therefore, the Government should ensure that penal provisions regarding such acts are put into more frequent practice" (GOB 2008, 75). Similarly, for the offence of **illicit enrichment** (Article 20), which is prohibited under both the Prevention of Corruption Act and the Anti-Corruption Commission Act of 2004, the gap analysis states that there have been hardly any convictions. The 2007 anti-corruption drive of the caretaker government, targeting corrupt politicians, public officials, and businessmen, however, was largely based on this offence. Thus, the conviction

rate has risen considerably. The gap analysis highlights the importance of this offence in the Bangladeshi context.

Obstruction of justice is already an offence in the penal code. In 2008, the Contempt of Courts Ordinance was issued, entailing an extensive notion of court interference. Unfortunately, as noted in the political economy analysis of Bangladesh above, an earlier contempt of courts provision has been used by courts to block scrutiny of their own behaviour. It is not likely that this loophole has been closed. The gap analysis notes that due to “a strong legal regime and consistent judicial activism in upholding its prestige and dignity, the offence of interfering in the exercise of judicial functions, as prescribed in article 25(a) of the UNCAC, is frequently brought to justice” (GOB 2008, 79).

The authors of the gap analysis give high priority to the issue of **asset recovery**, as large amounts of money are thought to have been siphoned off to other countries. They describe the introduction of a new legal regime and task force with the Money Laundering Prevention Ordinance 2008 by the caretaker government. Banks are strictly required or advised to uphold several due diligence tools concerning their customers, including enhanced security for accounts of politically exposed persons (PEPs). However, this only applies to foreign PEPs, not to national ones, and unfortunately there is no recommendation for correcting this omission. The gap analysis also points to the requirement to report foreign accounts, but it does not mention the existence of or need for a financial disclosure system applying to high-level public officials, as recommended by Article 52.5 of UNCAC. It is not clear to what extent the new regulatory regime was induced by the accession to UNCAC or—more likely—by earlier requirements to comply with recommendations by the international Financial Action Task Force.

7.11 Putting the gap analysis in perspective

As already noted, the gap analysis highlights important reform areas for Bangladesh. The report goes beyond pure anti-corruption reform to reflect on broader values such as improved governance, citizen-led accountability, etc. Nevertheless, it does not go as far as necessary in linking the anti-corruption agenda promoted by UNCAC with the reality of the political economy in Bangladesh. The following points should be noted:

- The gap analysis does not simply take the UNCAC requirements at face value, but also points to priority areas for reform in Bangladesh. In doing so, however, it does not sufficiently consider that the Convention itself does not provide remedies for some of the most important integrity reform issues in the country, such as parliamentary accountability, judicial independence, and rule of law. While the basis of gap analysis is of course UNCAC, it is notable that the document omits what little UNCAC does offer on judicial integrity and the private sector, two main areas of politicisation in Bangladesh.
- With the focus on the Convention, there is an inherent tendency to limit the scope of analysis to the reform options contained in this external document. Thus the country context is not the most decisive element in this assessment, although it probably should be. Even while remaining within the limits of an UNCAC assessment, it should have been possible to consider necessary constitutional changes or offer a risk assessment of how the envisaged anti-corruption reforms might be hampered by political economy realities.⁴⁵

⁴⁵ The Convention, which repeatedly signals the primacy of the fundamental principles of domestic law (which would include above all the constitution), was not intended to require constitutional changes. Nevertheless, an effective strategy for a more accountable state might require such changes. For example, Article 98 of the Bangladeshi constitution opens the door for politicisation of the judiciary by allowing for the appointment of additional judges to the high court. Article 70, as mentioned, restricts the voting rights of members of parliament. Such impediments to state accountability might appropriately be part of a sound assessment.

- Many of the reforms cited in the gap analysis were introduced by the caretaker government before or at the same time as it acceded to the Convention. The accession to UNCAC was itself only one of many reform items. Thus, UNCAC was not needed to trigger or guide many of the reforms. The question then arises as to what impact the Convention had and will continue to have.
- It is also unclear to what extent the reforms will be enforced in the future. Only the earlier ordinances passed by the interim government became effective without needing parliamentary approval. Given that the caretaker government stayed in power for a longer period than envisaged by the constitution, ordinances enacted after that initial period had to be approved by parliament following the elections in December 2008.
- Finally, the reforms of the caretaker government show a high level of political commitment to fight corruption. This can mainly be attributed to its nonpartisan nature. The question of the sustainability of the reforms after the return of political governments is still unanswered. To date, only 60 percent of the ordinances have been approved by parliament.

7.12 The wider reform context

The gap analysis sheds light only on parts of the reform agenda needed to improve governance in Bangladesh. It has to be seen as one piece of the puzzle. The sequence of steps taken by the caretaker government reveals the strategic approach behind UNCAC implementation: the first gap analysis was followed by a needs assessment to prepare a strategy for further UNCAC implementation. This process called for (a) updating and disseminating the first analysis, (ii) building the capacity of relevant public officials, (iii) enhancing Bangladesh's activities in the UNCAC working groups at the international level, and (d) putting more emphasis on mutual legal assistance and coordination of stakeholders. These requirements were partly addressed by putting in place the following:

- the second gap analysis,
- further legislative changes,
- capacity-building trainings,
- a national public procurement project,
- an action plan for UNCAC compliance, and
- the development of a National Integrity Strategy.

All of these steps are laudable and show the government's keen interest in addressing corruption in a holistic way. However, the emphasis on training, legislation, and (rather technical) action plans (GOB 2009b) could be seen as an indicator that the anti-corruption drive relies on the usual technical fixes. Where is the political debate between citizens and the state? Some would argue that "the constitution as it stands today is not the outcome of any social or society negotiation but rather a sheer display of non-democratic practices" (Bangladesh PCA 2008, 29). Others are convinced that the 1972 constitution can be as good as any other constitution in addressing the current governance problems if it is modified carefully to promote better state responsiveness to citizen demands (Hasan 2010). The latter position points us to the important qualification that no matter how sophisticated the legal and institutional framework in place, the dominant coalition may find ways to subvert it in order to secure its power base and limit access for other actors. There is thus a need for citizens to step up their demands for state responsiveness.

In addition, even though integrity reform has some strong elements in Bangladesh, as was shown in Box 1, the actual implementation by government is rather weak (Box 2). Such a large implementation gap suggests that the outcome of UNCAC implementation is problematic without more debate on the enforcement question.

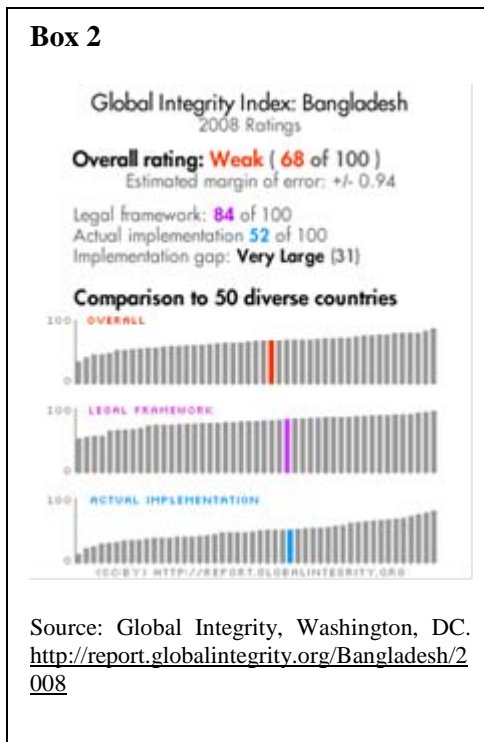
The process of developing a National Integrity Strategy has the potential to take some of these concerns seriously. True, the NIS development has taken three years already, and only part of this delay can be attributed to its inclusive multi-stakeholder consultation process. The strategy was to be finalised by the end of 2008, yet it is still not launched, partly due to a lack of commitment on the part of government. Its conceptualisation, however, promises an approach that grounds the necessary anti-corruption reforms in a context of broader governance reforms (Acharjee 2010). It includes several elements conducive to an improved overall political economy, addressing all actors in the integrity system and reminding them of their role and duties in improving governance and holding government to account.⁴⁶ Key features include:

- A strengthening of parliamentary accountability by allowing more debate before decisions are taken. This is to be achieved by forming standing committees in the first session of parliament and staffing them with proportional representation of parties in the parliament. More time is also envisaged for questioning of the prime minister and cabinet ministers.
- Improvements in the independence and performance of all oversight institutions (e.g., the Anti-Corruption Commission, Election Commission, judiciary, Public Service Commission, auditor general)
- Introduction of constitutions and codes of conduct for political parties (GOB 2009a).

The reforms outlined may not be presented at the level of detail desired by some stakeholders.⁴⁷ However, as one informant put it, while the UNCAC gap analysis might represent only a low common denominator among stakeholders, the NIS is more than that—indeed, it is a visionary document.

7.13 Conclusion

It remains to be seen what will happen to the NIS, and in particular, what forces will be the drivers of this strategy. The strategy clearly identifies responsibilities, but it is not clear how the commitment of key actors to effective implementation can be elicited and sustained. Prospects for the NIS, however, look bleak. Much will depend on whether key players actually take leadership. It is important to keep in mind the nature of politics in Bangladesh, as previously described. As one informant put it, it is great to have international and national commitments like UNCAC and the NIS, and action plans for



⁴⁶ Actors considered in the strategy include the national government, parliament, watchdog institutions, local government, political parties, civil society, the private sector, faith-based institutions, and even families.

⁴⁷ For example, the NIS does not include a modification of the Contempt of Court law to strike a better balance between protection of the judiciary and freedom of expression, or the installation of a grievance mechanism for questionable judicial conduct, as proposed in a 2010 policy note by the Institute for Governance Studies (IGS 2010b). The NIS also fails to tackle the problem of party financing, whether by introducing and enforcing ceiling amounts for campaign expenditures or by providing for state sharing of electioneering costs (IGS 2009a).

implementing them. Putting those plans into practice and enforcing the commitments made, however, is quite a different matter.

Not only are there other commitments that government needs to keep in mind, but government also is not a single homogenous actor who can take a clear decision to follow a single course of action. Political debate about reform will likely continue among different actors within government, and old rules of the political game will continue to apply. The political context has not changed fundamentally just because of a proactive interim government and free and fair elections. Even if reform needs are acknowledged, action still relies on political actors who are caught up in a system where politics is highly confrontational rather than issue-based. Many actors—not all—continue to treat politics as an investment for which returns in the form of corruption are expected. Ultimately, it is likely that international processes other than UNCAC will play a much more decisive role in Bangladesh's development agenda, with regional cooperation, for instance, focusing on trade, migration, and security issues.

This complexity is well illustrated by the reform drive since the last elections. Corruption was arguably the most important topic during the elections, and party pledges to combat it played a role in the election outcome. Commitment by the now-ruling Awami League continued to some extent after the elections, with the new government passing important legislation on rights to information and whistleblower protection.⁴⁸ Government also plans to have all public officials receive anti-corruption training. At the same time, reforms are being counteracted by amendments that serve to protect vested interests. Structural changes to the Election Commission, the judiciary, and the Public Service Commission, made under the caretaker government, have shown remarkable results in relatively short time, but their sustainability is in question as the practice of political appointments revives. Moreover, in order to protect vested interests, the law enforcement institutions are still not given the power to seriously clamp down on corrupt public officials.

As noted earlier, many of these reforms were not a result of UNCAC. But according to one informant, it is important that there is now a paper trail of reform obligations which have been informed in part by UNCAC. This may help sustain the reforms across government cycles. However, this is only likely if key actors in government and state institutions internalise the commitments made under the Convention and are constantly reminded of them by outside stakeholders. UNCAC could thus be used as a tool for facilitating dialogue between the government and citizens about better governance. This case study shows that the value of UNCAC is more the reinforcement it provides for the reform process than the specific content it proposes, which is only partly consistent with national reform needs. It is important to take repeated reality checks to confirm that technical assistance needs identified under UNCAC respond to the NIS reform priorities.

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⁴⁸ These reform efforts are especially significant for reducing corruption in the bureaucracy, as the Bangladeshi civil servant is traditionally bound to secrecy.

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8. Indonesia

A Political Economy Analysis of UNCAC Implementation in Indonesia

By Gretta Fenner Zinkernagel

8.1 Introduction

Indonesia has undergone rapid and far-reaching reforms of its political and economic system in the 12 years since the end of the Suharto era in 1998. Although political structures and institutions have largely stabilised since then, donors continue to describe the situation as fluid. Official decision making is hard to predict and interactions with the government are sometimes uncertain.

Corruption remains rampant in Indonesia and continues to penetrate all spheres of life. According to the Corruption Perceptions Index of Transparency International, this situation has only marginally improved from a rating of 2 (out of 10) in 1998 to a rating of 2.8 in 2010, even dipping below 2 from 2000 to 2004. This would suggest that broad political reform efforts as well as targeted anti-corruption programmes have had only limited success in tackling corruption.

This study seeks to identify the aspects of Indonesia's political, economic, and social structures that either block or have the potential to drive and expedite anti-corruption reform. We consider pertinent analyses by Indonesia's key donors, interviews with and reports by independent experts, academics, the media, and local and international civil society organisations, as well as the author's personal knowledge and experience. Based on these inputs, this chapter then seeks to assess the potential of the UN Convention against Corruption (UNCAC) and its official implementation and review processes, as applied in Indonesia, to overcome barriers to and accelerate expediting factors of anti-corruption reform.

8.2 Political dimensions of corruption in Indonesia

8.2.1 The legacy of Suharto

Corruption in Indonesia must be analysed against the background of the country's history of more than 30 years of repressive and highly centralised rule by Suharto, president of the Republic of Indonesia from 1967 to 1998. Under Suharto, the country's government functioned almost exclusively on the basis of corruption and patronage networks, creating a system that many referred to as state capture or "crony capitalism" (Schütte 2008). Informal networks converged with and became institutionalised in formal power structures. A quasi-feudal system evolved in the civil service, as powerful individuals and interest groups gained access to formal positions of power (Heymans, Pollard, and Budiayati 2005). Ironically, this led to a treacherous stability of political and power structures under Suharto, which found favour with domestic and international investors. As some interviewees stated, "the rules of the game, while not clean, were at least clear."

Since the fall of Suharto in 1998, identifying the real gatekeepers of power and decision-making authority has become more complex, and the level of predictability in some domains has temporarily diminished. For donors, this has meant that it is sometimes difficult to get decisions on programmes. Policy making is not streamlined, as observed not only in relation to anti-corruption but also in other

areas such as infrastructure projects (Heymans, Pollard, and Budiyati 2005). Similarly, some say that the anti-corruption push in recent years, coming at a time when the judicial and civil service systems remain largely unreformed, has resulted in an atmosphere of uncertainty and perceived risk for decision making. This has proved particularly problematic for the private sector, but also affects other government partners (Freedom House 2010).

At the same time, since the introduction of basic democratic reforms, there is better separation between formal and informal powers. This has opened opportunities for better governance and for political competition. However, it has also led to fierce rivalry between old and new elites. The old elites, while still occupying important positions in the formal system through the leadership of the Golkar, PDI-P, and PPP parties, once again operate increasingly through informal systems.⁴⁹ Some commentators note that although Suharto was ousted as president, his family, close friends, and other allies still make up an important part of the economic and political decision-making elites in Indonesia (World Bank 2003). In addition, new elites that have gained access to the political system are also using this formal authority to promote their personal economic interests. As a result, the political and economic landscape is becoming more competitive. At the same time, political power continues to be abused for private economic gains.

Many of the issues noted below are to some degree consequences of Suharto's legacy, present in Indonesian political, bureaucratic, economic, and societal structures and in the resulting hybrid structure of formal and informal powers.

8.3 Separation and balance of power

A continuing struggle for Indonesia, as for many countries emerging from extended periods of dictatorship, is to maintain the separation of the executive, the legislature, and the judiciary, and an appropriate balance between the branches. The reform of the Indonesian political system after 1999, including four revisions of the 1945 constitution, was carefully designed to safeguard the separation of the three branches of government and prevent authoritarian regimes in the future by strengthening the roles of parliament and the judiciary. Yet opinions are divided as to the success of this reform (Kawamura 2010).

Probably as a result of the experience under Suharto, many are suspicious of the considerable formal powers that the *executive* holds today. Others believe a strong executive is necessary to push through the radical reforms needed in Indonesia, as long as it is kept in check by the legislature. The executive is compromised by new rent-seeking elites as well as remnants of the old power structures that continue to hold vested political and economic interests. Consequently, as confirmed in interviews with Indonesian academics and activists, either policy decisions by the executive are unduly influenced by the personal interests of its members, or implementation is undermined by networks of nepotism and patronage. For example, Indonesia has developed a judicial reform programme which is widely regarded as very well designed. However, its implementation is said to stop short whenever the programme comes close to affecting the interests of certain groups. Also, possibly for similar reasons, the reforms fall short of introducing corruption prevention measures such as, for example, measures for strict implementation of the Judicial Code of Conduct, the introduction of a more transparent system for recruitment and promotion, and attention to some corruption-prone areas of the judiciary's case management system.

⁴⁹ Golkar is the Partai Golongan Karya, or Party of the Functional Groups, the leading party under Suharto. PDI-P stands for Partai Demokrasi Indonesia Perjuangan, or Indonesian Democratic Party of Struggle. It is a spin-off from the old Indonesian Democratic Party, which was one of the two state-approved parties under Suharto and was instrumental in bringing down the regime. The PDI-P is led by Megawati Sukarnoputri, president of Indonesia from 2001 to 2004. PPP is the United Development Party, a moderate Islamic party that holds 5.3 percent of the votes since the 2009 legislative elections.

This shortfall has particularly problematic consequences, as the *judiciary* is said to be among the most corrupt institutions in Indonesia (Wardany 2009). Case brokers, also known as black lawyers or judicial mafia, continue to hold a firm grip on the judiciary. This is illustrated by the infamous Gayus Tambunan case, in which lawyers, police, prosecutors, and judges conspired to free a defendant known to have powerful connections to top politicians and businessmen. In addition, some observers believe that when police and the Attorney General's Office prosecute corruption at all, they do so not in order to clean up corruption but for the purpose of extortion. Indeed, reports by investigative journalists, most prominently those associated with Indonesia Corruption Watch, provide considerable insight into the techniques employed by the police, prosecutors, and judges to extort bribes at every step of the judicial process (van Klinken 2009). As a consequence of this level of corruption as well as lack of capacity, the judiciary is not effective in keeping the executive and the legislature in check.

While the *national parliament* holds adequate formal powers, it is widely seen as relatively weak because it is highly fragmented and its members lack capacity (Kawamura 2010).⁵⁰ Consequently, the parliament has limited capacity to effectively perform its legislative, oversight, and accountability functions. Another factor limiting the capacity of parliament to exercise these functions (as further analysed in sections 2.3 and 2.5) is that there is only one declared opposition party, the PDI-P. All the other parties are part of the current government or friendly to it. Indonesian political parties have very limited experience in functioning effectively in opposition to government. In addition, the parliament is considered to be corrupt. Legislators are said, for instance, to have abused legislative review to extort bribes from government officials (Freedom House 2010). As a consequence, new regulations, such as the 2004 Regional Governance Law, have been implemented to limit legislative oversight functions. This further reduces the legislature's potential to enforce accountability of the executive (Buehler 2008).

In summary, democratic reforms have opened space for political competition and enhanced governance by introducing basic principles of separation of powers. At the same time, new economic elites compete for undue influence over politics. Combined with a lack of capacity in the case of the legislature, this reduces the accountability and proper functioning of the three branches of government.

8.4 Weakened leadership

The current president, Susilo Bambang Yudhoyono (commonly referred to as "SBY"), was the first Indonesian president to be directly elected by the people. Since coming to power in 2004, he has enjoyed considerable public support. However, his party, the Democratic Party (DP), only controls 21 percent of the seats in parliament and is therefore dependent on support from other parties to pass major reforms. This is not unusual in Indonesia, where the existence of a multitude of parties representing geographic, ethnic, and religious sectors makes it almost impossible for any one party to win a majority in parliament in its own right (Kawamura 2010). SBY was re-elected in 2009, and in keeping with the pattern of his first term, he invited six of the nine parties that had won seats in the national parliament to join his cabinet. This includes, as in his first term, the Golkar party, which was the ruling party under Suharto.

While political coalition building is not uncommon in many countries, in Indonesia it has a tendency to foster collusion and undermine political accountability. It also means that with constantly shifting sets of coalitions, the president will find it difficult to maintain support for his reform agenda (PT Ris 2007). SBY has limited leeway for governing the country, as he has to cater for the sometimes widely differing interests of those represented in his cabinet. Many observers are concerned that SBY is not taking full advantage of his clear reform mandate and accepts too many compromises for the sake of maintaining stability in his alliance-based government (Heymans, Pollard, and Budiayati 2005).

⁵⁰ The parliament was composed of 16 parties during the 2004–2009 legislature. This was reduced to nine parties which won seats in the 2009 legislative elections, although 38 political parties competed in those elections.

This tendency has been aggravated in his second term in office. The departures of Sri Mulyani Indrawati, who led the reformer movement in SBY's cabinet, and of Vice President Boediono are seen by many as further evidence that SBY is losing power (Alford 2010; Rieffel 2010). Some interviewees also explained the stalling of the reform drive in the president's second term by noting that he has only limited personal wealth and that his party, due to its small political base, will only be able to offer him limited protection at the end of his two terms. As a consequence, he is expected to be comparatively vulnerable when he leaves office in 2014. This exposes him to pressures from wealthy elites, both old and new, who control vast parts of the political spectrum and the country's economy. Indeed, attempts were made to impeach SBY early in his second term, based on the allegation that Vice President Boediono, during his time as Central Bank governor, provided loans to a failed bank which subsequently went missing and allegedly were used to finance the president's re-election. Given the lack of evidence, the impeachment failed. Yet many believe it was the principal reason for the derailment of the originally ambitious reform programme that the president had developed for his second term (Kingsbury 2010).

While few think that SBY is personally involved in corrupt practices (van Klinken 2009), many blame the president's coalition partners for his lukewarm support over the past year for the Corruption Eradication Commission (KPK). There were several tests of SBY's commitment to the fight against corruption at the time this study was conducted. One was the nomination of two candidates for a parliamentary election to fill the vacant position of KPK commissioner. Although it is the parliament that ultimately decides on these positions, the initial nominations by the president were an important test of SBY's commitment to KPK and the fight against corruption generally. Some say that KPK has been substantially weakened since 2009. Indeed, KPK's success in prosecuting leading figures of Indonesia's elite in the past stimulated resistance by powerful interest groups and thus backfired on the organisation (van Klinken 2009). The criminalisation of two KPK chairmen in a fabricated criminal case is an example of this well-planned effort to undermine the organisation. Yet the fact that SBY chose two capable and credible candidates for the KPK chairmanship from the selection committee's list is seen as promising. One of the two, Dr Busyro Muqoddas, was elected by the parliament in November 2010 and inaugurated by the president in December 2010.

On the other hand, the surprise nomination of Gen. Timur Pradopo as head of the Indonesian National Police was controversial. A friend of SBY from his time in the peacekeeping mission in Bosnia-Herzegovina, he reportedly was chosen because of his lack of ties to any political party. But Pradopo's reputation is tainted by unanswered questions about his role in shootings of protestors in the 1990s and his apparent proximity to the violent Islamic Defenders Front (FPI).⁵¹ Similarly, the appointment of former Deputy Attorney General Basrif Arief to the position of attorney general in November 2010 was initially not seen as a sign of courage by SBY. Not many are expecting Basrif Arief, as an insider, to show great interest in reform. This appointment was further tainted by media reports of various meetings between the leader of SBY's party and Golkar in the days preceding the announcement, which many interpreted as a sign that Golkar exerted strong influence over this decision and was increasing its hold over SBY. However, recent steps taken by Basrif Arief seem to indicate that he has some commitment to reform, at least compared to other candidates that the president could have selected from within the Attorney General's Office.

In summary, the president's original anti-corruption reform drive seems to have slowed considerably. While he enjoys relatively strong support as president, public approval ratings of his administration's anti-corruption efforts have recently sunk to an all-time low.⁵² He depends on a multi-party coalition to govern the country, and the Golkar party in particular seems to have gained influence over his policy agenda at the expense of reform-oriented factions. Recent senior appointments in law enforcement have done little to enhance perceptions of the president's commitment to the fight against corruption.

⁵¹ *Reformasi Weekly Review*, 8 October 2010, <http://www.reformasi.info/>.

⁵² *Reformasi Weekly Review*, 12 November 2010, <http://www.reformasi.info/>.

8.5 Conflicts of interest

Political, economic, and social elites have become somewhat more separate in the past 12 years, and political and business space has opened to greater competition and new actors. However, some of the old Suharto-era business groups, especially those of Aburizal Bakrie and James Riady, remain prominently involved in public life. Bakrie was in the cabinet from 2004 to 2009 and has been chairman of Golkar since 2009. In May 2010 he was elected leader of the majority parliamentary coalition which Golkar forms with President SBY's party and four other parties. His rise contrasts with the resignation of the reform-oriented minister of finance Sri Mulyani Indrawati, who openly accused certain interest groups of having attempted to unduly influence her policy making. Many saw this reshuffle as a clear sign that Bakrie, and with him the old elite, maintain a strong hold over politics, although not to the extent that they once did. In addition, new economic elites have succeeded in infiltrating the political sphere. While more and different elites now seem to have access to power, business and politics are still closely interwoven.

For example, many senior public officials act in a dual role in government and business, which opens doors to corruption, conflicts of interest, and misuse of power. A prominent example is again Aburizal Bakrie, personally worth an estimated US\$2.5 billion, according to Forbes. As head of Golkar Party, a key partner in SBY's ruling coalition, he continues to have considerable influence over government policy making while also playing a prominent role in Indonesia's business sector. Many interviewees noted that he essentially controls his family's conglomerate, the Bakrie Group, which operates in many key sectors of the Indonesian economy, such as agriculture, construction, mining, shipping, trade, banking, and insurance. The SBY government is suspected of having interfered directly or indirectly with numerous investigations into corruption involving Bakrie, as well as other members of the old political and economic elite. On the other hand, a recent move authorised by SBY to bring financial malfeasance charges against a protégé of Bakrie and several ongoing investigations into Bakrie-held companies for tax fraud could signal a cautious move by SBY to impose checks on Bakrie and others. Such limited steps, however, will only succeed in permanently breaking up these tightly knit networks of interests if they are accompanied by the introduction of unambiguous regulations on conflicts of interest and fundamental reform of key law enforcement organisations, the wider judicial system, and a broad range of accountability mechanisms and institutions.

Most observers believe that the government's extensive hidden and overt connections with business are among the main reasons why corruption remains pervasive and the country's anti-corruption battle has come to a near standstill in the past 12 months. The government still largely controls the exploitation of natural resources. It owns and controls major sectors of the economy, most notably oil and gas, mining, forestry, and to a considerable degree, banking. While the military has lost most of its business assets since 1998, the government continues to run a large number of state-owned enterprises (SOEs) and administers prices on basic goods such as fuel, rice, and electricity. SOEs are managed in a comparatively opaque manner, while regulations on corruption in SOEs and other government business are insufficient. In the private sector conglomerates, many of which have risen to economic power through special treatments and privileges received under the Suharto government, continue to dominate most business sectors (Sirait 2009).

Endemic conflicts of interest also persist at lower levels of the civil service, which also suffers from inadequate incentive, award, and promotion structures that foster patronage, nepotism, and favouritism. Positions in the public service are offered for sale to the highest bidder. One public servant explained that minimum prices are attached to most positions. According to this person, a senior position in the police service costs, at a minimum, US\$1 million. These initial "investments" of course have to be paid back, with interest. Other practices involve the payment of per diems and travel fees to public servants for attending, in the conduct of their regular duties, meetings of specialist committees, commissions, or working groups (World Bank 2002). When the monthly salary of a mid-rank public official in the Ministry of Foreign Affairs is around USD 350 and participation in a 2-hour meeting can pay as much as USD 80, it becomes obvious why membership in such groups is a valuable asset and is sometimes awarded by senior public officials to members of their staff as a form

of favouritism (*ibid.*). Donors are at risk of supporting this unhealthy trend as they often call for public servants to attend meetings and provide expertise in programme planning or evaluation. While the active involvement of partner organisations is of course laudable, generous payments for transport and meeting participation is a potentially distorting incentive, and many donors do not adhere to the official rates prescribed by decree.

In summary, while some observers note that political, economic, and social elites are better separated than under the Suharto regime, the potential still exists for extensive conflicts of interest between the political and economic spheres. New and old economic elites are actively involved in politics, sometimes holding high political office while also having responsibility for major private sector enterprises. At the same time, the government continues to control important aspects of the economy and runs considerable business activities through state-owned enterprises. These practices are mirrored in the civil service, where inappropriate incentive structures create systemic conflicts of interest. These have not been eliminated by the political and civil service reforms of the past 12 years.

8.6 Political and civil service reform

Indonesia's rapid and extensive decentralisation began in 2001. It was intended to counter a growing number of secessionist movements after the fall of Suharto by correcting the previously unequal treatment of the regions and the excessive centralisation of political and financial power in Jakarta (Ahmad et al. 2002). It has resulted in shifts in power relations between the centre and the regions and between the branches of government at the regional level. Decentralisation brings the potential for stronger democratic controls, enhanced accountability, and transparency. But when it is not accompanied by other critical reforms of the political system (see section 2.2) and the civil service, it can create opportunities for corruption. This has been confirmed by several recent studies (Rinaldi, Purnomo, and Damayanti 2007; Henderson and Kuncoro 2011; Kurniawan, forthcoming). Further evidence is the increasing number of governors and bupatis investigated and charged by KPK for corrupt practices, although this could also be attributed to a change in KPK's enforcement strategy.⁵³

While civil service reform has been promised in Indonesia for the past 10 years, there has been little progress in fundamentally restructuring the highly corrupt, Jakarta-centred, and ineffective bureaucracy. Some parts of the civil service, most recently the tax department, are trying hard to reinvent themselves and do away with nepotism and patronage systems. But others adamantly resist reform. The government has not come up with a comprehensive plan to enforce reform in the civil service. Some of the barriers are legal in nature, and even enshrined in the constitution. Others are the result of rent-seeking elites trying to preserve their economic interests (see previous section). Reform, therefore, has only affected a small part of the bureaucracy.

Instead of triggering broad civil service reform, decentralisation has resulted in the multiplication of *administrative* layers. Because the sharing of responsibilities between the central and regional administrations remains unclear, decentralisation in Indonesia has led to an excessive number of new regulations and processes, sometimes contradictory, which create loopholes. These in turn increase the opportunities for rent seeking dramatically. Every step in the process of registering land is said to be prone to petty corruption, while the process of obtaining location licenses provides opportunities for corruption on a larger scale. For example, bribes are used to get locations approved even though they do not meet planning or environmental standards and regulations (ADB 2004).

In addition, decentralisation has added multiple *political* layers. An election is held in one of Indonesia's many political entities almost every day of the year. This in turn accentuates political corruption as parties and candidates are increasingly pressured for campaign funding. The 2008 General Election Law provides for greater transparency of party finances, but a recent study by

⁵³ Governors are heads of provinces, which are made up of regencies and cities. Bupatis are heads of regencies.

Freedom House (2010) has found that it is hardly enforced and that “money politics” remains widespread in Indonesian elections.

In general, Indonesians still view political parties with suspicion, believing that they reflect narrow self-interests rather than community concerns and the needs of the electorate. Indonesia’s parties lack internal democracy, transparency, and accountability and are controlled by dominant leaders (Ziegenhain 2008). In practice, local parliaments continue to lack the capacity and fiscal power to perform their roles effectively (Heymans, Pollard, and Budiwati 2005). In the absence of any significant enhancement of the capacity of civil service institutions, this has led to the levy of arbitrary and sometimes predatory taxes. This in turn has opened doors to embezzlement, extortion, and bribery, as recently showcased by a number of high-profile tax scandals.

Candidates often rely on private sector contributions to finance election campaigns; they are then obliged to reward their contributors with privileged access to public contracts, licenses, and permits. It is also reported that due to the proportional representation system combined with restrictions on eligibility of political parties, individual politicians are heavily dependent on their party’s leaders and decision-makers for obtaining the right to represent their party, and pressured by these to collect funds for elections and the party’s election war chest. Again, once in office their contributors must be rewarded. The temptation to do so through corrupt practices is great, especially when the candidates do not have a personal fortune to rely on (World Bank 2003). While electoral corruption remains widespread, voters are also becoming better informed and thus more able to scrutinise the performance of their local officials and members of parliament. Money can still buy a candidature for political office and possibly a first term in a local or national assembly, but lack of performance is increasingly punished by voters. This is illustrated by the high turnover rate in both the 2004 and the 2009 legislative elections (Sulaiman 2009; Sherlock 2004). Not recognizing even the names of their local members, who mostly come from Jakarta and have never lived in their constituencies, voters are said to have used their democratic powers and replaced more than 70 percent of the national parliament (Sulaiman 2009). This may be seen as a sign of enhanced maturity on the part of Indonesian voters, but it also presents a considerable challenge for the parliament, as most members are inexperienced and will need time to learn about their roles and duties. In addition, it bears the risk of actually increasing the level of corruption as members will potentially only have one term to “milk the cow”.

As one former member of parliament has confirmed, the race for seats in the so-called “wet” commissions, that is, commissions with (illegal) rent-seeking potential, remains as intense as ever.

In summary, essential political and civil service reforms have not kept up with the speed of Indonesia’s decentralisation. Put another way, decentralisation has happened too fast in comparison with the slow pace of political and civil service reforms. As a result, the multiplication of layers in the administration and political structures of the country without adequate accountability mechanisms and controls has created opportunities for abuse of power. Elections are still heavily influenced by money, and abuse of authority and corruption in parliament remain common. At the same time, greater awareness and access to information for voters has increased the pressure on politicians to perform, though this has not yet filtered down to the local levels. If this public pressure is maintained and further utilised by the media and advocacy groups and if it is coupled with capacity development in the parliament, we may expect improvements in the functioning of the legislature.

8.7 The role of civil society

Indonesia has a vibrant civil society and a vocal media. A number of well-known civil society organisations are dedicated to fighting corruption, with others complementing this work by focusing on budget monitoring, judicial monitoring, human rights, and related topics. Civil society and the broad public have been successfully mobilised in recent months in a protest against efforts by powerful interest groups to weaken and discredit the KPK. Social media such as Twitter and Facebook have played an important role in this context and are increasingly used in Indonesia to voice concerns and bring pressure on government. Yet most of the influential civil society organisations (CSOs) are

based in Jakarta and work primarily in the capital. CSOs beyond the capital are not well connected, and only loose nationwide networks exist. Capacity is limited and programmes are largely dependent on foreign funding. As a consequence, activities are often sporadic, short-term, and influenced by donor agendas. NGOs in the regions depend for their funding on the Jakarta-based organisations.

In addition, some observers note that the fight against corruption remains thus far mainly a concern for middle-class Indonesians, mostly in Jakarta and the other large cities. While social transformation and education has progressed faster in the past 12 years than in other comparable countries, leading to a breakdown of the quasi-feudalistic structures which prevailed under Suharto, much of Indonesian society is still very paternalistic. There is still much to be done to educate people and convince them that corruption is an abuse that can be corrected rather than an inherent component of Indonesian culture. Many Indonesians continue to say that the anti-corruption agenda is driven by foreign pressure. Finally, Indonesians are divided in their view of the ideal state, with some favouring a lean, efficient, “modern” state, while others prefer a large and inclusive apparatus providing prosperity to all. Again, the division seems to fall largely along class lines (van Klinken 2009).

The print media, radio, and television all provide detailed and regular reporting on corruption cases, and the Indonesian Press Council is outspoken on the subject. As a result, the media is relatively effective in its role as an independent watchdog. On the other hand, journalists in Indonesia agree that much more could be done to use the public media to foster awareness of corruption and instil a culture of anti-corruption and integrity. In some cases, ownership interests of certain media have blocked comprehensive and independent reporting on corruption investigations.

Intimidation, violence, and legal action against journalists and other private individuals also continue to occur and are a threat to the role of the media in the fight against corruption. As Human Rights Watch (2010) reports, a controversial article in the Penal Code on defamation has been used regularly in recent years to justify legal action against individuals who engage in critical analysis. Under pressure from interest groups, the courts have used a broad and discretionary interpretation of the applicable charges of “intentionally harming someone’s honour or reputation” and “insulting” an authority or public body. Such a stance undermines opportunities for transparent reporting about corruption. However, this situation may be slowly improving, as the judiciary has started deciding defamation cases using the Press Act (Undang-Undang Pers) instead of the Penal Code. The establishment of the Public Information Commission (Komisi Informasi Publik), as mandated by the recently enacted Access to Information Act, creates further opportunities for strengthening media freedom in Indonesia.

In summary, an active civil society, a relatively free press, and a well-informed middle class in Jakarta have exerted increasing social pressure on the government to take effective measures against corruption. However, especially in rural Indonesia, remnants of feudalism and traditional paternalistic structures, while important for social stability, continue to undermine anti-corruption efforts.

8.8 Reform needs

As we have seen, elite capture and competitive rent seeking based on strong informal networks leads to weak leadership and extensive conflicts of interest in formal government power structures and the bureaucracy. This in turn results in resistance to reform and in particular to anti-corruption measures. A vibrant civil society and comparatively free media have the potential to break through some of the reform barriers. This dynamic continues to be primarily centred in Jakarta, however, while in rural Indonesia a traditional paternalistic society is less favourable to anti-corruption reform.

It is clear that a purely technical approach, based on legislation and institutional restructuring, will not be sufficient, as shown by the limited success of past reform endeavours. Reform efforts, while strengthening formal structures, must also take into account the political, economic, and social realities that can hinder or block these measures. Rather than pursuing a predefined reform programme, reformers need to adjust their strategies to specific political and economic contexts, without of course

being unduly influenced by them. Reform programmes also need to be understood not as isolated actions but as part of a comprehensive set of changes, in which success in one area both depends on and affects changes in other areas.

The following section analyses to what extent UNCAC review and implementation in Indonesia has responded to these challenges and succeeded in fostering a more comprehensive, dynamic, and responsive approach to anti-corruption reform.

8.9 UNCAC in Indonesia

8.9.1 Self-assessment checklist and pilot review mechanism

The findings of the self-assessment checklist offer few additional insights into how to overcome obstacles to the fight against corruption in Indonesia. Indeed, the checklist findings seem to imply that UNCAC provisions have been fully met. This probably has to do with the kinds of questions asked in the checklist, which focus on achievements rather than gaps. For instance, the answer to the question about Article 6.2, regarding the independent status of the country's anti-corruption institutions and their resources and trained staff, fails to acknowledge the threats and constraints under which KPK operates. Similarly, answers regarding Article 25 on the obstruction of justice fail to acknowledge the growing number of reports of intimidation and bribery in relation to court proceedings, particularly although not exclusively in corruption cases.

The report from the pilot review mechanism is more detailed. It does, for example, point to the need to maintain KPK's independence from presidential authorisation in order to investigate and prosecute corruption. However, it does not mention the attempts to weaken KPK through the false investigations of two KPK commissioners, noted above. It also does not assess the impact on future KPK effectiveness and independence of the restructuring of the anti-corruption courts, even though many observers see these courts as key to the past success of KPK (Bolongaita 2010).

The report from the pilot review mechanism addresses the political economy of anti-corruption reform only implicitly, rather than explicitly. For example, it highlights the need for Indonesia's new anti-corruption strategy to strengthen national leadership and to allow civil society and the media to participate in monitoring the strategy's implementation with a view to enhancing accountability and allowing direct public participation. However, no explicit reference is made in this context to the weakened leadership by President SBY or to the key role of civil society in a country largely captured by its elite. The report further acknowledges the country's efforts to establish a national anti-corruption strategy under Article 5 (preventive anti-corruption policies) and highlights a certain number of its measures (see section 4.4 for more information on the new strategy). It may be implied that some of these measures (such as those on integrity of the judiciary, or integrity of public sector recruitment and promotion practices) have the potential to help overcome political hurdles to anti-corruption reform. But there is no explicit analysis of this in the report, which makes only technical recommendations. Similarly, the pilot review report implicitly addresses the refusal by some government agencies to implement anti-corruption reform measures as mandated by the national anti-corruption strategy. But there is no analysis of the reasons for such blatant rejection of executive orders. Finally, even such limited references appear only in the report's section on preventive measures and are completely absent from other sections of the report. A similar (even if tacit) analysis is not provided for other critical issues, as illustrated in the previous section in relation to Article 25 (obstruction of justice) and others.

8.9.2 Impact of UNCAC review mechanisms on the political economy of corruption

The self-assessment checklist, therefore, has not provided a comprehensive analysis of the environment for anti-corruption efforts. Its focus on achievements rather than gaps and, moreover, has made a relatively superficial assessment only of practical implementation and enforcement of laws, policies, and procedures. The checklist seems to reduce rather than enhance the potential of UNCAC

to promote effective action to confront the political and economic realities of corruption in its signatory states.

Despite the relevance of many identified gaps for overcoming the political realities of corruption, as highlighted in the previous section, the *gap analysis* rarely makes explicit connections between UNCAC provisions and political economy constraints. In the rare instances in which this connection is made, the proposed remedies are limited to technical measures. For example, the report recognises that in countries like Indonesia with an established patronage culture, UNCAC provisions on trading in influence (Article 18) and abuse of public function (Article 19) are highly relevant. However, the proposed remedies focus exclusively on amending domestic legislation, seemingly suggesting that patronage structures in Indonesia are primarily caused by lack of appropriate legislation rather than by historic, pervasive, and endemic political, economic, and social dynamics. Thus the potential of these provisions to address key underlying issues is not addressed.

Nor does the report from the *pilot review mechanism* go much further in this direction. In theory, like the gap analysis, the review mechanism offers the opportunity to address political economy barriers to anti-corruption reform, given the narrative nature of its report and the option for on-site consultation. The blueprint for the peer review reports developed by the CoSP, in its section IV.C on the implementation of selected articles, invites a discussion of challenges to successful practical implementation of the Convention. However, no specific guidance is provided about the extent or nature of this discussion. Therefore the decision to use this opportunity to address the underlying political, economic, and social dynamics of a country is largely at the discretion of the reviewers. This in turn is influenced by the relationships between reviewing and reviewed countries, the capacity of the individual reviewers, and the political dynamics in the CoSP.

8.9.3 Reform efforts and UNCAC-induced processes

In summary, all three review reports acknowledge a number of important areas for reform, such as reform of electoral and political party financing; strengthening integrity in the public service by modernizing recruitment, promotion, and reward systems; strengthening public sector oversight and accountability; and preserving the separation and appropriate balance of powers. But other issues are inadequately addressed or completely neglected. On a technical level these include, notably, the need to fundamentally reform the judiciary with a view to establishing its independence and strengthening the rule of law, as well as a broad range of essential measures to disentangle the closely knitted network of politics and business. Establishing and enforcing strong conflict of interest regulations and strengthening the quality and transparency of public financial management and public procurement are among the most urgent measures that receive little or no mention in the review reports.

Most of those interviewed were not surprised by these findings, emphasising that these are among the most complex reform endeavours. They have far-reaching consequences across all of the country's political, economic, and social structures and potentially affect the vested interests of key actors. Interviewees noted that progress in these areas, particularly on the conflict of interest issue and on recruitment and promotion practices, would severely reduce the elite's ability to secure benefits for their clients and thus undermine their primary means of securing themselves in power. Many of those in a position to drive such reforms are precisely those with vested interests in hindering them.

The failure of all three review instruments (gap analysis, self-assessment, and pilot review mechanism) to adequately address the complex country contexts of anti-corruption reform suggests that the Convention, on its own, is unable to trigger the type of reform programmes that would be required to overcome entrenched barriers to the fight against corruption. While translating the requirements of UNCAC into the domestic legal and institutional anti-corruption framework remains very important, more fundamental changes in the socio-political and politico-economic environment will need to occur for any of these measures to have sustainable impact.

The initiators of the first gap analysis recognised this point. Amien Sunaryadi, then vice chairman and commissioner of KPK, stated that the gap analysis was conducted in an “effort to improve the socio-political environment in Indonesia” (Sunaryadi 2007). KPK also understood that the capacity of an UNCAC compliance review process to contribute to a fundamental political, economic, and social change depends to a great extent on the nature of the review process. We agree that the type of process chosen to implement the mostly technical recommendations of the UNCAC review instruments will determine the impact of UNCAC implementation on the underlying political economy, which continues to block fundamental anti-corruption and governance reform in the country.

Indonesia is a particularly interesting case, since not only was it the first country to design a comparatively participatory review process (gap analysis), but it is now in the process of embedding the results from UNCAC reviews more firmly into the country’s new anti-corruption strategy. Of the three review mechanisms, the gap analysis has had the most lasting impact on Indonesia’s anti-corruption reform agenda; this is so despite its shortcomings, which resembled those of the self-assessment checklist and the pilot review process. The findings from the gap analysis were used as the basic source of information for drafting Stranas-PK, the new 2010–2025 anti-corruption strategy. As a consequence, Stranas-PK represents a relatively comprehensive programme of action when evaluated against the provisions of UNCAC. Notably, it identifies a series of broad issues to be addressed under each of the Convention’s five chapters, broken down into actions to be taken in different parts of the bureaucracy. Stranas-PK specifies output and result indicators for each action item, provides for an implementation time frame, and assigns implementation responsibilities. In addition, it would seem that Stranas-PK has learnt from its predecessor Ran-PK in a number of respects. Notably, while the process of drafting Ran-PK was criticised for lacking civil society involvement (Schütte 2007), Stranas-PK has benefited from relatively broad consultation with concerned stakeholders.

However, many of the action items and performance indicators remain relatively vague, and some responsibilities are not clearly defined; this was acknowledged by the vice president in a cabinet meeting in late 2010, according to an interviewee. Some analysts believe that a shorter, more targeted programme would have brought about more concrete results. In addition, there is great uncertainty about the principal ownership of the strategy, including the responsibility for chairing the multi-stakeholder implementing committee and hosting the secretariat that reports to this committee. In addition, the National Development Planning Agency (Bappenas), which coordinated the strategy’s drafting, is relatively weak and has no powers to enforce the strategy’s implementation by other agencies.

To remedy these weaknesses, the vice president, in the cabinet meeting, directed the Presidential Work Unit for Development Monitoring and Control (UKP4) to refine the strategy. UKP4 is assisted in this by KPK and Kemitraan, a well-known Indonesian not-for-profit think tank. The assignment of this task to UKP4 is a positive sign, as the progressive and reform-oriented head of UKP4, Kuntoro Mangkusubroto, is said to have the full support of President SBY. It will be interesting to see how this revision affects the strategy’s implementation coordination and monitoring mechanism. Assigning the coordination of implementation to a multi-stakeholder committee holds the greatest potential for creating a coalition of like-minded partners from the political, economic, and social spheres that could bring about a fundamental shift in attitude and, consequently, in reform practice. Although this body so far exists only on paper, the process initiated by the vice president is a step in the right direction.

In summary, it is too early still to pass judgment on the power of Stranas-PK to trigger reform beyond what is strictly necessary to comply legally with UNCAC. The failure of the previous strategy showed that a plan is only as good as its implementation and monitoring. In that sense, the Stranas-PK is not unlike the UNCAC review processes, which, as noted earlier, depend to a great extent on the processes that countries use to apply them domestically. However, the UNCAC review instruments themselves are vague. Indeed they do little to fulfil the intention of the Convention’s Article 5, namely to foster the broad political, economic, and social processes that are required for fundamental reform. Rather, the review instruments’ highly prescriptive and legalistic nature, their tight time constraints, and the fragmented way in which the Convention will be reviewed under the official process weaken the potential of Stranas-PK to bring about this reform.

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9. Kenya

A Political Economy Analysis of UNCAC Implementation in Kenya

By Lucy Koechlin

9.1 Introduction

Over the past decade, Kenya has been seriously troubled by corruption. Under the current president, Mwai Kibaki, some spectacular grand corruption schemes have been uncovered. Several high-ranking ministers have been implicated in these schemes, tainting the anti-corruption pledge that the incumbent president featured so prominently before taking office. Corruption was also a significant background component of the conflict following the December 2007 election, which was triggered by the seriously compromised role of the Electoral Commission of Kenya in announcing the results. Petty corruption has not abated either. Although it declined sharply after the 2002 elections, it has re-emerged as a routine feature of daily interactions with public officials at a level exceeding that of neighbouring Tanzania and Uganda, according to Transparency International's *East African Bribery Index 2010* (TIK 2010).

Country	Bribery Incidence (%)	Rank
Kenya	45	1
Uganda	35	2
Tanzania	17	3

Source: *East African Bribery Index* (TIK 2010, 10).

According to Transparency International's Corruption Perceptions Index, Kenya scored 2.1 in 2010 (ranking 154 out of 178), which is only marginally better than its score of 1.9 in 2003, just after the Moi era. A 2009 evaluation by Global Integrity shows a substantial gap between Kenya's relatively sound legal framework (62 out of 100) and its implementation (45 out of 100), as outlined in Chapter 8. The following sections explore the political economy of Kenya by sketching power relations and patterns of corruption from a historical as well as a sectoral perspective. These are followed by a discussion of the strengths and weaknesses of the UNCAC implementation process.

9.2 Key findings of political economy analyses in Kenya

9.2.1 Politics in Kenya

Until recently, Kenya was commonly viewed as a beacon of prosperity and stability in Africa. Since independence in 1963, there have only been three presidents, two of whom represented the Kenya African National Unity (KANU). Jomo Kenyatta was president from independence to his death in 1978, followed by Daniel arap Moi, who continued to rule under a single-party constitution. In 1992 the first Kenyan multi-party elections were held; Moi won then and again in 1997. Moi was banned from running a third time in 2002, and Mwai Kibaki won the 2002 elections with a coalition of opposition forces, the National Rainbow Coalition (NARC), in what was seen as the first relatively free and fair democratic elections. These elections seemed to herald a new, democratic future for Kenya. However, in the wake of the violence that followed the December 2007 election, fundamental

problems haunting Kenya came into sharper focus (see section 1.5). In May 2008, a power-sharing agreement between the incumbent president and the leader of the opposition Orange Democratic Movement Party (ODM), Raila Odinga, was brokered with the help of Kofi Annan. At present, it seems that politics in Kenya is characterised by remarkable stability on the one hand and an explosive mixture of grievances and unresolved conflicts on the other hand.

According to the African Peer Review Mechanism Country Report of May 2006, some of the most serious challenges facing Kenyan politics include the management of ethnic diversity in nation building, gaps in implementation of government policies, constitutional reform, consensus building, and transformative leadership (APRM 2006, 23). The potential for collapse was disastrously demonstrated in the violent conflicts that erupted in the weeks following the 27 December 2007 election.⁵⁴

At the heart of the problem is the patronage politics characterising Kenya since independence. Political parties and party politics are organised around personalities and patronage, predominantly along politicised ethnic and regional lines, rather than around policy differences. According to the DFID Drivers of Change analysis:

The first two Presidents of Kenya developed and presided over a patrimonial state. In this system the structures of a modern nation state (executive, legislature and judiciary) existed only in the formal sense, and power was heavily concentrated in the hands of the head of state. Power operated through a web of informal, clientelistic networks based on personal ties between leaders and supporters at all levels of the political hierarchy. These informal networks permeated public institutions and subverted formal rules and decision making. They undermined systems of public accountability and created conditions where corruption and rent-seeking behaviour could flourish. [...] Under the NARC government the media have been quick to point to the influence of a supposed 'Mount Kenya Mafia', a cabal of powerful individuals close to President Kibaki. (Ng'ethe, Katumanga, and Williams 2004, 18)

Instead of transforming the factional and highly corrupt politics of Daniel arap Moi into a rule-based, inclusive political system, the NARC government consolidated these politics in favour of its own clients.⁵⁵ Compounding the problems of vertical inclusion and exclusion through patronage networks is the generation of personal profit as a main activity of parliamentarians. Kenyan members of parliament (MPs) are among the highest paid MPs worldwide. In addition to their salaries they receive both legally approved benefits, such as allowances, and illicit material gains through lucrative rent-seeking activities.

The situation has not improved significantly since the power-sharing agreement with Raila Odinga was reached in May 2008. On the one hand, this unlikely arrangement has succeeded in maintaining peace and has also weakened the President Kibaki's clientelistic networks, as the agreement has allowed Raila Odinga and his allies to tap into state resources. However, some analysts say that the arrangement has merely led to a slightly broader patronage network that now includes the ODM. It is an opportunistic alliance which by its very nature is incapable of addressing urgent reforms and making issue-based decisions. "Even though it was able to end the violence, which killed at least 1,300 people and displaced 300,000 others, the coalition government has done little since then to bring those accused of corruption to justice. The government has failed to push forward with political reforms or ease worsening economic hardships suffered by Kenya's citizens," according to Global Integrity's Reporter's Notebook of 2009 (Otieno 2009).⁵⁶

⁵⁴ See the Waki Report (GOK 2008) for ample evidence documenting the causes and extent of the post-election violence.

⁵⁵ Under Moi, according to Norad, "state predation led to the level of corruption reaching new heights" (Norad 2009: 8).

⁵⁶ For similar statements see also Norad (2009).

9.2.2 Centralisation of the executive

The three presidents who have ruled since independence have all shored up their power base with redistributive, patrimonial politics, each in his own way. As a result, the Kenyan institutional framework is highly politicised and deeply corrupt. This is particularly pertinent for the administration. Although Kenyatta used the bureaucracy to satisfy the demands of voters and others, it still maintained a certain degree of independence. Under Moi, it was reorganised, down to the local level, in such a way to maximise the influence of the incumbent government. Responsibilities, resources, and funding bases were reshuffled, and districts were subdivided to create and maintain an opaque system of allies. Further strategies included the deliberate weakening of key horizontal accountability institutions, such as the auditor general, and the parallel expansion of presidential powers to increase and secure control over state resources by the political elite around Moi.

Two factors have compounded these trends. First, the introduction of multi-party democracy paradoxically raised the political stakes by decreasing the security of tenure. This became an incentive for maximising short-term rent seeking for personal profit, rather than enabling long-term perspectives in the public interest. Second, there was a marked increase in intimidation and violence—intimidation to “comply” with “favours” to solidify patronage networks, and violence to ensure the “right” voting behaviour by citizens (Norad 2009, 8; GOK 2008, 21–28). The Waki Report concluded that “the growing power and personalisation of power around the Presidency” has led to politicised ethnicity as a means to access and secure state resources and goods, in part by deliberately fostering feelings of historical marginalisation and exclusion (GOK 2008, 23).

This trend towards ethnic polarisation, feelings of revenge and hate, and politicised patronage networks was not reversed under the Kibaki government. Although the new government vowed to fight corruption as one of its prime election pledges, grand corruption in Kenya remained inextricably tied up with political party financing. In 2002 a new institution was created, the Anti-Corruption Bureau in the President’s Office; this was followed by creation of the Kenya Anti-Corruption Commission in 2003 by an act of parliament. Both entities were intended to underscore the high-level priority accorded the government’s anti-corruption policies. In January 2003, a highly respected anti-corruption activist, John Githongo, was appointed permanent secretary for governance and ethics. His appointment was greeted with great hopes, and he had real powers. However, by early 2005 Githongo had gone into exile, and the position had become all but defunct.⁵⁷ This disappointing result demonstrates the extent to which the executive had succeeded in capturing the very institutions designed to guard the integrity of the state.

The power-sharing arrangement now in place has not addressed these problems. It is based on a fragile coalition and fragile peace. Despite some increase in accountability as a result of the power-sharing agreement, there is also extensive complicity between the different factions in the coalition government. At present, both parties seem to fear democratic reforms and to be willing to maintain the status quo in order to maintain their access to power.

⁵⁷ John Githongo, the permanent secretary for governance and ethics from 2003 to 2005, was a widely respected anti-corruption expert rooted in civil society who was recruited by Kibaki himself. This appointment of a man with an impressive track record and demonstrated integrity stirred hopes of real change. However, Githongo’s struggles to pursue his mandate within the Kenyan establishment revealed a dense network of lies, conspiracies, and threats, leading eventually to his ouster. For a detailed account see Wrong (2007). After Githongo returned to Kenya in 2008, he worked with political reform advocacy groups for Kenya (see <http://www.inukakenya.com/>) and for East Africa (<http://www.twaweza.org/>). In January 2011 he launched a national campaign against impunity, corruption, and injustice in Kenya, called Kenya Ni Yetu (Kenya Belongs to Us).

9.3 The justice system

The politicisation of Kenya's institutional framework is also evident in the legal and judicial system. Although both are well developed and advanced, especially in comparison to other countries in the region, the implementation of laws is vulnerable to political abuse, with the law commonly being used as an instrument of politics. In recent decades, independent appointment procedures have been dismantled. Appointments of judges are made according to interests and allegiances rather than expertise and merits, the buying of judges and verdicts is commonplace, and intimidation and harassment of legal parties is frequent. The resulting abuses of the rule of law have thoroughly discredited the justice system. There is a general sense of impunity prevailing with regard to cabinet ministers and senior officials, underscored in a variety of (surprisingly candid) official reports, such as the APRM country review (APRM 2006) and the N'dungu Report on land issues (GOK 2004). The recommendations of these reports address the biases and failures of implementation of the legal framework. Tellingly, however, there has been no consistent follow-up.

The effects of these political appropriation processes are the institutionalisation of factional, often personal interests; entrenched injustice and cynicism; and exclusion of the majority of citizens from political decision making and basic public goods. Perhaps the most damaging legacy is the culture of impunity which has allowed increasingly shameless looting of public resources, leaving scars in the hearts and minds of Kenyans.

9.3.1 Constitutional issues

On 27 August 2010, President Mwai Kibaki signed into law a new constitution, thus closing a highly contentious debate over more than two decades about fundamentally inequitable principles dating back to colonial times. The constitutional reform process—initiated just before the Kibaki government came to power, but carried forward with Kibaki's election pledges—engendered great hopes. However, for years the reform process did not serve to foster an integrative, consensual national dialogue. On the contrary, it revealed the deep social and political dividing lines of Kenyan society, culminating in the 2007 post-election violence.

Yet the fact that the constitutional referendum, held in late summer 2010 and supported by the coalition government, won an overwhelming majority vote without triggering any notable unrest was a promising sign. The new constitution will introduce a more equitable and decentralised political system, including limitations on the president's powers and the replacement of provincial and local governments, which are generally regarded as highly corrupt. It will also address matters of impunity, especially with regard to the serious and long-standing grievances around land issues. Another area of importance is the reform of the judiciary, including the Supreme Court, and provisions for identifying and removing corrupt judges.

Since the constitution is so new, the extent and effects of its implementation are still unclear. There is some question whether the constitutional reform will be backed up by the political will to implement it and to foster a more inclusive, reconciliatory process of healing the nation, which is deeply scarred by the institutionalised inequities of the past decades. At the time of writing (December 2010), parliament is still in session but has been unable to agree on a Constitution Implementation Committee (CIC).⁵⁸ There are several worrisome prospects. Some fear that the coalition government may engage in horse trading and subvert truly meritocratic, independent appointments.⁵⁹ Others raise the concern that the next elections may trigger renewed violence.

⁵⁸ See, for instance, Mutua and Ochami (2010).

⁵⁹ See, for instance, Waruru (2010).

9.3.2 Electoral processes and violence

The transition from the single-party rule of the Moi era to the rainbow government of Kibaki in 2002 was seen as a powerful symbol of democratisation.

The multi-ethnic coalition led by Kibaki was campaigning on a promise of zero-tolerance on corruption, and its victory, after elections that were deemed free, fair and peaceful, brought unprecedented hope and optimism to Kenya. In the days after the swearing in of Kibaki, passengers of the capital's matatu minibuses physically rebuffed policemen who tried to continue the routine collection of bribes from the matatu drivers for real or imaginary offences. This was a spontaneous demonstration of the power of accountability from below, when there is a sense of a common purpose and confidence that action will receive support, whether from the citizenry, the authorities or both. (Norad 2009, 9)

These hopes were soon shattered, as an opaque political system and politicisation along ethnic lines remained key features of Kenyan politics. Elections served to catalyse the increasingly sharp tensions between these vertical networks. Elections have become increasingly marked by the instrumentalisation of political violence, especially the targeted use of militias. As many experts have noted, in Kenya there is "a tradition of political violence, be it State-sponsored or private, which climaxes during elections, especially since the inception of the multiparty elections in 1991" (Lafargue and Katumanga 2008, 11). As early as 1991, there were high levels of violence which, tellingly, were left unpunished. The violence after the 2007 elections, therefore, should not be seen as an unexpected outbreak of irrational ethnic conflict, but rather as the result of decades of political violence and politicisation of ethnic identities. The violence was triggered by election rigging and false statements by the Electoral Commission of Kenya, acting as an instrument of the Kibaki government.

This showed the dominance of corruption and state capture, making it impossible for the state to act as a neutral arbiter and mediator of contentious issues. The post-electoral violence is an indicator that the government has lost legitimacy as a result of abusing its authority. The Waki Report, investigating "why violence has become a way of life in Kenya," concluded that "over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence. [Violence] now is largely outside of the control of the State and its security agents" (GOK 2008, 22). Thus a perverse effect of the instrumentalisation of public institutions by the executive has been the fragmentation and escalation of such violence. The rise of militias and youth gangs, with connections to politicians and members of the security forces, has "created a climate where violence is increasingly likely to be used and where its use is increasingly unlikely to be checked" (GOK 2008, 23).

9.4 Civil society

Despite these characteristics of Kenyan politics, the country also boasts a strong civil society, a flourishing urban middle class, a comparatively large and robust private sector, remarkably free and outspoken media, and a plethora of non-governmental and community-based organisations. Civil society in Kenya is organised around both issues and rights, with a keen sense of civic participation. In some respects, it has been a model distinct from other African countries.

However, in the light of the post-election violence, it is also essential to examine the limitations of the Kenyan model. First, although there are indeed many CSOs engaged in political dialogue and debate on a wide range of issues, serious questions have been raised about the representativeness, integrity, and interests of many of these organisations. Divisions associated with the elections have carried over into many civil society organisations, which "had in many cases become highly politicised in the months leading up to the elections" (Amis et al. 2008, 40). This raises questions about the image and self-perception of CSOs as defenders of civic values and mediators of societal interests. The same applies to the Kenyan middle class. Rather than acting as a merit-based and professional constituency

that could serve as a democratic buffer in the elections, significant sections of the middle class joined in the politicisation of ethnic and regional identities (Amis et al. 2008, 39).⁶⁰

9.5 Reform areas relevant to corruption emerging from PEA

Analysts agree that the official institutional, regulatory, and legal framework of Kenya is solid. The formal rules are in place, and they are reasonably coherent and encompassing. In addition, with the approval of the new constitution, some of the most serious remaining inequities and grievances have been addressed. However, there is still a serious implementation gap. In other words, the values, attitudes, and norms governing the actual practices of government officials and institutions are rarely in accordance with the letter or spirit of the formal framework. Although it was the post-election violence that made this impossible to hide, it was already blatantly obvious to those who cared to pay attention. For more than a decade, public debates in Kenya, as well as reports by governmental, non-governmental, or inter-governmental inquiries, documented the fundamental problems of (a) an increasingly centralised and politicised state, (b) abuse of the rule of law in the interest of elites, (c) proliferation of violence and intimidation, (d) channelling of political decision making along ethnic lines, (e) an entrenched culture of impunity, and (f) the concomitant disenfranchisement of citizens.⁶¹

A recent PEA analysis concludes:

Although Kenya can boast the strongest and most self-sufficient economy and the best educated population in the region, the political analysis [...] provides an admittedly bleak rendition of the state of Kenya and its system of government and governance. The very strengths of the Kenyan society point to some of the gaps in much of the development theories around governance and international assistance. Not least, it points to the limitation of traditional capacity building programmes. Taking the example of anti-corruption, conventional development partner analysis suggest that there are at least four factors that are present in states with good governance:

- A strong and vibrant civil society;
- Strong and independent media;
- A sizeable and influential middle class; and
- Competitive politics where no party dominates over the long term.

The puzzle with Kenya is that in the Eastern Africa region, she is by far the strongest in all these four dimensions, yet Kenya is consistently ranked as the most corrupt country in the region. Although corruption was considered by some to be just a particularly weak dimension of an otherwise strong state, recent events have highlighted that the high level of corruption in Kenya may be only one dimension of systemically poor governance. (Norad 2009, 13)

The “puzzle” is explained by recognising that Kenya’s power relations are systematically skewed in favour of particularistic patronage networks, most often based in the executive branch. Hence, the recommendations emerging from PEA analyses of Kenya consistently highlight the importance of transforming state-society relationships. Although the reform and strengthening of the legal and institutional framework is an important component of such efforts, it is not sufficient. In the case of Kenya, political elites have systematically and often violently undermined reforms.

⁶⁰ For detailed discussion of civil society in contemporary Kenya and its potential to contribute to democratic change, see Wanyande and Okebe (2009).

⁶¹ For documentation and analyses, see, for instance, Africa Watch (1992), the Akiwumi Report (GOK 1999), Anderson (2002), the Ndungu Report (GOK 2004), Southall (2005), APRM (2006), and, most recently, the Waki Report (GOK 2008) and IFRA (2008).

Two processes now underway will test whether this pattern can be changed. These are the implementation of the constitutional reform and the run-up to the elections scheduled for 2012. Both have the potential either to build trust, political legitimacy, and national reconciliation or to reignite violence and conflict. Given recent history, it is worrying that both depend on the political agendas of powerful individuals and factions. The political will of the two ruling parties, as well as of the government as a whole, to address impunity of politicians and senior officials—a litmus test of political integrity—has not yet been demonstrated. On the contrary, there is still much evidence that they are deeply involved in factional manoeuvres to secure allies and eliminate opponents rather than cooperating for national unity.⁶² Under these circumstances, reforms such as the strengthening of local government and a more effective and independent justice system are seriously jeopardised.

9.6 Key findings of the UNCAC gap analysis in light of the political economy analyses

9.6.1 Background

Kenya's history of compliance needs to be reviewed in the light of the political developments of the past decade. Kenya was the first country to ratify UNCAC, in 2003⁶³—an important signal by the new government that President Kibaki intended to honour his anti-corruption pledge. Within a very short time, a substantial body of new laws and institutions was introduced to comply with UNCAC. This legislation included the Anti-Corruption and Economic Crimes Act, 2003; the Public Officer Ethics Act, 2003; the Public Audit Act, 2003; the Government Financial Management Act, 2004; the Privatisation Act, 2006; the Public Procurement and Disposal Act, 2005; the Witness Protection Act, 2005; and the Fiscal Management Act, 2009. The most important new institution established was the Kenya Anti-Corruption Commission (KACC), endowed with preventative and investigative powers but no prosecuting powers. The National Anti-Corruption Campaign Steering Committee (NACCSC), the Public Procurement Oversight Authority (PPOA), and the Public Complaints Standing Committee (PCSC, or Ombudsman) were also established. Although Kenya still has no official anti-corruption policy, it adopted a National Anti-Corruption Plan in July 2006. Thus, Kenya's formal compliance with the international anti-corruption agenda was amply demonstrated.

In 2004, frustration with the weak enforcement functions of KACC led the then director to suggest a systematic assessment of Kenya's compliance with UNCAC. A structured analysis was initiated at the first Conference of States Parties to UNCAC in Jordan in December 2006. Inspired by the Indonesian gap analysis,⁶⁴ a multi-stakeholder process was established with facilitation by German Technical Cooperation (GTZ). The Oversight Commission was made up of the Ministry of Justice (MoJ), the KACC, GTZ, and later the Ministry of Foreign Affairs. The mandate of the KACC was to lead on technical aspects. The MoJ represented the government of Kenya and, as agreed during the process, was to be responsible for the implementation of actions to address identified gaps (for further details see Schultz 2010). The multi-stakeholder process featured some quite exceptional characteristics. It was not simply a technical exercise conducted by national or international experts, but a relatively

⁶² One example is the case of two ministers who were suspended by Prime Minister Odinga in February 2010 on grounds of corruption. Agriculture Minister William Ruto was implicated in a scandal involving US\$26 million that went missing in a deal over maize. Education Minister Sam Ongeru was implicated in the disappearance of US\$1 million earmarked for schools. The suspensions were overturned within hours by President Kibaki. Ruto, a former ally of Odinga, is allegedly on a list of 10 names of perpetrators of violence during the 2007 elections, which was handed over to the International Court of Justice by Kofi Annan as part of the post-election peace deal.

⁶³ Kenya was the first country to ratify UNCAC, although it had not been part of the negotiation process, which took place while Moi was in office.

⁶⁴ Later, there was intense cooperation with Bangladesh on exchanging experiences. In this sense, the gap analysis is an interesting example of South-South cooperation.

inclusive, process-oriented approach to the compliance review. One significant innovation was to include an additional column for enforcement gaps in the matrix, rather than only columns on UNCAC standards and on Kenyan laws and policies. This change made possible a more complete picture of compliance and the required reform process. The process also increased the competence and awareness of the governmental and non-governmental stakeholders involved, fostered trust and dialogue, and created some momentum to address issues, reservations, and needs around anti-corruption measures.

9.6.2 UNCAC Gap Analysis Report and Implementation Plan 2009

The Kenyan government's UNCAC gap analysis report cites as achievements the introduction of anti-corruption legislation, institutions, and administrative measures noted above (GOK 2009). These have undoubtedly contributed to strengthening the Kenyan integrity framework. However, the consolidation of power by self-serving groups within the government, entrenched rent seeking, and servicing of patronage networks has made these official reforms largely ineffective. The extent of achievements, therefore, should not be overstated. Indeed, it seems that their primary effects, for a limited time only, were to appease international donors and deflect domestic critique.

The major weaknesses and gaps identified echo the previous analysis of the political economy of Kenya. These weaknesses include:

- Lack of regular or systematic review of legislative and administrative anti-corruption mechanisms (GOK 2009, Chapter 2, Article 7)
- No system for structured collaboration and coordination of anti-corruption agencies involved in investigation, prosecution, adjudication, and training (Chapter 2, Article 7; Chapter 3, Article 38)
- A weak Political Parties Act, which does not bar candidates or members accused of corruption from office, regulate their declaration of income, or regulate activities of special interest groups (Chapter 1, Article 7)
- “Non-action” by parliamentary committees charged with oversight (Chapter 2, Article 8)
- Incoherent, insufficient, and compromised independence in prosecution and adjudication of corruption cases (Chapter 2, Article 11; Chapter 3, Article 42)
- No freedom of information act (Chapter 2, Article 10) and insufficient protection of whistleblowers (Chapter 3, Article 33);
- Widespread corruption and lack of transparency in civil society (Chapter 2, Article 13)
- No criminalisation of illicit enrichment, trading in influence, money laundering, and concealment of illegally acquired property; no scrutiny of wealth declarations of public officials (Chapter 2, Article 14; Chapter 3, Articles 17, 18, 20, 22, 23, 31, 34)
- No provisions on extradition (Chapter 4, Article 44) or mutual legal assistance (Chapter 4, Article 46)
- Absence or weakness of provisions on asset recovery (the whole of Chapter 5, Articles 51–59)

The implementation plan itself is quite comprehensive, but it lacks strategic coherence and prioritisation. Moreover, no single institution has been made responsible for the implementation plan, a fact that perhaps reflects the convoluted institutional and political landscape of the anti-corruption drive in Kenya. Rather, responsibilities have been diffused among “all stakeholders”, which may lead to a lack of leadership and unclear or even contradicting mandates. The key problem is that the National Anti-Corruption Policy is still under development by the MoJ, which means that “reforms must take place in the absence of a coherent policy framework that enforces responsibilities and

creates political pressure for follow-through” (Schultz 2010, 7). In addition, the implementation plan relies heavily on legislation not yet in place, which may cause considerable delays.⁶⁵

9.6.3 The gap analysis and the wider reform process

All these weaknesses are related to the pattern of patronage politics. Ironically, both the achievements and the gaps identified in the gap analysis have been instrumental in the survival of the Kenyan system and the entrenchment of illicit practices. The achievements have provided a smokescreen of legitimacy, while the weaknesses have continued to protect illicit activities.

Despite the prominence of debate about corruption in Kenyan political discourse, implementation of UNCAC has not had any substantial impact on supporting a deep reform process. The intimidation and persecution of John Githongo, the former permanent secretary for governance and ethics, illustrates how good appointments and well-designed anti-corruption institutions can be subverted. Reforms of the institutional and legislative framework have thus fallen short, failing to effectively secure political integrity and address the root of the governance problem. It seems highly unlikely that any substantial anti-corruption changes can be implemented without fundamental changes in the political system itself. Given the partisan nature and lack of representativeness of civil society organisations, it is also unclear which groups could take the lead in advocacy for more rule-based and accountable decision making. Just as important, the legal and institutional tools provided by the implementation of UNCAC are toothless because of their politicisation and corruption.

The post-election violence was seen as a complete breakdown of the façade of national unity and democratic politics. However, it was also viewed by some as an opportunity to “shock” politicians and citizens alike into addressing major grievances. Interviewees during the power and change analysis of 2008 “presented the crisis as having the potential to fundamentally change the informal ‘rules of the game’ of Kenyan politics. However, they indicated that this would only be possible if traditions of impunity were challenged and key governance issues such as inequality and, more recently, the need for reconciliation and fears of insecurity and violence were addressed” (Amis et al. 2008, 35). A year later, despite the success of the constitutional reform, there is still no evidence that the public interest will prevail over particularistic interests.

Indeed, Kenya can be cited as an example of a criminalised state (see Bayart et al. 1999), where the purpose of power is to amass wealth, and top governmental officials and politicians have managed to gain control over all major institutions. The criminalised state in Kenya, however, is not coherent or even monopolised. The existence of different factions associated with the ruling parties, organised crime, and instrumentalised ethnic and regional groups has led to a highly unstable situation. Inserting legal and institutional reform into this context may have served to change the framework, but it has not served to transform the practices, norms, and attitudes governing political agency. On the contrary, the framework has been appropriated and undermined by factional interests, mainly those in government. This raises serious questions about the potential of any institutional reform designed to combat corruption in a deeply corrupt political economy.

Despite this pessimistic viewpoint, the UNCAC gap analysis also shows that anti-corruption initiatives may have an impact on broader reform processes. In Kenya, for instance, the UNCAC gap analysis was of direct relevance to the constitutional reform process in two ways. First, there was feedback from the public authorities involved in the gap analysis, underscoring the overlaps between the UNCAC reform process and the constitutional reform process. Second, following this exchange, direct

⁶⁵ As the U4 Practice note dryly observes, the Kenyan parliament “has proven resistant to passing anti-corruption laws that threaten members’ personal interests. [...] If recent history is a guide, the tenuous political situation in Kenya, which resulted in numerous delays during the gap analysis process, will likely have the same effect on reform” (Schultz 2010: 7).

recommendations for the Committee of Experts on the constitutional reform process drew attention to salient issues from the perspective of UNCAC.

The gap analysis also generated support for the establishment of a National Anti-Corruption Policy, which would go beyond the National Anti-Corruption Plan of 2007 and consolidate a national anti-corruption strategy. In February 2010, a new National Anti-Corruption Policy concept paper was drawn up. Although the schedule has been somewhat delayed, the implementation of this policy has been declared a top priority by senior government officials, and it may happen in 2011. It remains to be seen how far political support for both constitutional reform and anti-corruption policy—two lynchpins of national integrity—will reach, and particularly whether progress will be derailed by preparations for the 2012 elections. If early elections are called due to disagreements around the implementation of the constitutional reform process, that would further reduce the chances for reform.

9.7 Global Integrity Report 2009: Kenya Integrity Indicators Scorecard

Overall Score: 69 (+/- 0.51): Weak

Overall Implementation Gap: 25

Category

I	Civil Society, Public Information, and Media	61	Weak
I-1	Civil Society Organizations	76	Moderate
I-2	Media	68	Weak
I-3	Public Access to Information	38	Very Weak
II	Elections	61	Weak
II-1	Voting and Citizen Participation	85	Strong
II-2	Election Integrity	80	Strong
II-3	Political Financing	17	Very Weak
III	Government Accountability	54	Very Weak
III-1	Executive Accountability	53	Very Weak
III-2	Legislative Accountability	57	Very Weak
III-3	Judicial Accountability	32	Very Weak
III-4	Budget Processes	73	Moderate
IV	Administration and Civil Service	77	Moderate
IV-1	Civil Service Regulations	50	Very Weak
IV-2	Whistle-Blowing Measures	75	Moderate
IV-3	Procurement	91	Very Strong
IV-4	Privatization	91	Very Strong
V	Oversight and Regulation	79	Moderate
V-1	National Ombudsman	67	Weak
V-2	Supreme Audit Institution	91	Very Strong
V-3	Taxes and Customs	92	Very Strong
V-4	State-Owned Enterprises	77	Moderate
V-5	Business Licensing and Regulation	69	Weak
VI	Anti-Corruption and Rule of Law	81	Strong
VI-1	Anti-Corruption Law	100	Very Strong
VI-2	Anti-Corruption Agency	88	Strong
VI-3	Rule of Law	67	Weak
VI-4	Law Enforcement	67	Weak

Source: Global Integrity, Washington, DC. <http://report.globalintegrity.org/Kenya/2009/scorecard>.

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The political economies of many developing countries are characterised by varying degrees of patronage and state capture, a reality that has far-reaching implications for measures addressing corruption. Political strategies in such contexts often include maintaining political and economic power through personalised relations and seeking to influence political decisions for the benefit of an individual or group. Gaining and retaining power within these systems is a resource-intensive process, and corruption is a common way to sustain extensive power networks.

This report asks whether this insight has found its way into one of the most important current anti-corruption instruments, the United Nations Convention against Corruption (UNCAC). Analysis of the Convention itself and implementation efforts in Bangladesh, Indonesia and Kenya suggest that UNCAC is only partly suited to address the political nature of corruption, especially if not complemented by further reform measures.