

Engelbert, Annika

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## The Role of Anti-Corruption Agencies in the Investigation and Prosecution of Procurement Related Corruption Cases

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**ANNIKA ENGELBERT**

THE ROLE OF ANTI-CORRUPTION AGENCIES IN  
THE INVESTIGATION AND PROSECUTION OF  
PROCUREMENT RELATED CORRUPTION CASES



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# **IEE WORKING PAPERS**

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Annika Engelbert<sup>1</sup>

## **THE ROLE OF ANTI-CORRUPTION AGENCIES IN THE INVESTIGATION AND PROSECUTION OF PROCUREMENT RELATED CORRUPTION CASES**

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<sup>1</sup> PhD student at the Institute of Development Research and Development Policy (IEE) and Research associate at the Chair of Public Law (Development Law), Research Project on Procurement Law and Anti-Corruption, [http://www.rub.de/lk\\_kaltenborn](http://www.rub.de/lk_kaltenborn). The project is funded by the Fritz Thyssen Foundation. The author would like to thank Lukas Lübken (RUB) and Johann Steudle (Max Planck Institute for Foreign and International Criminal Law) for their helpful comments and Katherine Walker (RUB) for proofreading this paper.

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der Ruhr-Universität Bochum  
Postfach 10 21 48, D-44780 Bochum

E-Mail: [ieeoffice@ruhr-uni-bochum.de](mailto:ieeoffice@ruhr-uni-bochum.de)  
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## **Abstract**

In most developing countries, anti-corruption agencies were established in compliance with international treaties to prevent and combat corruption through law enforcement. Yet conviction rates in corruption have remained very low, undermining the deterrent effect arising from a high risk of detection. Whereas previous research has focused on identifying external success factors for anti-corruption agencies, this paper argues that effective collaboration mechanisms between these agencies, monitoring bodies in corruption-prone sectors such as public procurement, and public prosecution are crucial for curbing corruption. By means of a comparative case study of Tanzania and Uganda, it shall be explored whether a more streamlined or dispersed collaboration approach is more promising in a highly corrupt setting. Besides national laws, the analysis is based on findings from expert interviews and on reports by procurement authorities and the media.



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## LIST OF ABBREVIATIONS

ACA	Anti-corruption agency
AUCPPC	African Union Convention on Preventing and Combating Corruption
CIID	Criminal Investigations and Intelligence Department
DPP	Director of Public Prosecutions
EAC	East African Community
EAAACA	East African Community
IGG	Inspectorate of Government
PAC	Public Accounts Committee
PCCB	Prevention and Combating of Corruption Bureau
PPAA	Public Procurement Appeals Authority
PPDA	Public Procurement and Disposal of Public Assets Authority
PPRA	Public Procurement Regulatory Authority
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
ZACECA	Zanzibar Anti-Corruption and Economic Crimes Authority

# 1 INTRODUCTION

Corruption remains a serious threat to the main objective of public procurement systems, which is to achieve value for money, i.e. to acquire goods, works or services of highest quality, at best price. Considering the fact that government contract volumes can be high and that complex administrative procedures facilitate the concealment of corrupt practices, it is not surprising that many big corruption scandals in East Africa during the last years were related to government contracts;<sup>1</sup> what is striking, though, is the fact that none of these cases have ever led to a conviction of high-ranking officials in a court of law.<sup>2</sup> Regulatory authorities overseeing procurement processes can detect corruption through internal and external monitoring mechanisms, such as audits and review procedures, but are limited in their investigatory powers and not authorized to prosecute alleged corruption cases. Anti-corruption agencies (ACAs), on the other hand, have been established to streamline national anti-corruption efforts, and to investigate and – depending on their mandate – also to prosecute criminal offences in corruption matters. ACAs therefore assume a crucial role in combating corruption in public procurement at the very interface of administrative and criminal law.

Scientific research in the last years has concentrated on identifying factors suitable for alleviating the current widespread ineffectiveness of ACAs. These factors include, amongst others, the degree of political, financial and operational independence of the agency; a general positive anti-corruption climate in the political sphere and the general public; the recognition of the rule of law and the existence of sound, understandable and applicable legal frameworks; adequate financial and human resources; and – last but not least – cooperation with civil society organizations, the media and other government agencies.<sup>3</sup> Yet it has not been researched how ACAs are interlinked with other law enforcement bodies, which forms of cooperation exist and which chances and challenges arise from different institutional arrangements. This paper aims to fill this gap by first discussing on a theoretical basis the necessities and conditions for cooperation between ACAs and other law enforcement bodies in procurement-related corruption. In a second step, the paper will present two exploratory case studies of Tanzania and Uganda from an institutional-functional comparative perspective, based on respective national legislation and reports of procurement authorities and enriched with findings from expert interviews conducted in May and June 2013 onsite and media reports. The last chapter shall sum up strengths and weaknesses of the different institutional settings.

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<sup>1</sup> One of the most prominent corruption cases in Kenya of the last years, the so-called AngloLeasing scandal, has been brought to the attention of a broader international readership by Michela Wrong's 2009 book "It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower". It tells the story of John Githongo, a senior public official under President Kibaki, who played a major role in uncovering the scandal and went to exile.

<sup>2</sup> Human Rights Watch 2013: 11 and 36.

<sup>3</sup> Cf. Camerer 2001, De Jaegere 2012: 92, Doig/Watt/Williams 2006, Heilbrunn 2004, Johnston/Kpundeh 2002, Meagher 2004: 11 ff., Pope/Vogl 2000: 8, Recanatini 2011: 530, Speville 2008: 2 ff., Transparency International 2000: 96 ff., UNDP 2005: 11, USAID 2006: 5ff.

## 2 THE ROLE OF ANTI-CORRUPTION AGENCIES IN COMBATING CORRUPTION IN PUBLIC PROCUREMENT

### 2.1 Characteristics of ACAs

From an international law perspective, the recent emergence of ACAs in most Sub-Saharan African states is the result of national implementation efforts to comply with two legally binding anti-corruption conventions. On a global level, many state parties have responded by institutional reform to the requirements of the United Nations Convention against Corruption (UNCAC), signed on December 9, 2003 and ratified by currently 171 states parties (April 2014). Its regional equivalent, the African Union Convention on Preventing and Combating Corruption (AUCPPC), was adopted in Maputo on July 11, 2003. To date, it has been ratified by 35 states (January 2014). Art. 6 and 36 UNCAC as well as Art. 5 (3) and 20 AUCPPC stipulate the establishment of national agencies to streamline anti-corruption efforts. Three main characteristics for ACAs can be drawn from the text of the conventions: First, the general objective of ACAs is to lower corruption by means of prevention and law enforcement.<sup>4</sup> Secondly, it is specified in which operational ways this objective shall be reached, namely by granting independence and adequate human and financial resources to the agencies to ensure effective functioning free from undue influence.<sup>5</sup> Finally, the institutional setup can differ in its degree of centralization according to UNCAC<sup>6</sup>, whereas the provisions in Art. 20 (1) AUCPPC are based on a more centralized approach when requiring states to designate one national authority or agency as contact point “for the purposes of cooperation and mutual legal assistance”. Reflecting the special focus of a regional agreement, AUCPPC stresses the need of exchange, collaboration and communication among ACAs of neighboring states. Given the fact that no separate body is charged with managing communication between African ACAs, this arrangement is most suitable for facilitating regional collaboration. It does not mean, however, that only one agency in each state is responsible for combating corruption; it rather emphasizes the coordination role of ACAs.

### 2.2 The need to cooperate

The core activities of the agencies depend on their strategic focus, which can be investigation, enforcement, prevention, awareness and education, or a combination of some or of all of these. Each of these general areas involves a long list of responsibilities.<sup>7</sup> By the sheer number and the fragmented nature of anti-corruption activities, it seems evident

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4 Art. 6 and 36 UNCAC; Art. 5 (3) AUCPPC.

5 Art. 6 and 36 UNCAC; Art. 20 (4) and (5) AUCPPC.

6 “body or bodies, as appropriate, that prevent corruption”, Art. 6 (1) UNCAC; “body or bodies or persons specialized in combating corruption through law enforcement”, Art. 36 UNCAC.

7 E.g. receiving and responding to complaints; intelligence gathering, monitoring, and investigation; prosecutions and administrative orders; research, analysis, and technical assistance; ethics policy guidance, compliance review, and scrutiny of asset declarations; public information, education and outreach; cf. USAID 2006: 5.

that one single agency cannot operate in isolation from other organizations. It is therefore not expected from the ACAs that these carry out the tasks alone, but that they “provide centralized leadership in [...] core areas of anti-corruption activity”.<sup>8</sup>

Whereas the AUCPPC remains tacit on the need of cooperation between ACAs and other government bodies, UNCAC states in its Art. 38:

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

- (a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or
- (b) Providing, upon request, to the latter authorities all necessary information.

The provisions reflect one of the major institutional problems in combating corruption: The authorities charged with investigating and prosecuting corruption cases (ACAs, public prosecution, police, courts of law) have an informational disadvantage in relation to those bodies monitoring good governance in public administration (for example audit departments, revenue services, procurement authorities). ACAs have very limited opportunities to detect corruption, as they are not involved in the day-to-day business of corruption-prone sectors. Furthermore, not all ACAs are mandated to prosecute corruption, but investigate corruption matters and refer them to the general prosecutor when evidence is compiled. Based on the specific body of evidence, public prosecution takes the decision whether to bring cases to court where actual jurisdiction takes place.<sup>9</sup> In cases where public prosecution continuously fails to bring charges against allegedly corrupt actors, the reasons can be manifold: It may be a lack of independence of the public prosecutors themselves – a widespread problem in deeply corrupt political systems - or their unwillingness to recognize the professional investigation work of the ACA.<sup>10</sup> On the other hand, there might be a capacity problem within the ACA to prepare cases adequately for litigation. The interface between investigation and prosecution is therefore critical.<sup>11</sup> In brief, the procedural relationship of detection, investigation and prosecution in corruption requires strong cooperation among monitoring and law enforcement bodies.

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8 Meagher 2004: 3, USAID 2006: 5.

9 UNDP 2005: 7-8.

10 Pope/Vogl 2000: 8, UNDP 2005: 12.

11 Chêne 2012: 8, UNDP 2005: 22.

## 2.3 Combating corruption in public procurement

Procurement is one of the core activities in public administration: Governments need to acquire goods, construction works and services by any contractual means (purchasing, hiring, or other) in order to perform their functions.<sup>12</sup> Such acquisition is effected with resources from public funds, aiming to achieve best value for money, and therefore follows strict rules “based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption”<sup>13</sup>. Public procurement is highly prone to corruption for several reasons: In many cases, especially for infrastructure projects and defense procurement, the contract volumes reach significant amounts, making business opportunities very attractive for tenderers. They are hence more willing to act in a corrupt way to win the contract; public officials, on the other side, can expect high returns from bribes. Secondly, procurement includes several complex procedural stages, offering many gateways for corruption and possibilities to conceal corrupt activities. Incentives for corruption are high whereas the risk of detection is low, thus making public procurement very vulnerable to corruption.

Developing countries suffer most from corruption in public procurement because of the latter’s high proportion in government expenditure,<sup>14</sup> leading to substantial losses of scarce financial resources. Furthermore, developing countries have a special need for public investment in areas such as education and health, whereas corruption favors the misallocation of public funds in capital-intensive procurement. Taking into account the devastating effects of corruption on the social and economic development of developing countries, but also the interest of industrialized states to safeguard development aid spent in endemically corrupt environments, international financial institutions have lately initiated numerous public sector reform programs in developing countries, among them assessments of national public procurement systems.<sup>15</sup> Sound public procurement systems are considered as a means to lower corruption in public administration and entail different anti-corruption mechanisms related both to prevention and to sanctioning. Whereas preventive strategies focus on awareness rising, clear and applicable procurement laws and regulations, capacity building of procurement officers, and trainings on ethics and integrity – to only name a few – sanctioning includes legal provisions on debarment from future tender opportunities, exclusion of procurement officers from professional cadres, and liability for damages. These measures aim to reduce the incentives for engaging in corrupt practices; others focus on raising the risk of detection for potentially corrupt public officials. These monitoring tools include audits by oversight authorities and administrative and judicial review systems.<sup>16</sup>

Thus, public procurement systems are very useful in uncovering corruption. However, their investigatory capacities under administrative law are limited to irregularities in the

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<sup>12</sup> Odhiambo/Kamau 2003: 10.

<sup>13</sup> Art. 9 UNCAC.

<sup>14</sup> Cf. Akech 2006: 831.

<sup>15</sup> Cf. World Bank projects on public procurement reform, <http://go.worldbank.org/8HE37SPEJO>.

<sup>16</sup> Gordon 2006: 429. For a detailed analysis of monitoring mechanisms in public procurement with special regard to corruption see Engelbert 2014.

procurement process in terms of deviations from the rules. Criminal offences need to be referred to the law enforcement organs of the state. The rather preventive effect of administrative law is however interlinked with the performance of criminal law enforcement bodies in general and with ACAs in particular: Where the exposure of corruption does not lead automatically to criminal investigation and potential prosecution and conviction, the credibility of the anti-corruption function of the procurement system is diluted. If there is no perceptible risk of conviction, the deterrent effect of monitoring, detection and inquiry is undermined.

The function of ACAs in investigation and prosecution of procurement-related corruption cases can take various forms. First, the ACA might be the sole law enforcement body to cooperate with public procurement authorities in corruption or one of several competent authorities. This cooperation can be either stipulated by law or based on more informal agreements. Second, ACAs can be vested with full, subordinated or no prosecutorial powers at all; the interplay with public prosecutions is dependent thereon. By means of two in-depth case studies, the following chapter shall discuss different institutional concepts with regard to their respective capacities for improving the fight against corruption in public procurement.

### 3 CASE STUDIES

Tanzania and Uganda have ratified UNCAC and AUCPPC in 2005 and 2004 respectively,<sup>17</sup> and are founding members of the East African Community (EAC)<sup>18</sup> and of the East African Association of the Anti-Corruption Authorities (EAAACA)<sup>19</sup>. Following an initiative by the EAAACA, the EAC has recently made efforts to draft a common Protocol on Preventing and Combating Corruption. Despite the relative homogeneity of the existing institutional frameworks in the member states as well as of the challenges arising from the problem of corruption, negotiations on the new protocol have not yet been successful. One of the issues the governments have not been able to agree upon to date is the question whether or not to grant prosecutorial powers to ACAs.<sup>20</sup> Section 6 (3) of the draft protocol stipulates that “[t]he competent authorities shall be vested with prosecutorial powers for the purposes of implementing this protocol.” Among the EAC’s five member states, only the Ugandan and Rwandan<sup>21</sup> ACAs are currently vested with full prosecution mandates. Since the issue is highly debated among heads of states in the EAC, its importance should not be underestimated. The case studies presented in this chapter shall analyze the coverage of ACAs’ prosecutorial and investigatory powers in relation to other law enforcement bodies and explore possible reasons why governments are reluctant to grant these powers.

Each year, an important percentage of the Tanzanian and Ugandan national budgets are spent through public procurement.<sup>22</sup> At the same time, the states are highly affected by corruption,<sup>23</sup> and the many corruption scandals brought to the attention of the general public via the media originate from distorted procurement procedures. Thus, both states

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17 See <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>; [www.au.int/en/sites/default/files/Corruption.pdf](http://www.au.int/en/sites/default/files/Corruption.pdf).

18 The EAC is a regional intergovernmental organization and was originally founded in 1967 by Tanzania, Uganda and Kenya, but collapsed in 1977. It was officially revived in 2000, when the Treaty for the Establishment of the East African Community entered into force. Rwanda and Burundi joined the EAC in 2007. In 2010, the EAC Common Market Protocol was ratified by all member states. <http://www.eac.int>.

19 Formed in 2007 as an independent, non-profit and non- political association. Rwanda and Burundi joined EAAACA in 2008; South Sudan, Ethiopia and Djibouti in 2013. <http://eaaaca.org>.

20 „Regional agencies seek more powers to fight corruption“, *The East African*, 28.06.2014, <http://www.theeastafican.co.ke/news/Regional-agencies-seek-more-powers-to-fight-corruption/-/2558/2364780/-/dbp3te/-/index.html>.

21 In 2011 the Rwandan ACA, the Office of the Ombudsman, initiated a draft bill on being granted prosecutorial power, arguing that the Prosecutor General has neither adequate expertise nor sufficient will to pursue corruption cases. According to the Prosecutor General’s office, however, only one case annually on average was referred by the Office of the Ombudsman, refuting the grounds of the request (Barnes 2010: 9-10, see also “Rwanda’s ombudsman seeks powers to prosecute graft cases”, *The East African*, 31.01.2011, <http://www.theeastafican.co.ke/news/Rwanda+ombudsman+seeks+powers+to+prosecute+graft+cases/-/2558/1210814/-/hvoma9/-/index.html>; “Rwanda: Ombudsman Seeks Prosecutorial Powers”, *The New Times*, 21.12.2011, <http://allafrica.com/stories/201112211088.html>).

22 Cf. Akech 2006: 831.

23 Uganda ranks 140 and Tanzania 111 out of 177 countries (score 26 and 33 and on a scale from 0 (highly corrupt) to 100 (very clean)) on the Corruption Perceptions Index 2013 published by Transparency International: <http://www.transparency.org/cpi2013/results>.

have strong incentives to foster anti-corruption in their public procurement systems. These systems show remarkable similarities both in structure and content as they share one common historical path.<sup>24</sup> Despite many analogies, different ways of collaboration between public procurement authorities and national ACAs were established, which shall be discussed in the second part of the case studies.

### **3.1 Tanzania: The Prevention and Combating of Corruption Bureau (PCCB) and the Zanzibar Anti-Corruption and Economic Crimes Authority (ZACECA)**

The Prevention and Combating of Procurement Act 2007 at section 5 establishes the independent Prevention and Combating of Corruption Bureau (PCCB) as an agency mandated “to take necessary measures for the prevention and combating of corruption in the public, parastatal and private sectors”<sup>25</sup> and replaces the former Prevention of Corruption Bureau.<sup>26</sup> The PCCB is headed by a Director-General as well as a Deputy Director-General, both of whom are appointed by the President<sup>27</sup> on undefined terms of office. The bureau reports directly to the President,<sup>28</sup> and its funding is appropriated by Parliament.<sup>29</sup> Although the PCCB is an independent public body according to the law,<sup>30</sup> its leadership and oversight remain entirely under presidential power.<sup>31</sup> It can be concluded that the PCCB does not enjoy sufficient operational independence. In addition to that, the PCCB is not enshrined constitutionally; it can be abolished by an ordinary Bill of Parliament. Nothing indicates that the elimination of the PCCB is currently or potentially a topic of discussion in Parliament or government, yet a constitutional status would stabilize the

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24 Both political and legal systems show important common features: The states gained independence in the early 1960s from the United Kingdom and are presidential republics; the respective presidents are hence both heads of state and heads of government. The constitutions provide for multi-party systems, whereas the unicameral parliaments operate de facto in one-party dominant party systems. Zanzibar has preserved a semi-autonomous status within the United Republic of Tanzania. The original constitutions have been replaced and amended several times, resulting in Uganda’s current constitution from 1995 and an undergoing reform process of the constitution from 1977 in Tanzania. The legal systems represent a mixture of English common law and African customary law, in the case of Tanzania also of Islamic law. With regard to Tanzanian and Ugandan procurement law, the first regulatory frameworks were established following a reform process in the late 1990s that was heavily supported by the international donor community, especially the World Bank, and were based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services 1994. The domestic procurement acts and regulations have very recently been subject to legislative reform, taking into account the revisions of the new UNCITRAL Model Law on Public Procurement 2011.

25 Section 7 Prevention and Combating of Procurement Act.

26 Tanzania's first ACA, the Anti-Corruption Squad, was established in 1974 by Act No. 2. In 1991 the squad was replaced by the Prevention of Corruption Bureau; see <http://www.acauthorities.org/country/tz>.

27 Section 6 Prevention and Combating of Procurement Act.

28 Section 14 Prevention and Combating of Procurement Act.

29 Section 47 (1) Prevention and Combating of Procurement Act.

30 Section 5 (2) Prevention and Combating of Procurement Act.

31 The current Director-General of PCCB has been in office since 2006.



ACA's persistence even in times of severe political crises and corroborate its relevance within the broader institutional setting.

Furthermore, the Prevention and Combating of Procurement Act is only applicable to Tanzanian mainland, but not to Zanzibar;<sup>32</sup> the PCCB is hence not a nationwide ACA. Until recently, corruption in Zanzibar was only investigated by the police.<sup>33</sup> This has changed since 2012, when the Zanzibar Anti-Corruption and Economic Crimes Act came into force and established the Zanzibar Anti-Corruption and Economic Crimes Authority (ZACECA).<sup>34</sup> Similar to the provisions on the PCCB, the ZACECA is an independent and autonomous agency,<sup>35</sup> but the President of Zanzibar appoints the Director-General<sup>36</sup> and the deputy.<sup>37</sup> ZACECA reports to the Minister "responsible for matters relating to anti-corruption"<sup>38</sup>. It is not yet recognizable from the current structure of the government, the Revolutionary Council of Zanzibar, which Ministry would be in charge of handling anti-corruption matters. The position of the Director-General is strengthened in Section 13 (3), where it is stipulated that s/he "shall not be subject to the direction or control of any other person or Authority" in performing the functions described in the Act. Drawing from the very scarce information available, it seems that the ACA is not fully operational yet; as soon as the ZACECA has adequate capacities for fulfilling its mandate, the United Republic of Tanzania will have two ACAs with geographically clearly defined areas of responsibility.

### *3.1.1 Investigatory and prosecutorial powers*

The functions of the PCCB and the ZACECA cover prevention and education on corruption-related matters by means of, inter alia, monitoring of public entities, advising the public and the private sector, and awareness-raising; as their third area of responsibility, both ACAs are mandated to investigate alleged corruption cases.<sup>39</sup> They possess enhanced investigatory powers to arrest, to enter into premises or vessels, search and detain suspects and seize property,<sup>40</sup> as well as to summon witnesses and documents.<sup>41</sup> The Directors-General (and other persons authorized by them) are vested with additional powers, the privileges and the immunities of police officers.<sup>42</sup> Investigating corruption,

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<sup>32</sup> Section 2 (1) Prevention and Combating of Procurement Act. Zanzibar has a semi-autonomous status within the United Republic of Tanzania.

<sup>33</sup> See <http://www.acauthorities.org/country/tz>.

<sup>34</sup> Section 3 (1) Zanzibar Anti-Corruption and Economic Crimes Act.

<sup>35</sup> Section 3 (2) Zanzibar Anti-Corruption and Economic Crimes Act.

<sup>36</sup> Section 4 (1) Zanzibar Anti-Corruption and Economic Crimes Act.

<sup>37</sup> Section 6 (1) Zanzibar Anti-Corruption and Economic Crimes Act.

<sup>38</sup> Sections 2 (1) and 12 Zanzibar Anti-Corruption and Economic Crimes Act.

<sup>39</sup> Section 7 Prevention and Combating of Procurement Act, section 13 (1) ZACECA.

<sup>40</sup> Section 8 (2) (c) Prevention and Combating of Procurement Act, section 14 (3) Zanzibar Anti-Corruption and Economic Crimes Act.

<sup>41</sup> Section 10 (1) Prevention and Combating of Procurement Act, section 15 (1) Zanzibar Anti-Corruption and Economic Crimes Act.

<sup>42</sup> Section 8 (2) (b) Prevention and Combating of Procurement Act, section 19 (2) Zanzibar Anti-Corruption and Economic Crimes Act.

however, is the responsibility of several institutions and not of the ACAs exclusively. The PCCB and the ZACECA therefore “shall establish and maintain a system of collaboration, consultation and cooperation with law enforcement agencies and other national authorities within Zanzibar and the United Republic of Tanzania engaged in investigation and prosecution [...]”<sup>43</sup>. Only the Zanzibari anti-corruption act makes provisions on conflicts arising from overlapping investigation mandates: In case there is a dispute between ZACECA and the police about an investigation, the Director of Public Prosecutions (DPP)<sup>44</sup> shall have the power to order the police officer to investigate that allegation.<sup>45</sup> This means, in return, that the ZACECA is only a secondary investigation force ranging behind the police. In contrast to the PCCB, the ZACECA also has to report the results of each investigation to the DPP.<sup>46</sup>

Despite their enhanced investigatory powers, the ACAs cannot bring alleged corruption cases to court without the written consent of the DPP<sup>47</sup>; their prosecutorial powers are hence subordinated. The Prevention and Combating of Procurement Act prescribes explicitly that prosecutorial functions can also be referred to the PCCB following investigations conducted by the police or by any other law enforcement agency for an offence involving corruption.<sup>48</sup> The division of competencies is hence unambiguous: The prosecutorial power is with the DPP, but can be seconded to the PCCB or the ZACECA. The decision whether or not to prosecute the alleged corruption case remains with the DPP.

The interplay between the PCCB and the DPP has been subject to concern.<sup>49</sup> As confirmed in an interview with experts from the Tanganyika Law Society, the Director-General of the PCCB has approached the Tanzanian government in the past to claim full prosecutorial powers for the ACA. The bureau is well staffed with experienced lawyers who have the necessary expertise and, even more importantly, more insights into the actual cases they investigate and compile evidence upon than the DPP. The PCCB had argued that there were thus no convincing reasons to leave the mandate to prosecute with another entity that is not well conversant with the case under investigation. Tanzanian judges who had been consulted on the issue, however, have stated that granting prosecutorial powers to the PCCB would be against the principle of checks and balances;<sup>50</sup> this is

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43 Quote from section 84 Zanzibar Anti-Corruption and Economic Crimes Act; see also section 45 Prevention and Combating of Procurement Act.

44 The term Director of Public Prosecutions (DPP) is mainly used in the jurisdictions of current or former members of the Commonwealth of Nations for the office in charge of the prosecution of criminal offences.

45 Section 72 (b) Zanzibar Anti-Corruption and Economic Crimes Act.

46 Section 31 (1) Zanzibar Anti-Corruption and Economic Crimes Act.

47 Sections 7 (e) and 57 (1) Prevention and Combating of Procurement Act, sections 14 (8) and 35 Zanzibar Anti-Corruption and Economic Crimes Act.

48 Section 10 (2) Prevention and Combating of Procurement Act.

49 Findings from interviews only concern the role of PCCB, not of ZACECA.

50 “Hoseah clashes with judge over PCCB”, *The Citizen*, 15.06.2013, <http://www.thecitizen.co.tz/News/-/1840392/1884378/-/ev56qtz/-/index.html>; see also “Anti-corruption agencies and prosecutorial power: which way for Kenya?”, *Transparency International Kenya*, 04.09.2013, <http://www.tikenya.org/index.php/component/k2/220-anti-corruption-agencies-and-prosecutorial-power-which-way-for-kenya>.

at least disputable against the background that the Ugandan Inspectorate of Government assumes both investigatory and prosecutorial powers, being subjected to a legal system very similar to the Tanzanian one.<sup>51</sup>

Several interview partners mentioned that both the PCCB and the DPP are exposed to considerable pressure from the political class and that their successful functioning depends on the political will of the executive. Against the background that politicians are often involved in corrupt activities in environments where corruption is endemic, it is not at all in the personal interest of political decision-makers to strengthen anti-corruption institutions. It was reported that in many cases, the PCCB was put under pressure by the government and had to play down allegations in the investigation reports. These corruption cases only surfaced and were made public because other bodies investigated the case simultaneously and came up with the evidence. It is hence arguable whether in a situation where corruption has become systemic, investigative powers should be channeled through only one ACA or, on the contrary, rather be dispersed amongst as many agencies as reasonable, in order to make political influence-peddling more difficult. A bilateral donor organization confirmed moreover that the DPP has often been held back by the government when trying to bring cases to court. As a result, only corruption cases on a minor scale have been convicted, whereas those perpetrators involved in bigger scandals are usually better connected to influential politicians and not impeached at all.<sup>52</sup> The low conviction rate in corruption has had a negative impact on the public's perception of the PCCB's ability to bring major corruption scandals to court:<sup>53</sup> Further research would be needed to shed light on the question whether this is due to the ACA's incapacity to compile sufficient evidence for the corruption case or rather the result of restricted independence, as the analysis above suggests.

### 3.1.2 *Cooperation with the public procurement authority*

The main legal source for measures to be taken against corruption in public procurement is the Public Procurement Act 2011. Although the Prevention and Combating of Procurement Act and the Zanzibar Anti-Corruption and Economic Crimes Act have integrated separate sections on "Bid rigging"<sup>54</sup> and "Corrupt transactions in procurement"<sup>55</sup> respectively, the Zanzibari Act merely refers to the provisions of the Public Procurement Act, whereas the corresponding legislation of Tanzania mainland also prescribes penalties to be imposed on those convicted on grounds of corruption in procurement. The Public Procurement Regulatory Authority (PPRA) is the responsible body – by ensuring "the

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51 See chapter 3.2.1.

52 Human Rights Watch 2013: 3.

53 E.g. "Tanzania foreign affairs official sacked for alleged corruption but not charged", Thomson Reuters Foundation, 12.04.2013, <http://www.trust.org/item/?map=tanzania-foreign-affairs-official-sacked-for-alleged-corruption-but-not-charged>; Freedom House Report 2012 "Countries at the Crossroads – Tanzania", <http://www.freedomhouse.org/report/countries-crossroads/2012/tanzania#.VA8RPWN8pIo>

54 Section 41 Zanzibar Anti-Corruption and Economic Crimes Act.

55 Section 17 Prevention and Combating of Procurement Act.

application of fair, competitive, transparent, non-discriminatory and value for money procurement standards and practices”<sup>56</sup> – for preventing and sanctioning corruption in the public procurement system. The PPRA disposes of investigatory powers, but only in relation to procurement contracts and not to criminal proceedings. Accordingly, the PPRA’s capacity to sanction corrupt actions in procurement is restricted to contractual matters: It is stipulated that a procuring entity can, if it comes to the conclusion following its own investigations that a tender is based on “corrupt, fraudulent, collusive, coercive or obstructive practices”, reject the proposal and debar the tenderer for at least ten years from future procurement opportunities.<sup>57</sup> Interaction with law enforcement bodies is hence necessary for those procurement procedures where the PPRA’s examinations suggest corruption offences, but where its investigatory mandate is not sufficient. The Public Procurement Act stipulates that the PCCB has to be informed about procurement contracts awarded on the basis of inducement in order to take appropriate action.<sup>58</sup>

The public procurement system uses mainly two mechanisms to detect corruption: First, the independent Public Procurement Appeals Authority (PPAA) conducts administrative review as requested by unsatisfied bidders, including those that were aggrieved by corrupt activities during the tender phase. Whereas the PPAA has no investigatory or prosecutorial powers, it submits a copy of their decision to PPRA, stating the reasons for believing that the procurement procedure was corruptly distorted. The PPRA then takes further action whenever there are sufficient grounds.<sup>59</sup> Secondly, the PPRA is in charge of auditing all procuring entities, and has established a system of “red flags” to measure the likelihood of corruption in the procurement process. This audit system has been well institutionalized and is closely interlinked with the PCCB via a Memorandum of Understanding that aims to strengthen collaboration in prevention, detection and investigation of corruption in public procurement between the PPRA and the PCCB.<sup>60</sup> Besides joint trainings and expert meetings on relevant topics, the Memorandum of Understanding also requires the PPRA to provide to PCCB information on corruption red flags collected during procurement audits in a checklist consisting of 50 statements.<sup>61</sup> All audit reports of procuring entities and contracts scoring 20% and above on the red flags scale are submitted to the PCCB, together with investigation reports on suspected fraud, for further investiga-

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56 Section 8 (a) Public Procurement Act.

57 Section 83 (2) Public Procurement Act.

58 Section 84 (6) Public Procurement Act ; “Inducement” is to be understood as a synonym for “corrupt practice” which is defined under Section 3 of the Public Procurement Act as “the offering, giving, receiving or soliciting of anything of value to influence the action of a public officer in the procurement process or contract execution”. Furthermore, winning tenderers have to furnish a statement to the PCCB and the Tanzania Revenue Authority on any payments made by way of commission or similar measures in relation to the public contract, as well as to whom these payments were made (Section 85 Public Procurement Act). This practice is a preventive strategy in order to avoid illicit transactions during the contract execution phase.

59 Section 99 (4) Public Procurement Act.

60 Signed on February 11, 2010; see PPRA: Annual Procurement Evaluation Report for 2009/10, chapter 4.6.4.3, <http://www.ppra.go.tz/index.php/about-joomla/annual-reports>.

61 Details on the red flag checklist are included in Annex 5.5 of the PPRA’s Annual Procurement Evaluation Report for 2012/13, <http://www.ppra.go.tz/index.php/about-joomla/annual-reports>.

tion.<sup>62</sup> Although red flag checklists are included in every audit, the coverage of the system is limited as audits are based on stratified sampling due to practical reasons. It is also important to note that a detected red flag is not in itself evidence of corruption, but can also be an indication for operational deficiencies related to capacity gaps.<sup>63</sup>

Summing up, cooperation between the Tanzanian public procurement system and the PCCB seems well established. However, the provisions of the Public Procurement Act as well as the Memorandum of Understanding only apply to Tanzania mainland and not to Zanzibar. Since the ZACECA was established after the new Public Procurement Act had been passed by Parliament, there is currently a loophole for alleged corruption cases in procurement in Zanzibar. As mentioned above, the ZACECA yet needs to achieve full operational capacity; as soon as this is the case, an amendment to the Public Procurement Act making reference to the ZACECA's area of responsibility would be advisable.

### 3.2 Uganda: The Inspectorate of Government (IGG)

Unlike the legal foundations of the Tanzanian ACA, the Ugandan Inspectorate of Government (IGG) is constitutionally established;<sup>64</sup> its institutional setup, functions, powers and administrative procedures are further specified in the Inspectorate of Government Act of 2002. The IGG is headed by the Inspector General of Government and two deputy inspectors;<sup>65</sup> they are appointed as well as removed from office<sup>66</sup> by the President upon approval of Parliament for a term of office of four years, renewable once.<sup>67</sup> Independence of the IGG is explicitly stipulated in Art. 227 of the Ugandan Constitution: "The Inspectorate of Government shall be independent in the performance of its functions and shall not be subject to the direction or control of any person or authority and shall only be responsible to Parliament." The IGG's budget is appropriated by Parliament;<sup>68</sup> it also reports directly to Parliament.<sup>69</sup> Compared to the provisions on the Tanzanian PCCB, the Ugandan legal framework therewith provides for greater independence of its ACA as the IGG is primarily accountable to Parliament, not to the President. Drawing from the legislation, the IGG seems to enjoy more autonomy in investigating and prosecuting corruption, especially in those cases affecting the political sphere, as potential influence-taking from the executive is contained rather effectively.

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<sup>62</sup> PPRA: Annual Procurement Evaluation Report for 2012/13, p. 43, <http://www.ppra.go.tz/index.php/about-joomla/annual-reports>.

<sup>63</sup> PPRA: Annual Procurement Evaluation Report for 2012/13, pp. 192 f., <http://www.ppra.go.tz/index.php/about-joomla/annual-reports>.

<sup>64</sup> Art. 223 (1) Ugandan Constitution; IGG was initially established by the Inspector General of Government statute in 1988 and has been entrenched in the Constitution upon promulgation in 1995; <http://www.igg.go.ug/about/mandate/>.

<sup>65</sup> Section 3 (2) Inspectorate of Government Act.

<sup>66</sup> Art. 224 Ugandan Constitution.

<sup>67</sup> Art. 223 (4) and (7) Ugandan Constitution.

<sup>68</sup> Art. 229 (1) Ugandan Constitution.

<sup>69</sup> Art. 231 Ugandan Constitution.

### 3.2.1 Investigatory and prosecutorial powers

According to Art. 230 (1) of the Ugandan Constitution, “[t]he Inspectorate of Government shall have power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office.” In order to “foster the elimination of corruption”<sup>70</sup>, the IGG is vested with enhanced investigatory powers as well as with the mandate not only to recommend, but also to execute prosecution on corruption matters. Similar to the PCCB, the IGG is entitled to search persons as well as public and private premises, to retain documents, to have access to any documents related to public office,<sup>71</sup> to investigate any bank account,<sup>72</sup> to summon witnesses<sup>73</sup> and to issue warrants of arrest<sup>74</sup> during the course of the investigations.<sup>75</sup> The IGG’s jurisdiction is however limited to public officials and does not include private persons.<sup>76</sup> Contrary to the Tanzanian anti-corruption laws, neither the Ugandan Constitution nor the Inspectorate of Government Act make provisions on collaboration of law enforcement bodies in corruption matters; Part IV of the Anti-Corruption Act of 2009 however grants the exact same investigatory powers to IGG and to DPP.<sup>77</sup>

The constitutional mandate of IGG to prosecute is also emphasized in Section 14 (8) Inspectorate of Government Act where it is stipulated that “[n]otwithstanding any law, the Inspectorate shall not require the consent or approval of any person or authority to prosecute, or discontinue proceedings instituted by the Inspectorate.” Accordingly to the principle of equality in investigatory matters, the IGG has the same prosecutorial powers as the DPP; the prosecution function for alleged corruption is shared by two law enforcement bodies.<sup>78</sup> Whereas the DPP’s jurisdiction is not limited, the IGG can only investigate and prosecute offences allegedly committed by public officers as mentioned above. It is not specified in the law in which way the two bodies shall coordinate their operations. Overlapping mandates without a clear definition of responsibilities, however, can be a severe drawback in combating corruption. It has indeed occurred that the IGG and DPP conducted investigations on the same case, but came to contrary conclusions which severely hampered prosecution.<sup>79</sup>

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<sup>70</sup> Art. 225 (1) (b) Ugandan Constitution.

<sup>71</sup> Section 13 Inspectorate of Government Act.

<sup>72</sup> Section 14 (1) Inspectorate of Government Act.

<sup>73</sup> Section 26 (1) Inspectorate of Government Act.

<sup>74</sup> Section 27 (1) Inspectorate of Government Act.

<sup>75</sup> See also Art. 230 (3) Ugandan Constitution.

<sup>76</sup> Section 9 Inspectorate of Government Act.

<sup>77</sup> Sections 36-50 Anti-Corruption Act.

<sup>78</sup> Section 14 (9) Inspectorate of Government Act, section 49 Anti-Corruption Act.

<sup>79</sup> In more detail: Human Rights Watch 2013: 31 f.

### 3.2.2 Cooperation with the public procurement authority

Similarly to the corresponding legislation of Tanzania mainland, the Ugandan Anti-Corruption Act takes up the issue of corruption in public procurement in its Section 4 on “Corruptly procuring tenders”, where corrupt behavior is declared an offence and applicable penalties are prescribed.<sup>80</sup> Nevertheless, neither the Anti-Corruption Act nor the Inspectorate of Government Act specify how information on corruption in public procurement is to be brought to the attention of the IGG or DPP.

The Public Procurement and Disposal of Public Assets Authority (PPDA), established by the Public Procurement and Disposal of Public Assets Act of 2014, is the national regulatory body for public procurement in Uganda. Identically to the wording of the Tanzanian Public Procurement Act, the PPDA shall “ensure the application of fair, competitive, transparent, non-discriminatory and value for money procurement and disposal standards and practices”.<sup>81</sup> Combating corruption is hence an implicit, but not a core responsibility of the PPDA. Its investigatory powers under administrative law are limited to matters strictly related to procurement and disposal procedures;<sup>82</sup> sanctioning corrupt activities is possible via bid dismissal or debarment and disciplinary sanctions against procurement officers.<sup>83</sup> Corruption as a breach of the Public Procurement and Disposal of Public Assets Act is not treated differently from other offences with regard to interaction with other law enforcement bodies. Section 9 of the Public Procurement and Disposal of Public Assets Act states generally that for persistent or serious breaches of the Act, the PPDA first directs the procuring entity to take action. Only when the entity rejects these recommendations, the PPDA shall “communicate its recommendations and all related supporting documentation to the relevant law enforcement and oversight agencies for their action”<sup>84</sup>. The IGG itself is not mentioned as an agency in charge of handling criminal corruption matters in the Public Procurement and Disposal of Public Assets Act.

Interviewees have confirmed that this loophole has created general confusion among all involved parties about the responsible institution to which the PPDA should hand over alleged corruption cases. In total, five public bodies have the mandate to investigate corruption cases: Besides the IGG and the DPP, these are the Criminal Investigations and Intelligence Department (CIID) under the Uganda Police Force, the Office of the Auditor-General and the Public Accounts Committee (PAC) of the Parliament. The PPDA itself has stated in interviews that they usually refer suspected corruption cases to the CIID. In addition to cases that are directly sent from the procurement authority to the law enforcement body, the PAC can – based on reports submitted to Parliament by the PPDA, the Auditor-General and IGG respectively – request a second opinion from either the Auditor-General or the IGG on alleged corruption. If the second law enforcement body

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<sup>80</sup> Section 26 (1) Anti-Corruption Act.

<sup>81</sup> Section 6 (a) Public Procurement and Disposal of Public Assets Act.

<sup>82</sup> Section 8 Public Procurement and Disposal of Public Assets Act.

<sup>83</sup> Sections 94 (d) and 95 Public Procurement and Disposal of Public Assets Act.

<sup>84</sup> Section 9 (3) (a) Public Procurement and Disposal of Public Assets Act.

agrees that the case requires further investigation, it is handed over to the CIID and eventually prosecuted by the DPP.

Contrary to the Tanzanian streamlined approach that involves only two authorities, Uganda has opted for the widespread dispersion of prosecutorial and especially investigatory powers in corruption matters. The procedure described above is customarily applied, yet not a prescribed standard. It seems not only extremely time consuming, but also rather unstructured with all of its ill-defined responsibilities. It is therefore not surprising that experts in Uganda consider investigation to be the main problem in combating corruption: First, overlapping mandates often lead to parallel investigations issuing divergent decisions and recommendations. Secondly, the quality of investigation results is not always good enough, so that the preparation of litigation is not adequate and charges are eventually dropped. Last but not least, the IGG and the DPP are still considered to be under extensive control of the government.<sup>85</sup> Taking all factors together, there was consensus among interview partners that collaboration between the PPDA and law enforcement bodies must be better defined.

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85 Cf. Human Rights Watch 2013: 24.



## 4 CONCLUSION

In order to fulfill their task to channel national anti-corruption activities, ACAs cooperate with other law enforcement as well as with monitoring bodies. The interplay between the different actors can be rather centralized or dispersed, depending on the exact sphere of competence of the ACA; both approaches entail certain strengths and weaknesses. As analyzed above, Tanzania and Uganda have adopted quite different approaches in their institutional arrangements in investigating and prosecuting corruption related to public procurement. The Ugandan IGG has been constitutionalized and is – according to the law written in the books – mainly accountable to the legislative, whereas its two Tanzanian twin authorities, the longstanding PCCB of mainland Tanzania and the recently established ZACECA in Zanzibar, are legally under considerable control of the executive. All three ACAs are vested with enhanced investigatory powers on alleged corruption cases, but only the Tanzanian main anti-corruption acts stipulate cooperation among law enforcement bodies. Disagreements on how to allocate prosecutorial powers to ACAs among East African governments, who recently came up with a draft EAC Protocol on Preventing and Combating Corruption, are reflected in the opposing approaches adopted by Tanzania and Uganda: the PCCB and the ZACECA are vested with subordinated prosecutorial powers, requiring the consent of public prosecutions. The PCCB's attempts to be granted the same status as the DPP for corruption cases have so far remained unsuccessful, as resistance of the executive and also the judiciary is strong. The underlying hierarchical rationale with the DPP's superior position in relation to the ACAs implies that responsibilities are clearly allocated: the DPP is in charge of bringing cases to court, but can delegate the task to the PCCB or the ZACECA. On the downside, corrupt actors only have to manipulate one institution to impede criminal proceedings. The IGG, on the other hand, is put on the same level as the DPP in corruption matters; nevertheless, and in contrast to the DPP, its mandate to prosecute only covers public officials. Contrary to the Tanzanian solution, the ACA and DPP have overlapping mandates that can result in two parallel investigation proceedings with divergent results, creating inefficiency and ineffectiveness.

Since public procurement oversight authorities have various means to detect corruption, but no investigatory power in criminal matters, the handover of alleged corruption cases to law enforcement bodies must be regulated in order to support the deterrent effect arising from monitoring mechanisms of the procurement system. The Tanzanian approach is again more centralized than in Uganda: Procurement law requires the information from the PCCB on criminal offences, and should also include the ZACECA in the near future to close the current regulatory loophole for Zanzibar. Cooperation is further strengthened via a Memorandum of Understanding between the two authorities, which includes the automatic referral to the PCCB of those procurement files that score poorly in the so-called corruption red flags mechanism during audits. Although this system is not perfect as it is based on sampling, the procedure is well defined and leaves no uncertainties about competencies. Ugandan procurement law does not separate corruption from other offences under the act; it is therefore not specified which law enforcement body is in charge of procurement-related corruption. In total, five law enforcement bodies are mandated to investigate such issues, and different ways of interaction between all parties involved have developed. These procedures are, however, not regulated by law and in

the past have not been able to erase widespread confusion among actors about responsibilities. Yet the involvement of numerous authorities, often simultaneously investigating the same issue, also implies the capacity to balance deficient or corrupted law enforcement bodies through a system of mutual checks. Influence-peddling is more complicated in a dispersed field of competencies where law enforcement bodies to some extent control each other.

Summing up, the institutional approach to combat corruption in public procurement applied in Tanzania appears to be more centralized as responsibilities among law enforcement bodies are better defined. Although this strategy supports efficiency, it makes the system more vulnerable to control by the political elite. The Ugandan system has chosen the opposite way and distributes investigation and prosecution functions among many authorities. Experience has shown, however, that inefficiencies due to overlapping mandates and unclear jurisdictions are detrimental to anti-corruption efforts as well. The role of anti-corruption agencies in investigating and prosecuting procurement-related corruption cases is certainly stronger in anti-corruption systems following the streamlined approach, which makes them, at the same time, more exposed to exertion of political influence.

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