U4 Expert Answer

Anti-corruption instruments of the African Union and Regional Economic Communities

Query

Which instruments exist to promote anti-corruption in the context of the African Union and the Regional Economic Communities? We are looking especially for policies and international public law, but also for direct instruments (e.g. court rulings) if possible.

Purpose

The agency is currently preparing a workshop and training on anti-corruption measures in the field of public finance management.

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Summary

In light of the significant challenges posed by corruption and its impact on economic growth and social development, a range of instruments have emerged in Africa to address the problem of corruption. These instruments vary in their scope and binding nature, ranging from international conventions and protocols to voluntary guidelines and standards.

In addition to its Convention on Preventing and Combatting Corruption, the African Union (AU) also has other legal instruments relevant to fighting corruption and can also make use of the instruments of its bodies such as the AU Commission, New Partnership for Africa's Development and its Court of Human and Peoples' Rights. However, there is concern that fragmentation, lack of coordination and lack of implementation may reduce the effectiveness of the AU's anti-corruption instruments.

The legal instruments of the RECs vary greatly depending on the level of cooperation and

Author(s): Samira Lindner, Transparency International, tihelpdesk@transparency.org
Reviewed by: Marie Chêne, Transparency International, Chantal Uwimana, Transparency International, cuwimana@transparency.org

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capacity. There are also overlapping memberships among the RECs and a duplication of efforts. Moreover, the instruments are not always ratified or, if ratified, not duly translated into national legislation; and in most cases they are not implemented.

1. Overview

In light of the significant challenges posed by corruption and its impact on economic growth and social development, a range of instruments and initiatives have emerged in Africa to address the problem of corruption, varying in their scope and binding nature.

These instruments and initiatives are embedded in the African Union (AU) infrastructure and its Regional Economic Communities (RECs), which are understood as the building blocks of the AU. RECs are seen to have “enormous potential” as they are the key implementing bodies of the AU in their respective regions (OSAA 2010).

However, it has been argued that the large number of bodies with formal mandates on governance in Africa and overlapping memberships cause fragmentation and challenge the harmonisation and coordination of instruments and initiatives (ISS 2011).

As a result, the African Governance Architecture (AGA) was created to strengthen coordination among AU bodies working on governance issues. The AGA is the overall political and institutional framework for the promotion of democracy, governance and human rights in Africa (ISS 2011). It also projects the continent’s governance vision, which is embodied in the different norms, standards and principles at regional and continental levels to which AU member states have committed themselves (EuropeAfrica 2011).

While still in its early years, the AGA is seen as an important opportunity for African governance, but is also faced with challenges. For example, while the AGA brings together existing institutions and instruments to enhance linkages, it is unclear what exact role initiatives such as the African Peer Review Mechanism or the African Peace and Security Architecture will play in the AGA framework (SAIIA 2014b). Nevertheless, based on the many instruments that currently exist, the emergence of the AGA is seen as crucial in order to harmonise and coordinate initiatives and binding instruments on governance in Africa (EuropeAfrica 2011).

The AGA has many instruments on governance and anti-corruption at its disposal. Defining how the AGA will make use of these instruments is crucial to its success (SAIIA 2014b). For example, the AGA could play a key role in assessing member states’ compliance with existing instruments (SAIIA 2014b).

This Helpdesk answer compiles the different anti-corruption instruments, both binding and non-binding, that currently exist within the framework of the AU and RECs. These instruments range from conventions and protocols to voluntary guidelines and standards.

2. African Union

The AU was first established as the Organisation of African Unity in 1963 and subsequently transformed into the AU in 1999. It has a membership of 54 states.

The structure consists of, among other bodies, the African Court of Human and Peoples’ Rights and the Commission that acts as the secretariat. Other affiliated bodies include the New Partnership for Africa’s Development (and its African Peer Review Mechanisms) and the African Commission on Human and Peoples’ Rights.

Legal instruments relevant to anti-corruption

Constitutive Act of the African Union

The Constitutive Act of the African Union, signed in 2000, is the founding document of the AU and forms the organisation’s framework. It is the first document of the AU to enshrine the promotion of democracy as part of the AU’s core mandate (Karume and Mura 2012). One of its objectives (Article 3) is to “promote democratic principles and institutions, popular participation and good governance”. As such, the AU shall function in accordance with “respect for democratic principles, human rights, the rule of law and good governance” (Article 4).

African Union Declaration on the Principles Governing Democratic Elections in Africa

The African Union Declaration on the Principles Governing Democratic Elections in Africa, also known as the Durban Declaration, was signed in

2002 and is seen as one of the important founding declarations for the promotion of democracy in Africa and a milestone for AU work in the field of democratisation (Karume and Mura 2012). While it provides clear and specific guidelines with respect to free and fair elections and the role of the AU, the declaration is a "soft law" instrument and not legally binding (Karume and Mura 2012). Therefore its application relies on the willingness of member states.

According to the declaration, AU member states have the responsibility to take measures to implement the principles contained in the declaration, including establishing appropriate institutions to decide on issues such as codes of conduct and voter eligibility requirements, establish national electoral bodies to oversee the electoral process, promote civic education on democratic principles, and take necessary measures to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process (Article 3). The AU heads of state also mandate that the AU be fully engaged in strengthening the democratisation process by observing elections in member states (Article 5).

African Union Convention on Preventing and Combating Corruption

The AU takes a comprehensive approach to preventing and combating corruption through its Convention on Preventing and Combating Corruption (Transparency International 2006). The convention is unique among anti-corruption instruments in that it contains mandatory provisions regarding private-to-private corruption and transparency in political party funding (Transparency International 2006). Other strengths include its mandatory requirements of declaration of assets by designated public officials and restrictions on immunity for public officials (Transparency International 2006).

Although the convention was adopted in 2003, it took three years to enter into force due to delays in its ratification. Only in 2006 did it meet the required number of ratifications (15). To date, it has been ratified by 34 member states.

The convention calls for governments to establish or consider establishing certain criminal offences. These include bribery of national and foreign public sector officials, bribery of private sector decision-makers, illicit enrichment by a public official (subject to domestic law), embezzlement, misappropriation or other diversion of entrusted property by a public official, embezzlement by persons working in private sector entities, trading in influence (subject to domestic law), abuse of functions, laundering proceeds of corruption, concealment or retention of proceeds of crime, aiding and abetting corruption, and obstruction of justice (Transparency International 2006). The convention also covers international cooperation between law enforcement authorities such as extradition, mutual legal assistance and law enforcement cooperation.

It also has provisions on preventive measures in the public and private sectors, including: declarations of assets, establishment of codes of conduct, access to information, whistleblower protection, procurement standards, accounting standards, transparency in the funding of political parties and civil society participation (Transparency International 2006). It also requires states to establish, maintain and strengthen independent national anti-corruption authorities (Transparency International 2006).

In terms of a review mechanism, the convention calls for an Advisory Board on Corruption elected by the AU Executive Council. The board has broad responsibilities for promoting anti-corruption work, collecting information on corruption and on the behaviour of multinational corporations operating in Africa, developing methodologies, advising governments, developing codes of conduct for public officials, and building partnerships (Article 22). It is required to submit a report to the AU Executive Council on a regular basis on progress made by each state party. States parties are required to report to the board on their progress within a year after the coming into force of the AU convention and thereafter on an annual basis through reports by national anti-corruption authorities (Article 22). The advisory board supports the implementation of the AU anti-corruption convention by promoting effective legal frameworks to combat corruption within member states, promoting the adoption of a code of conduct for public officials, and analysing and encouraging capacity development of national anti-corruption bodies (Akena 2011). It also supports member states by formulating draft model laws and harmonising legislation.

There has been slow progress in setting up this review mechanism. Since its inception in 2009, the board elaborated and submitted a self-assessment questionnaire to states parties, and

conducted country visits in a number of countries to assess levels of implementation of the convention as well as to advocate for its ratification (Advisory Board on Corruption 2013). While reports of some country visits can be accessed on the board's website, there is little publicly available information on state parties' self-evaluation processes and assessments.

African Charter on Democracy, Elections and Governance

The African Charter on Democracy, Elections and Governance was signed in 2008 to promote improved governance across the continent. It is a legally binding document and sets out standards on good governance and democracy in areas such as rule of law, free and fair elections, and unconstitutional changes of government (SAIIA 2014b). It has been lauded as an ambitious instrument that has great potential to strengthen the implementation of shared values on democracy and good governance (SAIIA 2014b). It has even been used by some countries as a guide during difficult transitions; for example, Mauritania used its principles to negotiate a return to constitutional order after a coup in 2008 (National Democratic Institute 2013).

Specifically on anti-corruption, Article 3 specifies that states parties shall implement the charter in accordance with "condemnation and rejection of acts of corruption, related offenses and impunity". Under Article 27, states parties commit themselves to "improving efficiency and effectiveness of public services and combating corruption" and under Article 33, states parties shall institutionalise good economic and corporate governance through "preventing and combating corruption and related offences". Article 44 provides for a mechanism for monitoring and evaluating the progress of states parties in implementing the charter, and assigns that responsibility to the AU Commission.

However, the effectiveness of the charter is dependent on how it is actually implemented by member states. It has been argued that it is being undermined by an absence of political will among some member states, and there is little awareness among citizens of its existence (National Democratic Institute 2013). To date, it has only been ratified by 10 out of 54 AU member states. Experts argue that more emphasis should be placed on using the AGA as a "legally binding anchor" that determines concrete actions in cases of electoral mismanagement and threats to democracy (SAIIA 2014b). As such, it is said that the AGA agenda should focus on promoting compliance with the charter and link its enforcement to other key processes in the continent (SAIIA 2014b).

African Charter on the Values and Principles of Public Service and Administration

Adopted in 2011, the African Charter on the Values and Principles of Public Service and Administration focuses on establishing quality public service that meets the needs of users and ensures that citizens can participate in the public administration process. Article 12 focuses specifically on preventing and combating corruption. Accordingly, states parties:

(1) "Shall enact laws and adopt strategies to fight corruption through the establishment of independent anti-corruption institutions.

(2) Public Service and Administration shall constantly sensitise public service agents and users on legal instruments, strategies and mechanisms used to fight corruption.

(3) States parties shall institute national accountability and integrity systems to promote value-based societal behaviour and attitudes as a means of preventing corruption.

(4) States parties shall promote and recognise exemplary leadership in creating value-based and corruption-free societies."

As it is still relatively new, there have not been many assessments of the charter's implementation and effectiveness. However, the government of Swaziland recently announced that it will draft its own national public service charter using the African Charter as the basis (UNDP 2014).

Instruments of relevant AU bodies

AU Commission

The AU Commission (AUC) is the secretariat designated to give effect to the provisions of the Constitute Act and the African Charter on Democracy, Elections and Governance (Akena 2011). The democracy charter requires the AUC to develop benchmarks for the implementation of the charter and promote harmonisation of laws and policies. To develop and monitor these

benchmarks, the AUC Department of Political Affairs has organised expert meetings on the Draft State Reporting Guidelines on the African Charter on Democracy, Elections and Governance (AU 2014).

The AUC organised the African Forum on Fighting Corruption in 2007. Participants discussed the problem of corruption and its impact on Africa (ECA and ABC 2011). The forum developed a unified African perspective on fighting corruption that was presented at the Global Forum V on "Fighting Corruption and Safeguarding Integrity" (Akena 2011).

Within the framework of the AUC, a forum of National Anti-Corruption Bodies in Africa was also established. This provides regular opportunities for exchange of knowledge and experience in implementing the AU anti-corruption convention (Chêne 2009).

The AUC is designated as the focal point of the AGA but experts argue that it is not well-organised to spearhead the AGA initiative (ISS 2011). A 2007 audit review described the relationship between the chairperson, deputy and commissioners of the AUC as "dysfunctional with overlapping portfolios, unclear authority and responsibility lines and expectations" (ISS 2011). As such, there are concerns about the AUC's effectiveness.

African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights was established in 1987 under the African Charter on Human and Peoples' Rights. Its authority rests on its own treaty but it reports to the Assembly of Heads of State and Government of the African Union. Its mandate is to promote and protect human and peoples' rights and interpret provisions of the charter and any other tasks assigned by the assembly.

Some of its past work has also focused on good governance. For example, the 2011 Resolution on Electoral Processes and Participatory Governance in Africa and the 2008 Resolution on Elections in Africa condemn the resurgence of electoral fraud and irregularities across the continent. They urge states parties to ratify the African Charter on Democracy, Elections and Governance, ensure the independence of electoral bodies and of judiciary bodies responsible for monitoring electoral processes, and ensure that states parties create conditions conducive to free, fair, transparent and democratic elections.

New Partnership for Africa's Development

The New Partnership for Africa's Development (NEPAD) is a technical body of the AU that serves as both a vision and a policy framework for socio-economic development in Africa, and as the institutional arm for implementing the AU development agenda. By linking poverty reduction to governance issues such as democracy, human rights and corruption, it is seen to have inaugurated a new approach in development (Chêne 2009).

(i) NEPAD framework document

The NEPAD framework document sets out NEPAD's goals and vision. In order to strengthen good governance, NEPAD states agree to undertake measures to ensure basic standards of good governance and democratic behaviour (Article 5). States agree to dedicate their efforts to creating and strengthening national, sub-regional and continental structures that support good governance.

The framework document also highlights the cooperative element of NEPAD, in that NEPAD states agree to support one another in implementing good governance measures. As such, the NEPAD leadership agrees to undertake a capacity-building process by supporting institutional reforms in member states on administrative and civil services, strengthening parliamentary oversight, promoting participatory decision-making, adopting effective measures to combat corruption and embezzlement, and undertaking judicial reforms (Article 5).

(ii) African Peer Review Mechanism

The African Peer Review Mechanism (APRM) was set up by the AU as part of the NEPAD. The APRM is a mutually-agreed programme that is voluntarily adopted by AU member states and serves as a self-monitoring mechanism. The APRM's mandate is to ensure that the policies and practices of participating countries conform with the agreed values. While not conceived as a review mechanism for anti-corruption conventions, in practice the APRM monitors anti-corruption activities and performance against convention requirements (Chêne 2009).

While the APRM has been heralded as a unique reform opportunity for Africa, there have been many challenges in carrying out the reviews, ranging from financial and technical to political (Chêne 2009). As of 2011, 30 member states have carried out the assessments. Moreover, although the APRM is formally part of the AGA, the scope of its contribution is still unclear (SAIIA 2014b). If well-integrated, the AGA is seen to have the potential to expand the scope and reach of APRM reviews, given the binding nature of treaty commitments of member states and the link to AU decision-making processes (SAIIA 2014a).

The review assesses the countries' adherence to a range of codes, standards and laws on good governance and anti-corruption. Some of these are stated in the NEPAD's Declaration on Democracy, Political, Economic and Corporate Governance that establishes the APRM. In terms of anti-corruption, this declaration includes commitments to combat corruption, ensure the effective functioning of anti-corruption bodies, maintain an independent judiciary that can prosecute corruption, and adopt codes of good governance at all levels of government.

The Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism document published by NEPAD in 2003 also summarises the main components that are assessed through the APRM. The review assesses to what extent there are independent and effective institutions, mechanisms and processes for combating corruption. To demonstrate their progress in fighting corruption, participating member states are assessed, among other indicators, on their adoption of the United Nations Convention against Corruption (UNCAC) and AU anti-corruption convention, the NEPAD Framework Document, international recommendations on anti-money laundering, and adherence to international standards on auditing.

African Court of Human and Peoples' Rights

The African Court of Human and Peoples' Rights is a court established by AU member states. The court's mandate is to complement and reinforce the functions of the African Commission on Human and Peoples' Rights. Currently, the AU is planning a merger between the African Court of Human and Peoples' Rights and an African Court of Justice that would create a comprehensive African Court of Justice and Human Rights with two chambers, one for general legal matters and one for rulings on human rights treaties. While the Protocol on the Statute of the African Court of Justice and Human Rights was adopted in 2008, it is still missing the number of ratifications needed for it to enter into force (African Court Coalition no date).

Recently, the court has dealt with a corruption-related human rights case, namely the ongoing Lohé Issa Konaté versus Burkina Faso case. The case concerns a journalist from Burkina Faso who, as a result of allegedly insulting and defaming a local prosecutor, served a prison sentence, was fined, and had his newspaper shut down (MLDI 2014). The journalist published reports accusing the prosecutor of corruption and abuse of power (MLDI 2014). His defence argues that Mr Konaté's case represents a violation of his right to freedom of expression, and raises concern about the unduly harsh sanctions and criminal law used in a dispute about reputation (MLDI 2014). The ruling, expected in late 2014, is eagerly anticipated as it is seen as a landmark case on freedom of expression and rule of law in Africa (MLDI 2014).

1. Regional Economic Communities

The AU has eight formally recognised RECs. These are:

- Arab Maghreb Union
- Common Market for Eastern and Southern Africa
- Community of Sahel-Saharan States
- East African Community (EAC)
- Economic Community of Central African States (ECCAS)
- Economic Community of West African States (ECOWAS)
- Intergovernmental Authority on Development
- Southern African Development Community (SADC)

Many more exist, but only these eight RECs are formally recognised. Each region contains an average of three to four organisations (ECA 2006). Moreover, there is an overlap in membership and duplication of programmes among the RECs (ECA 2006). This strains the already limited financial and human resources at the disposal of many RECs (ECA 2006).

Another challenge to the effectiveness of RECs in meeting their stated goals is that countries are slow to bring national legislation in line with

regional instruments. For example, the ratification process alone has taken most countries a year (ECA 2006). The effectiveness of the RECs is limited by weak national institutions in African countries. Many lack a central point in the government for coordinating sub-regional economic activities (ECA 2006). As such, REC goals are not often put into national plans and budgets, and regional cooperation does not go beyond signing treaties and protocols (ECA 2006).

There is great variation in terms of the integration and capacity of the eight officially recognised RECs. As such, this Helpdesk answer will focus on some of the more established RECs, namely ECOWAS, SADC and EAC. These RECs have similar structures that consist of an executive, bodies of expert advisors, and a court of justice. Nevertheless, even among these four, the level of information publicly available varies, especially when it comes to the respective courts and their rulings. There is also limited information on the implementation and effectiveness of existing anti-corruption instruments as many of them are still relatively new (ECA 2010).

Economic Community of West African States (ECOWAS)

Members of ECOWAS include: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. ECOWAS was founded in 1975 although its treaty was revised in 1993 (OSAA 2010).

The main policymaking institutions are the ECOWAS Commission, ECOWAS Community Parliament, and the ECOWAS Community Court of Justice.

The ECOWAS Community Court of Justice was created by a protocol signed in 1991, which entered into force in 1996 (OSAA 2010). Its jurisdiction includes ruling on disputes between states over interpretations of the revised treaty, and providing the ECOWAS council with advisory opinions on legal issues. It also has jurisdiction over gross human rights breaches (OSAA 2010).

The Inter-Governmental Action Group Against Money Laundering in West Africa is the ECOWAS institution dedicated to the fight against money laundering. It facilitates the adoption and implementation of Anti-Money Laundering and Counter-Financing of Terrorism standards in West Africa by conducting mutual evaluations of Member States in accordance with Financial Action Task Force standards.

Key legal instruments relevant to fighting corruption

(i) Revised Treaty of the ECOWAS

The Treaty of the ECOWAS was first signed in 1975 and subsequently revised in 1993. The only sections that focus on governance are those in the revised treaty in Article 4 on fundamental principles, which delineates that states parties declare their adherence to "promotion and consolidation of a democratic system of governance in each Member State" and to "accountability, economic and social justice and popular participation in development".

(ii) ECOWAS Protocol on the Fight Against Corruption

The ECOWAS Protocol on the Fight Against Corruption was signed in 2001 and has yet to enter into force due to a lack of ratifications.

It provides for preventive measures in the public and private sectors. These include requirements in the public service of declarations of assets and establishment of codes of conduct, requirements of access to information, whistleblower protection, procurement standards, transparency in the funding of political parties and civil society participation, and the establishment and strengthening of an independent national anti-corruption authority (Article 5).

The protocol calls for criminalisation of a wide range of offences with respect to public officials or employees of companies in the private sector, including bribery, trading in influence, and aiding and abetting the commission of corruption offences (Article 6). The protocol further requires states parties to establish diversion of property by a public official as an offence, as well as accounting and money-laundering offences (Article 7). Additional provisions relate to the protection of witnesses and victims (Articles 8 and 9), effective sanctions (Article 10) and liability of legal persons (Article 11). States are also required to prohibit and punish bribery of foreign public officials (Article 12). The protocol also covers seizure and forfeiture (Article 13), extradition (Article 14), mutual legal assistance and law enforcement cooperation (Article 15), and harmonisation of national legislation (Article 18).

The protocol calls for the establishment of a Technical Commission to monitor implementation at both national and sub-national levels (Article 19). This commission is mandated with gathering and disseminating information, organising training programmes and providing assistance to states parties. It is to be composed of experts from ministries in charge of finance, justice, internal affairs and security.

(iii) ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

Adopted in 1999, the above protocol creates a mechanism for addressing violent conflicts that spread across borders in West Africa. It also gives ECOWAS member states the mandate to eradicate corruption within their territories (UNODC 2005).

Through the protocol member states agree to promote transparency, accountability and good governance in order to eradicate corruption within their territories and in the region (Article 48); adopt strategies for combating money laundering by extending the scope of offences, enabling the confiscation of laundered proceeds and illicit funds, and easing bank secrecy laws within and outside the region (Article 49); and take steps to control trans-border crime including strengthening national legal instruments on mutual legal assistance and extradition (Article 46).

(iv) ECOWAS Supplementary Protocol on Democracy and Good Governance

The supplementary protocol was adopted by heads of state in 2001. It establishes a link between good governance and peace and security, and is seen as a clear improvement in the security culture within the West African community space (Yabi 2010). The protocol defines the constitutional principles ECOWAS member states must adhere to, and also defines a series of principles concerning elections in member states (Yabi 2010). Under Article 38, member states agree to "undertake to fight corruption and manage their national resources in a transparent manner, ensuring that they are equitably distributed" and "undertake to establish appropriate mechanisms to address issues of corruption within the Member States and at the Community level".

(v) Landmark ruling by the ECOWAS Community Court of Justice

One of the best-known cases related to corruption before a sub-regional court is the public interest litigation case of the Socio-Economic Rights and Accountability Project (SERAP) versus Nigeria at the ECOWAS Community Court of Justice. In 2006, SERAP in Nigeria received information from whistleblowers alleging massive corruption by Nigeria's Universal Basic Education Commission, following which SERAP undertook investigations and submitted a petition to Nigeria's Corrupt Practices and Other Related Offences Commission in 2007 (Mumuni and Sweeney 2013). The commission's investigation concluded that 3.3 billion Nigerian naira (US$21 million) had been lost in 2005 and 2006 to the illegal and unauthorised utilisation of funds (Mumuni and Sweeney 2013). SERAP estimated that as a result over five million Nigeria children lacked access to primary education (Mumuni and Sweeney 2013).

On the basis of the commission's findings, SERAP filed a right to education case before the ECOWAS court, arguing that the corruption in Nigeria amounted to a denial of the right to education for Nigeria's children. In a landmark judgement delivered in 2010, the ECOWAS court upheld SERAP's submission and declared that the Nigerian government has a legal responsibility to provide free, high-quality and compulsory basic education to every Nigerian child (Mumuni and Sweeney 2013).

However, implementation remains a challenge following the ruling. While the judgement is binding and immediately enforceable, there are no clear provisions on who is to effect or execute the decisions of the court (Mumuni and Sweeney 2013). Nevertheless, the judgement provided SERAP with a clear framework to work with anti-corruption agencies in order to ensure effective prosecution of those responsible and full recovery of stolen funds (Mumuni and Sweeney 2013). Moreover, the act of taking a public case to a regional court has also drawn international attention (Mumuni and Sweeney 2013).

(vi) WAEMU directives on public financial management

Many ECOWAS members are also members[1] of the West African Economic and Monetary Union (WAEMU) with which ECOWAS has a Memorandum of Understanding. There is a growing relationship between the two bodies, leading to their adoption of a common programme of action on a range of issues, including trade liberalisation and macro-economic policy convergence (ECA 2012).

WAEMU has put forward binding directives in the area of public financial management. These are seen as an important tool in the fight against corruption (CABRI 2012). The directives are on the code of transparency in the management of public finances, budget laws, general regulations of public accounting, government budget classification, state chart of accounts and table of state financial operations (International Budget Partnership 2014).

However, implementation of these directives has been slow. Few countries have reformed their legal framework to comply with the provisions. Even in those that have done so, implementation and enforcement of the law remains a challenge (International Budget Partnership 2013).

Southern African Development Community (SADC)

Members of the SADC include: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Although it started in 1980 as a loose alliance under a different name, it became the SADC in 1992 with the signing of the SADC Treaty (OSAA 2010).

The SADC is comprised of eight institutions. One of these is the SADC Tribunal, which is the SADC's supreme judicial body and is made up of ten judges. The court only became operational in 2005, 13 years after establishment, due to resource constraints (IDW no date). While the court has a human rights mandate, human rights organisations have expressed their concern that some SADC countries want to limit the extent to which individuals can bring human rights cases against member states (Gilbert 2012).

No rulings by the SADC Tribunal could be found that are relevant to this Helpdesk answer.

Key legal instruments relevant to fighting corruption

(i) Treaty of the SADC

The Treaty of the SADC is the founding document for the establishment of the SADC in 1992. The principles as outlined in Article 4 are, among others, "human rights, democracy, and the rule of law".

(ii) SADC Protocol Against Corruption

The SADC Protocol Against Corruption was adopted in 2001, making it the first anti-corruption treaty in Africa (Transparency International 2006). Although it entered into force in 2005, little progress has been made on implementation.

The protocol provides for both preventive and enforcement measures. Its purpose is to promote the development of anti-corruption mechanisms at the national level and cooperation in the fight against corruption by states parties, and to harmonise national anti-corruption legislation in the region (Transparency International 2006). It includes the following preventive measures: development of codes of conduct for public officials, transparency in public procurement of goods and services, easy access to public information, protection of whistleblowers, establishment of anti-corruption agencies, development of systems of accountability and controls, participation of the media and civil society, and use of public education and awareness as a way of introducing zero tolerance of corruption (Transparency International 2006).

States parties are required to establish as criminal offences acts of corruption including: bribery of, and diversion of property by, public officials as well as trading in influence with respect to such officials; bribery of employees of private sector entities and trading in influence with respect to such persons; fraudulent use or concealment of

[1] Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo are WAEMU members.

corruptly obtained property, as well as participation in any collaboration or conspiracy to commit acts of corruption (Transparency International 2006). The protocol also criminalises the bribery of foreign officials (Article 6). Moreover, the protocol addresses confiscation and seizure (Article 8), extradition (Article 9), judicial cooperation and legal assistance (Article 10).

In terms of a review mechanism, the protocol requires the establishment of a committee made up of stakeholders under the framework of the Southern African Forum Against Corruption, which should also be the designated authority to implement the protocol at national level (Transparency International 2006). The responsibilities include gathering and dissemination of information and intelligence on corruption among member states, organising training programmes, putting into practice a programme of implementation of the protocol and providing technical assistance to states parties where necessary. The committee has to report to council on progress made by each state party in complying with the protocol's provisions (Akena 2011).

(iii) SADC Protocol on Combating Illicit Drug Trafficking

The SADC Protocol on Combating Illicit Drug Trafficking was adopted in 1996. Its objective is to "reduce and eventually eliminate drug trafficking, money laundering, corruption, and the illicit use and abuse of drugs through cooperation among enforcement agencies and demand reduction through coordinated programmes in the region" (Article 2). Under Article 4, member states agree to promulgate, among measures, domestic legislation which shall make provision for "drug trafficking, money laundering, diversion of precursors, conspiracy, incitement and instigation and drug abuse to be illegal", "rendering mutual assistance in respect of illicit drug trafficking […]", "prevention and detection of laundering of the proceeds of drug trafficking", "conspiracy, incitement and instigation to be illegal".

The protocol also has a dedicated section on corruption (Article 8) in which member states shall take measures including those to establish adequately resourced anti-corruption agencies or units that are independent and free to initiate investigations and capable of gathering evidence; establish administrative and regulatory mechanisms for the prevention of corruption and abuse of power; strengthen and harmonising criminal laws and procedures to curb corruption; provide effective channels for submission of allegations of corruption; improve banking and financial regulations and mechanisms to prevent capital flight and tax evasion.

(iv) SADC Protocol on Mutual Legal Assistance in Criminal Matters

SADC is seen to be advanced in its measures for judicial cooperation in criminal matters, relative to other RECs (Kahombo 2010). The SADC Protocol on Mutual Legal Assistance in Legal Matters, signed in 2002, adopts common rules with regard to assistance in criminal matters (including investigations, prosecutions or proceedings relating to offences concerning corruption).

In signing the protocol, member states agree to "provide each other with the widest possible measure of mutual legal assistance in criminal matters" (Article 2.1). "Assistance shall be provided without regard to whether the conduct, which is the subject of investigation, prosecution, or proceedings in the Requesting State would constitute an offence under the laws of the Requested State" (Article 2.4). The protocol provides specific guidance on how such assistance will be given, the authorities responsible, and grounds on which such assistance can be denied.

(v) SADC Principles and Guidelines Governing Democratic Elections

In 2004 the SADC adopted the Principles and Guidelines Governing Democratic Elections under which member states agree to adhere to standards that ensure free, fair and democratic elections. Among the many guidelines, states also agree to take necessary measures and precautions to prevent the perpetration of fraud, rigging and any other illegal practice (Article 7).

While not legally binding, the principles and guidelines seek to inform Southern Africa's electoral processes. The principles have guided electoral processes in, among others, Mauritius in 2010 (SARDC 2010).

East African Community (EAC)

The EAC consists of the following member states: Burundi, Kenya, Rwanda, Tanzania and Uganda. It was originally founded in 1967 but collapsed in 1977 (OSAA 2010). It was re-established in 1999

with the signing of the Treaty for the Establishment of the EAC.

The main organs of the EAC are the Summit of Heads of State, the Council of Ministers, the Co-ordination Committee, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.

Key legal instruments relevant to fighting corruption

(i) Treaty for the Establishment of the EAC

The Treaty for the Establishment of the EAC is the founding document of the EAC. The fundamental principles of the community as outlined in Article 6 involve a commitment to "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".

(ii) EAC Protocol on Combating Drug Trafficking in the East African Region

Signed in 2001, the EAC Protocol on Combating Drug Trafficking in the East Africa Region provides for a regional mechanism and institutional framework on combating illicit drug supply, demand and related corruption in the member states (ECA 2013). According to the EAC, it has been ratified by all member states (ECA 2013). Its objective is to eliminate illicit drug trafficking, money laundering and corruption through cooperation among law enforcement agencies and demand-reduction programmes in the region (Article 2). States parties commit to promulgating and adopting domestic legislation for drug trafficking and money laundering to be illegal, effective measures for dealing with the proceeds of illicit drug trafficking including freezing, seizure, confiscation and forfeiture of said proceeds (Article 4). The protocol also has provisions on mutual legal assistance (Article 5), law enforcement (Article 6), institutional arrangements (Article 8) and settlement of disputes (Article 9).

(iii) EAC Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income

This agreement was signed in 2010, providing the necessary legal basis to enhance cooperation among the revenue authorities of the five EAC member states (TradeMark Southern Africa 2012). Through the agreement, member states agree to exchange information as necessary for carrying out the provisions in the agreement, in particular for the prevention of fraud or evasion of taxes (Article 27). A follow-up Memorandum of Understanding on the Exchange of Information on Tax Expertise and Other Related Matters was also signed in 2010 by the respective revenue authorities, which spells out the rules and procedures for the successful adoption of information exchange on tax matters.

(iv) Draft EAC Protocol on Preventing and Combating Corruption

The draft EAC Protocol on Preventing and Combating Corruption aims to promote and strengthen the development of mechanisms to prevent and combat corruption, to promote and regulate cooperation among states parties, and to develop and harmonise laws and policies related to preventing and combating corruption across the region. According to the EAC, it provides for preventive measures, enforcement, a definitive list of offences, asset recovery, jurisdiction, fair trial and transfer of criminal proceedings, financial intelligence units, and development and harmonisation of policies and legislation.

The signing of the protocol, has, however, been delayed over the issue of whether member states will give prosecutorial powers to their respective anti-corruption agencies (DiMauro 2014). Kenya, for example, vests prosecutorial powers in the office of the Director of Public Prosecutions and is thus advocating for the section on prosecutorial powers of anti-corruption agencies to be optional rather than mandatory (DiMauro 2014).

The EAC protocol also provides for the establishment of a Sectoral Committee on Preventing and Combating Corruption as an implementation and review mechanism. It is envisaged to be comprised of the heads of national anti-corruption authorities, representatives of relevant state ministries, and prosecutors and representatives of other relevant state regulatory or oversight bodies (Akena 2011). The Sectoral Committee would report to the Council of Ministers and would be supported by a Coordination Unit at the EAC Secretariat that would follow up on implementation, monitoring and evaluation of the protocol (Akena 2011).

(v) Draft EAC Protocol on Good Governance

Parallel to the protocol on combating corruption, the EAC is also currently developing a Protocol on Good Governance. Together, these two protocols will offer benchmarks and standards on transparency, accountability, good governance and rule of law, and access to justice at regional level (IPP Media 2013). The Protocol on Good Governance envisages harmonisation and approximation of policies on good governance. The key pillars of the protocol are: constitutionalism, rule of law and access to justice, protection of human rights and promotion of equal opportunities, democracy and democratisation, combating corruption and enhancing ethics and integrity, separation of powers, economic governance, and private sector development and corporate governance.

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