



# SANCTIONS AS A TOOL FOR ASSET RECOVERY: KENYA

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## KEY MESSAGES

- Kenya has been relatively successful in recent years in concluding modest asset recovery agreements and has shifted its strategy from purely pursuing corruption prosecutions and convictions to also tracing and locating the proceeds of corruption.
- The UK, the EU and the US have sanctioned several Kenyan nationals and residents of Kenya on the grounds of support for terrorism and corrupt conduct.
- Sanctions imposed by other countries have though been portrayed within Kenya as politically motivated and designed to preserve geopolitical or business advantage.
- The use of Magnitsky-style, 'smart' sanctions may present some advantages and opportunities in Kenya, especially in tackling past cases.
- Care needs to be taken when imposing these international sanctions that they address primarily cases where national progress is stalled. Extensive communication with a wide range of Kenyan stakeholders during the process is recommended.

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# ASSET RECOVERY AND ANTI-CORRUPTION FRAMEWORK

## CORRUPTION OVERVIEW

Kenya remains a high-risk country for corruption at all levels. The East African country is a regional economic hub and a financial centre. It nevertheless ranks as the ninth riskiest destination for money laundering in the world, according to the 2020 Basel Anti-Money Laundering Index. High levels of illicit financial outflows and assets laundered through illegal activity in the region are enabled by weak compliance with existing Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) legislation and policies.<sup>1</sup> Kenya is categorised by the US State Department as a jurisdiction of primary concern in respect to AML/CFT, due to the potential for terrorism financing.<sup>2</sup>

Despite obvious governance weaknesses, Kenya has been praised by the international community and, to some extent, Kenyans, as an anti-corruption reformer in recent years. The third FATF review in 2014 noted Kenya's significant progress in improving its AML/CFT regime.<sup>3</sup> Under President Kenyatta, the justice sector, considered corrupt and inefficient in the past, is being rapidly transformed. The institutional and legal anti-corruption framework is relatively well developed. The Ethics and Anti-Corruption Commission (EACC) is the leading anti-corruption agency; it was established in 2011 and is enshrined in the Constitution. Despite consistent attacks on its operational independence and integrity and numerous destabilisation attempts, the EACC is one of the most respected African anti-corruption institutions.

Unlike most other countries in the sub-Saharan region, Kenya guarantees the commissioners of the EACC security of tenure at a constitutional level, which has

decisively contributed to the effectivity and effectiveness of the institution.<sup>4</sup>

**THE KENYAN PUBLIC IS IN GENERAL HIGHLY SCEPTICAL OF GOVERNMENTAL ANTI-CORRUPTION EFFORTS. THE PUBLIC RANKS LAW ENFORCEMENT AND THE POLICE AS THE MOST CORRUPT KENYAN INSTITUTIONS.<sup>5</sup>**

Publications have highlighted the kleptocratic nature of corruption in Kenya and the difficulties in reforming a deeply corrupt system, with aspects of public service based on 'prebendalism' where elected and public officials perceive it as their right and duty to share government revenues and use them to benefit their supporters and members of their ethnic group.<sup>6</sup> A report conducted by the African branch of the Open Society Foundation echoes the majority public opinion of Kenyans that "[p]revention, suppression and punishment of corruption frequently feature in Kenyan political rhetoric, but rarely is this rhetoric matched by action".<sup>7</sup>

Kenya has a well-developed and independent media. Kenyan media and civil society are instrumental in reporting and investigating corruption cases and are well linked with global investigative organisations and other foreign partners. Investigative journalists frequently disclose crucial anti-corruption evidence despite some restrictive laws. Defamation charges against domestic media outlets and physical attacks related to their anti-corruption work do, however, occur.<sup>8</sup>

The government does not maintain a list of sanctioned individuals or entities. There are no international sanctions against Kenya. There are several individuals and entities on the US Specially Designated Nationals and Blocked Persons list (SDN List) and sanctions

lists of other nations.<sup>9</sup>

## ASSET RECOVERY OVERVIEW

The EACC and other law enforcement have relative operational independence despite occasional political interference and insufficient budget independence.<sup>10</sup> Compared regionally, the EACC has a track record of reliable performance in the investigation and conviction of corruption-related cases. For example, in 2018/19, 130 cases were completed with 48 convictions secured. 1748 active investigations took place during the same period.<sup>11</sup>

The EACC has also been progressing in the field of asset recovery. Between 2011-2019, 6.5 billion Kenyan Shillings (KSh) (USD 60.7 million) were domestically recovered and 20 billion KSh (USD 186 million) were frozen. The EACC also collects and publishes relatively detailed asset recovery statistics,<sup>12</sup> and, in 2019 alone, anti-corruption officials recovered USD 40 million with the support of international partners.<sup>13</sup>

**KENYA HAS ALSO INITIATED A MULTILATERAL PLATFORM: THE FRAMEWORK FOR THE RETURN OF ASSETS FROM CORRUPTION AND CRIME (FRACCK), AGREED AND SIGNED IN 2018 BY THE GOVERNMENTS OF KENYA, JERSEY, SWITZERLAND AND THE UK, THIS FRAMEWORK SUPPORTS TRANSPARENCY AND ACCOUNTABILITY IN ASSET RETURN.**

The signature of the agreement hopefully signals political commitment on the side of the Kenyan government and its partner governments, which will further facilitate cooperation leading to asset returns to Kenya. This instrument has already had an impact on successful asset repatriation of around GBP 3 million from Jersey.<sup>14</sup>

In a drive to regulate the management and utilisation of recovered assets and after

intense pressure from Kenyan civil society,<sup>15</sup> the National Treasury has proposed Proceeds of Crime and Anti-Money Laundering Regulations (2019), seeking to establish a Criminal Assets Recovery Fund and Administration. If enacted in its current form, the fund will receive, manage, and transfer all money and property derived from confiscation and forfeiture orders recovered under the Anti-Corruption and Economic Crimes Act.<sup>16</sup> This legal framework would address concerns of civil society and the public that assets returned from abroad and domestically may not be being utilised appropriately.<sup>17</sup>

In 2014 Kenya's National Assembly passed the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), amended in 2017, which anchored relevant asset recovery provisions in national law, as part of addressing gaps identified in the FATF review process. This law established an independent institution responsible for AML/CFT issues: the Financial Reporting Centre (FRC). The FRC's objectives include, among others, tracking the proceeds of corruption and crime abroad and within Kenya's jurisdiction.<sup>18</sup> Importantly, the FRC shares intelligence with the Assets Recovery Agency, which is a semi-autonomous body under the office of the Attorney-General and has the mandate to confiscate any assets that are a product of the proceeds of crime.<sup>19</sup> The Act also brought in a civil forfeiture regime, intending to lower the burden of proof for seizing the proceeds of corruption. Despite some progress in the application of the non-conviction based procedure, the tool is still underutilised according to Kenyan law practitioners and has the potential for further application.<sup>20</sup>

# TRANSNATIONAL CORRUPTION CASES AND EXTRATERRITORIAL SANCTIONS: KENYA'S EXPERIENCE

Kenya has occasionally hit international headlines with grand-corruption cases that have had global reach and are of substantial size. In 2002, based on whistleblowing by John Githongo, a presidential advisor on corruption, the Kenyan Anti-Corruption Commission investigated a consortium of Kenyan and international companies in the Anglo Leasing Group and revealed 18 grossly overpriced state security contracts worth a combined \$770m. After the scandal was made public, some of the credit supplier companies involved voluntarily refunded the full amounts relating to their commitments.<sup>21</sup> However, beneficial ownership of the entities involved in the Anglo Leasing case has never been fully explained, meaning that some suspects could not be investigated and charged.<sup>22</sup> Further, John Githongo eventually had to flee Kenya to the UK due to threats made against him.<sup>23</sup>

Some smaller recoveries from this enormous loot were eventually repatriated to Kenya. Switzerland returned around USD 14 million in 2004 linked the Anglo Leasing case, some more modest asset returns followed after that.<sup>24</sup> However, the majority of the assets have never been located and recovered. Moreover, a number of the Anglo-Leasing creditors won international arbitration awards against the Government of Kenya. The contracts had to be paid in full by the Government despite non-existing or grossly overpriced services linked to internal security and defence.

In 2007, the UK's Serious Fraud Office investigated offshore accounts in the British tax havens of Jersey and Guernsey, which were used to launder more than \$30m in connection with the failed contracts. It

however halted the probe citing lack of cooperation by Kenyan authorities.<sup>25</sup>

This case illustrates some of the problems that Kenyan institutions struggle with in deterring, prosecuting, and recovering large-scale corruption. No convictions have ever been reached in this case, only a fraction of the stolen assets have been located in Kenya and abroad, and only an insignificant portion has been returned.<sup>26</sup>

In terms of the damage to the Kenyan treasury, the Goldenberg scandal may even surpass the Anglo Leasing case. Goldenberg International, a company partly owned by the director of the Kenyan Secret Service, James Kanyotu, devised a scheme in the 1990s to export gold and diamonds to three companies in Dubai and Switzerland. As Kenya did not have significant deposits of diamonds and gold, Goldenberg International exports came from gold smuggled from the Democratic Republic of the Congo. Later, the company stopped smuggling gold and started faking export declaration forms, which were fully paid by the Government of Kenya, including a 35% export compensation.<sup>27</sup>

The total cost of the scandal is unknown, but the damage is estimated at 10% of Kenyan GDP at that time.<sup>28</sup> Investigations were slow and resulted in five indictments including the former deputy governor of the central bank, Eliphaz Riungu, the former treasury permanent secretary, Wilfred Karunga Koinange, and Kamlesh Pattni, a businessman and a director of Goldenberg International. It is widely believed that the entire political elite around President Daniel Arap Moi was involved in the cover-up and

profited from the scheme.<sup>29</sup> Despite some investigations, no convictions were ever reached. The whistleblower who made the case public, David Munyakei, a banker in the Central Bank of Kenya, was ‘hounded into destitution for his efforts [as] a victim of the forces of state capture’.<sup>30</sup>

## INTERNATIONAL SANCTIONS ON INDIVIDUALS AND ENTITIES IN KENYA

This Goldenberg scandal reverberated within Kenya’s anti-corruption efforts domestically and internationally. The US twice imposed sanctions on the former attorney general (1991-2011) and later a popular senator, Mr Amos Sitswila Wako, over his inaction in this case. Wako was blacklisted in 2009 and again in 2019 under an executive order prohibiting officials of foreign governments involved in corruption from entering the United States and including their immediate family members.<sup>31</sup> The case sparked a diplomatic row between the US and the Government of Kenya and was also widely dismissed by the Kenyan public as unfair to the famous politician.<sup>32</sup>

The US Specially Designated Nationals and Blocked Persons (SDN) list includes 11 persons and organisational entities of Kenyan nationality or residing in Kenya, which are under US Magnitsky Act sanctions. Most individuals and entities are sanctioned for their corrupt conduct in South Sudan.<sup>33</sup> The US Securities and Exchange Commission also charged the US-based Goodyear Tire & Rubber Company for violating the Foreign Corrupt Practices Act (FCPA) whose subsidiaries paid bribes to land tire sales in Kenya and Angola. The company settled the charges through a payment of USD 16 million. No compensation was paid to potential corruption victims in Kenya.<sup>34</sup> The UK has listed some Kenyan nationals and residents of Kenya on the Financial Sanctions Targets list, mostly for support of terrorist organisations in Somalia.<sup>35</sup> The EU has not sanctioned any Kenyan entities or persons except the Al-Haramayn Foundation in Kenya, due to their support for terrorism.

### KENYA HAS BEEN RELATIVELY SUCCESSFUL IN RECENT YEARS IN CONCLUDING MODEST ASSET RECOVERY AGREEMENTS AS IT HAS SHIFTED ITS STRATEGY FROM PURSUING CORRUPTION PROSECUTIONS AND CONVICTIONS TO TRACING AND LOCATING THE PROCEEDS OF CORRUPTION.

Internationally, a successful case of recovered assets was reached in March 2017 between the governments of Jersey and Kenya under the FRACCK agreement. In December 2018, Jersey and Kenya signed an asset-sharing deal for the return of around USD 5.2 million from the offshore bank account in Jersey of Windward Trading Company. Windward Trading had pled guilty to four counts of money laundering in Jersey’s Royal Court in 2016, which prompted the confiscation of assets in the firm’s offshore account.<sup>36</sup> A crucial element was hiring a Jersey-based private company, which devised a strategy resulting in the successful repatriation of the assets to Kenya on behalf of the EACC.<sup>37</sup>

As part of its asset recovery anti-corruption strategy, Kenya has attempted to improve its legal and institutional capacity to enhance domestic asset recovery. In 2019, the public prosecution achieved its second and largest unexplained wealth order for an amount exceeding USD 3 million. The case involved a senior local county official in a position to exert influence over the awarding of procurement contracts. The EACC was able to review substantial amounts of financial material to identify the flow of funds and subsequent acquisition of properties. The impact of this case extends far beyond the confiscated assets as it set a strong precedent. This is particularly the case as unexplained asset recovery proceedings are often challenged and blocked in Kenyan courts on allegations that they violate constitutional rights relating to the presumption of innocence and the right against self-incrimination.<sup>38</sup>

In recent years, Kenyan law enforcement has grown in confidence and increased attempts to prosecute powerful actors on



corruption charges. In July 2019, a sitting Finance Minister - Henry Rotich - along with 27 co-accused was arrested on suspicion of financial misconduct related to the construction of two dams overseen by an Italian construction company. Kenyan prosecutors have requested help from British and Italian authorities in pushing the charges and tracing part of USD 446 million earmarked for the construction. No convictions have been reached, and no assets have been recovered to date, but the case remains in an early phase.<sup>39</sup>

A critical success story of Kenyan-led, international cooperation has been the recent case of conviction of a sitting Member of Parliament, John Waluke, who defrauded the National Cereals and Produce Board of 40,000 tonnes of maize worth around USD 5 million through a South African based company. The case involved successful cooperation with South African authorities through a mutual legal assistance request, which provided key evidence of faked invoices for the case.<sup>40</sup>

The trend shows that Kenyan authorities, especially the EACC and the Office of the Director of Public Prosecution, are gradually opening grand-corruption cases involving asset tracking outside of Kenya's jurisdiction. Asset recovery is gaining traction as a strategy by Kenya's law enforcement and other stakeholders to circumvent difficulties in prosecution and conviction on corruption charges. Many hundreds of senior government officials and business people have been charged under various indictments related to corruption, including the chairman of the National Land Commission, the managing director of the Kenya Railways Corporation, the deputy chief justice, the CEO of Kenya Power and the head of Kenya Pipeline Company. However, it is disappointing to Kenyan public that no convictions in the major Kenyan corruption scandals such as Anglo Leasing and Goldenberg have been reached.<sup>41</sup>

DESPITE SUBSTANTIAL TECHNICAL, FINANCIAL AND, IN SOME CASES, POLITICAL ASSISTANCE FROM INTERNATIONAL PARTNERS INCLUDING INTERNATIONAL SANCTIONS, MOST OF THE ASSETS FROM THE GIGANTIC CORRUPTION SCANDALS IN THE PAST REMAIN TO BE TRACED, ALONG WITH CONVICTIONS OF THE MAIN CULPRITS.

In recent years, Kenya's actions on asset recovery seem to demonstrate political will and also a shift of strategy towards domestic and international asset tracing and repatriation of stolen assets. Legal and institutional tools are being revamped for practical international cooperation and domestic asset recovery, and law enforcement is acquiring the skills to pursue asset recovery abroad and domestically. Civil society has been essential in highlighting the need to regroup the anti-corruption agenda towards asset recovery but acknowledges lacking the necessary understanding and skills to be more effective in asset recovery processes. Given that international asset recovery cases can last over ten years, recent domestic reforms may be too recent to be judged. However, there is a real concern that the generation of politicians and public servants responsible for the enormous corruption scandals in the past will never be punished and the stolen assets totaling billions of dollars will never be returned to the Kenyan treasury.<sup>42</sup>

# IMPACT OF INTERNATIONAL SANCTIONS IN KENYA'S ANTI-CORRUPTION CONTEXT

Within the African context, including in Kenya, sanctions, especially if imposed by Western, ex-colonial powers or the USA are perceived in many cases as a sign of dependency and inferiority. Sanctions imposed by other states, for example the US or EU, are considered by the Kenyan population as politically motivated and designed to preserve global dominance or business advantage.<sup>43</sup> Magnitsky-style, 'smart' sanctions<sup>44</sup> may present some advantages and opportunities in Kenya, especially in tackling past cases rooted in the state capture of the Moi and Kibaki eras. However, application of international sanctions, even in targeted and limited scope against carefully selected individuals or entities, may carry substantial weaknesses and threats.

## POTENTIAL STRENGTHS AND OPPORTUNITIES OF INTERNATIONAL SANCTIONS

**Sanctions may avoid perceiving corruption charges as a political vendetta against a particular tribal or religious affiliation**

Despite some progress of Kenyan law enforcement, the actual rate of convictions on anti-corruption charges and recovery of stolen assets remains very low. The de-facto impunity of Kenyan public officials, especially in past grand corruption cases, poses serious challenges to investigate and prosecute corruption within Kenya's jurisdiction. Almost all prominent corruption cases are labelled as political, and the Kenyan public is focused on whose political advantage is gained by the charges being brought. For example, the arrest of the sitting Minister of Finance in 2019 has been widely interpreted as a

consequence of a rift between the President of Kenya Uhuru Kenyatta and his Vice-President William Ruto. Politically motivated violence in Kenya, fueled by the fear of losing power and influence, is a threat not to be ignored in the context of corruption and impunity.

**Sanctions may highlight systemic weaknesses in corruption investigation and prosecution**

The Office of the Attorney General is primarily responsible within the Kenyan legal system for the prosecution of corruption charges. The Attorney General is simultaneously the Government's chief legal advisor and chief legal defender. This situation makes it difficult to press charges against senior government officials or political allies of those in power, as witnessed in the Anglo Leasing case and the Goldenberg scandal.<sup>45</sup> If there is an apparent bottleneck at this level, as it has been the case in the past, international sanctions may be one of the few instruments that have the potential to move a case forward both within Kenya and abroad.

In the Goldenberg scandal, Attorney General Amos Wako, added to the US sanctions list twice (in 2009 and 2019), failed to launch proceedings for four years after the scandal had become public. It was the suspension of International Monetary Fund (IMF) aid, sustained pressure from Kenyan academic institutions and an outraged Kenyan public that moved the Attorney General to reluctantly launch investigations in the Goldenberg case. Still, he continued being obstructive. No convictions have been made and the Attorney



General's strategy has been heavily criticized, filing at some point more than 90 criminal counts in one judicial charge. This strategy predictably invalidated the charges and led to speculations that no serious attempts were ever made to prosecute the culprits and to recover any stolen assets. Similarly, in the Anglo-Leasing scandal, the at that time newly established Kenyan Anti-Corruption Commission (KACC), which was later superseded by the EACC, either did not investigate the prime suspects or accepted court defeats on procedural or technical grounds.<sup>46</sup>

**Sanctions may reveal the lack of a legal and regulatory framework to investigate financial crimes and recover stolen assets**

In anticipation of asset recoveries from abroad and also taking into consideration experiences of other African countries with recovered assets from abroad such as Nigeria and South Africa, critical legal drafts are at the moment at advanced stages of the legislative process. For example, the Proceeds of Crime and Anti-Money Laundering (Criminal Assets Recovery Fund) (Administration) Regulations 2019<sup>47</sup> is a direct result of the national debate about the need to recover stolen assets from internationally and nationally sanctioned entities and individuals. High-profile international sanctions, for example, the case of the ex-Attorney General Wako, add urgency to this debate.

**Sanctions can exert diplomatic pressure to impose consequences on suspects in stalled Kenyan corruption cases**

The imposition of sanctions may lead the EACC and the prosecutors to break free of the disadvantages of complex, corruption investigations, including resource- and capacity-expensive tracking of potential corrupt assets. The Kenyan corruption investigations confirm that gathering relevant evidence takes significant resources and

expertise, while suspects are able to hire the best national and international lawyers who exploit every possible legal loophole. Persons suspected of corruption have also in Kenya been able to pressure, intimidate or even eliminate witnesses: in 2015, Meshack Yebei was killed while he was linked to the International Criminal Court (ICC) trial of the Deputy President William Ruto. Mr Yebei allegedly attempted to bribe witnesses in the ICC trial of Ruto for election violence.<sup>48</sup>

International sanctions targeted at specific entities or persons and including travel bans and asset freezes would assist Kenyan law enforcement with some of the challenges of fighting against skilled political operatives able to corrupt and manipulate law enforcement and the judiciary. International pressure in anti-corruption cases or the mere threat to do so has been a clear incentive for Kenyan authorities to act. International sanctions could also galvanise civil society and the Kenyan general public with concentrated attention on a particular case. The strength of Kenyan public opinion has proven decisive in the past high-profile corruption cases, including opening investigations into the Goldenberg scandal and Anglo-Leasing, at least in the short term. Moreover, Magnitsky-like international sanctions would bypass the Kenyan judiciary, which has failed to convict almost any significant suspects of corruption and could not find a way to seize their suspicious assets. Many Kenyans accuse the judiciary of corruption or at least lack of capacity as the judges do not provide any explanations in questionable decisions from past unsuccessful cases in Anglo Leasing, Goldenberg and other high-profile cases.<sup>49</sup>

In cases such as Anglo Leasing and Goldenberg, sanctions may also be the only alternative to target powerful cabal - 'deep state' - members, made up of hidden or covert networks of power operating independently or with the political leadership. Despite some progress in

recent years, this 'class' remains practically untouchable by Kenyan law enforcement and too dangerous to tackle by civil society and investigative journalists.<sup>50</sup>

### Sanctions could send a powerful diplomatic message that corruption has consequences

It is reported that after the US put the ex-attorney general Mr Wako on the blacklist, '[p]anic has gripped senior government officials and politicians in the Moi, Kibaki [administration]'.<sup>51</sup> The move had such repercussions that EU representatives reported having been 'inundated' with calls by various senior civil servants and business leaders to know if the EU planned similar action against other Kenyan persons or entities. The EU did not impose any similar sanctions and assured them that no such sanctions were scheduled, to the disappointment of many anti-corruption activists.<sup>52</sup>

Imposing 'smart' and targeted international sanctions by countries attractive to suspected corrupt Kenyan officials carries significant 'social stigma'. The US and UK are important business and leisure destinations for Kenya's elite. The seizing of the proceeds of corruption is, for Kenyan kleptocrats, a much greater threat than the real or perceived threat of serving jail sentences for corruption charges.<sup>53</sup> Wealthy politicians and businesspersons send their children to top US and UK schools. Being a target of sanctions carries social and political costs for those concerned and those in the family, business and political circles of those targeted. Besides, international sanctions may provide an opportunity to tackle cases where suspects enjoy diplomatic immunity from investigation and prosecution within Kenya. Abuse of diplomatic immunity by Kenyans attached to the UN in New York in connection with human rights' violations has been problematic in the recent past.<sup>54</sup>

### Sanctions may be most impactful if they contain detailed reasoning and evidence behind the designation

The US has been heavily criticised by the Kenyan Government and civil society for not disclosing any specific evidence as to why the ex-Attorney General was sanctioned. The US Embassy in Kenya issued only a general statement that this move would aid Kenya's anti-corruption effort. The Law Society of Kenya (LSK) pointed out that Kenyan authorities can do nothing to react to these sanctions unless there is a complaint filed with Kenyan authorities, such as the LSK disciplinary committee.<sup>55</sup> Civil society organisations were also unsure about how to react to the case.

Kenya's civil society may welcome the imposing of international sanctions if national progress in specific cases is stalled and extensive communication with a wide range of Kenyan stakeholders during the process is carried out. Kenyan CSOs are ready to capitalise on the momentum created by the media and political attention whenever international sanctions are imposed on Kenyan individuals, entities and their assets. CSOs are gradually engaging in crucial advocacy for the national asset recovery infrastructure, for example contributing and being involved in discussions about the legal and policy framework for the management of domestically and internationally recovered assets.

### The effectiveness of sanctions may be increased if complemented with robust technical and financial support to CSOs and the investigative media

While it is recognised that investigations of corruption cases have to be led by law enforcement, Kenyan CSOs and world-leading journalists have a sound record in policy and advocacy within the anti-corruption field. It is worth mentioning that all significant domestic anti-corruption

scandals have been exposed by Kenyan anti-corruption activists or whistleblowers. Civil society has been less prominent in the areas of money laundering, illicit financial flows and asset recovery, mainly due to lack of technical capacity to engage with these issues.<sup>56</sup> The imposing of sanctions should therefore be coupled with extensive support to Kenyan CSOs in the fields of money laundering, illicit financial flows and asset recovery.

Some Kenyan CSOs already cooperate with international NGOs and other partners on global advocacy for investigation of corrupt Kenyan suspects and tracing Kenyan stolen wealth. CSO-led analysis of specific asset recovery cases and more evidence-based policy and advocacy to promote tools that have worked in similar contexts is, however, needed and currently lacking. International support to the asset recovery process in Kenya has been understandably concentrated on law enforcement and the judiciary. Experience sharing with CSOs in similar African contexts such as Nigeria and South Africa is thus in high demand as well as an understanding of non-conviction based approaches, the importance of statistical records, and CSO cooperation at the level of African Union, amongst other issues.<sup>57</sup>

### POTENTIAL WEAKNESSES AND THREATS OF INTERNATIONAL SANCTIONS

Sanctions are often perceived as a political, not an anti-corruption tool

There is an almost unanimous perception across the strata of Kenyan society that international sanctions are primarily motivated by the national interests of the states imposing sanctions.<sup>58</sup> In particular, the role of the US and the UK sanctions, imposed by two dominant international players in domestic politics, is rather unpopular in Kenya. When Mike Pompeo announced

in November 2019 that he has ‘credible information’ that the ex-Attorney General and sitting Senator, Julius Wako, had been involved in corruption and therefore banned him from travelling to the US along with his family, most Kenyans opposed the move. The US Government stressed that this sanction was put in place to aid Kenya in the fight against corruption.<sup>59</sup> However, this explanation was not accepted by the Kenyan Government and most of the general public. The government, along with civil society, criticized the decision on the grounds that the US government neither consulted any Kenyan stakeholders nor provided any evidence to the public. No criminal investigations were launched, and no asset freezes followed. The sanctions do not appear to have weakened the personal popularity of Mr Wako.<sup>60</sup>

From the Kenyan perspective, the Wako case does not have any positive impact on the anti-corruption campaign in Kenya. Banning an individual and his family from visiting or dealing with the US is not understood in the context of fighting corruption. For example, a prominent Senator in the Kenyan Parliament dismissed the sanctions and demanded that “[h]e US authorities owe it to Kenyans to say what this ‘significant corruption’ is and how naming and banishing Sen. Wako and his family from the US takes forward the war on corruption”.<sup>61</sup>

Sanctions may undercut Kenyan national law enforcement

On the operational level, there is no evidence that international sanctions would help in ongoing cases.<sup>62</sup> As noted by one stakeholder, international sanctions and foreign-led investigations related to the Goldenberg scandal, Anglo-Leasing and also the Wako case have all come in addition to investigations conducted by Kenyan law enforcement. The imposing of sanctions did not appear to have any significant effect on



the progress in these investigations and the Wako case certainly did not result in any convictions or substantial recoveries of assets, while the public and Kenyan elite have been antagonised. Moreover, at the level of individual cases, imposing international sanctions against specific persons or entities, who or which are already under investigation by Kenyan law enforcement may hamper the ability to track the corrupt proceeds abroad and within the Kenyan jurisdiction. There is little evidence suggesting that sanctions would help convictions and asset recovery in grand corruption cases.<sup>63</sup>

On the contrary, sanctions are perceived by the political leadership and also by the law enforcement authorities as infringing national sovereignty and may make international cooperation very challenging from the Kenyan perspective.<sup>64</sup> On the political and diplomatic level, the imposing of international sanctions outside of Kenyan jurisdiction is perceived as the sign of inability, incompetence or corruption to investigate and prosecute grand corruption cases and work with international partners, especially in locating the illegal proceeds of crime.<sup>65</sup>

### Sanctions may weaken international collaboration

At the diplomatic and policy level, imposing sanctions from one country may lead to complications in unrelated fields of bilateral cooperation. While Kenya's law enforcement does not have a very high success rate in convictions on corruption charges, there has been some progress at the national level in locating and recovering the proceeds of corruption,<sup>66</sup> with the Kenyan Government signing important framework cooperation agreements such as the FRACCK. International partners have worked with law enforcement and, to a limited extent, with civil society and the media to build capacity in the pre-investigative phase, the investigative phase, the judicial phase and the return phase. International

sanctions may undercut all these efforts, as they could create a backlash against political commitment to cooperate on international asset recovery and transnational corruption cases. After imposing sanctions against Wako in 2019, the Government of Kenya unanimously opposed the move and threatened the US with unspecified 'consequences'.<sup>67</sup>

### Sanctions often lack coordination amongst international partners, including those that are involved in support of anti-corruption efforts in Kenya

If one partner imposes sanctions on individuals, the proceeds of corruption or other interests elsewhere can be further hidden. This fracturing significantly complicates Kenyan national law enforcement efforts to locate the proceeds of corruption and work out a successful prosecution strategy. The lack of international cooperation and unilateral moves of state parties against Kenyan persons has been heavily criticised by civil society and also by some international partners in the Wako case.<sup>68</sup> Unless international sanctions come within a broader consensus with important strategic state parties active in Kenya, civil society and media and other Kenyan actors, they risk being perceived and portrayed as harming Kenya's legitimate national interests.

### Sanctions may bring a potential backlash of Kenyan authorities against national CSOs and journalists

Some Kenyan observers argue that CSOs are accountable to their donors and advance the political agenda of foreign powers funding them. John Githongo, former head of Transparency International Kenya and later the presidential advisor on corruption who fled to the UK, has been repeatedly accused of being a spy for the British government for exposing some of the biggest corruption scandals in Kenyan history.<sup>69</sup> International sanctions could further aggravate attacks

against civil society activists and CSOs that may be financially and technically supported by the same state party imposing sanctions. A confidential exchange between diplomatic circles and civil society activists with intimate knowledge of the Kenyan anti-corruption landscape is therefore essential to assess possible long-term consequences of imposing international sanctions.

International experience shows that

## CONCLUSIONS

imposing sanctions, whether national or 'smart', targeted sanctions, are always a 'double-edged sword'. For example, EU misappropriation sanctions imposed on a range of targets in Ukraine, Egypt and Tunisia showed political support. Still, they have had minimal effect on the recovery of stolen assets and corruption-related convictions.<sup>70</sup> Similarly, Magnitsky-style, targeted sanctions imposed on Kenyan individuals or entities concerning corruption suspicions and, to some extent, human rights' abuses, may be used only as a measure of 'last resort'. They carry substantial long-term risks for the Kenyan anti-corruption effort. At the same time, the Kenyan experience with targeted sanctions to date does not show significant evidence of higher conviction rates or recovered assets in the context of the anti-corruption effort.

Despite apparent challenges in the investigation, prosecution and conviction of grand corruption cases of a transnational nature, Kenyan authorities have undoubtedly made progress. Anti-corruption agencies seem to operate more independently compared to the past and increasingly bring charges in high-profile corruption cases. A new legal and institutional infrastructure for asset recovery is being created, and there seems to be a broad-based political consensus that domestic and international asset recovery should be a priority in anti-corruption efforts. Kenyan civil society has been very active recently in calling for the aggressive tracing of the proceeds of crime and greater accountability in action and inaction in high-profile corruption cases. International partners have been supporting these efforts.

international 'smart' sanctions, if imposed, must be restricted only to selected cases of individuals or entities, who are linked to past corruption cases. An essential condition is that there should be little expectation that Kenyan law enforcement would further progress with investigations or the recovering of assets. Sanctions should be accompanied with justifications to spell out the reasons for imposing sanctions with preference given to explanations of offences for which evidence may be more easily found – such as tax evasion.<sup>71</sup> Coordinated action involving Kenya's important allies may also send a much stronger signal as opposed to unilateral moves of individual state parties.

Preferably, informal consultations with Kenyan governmental and non-governmental stakeholders should be held to gain a plurality of views about the potential direct and indirect effect of international sanctions. Kenyan stakeholders argue that targeted international sanctions must come with corresponding policy measures, which would help Kenyan law enforcement, civil society and the private sector to address grand corruption domestically. If these measures are not in place, international sanctions are unlikely to deliver any long-term positive results for Kenyan anti-corruption efforts.

Against this background, it is urged that



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