



Corruption risks in the criminal justice chain and tools for assessment Chapter 4: Trials

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Corruption risks in the criminal justice chain and tools for assessment

Chapter 4: Trials

This is part four of a six-part issue paper examining tools for assessment of corruption risks in criminal investigation, prosecution, trials, and detention.

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1. Basic steps in the resolution or trial of a criminal case

Although the procedures for determining the guilt or innocence of a person charged with a crime vary greatly by country, there are common steps and decisions to be made in a criminal trial and appeal process. Table 1 provides a general overview of the responsibilities of actors at the trial and appellate levels. It is followed, in section 2, by an analysis of the forms and risks of corruption that actors face in executing their responsibilities, focusing on points where officials exercise discretion and on the effectiveness of oversight mechanisms. Sections 3 and 4 review available assessment tools for measuring corruption risks during a criminal trial and appeal and consider whether these tools are appropriate for gauging the corruption risks identified earlier.

Table 1: Activities, actors, and their responsibilities in a criminal trial and appeal

Activity	Responsibilities of actors
Notification of trial	Once a prosecutor decides to proceed with charges against an accused person, police or court staff inform the accused of the date and location of the trial.
Court operations and criminal case management	Court managers, administrators, or clerks assist judges with running court operations and with case flow management, overseeing the progress of a case from registration to conclusion. A country's Ministry of Justice may be involved in budget allocation or official appointments.
Court assistance projects	Court assistance provides, for example, legal advice or protection to victims, witnesses, and the accused.
Bail hearing	In many countries, individuals charged with particularly serious crimes remain in custody until their case is resolved. For lesser crimes, a judge or other court officer will decide whether to release the accused or detain him or her until trial. Release may be conditioned on the posting of a money bond, restrictions on movement, the wearing of a location tracking device, a prohibition on contacting victims or witnesses, or other conditions as permitted by law.
Establishing who sits in judgment	A criminal trial requires decisions of two kinds: (a) Did the accused do the acts alleged in the charging document? (b) Do the acts constitute a violation of the law? The responsibility for answering the first question, that is, determining the facts, may be assigned to a jury of lay people, a judge or panel of judges, or a judge assisted by one or more lay assessors who are non-lawyers, often with specialized training. Judges – not juries – typically decide on the application of the law to the facts. In some systems different judges are assigned to different phases of the case. For example, the judge assigned to the preliminary hearing stage to decide whether there is enough evidence to go to trial will be different from the judge assigned to the trial phase (California Judicial Council 1974).

Preliminary proceedings	Most systems provide an opportunity to determine, prior to a full trial, whether there is enough evidence to justify a trial for the defendant. The prosecution presents its case. If there is sufficient evidence to show a crime has been committed, the judge sets a trial date. If there is not, the judge discharges the accused and the case is closed.
Plea negotiations	In many systems, the prosecution and the defense may negotiate a resolution of the case. The defendant may admit guilt in exchange for the prosecution recommending a sentence less than what the defendant could receive if the case were tried. Systems differ in the degree of formality attached to such plea bargains. In some systems plea agreements are closely overseen by the judge; in others the judge has the power to ignore or alter deals made earlier.
The trial or proceeding	The prosecutor and the defense present their evidence, examine witnesses, including expert witnesses, and sum up their cases. Court reporters, most often using recording devices, record the proceedings in order to produce transcripts, and court clerks assist the judge. A jury, a single judge, or a panel of judges, sitting alone or advised by assessors, decides the verdict. The media may be admitted to the court to report on the trial. Families of the accused and of victims may also be present, along with members of the public.
Sentencing	In many systems, the judge alone decides the sentence. In a few systems the jury or lay assessors may have a say. The prosecutor and the defense may make recommendations, which in some systems are binding on the judge.
Appealing the verdict	The defense may appeal a verdict or a sentence to a higher court, and in some systems the prosecution may also appeal. Depending on the system, appeals may or may not be limited to errors of law only. An appeal court judge or judges hear such appeals.

2. Corruption risks and forms of corruption: Who exercises discretion, and what oversight exists?

Four main forms of corruption can manifest themselves in the criminal trial and appeal process: (a) *political interference* to influence the outcome of a trial – indeed, more insidiously, the threat of socio-political backlash to court decisions may pressure judges to ‘self-censor’, that is make a decision in compliance with the perceived wishes of elites or criminal gangs to avoid any political opprobrium or retaliation (b) *extortion* of victims and witnesses, as well as pressure on officials themselves to act corruptly under threat of violence or release of damaging information; (c) *nepotism*, in which officials enable close contacts or family members to benefit (for example, judges may appoint favored lawyers as defense counsel, or court staff may select firms with which they have personal connections to provide services such as security); and (d) *misuse of public funds and resources intended for the courts*, which may result in trials being delayed or collapsing (Transparency International 2007b; UNODC 2004).

The remainder of this section outlines common corruption risks, that is, opportunities for these four forms of corruption to affect the behavior of actors in a trial and appeal process. The focus of the discussion is on

points where officials exercise discretion and on the effectiveness or limitations of any oversight mechanisms. Prosecutors are not included in the analysis here as they were discussed in depth in chapter 3 of this six-part issue paper.

2.1. Judges

This section discusses two sets of risks: those pertaining to the behavior and decision making of judges as they exercise their judicial functions during criminal trials and appeals, and those connected to the more general organizational issues of the judiciary.

2.1.1. Risks during trials and appeals and oversight mechanisms to mitigate the risks

Judges make decisions affecting the life and sometimes the property of the accused before and during the trial. For example, the judge rules on whether the accused will be released on bail or remain in prison until and during the trial, and on whether his or her property will be forfeited to the state upon conviction. The judge may have discretion to appoint a defense lawyer for an unrepresented defendant. The judge may rule on pretrial motions that can terminate the case or make conviction easier as well as rule on questions that arise during trial that can affect the outcome. In some legal systems, the judge may have the sole say in whether the defendant is guilty, and in many systems the judge is the one who determines the sentence upon conviction.

At all these points there is a risk that judges may be corrupted to make decisions favorable to private interests or to engineer delays. Such decisions can range from the obvious, such as issuing a judgment of acquittal, to the more subtle, such as preventing a critical piece of evidence from being considered. Judges might be induced to postpone the trial until the time limits within which proceedings must be brought have expired, or witnesses or victims have moved or otherwise become unavailable.

There are a variety of potential oversight mechanisms for monitoring the appropriateness of a judge's discretionary decisions. For example:

- A “public defender” institution with procedures for appointment of defense lawyers or a legal aid service can limit or make unnecessary a judge's involvement in appointing defense counsel.
- Judges can provide written and reasoned opinions for decisions, which can be appealed to higher courts. As an oversight mechanism, however, appeals can be ineffective when they are subject to lengthy delays or when judges do not have adequate time or resources to write decisions.

- Conflict of interest statements can enable oversight of situations where judges should recuse themselves from cases. Asset declarations, by the judge and sometimes also by her/his family, can provoke questions about the sources of a judge's assets. Such oversight mechanisms are effective only if they are available for review by appropriate decision makers (Hoppe 2014).

More generally, statistics may be collected on, for example, numbers of cases assigned to each judge as well as the time frame in which a judge reaches a decision. "Court user committees" and public surveys can inform judges about public perceptions of their performance and areas in need of reform. Courts can facilitate access to information about criminal trial and appeal processes as well as about cases. Such data and access to information can allow oversight of judicial performance and compel judges to manage their cases and decision making in an appropriate and timely manner (UNODC 2006d).

Some accountability and transparency tools may not, however, be appropriate for the judiciary. Sometimes closed courts are necessary to protect the identity of victims or witnesses or the details of ongoing investigations. Similarly, privacy rights, or in some cases national security arguments, may trump demands for the disclosure of information.

2.1.2. Risks in the organizational structures of the judiciary and oversight mechanisms to mitigate the risks

In addition to the discretion judges enjoy in criminal trials and appeals, organizational issues in the judiciary may also pose corruption risks. Appointments and promotions, terms of service and remuneration, assignment of cases, and complaint mechanisms all may be manipulated by political elites to induce judges in criminal trials to perform in the interests of the powerful.

If dominant political forces control the *selection, appointment, and placement* of judges in certain courts, there is a heightened risk that judges can be corrupted to manage and decide cases in the interests of the powerful. Independent judges who refuse to be improperly influenced may be penalized by being placed in remote courts or denied promotions or salary increases.

The existence of a judicial appointments body that includes not only those from judicial, legal, and political circles but also members of civil society can mitigate the risk of judges being appointed by political actors. Lay members can, of course, themselves be corrupted or influenced to appoint certain judges, but many systems that involve lay members in appointments do so on the assumption that they reduce the risk of political interference in the appointments process. Nonetheless, consideration must be given to how lay members are appointed and how representative they are (Bell 2005, 43).

Corruption risks vary depending upon how judges are selected. In countries that follow the civil law tradition, the selection of judges is based on examinations, and candidates may bribe examiners to provide them with a copy of the test in advance or to "pass" them regardless of their score. In common law countries, a judicial services commission or other body often recommends candidates for appointment by the executive, the legislature, or both, and recommendations can be put up for sale.

Laws or regulations should determine the *terms of service and remuneration* for judges. Where the executive has the discretion to terminate or extend a judge's service, there is the risk that "cooperative" judges will be rewarded while those who do not rule in accordance with the executive's preferences will be sanctioned. If the judiciary does not manage its own budget, there is a greater risk that political actors can manipulate the actions of judges by withholding salaries or court funds.

A law that details how the court system is funded – including who plans the budget for courts, who determines judicial salaries, who allocates the budget, and who manages the budget – provides a basis for oversight of the *judicial budget process* and judicial remuneration. Parliamentary judicial oversight committees, judicial management authorities such as judicial councils, as well as civil society organizations, the media, and multilateral and bilateral donors can provide further oversight by implementing budget-tracking tools and/or questioning the authorities about failures to follow laws and regulations on judicial budgets and salaries.

The *assignment of cases* to judges should be done transparently. Cases can be assigned randomly, either electronically or manually through some form of lottery or drawing. This helps avoid the risk that judges may request specific cases in which they or their family have an interest or cases where they have been approached about issuing a particular ruling.

There should be a *complaint mechanism* to handle allegations of misconduct against judges. It is true that there is a risk that such mechanisms can be used by powerful elites or aggrieved citizens to harass judges. To mitigate the risk to judges' security, the disciplinary system should precisely define the types of judicial misbehavior that it investigates.

2.2. Defense lawyers

Defense lawyers have the duty to present a case on behalf of the accused. National laws and ethics codes prescribe the content of those duties. Lawyers may be bribed or pressured to present a substandard case, compromising their representation of their clients; alternatively, lawyers may seek to improperly influence court officials to favor their clients' interests. In some cases they may seek additional fees from clients ostensibly to bribe court officials but instead keep the money themselves.

Higher courts can provide oversight of defense counsels' conduct through petitions for habeas corpus and other procedures that allow courts to review the adequacy and competence of the counsel's representation. Bar associations can also play a role in checking the behavior and integrity of defense lawyers by enhancing lawyers' ethics through training, providing mechanisms to handle complaints against lawyers, and imposing sanctions on members who act corruptly or unprofessionally.

2.3. Court staff

Court staff are particularly at risk of corruption, given their direct interaction with many actors in a criminal trial or appeal. Court staff may act as middlemen, demanding bribes to secure a fair trial and sharing the bribe with a complicit judge. They can solicit or receive bribes to release privileged information or even to give parties information about the trial that they are obliged to provide anyway. Court staff can grant measures in exchange for money or deliberately delay or fail to transmit orders made by the court concerning a criminal trial, for example detention orders or orders to freeze or seize assets (Jennett 2013).

There is the risk that court clerks and other administrative staff may invent or inflate fees for court users. They may accept bribes or may be influenced by powerful interests to misinform court users about court procedures in order to sabotage cases. To counter such risks, court costs and court procedures should be published and readily available so that users know what to expect when they come to court.

In some systems, clerks may make or assist with orders to expedite criminal trials, as well as manage the expedition schedule. To enable oversight of the expedition process, orders should be made public and all parties should be informed. Transparent rules should clarify the clerk's role and the circumstances in which a case may be expedited.

Court staff may be bribed to lose, steal, or tamper with evidence held by the court for criminal trials. A secure evidence room, sealed evidence, and a well-maintained registry with records of who enters and handles evidence can guard against such risks.

Court documents, such as court orders, summonses, subpoenas, and warrants of arrest, must be served on time; otherwise cases risk collapse or delay. To facilitate oversight, the body responsible for serving documents (court or law enforcement agency) should maintain records. Statistics should be kept on the reasons for trial delay or collapse, such as witnesses not being served on time. Many systems have automated court records that collect case information as well as receipt of filings, schedules, and summaries of proceedings and verdicts (World Bank 2002). These can be effective accountability mechanisms provided there are adequate resources, including trained and supervised staff, to maintain them.

As in the case of judges, many corruption risks for court staff are not directly related to their responsibilities during criminal trial and appeal but are connected to organizational structures. These can, nonetheless, affect the outcome of a criminal trial or appeal.

If the Ministry of Justice has a role in the hiring and firing of court staff, this may pose a risk of corruption because political actors can influence the hiring of staff who are susceptible to influence by those in power. The consensus is that the court should have the lead role – or ideally the sole role – in hiring and firing its own staff. Salaries should be adequate: a “living wage” should be paid so that staff can cover costs of living for themselves and their families.

The training of court staff, including ethics training, should be well resourced, adequate, and ongoing so that staff have the skills to handle new legal and procedural developments that affect their work. Independent bodies or the judiciary itself should provide training, rather than the Ministry of Justice, to avoid actual or perceived political influence on court staff.

A complaints mechanism and a disciplinary body for court staff can also act as checks on corrupt or unethical behavior. An ethics code or similar written document can provide clear guidance on what is expected of staff. Applying conflict of interest and asset disclosure policies to those in key court administration positions, similar to the policies governing judges, may also help maintain the integrity of court staff.

Regular audits and freedom of information legislation can provide oversight of the completeness and accuracy of records. Statistical data on the management of cases, surveys on the public perception of court staff, and court user committees can provide oversight of the behavior of court staff.

2.4. Juries and lay or legally qualified assessors

Like judges, juries and assessors may be bribed, threatened, or unlawfully influenced to decide cases in the interests of a private party. Oversight of juries and assessors begins with a transparent appointment process based on written protocols. The process of notifying them to report for duty should be monitored to prevent summonses being lost. The lists or bodies from which jury members and assessors are selected should be clearly specified. For example, juries might be drawn from voter registration lists, as in the United States, the United Kingdom, and Japan. Assessors could be nominated by trade unions, public authorities, or companies, as in Germany.

Jury members and assessors should have security arrangements to protect against intimidation and threats. Sequestration of juries is one mechanism sometimes used to protect juries in high-profile criminal cases. Sequestered jurors are isolated without access to news media or the public (including their families) so that they are not exposed to outside opinions or information about the trial – or to threats.

2.5. Victims, witnesses, and their families

Victims and witnesses may be bribed, intimidated, or improperly influenced to withhold evidence or to change or invent evidence. “Protective measures” are designed to protect victims, witnesses, and their families from intimidation and retaliation (UNGA 1985, Principle 6.d). For example, victims or witnesses should be able to request anonymity (including being concealed during testimony) and nondisclosure of court records. This may require closed sessions or temporary removal of the accused from the courtroom (O’Connor and Rausch 2008). There may also be witness protection programs. The effectiveness of these measures in protecting victims and witnesses must be weighed in each case against the risk of reducing the transparency of court activity.

3. What tools exist to measure the extent and prevalence of corruption risks in a criminal trial and appeal process?

None of the available tools assesses all the corruption risks associated with the trial and appeal phases of a criminal case. Below is an overview of several assessment tools that measure aspects of corruption risks within the criminal trial and appeal process, with particular focus on tools developed by the United Nations Office on Drugs and Crime (UNODC).

3.1. UNODC Criminal Justice Assessment Toolkit

The Criminal Justice Assessment Toolkit developed by UNODC consists of a set of detailed questions about different sectors of the criminal justice system. The assessment tool dealing with the courts (UNODC 2006c) includes questions about the risks of corruption and the existence and effectiveness of oversight mechanisms in a criminal trial and appeal process. Implementation of this toolkit requires substantial time and resources. A major strength is that the tool reflects understanding of the differences between and within common law and civil law systems, as well as hybrid systems and traditional or customary law systems. It is therefore appropriate for use in many different countries.

It should be noted, however, that many of the questions included do not relate specifically to corruption risks. Since the toolkit is comprehensive and is not tailored for corruption risk assessment, corruption risk assessors need to exercise judgment in identifying the most relevant portions for their purposes. The toolkit has been applied in part or in its entirety in at least 29 countries, in exercises led by the UNODC as well as other donors.

The toolkit includes references to a large number of other documents, from the United Nations and other sources, laying out standards, guidelines, and norms concerning the responsibilities of official actors and the rights of victims, witnesses, and the accused in the criminal justice system. These references are an invaluable resource for assessing the commitments that countries have made or should make.

3.2. UNCAC Article 11 Implementation Guide and Evaluative Framework

UNODC has developed an implementation guide and evaluative framework to help states assess their compliance with the United Nations Convention Against Corruption (UNCAC) Article 11, which sets forth measures relating to the judiciary and prosecution services. The document provides two tools. The implementation guide summarizes international standards and best practices and outlines measures states could adopt in order to implement Article 11. The evaluative framework is a set of questions that can be used to highlight gaps and potential risks of corruption. These tools, made available in 2014, are still too new for there to be information available documenting their use in practice.

3.3. GIZ Judicial Integrity Scan and Bangalore Principles implementation measures

The Judicial Integrity Scan is an assessment tool devised by GIZ that draws on the measures for effective implementation of the Bangalore Principles of Judicial Conduct developed by the Judicial Integrity Group (2002, 2010). The implementation measures enable a state to determine whether it has mechanisms within its judiciary and state structures that fulfill the Bangalore Principles.

Integrity scans are based on desk research and on interviews with stakeholders. Interview questions draw on the implementation measures and focus only on the role of judges and court staff. Although not specifically designed to assess the criminal trial and appeal process, the scans do assess the ability of judges and court staff to cope with a variety of corruption risks. They are relatively inexpensive and do not involve a lengthy process. To date, integrity scans have been carried out in Georgia and Côte d'Ivoire (BMZ 2013).

3.4. Country-level assessments of judicial integrity and capacity

UNODC has developed an assessment tool for understanding the levels of integrity and the capacity of justice sector institutions. To date, working in collaboration with actors in the countries' justice systems, they or other donor agencies have carried out two assessments in Nigeria, an assessment in two provinces of Indonesia, as well as an assessment in Montenegro and one in Kosovo (UNODC 2006a, 2006b, 2007; DACI 2008; UNDP/UNODC 2014).

The parts of the assessments dealing with the criminal justice system are based on desk research, on criminal laws and analyses of judgments and rulings in a variety of cases, and, most significantly, on questionnaires administered by trained field staff. The questionnaires ask about corruption risks and experiences as well as about perceptions of corruption. See Box 1 on page 11. The substance of the questions is the same from country to country, despite minor differences in wording. Respondents include official court actors (judges, lawyers), court users, defendants awaiting trial, and business people, although not every question is applicable to all actors.

3.5. Transparency International diagnostic checklist

Transparency International (2007a), working with a group of judges, lawyers, and academics from around the world, has developed a diagnostic checklist for assessing safeguards against judicial corruption. Part of an advocacy toolkit for combating corruption in judicial systems, the checklist provides a snapshot of corruption risks, as well as weaknesses in integrity or oversight systems, in a country's justice sector. The focus is on the system requirements for a clean judiciary and on the responsibilities of actors involved in the judicial system. The checklist is an inexpensive and quickly implemented assessment tool. However, no information about its use in countries where Transparency International has chapters could be found on the organization's website.

BOX 1. SAMPLE QUESTIONS ON CORRUPTION IN UNODC'S NIGERIA ASSESSMENT

The following were among ten questions asking about perceptions and experience of corruption in the questionnaire administered by UNODC in three Nigerian states:

- Are excessive unofficial payments to judges and the courts the main obstacle to using the courts?
- Are you aware of anyone being asked to pay unofficial money to judges, lawyers, court staff or police?
- Have you or another person on your behalf made any unofficial payment in connection with this case to judges, lawyers, court staff or police?
- On how many occasions have you made such payments?
- Would you attribute any delays you experienced to corruption?

Source: UNODC 2006b.

4. Conclusion: Do the assessment tools assess common risks of corruption?

Taken together, the tools outlined above address many of the corruption risks that arise during the trial and appeal of a criminal case, as summarized in table 2. It is important to note that while each tool covers some of the relevant risks, no single tool covers all of them. There are also gaps, that is, areas covered by none of the tools. For example, no tool gives adequate attention to the role of nongovernmental organizations, which may provide court assistance to victims, witnesses, and their families. Another neglected issue is corruption risks associated with the role of the media in investigating and reporting on trials and appeals. Further research is also needed on corruption risks associated with specific activities such as notification of trials and court assistance for court users.

Lessons learned from experiences in implementing these tools include the importance of involving the targets of reform in the assessment. For example, judges should be involved in carrying out an integrity scan to increase the chances that they will feel ownership of the results and of subsequent interventions that may be recommended by the assessment (U4 2014).

In using the available set of tools to assess corruption risks in criminal trials and appeals, the greatest challenge for practitioners is finding the *relevant parts of tools* that assess the risks particular to these processes. Locating these relevant parts is a time-consuming challenge. This implies that a consolidated corruption risk assessment tool specifically designed for the criminal trial and appeal phase would be useful.

Table 2: Summary of risk assessment tools for trial and appeal phases

Activity	Stakeholders	Method	Focus (criminal trial and appeal phase)
UNODC Criminal Justice Assessment Toolkit: Access to Justice: The Courts	Official court actors, court users	Research on country, its legal system and laws; questionnaires	Covers many functions of judges, prosecutors, defense lawyers, and court staff during criminal trial and appeal phases. Role of victims and witnesses covered. Does not focus solely on corruption issues.
UNCAC Article 11 Implementation Guide and Evaluative Framework	Governments, official court actors	Questionnaires	Covers judges and prosecutors but not their functions during a criminal trial or appeal.
GIZ Judicial Integrity Scans	Judges, court staff	Research on existing integrity and anti-corruption policies; questionnaires based on Bangalore Principles	Covers judges and prosecutors but not their functions during a criminal trial or appeal.
UNODC country-level assessments	Judges, court staff, court users, defendants awaiting trial, business community, civil society	Research on country's laws; case analyses; questionnaire	Focuses on functions of judges and court staff during criminal trial and appeal, as well as perceptions and experiences of corruption among official actors and court users.
Transparency International Diagnostic Checklist	Judges, judiciary, politicians, judges' associations, prosecutors, lawyers, court users including business entities, media, civil society, donors	Checklist of best practices and standards that should be in place to protect against corruption and promote integrity	Does not focus specifically on functions of actors in criminal trial and appeal phase.

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