

# PART 1

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## **The Challenge of Prosecuting Corrupt Businessmen and Politicians**

### **1.1 Coping with high-profile judicial cases: Experience of prosecutors from Asia and the Pacific, and from Europe**

**Report on the technical workshop**

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According to a fundamental democratic tenet, everyone is equal under the law. This noble principle, however, does not do much to help police or prosecutors act effectively when corruption suspects are wealthy businessmen or prominent politicians. The success rate of prosecutions against senior government officials and corporate executive officers in major multinational enterprises is still low. This is true throughout the world and even in countries that have enacted comprehensive anti-corruption legislation and have otherwise well-functioning institutions at their disposal. The lack of success in this very sector is due to an institutional framework that is often unsuitable for coping with the specific complexity of the crimes, the need to find a balance between the defendant's rights and prosecution, the impact of public interest, and the institutional and psychological pressures these entail.

### ***The challenge of prosecuting high-profile corrupt individuals***

#### *a. Unsuitable institutional provisions*

Statutes, procedures, and institutions are usually tailored to the efficient prosecution of average and petty corruption. They do not take into account the particularities of high-level corruption, especially the sophisticated means criminals involved in such schemes employ to commit and disguise their illicit activities.

*Lack of adequate training* High-level corruption mobilizes extensive resources to camouflage "levies," "commissions," and "kickbacks" and to transfer the acquired assets to safe financial havens. The sophistication and complexity of these crimes contrast with the broad lack of sufficient capacity and appropriate training of many law enforcement agencies. This is particularly true of cases involving public funds or insider trading. There is a clear and pressing need for more specialized training, covering especially forensic accounting.

*Interference from governmental bureaus* In addition, when investigating high-level corruption cases, law enforcement agencies often face interference from government bureaus. Rather than being able to conduct their investigations as they themselves see fit, they are often obliged to follow orders from superiors who are close to the political power structure and might try to influence the course of prosecution.

#### *b. Impact of influential defendants and their entourage on the proceedings*

*Institutional and psychological pressures* Leading figures often owe their political or financial success to their personal skills: intelligence, charisma, popularity, and vast networks. They might try to employ these during the investigation as a powerful tool to influence the procedure and its outcome.

Such defendants do not tend to back away from conflict; on the contrary, they have the support of skilled lawyers and utilize lengthy appeals, processes, and other stalling tactics to wear down public opinion, which tends to demand results quicker than sound judicial systems can deliver. In some cases, the power of leading figures under judicial scrutiny enables them to intentionally weaken a sound legislative framework even during sometimes lengthy investigations. The prominence of the defendant comes into play even during the trial, especially when the case is heard before a jury. Many citizens display seemingly “instinctive” tendencies to be pro-defendant, and are often especially sympathetic toward the more well-dressed, well-spoken, and politically or economically successful defendants who are likely to be involved in a high-profile case.

Other hindrances have effects at a more personal level. It is obviously very difficult to request individuals conducting inquiries never to put concerns about their professional careers first. Prosecutors do not act in a political or social vacuum. The more prominent and powerful the figures being investigated, the stronger the constraints. Those with an interest in undermining prosecutors' efficacy or credibility often look to the prosecutors' colleagues or subordinates, seeking the opportunity to appeal to their personal priorities. For these reasons, it is important that prosecutors continually ensure that they have the full and uncompromised loyalty of all their confrères and staff.

*Political and  
personal  
influence*

*c. Institutional and psychological pressures*

Prosecutors dealing with high-profile cases have to be prepared to undergo sometimes very intense institutional and psychological pressures. For instance, influence from sources such as those mentioned above tends to make prosecutors doubt the validity of their own courses of action.

Regulations restricting disclosure of information even within law enforcement agencies may be detrimental to personal relations with colleagues and may consequently lead to isolation and frustration especially in lengthy investigations.

*Public pressure* Investigations targeting high-profile defendants and especially politicians usually give rise to wide public attention. While this interest contributes an important share in developing public awareness about corruption and as such may be viewed positively, it also entails serious obstacles to the investigation and causes pressure on law enforcement agencies. Such pressure grows with the media coverage. Following their own mechanisms and principles, journalists may inquire into the cases themselves or prematurely disclose confidential information to the public. They may also comment on strategic moves of the prosecution and thereby influence the public's view of the case. Moreover, certain media may have sometimes well-defined interest in a specific outcome of the case. As such, they may influence public opinion in favor of the defendant or the prosecutor, thereby inevitably weakening the principle of impartiality.

### ***Strategies for successful prosecution***

#### *a. Remedies at legislative and international level*

*Institutional, legislative, and international remedies* Some of the above-mentioned obstacles to the successful prosecution of corrupt individuals in high positions have to be solved at the legislative or even international level. More specifically, regional and international instruments and networks may provide mechanisms to strengthen and facilitate international cooperation. At the national level, barring convicted corrupt officials from reentering elected politics and strengthening the independence of law enforcement agencies may be useful tools. Finally, the fostering of cooperation and loyalty within law enforcement agencies by corresponding

institutional structures and mechanisms is important.

*b. Practical tips*

Drafting and amending legislation is a lengthy procedure and this is even truer for international agreements. However, prosecutors and law enforcement agencies at large may make use of the following practical tips to investigate such corruption cases more successfully—keeping in mind that even a single top conviction could send the right message: that there is no longer impunity for high-profile criminals.

– It is vital to focus on all possible financial angles in corruption cases, especially when it comes to eventually being able to confiscate ill-gotten money, property, or other assets. The fact that corrupt individuals are often more afraid of losing the fruits of their crimes than of serving jail time can work to a prosecutor's great advantage. Some countries (e.g., Ireland and the UK) are, under certain circumstances, legally entitled to seize such assets without being obliged to fully prove these were gained through crime if the defendant is unable to explain the origin of such assets.

*“Follow the money”—and seize it*

– Prosecutors should also consistently take full advantage of whatever beneficial transparency laws are at their disposal. In some Scandinavian countries, for example, the earnings of public officials are freely disclosed to the public. This provides the prosecutor with an invaluable tool for determining an individual's demonstrable network if there are reasons to believe the suspect to have other, illegally obtained assets to support him or her. In Norway, those convicted of serious crimes such as drug trafficking or bribery must be able to demonstrate the sources of their assets. Otherwise, prosecutors may ask the court to seize properties from the convicted felons and declare them public property.

*Avoid ambiguous situations* – Ambiguous situations, e.g., conducting interrogations in prison, or calling witnesses whose integrity might be called into question by the defense, can constitute a risk and weaken the case. Prosecutors should always anticipate likely consequences when deciding on the strategy for the investigation.

*c. Remedies at the personal level: Lessons from the experience of a French investigative magistrate*

*Work in teams and share information* – Prosecutors should work in teams and share information and pressure with close and likeminded colleagues, especially information that is not yet widely known. The necessity of sharing key information with colleagues becomes particularly vital in light of the personal risks that prosecutors sometimes undergo in high-profile cases.

– Besides, it is a wise precaution to inform one's colleagues outside the team about what the team is doing. This helps to lower the likelihood of resentments. However, advice from those who do not share one's immediate concerns should be avoided; their motives and agendas can be very difficult to ascertain.

*Take advice* – All of the above points reinforce the need for prosecutors to present in court the technically strongest cases they can put forward. To this end, prosecutors should not hesitate to seek the advice of their more experienced colleagues. The technical merits of a prosecutor's evidence should help him or her, at least partially, to overcome the personal qualms that are a routine feature of bringing high-profile defendants to trial.

*Dealing with the media* – When dealing with the media, prosecutors must be aware of how journalists work and think; everything prosecutors may say publicly tends to have some degree of resonance. A journalist is never a prosecutor's friend *per se* and the media always have their own agenda, which could easily clash with

a prosecutor's. Violation of secrecy laws by disclosing details to the media must be particularly avoided, starting with situations that might constitute a risk of such violation. A prosecutor might even consider taking professional training in dealing with the media.

– A prosecutor's own professional and personal behavior must be exemplary. Asking for favors or committing even the most minor legal or ethical infringements may cause public exposure. Also, prosecutors should avoid striving for professional advancement while a major inquiry is in process. Being seen as overly personally ambitious is bound ultimately to work against a prosecutor's case.

*Control personal behavior*

– Severe psychological pressures, coming from many directions simultaneously, are inescapable. These burdens should not be over-internalized or personalized. Lawsuits against prosecutors' offices can be commonplace and a very serious cause of stress. It might be a great advantage to maintain, at a personal level, a support group of friends to help keep up one's self-esteem and relieve stress.

*Self-preservation strategies*

– No one has to "take on the weight of the world." A prosecutor has done his or her job well if he or she secures a conviction or convictions in proportion to the evidence presented.

– Prosecutors should strive as much as possible to humanize defendants in their own minds. There are a number of small psychological tricks that can be employed to tell oneself that the accused are far from the insuperable forces they can appear to be.

## **Conclusions**

The lack of success in prosecuting influential politicians or businessmen is to a large part due to an unsuitable institutional framework, the influence that these individuals and their entourage have on the proceedings, and hindrances arising from

institutional and psychological pressures. Legislative, institutional, and international remedies have to be found; however, since reform at these levels usually progresses slowly, prosecutors are well advised to adopt other remedies for the meantime. This addresses aspects at a methodological level, such as the use of procedural provisions hardly used so far, and also at a personal level, particularly with respect to personal security.



## 1.2 Difficulties encountered by the judiciary: A summary of key issues

**By Bernard Bertossa,\* Former Attorney General of  
Geneva, Switzerland**

The judiciary encounters greater—and at times insurmountable—problems when indicting perpetrators of corruption than for other types of organized or serious crimes. These difficulties are sometimes of a political, legal and operational nature and are briefly summarized below.

### ***Political difficulties***

Public figures and political parties under indictment have special powers, particularly among the public institution under their control, which they use to prevent evidence from being found. Even the judge does not always have enough independence vis-à-vis the executive power, nor—at times—the necessary integrity or courage. There are corrupted magistrates, who are more interested in “carrying out orders” or advancing their careers than in concluding investigations.

The judge is frequently accused of being used as an instrument by one political party against another, by one state figure against the other, or by one regime against another. These accusations, even when they are completely false, manage to discredit the investigation. Reasons related to the country's interests are often used to “justify” corrupt acts: it was necessary to defend the country against foreign competition, to protect employment, etc. The

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accused persons cynically justify corrupt acts as being perpetrated for the well-being of the co-citizens or for the economic wealth of a country.

### ***Legal difficulties***

The non-incrimination of foreign public officials for corruption still represents a major obstacle. This loophole was, however, partially covered when the Member States of the OECD incorporated the principles of the 1997 Convention on Corruption in their national legislation.

There is a lack of common regulations, or even worse, a complete lack of regulations defining those violations of duties that should be considered as corruption. This loophole is particularly evident in the area of public administration, which is unfortunately easily corruptible. There is an absence in many countries of laws incriminating private corruption that does not directly involve public officials. There are still largely incomplete sets of legislation on money laundering.

Many states consider bribe-giving in order to obtain legal services by public officials as being legitimate. It is often difficult to distinguish between obtaining a favor (which is punishable by law) and the recognition of a right (which is not punishable by law).

### ***Practical difficulties***

Serious cases of corruption almost always involve actors from different states, and the money used to corrupt is usually transferred through complex channels, which often involve banking institutions of various countries. The considerable obstacles met at the level of international penal cooperation favor both corrupters and corrupted persons.

The financial strategies used to camouflage the methods used to perform a corrupt act or the profits

derived from it are becoming increasingly sophisticated and the judges often do not have the instruments needed to uncover them. Appeals for compensation are also becoming more and more frequent. Financial intermediaries have become specialized in these systems and are able to eliminate paper trails. The systematic use of offshore or other shell companies represents an effective form of camouflage. Furthermore, the legal authorities of the fiscal havens rarely collaborate in legal investigations. Lawyers and other people tied by professional secrecy and who can oppose the judge are used as financial intermediaries, as are people who enjoy immunity (heads of state, diplomats). The judge is powerless before this type of privilege. Although the confiscation of the profits of corruption is often an effective instrument, experience very often shows that the judges do not take advantage of it, especially at the international level.

Governments and lawmakers are often the very people involved in corrupt practices, either for personal or for political reasons. It is therefore reasonable to believe that any significant progress will be difficult to achieve, at least in the short term, unless the legal authorities are granted more concretely effective instruments to investigate the perpetrators of these practices which the lawmakers themselves define as being criminal.