



An exception to the rule?

Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines' Ombudsman

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By

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Abstract

Anti-corruption agencies have long been a principal strategy to fight corruption in many developing countries. Unfortunately, few of them have produced evident results and they are seen as being rather ineffective. Recently, however, the Corruption Eradication Commission of Indonesia (KPK) seems to have emerged as an exception. Can this success be substantiated and, if so, how can it be explained?

A comparison with another such institution in a very similar neighbouring country – the Office of the Ombudsman of the Philippines – illustrates the KPK's success especially in investigating and prosecuting corrupt public officials. Why was the KPK, in just five years, able to reach a 100% conviction rate against top officials in all major branches of the Indonesian government, while the Philippine Ombudsman has scored only few convictions in its 20-year history? Part of this success can be explained by considerable investigative powers given to KPK, which the Philippine Ombudsman does not hold. Also, rigorous pre-testing of every prosecution and a highly efficient anti-corruption court contribute to KPK's success. These and other factors are analysed in this U4 Issue, which concludes with recommendations for donors and governments on the establishment and strengthening of anti-corruption agencies.

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Fighting corruption in the Philippines is like trying to kill an elephant with a flyswatter.

Atty. Simeon V. Marcelo, former Ombudsman of the Philippines

We are crocodile and they are just gecko. How could a gecko stand against a crocodile?

Cmr. Gen. Susno Duadji, former head, Criminal Investigation Division, Indonesia National Police (comparing the Police and the KPK)

Introduction

Since the World Bank identified corruption as the ‘single greatest obstacle to economic and social development’ in the mid-1990s, the problem remains as pernicious and pervasive as ever. The World Bank’s recent internal evaluation of its Public Sector Reform programme finds that, while a majority of its country borrowers have implemented anti-corruption and transparency strategies, their efforts have ‘not reduced perceptions of corruption’. The report also finds that ‘direct measures to reduce corruption – such as anti-corruption laws and commissions – rarely succeeded...’ (World Bank 2008, p.xvi). This is a finding consistent with studies of the impact of anti-corruption bodies in developing countries (see for example Doig, Watt, Williams 2007, and Mutebi 2008). Virtually all anti-corruption agencies of low- to middle-income countries have been more bark than bite, and in many cases the agencies themselves have been the ones ‘bitten’ – and too often were ultimately abolished.¹ However, there now appears to be a clear exception to the established pattern of ineffectiveness among anti-corruption bodies in developing countries, namely the Indonesian Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK).

In the few years since its establishment in 2003, the KPK has prosecuted and sent to jail for corruption over a hundred high-ranking officials. It has won *all* its cases in the corruption court, with all appealed verdicts upheld by the Supreme Court. In addition, the KPK has conducted extensive corruption prevention activities and recovered substantial state assets. As a result, the KPK has become the most highly regarded government institution in Indonesia. It has helped to make corruption a more high-risk and low-reward activity than at any previous period in the country’s history. To be sure, the KPK is currently facing serious challenges to its sustainability and effectiveness, but its performance to date has already set unprecedented standards.

To properly understand the factors that have contributed to the KPK’s remarkable accomplishments, this U4 Issue compares the KPK with a seemingly analogous agency in a similar country governance environment: the Philippines’ Office of the Ombudsman. In stark contrast to the KPK, in the more than twenty years since its founding in 1988, the Ombudsman can hardly point to any case against high-ranking officials that resulted in convictions. Beyond a handful of mayors of small municipalities, no high-ranking official has been penalised, let alone imprisoned for corruption, in the Philippines’ entire history.

Because of the similarities between Indonesia and the Philippines, a comparison of the different performance of the KPK and the Ombudsman becomes compelling, or at least

¹ Some of the more prominent examples: In 2000, the Kenya Anti-Corruption Authority was abolished by the Kenyan Supreme Court as unconstitutional. The Portuguese High Authority against Corruption was dissolved by parliamentary vote in 1992. The Directorate of Special Operations of South Africa was abolished in 2008. Also in 2008 the Italian High Commissioner against Corruption was abolished by Prime Minister Berlusconi (See de Sousa 2009).

interesting. The comparative approach utilised here will isolate the factors that could best explain the performance of the KPK, and show the depth of analysis needed to get beyond the nominal characteristics to the core issues that determine whether an agency succeeds or fails. What policy and programmatic lessons can be drawn from the KPK and Ombudsman cases? What explains the remarkable results of the KPK and the poor performance of the Ombudsman, despite similar weak governance and highly corrupt environments? Under what conditions could the KPK's effectiveness be replicated by other governments' anti-corruption agencies? This U4 Issue seeks to provide some answers to these questions.

The focus of this paper is on the investigation and prosecution functions of both agencies. This is not to suggest that corruption prevention and education functions are unimportant or did not contribute to their effectiveness. Indeed, the KPK is placing considerable investments here, albeit with a lower profile than its law enforcement activities. However, KPK's success can most strikingly be observed in its pursuit of corrupt officials and private individuals in high places. It is the capture of these previously elusive 'big fish' that has captivated the imagination of Indonesians and foreign observers alike.

1. The basis for comparison

The KPK and the Ombudsman are the chief anti-corruption agencies of their respective countries, which have striking similarities in terms of governance and operating environments.² Although there are other agencies in both countries with accountability responsibilities, none have broader anti-corruption mandates than the KPK and the Ombudsman.³ Even as the KPK and the Ombudsman have important differences in jurisdiction, they have major operational similarities. Both are tasked to receive and handle corruption complaints, to investigate corruption cases, and to prosecute them before a special anti-corruption court (the *Pengadilan Tindak Pidana Korupsi* or TIPIKOR in Indonesia, the Sandiganbayan⁴ in the Philippines).⁵ Each is also authorised to examine systems and

² Indonesia also has a government agency called the Office of the Ombudsman. However, unlike in the Philippines, the Indonesian Ombudsman is not an anti-corruption agency. Created by a Presidential Decree in 2000, its mission is to receive and respond to public complaints about government services.

³ In the Philippines, there is a Presidential Anti-Graft Commission created by a presidential directive that seeks to address corruption complaints against presidential appointees. However, this commission has no institutional independence (it reports to the President). It is an administrative body with some authority to impose administrative sanctions, but it does not have law enforcement or prosecutorial authority. There was formerly an Inter-Agency Anti-Graft Coordinating Council, which brought together agencies such as the Ombudsman, the Commission on Audit, the Civil Service Commission, the Department of Justice, and the National Bureau of Investigation. However, this council has been moribund in recent years. In Indonesia, as in the Philippines, the Police has the authority to investigate corruption, while Indonesia's Attorney-General Office and the Philippines' Department of Justice can prosecute corruption. However, none of these agencies have distinguished themselves as anti-corruption entities in their respective countries. In fact, the Police and the Prosecutors are perceived by many to be part of the problem rather than a solution to it.

⁴ The Ombudsman only prosecutes cases in the Sandiganbayan that involve high-ranking officials (defined as officials at civil service salary grade 27 and above). For cases involving low-ranking officials (officials below the civil service salary grade of 27), Ombudsman cases are prosecuted by the Department of Justice in the regular courts.

⁵ In these respects, both the KPK and the Ombudsman have a broader scope of work than the well-known Independent Commissions against Corruption of Hong Kong and New South Wales (Australia) as well as the Corrupt Practices Investigation Bureau (CPIB) of Singapore. These other bodies have investigative authority but

procedures of government agencies for corruption vulnerabilities and to recommend corresponding measures for corruption prevention and education. The KPK's mandate extends further into monitoring the corruption prevention performance of government agencies and coordinating such state institutions involved in combating corruption.

Furthermore, Indonesia and the Philippines share a number of other important characteristics. Politically, both countries experienced long periods of authoritarian rule that were characterised and sustained by rent-seeking and systemic corruption. The Marcos dictatorship in the Philippines lasted 14 years, from 1972 to 1986, while Soeharto's authoritarianism endured for 31 years, from 1967 to 1998. Similarly, both authoritarian governments collapsed following popular protest movements fuelled by widespread anger against massive corruption and its precipitating role in economic crises. Moreover, both countries equally saw a burst of pluralism during their respective transitions from authoritarian rule. Numerous political parties formed, civil society organisations mushroomed, and media channels multiplied. Today, both countries are characterised by strong chief executives, with relatively weak bicameral legislatures, and a robustly decentralised local government sector.⁶

Economically, both Indonesia and the Philippines are lower middle income countries. Indonesia's Gross National Income per capita in 2008 was US\$1,880 while the Philippines' was US\$1,890 (World Bank 2009). Their political economies are likewise similar in terms of the persistence of neo-patrimonial practices, where the structures and systems of modern government mask the practices and patterns of patronage and corruption. The respective transitions to democracy of both countries failed to dismantle the family-focused, clan-oriented, and region-sensitive ways that dominate politics and economics in interlocking ways.⁷

In terms of corruption, both Indonesia and the Philippines are considered among the more corrupt in Asia. Both score very low in various indices such as Transparency International's Corruption Perceptions Index and the World Bank's Control of Corruption indicator. (Indonesia's ranking, however, has improved in recent years compared to the Philippines, in part because of the work of the KPK.) When the KPK and the Ombudsman were established (in 2003 and 1988 respectively), both faced similarly high levels of state capture as well as grand and petty corruption.

2. Institutional histories

When the KPK was established by law in 2003, it was the culmination of several years of planning and cooperation among reformers in the Indonesian government and civil society,

do not have any prosecutorial power; the results of their investigations are forwarded to their respective justice departments or agencies for prosecution.

⁶ To be sure, there are differences in the two countries' political systems, i.e. in terms of executive-legislative balance of power, party development, and electoral rules, as well as in the nature and degree of decentralisation. However, for purposes of this paper, these differences are not discussed because they are not of immediate relevance to the topic.

⁷ Indeed, important political and economic changes are underway in Indonesia since the downfall of Soeharto, of which the KPK plays an important part, and which are underpinning its democratic consolidation and improved living standards. The Philippines, on the other hand, has been faced with faltering democratic institutions and no less pervasive rent-seeking practices since the toppling of Marcos (See MacIntyre; Ramage 2008, and Hutchcroft; Rocamora 2003).

donors, and international advisors. The impetus to create the Commission was provided by the economic calamity that befell Indonesia during the 1997 Asian Financial Crisis, which subsequently led to the downfall of President Soeharto. The magnitude of Indonesia's 'corruption, collusion and nepotism' (the so-called *Korupsi, Kolusi dan Nepotisme* or KKN) was widely seen by the public as having hollowed out the Indonesian state and made it vulnerable to the gales of the financial tsunami that swept Asia. Donors were compelled to recognise the same and to ensure that their post-authoritarian development assistance would be guarded by good governance measures. In this crisis environment, there was a sense among international and domestic reformers that drastic measures were needed to tackle the corruption that thrived during the Soeharto era and contributed to the country's economic debacle that swiftly unwound developmental gains.

The main model followed by the KPK's designers was the Hong Kong Independent Commission against Corruption (ICAC). While other examples were available, the ICAC was considered more compelling than others because of its comprehensive scope and powers.⁸ Thus, among the chief consultants was the former Commissioner of the ICAC itself, Bertrand de Speville. With funding from the Asian Development Bank, de Speville & Associates worked with the Ministry of Justice to help hammer out the charter of the KPK. Interestingly, the designers sought to make the proposed commission even stronger than the ICAC. Unlike the ICAC, the KPK was to be provided not just with prevention and investigation powers, but also with prosecutorial authority.⁹

The motivation for making KPK institutionally independent and endowed with both investigation and prosecutorial powers was two-fold: 1) previous Indonesian anti-corruption entities were weak because they were not independent and operated under the control of the Executive; 2) the results of previous anti-corruption investigations did not prosper because they were handled by government prosecutors in the Attorney-General's Office (AGO) who were ill-trained to prosecute corruption cases, burdened with their own caseload, and saddled with integrity issues themselves (Hadiz 2004).

The passage of the law creating this powerful anti-corruption agency was made possible by the gravity of the crisis faced by Indonesia, the commitment of reformers in the Indonesian government, the insistence of donors for institutional safeguards protecting development assistance, and the societal demand to clamp down on corruption. Minus any of these factors, it is difficult to imagine that such a powerful institutional design would have survived the pushback of executive and legislative officials wary that the new entity could turn around and target them.¹⁰

⁸ For a discussion of different types of anti-corruption agencies, see Heilbrunn 2004.

⁹ Hong Kong's ICAC only investigates corruption; the prosecution is handled by the Justice ministry. The ICAC's mandate, however, is broader because it is tasked to tackle both public and private sector corruption. The ICAC can investigate any kind of crime suspected of having been facilitated by corruption, be it between public and private entities or just between private parties with no involvement of public officials. If no corruption is involved in a criminal transaction, the crime is a police matter. In Indonesia and the Philippines, the private sector is prosecuted for corruption only in so far as it is party to an alleged corrupt exchange with a public official.

¹⁰ A supplemental explanation for the passage of the KPK law could be that the outgoing administration of President Megawati wanted a strong anti-corruption agency because it could put in check the succeeding administration of Susilo Bambang Yudhoyono (SBY), i.e. the KPK would be a Trojan horse to weaken and topple the SBY administration. If this was the case, it was a gambit that backfired, because SBY became associated with the KPK's anti-corruption successes and his popularity increased as a result.

Similarly, the Philippine Ombudsman was created following a political and economic crisis that precipitated regime change. The People Power Revolution that ousted President Marcos in 1986 was driven in great part by societal outrage at his regime's corruption and the economic crisis facing the country. While the framers of the 1987 Philippine Constitution who conceived of the Ombudsman did not get any donor-funded advice on the institution's design, they did expressly borrow the term 'Ombudsman' from Scandinavia, to highlight the prominent role it was meant to have in responding to citizens' complaints about corruption and poor governance. But beyond the name, the design of the Philippine Ombudsman was not modelled on any external example. If anything, the design was internal and built on prior institutions. Hence, the Ombudsman is also called the *Tanodbayan*, which was the national entity established by Ferdinand Marcos to supposedly tackle corruption and official misconduct.

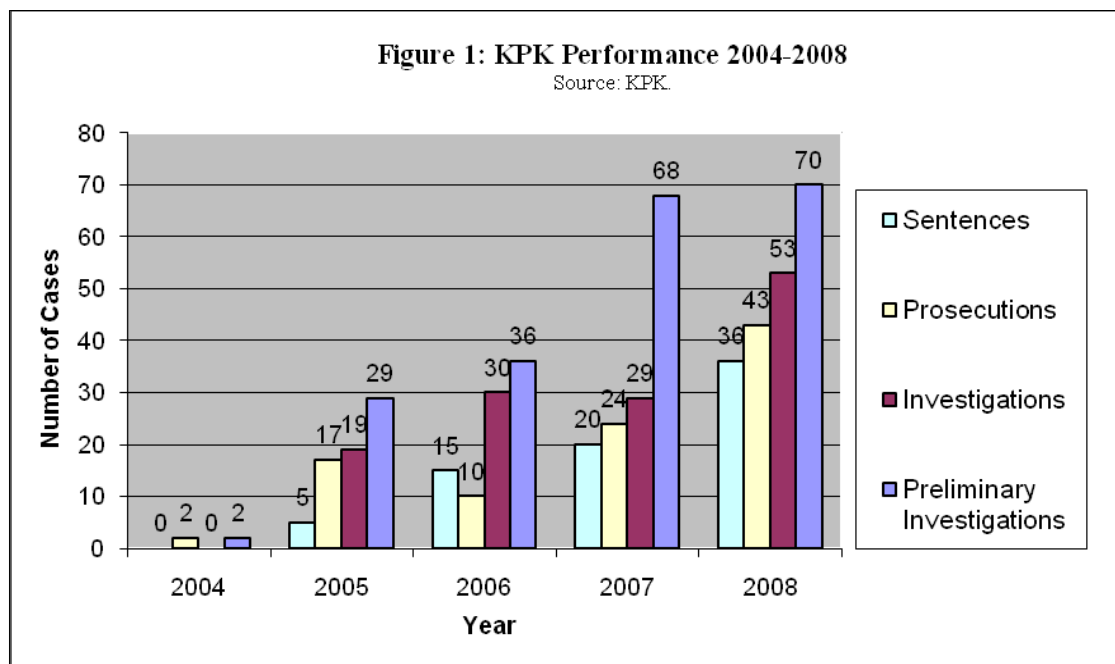
3. Performance comparison

Despite the similarities noted in the previous sections, the performance of the KPK and the Ombudsman could not be more different. The KPK's achievements are especially remarkable given its relatively brief existence in a corruption-hardened environment. The Ombudsman, by contrast, is a study of paucity in performance, despite the fact that it has been in office four times longer than the KPK and has twice as many personnel.

In terms of investigation and prosecution, the KPK has distinguished itself by scoring unprecedented convictions, leading to the imprisonment of high-ranking officials across different branches and agencies of the Indonesian government. In just five years, the KPK has successfully prosecuted over one hundred senior officials that before would have been considered as 'untouchable' by their positions and prominence. To date, the KPK has yet to lose a single case, either at the anti-corruption court or at the Supreme Court where the guilty verdicts of the TIPIKOR are appealed.¹¹ In a country long perceived to be endemically corrupt, with a history of 'untraceable' anti-corruption performance,¹² this accomplishment of the KPK is nothing short of extraordinary (see Figure 1 below).

¹¹ Both institutions prosecute their cases before a special anti-corruption court (the Pengadilan Tindak Pidana Korupsi or TIPIKOR in Indonesia, the Sandiganbayan in the Philippines). The Ombudsman only prosecutes cases in the Sandiganbayan that involve high-ranking officials (defined as officials at civil service salary grade 27 and above). For cases involving low-ranking officials (officials below the civil service salary grade of 27), Ombudsman cases are prosecuted by the Department of Justice in the regular courts.

¹² The term 'untraceable' anti-corruption performance refers to the view among a number of Indonesian observers that, prior to the KPK, none of Indonesia's anti-corruption agencies made an impact or mark during their tenure in office.



If the KPK's prosecutions were selective and involved only 'small fish' or easy targets, then perhaps its performance could be discounted. But the record shows that it has aggressively pursued high-ranking officials in even the most powerful entities in government.¹³ Convictions to date include members of parliament, heads and senior officials of key agencies (i.e., the Central Bank, the Election Commission, the Competition Commission, etc.), governors and mayors, officials from the National Police (including a former Chief of Police), the Attorney-General's office, ambassadors and top officials of ministries (including one Minister). In addition, the KPK has also prosecuted and jailed private businessmen, including owners and directors of companies involved in corrupt transactions with public officials.

Notably, the KPK has prosecuted the father-in-law of the President's son, a former Deputy Governor of the Central Bank. The conviction and imprisonment of Aulia Pohan set a precedent: first, that someone in the family of an incumbent President could be prosecuted and jailed, and second, that the incumbent President himself apparently did not obstruct the process. As with the other KPK cases against high-ranking officials, the Pohan case was widely seen as bolstering the rule of law in Indonesia.

By comparison, the Ombudsman's record is strikingly poor. With the notable exception of former President Joseph Estrada who was convicted of corruption in extraordinary circumstances (*after* he was already ousted from office), the Ombudsman cannot point to any high-ranking official that it has convicted and imprisoned for corruption.¹⁴ A survey by a

¹³ The only sector officially untouched by KPK is the military. By law the KPK does not prosecute officials of the military, which operates its own system of justice.

¹⁴ While an exception, the conviction by the Sandiganbayan of former President Estrada for corruption in September 2007 was a major achievement of the Ombudsman during the tenure of Simeon Marcelo and Special Prosecutor Dennis Villa-Ignacio. Estrada was found guilty of 'plunder' and sentenced to life imprisonment. The conviction was made possible in great part by the fact that Ombudsman Marcelo and Prosecutor Villa-Ignacio worked closely to marshal the strong evidence presented during Estrada's impeachment trial and make a compelling case at the Sandiganbayan. This evidence, it should be noted, was unearthed not by Ombudsman

Philippine public policy institute shows that in the corruption court's history, the highest ranking official convicted of corruption is at the level of governor; only two governors have been convicted but neither ultimately served time in prison (CENPEG 2006). Examining the records of the Sandiganbayan from 2001 to 2006, the same survey found that the conviction rate (including guilty plea) in the court was only 0.7% (see Table 1 below).

Table 1: Distribution of Cases at the Sandiganbayan, 2001 - 2006 (May)	
STATUS	FREQUENCY
Pending	3,909
Dismissed	1,494
Archived	1,413
Dismissed with trial	277
Withdrawn by Prosecutor	54
Acquitted	51
Transferred to other courts	36
Dismissed (respondent deceased)	28
Dropped from information	12
Acquitted (demurrer to evidence)	4
Pleaded guilty	1
Convicted	25
TOTAL	7,304

Source: CENPEG 2006.

Other evidence shows similar results. A 2005 study focused on the caseload and disposition of Ombudsman cases found that 'less than 6% of cases disposed resulted in a penalty', either criminally or administratively (ADB 2008). Another study from 2003 found that 77% of the Ombudsman's cases either result in acquittals or in successful appeals of guilty verdicts (Hunter, no date).

In 2002, this author conducted a study of the Ombudsman's performance which found that during the previous year, the institution secured only 43 convictions out of the 738 cases it

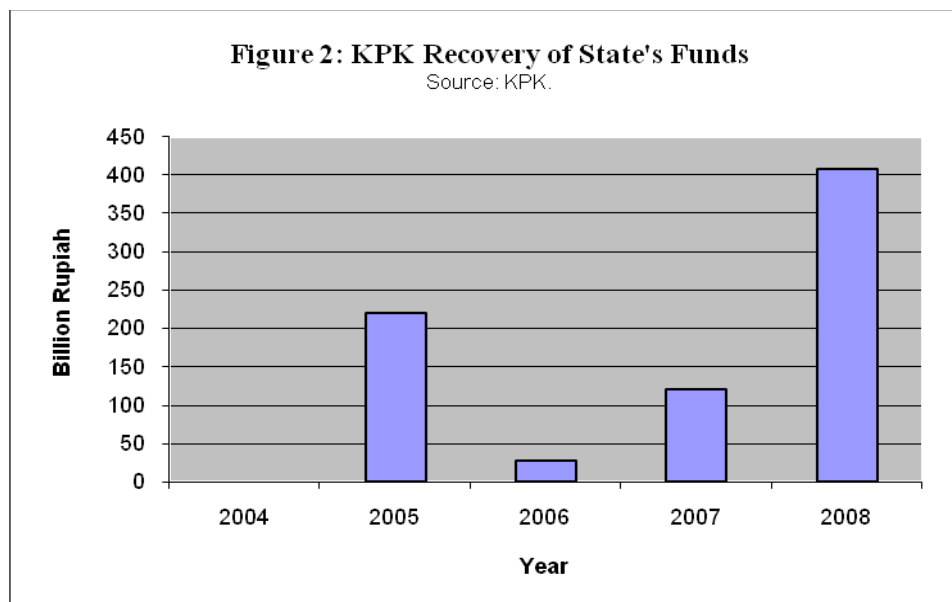
investigators, but by the intrepid work of investigative journalists, notably those at Philippine Center for Investigative Journalism (See, for example, PCIJ 2000). However, the impact of that conviction was undermined by the fact that Estrada was given a full, unconditional, and absolute pardon a month later by President Macapagal-Arroyo. This pardon was strongly opposed by Ombudsman Marcelo and other lawyers who worked on Estrada's prosecution.

filed at the Sandiganbayan, for a conviction rate of 6%.¹⁵ To be sure, this is not a true conviction rate because these verdicts usually were appealed to Supreme Court, and were often reversed.

At present, the current Ombudsman claims a much higher conviction rate in the Sandiganbayan. For 2008, the Ombudsman reported a conviction rate of 73%, but this figure is misleading. The corruption court itself corrected the Ombudsman, pointing out that '221 of the 406 convictions the Ombudsman referred to involved only one person – a mayor in Quezon province...' The anti-corruption court also pointed out that the Ombudsman's figures did not include cases that the court dismissed for lack of merit or that were withdrawn by the Ombudsman itself (Philippine Daily Inquirer, February 24, 2009).

Asset recovery

As a result of its successes in achieving convictions, KPK also has made significant inroads in recovering assets stolen from the state. From 2004 to 2008, the KPK has recouped a total 776 billion Rph (see Figure 2 below).¹⁶ The increasing volume of assets recovered reflects the KPK's successful prosecution of corruption cases and the consequent forfeiture of assets illegally obtained by convicted officials.



By contrast, the Ombudsman did not include asset recovery in its prosecution of corruption cases until the tenure of Simeon V. Marcelo, who, working together with the Philippine Commission on Good Government (PCGG), successfully recovered US\$ 624 million of assets of Ferdinand Marcos (UNODC; World Bank 2007). Of course, given the Ombudsman's otherwise poor performance, it does not ultimately matter that it does not pursue asset recovery as part of its prosecutions. Beyond the recovered Marcos assets, the Ombudsman cannot point to any significant amounts of assets recovered.

¹⁵ Prior to 2002, the Ombudsman did not mention conviction rates in any of its publications and annual reports. Its principal measure of performance was Disposal Rate, i.e. how many cases it has removed off its rolls, not by how many cases it has won relative to the number of cases it has investigated and prosecuted. Moreover, the cases decided in one year were actually not the same cases filed during that year. This is because Ombudsman cases in the Sandiganbayan generally take 6.6 years to complete; hence, the cases decided e.g. in 2001 on average were cases filed 6.6 years earlier.

¹⁶ Incidentally, this amount exceeds the KPK's actual expenditures during the period (582 billion Rph). In this regard, it could be said that that the KPK has already paid for itself.

4. Exploring the factors of success

Given the similarities in mandates and powers, in addition to the economic, political, and historic contexts described above, what could account for the remarkable differences in the performance of the KPK and the Ombudsman? Indeed, at first glance, the KPK and the Ombudsman appear to have identical mandates across several key areas of anti-corruption operations: repressive functions of investigation and prosecution, as well as some key corruption-prevention functions. A closer look, however, reveals fundamental differences in the extent of mandates and authorities of the institutions that account for the variance.

4.1. Jurisdiction

To begin with, both the KPK and the Ombudsman nominally have the authority to investigate any public official for corruption, and they can also prosecute almost all categories of public officials. Yet the seemingly few exceptions amount to a much broader scope of responsibilities:

The Ombudsman can prosecute most public officials, including the military,¹⁷ except for those officials that are removable only by impeachment, as well as members of Congress and members of the Judiciary.¹⁸ This means that officials of two of three main branches of government – the legislature and the judiciary – are out of the reach of this agency.

By contrast, the KPK has a much broader reach. It can prosecute any official, including members of parliament and judges. There is only one exception: the military. The KPK can investigate, but it cannot prosecute, members of the military.¹⁹ This difference in jurisdiction helps to explain why the Ombudsman has not pursued allegations of corruption against members of congress and judges, in contrast to the KPK that has to date already succeeded in convicting several members of Parliament and officials in the Judiciary.

4.2. Powers and capacities

While both the KPK and the Ombudsman can nominally investigate and prosecute corruption, upon closer scrutiny, the similarities exist only on the surface. Their differences as organisations are fundamental and extensive. While they may have similar mandates, they have unequal powers, particularly in investigation.

¹⁷ The Office of the Ombudsman has an office of Deputy Ombudsman for the Military, which is tasked with investigating and prosecuting corruption cases involving military officials. With respect to cases involving judicial corruption, these are handled by the Philippines' Judicial and Bar Council.

¹⁸ Philippine officials that can only be removed by impeachment include the President, the Senate President, the House Speaker, the Chief Justice, and the heads of independent commissions, such as the Ombudsman itself. Cases involving these officials have to follow established impeachment rules, which include being investigated, prosecuted and tried by the Philippine Congress.

¹⁹ The prosecution of corruption cases against military officials is handled by the military's own law enforcement apparatus. Based on the author's confidential interviews, the KPK has reportedly conducted a number of corruption investigations against ranking military officials, the results of which led to convictions. This is an area of KPK's work that deserves greater attention; however, it appears that the KPK is content to leave this area unnoticed, in part because of concerns of pushback from the armed forces when the agency is already facing resistance from different entities.

The KPK essentially has all the investigative powers of a law enforcement agency, while the Ombudsman does not. The KPK can, on its own accord, conduct wiretaps on suspects, examine their bank accounts and tax records, freeze suspects' assets, issue hold orders and make arrests. The Ombudsman cannot wiretap,²⁰ it cannot examine bank accounts or freeze assets,²¹ and it cannot make arrests. This makes the institution practically toothless: if a corrupt transaction was taking place in the Ombudsman's own premises, it would be powerless to arrest the culprits even if they are observed *in flagrante delicto*.

In terms of *prosecution*, The Ombudsman and the KPK and are both authorised and tasked to prosecute the cases they investigate.²² But in reality, only the KPK is effective because – as noted above – the Ombudsman has no investigative powers to gather the requisite evidence.²³ Effective prosecution depends on strong evidence, and without it, no case can prosper even in the hands of skilled prosecutors. This is in great part the reason why many of the Ombudsman's cases are dismissed by the Sandiganbayan for lack of merit or eventually withdrawn by the Ombudsman itself before they are tried.

4.3. Operational differences

In addition, the two organisations also differ in the manner the cases are prepared. In the KPK, investigators and prosecutors work closely to ensure that an investigation gathers sufficient evidence for prosecution. Consultation is facilitated by the fact that the investigators and prosecutors are housed in the same building. When KPK investigators and prosecutors agree that they have a strong case to prosecute before the TIPIKOR, their case undergoes a three-stage panel review conducted by the KPK commissioners. The commissioners' role is to challenge the proposed case strategies in order to ensure that each case filed is winnable.²⁴ Only when a case has successfully gone through these panel reviews will it be approved by the Commission for prosecution at the TIPIKOR. This level of preparation of the KPK contributes to the efficiency of the court as the prosecution is able to proceed methodically without seeking postponements in the trials.

At the Office of the Ombudsman, investigators and the prosecutors do not even coordinate with each other prior to the decision to prosecute or not. Unlike the KPK, Ombudsman investigators and the prosecutors are located in different buildings in different parts of Quezon City. But this physical distance is only part of the Ombudsman's incongruous

²⁰ At best, the Ombudsman can conduct surveillance but it can only use still cameras, not video recording equipment. Video recording evidence, in so far as it has audio characteristics, is proscribed under the Philippines' anti-wiretapping law and thus inadmissible in court.

²¹ Only the Philippines' Anti-Money Laundering Council can examine and freeze bank accounts as part of a criminal investigation. The Ombudsman can request the Council for help *after* it has filed a case against the suspects in court, a protracted process that prevents secrecy and dispatch in investigation, which are needed to prevent suspects from destroying evidence and hiding ill-gotten funds.

²² Moreover, KPK has the additional power to take over any corruption-related investigation conducted by the police or any prosecution being made by the Attorney-General's Office.

²³ Cooperation with other Philippine law enforcement agencies with investigative powers (the National Bureau of Investigation and the Police) would not necessarily improve the situation much, as neither of these agencies have as extensive investigative powers as the KPK to go after corruption cases.

²⁴ This rigorous review explains two things: firstly, why among so many complaints forwarded to the KPK's repression unit, only a select few goes to court, and secondly, why the KPK has never lost a case in the TIPIKOR.

arrangements in its investigative and prosecutorial functions. Unlike in the KPK, procedurally, Ombudsman investigations do not take into account prosecutors' inputs.²⁵ It is the investigators, not the prosecutors, which make the recommendation to prosecute. The investigators' recommendation is proposed directly to the head of the Office of the Ombudsman – the Ombudsman himself – who alone makes the decision to proceed or not. If the Ombudsman decides to prosecute, the case is then forwarded to the institution's Office of the Special Prosecutor.²⁶

Thus, Ombudsman prosecutors pursue whatever case is handed to them by the Ombudsman. They do not play a role in the decision to prosecute. This process is a key problem pointed out by the prosecutors themselves: they are assigned cases to prosecute without, in their view, sufficient evidence. They argue that the dismissal and withdrawal of many Ombudsman cases prior to trial in the Sandiganbayan is not their fault, but the failure of investigators who did not gather the required evidence (Bolongaita 2002).

Specifically, Ombudsman prosecutors argue that the decision of the investigators to recommend prosecution only utilises the criteria of *probable cause* (i.e. investigators are only asking 'is there evidence to show that the accused probably committed the alleged offense?'). From their perspective, the decision to prosecute needs to apply more stringent criteria (i.e. investigators should be asking 'does the evidence prove *guilt beyond reasonable doubt*?'). Because the investigators provide evidence that only show probable cause, Ombudsman prosecutors contend the defendants can, more often than not, sow reasonable doubt and get their cases dismissed. This disconnect could probably be bridged if the investigators and prosecutors would communicate with each other.²⁷ More importantly, this issue might be resolved if the Ombudsman let the prosecutors, not the investigators, make the determination and recommendation to prosecute. This would entail changing an internal rule that is within the authority of the Ombudsman to amend. However, to date, the policies and practices that divide the processes of investigation and prosecution at the Ombudsman remain unchanged.

4.4. Human resources

In terms of number of personnel, the KPK is only about half the size of the Ombudsman yet it is far more productive. As of 2008, the KPK had about 580 personnel, while the Ombudsman had over 1,000 staff. A big factor in the productivity of the KPK is the composition and capability of its personnel. In this matter, the KPK and Ombudsman differ sharply.

The investigators and prosecutors of the KPK are chosen mainly from applicants from the Indonesian National Police and the Attorney-General's Office. Other applicants for

²⁵ The Ombudsman's investigation process proceeds in two stages: there is a field investigation unit that makes the initial response to a corruption incident or complaint; if the field investigation unit sees that there is likely probable cause of corruption, it forwards its findings to a preliminary investigation unit that makes the actual determination of a probable case. If the preliminary investigation unit then determines there is probable cause, it makes a recommendation to the Ombudsman for prosecution.

²⁶ If the accused officials are outside of the National Capital Region, the recommendations to prosecute or not are first coursed through the relevant Deputy Ombudsman (one each for the three major geographic areas of Luzon, Visayas, and Mindanao), before reaching the desk of the Ombudsman.

²⁷ Bridging this disconnect may also have a positive effect on trial times. Because of the weak evidence given them, Ombudsman prosecutors claim they are compelled to frequently ask the Sandiganbayan for a continuance (postponement of trials) because they discover in the course of the trial insufficient evidence to convict the accused.

investigators come from the Ministry of Finance and the Financial and Development Supervisory Board (BPKP). It should be noted that this approach is the opposite of what some anti-corruption analysts recommend, in part due to fears that the law enforcement agencies in the executive branch are involved in corruption themselves. To guard against this risk, the KPK's recruitment of investigators and prosecutors is highly selective, with the applicants undergoing thorough background checks as well as a battery of technical and psychological tests. Following their selection, investigators and prosecutors are engaged on fixed-term contracts; if the contracts are not renewed, the officials are expected to return to their home agencies. To be sure, the KPK realises that its reliance on the police and AGO for its investigators and prosecutors is not ideal, but at the time of its inception, the KPK leadership felt that there was no other way of recruiting in short order qualified and experienced personnel.

In addition, there is a concern that the KPK's recruitment of top-notch investigators and prosecutors from the Police and the AGO are weakening those institutions. This is a valid point. But as the KPK would say, this is only a temporary weakening, because the appointments of these individuals to the KPK are on short-term basis. They are expected to be back in their agencies after three to five years of serving in the KPK, with more competencies and skills than before. By the same token, the return of these investigators and prosecutors to their parent entities could also have a weakening effect on the KPK. Thus, the KPK has realised that it needs to build up its own cadre of investigators and prosecutors.

In the case of the Ombudsman, investigators and prosecutors are recruited at large, and not from the police or other law enforcement agencies. Until 2002, professional staff qualifications emphasised the importance of law degrees or some legal training, without prioritising investigative or prosecutorial experience. As a result, virtually no Ombudsman recruits had relevant prior operational experience. Part of the reason for this situation is that the Ombudsman saw itself as being able to provide the requisite training for its staff. But an alternative reason is pay. Personnel of other law enforcement agencies did not see a compelling cause to transfer to the Ombudsman as it did not offer a competitive compensation package; experienced lawyers can earn more in the private sector. A related reason is purpose. For similar pay in other government jobs, lawyers would rather go to agencies that are less risky to work for. Another reason is reputational. Compared to technocratic government agencies such as the Finance or Trade Department, the Ombudsman is not seen as a good training ground.

After 2002, then Ombudsman Marcelo sought to diversify the composition of the Ombudsman by hiring fresh college graduates from disciplines outside the law. His rationale was based on the fact that the Ombudsman's pay package could not attract professionals with several years experience. In addition, hiring from different disciplines was intended to help address the narrow investigation skills within the organisation: Ombudsman lawyers had no investigative training and experience and possessed only legal analytical tools. Marcelo wanted to bring to bear multidisciplinary skills to tackle the multidisciplinary characteristics of corruption: for instance, investigation of corruption in infrastructure could benefit from engineers who could analyse construction issues; the conduct of net worth analysis could benefit from forensic accountants, and so on. However, after Marcelo resigned in 2004, the succeeding Ombudsman abandoned this approach and reverted back to the previous model of hiring lawyers.

By contrast, employment in the KPK is remarkably sought-after, perhaps more than any other entity in the public and private sectors in Indonesia. For example, in 2008, under its

'Indonesia is Calling' recruitment campaign, the KPK received more than 28,000 applications for 85 regular staff positions, for an acceptance rate of 0.3%. For seven senior management positions, the KPK had over 2,000 applicants, for a similar acceptance rate of 0.3%. With this level of interest and competitiveness, the KPK has been highly selective and able to tap very qualified individuals.

Notably, KPK recruitment is not mainly done by the KPK. The process is actually managed by a private human resource management firm that is competitively procured by the KPK. This firm receives the applications online, and conducts a series of aptitude and psychological tests. The firm then assesses and shortlists the applicants for the consideration of and decision by KPK management. The KPK claims that this manner of recruitment ensures a very high level of integrity and professionalism in the process.

4.5. Performance measurement

In addition to differences in leadership structure and personnel recruitment, there is also an important difference in terms of performance management. Until 2002, or more than 15 years since it was founded, the Ombudsman did not even track and publish its wins and losses in the anti-corruption court. Its main performance indicator in its annual reports was the Case Disposal Rate, i.e. the number cases it is able to remove from its files relative to the number of cases it receives in a given year. No emphasis or notice was given to outcomes or results, i.e. to convictions or acquittals in the Sandiganbayan. This is a sharp contrast with the KPK, which is very results-oriented. The KPK monitors not just its conviction rates but also performance criteria of each individual staff. In the latter case, the KPK uses the Balanced Scorecard for all its personnel to ensure their work is aligned with organisational goals, strategies, and systems. Daily, all KPK staff, with the exception of the Commissioners, have to complete their individual scorecards which record how each officer is doing in relation to pre-determined and mutually agreed work goals.

4.6. Accountable management

Finally, it is important to note that the KPK is led by a five-person commission that operates as a collegial body, with commissioners appointed to serve a maximum of two four-year terms. The Ombudsman, appointed for a fixed term of seven years, is headed by a single individual who alone makes policy and all major decisions in the organisation. Both leaderships are meant to be independent from political pressure: the Commissioners' cannot be truncated without due process, while the Ombudsman is appointed for a seven-year term and can only be removed from office by impeachment of Congress. However, the collegial composition of the KPK introduces greater accountability among the commissioners. It is much harder to influence the decision-making of a five-person body than it the decisions of a single individual.²⁸ In addition, the collegial character of the KPK leadership has the

²⁸ Former Ombudsman Marcelo was acutely aware of the vulnerabilities of his office, especially in the cultural context of the Philippines. Upon taking office, he decided that he would not meet with individuals with pending cases at the Ombudsman or related to those with cases, with members of congress, as well as members of his law school fraternity. There was no precedent for this decision, and it has not been sustained after Marcelo's resignation.

advantage of being able to spread the workload among the five commissioners, for greater efficiency and, arguably, sustainability.²⁹

4.7. The Anti-Corruption Courts

The exceptional performance of the KPK in prosecuting corruption and the poor performance of the Ombudsman cannot be understood without considering the role of the anti-corruption courts, namely the TIPIKOR in Indonesia and the Sandiganbayan in the Philippines. Part of the reason for the KPK's effectiveness lies in the efficient adjudication of the TIPIKOR and the Supreme Court (*Mahkamah Agung* or MA). For its part, a key reason for the poor performance of the Ombudsman is the protracted process in the Sandiganbayan and the reversal of its verdicts by the Supreme Court. Let us consider each in turn.

The TIPIKOR was created by the same law that established the KPK. A principal reason for its establishment was the perception among reformers that the corruption in Indonesia's existing judicial institutions could render the KPK ineffective, because the courts' decisions could be compromised by corruption.

By law and practice, all corruption trials handled by the KPK have been completed within eight months.³⁰ This eight-month period includes the time taken for the TIPIKOR verdict to be appealed to and decided by the Supreme Court. For its part, the median duration of Ombudsman cases tried at the Sandiganbayan is 6.6 years. This period does not include the review process of the Supreme Court with respect to appeals of Sandiganbayan decisions. The median duration of Supreme Court's adjudication process is 3.2 years (Hunter, no date). Combining these two median duration times means that corruption cases tried in the Philippine court system take on the main 9.8 years. This makes the KPK prosecution about 15 times faster than the Philippines.³¹ The glacial pace of corruption cases in the Philippines worsens the prospects of prosecutions because the extended period means that it is more likely that over time, witnesses lose interest, prosecutors change, files go missing, etc.

This is not to say that a more efficient Philippine judicial system would do wonders in enhancing corruption conviction rates. If the quality of the Ombudsman's cases remains poor due to its lack of investigative capacity and weak prosecutorial process, then there will probably be no improvement in outcomes.

Aside from speedier trials in Indonesia than in the Philippines, there is also an important difference in sentencing and actual enforcement of the sanctions. In Indonesia, a guilty verdict rendered by the TIPIKOR is immediately executable, i.e., a sentence of imprisonment could already take effect even if the court's decision is appealed to the high court. In the

²⁹ During his tenure, former Ombudsman Marcelo mentioned a number of times to the author that the Ombudsman position should at least be a three-person entity due to the volume of work. Mr. Marcelo resigned after only two years into his term, citing stress and exhaustion.

³⁰ By law, the maximum duration for a corruption case to be processed at the district court level (*Pengadilan Negeri*) is 90 days; at the provincial court level (*Pengadilan Tinggi*) it is 60 days; and at the Supreme Court (*Mahkamah Agung*), it is 90 days. So, at a maximum, KPK cases can take up to 240 days (8 months).

³¹ Given the extremely slow process of adjudicating Ombudsman cases, it is perhaps unsurprising that both the Sandiganbayan and the Supreme Court have low popularity ratings (with the former having far lower than ratings than the latter). In annual surveys conducted from 2000 to 2004, the Supreme Court received on average a net sincerity rating of +53 in fighting corruption, while the Sandiganbayan average rating for the same period was +24 (See SWS 2004).

Sandiganbayan, sentences are not executed if the court's decisions are appealed to the Supreme Court. Pending final judgment of the Philippine high court, a convicted defendant can post bail.³² One study found that 86% of Sandiganbayan defendants are on bail (Hunter, no date). In this regard, because of protracted trials and delayed sentencing in the Philippines, the likelihood of being sanctioned is severely diluted, thereby weakening any potential deterrent effect they might have had.

5. Macro-political factors underpinning performance

While crucial, the above analysis in the differences in powers and operating procedures does not provide a complete picture of the respective success and failure of the KPK and the Ombudsman, however. There are three important enabling factors at the macro-political level that are arguably necessary, though insufficient, conditions, impacting on both agency's performance.

The first factor is the strong external monitoring and advocacy of anti-corruption NGOs and civil society organisations (CSOs) and the presence of a vigorous free press. Groups such as Indonesia Corruption Watch (ICW), The Indonesian Society for Transparency (MTI) and Transparency International Indonesia (TI-I) have been notably effective in putting pressure on the government to enact and implement anti-corruption policies. The work of these organisations has found strong outlets in investigative journalists in Indonesia's burgeoning and open mass media. There are almost daily media reports on corruption cases handled by the KPK. The write-ups on KPK's successes have fostered strong public affinity for the agency seen as fearlessly fighting for the public good. In combination, this activist role of CSOs and the robust vibrancy of the Indonesian press have helped to propel public support for the KPK's work. Nowhere is the impact of these two sectors more felt than in the recent episode involving the corruption allegations against two KPK commissioners. Through Indonesian civil society activities and mass media reports, public support was galvanised in support of the KPK, which probably could have been fatally wounded by what turned out to be fabricated charges against the Commissioners (NCIA 2009).

To be sure, civil society and a free press were also key players in anti-corruption in the Philippines. They were clearly instrumental in the downfall of the Marcos and Estrada regimes. However, their level of involvement following the downfall of those regimes has been mixed. Many NGOs and private sector groups were supportive of former Ombudsman Marcelo who was widely perceived as credible, but their support for the Ombudsman waned after Marcelo resigned. The present Ombudsman leadership has been criticised for its lack of interest in pursuing corruption cases against allies of the President, as well as addressing issues related to the President herself (See PCIJ 2009, and PCIJ 2009a).

The second related factor involves the continuing widespread public anger towards Indonesia's corruption at both the grand and petty levels. This relatively high degree of societal discontent against corruption has been a source of strong backing for the KPK. As noted above, the public support for the KPK was demonstrated by recent mass

³² The exception to this rule is if the conviction pertains to the charge of 'plunder' – defined as involving sums of 50 million pesos and above (about USD 1 million). To date, only two Philippine officials have been charged with plunder: former President Joseph Estrada and former Comptroller of the Armed Forces of the Philippines Major General Garcia.

demonstrations defending the two KPK commissioners who were being investigated by the police for alleged corruption. The November 2009 Constitutional Court ruling that the case against the two KPK commissioners was fabricated by senior police officials and other actors was a vindication of perceptions that the KPK was being weakened for being too effective. The KPK certainly did not endear itself to the Police and the Attorney-General's Office for investigating and prosecuting their respective officials.

In the Philippines, there remains strong widespread public discontent against corruption. However, the Office of the Ombudsman never experienced the level of public backing as the KPK had, partly due to the fact that the Ombudsman had not been able to win any major corruption case since its founding. In addition, there were the impeachment charges against the head of the Ombudsman itself: In 2001, the then-Ombudsman Aniano Desierto faced impeachment charges for corruption. In 2009, current Ombudsman Merceditas Gutierrez likewise faced impeachment charges (CAC 2009).³³ Although both charges were ultimately dismissed by the House of Representatives, the perception of poor performance has resonated among the public. In a 2008 survey of Philippine enterprises on corruption in government institutions, the Ombudsman is rated as mediocre in its sincerity in fighting corruption (SWS 2008). This is, again, a stark contrast to the KPK's reputation. In a 2008 national survey, the KPK was ranked the best performing government institution in Indonesia, with 63.5% of respondents indicating that its performance was very good/good (LSI 2008).

The third factor is the high-level political support for the KPK among key Indonesian officials – notably Indonesian President Susilo Bambang Yudhoyono (SBY), particularly during the President's first term in office in 2004-2009 (Davidsen et al, 2006). This political will coincided with the first five years of the KPK's existence and gave it important support in its investigation and prosecution of high-level corruption.³⁴ By contrast, surveys in the Philippines suggest that people see little political will to fight corruption. In the 2008 survey of Philippine enterprises on corruption mentioned above, the Office of the President is rated as having 'poor' sincerity in fighting corruption (SWS 2008).

6. Can success be sustainable?

As alluded earlier, in the latter part of 2009 the KPK faced what was possibly a near-death experience, when two of its commissioners were accused of corruption and its chairman was accused of murder. The Chairman has since been found guilty, a conviction he contends has been pursued by the prosecution because of his crusade against corruption. He is, however, notably alone in this contention, supported neither by the KPK itself nor the broader public. There are no civil society demonstrations or mass protests to clear his name.

The case against the two commissioners charged with corruption is entirely different. The Constitutional Court ultimately found that the evidence was fabricated by some senior

³³ There have been several cases that have drawn public ire with respect to the Ombudsman's decisions. Among the more prominent ones was the Ombudsman's decision not to prosecute officials of the Commission on Elections involved in the procurement of elections equipment despite a Supreme Court order cancelling the project and issuing a finding that the officials violated their own procedures and the Procurement Law itself (see Philippine Daily Inquirer, September 19, 2008).

³⁴ At the start of President SBY's second and final term in office, there are some perceptions that his support for KPK is now less than during his first term. There are suggestions that this may be because KPK is hitting too close to home, beginning with the aforementioned Aulia Pohan case and the current Bank Century scandal.

officials in the Police and Attorney General's Office (AGO) in an effort to counter KPK investigations and prosecutions against some of their senior officials. Released wiretapped conversations by the KPK between a senior police official and other conspirators lent credence to perceptions that the charges were a pushback by the police and the AGO (National Coalition of Indonesia for Anticorruption 2009). This episode highlights a key reality that an anti-corruption agency faces: the more effective it becomes, the stronger will be the resistance of corrupt forces. This episode is thus instructive for anti-corruption agencies around the world: its triumphs could be precursors to its defeat.

The KPK survived this recent coordinated assault from corrupt interests in great part because of overwhelming public backing. Without thousands of Indonesian citizens voicing their support in the streets, airwaves, and the Internet,³⁵ the KPK probably would have been extinguished by the weight of the forces allied against it. To be sure, all this is made possible by Indonesia's democratising environment, where the people's voice is gaining greater resonance than ever before. The President, re-elected in great part on his anti-corruption accomplishments, has been compelled to heed the popular outcry. Given the extent of public protests, it was thought that the President's policy and legislative agenda – not to mention his political survival – would have been at risk if he persisted in a neutral or adversarial stance against the KPK.

In many ways, it could be argued that the KPK became too successful as it miscalculated in taking on too many high-level corruption cases in very short time. Indeed, the KPK did not fully anticipate the backlash from vested interests in the executive and legislative branches. As it is, the KPK survived this bruising battle because the anti-KPK forces underestimated both the level of public support for the agency and the level of public disgust over high-level corruption. Arguably, this public show of force has been a great break for KPK even as it actively sought and stoked mass support. Working with allies in civil society, the KPK encouraged the mobilisation of public demonstrations in defence of the agency. Because of its credibility, the KPK's call for help was heard and heeded. Indeed, some in the KPK feel that this lucky break was made possible by the work of the agency, both in its bold pursuit of corrupt officials, as well as in its outreach through anti-corruption education and advocacy.

An unfortunate contrast is presented by the example of the Ombudsman during the tenure of Marcelo. Marcelo had quickly raised the level of risk among corrupt forces in the Philippine government by exercising his powers, however limited they were. Although the Ombudsman has very weak investigative powers, it had very strong administrative authority: the Ombudsman can impose administrative sanctions against public officials, notably suspensions if an official is under criminal investigation and prosecution. Marcelo exercised this power liberally, arguing that by suspending an official even as he or she was being investigated and prosecuted, he was at least preventing corruption from taking place. The resultant backlash of death threats, compounded by a crushing workload, seriously affected his health and led to his resignation in just over two years of his seven-year term.

What happened to the Ombudsman could very well have happened to the KPK during its recent clash with the police and the AGO, and could happen still. The KPK needs to be more strategic in both its pursuit of corruption as well as in protecting itself from the retaliation. Arguably, the KPK was strategic in the sense that it did not focus on pursuing corruption

³⁵ In November, public support for the two KPK Commissioners in the social networking site Facebook exceeded 1.2 million members.

cases against former President Soeharto and his family: it decided to focus on present, not past, corruption. If the KPK had started by prosecuting Soeharto and his family, it might have faced significant partisan resistance and caused political polarisation that in turn could have weakened the agency even before it could consolidate as an organisation. Hence, from a sequencing standpoint, it was in retrospect a prudent move. This is similar to the situation of the Hong Kong ICAC when, three years after it started operations, it was decided to halt the investigation of corruption that had occurred prior to the ICAC's creation. This decision was reached by the Hong Kong authorities following widespread protests by the police over the ICAC investigations of previous corruption in the police itself.

However, this is not to say that excluding former and/or high-level corruption cases from scrutiny and prosecution should be the rule. In fact, in the Philippines as in Indonesia, it is galling to many of their citizens that none of the members of the Marcos and Soeharto families were ever prosecuted for corruption. Who to prosecute when should be carefully evaluated in context of the existing opportunities and threats. Such decisions are controversial in many countries: For example, the decision to prosecute members of a former government can on the one hand serve a nation's reconciliation with a disreputable past. On the other hand, it could just indicate the intention of an incumbent government to distract from its own dubious activities.

In any case, this recent episode has made the KPK acutely aware that while it is a predator of the corrupt, it can also become prey. Moreover, although it has survived this backlash, the KPK is facing serious new challenges going forward. Three are particularly important in light of the new Corruption Court law, which some observers contend reflects an attempt by opponents to weaken the KPK and the TIPIKOR (The Jakarta Globe 2009):

- Under the new law, the TIPIKOR is to be decentralised. In two years, anti-corruption courts are to be established in 33 provincial capitals. This means that KPK will be prosecuting corruption cases against high-ranking local government officials in these provincial TIPIKORs. To date, KPK does not have the resources and reach to operate in all the provincial capitals. An expansion programme would be required to enable it to do so.
- The new law mandates that career judges are to be the majority in the judicial panels of the TIPIKOR, unlike the present situation where *ad hoc* judges form the majority. These *ad hoc* or temporary judges recruited from outside the existing courts have been viewed as less susceptible to capture by vested interests than career judges habituated to 'business as usual'.
- The new law also states that the decentralised corruption courts are subordinated to the district courts. This means that the district court chief will have the responsibility for assigning judges in the panel. This could erode the independence and performance of the local anti-corruption courts in so far as local career judges are not trained in anti-corruption law and are not independent like the *ad hoc* judges.

In addition, there are also calls to curtail the KPK's wiretapping powers. The Ministry of Communications is seeking to establish a regulatory entity that would govern the KPK's application of this power. The KPK is strongly resisting the proposition, arguing that submitting its authority to another entity would remove the elements of confidentiality and surprise, which are essential to effective evidence-gathering.

To meet the above challenges, there are obvious basic tasks for KPK. With respect to the decentralisation of TIPIKOR, the agency needs to establish regional KPK branches with dedicated investigators and prosecutors who can handle the cases before the local corruption courts. Thus, the KPK has to beef up capacity in its national office to be able to send investigators and prosecutors to the provinces. This will require a major organisational review of the nature of KPK's needs.

Further, the Supreme Court needs to be involved to help ensure that the local corruption courts are functioning effectively. This could involve capacity-building on the part of local judges, as well as ensuring integrity in the appointments and performance of judges. The latter could benefit from the involvement of local civil society to monitor performance and ensure external demand for integrity. Of course, these issues involving judicial performance are serious challenges over which the KPK has little control. In the new decentralised environment, it is clear that the level of difficulty for KPK to maintain its performance will increase considerably, far beyond its current capacity.

7. Conclusions and recommendations

The remarkable story of the KPK shows that state capture and grand corruption can be seriously tackled by an anti-corruption agency in a relatively short span of time. In just under five years, the KPK has made tremendous and unprecedented strides in the investigation and prosecution of corruption cases against high-level officials in all branches and sectors of the Indonesian government. It has also made extensive efforts in planting seeds for corruption prevention and education. It has successfully recovered sizable amounts of stolen assets and arguably prevented the theft of many more. With its successive convictions and perceived sure-fire prosecutions, the KPK is making corruption an increasingly high-risk and low-reward activity in Indonesia.

However, the KPK is also a cautionary tale that an effective anti-corruption agency can naturally produce, by its success, the sources of its destruction. By pursuing corruption where the evidence led it, no matter who was involved, the KPK triggered a backlash of a magnitude that it did not expect. Few anticipated that senior officials at the top echelons of the Indonesian National Police and the AGO could conspire to frame KPK commissioners. In retrospect, this was not a surprising move. When fortunes and livelihoods of the corrupt are at stake, it should not be surprising that they will retaliate with all means at their disposal. Hence, the KPK experience suggests that anti-corruption agencies need to pay careful attention to anticipating the location, concentration, organisation, and resources of its opposition. By exercising a more strategic posture, the agency could prepare adequate means and counter-measures to combat the natural resistance to its work.

The KPK survived its most serious challenge to its existence in 2009 because it had numbers on its side. The reality is that its effectiveness was not its achievement alone. It was made possible by deep and wide public support for the agency (related to the public's contempt for grand corruption), the vigorous investigative press in Indonesia, and the continued backing from President Susilo Bambang Yudhoyono – even if this backing was motivated primarily by the previous two factors.

At the same time, the KPK owes its survival to its robust institutional design that has given it a combination of institutional independence, fiscal autonomy, and various preventive and law enforcement powers and capacities. In this regard, the KPK benefited from donor support

when it was founded – a support that owed partly to donors' regrets about not having effectively addressed corruption during the Soeharto years as well as concerns about their fiduciary responsibilities in the post-Soeharto era. But the KPK's inception, institutionalisation and consolidation show that the organisation quickly stood on its own feet and just as quickly advanced its agenda independently and strategically. The speed and efficiency with which the KPK moved worked to its advantage because it did not give its opponents time to mobilise. Today, however, the KPK has lost this 'first move' advantage. It is now a known entity, and it must face enemies that will seek to apply all means to defeat it – by delaying its work, defying its decisions, or sabotaging its operations.

By comparison, the experience of the Philippine Office of the Ombudsman is a cautionary tale of what can happen when an anti-corruption agency is badly designed and ill-equipped. As the experience of Mr. Marcelo showed, even a capable and courageous leader can only do so much with limited tools at his disposal. In many ways, the Ombudsman can be said to have been designed to fail, engineered to be toothless and clawless from the start. For one brief shining moment during Marcelo's short-lived tenure, this organisation fought innovatively and aggressively, but it was and is no match for the resources and reach of its prey. Efforts were not institutionally embedded, could be easily reversed with a change of leadership, and were thus unsustainable.

In what follows, different sets of recommendations are proposed regarding i) a country's choice on which institutional anti-corruption approach to favour based on its macro-political context, ii) likely factors of success for anti-corruption agencies, based on the KPK experiences, and iii) improving the concrete situation of the Philippine Ombudsman.

7.1. Considering the macro-political context

Given this comparative analysis of the KPK and the Ombudsman, what practical recommendations can be drawn for existing anti-corruption agencies and for donors and other development officials contemplating the creation of such agencies? The following three recommendations are presented for consideration.

- If there is no genuine interest and confidence at the highest political levels about the benefits of having an independent and powerful anti-corruption agency, then donors should think twice about demanding or supporting one. Such an anti-corruption agency is likely to be a waste of time and resources. Worse, it could exacerbate the problem if the anti-corruption agency itself is captured by the corrupt. Only with high-level political support and wide societal backing can such an anti-corruption agency maintain its independence and fend off powerful enemies, as the recent KPK episode suggests.
- Strong public action to fight corruption is essential. Public awareness and realisation of the problem of corruption are, however, not enough. A significant mass of citizens demonstrating willingness to combat corruption is crucial. At the same time, there must also be a free and robust media that can report about corruption without fear or favour. Such support is essential especially once an agency comes under attack for being 'too successful'.
- If there is no realistic prospect that the charter of an anti-corruption agency is going to give it the necessary combination of institutional independence, fiscal autonomy, and strong law enforcement powers, particularly in investigation, then it does not make sense

to establish it. This, more than anything, is what the Ombudsman experience abundantly makes clear.

The above three recommendations present the basic propitious conditions for the creation and operation of an effective anti-corruption agency. This is not to say that if these conditions are not evident, then one must forget or give up the fight against corruption. It is simply to argue that other anti-corruption instruments need to be considered and crafted according to the particular governance and corruption conditions of the context in question (Bhargava; Bolongaita 2004).

7.2. Potential factors of success to improve performance of anti-corruption agencies

Going forward, in the event that reform-oriented governments and development stakeholders decide that macro-political conditions are propitious for the creation or strengthening of an anti-corruption agency, what general recommendations could be considered in view of this comparative analysis of the KPK and the Ombudsman? Eight points come to mind:

- ***Give the anti-corruption agency appropriate jurisdiction and autonomy***

An anti-corruption agency should be given considerable scope to operate, and its mandate should encompass all branches of government – the executive, legislature, and judiciary.³⁶ The Ombudsman's anti-corruption potential is congenitally stunted by the fact that its charter allows it to only prosecute officials in the executive branch, leaving the legislature and judiciary to their respective accountability procedures. This framework presumes that corruption occurs or is driven mainly in the executive branch. It also assumes that the legislature and the courts can self-police themselves. For a political economy like the Philippines, these are assumptions that have little resemblance to reality as the reports of corruption affect all institutions. For its part, the KPK is designed to respond to the cross-sectoral presence of corruption. Hence it can prosecute wherever the corruption originates in the political system. In this regard, the KPK is *operationally* autonomous of other institutions, possessing the requisite authority to check virtually all corners of the public sector.

- ***Equip the organisation with standard powers of criminal investigation***

In a world where even very poor countries exhibit high levels of technology and mobility, an anti-corruption agency without the powers to conduct wiretaps, investigate financial records, freeze assets, and apprehend suspects is a useless entity. An anti-corruption agency needs to be able to conduct surveillance, follow the money trail, set up sting operations, and make arrests of likely fugitives. Only with standard investigative powers and capacities can an anti-corruption agency gather the necessary evidence to ensure effective prosecution.

³⁶ The issue of whether or not the armed forces should be in the domain of an anti-corruption agency (as in the Philippines), or outside of it (as in Indonesia), is an important issue that requires a fuller treatment than can be given here. But it appears that exclusion – at least in the initial years of an anti-corruption agency – may be advisable for both strategic and tactical reasons. Excluding the military reduces the risk of an anti-corruption agency being spread too thinly and eviscerated by violent retaliation before it could develop and consolidate itself.

- ***Endow the agency with both investigative and prosecutorial capacity, and shared responsibility for prosecutorial decisions***

The KPK's joint investigative and prosecutorial units have demonstrated remarkable efficiency and effectiveness in collecting evidence and developing compelling cases. In contrast, by letting the investigators decide when to prosecute, the Ombudsman has weakened key factors in prosecutorial power. Moreover, in sharing responsibility for decisions to prosecute, the quantum of evidence in deciding to prosecute should not only be on basis of probable cause but on the probability of guilt beyond reasonable doubt.

- ***Establish an independent process to hire and pay the agency's managers and staff according to merit and market***

The KPK has established very high standards of personnel qualifications for its staff. To apply these standards, it has competitively hired a private firm to help it manage the recruitment and selection of candidates.³⁷ Job applications are accepted only online, and a battery of aptitude and psychological tests are conducted to select only the most qualified candidates. Through these rigorous screenings, the KPK has reduced the risk of political interference in the hiring and appointment of staff, a situation not uncommon in many Indonesian government agencies.

- ***Provide the organisation with adequate room and resources so it can manage itself according to results***

Unshackle the anti-corruption agency from archaic civil service rules and procedures for managing personnel and operations. Allow the agency to recruit on secondment the best investigators in the police and other law enforcement agencies as well as the best prosecutors in the justice department. At the same time, establish performance contracts for personnel to avoid careerism. Strongly align staff activities to organisational objectives to enable the agency to execute its mandate and scale up its operations quickly. Moreover, an adequate budget should be allocated to the agency directly and regularly that is sufficient for its operational purposes.

- ***Measure the performance of the anti-corruption agency and its personnel on suitable outcome and impact indicators***

While there exists much literature in public sector performance, anti-corruption agencies generally have problems to install meaningful indicators to measure their performance, let alone impact. The KPK is very focused on counting what counts, i.e. its win rate in the courts, and not counting only what is telling little about performance, i.e. the number of complaints received and referred to other agencies (which was the Ombudsman's principal measure of performance for the first 15 years of its existence). The KPK is also an exception among its peers in the extent to which it has adapted proven private sector methods, i.e. the Balance Scorecard, and modified these for its purposes.

- ***Establish a collegiate leadership for the anti-corruption agency to spread its leadership risks and workload and to foster internal checks and balances***

An anti-corruption agency led by a single person is more easily subjected to threats and intimidations than an agency with a collegial leadership. Having a collegial group at the

³⁷ This obviously does not include the appointment of the KPK's commissioners. For their selection, the President appoints a selection committee from integer members of society and representatives from prosecution and police. This committee recommends ten candidates, of which Parliament chooses five.

helm may make an anti-corruption agency inefficient (although this has proven not to be the case with respect to KPK or to Hong Kong's ICAC), but it arguably makes coercive action against it more difficult. A collegial structure also fosters an environment of greater transparency and accountability in operations as there are more than two eyes at the top revising complaints and examining cases.

- **Create a coterminous anti-corruption court whose verdicts have direct effect**
Without an anti-corruption court that efficiently and impartially adjudicates cases, an anti-corruption agency cannot be effective. The KPK's success owes much to the efficiency and credibility of the TIPIKOR just as the Ombudsman's failures own much to the dilatory systems of the Sandiganbayan and the Philippine judiciary.

7.3. How to improve the Philippine situation?

The analysis showed a rather ineffective approach to anti-corruption in the Philippines and decision makers as well as donor agencies supporting anti-corruption reform might be left with the question how to proceed. The following recommendations are thought to show some options to the Philippine situation, but also other countries and agencies in a similar situation.

The first option would be to *continue providing technical assistance and training as before, but adjust the interventions to where the organisation's powers and capacities could be improved*. With respect to the Philippine Ombudsman itself, this option lends itself to at least four specific measures:

- The Ombudsman could give its Office of Special Prosecutor the authority to make the determination if an investigation is already ripe for prosecution. At present, this is a decision that rests with the Ombudsman's investigators, and has been responsible in great part for why many of the Ombudsman's cases are thrown out of court even before trial.
- The Ombudsman could restructure the operations of its investigators and prosecutors and establish mechanisms for close coordination. This could involve putting the investigators and prosecutors in the same building, and establishing regular channels of cooperation among the two units.
- The Ombudsman could establish a cooperation agreement with the Philippine National Bureau of Investigation (NBI) to draw on the latter's pool of trained investigators, as the KPK had done. By recruiting NBI agents, the Ombudsman could quickly scale up the investigative capacity of the office. It could also draw on the NBI's law enforcement powers, which the Ombudsman does not have. The latter could give the Ombudsman greater clout to gather evidence, and make arrests when necessary.
- The Ombudsman could consider reviewing its method for measuring its performance indicators, including its conviction rates, and align it with the method of the Sandiganbayan to ensure consistency and credibility. The fact that the Sandiganbayan would dispute the Ombudsman's figures is problematic. Both institutions must work to bridge the wide discrepancy between various indicators of performance.

If the above measures are taken, the Ombudsman could improve its performance, but even then its effectiveness would be limited either by the lack of its own law enforcement powers, or the performance of the proposed partner institutions.

The second option for donors faced with an underperforming anti-corruption agency would be to *scale back technical assistance and training, and instead focus support on enhancing the organisation's powers, institutional authority and autonomy*. This could mean working with the executive and the legislature to give the agency strong investigation and law enforcement powers, i.e. enabling the agency to conduct wiretaps, examine financial accounts, freeze assets, and make arrests. It could also mean reviewing arrangements for institutional independence and financial autonomy, leadership configuration, personnel size, organisational structure, and operating systems outside national civil service rules.

In the Philippines, this option would be likely more effective but perhaps is as yet inopportune. Of the three macro-political conditions discussed above, one major factor is arguably missing. While there remains in the Philippines a robust free press, vigorous civil society, and continuing public anger against corruption, there are serious doubts about the adequacy of high-level political support for anti-corruption. Moreover, many executive officials and legislators are unlikely to welcome the idea of strengthening an agency that could pursue them for corruption. Furthermore, many NGOs and civil society organisations are likely to resist proposals to give greater powers to an agency that in their eyes has not made significant inroads against corruption.

A third option would be to *dismantle the agency and build a new anti-corruption agency along the model of the KPK*. This alternative may have the short-term benefit of sweeping the ground clean for a new approach to fighting corruption, but the risks are equal if not greater, in terms of both lost time and resources and also the risk of public (and donor) disillusionment with start-and-stop initiatives. In addition, the specific arrangements that have worked for the KPK may not be appropriate in other settings. In the Philippines, this approach is likely to be counter-productive, as the Ombudsman, its staff and its allies are likely to resist any idea to abolish the organisation or create a replacement. The resultant conflicts could derail reform efforts and worsen the situation.

Finally, donors could *consider supporting alternative and innovative approaches to anti-corruption* that are not anchored on the anti-corruption agency but on other institutions and initiatives. It is beyond the scope of this paper to explore those alternatives, but anti-corruption practitioners and donors have at their disposal a broad range of approaches to support, among other things, civil society and the media, judicial and legal reform, and efforts to improve international regimes to restrict the "supply side" of corruption and limit opportunities for corrupt officials to hide ill-gotten riches in secret accounts. For the Philippines, the lesson from the experience of the Ombudsman is that any such initiatives need to be crafted to reflect the constraints and opportunities within the institutions and incentive structures that drive the Philippine political economy.

7.4. Concluding remarks

Based on this comparative analysis of the KPK and Ombudsman experiences, it is clear that under certain macro-political conditions, equipped with the requisite powers and resources and with support from other legal institutions, an anti-corruption agency can be highly effective even in an environment of poor governance and high corruption, and in a relatively short period. The 'investment' of political and economic resources in the KPK is arguably paying off for Indonesia. By making corruption a high-risk and low-reward activity, the KPK is helping pave Indonesia's path to better governance and improved economic development.

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Abstract

Anti-corruption agencies have long been a principal strategy to fight corruption in many developing countries. Unfortunately, few of them have produced evident results and they are seen as being rather ineffective. Recently, however, the Corruption Eradication Commission of Indonesia (KPK) seems to have emerged as an exception. Can this success be substantiated and, if so, how can it be explained?

A comparison with another such institution in a very similar neighbouring country – the Office of the Ombudsman of the Philippines – illustrates the KPK's success especially in investigating and prosecuting corrupt public officials. Why was the KPK, in just five years, able to reach a 100% conviction rate against top officials in all major branches of the Indonesian government, while the Philippine Ombudsman has scored only few convictions in its 20-year history? Part of this success can be explained by considerable investigative powers given to KPK, which the Philippine Ombudsman does not hold. Also, rigorous pre-testing of every prosecution and a highly efficient anti-corruption court contribute to KPK's success. These and other factors are analysed in this U4 Issue, which concludes with recommendations for donors and governments on the establishment and strengthening of anti-corruption agencies.