



**An Audit of the Kibaki Government's
Anti-Corruption Drive 2003-2007**

SHATTERED DREAMS



Africa Centre for Open Governance (AfriCOG)
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Executive Summary

On a purely quantitative level, the Government of Kenya (GOK) has since 2003 enacted or proposed an elaborate legal regime to detect, control and punish corruption. Qualitatively, the fight against corruption is in a dire state.

The legal infrastructure for the fight against corruption is weakened or compromised by a combination of factors including the character and quality of the bureaucracy (largely unreconstructed from the Moi regime) and fading political power within the Kibaki regime, induced largely by a massive corruption problem within and political contestation on a continuous basis since January 2003, to the extent that he had to reach out to his predecessor for support); weak oversight of executive taxation decisions and spending (ex post facto parliamentary auditing); and a weak Judiciary that (despite the "radical surgery" purge of 2003, or perhaps because of it, has not managed to convincingly handle politically connected suspects coming before it. Where new legal infrastructure has been attempted, it has proved ineffective or compromised.

Judged only at the level of enactment of laws and establishment of commissions of inquiry, the GoK has done well. However at the level of enforcement of provisions and implementation of related policies the GoK has been remiss. Parliament has not fulfilled its oversight function adequately. For example since 2003, political chicanery (related to the fallout in NARC and the Constitutional reform debate) has combined with archaic standing orders to allow ministerial budgets to be passed without adequate scrutiny. Where Parliament has constituted its own ad hoc investigatory interventions, the results have been disappointing. For example, two special PAC investigations later, the Anglo Leasing scandal has yet to be resolved. Clearly Parliament can, and should be urged to do more to enforce its own recommendations.

The premier anti-corruption agency, the Kenya Anti Corruption Commission (KACC) has, in

essence, a short life expectancy. It has failed to win the hearts and minds of Kenyans because it is not an effective enforcement anti corruption institution.

A few examples will suffice. The compulsion powers of the Director of the KACC under the Anti Corruption and Economic Crimes Act (ACECA) include a power to compel persons in the public service to produce statements on the origin of their property. Read together with the Public Officer Ethics Act (POEA) requirement that every public officer declare their

assets and liabilities annually, and the specific codes of conduct (including the Ministerial Code of Conduct which requires Ministers to cooperate with the KACC) one would not expect the KACC to complain that it is being defied by corruption suspects. Despite a constitutional court ruling validating the constitutionality of the KACC Director's powers in this regard, the Legal Affairs Committee of Parliament has indicated its intention to amend ACECA to remove this compulsion power from the KACC Director. This move is retrogressive and should be opposed.

The situation KACC finds itself in is largely its own fault. Because of its poor performance in relation to grand corruption investigations, KACC finds itself with few allies - few spoke out in its defence when the Minister for Justice and Constitutional Affairs threatened it with a reduction in the salaries and emoluments of its management. KACC's success rate in criminal and civil action falls short of legitimate expectations with great disparities being revealed in the calibre of people charged in court vis-a-vis convictions. Only 2 so called "big fish" have been convicted out of 61 cases at the time of going to press.

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These disparities also impact prosecutions through numerous instances where the Attorney General terminated criminal proceedings against prominent accused persons. Furthermore, KACC has brought numerous civil suits with little to show in terms of actual money recovered.

Regarding the Anglo Leasing investigation, it remains unclear whether KACC has sought international cooperation as it claims, to investigate the provenance of the contentious 18 security contracts and the governments' interlocutors abroad. Only 6 public officers have been charged in court over Anglo Leasing and their trials are still in the preliminary stages. Their ostensible co-conspirators in Anglo Leasing and Finance Company Ltd are purportedly fugitives from Kenyan law enforcement.

No politicians or their associates have been arrested or charged for their role in the affair. There should be a clear statement from the Attorney General and the Director of KACC as to the status of international dimensions of investigations into grand corruption scandals including but not limited to Goldenberg and

The Anglo Leasing scandal described later in this report proves that it is not for want of procurement laws and procedures that GOK procurement is ridden with corruption. The GOK itself estimates that it loses up to 20% of its procurement spend of Ksh 150 billion annually to waste, mismanagement and corruption. Anglo Leasing also exposes the impunity with which corruption suspects are able to dip into the procurement kitty time and time again despite the existence of procurement rules that propose such anti-corruption measures as blacklisting of errant contractors. For example, it is suspected that the principals behind Anglo Leasing include directors of a company that was blacklisted by the Parliamentary Accounts Committee in the 1990s, under the previous regime, for the supply of defective vehicles to the Kenya Police.

Lack of enforcement combines with a lack of offices to advise high public office holders on the standards expected of them. Furthermore the implementation of certain anti-corruption innovations such as the annual declarations of wealth, under POEA were not accompanied by the allocation of adequate resources for the establishment of the infrastructure to handle the implementation of the new laws. The report, for example, illustrates this point by reference to the largest employer of public servants in the country, the Teachers Service Commission, which has found itself literally drowning under the quarter of a million declaration forms it has received annually since 2004. The GOK's rush to formal compliance without the support structures to give effect to its legislation has undermined public confidence in its will to reduce corrupt practices in government. In the period going forward more attention should be paid to ensuring the entrenchment of the structural underpinnings of anti-corruption legislation and policy. For example, in ensuring that subsidiary legislation is enacted and that oversight bodies (e.g. boards) across sectors are inaugurated and properly resourced.

Regarding International Conventions, Kenya is yet to complete the process of domesticating the provisions of the AU Convention on Preventing and Combating Corruption and Related Offence (UNCAC) - which requires state parties to make provisions in national legislation for whistle blowers and witness protection. The recent Witness Protection Act does not fit the bill as a whistleblower protection law, as is demonstrated later. There is a pressing need for a serious stakeholder consultation that will result in real protection for whistleblowers in Kenya, whether in the public or private sectors.

There appears to be a vicious internecine battle between various GOK institutions. Thus the courts, the KACC, the Minister for Justice and the Attorney

General have engaged in public spats over mandate, and interpretation of policy almost continuously since 2003. GOK's anti-corruption policy is discredited by these incoherencies between the premier anti-corruption institutions.

A measure of the ineffectiveness of the institutions is their perennial mention in corruption surveys as bribery burdens on the people of Kenya. Worse still, the Kibaki anti-corruption credentials were critically injured by the departure in early 2005 of the globally respected former Permanent Secretary for Governance and Ethics and the series of revelations he subsequently made of grand corruption and cover-ups at the highest level. The GOK has no basis anymore for denying that grand corruption networks have clearly found collaborators, and a degree of impunity, within the Kibaki government.

Now in the aftermath of the 2007 general election and with a Grand Coalition Government in place, it is too late to restore public confidence in the rhetoric of the early Kibaki period - zero tolerance to corruption and no sacred cows - but a measure of leadership from the top is still expected or, at the very least, should be demanded by civil society and other stakeholders. Consolidation of bureaucratic reforms is critical, in this period.

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Though civil society must critically assess the merit of continued engagement in such processes as GJLOS, in the light of the GOK's lack of political will to deal conclusively with major grand corruption scandals; it must attempt, to its utmost, to support the consolidation of bureaucratic reforms and reformers in government, hard to identify as they might be.

We have in mind, for example, continued support to the Kenya National Commission on Human Rights (KNCHR) that has stepped into the breach left by the abolition of John Githongo's former office, provided it continues its vigorous implementation of its mandate and working to ensure that sufficient resources are available to ensure that the declaration of wealth forms, tax revenue records and KACC investigation files are kept in a secure state for more amenable periods for investigations.

This report commences with an assessment of the degree to which keystone anti corruption legislation has been implemented by the Kibaki government.

It then reviews progress in the indictment and prosecution of persons for corruption since December 27th 2002; and considers the use of Commissions of Inquiry to address and investigate corruption during the same period.

After evaluating other measures including policies, judicial reform and bureaucratic changes so far implemented; it briefly outlines areas needing further attention in future.

The report is based on a systematic review of the NARC government's anti-corruption reform measures as initially conducted by the Africa Centre for Open Governance in 2006 and 2007.

Introduction

On December 27th 2002, the Kenya African National Union (KANU) was punished severely at the poll for its corrupt past when 61.3% of the electorate chose the National Rainbow Coalition (NARC) and NARC's candidate, Mwai Kibaki, as Kenya's 3rd President. NARC distinguished itself from KANU by explicitly stating in its manifesto its policy of "zero tolerance to corruption", a claim KANU could not credibly make following its 4 decade incumbency and misrule. In his inauguration speech Kibaki declared that "Corruption will now cease to be a way of life in Kenya and I call upon all those members of my government and public officers accustomed to corrupt practice to know and clearly understand that there will be no sacred cows under my government."

Barely 12 hours after this declaration, the Daily Nation of January 1st 2003, reported that the reality of this pledge was communicated in a direct fashion to an Othaya traffic officer who was caught red-handed receiving a Sh100 bribe from a minibus tout.

This report seeks to trace the anti-corruption drive's path since 2003 with a view to providing a measure of understanding of why, nearly six years on, the Kibaki anti-corruption drive is completely discredited, having foundered due to political considerations, infiltration by corruption networks and a spectacular loss of political will in the face of the reemergence of grand corruption in the Government of Kenya.

Current Corruption Overview

Kenya's historical experience of corruption has been largely that of corruption emanating from the highest levels of the state to become endemic, well-nigh ubiquitous, in society. As in other African countries, corruption in Kenya has been inextricably intertwined with the nature of the modern African state that is driven by patronage and derives its legitimacy from an ability to create and dispense patronage. Some students of Kenya's political economy have

characterised Kenya as a kleptocracy exemplified by a drive for primitive accumulation by those who run government, accompanied by a parasitic business class which has failed to promote industrialisation and development.

These two elements of the kleptocracy combine in innovative plots to steal public resources through financial and commercial corruption; and a special case for Kenya, through massive theft of public land.¹ Since 1995, when Transparency International first published the Corruption Perceptions Index (CPI), Kenya has performed very poorly, always in the bottom ten per cent. In 2003-4, the CPI score improved and there was a real hope that Kibaki had broken Kenya out of the corruption cycle which had so devastated the country. However by 2006, Kenya's CPI ranking was the worst of the East African region with an index score of 2.2 - connoting a perception of a very corrupt public sector and a similarly compromised political leadership.

Worse for the government, all recent survey work shows that confidence levels in the government's commitment to fight corruption are falling. For example, the Global Corruption Barometer of 2006 found that 39% of the respondents regarded the government as not effective. 9% believed that the Government does not fight corruption at all and 8% believe that the government not only does not fight corruption but actually encourages it. The government's attempted cover-up of the Anglo Leasing scandal (see below), and the impunity enjoyed by its perpetrators suggest the basis for the respondents' beliefs.

The Initial Policy Framework

The first 12 months of NARC rule were frenetic in legislative and policy terms. Riding on the back of the clear electoral mandate, Kibaki began to construct a new anti-corruption framework while dismantling his

¹ Southall, R. (1999), 'The Ndung'u Report: Land and graft in Kenya', *Review of African Political Economy*, 103, March 2005, 142

government. The pre-election manifesto's zero tolerance pledge was immediately embedded within government's 5 year legislative and policy blue print, the National Economic Recovery Strategy Paper (ERS). At this point the Gallup Voice of the People poll found that Kenyans were the most optimistic people on the planet.²

With a free hand, Kibaki set about taking drastic actions to mainstream anti-corruption in government functions and purge government of Moi's holdovers. Among his first executive acts, President Kibaki created a new Ministry of Justice and Constitutional Affairs, mandated to coordinate the anti-graft war and especially to spearhead the enactment of requisite laws to facilitate the execution of the campaign. He also appointed the Head of the Transparency International Kenya Chapter to the new position of Permanent Secretary in the Office of the President in charge of Public Ethics and Governance.³ Further, a cabinet committee on anti-corruption started meeting fortnightly to review and coordinate the attack on corruption and various task forces and commissions were instituted to look into past misdeeds and the root causes of endemic corruption and recommend changes.

In May 2003, the government suspended nearly 1,000 public procurement officers after an audit found widespread procurement irregularities.⁴ Suspect pending bills held by contractors were frozen or disavowed. As a result, leading officials in public institutions and parastatals left office and some were prosecuted. Among this number were the former Head of the Kenya Revenue Authority, the Head of the National Aids Control Council, the Head of the National Social Security Fund, and the Head of the Kenya Pipeline Company. Some stolen assets (such as government land) were recovered, or even returned, while an international asset tracing effort, primarily by the PS for Governance and Ethics, identified close to US\$1 billion held abroad by former big wigs in the Moi administration.⁵

Early in 2003, Chief Justice Chunga and High Court Judge Oguk resigned in the wake of charges of corruption levied against them. By December 2003, the government was engaged in what the Minister for Justice and Constitutional Affairs called "radical surgery" on the judiciary. The new Chief Justice, Evans Gicheru, requested the President to commission two tribunals to investigate 23 Judges of the High Court and the Court of Appeal. However, by the end of November 2006 not a single Judge had been found guilty by the tribunal. Over 80 Magistrates left

service

² By 2005 the same poll reported that less than half of the respondents felt that corruption had decreased over the next 3 years. Incredibly 30% believed corruption had increased since 2002 when Kibaki took over.

³ John Githongo held this position until February 2005 when he resigned and went into exile after receiving death threats.

⁴ This resulted in paralysis of the government's procurement activities and most of the officers were reinstated.

⁵ See for example Kenya hunts for missing billions, BBC Online 16.12.2003 <http://news.bbc.co.uk/2/hi/business/3324369.stm>

⁶ Subsequently amended to biennially by the Statute Law (Miscellaneous Amendments) Act of 2006

after being branded corrupt by a judicial investigation, eponymously known as the Ringera committee. A five year anti-corruption campaign announced by the President was aimed at achieving a sea change in the cultural attitudes of Kenyans towards corruption. This was the season of low hanging fruits ready for picking, but it was still not buttressed by a robust legal anti-corruption framework.

The Statutory and Policy Framework for Anti-Corruption

Work on legislating the legal framework started during the first parliamentary session in 2003, and by May 2003, NARC had pushed through Parliament its two key anticorruption legislative pillars: the Anti-Corruption and Economic Crimes Act (ACECA) and the Public Officer Ethics Act (POEA).

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The former sought to provide a comprehensive framework for prevention, investigation and punishment of corruption and economic crimes, while the latter sought to enforce codes of conduct prescribing minimum ethical standards for the entire public service. ACECA established the Kenya Anti-Corruption Commission (KACC), albeit devoid of the powers to prosecute.

The requirement under the POEA that public servants declare their assets and liabilities annually⁶ was a further innovation introduced by the NARC regime, although one attended by significant limitations, such as those on access to the information by the public.

Other laws, such as the Public Procurement and Disposal of Assets (PPDA) Bill 2003, the Public Finance Bill 2003, the Privatisation Bill and the Government Financial Management Act 2004 were introduced in parliament and eventually enacted by 2005.

Subsequently, the Witness Protection Act and the Political Parties Act were also passed - though both were not given presidential assent until well after the

2007 general elections

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It took up to September 2004, for the KACC to be fully established. Its Director, Justice Aaron Ringera had previously served as Director of the Kenya Anti Corruption Authority which was declared unconstitutional by the High Court in December 2000. The first Chairman of the Advisory Board of KACC, Ahmed Nassir Abdullahi, was the then Chair of the Law Society of Kenya.

The decision of the Constitutional Court in Christopher Ndarathi Murungaru v. Kenya Anti Corruption Commission (Miscellaneous Civil Application No. 54 of 2006 (O.S.)) confirms the constitutionality of the KACC Director's power to issue compulsion notices.

In December 2003 the first round of wealth declarations were submitted by the President and over 600,000 public officers around the country. During the same year, Kenya signed and ratified the United Nations Convention against Corruption in Merida, Mexico, and pledged to sign the African Union Convention on the Combating and Preventing of Corruption in Maputo, Mozambique. The UN Convention and the AU Convention have both entered into force.

Legislative Overview

On paper, the legislative framework for anti-corruption is developed. However, the form of the legislation is not matched by substance in terms of implementation. What follows is a summary of key issues related to Kenya's anti-corruption laws. The aspects of law that are neglected or not fully implemented are pointed out below.

1. The Anti-Corruption and Economic Crimes Act (ACECA)

ACECA established the KACC and defined offences of corruption and economic crimes. Section 2 (1) of ACECA, 2003, defines corruption to include such offences as abuse of office, breach of trust, embezzlement or misappropriation of public funds, fraud, bribery and dishonesty in connection with taxation or election to public office, and further, those offences listed in sections 39 - 47 of the Act.

Section 2 of ACECA, 2003 states that 'economic crime' means any offence under section 45 of the Act or any offence involving dishonesty under any written law providing for the maintenance or protection of the

public revenue. Under sections 26 (3) and 58 of ACECA a public officer may be required by the Director of the KACC to explain the source of his property. The decision of the Constitutional Court in Christopher Ndarathi Murungaru v. Kenya Anti Corruption Commission (Miscellaneous Civil Application No. 54 of 2006 (O.S.)) confirms the constitutionality of the KACC Director's power to issue compulsion notices.

However, the law does not permit "fishing expeditions" and the KACC Director's notices must specify which property is in issue. Dr. Murungaru's legal counsel in this case, also a legislator and Chairman of the Parliamentary Committee on Legal Affairs and Administration of Justice, has indicated his intention to move amendments to ACECA in Parliament during 2007, to give effect to his pleadings in the case his client lost before the constitutional court. This is retrogressive and must be opposed.

2. The Public Officer Ethics Act (POEA)

Part IV and V requires the over 600,000 public officers to annually make financial declarations and, in Part III, requires Commissions responsible for the employment and discipline of public officers to publish specific Codes of Conduct for each category of public officer. The first wealth declarations were made in December 2003.

The law has since been amended to provide for biennial declarations. The Code of Conduct regulates the actions of public officers and specifically provides that they are under a duty of professionalism and prohibits improper enrichment, conflicts of interest, participation in harambees,⁷ acting for foreigners, political partisanship, sexual harassment, and regulates private affairs.

The best known innovation of the POEA, the wealth declaration process, has not been a big success in curbing governmental corruption.

KACC has only brought one major suit to compel a public officer (former Internal Security Minister Chris Murungaru) to reveal the source of his wealth, and even this was a qualified success with the court requiring KACC to particularise the property it believed to be the fruit of corruption.

However there were no amendments made to the Official Secrets Act. At the time of writing the Witness Protection Bill 2005, the Anti Money Laundering Bill 2005 and the Freedom of Information Bill are pending before Parliament.

² In 2008, prominent public officials, including the President and the Prime Minister, have presided over harambees in contravention of this provision.

3. *The Public Procurement and Disposal of Assets (PPDA) Act*

This was the product of considerable dialogue between the government, private sector lobbies, international development partners led by the World Bank and the civil society. Its stated aim was to promote competition, economy, efficiency, integrity, fairness, transparency and accountability in public procurement. It established a Public Procurement Oversight Authority (PPOA) with an Advisory and Administrative Review Board. The law prescribes the internal organisation of public entities relating to procurement and lays down procurement rules and procedures. In sections 38, 40 through 43, it creates offences related to inappropriate influence on evaluations, corrupt and fraudulent practices, collusion and conflict of interest. Section 115 of PPDA provides for the debarment, by the Director General of the PPOA, of certain persons from public procurement for a minimum of 5 years.

Global experiences and the Anglo Leasing scandal (described in brief below) demonstrate that security and defence procurement are prone to corruption because of their national security implications. It has been proposed by the Institute of Economic Affairs, a local civil society organization, that parliament should amend the PPDA and the Official Secrets Act to allow the Parliamentary Departmental Committee on Defence and Foreign Affairs, sworn to secrecy, to scrutinise security related contacts and the budgets of security agencies.

The Auditor General's report in April 2006 also recommended the establishment of a special security procurement committee.

4. *The Proceeds of Crime and Money Laundering Bill 2006*

This Bill is still pending before Parliament. It addresses a wide range of issues including freezing suspect accounts including those involved in terrorism financing; confiscating the proceeds of crime, outlawing anonymous bank accounts and the introduction of mandatory reporting for suspicious transactions above a certain amount.

The Financial Action Task Force on Money Laundering refers to money laundering as "the processing of criminal proceeds in order to disguise their illegal origins" In short it could be referred to as the introduction of illegally sourced monies into an economy for purposes of legitimizing the said monies.

This would entail the channelling of money acquired through criminal activities into legitimate avenues so as to 'sterilize' the funds. Evidence suggests that an enabling environment ripe for money laundering is one in which high level corruption and lack of proper governance prevail.

Money laundering is a problem with global significance and one that needs both a regional and global effort to combat it. To this end it is imperative that there be international cooperation in ensuring that money laundering does not thrive. The structure of anti-money laundering legislation is that the offences from which the money is obtained are dealt with under criminal law while the offence of money laundering per se is dealt with under the anti-money laundering legislation. The bill in Parliament had proposed, inter alia, the establishment of a Financial Reporting Centre (FRC), the equivalent of the Financial Intelligence Unit (FIU) in the United Nations Convention against Corruption.

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Known scandals with a probable money laundering link include the Charterhouse Bank scandal in which the Bank by that name was put under statutory management by the Central Bank of Kenya in September 2006. The action followed revelations by whistleblowers in 2004 that it was involved in facilitating massive tax evasion and money laundering activities on behalf of a large group of companies. The Central Bank of Kenya commissioned an investigative report into the bank which claimed that the bank's activities "threaten the stability of the Kenyan economy" with the potential loss to the country estimated at between US\$243 million and US\$338 million in tax revenue. Apparently, a number of account holders had multiple dummy bank accounts, which is a common technique used by tax evaders.

Interestingly, however, the Parliamentary Departmental Committee on Finance also conducted an inquiry into the matter and recommended the bank's reopening.

Two of the whistleblowers (former employees of the CBK and Charterhouse Bank) have since been given asylum in the United States, which, together with other major donors, is critical of the government's failure to act on this scandal.

5. Government Financial Management Act, 2004

Traditionally, Permanent Secretaries, Heads of Departments and Chief Executives of public bodies were appointed as principal accounting officers. The Government Financial Management Act expanded the definition of accounting officers to include all public officers who are appointed by the Treasury to manage government resources and to whom any payments from the Exchequer are made.

The Ministerial Code of Conduct explicitly binds Ministers to strictly follow the provisions of the Government Financial Management Act. However, ... since 2003, Ministers have been found to have interfered with procurement decisions in the parastatal and governmental sector.

Accounting officers are now personally responsible for the propriety and regularity of public finances for which s/he is responsible, for keeping proper accounts; for the avoidance of waste and extravagance; and for the efficient, effective, economical, lawful and authorised use of resources. Accounting officers answer personally on these matters, through Ministers in Parliament, for the policies and actions of their departments.

Accounting officers have a particular responsibility to see that appropriate advice is tendered to Ministers on all matters of financial propriety and regularity; economical administration, prudence, efficiency and effectiveness in use of resources and value for money in public procurement. If the Minister is contemplating a course of action that would involve a transaction which the accounting officer considers would breach the requirements of propriety or regularity, the accounting officer is required to set out in writing his or her objection to the proposal and the reasons for the objection. The accounting officer has a duty to inform Treasury should the advice be overruled.

If the Minister decides nonetheless to proceed, the accounting officer shall see a written instruction to take the action in question. The accounting officer is obliged to comply with the instructions, send relevant papers to the Auditor General and inform the Treasury of what has occurred.

A similar procedure applies where the accounting officer has concerns regarding the value for money of a proposed course of action.

The Ministerial Code of Conduct (see below) explicitly binds Ministers to strictly follow the provisions of the Government Financial Management Act. However, there is little evidence that this is how it works in practice. On the contrary, since 2003, Ministers have been found to have interfered with procurement decisions in the parastatal and governmental sector. For example, two Ministers interfered with the procurement of gantry cranes for the Kenya Ports Authority; another Minister interfered with the award of contracts for the importation of relief food; yet another intervened in a licensing procedure on behalf of a foreign company whose local representative is the Minister's son; and, most irregularly, another Minister unilaterally cancelled a national communications license and disbanded the Board of the Regulatory Authority who had awarded the license.

What appears to be missing in the Kenyan legal and policy regime arrangement is an office to advise Ministers and public servants on ethical standards and conflicts of interests. In some jurisdictions, such as the United States, public servants and legislators have access to lawyers and other experts for such advice. In Canada, there is an Ethics Commissioner who administers ethical principles, rules or obligations established by the Prime Minister for public office holders. Whatever the case, it is urgently necessary to take statutory steps to strengthen the POEA and to mitigate ethical lapses by public officers at the highest levels.

6. Political Parties Act

This Act requires the government to fund political parties so as to, hopefully, reduce incidents of corruption during or before elections. This law is also designed to reduce the obligation of officials to political party contributors and donors. Finally, it seeks to make party accounts available for public scrutiny. The bill was passed before the President prorogued the last session of Parliament of 2006.⁸

The statute is especially important because of the historic link between corruption, political financing and patronage politics that characterise recent Kenyan history. For example, according to John Githongo, former Permanent Secretary for Governance and Ethics, the Anglo Leasing scandal was justified to him by the then Minister for Justice and Constitutional Affairs as a government political fundraising project. In a 91 page dossier, dated 22nd November 2005, addressed to President Kibaki, Mr. Githongo recalls that "on the 29th of June 2004 I met with Hon. Kiraitu at his office. Essentially, he said that it was now clear that Anglo Leasing was 'us' - our people.

⁸ The bill, however, was subsequently returned to parliament for revision after the President declined to assent to it. The presidential objection was mainly on the grounds that it did not adequately cater for coalitions among political parties. Parliament accepted the President's objections and accordingly made changes to the Bill. It was passed for the second time in 2007 but would not receive presidential assent until 2008 - after the general elections.

He said that no matter what, he did not have what it took to order or countenance the arrest of Chris Murungaru for corruption because 'they had too much history'. He was blunt and emotional. He admitted that people like Murungaru were key to the transactions of Anglo Leasing and, even though he personally did not have the details, the excuse given to him was that the money was needed for political fund raising."⁹

The new statute seeks to mitigate corruption in political financing and establishes a political parties fund,¹⁰ which allocates tax money to parties for purposes "compatible with democracy", including promoting active participation by individual citizens in political life; covering the election expenses of the political party and the broadcasting of the policies of the political party; ensuring continuous vital links between the people and organs of State; organization by the political party of civic education in democracy and the electoral processes; bringing the party's influence to bear on the shaping of public opinion; and not more than ten per cent for the administrative expenses of the party. The fund is administered by a Commission.

Fifty percent of the monies allocated to political parties by Parliament shall be distributed equally among political parties, each of which obtained not less than five per cent of the total votes cast at the previous parliamentary elections; and the remaining fifty percent shall be paid proportionately by reference to the number of votes secured by each of the political parties and the number of women candidates elected in each party.

However, there are now over 70 registered political parties in Kenya most of which are locked out of the fund for lack of parliamentary representation. Contributions to political parties by non-nationals are prohibited and individual contributions are capped at 1 million shillings per annum.

Sections 26 to 28 provide for declarations of assets by political parties; disclosure of sources of funding and annual audits of political party finances.

7. Privatisation Act

The Privatization Act was passed in 2005 under urging of donors that the government stop subsidies to poorly-performing state corporations to regulate the off-loading of public share-holding in parastatals to private hands. However, much of the privatisation

promised by the government in the Economic Recovery Strategy of 2003 has yet to take place. The Privatisation Commission has nonetheless been established, though only after the highly contentious and suspect partial privatization of Safaricom in early 2008.

The government has also completed the concessioning of the Kenya Railways - though the winning consortium has since dismally failed to meet key financial and performance requirements of the contract and, at the time of writing, were under a threat of revocation of the concession by the Kenya and Uganda governments.

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Also privatised in recent times is Telkom Kenya and the government divestiture of shares in the country's first GSM operator, SafariCom. All these have been attended with controversy. Other attempts to roll out new telecommunications investments such as the second national operator and the 3rd GSM license have been the subject of litigation by an aggrieved party, EcoNet Wireless Kenya.

8. The Witness Protection Act

The Witness Protection Act was passed by Parliament on 5th December 2006. In summary, it is a criminal witness protection bill and not whistleblower legislation. Section 3 defines a "witness" for the purposes of this statute as a person who has given or agreed to give evidence, or made a statement to the authorities concerning an offence against Kenyan law and determines such a person as qualified for the protection of the Attorney General. At this point, it is clear that it would not apply to, for instance, a whistleblower in a private sector corporation. Furthermore, it does not cover disclosures to persons outside the government.

Nevertheless, it introduces a new measure to protect a class of persons who would otherwise be exposed to retribution for assisting in the prosecution of crimes, including corruption offences and economic crimes.

⁹ See "Report on my findings of graft in the Government of Kenya", John Githongo, St. Anthony's College Oxford, England, 22.11.2005 at http://www.marsgroupkenya.org/Reports/OtherReports/GITHONGO_REPORT.pdf

¹⁰ Section 23

9. International Conventions

Kenya is a State Party to both the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption and Related Offences. Indeed, when UNCAC was opened for signature and ratification on 9th December 2004, in Merida, Mexico, Kenya became the first country to sign and deposit the instruments of ratification. Unfortunately, in contrast to its haste in ratification, Kenya is yet to domesticate all the provisions of the said convention.

This failure to fully domesticate international treaties has remained a thorny issue because it negates the very purpose of the ratification. However, this also raises questions on whether there are consultations between the legislative and executive arms of government before the ratification of these international instruments. Domestication of these laws would infuse them with the power of law within our jurisdiction. The legislature is mandated with making laws to govern the people of this country.

It seems to be a great shortcoming in these international instruments that there is no mandatory obligation on the state parties to domesticate the conventions/treaties.

It should therefore be a logical progression that before the ratification of international instruments, the legislature or a committee thereof be consulted in furtherance of their duties and a determination arise from such consultations on the necessity or otherwise of ratification of the instrument. It seems to be a great shortcoming in these international instruments that there is no mandatory obligation on the state parties to domesticate the conventions/treaties.

The AU Convention specifically provides that state parties shall make provisions in national legislation for whistle-blower and witness protection. In Kenya whereas specific provisions have been made for witness protection by the Witness Protection Act, there has been no provision for the protection of whistle-blowers which omission might adversely affect the confidence of persons to offer information on corruption-related matters.

Furthermore, whereas specific institutions have been established, such as the KACC, some issues still need addressing to facilitate implementation, such as giving KACC powers to prosecute investigated cases and obviate any anticipated impasse with the AG.

The power of the State Parties to prosecute their

nationals for corruption related offences committed outside their jurisdiction, as set out in the AU Convention, has been entrenched in Section 67 of the ACECA.

10. Facilitating speedy hearing of corruption proceedings

The Chief Justice, pursuant to his mandate, made The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules (the CJ's rules) in 2006 to deal with the frequent applications to the Constitutional Division of the High Court. Before the CJ's rules came into effect, persons accused of various offences would apply for a constitutional reference as it guaranteed immediate stay of proceedings until after the determination of the Constitutional reference and in that manner progress of the cases was held up indefinitely. The CJ's rules now provide that magistrates are given discretion to determine whether or not a constitutional question indeed exists before making the reference to the Constitutional Division.

Further Provisions

1. The African Peer Review Mechanism (APRM) and the New Economic Partnership on African Development (NEPAD)

The African Peer Review Mechanism (APRM) is a process of the New Economic Partnership on African Development (NEPAD) whereby AU countries are evaluated on governance, democratization and human rights. Upon review by a panel, recommendations are made to the heads of state on improvements to be made and the country under review commits itself to implementing the suggested recommendations. Whereas Kenya was subjected to the APRM process in 2005 and recommendations presumably made, the lack of information thereon at the time of writing makes it impossible to measure the steps the government has taken towards implementation.

The question also posed is what kind of report the government submits for peer review, the criteria used and who prepares the report. It would be easy for the government to submit a report heavily skewed in its favour especially with the lack of mechanisms in place to access the information.

This calls to attention the necessity of a Freedom of Information Act which would in turn make it easier to audit the government's performance on various aspects from the available information.

2. Ministerial Code of Conduct

The Ministerial Code of Conduct provides for principles on the conduct of ministers. It requires ministers to have integrity and to be accountable to both the general public and parliament and for them to submit to the scrutiny of both. As a guideline on how public servants and specifically ministers ought to conduct themselves, it is a commendable document, (if in a somewhat unwieldy format) but whether it is worth more than the paper it is printed on remains to be seen, especially in light of the various scandals involving government ministers. The Code also makes provision regarding the acceptance of gifts and presents by ministers and specifically forbids it except with the presidents' consent.

Again, without the accessibility of information it would be impossible to ascertain whether there is compliance with the code.

In the preamble to the code of conduct, specifically section 1.4, the Code provides as follows:-
"This code should be read against the backdrop of the duty of Ministers to comply with the law, including international law and treaty obligations, to uphold the administration of justice and to protect the integrity of public life....."

It is evident that this requires them to shun corrupt practices and act at all times within the public interest.

An Assessment of the Achievements of the New Anti-Corruption Framework

i. Wealth Declarations

In September 2005, the Efficiency Monitoring Unit (EMU), a department in the Office of the President, published a report on compliance with the provisions of the Public Officer Ethics Act (POEA). The report revealed that the Act had spawned unanticipated bureaucratic burdens on the Commissions responsible for the implementation of the wealth declaration process. EMU found that there was general non-compliance with the legally stipulated deadlines for submitting wealth declaration by the public officers across most of the responsible Commissions. Despite it being an offence to fail to declare, none of the responsible Commissions reported any of its subject public officers for failing to submit declarations, or in many cases submitting blank forms. Most of the responsible Commissions did not have any handling protocol for the declaration forms they received. In the case of the Teachers' Service Commission, it had to rent extra premises at its headquarters to store the 750,000 declarations it has received since the Act came into force.

The EMU report found a complete "lack of capacity and ability to analyse, review and verify the information submitted in the wealth declaration forms to detect any falsification, incompleteness, disproportionate to income declared and improprieties or conflict of interest" in almost all the commissions.

Some of the responsible Commissions did not know how many public officers fall under them. Worse still the EMU experienced an uncooperative bureaucracy, stating that "there is reluctance amongst ministries, state corporations and local authorities to indicate the

number of their employees in spite of having been requested to submit the statistics. Attempts under Githongo to have the declarations electronically recorded and stored for easier monitoring were successfully resisted.

Finally, the annual budget did not allocate funds to cater for the cost of activities relating to the administration of the Code of Conduct and Ethics as spelt out in Act.

In conclusion, the EMU suggested that there is a need to have a centrally placed institution with the mandate to review and verify wealth declarations. A task force appointed by the Minister for Justice and Constitutional Affairs considered the possibility of KACC or EMU taking the responsibility for verifying wealth declarations. The task force found that legally, KACC had no such mandate under either ACECA or POEA. It also proposed to reduce the number of public officers required to declare (at present over 700,000) and thereby reduce the burden on the Commissions. It pointed out that only 16,000 Uganda public officers declare; while their counterparts in Tanzania number only 5,400.

ii. The Kenya Anti Corruption Commission (KACC)

Established by the Anti-Corruption and Economic Crimes Act (ACECA) in May 2003, the KACC commenced operations in late 2004 with the former head of the defunct Kenya Anti-corruption Authority (KACA), Justice Aaron Ringera, as its first Director. The

legal defence afforded by the laws of Kenya and the guarantees it gives to the due process of law.

Further, there are capacity constraints in both the Office of the Attorney General and the Judiciary. It is however heartening to note that both constraints are being addressed. The Chief Justice has promulgated new rules of procedure in constitutional matters which should, if all goes well, facilitate expeditious hearing of constitutional references.

He has also expanded the territorial jurisdiction of several special magistrates. For his part, the Attorney General has moved to recruit more State Counsels and authority has been given to his office to recruit 26 special prosecutors to deal with corruption cases.

Nevertheless, in the years since KACC commenced operations, its success rate in the criminal and civil action it has taken falls short of the expectations that its Ksh.1 billion annual budget would result in significant reductions in corruption levels in Kenya.

The poor performance of KACC, which is rightly accused of not having won a single significant corruption case, also raises questions as to the level of political commitment to the mandate set by the ACECA.

What follows is an assessment of KACC:

a. KACC Criminal Cases

Between 2003 and 2006, according to the 2005 - 2006 KACC Annual report to Parliament, the organisation prosecuted a total of 61 cases; and won only 14 convictions.

CASE NUMBER	NAME OF ACCUSED	NATURE OF CHARGE	STATUS
CC. 25/2002	John Ndirangu Kariuki –ex Mayor, City Council of Nairobi and Lydia Wanjiru Mutamba.	Attempting to defraud the city Council of Nairobi Kshs. 560,000	1st accused, John Ndirangu Kariuki convicted by Mrs. Wanjiru Karanja (PM as she then was) on counts one and two and sentenced to a fine of Kshs. 100,000 on each count in default one year imprisonment. A warrant of arrest is out for the 2nd accused.
CF 481/2002	Mr. Gideon Osoro Makori- Personnel Officer, Ministry of Agriculture	Corruption	Accused convicted on 2nd May 2003 by Mrs. Maureen Odero (PM) and fined Kshs. 20,000 in default 10 months imprisonment.
CF 279/2004	Dr. Mohammed Abdullah, ex-Chairman of National Aids Control Council Board and Dr. Margaret Wangui Gachara, former Director, National Aids Control Council	Abuse of office contrary to section 101(1) of the Penal Code	1st accused, Dr. Abdallah discharged under section 215 of the Criminal Procedure Code on 27th August 2004 while the 2nd accused, Dr. Gachara was convicted on all three counts. She was sentenced to one year imprisonment on each count and the sentences were to run concurrently.
CF ACC. 41/03	Philip Kiprop Kirgong – Assistant Chief Dandora Phase 1	Corruption	Accused convicted on 3rd September 2004 and fined Kshs. 10,000/- in default 12 months imprisonment.
CR 67 OF 2003	Peter Angwenyi Koinange- Clerk with Pensions Department	Corruption	Accused convicted on 8th April 2005 for soliciting for a bribe and was sentenced to pay a fine of Kshs. 12,000/- in default 6 months imprisonment.
ACC/INQ/2002	Harry Kiptoo Kipsuto	Obtaining money by false pretences	Accused convicted and sentenced to pay a fine of Kshs. 60,000/- and in default 10 months imprisonment.
CR 42/181/2003 ACC 35/05	Peter Karanu Njoroge (Former OCS, Hardy Police Station)	Bribing agents c/s 39(3)(a) of the Anti-Corruption and Economic Crimes Act	Accused convicted on 8th September 2005 and sentenced to pay a fine of Kshs. 20,000/- I/D 1 year imprisonment for count one and a fine of Kshs.30,000/- I/D 1 year imprisonment for count two.

CONTINUED NEXT PAGE

ACC 51/03 KACC 142/181/03	Peter K. Njoroge	Bribing agent contrary to section 39(3) of the AC&ECA	Accused convicted on 9th September 2005 and sentenced to pay a fine of kshs.50,000/- I/D 1 year imprisonment
KISUMU ACC 743/05	Luke Ouma Ochieng (Chief God Jope Location in Migori District)	Corruption contrary to section 39(3) of the AC&ECA	Accused fined Kshs. 200,000/- I/D 36 months imprisonment.
ACC 48/03 11/856/2003 CID Nairobi Area	John K. Bett	- DO -	With regard to Count 1, Accused convicted on 16.3.06 to pay a fine of Kshs. 20,000, I/D 4months imprisonment, and Count 2, 30,000 I/D 4months imprisonment.
ACC 30/04 151/1075/04 INDUSTRIAL AREA P/STN	Joseph Oroche Makori	- DO -	Accused convicted and fined Kshs. 5,000, I/D 3months imprisonment on 14.3.06
ISUMU CR 32/11/05CF 79/05	David Osoro Omwoyo (Ministry of Labour)	- DO -	Judgment delivered on 28.4.06. On count 1, accused fined Kshs. 15,000/-, I/D 4 months imprisonment. On count 2, fine of 45,000/-, I/D 6 Months imprisonment. Additional mandatory fine of Kshs. 20,000/-, I/D 3months imprisonment. An appeal has been lodged.
CC 17/04 CR 73/109/04 IRUTA /STATION	Boniface Muchiri Maina	- DO -	Accused sentenced to a fine of Kshs. 15,000/- I/D 3months imprisonment
F. 197/03, CR. 11/116/03	Paul Kaburu Watatua (Peasant farmer)	Obtaining money by false pretences c/s 313 of the Penal Code	Accused was sentenced to serve six months community service at Pumwani Maternity Hospital on 30th June 2006.

An audit of the prosecutions conducted so far by KACC reveals great disparities, especially in the calibre of people taken before the courts vis-a-vis the convictions.

The majority of those convicted are what KACC would not describe as "big fish." The two most prominent persons convicted are former director of the National Aids Control Council, Dr. Margaret Gachara, and rogue businessman Ketan Somaia. Dr. Gachara was convicted in August 2004 for abuse of office and corruption involving a sum of KShs 21 million and sentenced to 1 year imprisonment.

She was however pardoned in a presidential amnesty on December 11 having served barely half her term.

Ketan Somaia and his co-accused, the former General Manager of National Bank of Kenya, were jailed for 2 years each for stealing 1.4 million US Dollars in a scheme involving the importation of 500 used London taxicabs into Kenya. The two were released months later after an appellate court decision in their favour.

Also on the books are less glamorous convictions such as that of Cornelius Ayaga Seme who, on his own guilty plea, was convicted of forgery involving less than KSh. 1 million and sentenced to 21 years

Disparities are not only apparent as relates to sentencing; some accused persons are favoured even during prosecution.

For example, Dr. Mohammed Abdi Isahakia, a former Director General of the National Museums of Kenya, was discharged from the offence of stealing by director after the entrance of a nolle prosequi by the AG.

The reasons adduced were that 3 crucial witnesses had left the country and that Dr. Isahakia had offered to repay (and had issued a cheque in restitution) the KShs 2,555,000 stolen, back to the National Museums of Kenya.

A surprisingly vast number of criminal proceedings were brought to an end by acquittal, discharge under the Criminal Procedure Code, or by the AG exercising his power of nolle prosequi.

The table in the next page sums up the picture:

Criminal proceedings brought to an end by acquittal, discharge under the Criminal Procedure Code, or by the AG exercising his power of *nolle prosequi*.

NO	CASE NO	NAME OF ACCSD	OFFENCE	STATUS
1	CF/152/2002	Dr Mohammed Isahakia	Stealing by director	Nolle prosequi entered by AG on 19.11.2004
2	ACC 7/04	Harun Kiplagat	Corruption u/s 3(1) of Cap 65	Nolle prosequi entered on 14.09.2005
3	ACC 24/04	Michael Njoroge Githua & Francis Mutunga Mutune	- DO-	Accused discharged u/s 87(a) of the CPC on 27.10.2005
4	ACC 10/05	Douglas Ruto Kipchumba	Soliciting for a bribe c/s 39(3)(a) of ACECA	Matter withdrawn u/s 87(a) of CPC
5	ACC 33/02	Joseph Musembi & Joseph Njoroge	Corruption	Accused discharged u/s 89(5) of CPC on 9.10.2003
6	ACC 15/02	Henry Muchiki Njangi	Corruption	Accused discharged u/s 89(5) of CPC on 8.09.2003
7	ACC 38/2002	Peter Kariuki Mugo & Tom Odera	Corruption	Accused discharged u/s 89(5) of CPC on 15.09.2005
8	CF 2913/01	Michael koikai & James Sindiyo	Abuse of office	Accused acquitted u/s 215 of the CPC on 7.05.2003
9	CF 1167/2000	Chief Inspector James Kariuki	Abuse of office	Accused acquitted u/s 210 of CPC
10	CF/1497/04	Fred O. Ojiambo	Failing to comply with order to compel attendance	Charges withdrawn by AG u/s 204 of CPC on 13.07.2004
11	CF 1838/04	Solomon Muthamia, John Munge and Firadoshi Jamal	Obtaining by false pretences	Accused acquitted u/s 215 of CPC on 8.06.2006
12	CF 254/2001	Mrs. Grace Maundu, Mr. S. Kuria and Mr. Carlo van Wageningen	Corruption and Abuse of office	Nolle prosequi entered by AG on 7.07.2003

Cases no. 2, 3 and 12 in the table above were withdrawn ostensibly because they were brought under the Prevention of Corruption Act, Cap 65 (now repealed). However, section 71(1) and (2) of ACECA specifically addresses those instances. In enacting ACECA, parliament had considered the consequences that the repealing Cap 65 would have on ongoing prosecutions and, more importantly, made provisions for the same. For cases to subsequently be withdrawn under the pretext that there was no provision in the new legislation shows a distinct lack of commitment in prosecution of those cases by the relevant authorities. Furthermore, such a low conviction rate suggests ineffective or compromised investigations.

b. KACC Civil Matters

In terms of restitution, KACC has brought numerous civil suits, with little to show in terms of actual money recovered. One measure of success is its effectiveness in restitution of the proceeds of crime vis-à-vis its Ksh. 1 billion annual expenditure. According to its 2006 Annual report to parliament, KACC has prepared pleadings in 43 cases for restitution/recovery or preservation of illegally alienated, lost or damaged property. Eighteen of the filed cases were for recovery of a liquidated sum of Ksh. 83.5 4 million. Another

eighteen cases were for recovery of land whose estimated value is Ksh. 1.5 billion. The Commission also obtained orders to preserve property worth over Ksh. 568,361,613 in applications brought under either Section 56 of the ACECA or the provisions of the Criminal Procedure Code. KACC claims to have recovered only Ksh. 4.54 million whilst freezing Ksh. 8.052 million. By way of comparison, KACC spends about Kshs 30 million annually on rent at Integrity Centre, formerly headquarters of Trade Bank.

Ironically, KACC's biggest civil recovery loss is a suit it brought against L.Z. Engineering Construction Limited and several others, partly because of their relationship to Trade Bank. The suit against LZ was struck out and KACC was forced to negotiate the costs of the case, believed to have been in tens of millions of shillings, with LZ. The suit was filed seeking to recover the Yaya Centre of Nairobi, which was traceably bought with funds from the collapsed Trade Bank. In its annual report 2006, KACC states that it had filed a suit against its advocate for professional negligence.

Another major failure is related to the Anglo Leasing scandal in which there is some confusion as to whether or not KACC sought international cooperation, as it claims to have, to investigate the provenance of 18 security related contracts and the

In its annual report to parliament of 2006, KACC claimed that "Letters of request for mutual legal assistance have been sent to relevant collaborating agencies to assist with international investigation." This was directly and publicly contradicted by the then Assistant Minister for Justice and Constitutional Affairs, Danson Mungatana, in the presence of the UK Attorney General, Lord Goldsmith where he said, "It must be realised that we have semi-autonomous organisations such as KACC, which is in charge of asset recovery and since they went to London, they have never come back to us to say whether they encountered any hindrances from Britain because we would have taken up the matter."

What follows is a list of other major recovery actions brought against:

" **Isabella Vickly Nzalambi**, spouse of a former KANU minister, seeking to recover the official residence of the Mayor of Nairobi under section 56 of ACECA.

" **Margaret Gachara**, former Head of the National AIDS Control Council, regarding 27 million shillings overpaid to her as salary based on fraudulent misrepresentation of the facts to the NACC. Dr. Gachara was jailed for one-and-a-half years for a related criminal offence in August 2004 but released on a presidential pardon 11 days shy of Christmas in December 2004.

" **John Mututho & Countrywide Supplies Limited** who were paid as reimbursement of taxes paid upon importation of bedside lockers supplied to the Hospital, in settlement of a claim based on false documents.

" **Kamlesh Pattni & 16 others**, a suit related to the Goldenberg scandal seeking to preserve and recover the Defendants' property, which is suspected to have been, acquired corruptly using public funds unlawfully obtained.

" **Dr. Florence Musau**, former Director of Kenyatta National Hospital seeking restitution of Kshs 1,670,020 being sitting allowances paid for attending board meetings, when she was not in law entitled to such payments.

" **Joe Aketch and Lawrence Ngacha**, the former Mayor and Deputy Mayor of Nairobi respectively, in respect of a fraudulent furniture allowance scheme.

" **Samuel Gichuru**: most recently, in November 2006, it was reported in the press that the KACC had moved in to freeze bank accounts and investigate multi-billion shillings properties and assets owned by former Kenya Power and Lighting Company Managing Director Samuel Gichuru.

" **Nathaniel Arap Tum & 8 others**, a case in which KACC seeks to reconstitute land formerly owned by Mt. Elgon Hospital in Kitale, which was fraudulently transferred to the Defendants.

" **David Rogito & 3 others**, a suit seeking restitution of money obtained by the four Defendants who are public servants and who used their positions to fraudulently siphon out Local Authorities Transfer Fund monies for their personal gain. It is alleged that the Defendants used their offices to open bank accounts in the name of Nyando County Council and through that account obtained money not deserved by the Council or by themselves.

c. Anglo Leasing

What Anglo Leasing means is contested. On the one hand, the government insists it's the scandal that never was; on the other, critics say it is proof that elements in the government have been captured by old corruption networks or have succeeded in establishing new ones. Since 2004, this scandal has demonstrated the power of corruption networks within the Kenyan government. It caused the exile of John Githongo, Permanent Secretary for Governance & Ethics. The President sacked his Personal Assistant, Alfred Gitonga; dropped the Minister for Internal Security, Dr. Chris Murungaru; accepted the resignation of the Minister for Finance, David Mwiraria; and demoted the Minister for Justice and Constitutional Affairs, Kiraitu Murungi, to the Energy Ministry before accepting his resignation in February 2006. Murungi was later re-instated.

Anglo Leasing is a series of scandals related to security related procurement in which the government entered into agreements with fictitious entities; or committed itself to highly disadvantageous contracts. The total value of these scandals is estimated at US\$ 700 million. Over 18 dubious security related contracts have come to the fore following investigations, which commenced in April 2004, after revelations in parliament that the government had entered into a fraudulent contract worth Ksh. 2.7

The following persons have been charged in court in relation to the Anglo Leasing Scandal:

Zakayo Cheruyiot
(former PS in Office of the President)

John Agili
(finance officer in Office of the President),

Sylvester Mwaliko
(former PS in Office of the Vice President)

Joseph Magari
(former PS in the Ministry of Finance)

Wilson Sitonik
(former director of Government Information Technology Services at the Treasury)

David Onyonka
(former finance official at the Treasury Department)

Their ostensible co-conspirators in Anglo Leasing and Finance Company Limited are fugitives from Kenyan law enforcement. International attempts to trace their whereabouts were reportedly unfruitful. Nevertheless, KACC has issued preservation orders against property associated with the Kamani family, alleged to be the beneficial owners of Anglo Leasing. No politicians or their associates have been arrested or charged for their role in the Anglo-Leasing affairs. The network responsible for conjuring up this scam is most likely still embedded in the Government of Kenya.

d. Relationship between KACC and AG's chambers

In October 2006, the Attorney General and KACC had a public exchange over investigation files prepared by KACC in respect of grand corruption cases. The AG sent back the files and issued a public statement castigating KACC for submitting investigation case files that inter alia, did not contain copies of all statements of the prosecution witnesses and exhibits; and further contained material gaps and deficiencies that would undermine a successful prosecution. The AG claimed that the gaps were so grave that, if a prosecution were to ensue at that time, there was a real danger of the cases being thrown out.

The following are some of the gaps and deficiencies identified:

1. There was insufficient evidence to charge suspects with failure to ensure that budgetary provisions were made for the projects in the estimates of expenditure approved by parliament contrary to s.3 (2) of the External Loans and Credit Act.

2. There was no formal statement from the Central Bank of Kenya to support a charge that suspects failed to consult the Central Bank of Kenya before entering into the external loans agreements in question contrary to s.31 of the Central Bank of Kenya Act.

3. The investigation files did not contain a comprehensive statement from the Director of Public Procurement on what breaches of public procurement regulations and procedures had occurred.

4. There were no forensic examination reports in the KACC files.

5. KACC had recommended charging persons in some files, while hoping the same persons would be prosecution witnesses in other files, exposing the prosecution to the prospect of material witnesses in some cases turning hostile.

6. Finally, KACC by its own admission had failed to include a report on international investigations which it claimed were ongoing.

A Brief Assessment of Commissions of Inquiry¹¹

Since 2003, President Kibaki has established the Bosire, Ndung'u and Kiruki Commissions of Inquiry under the Presidential Commissions Act (Chapter 121, Laws of Kenya), as a means to consider what action to take to address specific problems related to corruption offences and economic crimes, some committed during his term. In addition, several Ministers established ad hoc mechanisms to investigate past economic crimes and human rights abuses.

Among these were the Task Force on Harambees and the Committee on Public Housing and Pending Bills. What follows is an assessment of the major Commissions of Inquiry established by the President since January 2003.

1. The Bosire Commission of Inquiry into the Goldenberg Affair (2003)

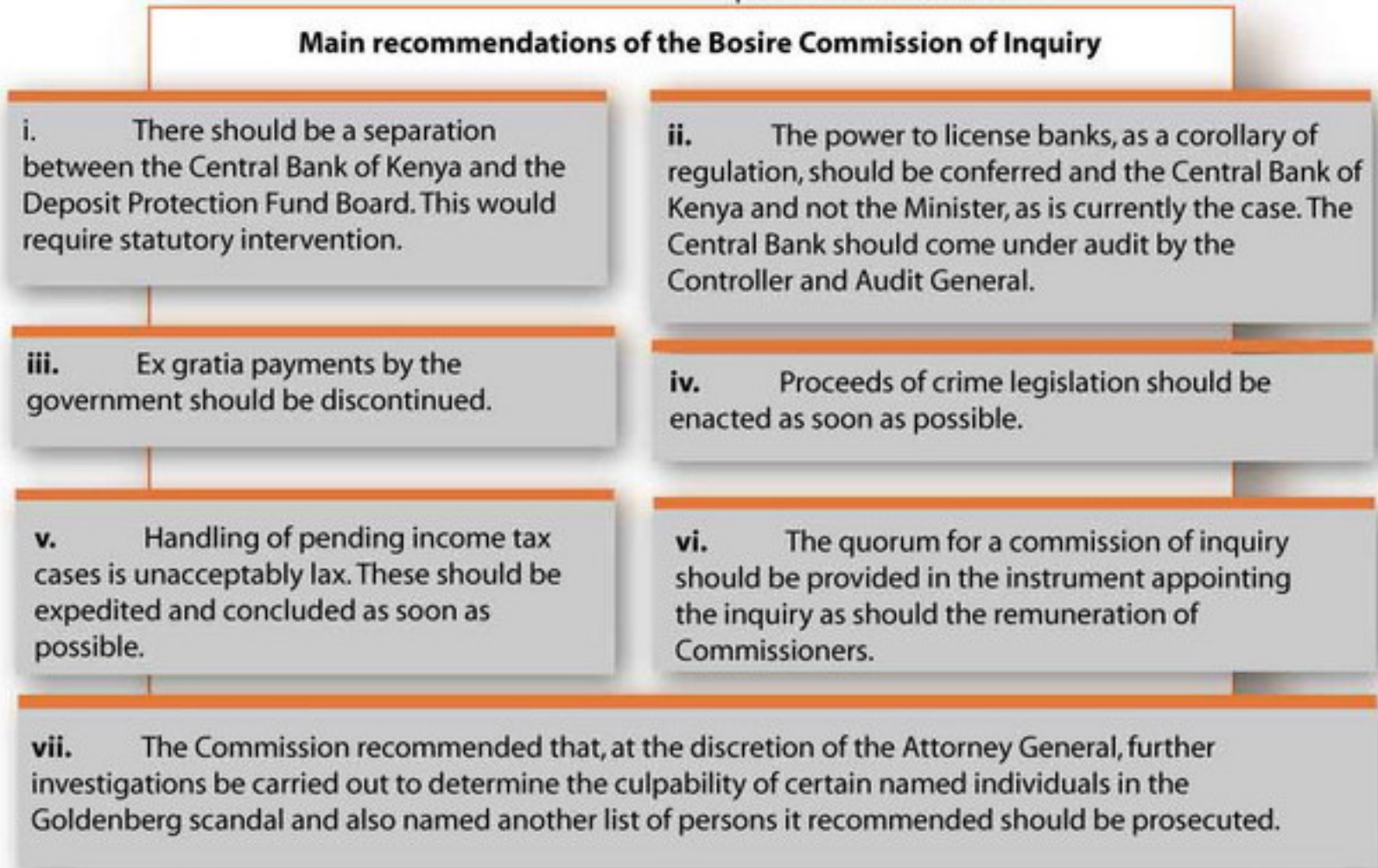
This was established to investigate a major financial fraud involving a company called Goldenberg International Limited and the Central Bank of Kenya in which the Central Bank and the banking sector made financial losses amounting to over US\$ 1 billion. The inquiry established the extent of the loss suffered and apportioned responsibility. It also recommended that a list of named persons be subjected to further investigation.

¹¹ See also 'Postponing the truth: How Commissions of Inquiry are used to circumvent justice in Kenya', AfriCOG 2008

The terms of reference of this Commission were to inquire into the activities of Goldenberg International Limited which had cost the government in excess of US\$1 billion during the early 1990s.

offence against the double jeopardy rule, because in Appointed in early 2003, the Commission submitted its report to the President in February 2006.

It made several recommendations, of which the main points are set out below:



The Bosire Commission did not, however, fulfil its term of reference (m); which required the Bosire Commission to inquire into, establish and trace, locally and internationally, all assets acquired directly or indirectly with moneys illegally obtained from the Central Bank of Kenya, the Customs Department and Treasury through the transactions under inquiry.

The prospects of the Bosire Commission's findings being acted upon are bleak.

The government and KACC maintained that prosecutions had been initiated against some individuals, while investigations were ongoing against others.

However in late July 2006, the High Court made a decision that probably ended the hope of successful prosecution of the Goldenberg culprits. The court ruled in favour of George Saitoti, a former Vice President and Minister for Finance and the most prominent political figure found culpable in the Goldenberg affair, in response to his claim that the findings of the Bosire Commission against him were unconstitutional and oppressive; being in part a restatement of charges against him which parliament had cleared him of; and further constituting an

1995, the Attorney General had terminated a private prosecution brought against Saitoti by Raila Odinga.

The High Court gave Saitoti orders:

" Of certiorari to quash the findings, remarks and decisions in the Bosire Commission report as they relate to Prof. Saitoti; and

" Of prohibition, directed to the Attorney General, prohibiting the filing and prosecution of criminal charges against Prof. Saitoti in respect of the Goldenberg affair, either arising from the report of the Bosire Commission or otherwise.

If this decision is upheld, then any person named as culpable in the same report, would have strong grounds to use this precedent to halt criminal investigations, charges or prosecutions.

At the time the court rendered its decision, Prof. Saitoti was out of the cabinet, the President having accepted his resignation in February 2006 following the publication of the Goldenberg report.

the decision he stated that the "judgement appears to have turned the well known and settled principles of constitutional, administrative, criminal law and legal jurisprudence topsy turvy;" and further that, "contrary to well settled principles of judicial review, the judges ruled that they had the power and jurisdiction to review, re-evaluate, correct and substitute the factual findings and determinations of the Bosire Commission as if the Bosire Commission was a trial court and they were the appellate court and thereby arrogated unto themselves a power they did not have. They failed to hold, as they should have, that any explanations and contentious constituted anticipatory defences to be raised in the event of criminal prosecutions being instituted against him."

By November 2006, Saitoti was back in cabinet as Minister for Education.

In early December 2006, the architect of Goldenberg, Kamlesh Pattni, announced his intention to run for parliament after taking control of the Kenya National Democratic Alliance political party.

2. The Ndung'u Land Commission of Inquiry

The Commission of Inquiry into the illegal and irregular allocation of public land, chaired by a Nairobi lawyer, Paul Ndung'u published its report in June 2004.

It made a series of findings of fact, concerning the illegal privatisation of public land by Kenya government officials in excess of 200,000 allocations since independence in 1963, most notably to the Kenyatta and Moi families, as well as to a raft of former ministers, MPs, judges, civil servants and military officers. In its report, the Ndung'u Commission ascribed responsibility for established wrongdoing to a number of individuals; and made a series of recommendations intended to correct the wrongdoing.

The Commission proposed the establishment of a foundational institutional framework to implement its recommendations. Chief among these were:

Main recommendations of the Ndung'u Commission of Inquiry

- i. Establishment of a tribunal which, as a quasi judicial body, would have the same powers as the High Court, to oversee the implementation of the detailed recommendations. This would require amendment of the Government Lands Act.

Cont'd: Main recommendations of the Ndung'u Commission of Inquiry

- ii. Establishment of a Task Force under Section 23 of the Constitution of Kenya, consisting of specialists in land administration and whose responsibility would be to advise the Ministry of Lands on the revocation of illegally registered titles, repossession of land, measures to be taken regarding claims filed in the courts; information retrieval systems for multiple purposes and the verification of registered titles.

- iii. A steering system and strategic unit to monitor the implementation of the policy and identify slippages and drifts in the course of implementation.

The government has not implemented any of these foundational recommendations by the Ndung'u Commission and does not appear to be interested in implementing any of them. The President has, however, publicly stated the commitment of the government to implement the report of the Ndung'u Commission, and the government has said it will implement the recommendations. Former members of the Ndung'u Commission have expressed their deep displeasure over this, claiming that it will not succeed since the government appears to have ignored the logic on which the Commission's recommendations were based.

Nevertheless, at a secondary level, there is some evidence of partial implementation. In its 2005-6 Annual Report to Parliament the KACC states that it has acted to implement the Ndung'u Report by establishing a recovery desk at Integrity Centre and issuing more than 450 demand notices to persons requiring them to surrender titles and property. At the time of reporting, the KACC had recovered 37 title deeds and 11 deed plans totalling 223 acres with an estimated value of KShs 144,000,000. In 2008 the present Minister for Lands, James Orengo, asserted his personal determination to finally implement the report's proposals.

The Ndung'u report was only released following great public pressure. There were media reports that a cabinet decision had been made that the report be released and that the subsequent delay in releasing the report was the personal agenda of the responsible minister, Amos Kimunya, who was out to protect his friends in government mentioned adversely in the report.

There were even claims that the delay was intended to provide opportunity to alter the contents of the report to make it palatable to the government. The Law Society of Kenya brought an action in the High Court to compel the immediate release of the report. The Society claimed that it was doing so to protect the public interest "in the light of the government's callous conduct and the opaque manner it conducts itself".

The Society dismissed the assertion that the delay was to allow the cabinet to study the report and asserted that it was more likely that the delay was so as to allow an editing of the report to produce a form more acceptable to the government.

3. The Kiruki Commission of Inquiry 2006

A public outcry ensued following a series of incidents involving two alleged Armenian brothers, including one in June 2006, at Jomo Kenyatta International Airport in Nairobi, in which they assaulted Customs Agents using guns, and were subsequently deported in shady circumstances, apparently to escape justice. President Kibaki instituted a formal inquiry into their activities headed by a former Commissioner of Police, Shadrack Kiruki and received its report in late August 2006.

The report has not been made public but various media have described its contents and findings. The main emerging findings are set out below.

In the fallout over the Armenian incident, the Director of the Kenya Police Criminal Investigation Department was suspended and subsequently retired, while Ms. Wangui was relieved of her position at the Ministry of Water. No one has been prosecuted for any of the criminal acts identified by the Kiruki Commission.

Looking ahead: Areas needing more attention in the future

1. Legislative oversight of government spending plans

In theory, the Kenya parliament plays an oversight role over the government budget. In practice, the preoccupation of legislators with political chicanery combines with archaic standing orders to undermine this important parliamentary function. This is most starkly obvious whenever parliament debates on ministerial budget and the guillotine system, under standing order No. 142, is brought to bear.

A striking example took place in 2006 when only 6 out of 35 ministries' budgets were debated, scrutinised and passed by parliament leaving the rest to the mercy of the guillotine.

The result: over Kshs 86 billion under the following large vote heads was passed undebated in one hour.

Guillotined Estimates (October 2006 - June 2007)

Ministry / Department	Budget (Kshs)
Education	48,040,000,000
Ministry of Finance	24,500,000,000
Department of Defence	11,900,000,000
Ministry of Water	3,700,000,000
National Security Intelligence Service	2,900,000,000
Parliamentary Service Commission	2,200,000,000
Ministry of Special Programmes	2,070,000,000
Kenya Anti Corruption Commission	631,000,000
TOTAL	86,341,000,000

Reported findings of the Kiruki Commission of Inquiry

i. It reportedly uncovers a pattern of fraud and corruption in the customs, immigration and police services, and also within the Kenyan political elite.

iii. It apparently accuses the Armenians of drug smuggling and money laundering and calls for their immediate arrest should they return to Kenya. Specifically, it states that it believes that Sargasyan "was involved in organized crime and drug smuggling and ... was seeking an outlet for his illegal business in Kenya."

v. It reputedly does not connect the Armenians with a series of cocaine shipments routed through Mombasa and other Kenyan ports.

ii. Its most explosive recommendation is said to be the prosecution for tax evasion and corporate fraud of Winnie Wangui, reputedly the President's second wife's daughter. It also recommends her immediate dismissal from her civil service job in the Ministry of Water.

iv. It reportedly does not attribute political responsibility for the Kibaki government's apparent tolerance of the activities of the Armenian brothers. Nor does it report a finding on whether or not it was proper for the Minister for Internal Security to direct the Armenians' deportation instead of prosecuting them for criminal offences.

Close to Kshs 15 billion was voted to the DOD and NSIS by a Parliament who, three months previously, had had cause to consider the Auditor General's Report on security-related contracts in which both departments had featured in a bad light.

In that report the Auditor General queried payments made in respect of Project Nexus (DoD), Operation Flagstaff (NSIS) and the Spanish Warship (DoD) and 15 other security related procurement contracts in which the government had committed 16% of the government's gross annual expenditure, outside the budget process and without parliamentary approval.

It should be noted that the Auditor General's reports are typically presented two years after the fact, for reasons that can only be regarded as efforts to hinder effective scrutiny.

2. Parliamentary Corruption

The prosecutorial response to corruption of parliamentarians is not an adequate measure of the size of the corruption problem in Parliament. There have been a few cases reported in the media of MPs being questioned by the KACC over the use of Constituency Development Fund (CDF). A good example is the inquiry by the KACC into CDF funds in Eldoret East Constituency where over 15 million shillings went missing.

Another illustration alludes to the scale of parliamentary corruption. When KACC forwarded an investigation file on a sitting cabinet Minister to the AG, there was a palpable political sharp intake of breath. The Minister, Soita Shitanda, was to be indicted for falsifying mileage claims of more than a quarter of a million shillings. In this particular incident, the AG decided to exercise his discretion to forbear prosecution of the Minister for making false mileage claims to the tune of Kshs 285,984.

In letting the Minister off the hook, the AG observed that at least 65 members of parliament were in a similar position but had, unlike the Minister, been allowed to refund the money falsely obtained.

The irony was that the AG and KACC had unwittingly exposed the fraud carried out by close to 3 out of every 10 Kenyan parliamentarians with impunity.

3. Asset Recovery

The provisions for the return of assets corruptly acquired to the countries of origin are a laudable inclusion to the United Nations Convention against Corruption (UNCAC). This is provided for in article 51 of the Convention. The use of this provision by the government has, however, been far from satisfactory. Indeed one could go as far as stating that their 'efforts' have been laughable. At the initial stages of the campaign against graft, a high-powered government delegation went to Switzerland and France to request assistance of the respective governments and relevant authorities to help trace and facilitate the return of assets, including monies, corruptly acquired by Kenyan nationals .

The team comprised the Minister for Justice and Constitutional Affairs, the Director of the Kenya Anti-Corruption Commission and the former PS in charge of Governance and Ethics. Subsequently, asset recovery firm Kroll & Associates were hired to help in the tracing of assets acquired through corrupt means. The government has never published the findings of Kroll & Associates.¹²

Apart from monies 'returned' by dubious contractors in the Anglo Leasing scandal as set out in the Githongo dossier there has been little more than the usual government back and forth on the current status.

¹² In August 2007, a purported leaked copy of the Kroll Report was published on the whistleblowing website www.wikileaks.org/wiki/The_looting_of_Kenya_under_President_Moi.

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