

The Anti-Corruption and Economic Crimes Act, 2003; Has Kenya Discharged her Obligations to Her Peoples and the World?

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We are apprehensive that in handing this to you, we are presenting to you a dragon; it is bound to snort, jump, kick and even attack, for corruption always fights back. Your lordship will have no option but to seize it by the horns and slay it... This is a battle we are going to fight without looking backward. We are going to mount this beast and wrestle it to the ground.¹

1 Introduction²

Contrary to the widely held view that corruption is a problem of the third world and emerging economies,³ the vice afflicts all nations.⁴ There are intricate links between corruption and other forms of crime, in particular organised crime and economic crime. Corruption often involves huge quantities of assets comprising a significant portion of the wealth of states. Accordingly, corruption may

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1 Exchanges between Ringera J (as he then was) and the Chief Justice of the Republic of Kenya during the handing in of a report by the former to the latter on corruption in the Kenyan Bench. Reported in the Daily Nation (Nairobi, issue No. 14211 of 14th September 2006) at p. 13.

2 I am indebted to Mr. Kamotho Waiganjo of Kamotho Maiyo & Mbatia Advocates for this part of the paper.

3 Daniel Kaufmann, *Corruption, Governance and Security: Challenges for the Rich Countries and the World*, available at [http:// worldbank.org/wbi/governance/pdf/Kaufmannn_GCR_101904_B.PDF](http://worldbank.org/wbi/governance/pdf/Kaufmannn_GCR_101904_B.PDF) (Last accessed on 27th June 2006).

4 *Ibid.* See the preamble to the United Nations Convention Against Corruption (UNCAC), "...convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential..."

undermine the political stability and sustainable development of states;⁵ it may undermine the institutions and values of democracy, ethical values and justice, and jeopardize the rule of law.

The conception of corruption varies among scholars. The narrowest understanding of corruption sees the vice as the abuse of public office for private gain.⁶ Broadly defined, corruption is the abuse of not only public office but also private or commercial office for private gain.⁷ It invariably involves giving⁸ something to someone in a position of power⁹ either in government or in a corporation, so that he will (ab)use his power and act in a manner favouring the giver. It involves the offering, giving, soliciting or acceptance of an inducement or reward, which may influence the action of any person.

Corruption manifests itself in one or more of various forms, viz. bribery, extortion, fraud, embezzlement and other forms of malfeasance by public or corporate officials. Though universal in its existence, the pervasiveness of corruption varies across nations¹⁰ and organizations. Corruption occurs in different forms, in different types of organizations and at different levels. Typologies of corruption

5 See the preamble to UNCAC.

6 Maria Dakolias and Kim Thachuk, *The Problem of Eradicating Corruption from the Judiciary: Attacking Corruption in the Judiciary: A Critical Process In Judicial Reform*, 18 Wis. Int'l L.J. 353, 355 (2000).

7 It is submitted that this is the more informed and holistic approach to the problem of corruption.

8 Alternatively, promising to give.

9 Kumar Raj, *Corruption and Human Rights* available at <http://www.hinduonnet.com/fline/f11919/19190780.htm>.

10 Daniel Kaufmann, *op. cit.* Also, see Bhargava Vinay, *The Cancer of Corruption*, paper prepared for presentation as part of the Global Issues Seminar Series, October 2005. Available at <http://siteresources.worldbank.org/EXTRABOUTUS/Resources/Corruption.pdf> (Last accessed on 27th June 2006).

include Grand Corruption,¹¹ Political Corruption,¹² Corporate Corruption,¹³ Administrative Corruption¹⁴ and Petty Corruption.¹⁵ Petty corruption is the common man's¹⁶ version of corruption. It is said that petty corruption involves small sums paid to low-level officials to "grease the wheels"¹⁷ or cut through bureaucratic red tape. Where corruption is prevalent throughout all levels of a society, as is widely believed to be the case in Kenya, it is termed as systemic corruption.¹⁸ Daniel Kaufman¹⁹ gives a further typology of illegal and legal forms of corruption. Illegal corruption, according to Kaufman, comprises acts such as bribery, embezzlement and extortion, which are *prima facie* unlawful. However, corruption may take place without infraction of the letter of the law. This subtle

11 Involves heads of states, ministers and other senior level government officials. It serves the interests of a narrow group of business people and politicians, or criminal elements.

12 Involves lawmakers such as monarchs, dictators and legislators acting in their role as creators of the rules and standards by which a polity operates. Such officials engage in corruption when they seek bribes or other rewards for their own political or personal benefit and in return provide political favours to their supporters at the expense of the public interest.

13 Occurs in the relationship between private business corporations and their suppliers or clients. It also occurs within corporations, when corporate officials use the corporation's resources for private gain, at the expense of the corporation or shareholders.

14 Includes the use of bribery and favouritism to allow certain individuals or businesses to lower their taxes, escape regulations or win low-level procurement contracts.

15 Involves payment of comparatively small amounts of money to "facilitate" routine official transactions, e.g. customs clearance or the issuing of building permits. See Igor Osyka, *International Business Transactions and Corruption* available at http://www.univd.edu.ua/_projects/ezloch_kor/docs/eng/1.doc (Last Accessed on 3rd July 2006).

16 The meaning of which is not very clear. The English Common Law is replete with judicial authorities on who the common man is. Page 10 of the judgment in the Referendum Case {High Court of Kenya (Nairobi) Miscellaneous Civil Suit No. 677 of 2005} has provisions on the common Kenyan: " *For those who do not know, Warjiku is a popular girl name among the Agikuyu sub-nation of Kenya, and legend has it that she was one of the founding daughters of the house of Mumbi, the progenitor of the Agikuyu. All said, the name 'Warjiku' in the understanding of Kenyans, represented the ordinary Kenyan.* " Is the ordinary Kenyan a female? For an analysis of the Referendum Case, see Muthomi Thiankolu, *The Constitutional Review Cases; Emerging Issues in Kenyan Jurisprudence*, 2005 East African Law Journal vol. 2, also available at www.kenyalaw.org

17 Igor Osyka, *op. cit.* Can high-level officials engage in petty corruption?

18 Bhargava Vinay, *The Cancer of Corruption*, *op. cit.*

19 Daniel Kaufmann, *Corruption, Governance and Security: Challenges for the Rich Countries and the World*, available at http://worldbank.org/wbi/governance/pdf/Kaufmannn_GCR_101904_B.PDF (Last accessed on 27th June 2006).

and 'legal' type of corruption often involves exerting undue influence on public policies and influencing the formulation of rules of law to facilitate the achievement of some improper private gain. It occurs where the "rules of the game, laws and institutions" have been shaped, at least in part, to benefit certain vested interests.²⁰

Kenya is often viewed as one of the most corrupt countries on earth.²¹ Reports published by Transparency International have continually indicated that corruption is systemic and afflicts key departments of Government. The year 2002 was remarkable in Kenya's history. A new Government came into power and replaced the monolithic KANU²² regime, which had ruled the country since independence from Britain in 1963. The new Government was elected on the manifesto of change.²³ The Government, under the newly created Ministry of Justice and Constitutional Affairs,²⁴ implemented a number of anti-corruption

20 *Ibid.* Kaufmann cites the example of countries where some form of political funding by private enterprises is permitted. In such countries, Kaufmann argues, corporations or individuals who fund political activities of the Government in power may exercise enormous influence in shaping institutions and policies to benefit themselves, at the expense of the broader public welfare. It is submitted that the categorization of legal and illegal types of corruption is one of semantics and is not, strictly speaking, maintainable. A judge, properly directing himself to the administration of justice, would issue sanctions against infractions on both the letter and spirit of the law.

21 A matter I had rather leave to field researchers. The object of this paper is to examine whether the legal framework for combating corruption in Kenya reflects the minimum international standards embodied in the United Nations Convention Against Corruption, and whether the implementation of that law is in tandem with the expectations of the world and the peoples of Kenya.

22 Kenya African National Union, the Political Party that ruled Kenya from Independence up to 31st December 2002.

23 On the question as to whether a court of law has the capacity to determine the mandate of the current Government, and the applicability of the American Political Question Doctrine in Kenya, see Muthomi Thiankolu, *The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence*, 2005 East African Law Journal vol. 2, also available at www.kenyalaw.org.

24 A rather controversial Ministry in the political history of Kenya. The Ministry was initially established in the initial years of Independence headed by Mr Thomas Joseph Mboya, an exceptionally brilliant and controversial politician who was assassinated in 1969. (Sir) Charles Mugane Njonjo also headed the Ministry. Like Mboya, Njonjo was exceptionally brilliant and controversial. The Ministry was scrapped following the botched coup of 1982 and reintroduced by

policies and measures. The most notable of these measures was the enactment of the Anti-Corruption and Economic Crimes Act, 2003.²⁵

2 Précis of the Contents of the Anti-Corruption And Economic Crimes act, 2003

The object of the Anti-Corruption and Economic Crimes Act, 2003 (the Anti-Corruption Act) as stated in its preamble is to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and incidental matters. This partially accords with the purposes of UNCAC, which include promoting and strengthening measures to prevent and combat corruption more efficiently and effectively.²⁶

Part I of the Anti-Corruption Act comprises definitions. The Act embodies a broad conception of corruption²⁷ viz. bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, and breach of trust or an offence involving dishonesty in connection with any tax, rate or impost levied under any Act. It extends to an offence involving dishonesty under any law relating to the election of persons to public office. The most notable aspect of this part is the distinction between corruption and economic crime. The latter is defined as an offence under section 45 or an offence involving dishonesty under any written law

the National Rainbow Coalition Government in 2002, headed by Mr Kiraitu Murungi. Like his predecessors, Mr Murungi was exceptionally brilliant and controversial. He (briefly) fell from political power after spearheading (commendable?) anti-corruption measures. His fall from power arose from accusations of attempts to cover up corruption in Government. He has since been reinstated to the Cabinet, heading the Ministry of Energy.

25 Act No. 3 of 2003. Assented to on 30th April, 2003 and commenced on 2nd May 2003.

26 The purposes of UNCAC also include the promotion of integrity, accountability and proper management of public affairs and public property and promoting and facilitating support and international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery. See Article 1.

27 See section 2.

providing for the maintenance or protection of the public revenue. Under section 45, it is an offence for a person, fraudulently or otherwise unlawfully (a) to acquire public property or a public service benefit; (b) to mortgage, charge or dispose of any public property; (c) to damage public property²⁸ or (d) to fail to pay any taxes or any fees, levies or charges payable to any public body or effects or to obtain any exemption, remission, reduction or abatement from payment of any taxes, fees, levies or charges. Further, it is an offence under Section 45 for any officer or person involved in the administration, custody, maintenance, receipt or use of any part of the public revenue or public property to (a) fraudulently make payment or excessive payment from public revenues for substandard or defective goods, goods not supplied or not supplied in full or for services not rendered²⁹ or not adequately rendered.³⁰ It is an offence under Section 45 for a person involved in the administration, custody, maintenance, receipt or use of any part of the public revenue or public property to willfully or carelessly fail to comply with any law or applicable procurement procedures or any procedures or guidelines relating to the allocation, sale or disposal of public property, tendering of contracts, management of funds or incurring of expenditures. Lastly, it is an offence under Section 45 for a person involved in the administration, custody, maintenance, receipt or use of

28 Including causing a computer or other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affect any public revenue or service.

29 As at the typing of this paper, an industrial dispute between lecturers at public universities in Kenya and the universities had taken an interesting twist because the Kenya Anti-Corruption Commission warned the universities not to pay the lecturers for the days they had engaged in a strike in the months of October and November 2006. The universities and the lecturers had agreed that the latter would be paid their salaries for the days they had engaged in the strike as part of a return-to-work negotiation. The Kenya Anti-Corruption Commission warned that paying the lecturers in respect of those days would amount to an economic crime within the meaning of section 45 of the Anti-Corruption Act-as it would entail making a payment out of public services for services not rendered.

30 This provision could be used against public officers who process payments to the so-called cowboy contractors.

any part of the public revenue or public property to engage in a project without prior planning.³¹

It appears from the foregoing that not all acts of corruption involve economic crime. Equally, economic crime need not always involve or amount to corruption. However, for the most part, the consequences of corruption and economic crime are identical. Further, a particular act or omission may amount to both corruption and economic crime. Economic crime may arise from mere imprudence in the management of public property. Like corruption, economic crime invariably involves abuse of public office. However, unlike corruption, economic crime need not involve fraud or other improper motive on the part of the offender. Economic crime need not result in, nor be aimed at, any improper gain on the part of the offender.

Part II of the Anti-Corruption Act provides for appointment of special magistrates. These magistrates have exclusive jurisdiction to try offences specified in the Act.³² The special magistrates are obliged, as far as is practicable, to hold the trial of an offence under the Act on a day-to-day basis until completion. The existence and jurisdiction of special magistrates has been challenged in court. In *Prof. Julius*

31 No impulse expenditure of public revenue? During the heyday of the single-party misrule in Kenya, the political opposition, and in particular the current President, invariably accused the Government of making “roadside policy declarations.” The declarations often led to expenditure of public funds on projects that had not been factored in the Government estimates of revenue and expenditure. Paradoxically, the current Government, which comprises mainly those personalities who accused the former KANU Government of impulsive expenditure of public funds, made similar “roadside policy declarations” during the Referendum Campaigns over the Proposed New Constitution of Kenya in 2004. In particular, the Government whimsically increased, *inter alia*, the salaries of Chiefs in a bid to win their support for the Proposed New Constitution. For insights on the Proposed New Constitution of Kenya, and legal developments in Kenya’s constitutional reform process, see Muthomi Thiankolu, *The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence*, 2005 East African Law Journal Vol 2, also available at www.kenyalawreports.or.ke.

32 Section 4 (1). The exclusivity of the special magistrates overrides the provisions of the Criminal Procedure Code (Cap. 75 laws of Kenya) and all other laws.

Memev. Republic & Others,³³ the applicant was charged with two counts of abuse of office contrary to section 101(1) of the Penal Code.³⁴ The Anti-Corruption Act had not come into force at the time of the institution of the charges. The charges were laid before the Anti-Corruption Court, which the Chief Justice had established administratively. When the Anti-Corruption Act came into force, the applicant filed a constitutional reference under section 67(1) of the *Constitution of Kenya*³⁵ arguing, *inter alia*, that anti-corruption courts as well as anti-corruption magistrates were unknown to the law *ultra vires* the Constitution. Further, the applicant argued, the Anti-Corruption Act was unconstitutional in form and application. It was held, *inter alia*, that the question as to whether the Anti-Corruption Act was unconstitutional in form and application was misconceived as the Act had no relevance to the offence with which the applicant was charged. The charges against the applicant being in respect of section 101 of the Penal Code, stated the court, had no relationship with the Anti-Corruption Act and therefore it was untenable for the applicant to impugn the Act.³⁶

33 High Court of Kenya (Nairobi) Miscellaneous Criminal Application No. 495 of 2003.

34 Chapter 63, Laws of Kenya.

35 Section 67(1) of the Constitution of Kenya provides that where a question as to the interpretation of the constitution arises in proceedings before a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court. A Rule in Legal Notice No. 133 of 2001 (popularly known as "the Chunga Rules") provided for automatic stay of the proceedings in the subordinate court pending the determination of the reference-leading to abuses of court process as accused persons took advantage of it to indefinitely delay the prosecution of corruption cases against them. This lacuna has since been cured by Rule 29 of the Constitution of Kenya (Supervisory Jurisdiction And Protection of Fundamental Rights And Freedoms of the Individual) High Court Practice And Procedure Rules, 2006-Legal Notice No. 6 of 17th February 2006, popularly known as "the Gicheru Rules."

36 It is submitted that the application would have failed even if the charges had been brought under the Anti-Corruption Act. Section 65(1) of the *Constitution of Kenya* empowers the Kenyan Parliament to establish courts subordinate to the High Court and courts-martial. A court so established may have such jurisdiction and powers as may be conferred on it by any law. It is notable that the existence of the court of the special magistrate is recognized in section 5(2) of the Anti-Corruption Act, which is an Act of the Parliament of Kenya.

The most notable provisions Part II of the Anti-Corruption Act relate to the procedures and powers of special magistrates. A special magistrate may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstance within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission of the offence.³⁷ Such pardon, when so tendered, is deemed a pardon for purposes of section 77(6) of the Constitution of Kenya.³⁸ Section 5 of the Anti-Corruption Act accords with the provisions of Article 37 of UNCAC, which obliges State Parties to take appropriate measures to encourage persons who participate in or who have participated in the commission of an offence established under the Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds. In particular, the pardon provided by section 5 of the Anti-Corruption Act accords with the requirement for State Parties to consider the possibility of granting immunity from prosecution to a person who provides substantial cooperation in

37 Section 5(1).

38 Section 77(6) provides that no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence. An accomplice to an offence under the Anti-Corruption Act can thus escape the consequences of his conduct by merely making a full disclosure of the transactions and circumstances surrounding the commission of the offence and in the process, gravely incriminate his 'partners in crime'. It is yet to be seen whether the provisions of this section are compatible with the rules guiding the admissibility and credibility of accomplice evidence. Section 60 provides that for the purposes of any rule requiring the corroboration of the evidence of an accomplice, a person shall not be considered an accomplice of a person accused of an offence under part V by reason only that he received, solicited or agreed to receive or solicit a benefit from the accused person. Further, the section provides, a witness will not be deemed an accomplice for purposes of the rule on corroboration of accomplice evidence on the sole ground that he gave, offered or agreed to give or offer a benefit to the accused person. On corroboration of evidence generally, and care warnings regarding the admission of certain types of evidence, see Adrian Kean, *The Modern Law of Evidence*, 4th Edition, pp. 171-197.

the investigation or prosecution of an offence established in accordance with the provisions of the Convention.³⁹

Part III of the Anti-Corruption Act establishes the Kenya Anti-Corruption Commission (KACC) and the Kenya Anti-Corruption Advisory Board (the Advisory Board). The establishment of KACC and the Advisory Board accord with Article 6 of UNCAC, which calls on State Parties to ensure the existence of a body or bodies that prevent corruption.⁴⁰ KACC has several functions.⁴¹ It is obliged to investigate any matter that in its opinion raises suspicion that conduct constituting corruption or economic crime, or conduct liable to allow, encourage or cause conduct constituting corruption or economic crime, has occurred or is about to occur. KACC may examine the practices and procedures of public bodies in order to facilitate the discovery of corruption practices and to secure the revision of methods of work or procedures that, in its opinion, may be conducive to corrupt practices.⁴²

Further, KACC's functions include educating the public on the dangers of corruption and economic crime, and enlisting public support in combating corruption and economic crime.⁴³ This meets the requirements of Article 6(1) (b) of UNCAC, which obliges State Parties to ensure the existence of a body or bodies to increase and disseminate knowledge about the prevention of corruption as part of preventive measures. The principal function of the Advisory Board is to advise

39 UNCAC, Article 37(3).

40 Such bodies may prevent corruption by implementing the policies referred to in Article 5 of UNCAC and increasing and disseminating knowledge about the prevention of corruption.

41 For an enumeration of the functions of KACC, see section 7 of the Anti-Corruption Act.

42 The Anti-Corruption Act, section 7(1) (e)

43 *Ibid*, Section 7(1) (g).

KACC generally on the exercise of its powers and the performance of its functions under the Anti-Corruption Act.⁴⁴

Part IV of the Anti-Corruption Act deals with investigations. The Director or a person authorized by the Director may conduct an investigation on behalf of KACC. While conducting investigations, the Director or an investigator has the powers, privileges and immunities of a police officer in addition to other powers under the Anti-Corruption Act.⁴⁵ KACC may by notice in writing⁴⁶ require a person reasonably suspected of corruption or economic crime to furnish within a reasonable time specified in the notice a written statement enumerating his property and the times at which it was acquired, and stating in relation to any property that was acquired at or about the time of the suspected corruption or economic crime.⁴⁷ Failure or neglect to comply with the notice is an offence for which the suspect, if convicted, is liable to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.⁴⁸ It remains to be seen whether the provision for these notices infringes section 77(7) of the Constitution of Kenya, which provides that no person who is

44 *Ibid.*

45 *Ibid.*, section 23.

46 Notices may also be sent to persons who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime. See section 27(1).

47 The Anti-Corruption Act, section 26. The notice applies to all property howsoever acquired, whether by purchase, gift, inheritance or in other manner. It has been stated that in the absence of "*reasonable suspicion*," of involvement in corruption or economic crime, KACC and its director have no power to issue a notice under section 26 of the Anti-Corruption Act. For insights on this, as well as the question as to whether section 26 of the Anti-Corruption Act is ultra vires the Constitution of Kenya, see *Christopher Ndarathi Murungaruv. Kenya Anti-Corruption Commission & Another* [2006] eKLR.

48 Section 26(2). Notices may also be sent to any person requiring him/her to provide any information or documents in his possession relation to a person suspected of corruption or economic crime. Section 27(8) provides that no notice may issue requiring the disclosure of anything which is protected by legal professional privilege, including anything which is protected under sections 134 and 137 of the Evidence Act (Chapter 80 Laws of Kenya).

tried for a criminal offence shall be compelled to give evidence at the trial.⁴⁹ KACC may, with a warrant, enter and search premises.⁵⁰ The Director of KACC or an investigator has the power to arrest any person for and charge them with an offence, and to detain them for the purpose of an investigation, to the like extent as a police officer.⁵¹ The investigations contemplated by the Anti-Corruption Act could be described as rudimentary in nature and, accordingly, below the standards contemplated by UNCAC. There is no provision for special investigative techniques like those contemplated by Article 50(1) of UNCAC.⁵²

Part V of the Anti-Corruption Act establishes a number of offences. These include bribing agents, secret inducements for advice, deceiving principal, conflict of interest, improper benefits to trustees for appointments, bid rigging, abuse of

49 For judicial interpretation of this section, see *Republic v. El Mann* [1969] EA 357.

50 The Anti-Corruption Act, section 29.

51 The Anti-Corruption Act, section 32. One possible interpretation of this is that the Director or an Investigator may arrest a person with or without a warrant as per the provisions of sections 29-33 and 102-113 of the Criminal Procedure Code (Chapter 75 Laws of Kenya). As for the power of prosecution, which has been the subject of disputes between KACC and the Attorney General, it is submitted that KACC and its Director are not as helpless as is widely believed. First, under section 88(1) of the Criminal Procedure Code, a Magistrate may permit the prosecution to be conducted by any person, including a private person. Further, it is possible for KACC to request that police officers seconded to it under section 73 of the Anti-Corruption Act include a public prosecutor. Of course, even if this were done, the Attorney General would still have control over such prosecutions by virtue of section 26 of the Constitution of Kenya. For a contrary view regarding whether KACC may institute criminal proceedings, see the ruling of Lady Justice Aluoch in *Republic v. Kenya Anti-Corruption Commission & Another Ex Parte Josephat Konzolo* [2006] eKLR. The learned lady justice states, "I did not find any charge sheet drawn by the Kenya Anti-Corruption Commission, in this case which means to me that they do not have powers to charge suspects (*sic*) and as at now the law only recognizes charges preferred and drawn by the police (*sic*), at the direction of the Attorney General."

52 These include controlled delivery, electronic and other forms of surveillance and undercover operations. Article 50 (1) of UNCAC obliges State Parties, in conformity with the basic principles of their legal systems, to provide for admissibility of evidence obtained by special investigative techniques. Though the general principle in Kenya is that all relevant evidence is admissible howsoever obtained (see *Kuruma s/o Kaniuv. Republic* [1955] AC 197), there is no express provision in the Evidence Act for admissibility of evidence obtained by the techniques contemplated by Article 50(1) of UNCAC.

office and dealing with suspect property. A person convicted of an offence under this part is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both. A convict is liable to an additional mandatory fine if, as a result of the conduct constituting the offence, the he received a quantifiable benefit or any other person suffered a quantifiable loss.⁵³ The mandatory fine shall be equal to two times the amount of the benefit or loss. If the offence resulted in a benefit and loss, the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

Part VI of the Anti-Corruption Act provides for Compensation and recovery of improper benefits. Section 51 provides that a person who does anything that constitutes corruption or economic crime is liable to anyone who suffers loss as a result for an amount that would be full compensation for the loss suffered. This section reflects the spirit of the provisions of UNCAC, which recognize the right of entities or persons who have suffered damage from corruption to initiate legal proceedings for compensation.⁵⁴ The victim may be a public body or a private individual.⁵⁵ A court that convicts a person of corruption or economic crime is obliged to order the convict to pay any amount that he may be liable for under section 51 or 52. Under section 54, the court must also order the convict to give to the rightful owner any property acquired in the course of or as a result of the conduct that constituted the corruption or economic crime an amount equivalent to the value of that property.⁵⁶ An order made under section 54 of the Act may be

53 The Anti-Corruption Act, section 48.

54 UNCAC, Article 35.

55 The effects of corruption affect national economies and are felt by the entire citizenry of the country, both the haves and the have-nots. Does this mean an offender would be liable to the entire nation? It is notable that the Anti-Corruption Act does not tackle the problem of standing in bringing claims for compensation. How would a Kenyan Community, for instance, bring such an action?

56 The Anti-Corruption Act, section 54.

enforced by the person in whose favour it is made as though it were an order made in a civil proceeding.

Part VII of the Anti-Corruption Act deals with evidence. A court trying corruption or economic crime may take unexplained assets as corroboration that a person accused of corruption or economic crime received a benefit.⁵⁷ The assets of an accused person include any assets of another person which the court finds (a) are held in trust for the accused person or otherwise for or on his behalf; or (b) were acquired from the accused person without adequate consideration.

3 Overview of the Weaknesses of the Anti-Corruption Act

The Anti-Corruption lacks many of the significant features and obligations imposed on State Parties under UNCAC. It does not, for instance, make sufficient provision for international cooperation and technical assistance in the prevention of and fight against corruption,⁵⁸ yet Kenya is a signatory to UNCAC.⁵⁹ The Anti-Corruption Act does not have adequate provisions to criminalize corruption in the private sector.⁶⁰ In fact, the Anti-Corruption Act does not adequately address

57 *Ibid*, section 57(1).

58 Section 12(2) of the Anti-Corruption Act states that the Commission may in the performance of its functions work in co-operation with any foreign government or international regional organization. This is only a minimal provision on international co—operation, the Act does not provide for the mode and scope of international cooperation. Further, since the Act does not address transboundary aspects of corruption, it can legitimately be argued that the cooperation envisioned under the Act only relates to matters touching on corruption or economic crimes committed in Kenya. In fact, section 67 of the Act only criminalizes extra-territorial offences committed by Kenyan citizens. In the absence of a local law domesticating the provisions of UNCAC, it is legitimate to argue that Kenya has no legal sanctions against transnational aspects of corruption.

59 Kenya was the first country to ratify UNCAC. For information on this, see Cecil Hunt, *Recent Measures to Combat Corruption*, paper presented to the American Law institute-American Bar Association program, *Fundamentals of International Business Transactions*, in May 2004.

60 Article 21 of UNCAC calls on State Parties to consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in

many of the offences created under UNCAC, e.g. bribery of foreign public officials and officials of public international organizations,⁶¹ illicit enrichment,⁶² laundering of the proceeds of crime,⁶³ trading in influence⁶⁴ and obstruction of justice.⁶⁵

Though sections 48 on penalties and 51 on liability to compensation are laudable, they are not far from problematic. Besides failing to address the question of *locus standi*, a literal reading of section 51 suggests that liability to compensation only arises in respect of such losses as a claimant can quantify. The costs and consequences of corruption can be inter-generational and incapable of monetary

the course of economic, financial or commercial activities: (a) the promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting and (b) the solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, in order that he or she, in breach of his or her duties, act or refrain from acting. See, also, Article 22 on embezzlement of property in the private sector.

⁶¹ UNCAC, Article 16.

⁶² Defined at Article 20 of UNCAC as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. It is notable, however, that under sections 55-56 of the Anti-Corruption Act, KACC may institute proceedings against any person for the forfeiture of unexplained assets.

⁶³ UNCAC, Article 23.

⁶⁴ UNCAC, Article 18.

⁶⁵ UNCAC, Article 25. Obstruction of justice entails the use of physical force, threats or intimidation or the promise, offering, or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with the Convention. It includes the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with the Convention. Section 66 (1) of the Anti-Corruption Act nonetheless makes it an offence, *inter alia*, for any person without lawful justification or lawful excuse to obstruct, hinder, or assault or threaten a person acting under the Act. The former Kenyan Minister for Justice and Constitution Affairs, Mr Kiraitu Murungi, (now in charge of the energy docket) quit office in 2006 under accusations of obstructing justice by trying to intimidate the "graft C-Zar," Mr John Githongo, from investigating and unravelling corrupt deals by high-level officers in the Kenyan Government. It is debatable whether Mr Kiraitu could have been charged with an offence under section 66 (1) of the Anti-Corruption Act, since Mr Githongo was not acting under the Act-and given that penal statutes are normally construed strictly.

quantification.⁶⁶ It is probably with this in mind that UNCAC calls on State Parties to take measures to address consequences of corruption.⁶⁷

The fact that the Anti-Corruption Act limits KACC to investigations without prosecutorial powers⁶⁸ is a major shortcoming of the Act. It has often been observed that KACC “lacks the teeth” to bite corrupt officials. This is because the Attorney General may decide not to prosecute individuals even after investigations by KACC.⁶⁹ The Government should have addressed the monopoly of the Attorney General on the prosecution of offenders.⁷⁰ The exclusive nature of the Attorney General’s powers under the Kenyan Constitution and the wide discretion⁷¹ enjoyed by the Attorney General in instituting or terminating criminal proceedings are incompatible with provisions of UNCAC. In particular, they offend the provisions of Article 30(3) of UNCAC. Article 30(3) calls on State Parties to endeavour to ensure that any discretionary legal powers under their

66 Especially when systemic corruption gradually leads to total stagnation of the national economy, as happened in Kenya. It is difficult to quantify the lost prospects of improvement in an individual citizen’s life.

67 UNCAC, Article 34. In this regard, State Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

68 The see note 50 (supra).

69 As happened recently when the Attorney General returned files to KACC citing “lack of evidence.” See the *Daily Nation* (Nairobi), Issues Nos. 14236 and 14237 of 19th and 20th October 2006 respectively.

70 Section 26 of the Kenyan Constitution vests the powers to institute criminal proceedings on the Attorney General. The Kenyan Attorney General has powers to take over criminal proceedings instituted by any other person and to terminate such proceedings at any stage before judgement is delivered, effectively giving him a monopoly over criminal prosecutions.

71 Cases on the Kenyan Attorney General’s power to control, take over and terminate criminal proceedings are legion. For a long time the predominant view was that this power was wide and unfettered. However, the correct view is that the High Court has jurisdiction under section 123(8) of the Kenyan Constitution to prohibit the Attorney General from exercising this power in a capricious, unfair or oppressive manner. See *inter alia Githunguri v. Republic* [1986] KLR 1 and *Crispus Karanja Njoguv. The Attorney General*, Nairobi High Court Criminal Application No. 39 of 2000 (unreported). Also, see *Republic v. the Judicial Commission of Inquiry into the Goldenberg Affair & Others Ex Parte Hon. Professor George Saitoti*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 102 of 2006, available at www.kenyalaw.org.

domestic law relating to the prosecution of persons for offences established in accordance with the Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences.

Further, the Anti-Corruption Act does not embody key features of UNCAC on protection of witnesses, informers and victims of corruption and economic crime. It appears that the protection afforded to witnesses under section 65 of the Anti-Corruption Act only extends to protection from disclosure of an informer's or witness' identity and protection from legal and disciplinary action. Article 32 of UNCAC requires State Parties to take appropriate measures to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention. The protection accorded under UNCAC extends to relatives and other persons close to the witness or expert.⁷² Further, unlike the Anti-Corruption Act, which merely provides for protection from the disclosure of the identity of a witness, UNCAC provides for physical protection and relocation as well as non-disclosure of the whereabouts of witnesses.⁷³

There are virtually no provisions in the Act on freezing, seizure and confiscation of assets or proceeds of corruption or economic crime.⁷⁴

⁷² Article 32(1). The Anti-Corruption Act does not appreciate that retaliation or intimidation could be meted on the relatives or friends of a witness.

⁷³ Article 32(2). UNCAC also calls on State Parties to provide for evidentiary rules permitting witnesses or experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given by communications technology such as video or other adequate means. Neither the Evidence Act (Chapter 80 Laws of Kenya) nor the Anti-Corruption Act envisions the use of communications technology in giving testimony.

⁷⁴ See UNCAC, Article 31. The closest semblance of this Article is found in sections 47(2) and 56 of the Anti-Corruption Act.

It is arguable that the establishment of KACC and other bodies under the Anti-Corruption Act does not fully meet Kenya's obligations under Articles 5 and 6 of UNCAC. Article 5 of UNCAC obliges State Parties to develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. First, the effectiveness of anti-corruption policies and measures in Kenya is doubtful if reports and rankings by Transparency International and other agencies on the incidence and prevalence of corruption among nations are believable.⁷⁵

Further, it appears that there is no coordination in implementing anti-corruption measures and policies. Though section 12 of the Anti-Corruption Act provides for cooperation between KACC and other bodies, for instance, we have witnessed conflicts between KACC and the office of the Attorney General.⁷⁶ Though section 12 obliges public bodies and officers to cooperate with KACC, it should be contrasted with multiple constitutional and statutory provisions which provide that certain officers and bodies are not subject to the control and direction of any person or authority.⁷⁷ Still on coordination and harmonization of anti-corruption measures and policies, it is not clear whether officers of the Anti-Corruption Unit of the Kenya Police Force are answerable to the Commissioner of Police or

⁷⁵ Kenya has continuously been ranked poorly even after the enactment of the Anti-Corruption Act.

⁷⁶ See *inter alia* the Daily Nation (Nairobi, Issues Nos. 14236 and 14237 of 19th and 20th October 2006 respectively).

⁷⁷ See, for instance, sections 105(5) and 106(12) of the Constitution of Kenya on the Controller And Auditor General and the Public Service Commission respectively. The Director of KACC has, during conflicts with the office of the Attorney General, asserted that under section 10 of the Anti-Corruption Act, neither he nor KACC is subject to the direction or control of the Attorney General. See *inter alia*, the Daily Nation (Nairobi, Issue No. 14237 of 20th October 2006 at p.1).

Director of KACC.⁷⁸ In short, the provisions of section 12 of the Anti-Corruption Act fall below the requirement set out in Article 38 of UNCAC. Under Article 38, each State Party is obliged to take such measures as may be necessary to encourage cooperation between its public officials and authorities on the one hand and its authorities responsible for investigating and prosecuting criminal offences under the Convention. Other than section 12 of the Anti-Corruption Act, whose weaknesses have been demonstrated, there are no known measures in Kenya, legal, policy or administrative, obliging public authorities and officials to assist and cooperate with KACC.

4 Conclusion:

The Anti-Corruption Act is a commendable effort to address the menace of graft. It reflects many of Kenya's obligations to criminalize corrupt acts under UNCAC. However, as already indicated, it lacks adequate provisions on key aspects of corruption, in particular, international dimensions of corruption. Kenya's options in this regard lie in making amendments to the Act or passing a local Act to domesticate the provisions of UNCAC.⁷⁹ The former approach is more preferable, as it will avoid the possibility of multiplicity of laws on the same phenomenon.

Corruption is more than simple delinquency. It is not just a matter of avarice. It has socioeconomic dimensions. The fight against corruption in Kenya has,

⁷⁸ Subsection (1) of section 73 of the Anti-Corruption Act transfers the operations of the anti-corruption unit of the Kenya police force to KACC while sub-section (5) states that the transfer of operations of the unit does not result in the transfer of any staff of the anti-corruption unit of the Kenya Police Force to the Commission. One possible interpretation of this is that while the officers conduct their operations under the general guidance of KACC, they are ultimately answerable to the Commissioner of Police and not KACC. This could thwart the operations of KACC if the Commissioner of Police were to give the officers instructions that conflict with those given by KACC.

⁷⁹ Kenya follows the dualist approach to treaty making. Accordingly, the ratification, signing or accession to a treaty by the Kenyan Government does not *ipso facto* make the treaty part of Kenya's municipal laws.

regrettably, been conjoined with politics. This has given corruption in Kenya a political dimension as well. Accordingly, eradicating corruption in Kenya (and indeed other countries) requires more than mere enactment of statutes. The fight against corruption must be holistic. It must address the socioeconomic and political aspects of the vice. In this regard, there is need for widespread, sustained and concerted public awareness campaigns. KACC has the mandate to do this under section 7(1) (g) of the Anti-Corruption Act. To make meaningful progress in the war against corruption, KACC must devise effective ways of educating the common person on the dangers of corruption and economic crime. It must discharge the mandate given on it by Parliament, to *"enlist and foster public support in fighting corruption and economic crime."* If we are to make significant progress, the people of Kenya, i.e. the common person in Kenya, must be on the battle line in the war against corruption. We must de-link the issue of corruption from ethnicity, regionalism, politics and other parochial interests. When all this is done, we shall, to use Justice Ringera's illustrative verbiage, have wrestled the dragon of corruption to the ground, and slain it.

*My journey was eventful
eventful and plentiful
in the land of wonders
wanderers and wanderers
the land of plunderers
of blunders and blunderers
a land endowed
endowed and widowed
endowed with talkers
widowed by walkers
the talkers talked the walk
the walkers walked the talk⁸⁰*

⁸⁰ Adopted from "*African Babel*," in Muthomi Thiankolu, *Poems from the Slopes*, 2006 (Unpublished).