



NEW ANTI-CORRUPTION GOVERNMENTS: THE CHALLENGE OF DELIVERY

POSTSCRIPT:  
WHAT STATUS THE NARC WAR  
ON GRAFT?

Postscript to the Conference

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Postscript in October 2005 to the Kenya Meeting on New Governments,  
co-organised by the Government of Kenya, TI-Kenya and Transparency International,  
held in Nairobi, Kenya, in October 2004.

## Postscript to the Kenya Meeting on New Governments

The international conference on “New Anti-Corruption Governments: The Challenge of Delivery” was held in Nairobi in October 2004, hosted by Transparency International (TI), its local chapter TI-Kenya and the government of Kenya represented by the Department of Governance and Ethics, which had been newly created under the new coalition government led by President Mwai Kibaki. In the months that have elapsed since the holding of the New Anti-Corruption governments meeting in Nairobi, events have moved with rapidity. The year 2004 was a time when the Kenyan government’s anti-corruption drive had appeared to slacken after the heady early days of the new regime, which were heavy with the promise of reform. The year had opened with anticipation of significant progress in the Goldenberg Commission of Inquiry; the Kenyan public, whether realistically or not, looked forward to the arraignment of senior public figures from the kleptocratic previous regime they had roundly rejected in December 2002, before the committee. They entertained hopes that they would see these people publicly responding to questions on their actions. There was still a reservoir of readiness to grant government the benefit of the doubt, and believe the promises that, indeed, the long months of testimony and the heavy investment of resources would culminate in a worthy conclusion. However, voices were increasingly being raised which doubted the Kibaki regimes capacity or willingness to resolutely conduct the anti-corruption campaign.

These doubts seemed justified when, five months before the conference, a Cabinet reshuffle was conducted, during which the Permanent Secretary Governance and Ethics, John Githongo, was relocated from the Office of the President to the Ministry of Justice and Constitutional Affairs. This was not the first, but the most public, attempt to remove the PS from proximity to the President. The move was widely interpreted as a relegation of the anti-corruption fight to the back burner, an interpretation supported by President Kibaki’s original presentation of that office with easy access to him as a guarantee of his personal political commitment. Although this act was quickly reversed, it left Kenyans sobered at the speed with which progress achieved could be reversed and at the apparent confusion reigning within the centres of power. It also led to intense consultations on the advisability of holding the conference in Nairobi, given the danger of being seen to support an apparent move away from the original forceful and repeated commitments of the government to the anti-corruption cause.

Ultimately, and after earnest, high-level guarantees from the Kenyan side, the decision was made to continue. This should by no means be seen as an indication of naiveté, or misplaced optimism. On the contrary, the events in Kenya underlined the oft-repeated message that the fight against corruption should be seen as a long-term and arduous struggle, which must be pursued on many fronts. A conscious effort was therefore undertaken to use the conference as an occasion to deliberate on the difficulties and dilemmas of implementing anti-corruption reform and to renew international support for anti-corruption governments around the world in their fight. And to remind those whose resolve was failing that the world cared, that it was committed to supporting all serious efforts and was watching progress in combating corruption keenly. This was particularly so for the newcomer to the fold of reforming governments, Kenya, where progress could have a potentially powerful impact in Africa, the continent which has had to suffer more than any other under the depredations of unrestrained large-scale economic delinquency.

Africa is that continent where the welfare of the majority has been held hostage by tenacious and complex networks linking diverse and often hidden interests in an illicit web of complicity. At the conference, the Minister for Justice and Constitutional affairs, Mr. Kiraitu Murungi admitted that the anti-corruption war in Kenya was encumbered by the re-organisation and fight-back mounted by corruption networks. Given events before and after the conference, it

seemed that those interests were rapidly recapturing lost ground within the very heart of the new government.

A particular impression was made by the Prime Minister of Georgia, Zurab Zhvania and his forceful exposition of the determination necessary to make headway in the fight against entrenched corruption. You have very little time, he warned. His remarks struck a chord in the hearts of the Kenyan public, who yearned for greater decisiveness in the approach to Kenya's malignant legacy of endemic corruption and the "new" corruption which was tarnishing the reputation of the NARC government, particularly symbolised by the so-called Anglo-Leasing scandal, two questionable contracts totalling about US\$90 million for the supply of new passport equipment and the construction of forensic laboratories, which had dominated the Kenyan media in the months before the conference. The "Georgian model" was widely quoted afterwards to promote the need for swift action to shake up entrenched networks and above all the need for a more radical approach to political accountability.

In the event, expectations that the conference would be a boost for the government's anti-corruption war have been frustrated. Only three and a half months passed after the hosting of the high profile conference and the resignation, on February 7, 2005, of John Githongo, while on official mission abroad, where he remains. Sadly, just two weeks before this, Premier Zurab Zhvania died in Georgia. (His death was due to an unfortunate accident—no foul play was found.)

The passage of new laws has been a central aspect of the NARC anti-corruption programme, However effective implementation and enforcement continues to be a great challenge. Though a new law to streamline public procurement, the Procurement Act, was passed this June, the war on graft has slackened. central factions of the increasingly divided NARC government appear to have adopted a much more defiant and dismissive attitude in response to reminders of the anti-corruption pledges which were at the core of their promises of economic recovery to Kenyans. In this, they seem to derive confidence from the economic recovery currently being experienced in the country. However, it would be mistaken to ignore or downplay the role played by improved governance, public rejection of bribery and corruption and compliance with the law in buoying growth. Nor should the fragility of this upturn be forgotten, based as it is on while more long-term improvements remain elusive.

As part of its strategy to deal with past corruption and human rights abuses, the NARC government had in 2003 and 2004 launched several inquiries under the Commissions of Inquiries Act. The recommendations of these commissions, where reports have been concluded, are being insufficiently implemented: Two of the most important of these inquiries were the Ndungu Commission of Inquiry into Illegal and Irregular Allotment of Public Lands and the Bosire Commission of Inquiry into the Goldenberg Scandal.<sup>1</sup> The first inquiry reported back to the President in January 2005 recommending a slew of measures: consolidation of Kenya's multiple land registries; consolidation of Kenya's many land laws, revocation of illegally issued titles and eviction of people illegally settled on fragile ecosystems such as water catchment areas. Though ordinary people settled in water catchment areas have been evicted, illegal titles have not been revoked. This has fuelled speculation that it is because some of the allottees named in the Ndung'u Report are politically connected. The Bosire Inquiry is due to report in October, 2005.

A draft Constitution founded, at least in part, on principles of "open and transparent government" and "accountability of state officers" is set for a referendum vote on November 21<sup>st</sup> 2005 but its anti-corruption provisions are weak<sup>2</sup> and tokenist and it may leave the Kenya

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<sup>1</sup> The Goldenberg Scandal was a complex scheme hatched in 1991 and carried out in 1992 and 1993 involving the export of fictitious gold and diamonds. The initial justification was that gold and diamond exports would help repair the countries foreign exchange reserves which had been depleted following a cut-back in foreign aid and a withdrawal by foreign investors. The country lost in excess of US\$1 billion in this scam. An incommensurable amount was lost in associated fiddles.

<sup>2</sup> The proposed Constitution provides for an Ethics and Integrity Commission whose mandate is largely to enforce ethics in public life along the lines of the existing Public Officer Ethics Act. Indeed many of the provisions of the Public Officer Ethics Act have been upgraded into the proposed draft. Unfortunately, the Public Officer Ethics Act has not been very

Anti-Corruption Commission vulnerable to constitutional challenges. In February 2005 indictments were laid against four former senior civil servants for their role in the Anglo-Leasing scandal, but the cabinet ministers who approved the contracts have not been indicted, nor does it appear likely that they will be. Political accountability has proved an elusive concept with cabinet ministers repeatedly being associated with apparent conflicts of interest or abuse of office, or sheer failure in central aspects of the responsibilities entrusted to them with no consequences suffered.

The conference represented an attempt by civil society to overcome its growing reservations about government political will and strengthen the hand of those within government who were committed to reform by bringing the spotlight of international attention to bear on Kenya's anti-corruption fight. Since then, its relationship with government has increasingly frayed. Elsewhere, through government reform documents such as the Medium Term Strategy of the Governance, Justice, Law and Order Sector, GJLOS, incorporate civil society organisations and establish consultative mechanisms, the relationship between government and civil society has deteriorated principally on account of the government's slow-down in the war on graft. Soon after Mr. Githongo's resignation, civic and media institutions such as the Federation of Kenya Women Lawyers, (FIDA), the Standard Newspapers, and the Institute for Education in Democracy, (IED), resigned from the cross-sectoral National Anti-Corruption Campaign Steering Committee, whose objective was to achieve a sea change in the widespread culture of acceptance of corruption which frustrates attempts at reform. Transparency International, (TI-Kenya), had waited until after the NGM conference to tender its resignation in December.

Even though the steering committee continues to operate, its chairman has lamented the lack of resources. An opinion poll conducted by Steadman Research Services in August 2005 showed that 33% of Kenyans find government's approach to civil society and the issues it raises is unfair, of these 45% of urban respondents held that view. In the face of what they considered government roll-back on central planks of its reform programme; on constitutional reform, land reform and anti-corruption, civil society organisations have adopted an increasingly critical and adversarial stance. Government has responded with a crackdown which was at times reminiscent of the past regime. Civil society was also confronted with its own internal contradictions as the NARC rollback targeted critical voices, an offensive which was facilitated by governance weaknesses within civil society. As in other African countries, the boundaries between the state and civil society are porous and undefined. Opposition to the last regime united various factions and interests in a common front. With the advent to power of the reform-willing new government, the unity that was forged among the forces opposed to the Moi regime sharply came up against the reality of divergent interests, particularly when the new government started retreating from its reform pledges.

Throughout the latter part of 2004 and the early part of 2005, the Kenya Anti-Corruption Commission established under the Economic Crimes Act, 2003, was recruiting staff. Though it has the mandate to investigate corruption, it lacks the power to prosecute and must therefore depend on the Attorney General's office. Its fate when a new constitution comes into force is unclear. Though it had been provided for in one of the earlier drafts of the proposed constitution, it has been deleted from the draft that will go to the referendum. Chances are that it may have to be scrapped when a new constitution comes into force. If not, it may be challenged as an unconstitutional body in the courts.

After an initial spurt of optimism in 2003, surveys report that the public has lost confidence in the government's ability to fight corruption: In December 2004, the Global Corruption Barometer, 2004 reported that corruption was persistent in Kenya and that the public had no confidence government's ability to deal with it. These findings were mirrored in TI Kenya's Bribery Index for 2005 issued in February 2005. Kenyans in the survey reported that bribery was

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effective. One of its key problems- which has not been fixed by the proposed Constitution- is that declarations of wealth by Public officers are not made public. The credibility of the law has in any case continued to be undermined by ministerial actions. In January this year, it emerged that the Minister for Finance David Mwiraria had given his colleague Mr. Njeru Ndwiga, the Minister for Co-operative Development a US\$70,000 dollar tax waiver in circumstances that clearly breached, on the face of it, the provisions of the act.

still rife: Even though incidences of bribery were reported to have gone down, the average size of bribes paid, especially in the judiciary and in the police force had gone up significantly. This gloomy assessment contrasts with the mood in early 2003 when a global Gallup survey ranked Kenyans the most optimistic people in the world. The Kenyan public views government's handling of two major scandals critically, 67% criticised government handling of the Goldenberg scandal and 82% found that the Anglo-Leasing issue was poorly or very poorly dealt with.

Donors are discouraged but continue to engage with government: in February 2005, the US government suspended a US\$2 million dollar grant to the GJLOS programme in the wake of John Githongo's resignation and failure of government to deal with known cases of corruption. Other donors, including Japan and Germany, said that they were reviewing their stance but wanted to see steps taken to combat new corruption. During his tenure at the security docket the then British High Commissioner in Kenya, Sir Edward Clay, released a dossier charging that a number of large security contracts were among the twenty or so contracts irregularly awarded by the Government. While the government made a strong attempt to respond to these charges during the Consultative Group meeting in April, 2005, reservations remained on its seriousness in addressing grand corruption within its ranks, particularly given the slowness of progress by the KACC. In July 2005, the British Government cancelled the visa of Dr. Chris Murungaru,<sup>3</sup> minister for Transport and immediate former minister for Internal Security. The British government said that Dr. Murungaru was "undesirable" and "a threat" to British national security. The minister has been largely left to deal with the problem on his own, but it is doubtful whether the NARC government can remain wholly untouched by this ignominious chapter.

In August, 2005 the Minister for Justice and Constitutional Affairs announced that the government had lost the war on corruption, a statement he retracted three days later after public outrage in the media. Despite the attempted withdrawal, a pall of failure hangs over NARC's anti-corruption efforts. In contrast to the President's repeated and strong public statements on his personal commitment to the fight against corruption early on in his tenure, his pronouncements on the issue have become rare and devoid of conviction.

As the battle over the new constitution heats up the anti-corruption agenda will fall below the radar: The debate and campaign for a new constitution is being conducted in a highly polarised and fractious manner by the political elite. The in-fighting and political divisions that have stalked President Kibaki administration since 2003 have resurfaced with new force. The main criticism of those who oppose the new constitution is that it centralises power in the presidency. The overweening power of the Executive was one of the major factors motivating the agitation for constitutional reform. Supporters say that the proposed constitution has sufficient checks and balances. The country is deeply divided. The campaign for and against the new constitution will become noisier and more discordant. The political struggles before and after the referendum must inevitably detract from the anti-corruption war. Moreover, as the government grasps for votes for its YES campaign it may have to do political deals even with the unsavoury. The readiness evidenced in 2005 to collaborate with some of the most controversial figures associated with past mega-corruption in the pursuit of narrow political ends was a particularly disillusioning moment for many Kenyans. Prospects for progress in the struggle for good governance and an end to Kenya's agony at the hands of looters are dim, as the referendum will be closely followed by campaigning for the next general elections set for 2007. The hunger for resources with which to fuel the search for political power has been one of the chief drivers of grand corruption in Kenya, as in Africa.

Kenyans and civil society are still grappling with the questions thrown up by these setbacks at the same time as they respond to rapidly moving events. Experience however demonstrates that the struggle for democratisation, which is what lies at the basis of the fight against corruption, is a long-term project. The corruption which envelops Kenya and defies attempts to uproot it has grown over decades and will take many decades to bring under control. Lessons emphasised during the conference returned to haunt the anti-corruption campaign; such lessons include the centrality of political will, the importance of careful sequencing, of a comprehensive and

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<sup>3</sup> See the [East African Standard](#) and the [Daily Nation](#) issues of July 27<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup>.

concerted drive particularly against corruption in the bureaucracy where it has entrenched itself. It may be too early for a comprehensive assessment of the failures and wrong turns taken, but also of the positive steps, the correct decisions which were perhaps too hesitantly pushed and not allowed to take root. Unfortunately, time is a luxury we do not have; corruption continues to exact its toll on the lives of the majority of Kenyans. Experience under the NARC regime, with its largely government led anti-corruption campaign, has underlined the necessity for an independent, strong and permanently vigilant civil society to monitor government performance, and mobilise the public demands for increased accountability.