A COMPARATIVE ANALYSIS OF THE STRATEGIES OF KENYA AND NIGERIA'S ANTI-CORRUPTION AGENCIES

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Abstract

The adverse effects of corruption on the development of various States have raised global concerns for its control leading to the adoption of the United Nations Convention Against Corruption (UNCAC) in 2003. Kenya Anti-corruption Commission (KACC) and Nigeria's Economic and Financial Crimes Commission (EFCC) are the foremost anti-corruption agencies in both countries. There is paucity of comparative studies devoted to the evaluation of the nexus between the Convention and the strategies of these anti-corruption agencies. The extent to which the Convention has shaped the anti-corruption strategies of these agencies has not been fully explored.

This study examined the anti-corruption strategies of KACC in Kenya and EFCC in Nigeria between 2004 and 2008 to determine the extent of implementation and compliance to UNCAC. The study adopted a comparative case-study research design using good governance model. Data were collected from primary and secondary sources through a mix of library and survey research. This involved content review of official journals, international sponsored documents, newspapers, magazines and Internet resources. The survey involved interview of thirty officials purposively selected from both countries supplemented with snowball sampling techniques, nine from the Kenya Anti-corruption Commission (KACC), nine from Nigeria's Economic and Financial Crimes Commission (EFCC) and three officials each from four non-governmental anti-corruption agencies in both countries. The interview focused on compliance and implementation of the convention's five pillars: prevention, criminalisation, asset recovery and international co-operation and technical/information exchange. Responses from the interviews were recorded, transcribed and content analysed.

The emergence of the UNCAC, corruption control in Kenya and Nigeria were patterned along typical unproductive anti-corruption strategies. However, the Convention shaped the KACC and EFCC's strategies via significant compliance to prevention and criminalisation as reflected in the enactment and emergence of anti-corruption laws and agencies in both countries; namely, Anti-Corruption Economic Crimes Act, Witness Protection Act and Anti-corruption Court in Kenya and Nigeria Extractive Industries Transparency Initiatives and Money Laundering Prohibition Act and similar acts . International co-operation in prosecution and asset recovery was visible. Thirty-seven convictions were secured and $5 million in assets and cash recovered by KACC while the EFCC secured three hundred and fifty convictions and recovered assets and cash worth $5 billion between 2004 and 2008. Major differences in the strategies of both agencies included the existence of the Special Anti-Corruption Court and provision for the protection of witnesses in Kenya but absent in Nigeria. The EFCC has prosecutionary power but the KACC can only make recommendations to the Attorney-General. The UNCAC's partial domestication, inadequate funding, delay in prosecuting suspects and inability to recover stolen assets from proven cases were identified as constraints to both agencies' anti-corruption strategies.

The advent of the United Nations Convention Against Corruption transformed the anti-corruption initiatives in Kenya and Nigeria. However, a more effective corruption control within the framework of UNCAC requires proper domestication and the dismantling of the identified constraints.

Key Words: Anti-corruption agencies, anti-corruption strategies, UNCAC, KACC, EFCC

Word Count: 473

CERTIFICATION

I certify that this research work was carried out by Mr. G.I Ayodeji in the Department of Political Science, University of Ibadan

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DEDICATION

This research work is dedicated to the Almighty Allah, the All knowing and the Bestower of Knowledge.

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LIST OF ABBREVIATIONS

ACECA:	Anti-Corruption and Economic Crimes Act
ACPU:	Anti-Corruption Police Unit
ADB:	Asian Development Bank
AFDB:	African Development Bank
APRM:	African Peer Review Mechanism
AU:	African Union
BEEPS:	Business Environment and Enterprise Performance Survey
BMPIU:	Budget Monitoring Price Intelligence Unit
BPI:	Bribe Payers Index
CBN:	Central Bank of Nigeria
CCB:	Code of Conduct Bureau
CFA:	Commission for Africa
CID:	Criminal Investigation Department
COC:	Control of Corruption
CPI:	Corruption Perceptions Index
CSO:	Civil Society Organisation
DFID:	Department for International Development
DANIDA:	Danish International Development Assistance
ECOSOC:	Economic and Social Council
ECOWAS:	Economic Community of West African States
EFCC:	Economic and Financial Crime Commission
EITI:	Extractive Industries Transparency Initiative
EU:	European Union
FATF:	Financial Action Task Force
FDI:	Foreign Direct Investment
GDP:	Gross Domestic Product
GEITI:	Global Extractive Industries Transparency Initiative
IBRD:	International Bank for Reconstruction and Development
ICJ:	International Court of Justice
ICPC:	Independent Corrupt Practices and other Related Offences Commission
IDB:	Inter American Development Bank
IMF:	International Monetary Fund

KACA:	Kenya Anti-Corruption Authority
KACC:	Kenya Anti-Corruption Commission
KBI:	Kenya Bribery Index
KEPSA:	The Kenya Private Sector Alliance
LATF:	Local Authority Transfer Fund
LDP:	Liberal Democratic Party
MDGs:	Millennium Development Goals
MNCs:	Multinational Corporations
NACCSC:	National Anti Corruption Campaign Steering Committee
NARC:	National Alliance of Rainbow Coalition
NEITI:	Nigerian Extractive Industries Transparency Initiative
NEPAD:	New Partnership for Africa's Development
NFIU:	Nigerian Financial Intelligence Unit
NGO:	Non Governmental Organisation.
NIS:	National Integrity System
NNPC:	Nigerian National Petroleum Corporation
NJC:	National Judicial Council
OAS:	Organisation of American States
OECD:	Organisation for Economic Co-operation and Development
PCC:	Public Complaints Commission
PEFA:	Public Expenditure and Financial Accountability
PFM:	Public Finance Management
PRS:	Poverty Reduction Strategy
PSR:	Public Sector Reform
SADC:	Southern African Development Community
SIDA:	Swedish International Development Cooperation Agency
SSA:	Sub-Saharan Africa
TUGAR:	Technical Unit on Governance and Anti-Corruption Reform
UNDP:	United Nations Development Programme
UNCAC:	United Nations Convention Against Corruption
UNCITRAL:	United Nations Commission on International Trade Law
UNO:	United Nations Organisation
UNICEF:	United Nations International Children's Education Fund
UBEC:	Universal Basic Education

UNTOC:	United Nations Convention against Transnational Organised Crime
USAID:	United States Agencies for International Development
WAIC:	War Against Indiscipline and Corruption
WEF:	World Economic Forum
WGI:	World Governance Indicators
WIN:	Water Integrity Network
WSS:	Water Supply and Sanitation

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The history of corrupt practices is as old as the globe. Corruption can be found in different periods and in all political and administrative systems. Throughout history, efforts have been made to combat corruption. Earliest civilisations have traces of widespread of 'illegality and corruption'. Thus, "corruption has been rampant in complex societies from ancient Egypt, Israel, Rome, and Greece down to the present."[1]

Even in the nineteenth century in Great Britain and the United States, for instance, much of the impetus for the reform of the civil service derived from reactions to corrupt practices in government.[2] Therefore, the phenomenon of corruption is both widespread and a universal one which impacts on nations in varying degrees and forms. According to Alatas,[3] the problem is "trans-systematic; that is, it inheres in all social systems - feudalism, capitalism, communism and socialism".

Based on the account of the "growing concern with the effects of corruption on development, and an increasing emphasis within the donor community on assistance for anti-corruption strategies,"[4] the study of corruption is now a serious subject in the development discourse. It is not surprising therefore that corruption has recently emerged as a concern in the transitional economies of the former socialist world and in the developing nations of Africa, Asia, and the Americas. Hence, the search for strategies to combat corruption has acquired growing importance among the citizens of these countries, their leadership, and the international donor community.

In sub-Saharan Africa, the scourge has reached pandemic proportions and a matter of global concern. According to the recent Transparency International Corruption Perceptions Reports (ICPR), most corrupt countries in the world are still found in sub-Saharan Africa; it affects almost all institutions, both public and private, and has become a way of life, especially in terms of private property acquisition. [5]The 2005 Report of the Commission for Africa (CFA)[6] identified, among other things,

corruption as a central concern because “the widespread prevalence of corruption undermines efforts to improve governance, and yet improved governance is essential to reduce the scope of corruption”.[7] Also, the African Development Bank (AFDB)[8] estimates that lower income households spend an average of 2 to 3 % of their incomes on bribes, and rich households an average of 0.9%. These figures illustrate the fact that corruption is perceived to be both widespread and costly, diverting assets away from their intended use.

Before now, "corruption was seen by donor agencies as something regrettable but probably inescapable"[9] and its study was not thought to be significant. One of the main development institutions, the World Bank, also noted the change in context arguing that corruption which "seems to us today an obvious economic issue was then ... simply too political...and thus outside the limits of the Bank's nonpolitical mandate."[10] Therefore, corruption is no longer taken to be just a momentary disorder of modernising societies that literacy, development and good public ethics will cure.[11] No other ill of the society seems to be capable of inflicting more colossal damage on its fabric, undermining all efforts of economic growth, encouraging visionlessness, entrenching self motivated political agenda and climaxing into spiritual stupor than corruption. That is why corruption in any form is a major enemy of good governance. The devastating economic, political and social consequences of corruption are being experienced everywhere, especially in Kenya and Nigeria, two major power brokers of the East and West African sub-regions.

Given its devastating and corrosive nature and the intense global concern, there have been unending debates on the definitions, types, causes and consequences of corruption in the scholarly literatures which have made it to be voluminous.[12] No wonder the sustained anti-corruption strategies in both countries, as elsewhere in the developing countries, developed in response to the demands of a renewed good governance strategy. Unrelenting effort in the present context implies that when anti-corruption dialogue became rife, agencies were set up to investigate and perhaps prosecute offenders.[13] All these strongly suggest that the study of the phenomenon of corruption is continuous and not new in sub-Saharan Africa.

1.2 Statement of the Problem

Corruption is a well-known phenomenon globally. No country in the world is immune from corruption. Corruption survives monarchy, dictatorship, democracy or

any form of government. Corruption is unarguably one of the most contemporary issues in the treatises of the deepening crisis and contradictions of post-independent sub-Saharan Africa. The intensity of attention dedicated to it may not only be due to its swift and unprecedented expansion to all components of human endeavour and its threatening consequences, but has been cited as the singular factor responsible for poor governance, a major impediment to economic development and has intensified the poverty levels in sub-Saharan Africa.

As noted by the World Bank:

> The burden of petty corruption falls disproportionately on poor people …For those without money and connections, petty corruption in public health or police services can have debilitating consequences. Corruption affects the lives of poor people through many other channels as well. It biases government spending away from socially valuable goods, such as education. It diverts public resources from infrastructure investments that could benefit poor people, such as health clinics, and tends to increase public spending on capital-intensive investments that offer more opportunities for kickbacks, such as defence contracts. It lowers the quality of infrastructure, since kickbacks are more lucrative on equipment purchases. Corruption also undermines public service delivery.[14]

Corruption in Kenya and Nigeria has been recognised as a major impediment to both countries' development[15] and has become so endemic that one can begin to discuss about the political culture of corruption in both countries.[16] To be sure, in Kenya, the Daniel Arap Moi-led administration was reported to have looted more than US$1 billion from Kenya treasury while corruption is said to cost Kenya as much as US$1bn annually.[17] In Nigeria, Sani Abacha personally embezzled at least US$5 billion during his five year-period in office. Recent report provided stunning evidence, which put the total amount of money stolen by past and present Nigerian rulers at US$521 billion.[18] The Transparency International's Corruption Perception Index (CPI) reveals that Kenya and Nigeria are part of the countries perceived to have the highest incidences of corruption in world, scoring averages of 2.05 since 2002.[19]

Although, successive attempts at combating corruption have been made in Kenya and Nigeria, but all were essentially internal and patterned along typical unproductive anti-corruption strategies. However, the recent global concern and coordinated efforts, especially within the framework of the United Nations Convention Against Corruption (UNCAC), to tackle this phenomenon via the creation and implementation of anti-corruption laws policies and more importantly anti-corruption

agencies in countries such as Kenya and Nigeria are noteworthy. While some nations like Botswana and Mauritius have been successful in their quest to reduce the level of corruption via the creation of anti-corruption agencies other countries like Kenya and Nigeria are still struggling to reach such height.[20]

Kenya and Nigeria are sub-Saharan African countries that have subscribed to the UNCAC and ranked high in the anti-corruption strategies in recent years. With the adoption of the UNCAC, the anti-corruption strategies championed by the Kenya Anti-corruption Commission (KACC) and the Economic and Financial Crimes Commission (EFCC) in Nigeria became intensified and various anti-corruption institutions and laws were reviewed. Prevention of corruption, criminalisation and law enforcement, asset recovery and international cooperation on corruption which are the UNCAC's pillars became central elements in the anti-corruption strategies of both agencies.

However, the comparative analysis of the strategies of Kenya and Nigeria's anti-corruption agencies within the framework of the UNCAC has remained sparse. Aside this, the extent of the influence of the UNCAC on anti-corruption agencies' strategies in both countries has not been ascertained. Adequate attention has not been devoted to the evaluation of the nexus between the UNCAC and the effectiveness of strategies of the anti-corruption agencies in both countries. That is, how effective are the anti-corruption strategies of the KACC and the EFCC in the context of the UNCAC's pillars. It is this observed gap that this study intends to fill.

1.3 Research Questions

This study seeks to provide answers to the following questions:

i. What is the nature of the renewed strategies of Kenya and Nigeria's anti-corruption agencies?
ii. What is the relationship between the UNCAC's renewed anti-corruption initiatives and the anti-corruption agencies' strategies in Kenya and Nigeria?
iii. To what extent has the UNCAC framework shaped the renewed strategies adopted by Kenya and Nigeria's anti-corruption agencies?
iv. How far have the strategies of the anti-corruption agencies of Kenya and Nigeria achieved their objectives vis-à-vis the UNCAC pillars?
v. What are the visible comparative changes induced by the UNCAC in the context of the strategies of Kenya and Nigeria's anti-corruption agencies?

1.4 Research Objectives

In the light of the foregoing research questions, the aim of the research is to examine the extent to which the strategies of Kenya and Nigeria's anti-corruption agencies have been shaped by the emergence of the UNCAC between 2003 and 2008 in the areas of compliance and implementation.

In specific terms, the objectives of this study are:

i. to appraise the nature of the renewed strategies of Kenya and Nigeria's anti-corruption agencies;

ii. to examine the relationship between the UNCAC's renewed anti-corruption initiatives and the anti-corruption agencies' strategies in Kenya and Nigeria;

iii. to ascertain the extent the UNCAC pillars shaped the strategies adopted by KACC in Kenya and EFCC in Nigeria;

iv. to establish whether the strategies of the anti-corruption agencies of Kenya and Nigeria have achieved their objectives vis-à-vis the UNCAC pillars; and

v. to identify the visible comparative changes induced by the UNCAC in the context of the strategies of Kenya and Nigeria's anti-corruption agencies.

1.5 Methodology

Corruption is perceived in this study as a global phenomenon which over the years has metamorphosed into an avalanche of methodologies. Any method of analysis to be used at all should be able to incorporate an approach that has the competence of reflecting the extent or degree of the treatment of the global anti-corruption strategies in line with the strategies of anti-corruption agencies of the two selected countries.

Therefore, for the purpose of this study, the comparative-case study method and a combination of expert interviews/information were used. The choice of methodology was influenced by the presence of multiple actors in the anti-corruption initiatives and considering the nature of this study. This choice was also informed by time constraint and practical reasons. The arrangement goes thus:

1.5.1 Study Design

This study was designed as a survey research. This type of research is concerned with gathering information, generally obtained from a fraction of a total population (universe), through interviews and secondary sources.[21] Survey research entails the standardisation of data collection, while the reliance on qualitative methods exploits the context of data gathering to enhance the content of data.[22] This research

format has several advantages, two of which are quite vital for the study. First, the survey method allows generalisations to be made on the findings based on the drawn sample. Second, surveys provide one of the few instruments for the study of approaches as its techniques directly elicit responses on these issues.[23] Since this study was designed to collect data on the strategies of anti-corruption agencies for dealing with public sector corruption, survey research was the most suitable research design.

It should, however, be noted that the survey design is not without limitations. The most crucial is the fact that it is generally associated with the production of inaccurate data occasioned by memory decay.[24] In surveys, respondents may suffer memory decay if the requested information has been forgotten or if the information involves an individual's self esteem.[25] The implication is that invaluable data could be lost as events can either not be recalled or mis-recalled, hence the production of inaccurate data.[26] Since this study was partly concerned with the recollection of past events, secondary quantitative and qualitative data were used as a backup. As the survey investigated anti-corruption strategies put in place by anti-corruption agencies established by governments in power, there was a high probability of officials exaggerating, biasing the study, and causing individuals to either under-report or over-report their actions.[27]

Unfortunately, this bias could not be eliminated, but was mitigated in this study through dependence on the avalanche of well researched quantitative and qualitative data made available by various anti-corruption bodies like the World Bank, TI, Global Integrity, Afrobarometer, Freedom House and a host of others. Hence, part of the information for this study had been researched primarily through the interviews of experts coupled with usage of relevant organisations' websites and e-mail addresses of their representatives and officials to solicit for relevant information.

1.5.2 Instrument of Data Collection

The instrument of data collection is the interview. This is the stage where the relevant interview questions were designed on the basis of the objectives of the study.[28] The interview involved thirty officials purposively selected from Kenya and Nigeria. This consisted of nine officials from the Kenya Anti-corruption Commission (KACC), nine from Nigeria's Economic and Financial Crimes Commission (EFCC) and three officials each from four non-governmental anti-corruption agencies in both countries. These included Transparency International, Kenya, Mars Group, Kenya on one hand and Transparency International, Nigeria and Anti-Corruption Awareness

Organisation Nigeria (ACAON) on the other hand. Major part of the interview focused on compliance and implementation of the convention's five pillars: prevention, criminalisation, asset recovery and international co-operation and technical/ information exchange in line with the corruption strategies of the KACC and the EFCC. While other parts dwelled on the successes and challenges of the KACC and the EFCC anti-corruption strategies during the focused period. The questions asked during the interviews were drawn by the researcher and validated by the supervisor of the study and experts in the field, such as Professor Assise Asobie of TI Nigeria, Professor Adele Jinadu (currently the Head of Political Science Department, Tai Solarin University of Education) and Dr. David U. Enweremadu of Political Science Department, University of Ibadan.

1.5.3 Methods of Data Analysis

The study is based on comparative-case study approach using good governance model and supplemented by contingency theory. The relevant data were collected, collated and content analysed comparatively vis-à-vis the strategies of anti-corruption agencies in Kenya and Nigeria and using the following five pillars of the UNCAC:

i. Prevention of Corruption

ii. Criminilisation of Corruption and Law Enforcement

iii. International Co-operation and Legal Assistance

iv. Asset Recovery

v. Technical Assistance and Information Exchange

The above evaluation criteria were used to analyse comparatively the strategies of Kenya and Nigeria's anti-corruption agencies between 2003 and 2008. The responses from the conducted interviews were recorded, transcribed and content analysed. These were supplemented and supported with relevant tables and figures from credible secondary sources which included the content review of official journals, international sponsored documents, newspapers, magazines and Internet resources. In essence, the strength of the analysis relies heavily on descriptive and evaluative interpretation, critical argument and narrative details.

1.6 Justification

Anti-corruption strategies are complex and multi-faceted issues. This is because every society tends to share a particular understanding of what, in each

context, constitutes corruption. The adoption of the UNCAC in the pursuit of corruption control is expected to rub-off on the domestic anti-corruption efforts, especially in the sub-Saharan Africa. Aside unfolding challenges in the areas of implementation and abound doubts whether the Convention has the wherewithal to effectively tackle endemic corruption in these countries. There is also paucity of comparative studies on the extent of how this Convention has shaped the anti-corruption strategies in most of the sub-Saharan African countries.

It therefore requires contextual analysis and understanding of the extent of the Convention's response to corruption vis-à-vis the renewed anti-corruption strategies in Kenya and Nigeria being the foremost subscribers to the UNCAC among the sub-Saharan African countries. And both countries ranked high in the anti-corruption strategies in recent years. It is therefore appropriate to comparatively analyse the strategies of Kenya and Nigeria's anti-corruption agencies to comprehend the extent they have gone in their quest to fight corruption within the framework of UNCAC which emerged in 2003.

1.7 Scope of the Study

The scope of this study is a broad one which is basically on public sector corruption. It focuses on the major five pillars of the UNCAC within content and context of the anti-corruption strategies of Kenya's KACC and Nigeria's EFCC. The focused period falls between 2003 and 2008. The choice of this timeline is due to the fact that 2003 signaled the beginning of genuine United Nations attention on corruption given the overwhelming support for the adoption of the UNCAC in October, 2003. Focusing on this five-year period gives enough allowance for proper examination of the UNCAC score card in the context of the anti-corruption strategies of the KACC and the EFCC. This also enhances the achievement of the objectives of this research and has the potential of providing an opportunity for the answering of the major research questions raised.

The intention of this study is therefore not to examine all sub-Saharan countries, but countries like Kenya and Nigeria were singled out for in-depth analysis using the aforementioned UNCAC pillars, served as the evaluation criteria for our cross-country comparative method.

1.8 Organisation of the Study

This section focuses on the chapterisation. The study is divided into eight chapters. Chapter one concerns introduction/background to the study, chapter two focuses on literature review and theoretical framework, chapter three examines the provisions of the UNCAC while chapter four is on the state of corruption in Kenya and Nigeria. In chapter five, strategies of Kenya's KACC and Nigeria's EFCC are examined while an attempt is made in chapter six to compare strategies of Kenya and Nigeria's anti-corruption agencies within the framework of the UNCAC. Chapter seven presents the findings of the study while chapter eight focuses on summary and conclusion.

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CHAPTER TWO

LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1 Introduction

Understanding corruption is important in the context of global strategies to reduce its influence in public life. But that is not an easy task. The reason being that it is a complex concept with social, legal, economic and political dimensions. This makes it a controversial subject with competing approaches trying to come to grips with and explicate its nature. Naturally, views on corruption focus on one or several aspects of the phenomenon.

For the purpose of this study, the literature review on corruption and anti-corruption strategies have been categorised into the analytical and empirical literature. The analytical literature focuses on definitions and categorisation, causes and costs, analytical frameworks, governance and indicators,[1] structural and normative fronts; while the empirical literature reviews political and societal dimensions (systemic corruption), rule of law (control and prosecution of corruption), public administration and systems reforms (prevention), extractive industries and service delivery (sector corruption), non-state actors (transparency and accountability) and anti-corruption initiatives (capacity building and organisational development)[2]. All these categorisation are not mutually exclusive. This is because contextualising corruption in terms of its meaning, categorisation, causes and costs on one hand and various anti-corruption initiatives on the other hand are interwoven.

In this section, an attempt is made to put into perspective various anti-corruption strategies, the development of global strategies on corruption, reasons for global strategies on corruption and objectives of the UNCAC. The focus of this chapter is therefore to undertake the above-mentioned tasks with a view to identifying existing gaps in the literature in context of the itemised headings, as well as situating the study within the relevant theoretical framework.

2.2 The Analytical Literature on Corruption

The concept of corruption can be appreciated from the stance of a phenomenon that has defied precise and specific definitional logic.[3] Corruption was once viewed as a positive occurrence because it oils the wheels of the economy, relatively efficient options for the distribution of resources and that the little bit of corruption that comes with democracies makes them work better-by lowering transaction costs, reducing the inefficiencies of cumbersome rules, and generally making things happen.[4]

In the same vein, Gould and Reyes[5] argue that corruption promotes efficient and entrepreneurial behaviour by encouraging capital formation and investment, cutting back bureaucratic red-tape and overcoming rigidities in the awarding of contracts, and granting of licences etc,. In this way, corruption is said to promote economic development and it also transfers decision making power from the public sector to private sector thereby creating rationality and effectiveness in the bureaucracy. For this reason, corruption is said to add to national integration, sustains political stability, fosters political development and encourages economic growth. Given the above scenario, according to these authors, there are political, economic and bureaucratic merits of corruption.

Similarly, Nye[6] avers that if development can be conceptualised in terms of economic growth, national integration, and expansion of governmental capacity, then corruption can contribute to development. This is because corruption can lead to capital formation, cut back red-tape and give incentives to enterprises. Further, Nye argues that corruption may help to civilise civil service and engenders public friendship, and unite the elites, bankroll political parties and incorporate political support. The thrust of these arguments is that corruption in developing countries is not necessarily anti-development of contemporary economic and social systems; that it serves beneficial purposes in developing countries.

In contradistinction to the above views, positive stance on corruption has since been changed and dispelled and now being viewed negatively. Despite this, the nature of corruption has been vigorously contested in the extant literature. Although seen as a general term for a range of depressing phenomena in any polity, analysts do not agree on its definition, causes, costs and reforms.[7] Hence, it can be given as diverse understanding as the sources available for review. Osobo cited by Mulinge and Lesetedi[8] defines corruption as:

> a form of anti-social behaviour by an individual or social group which confers unjust or fraudulent benefits on its perpetrators, is inconsistent with the established legal norms and prevailing moral ethos of the land and is likely to subvert or diminish the capacity of the legitimate authorities to provide fully for the material and spiritual well being of all manners of society in a just and equitable manner.

Corruption has also been viewed as 'an illegal act that involves the abuse of public trust or office for some private benefit',[9] or 'the misuse of public office for private gain'.[10] Kaufmann refers to it as 'use of public office for private gain.[11] Corruption is also seen as:

> any act, intentional or unintentional, paid for financially or otherwise to gain an unfair advantage in influencing decisions for personal or group gain largely transacted for by political power, bottom power, financial stamina, authority or any other form of influence that can be used to arm-twist or palm-grease in one's favour.[12]

According to Mbaku cited by Destas[13] corruption is viewed by most Africans as a practical issue involving "outright theft, embezzlement of funds or other misappropriation of state property, nepotism and the granting of favour to personal acquaintances and the abuse of the public authority to exact payments and privileges." Defined this way, the general public is seen as the principal agent and the public officials as the agent.

Corruption is to mean a transaction or an attempt to secure illegitimate advantage for national interests, private benefit or enrichment, through subverting or suborning a public official or any person or entity from performing their proper functions with diligence and probity.[14] The definition of Frazier-Moleketi[15] takes into cognizance the different forms of corruption that exists in both the public and private sectors of the Kenyan and Nigerian societies. Trust is often times abused hence leading to a situation where "public goods" which was suppose to be used for the general interests of the people is usurped as the property of a few political and public official holders.

Institutional perspective on corruption has also been underscored. Anti-corruption efforts became a visible and official part of the development community's agenda when the then President of the World Bank, Mr. Wolfensohn, addressed what he termed "the cancer of corruption" at the Bank's Annual Meeting in Hong Kong in

October 1996. The following as stated in the in UNDP's Anti-corruption Practice Note sums up his view on the impact of corruption:

> The negative impact of corruption on development is no longer questioned. Evidence from across the globe confirms that corruption disproportionately impacts the poor. Corruption hinders economic development, reduces social services, and diverts investments in infrastructure, institutions and social services. Moreover, it fosters an anti-democratic environment characterised by uncertainty, unpredictability and declining moral values and disrespect for constitutional institutions and authority. Corruption, therefore, reflects a democracy, human rights and governance deficit that negatively impacts on poverty and human security. That is, corruption is rejected on efficiency and effectiveness grounds – it is dysfunctional to the attainment of the Millennium Development Goals. But it is also attacked from a rights perspective: corruption undermines democratic values and institutions, and in particular works against the interests of the poor. [16]

The World Bank considers it as 'an abuse of public authority for the purpose of acquiring personal gain'.[17] According to the World Bank, corruption is:

> …the abuse of public office through the instrumentality of private agents, who actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Beyond bribery, public office can also be abused for personal benefit through patronage and nepotism, for example, the theft of state assets or the diversion of state revenues.[18]

The African Union Convention on Preventing and Combating Corruption views corruption as 'the acts and practices including related offences proscribed in the Convention.[19] They are the solicitation or acceptance by a public official, or the offering or granting to a public official or any other person a gift, favour, promise or advantage in exchange for the performance of public functions.[20]

The Inter-American Convention against Corruption similarly describes acts of corruption to include the solicitation or granting of inducements to public officials in exchange for any act or omission in the performance of public duties.[21] Similar provisions are found in the Council of Europe's Criminal Law Convention on Corruption[22] and the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).[23]

The United Nations Convention against Corruption (UNCAC)[24] does not provide a definition of corruption. However, an understanding of what corruption entails may be gleaned from article 15(b) which prohibits:

> (t)he solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties.

It proceeds to deal with specific aspects of corruption in the public and private sectors[25] bribery, embezzlement, trading in influence, illicit enrichment, laundering of proceeds of crime and concealment of property.[26]

Similarly, Transparency International (TI) interprets corruption to mean 'misuse of entrusted power for private gain.' It also views corruption as behaviour on the part of officials in the public sector, whether politicians or civil servants, in whom they improperly and unlawfully enrich themselves, or those close to them, by the misuse of public power entrusted to them.[27] Although the definition of the Transparency International is very descriptive, it focuses only on the public sector and this is germane for this study.

From the foregoing, what comes to the fore is that; first, corruption is a complex issue with intricate linkages to other political and economic factors, both within a country and internationally; and second, tackling corruption is not a one-shot endeavour, but a challenging long-term undertaking. Efforts to be definitive regarding corruption have led to the development of various typologies and taxonomies of practices and behaviours. However, some scholars see these as unhelpful because they isolate corrupt practices from the political and institutional setting in which they occur. As Johnston points out, "corruption is now most frequently analysed as endogenous to political and economic development rather than as an external influence upon them…It is viewed as a systemic process, rather than as a discrete action or set of incidents, and evidence of its effects is sought at a variety of levels in society and in the economy". [28]

2.2.1 Categorisation of Corruption

The literature on corruption distinguishes between different types of corruption, such as petty versus grand, administrative versus political. The terms petty and administrative refer to the smaller scale corruption involved in service delivery and can also refer to the type of extortion (e.g. by traffic police) or soliciting of "speed money" (e.g. customs officials). Grand corruption relates to transactions that involve

larger sums of money, as for example in procurement and construction.[29] Political corruption can refer to the same, but also encompasses what is commonly referred to as "state capture", when groups are able to influence the rules and regulations set by the state in ways that allows them to extract undue economic or political benefits. The terms, petty and bureaucratic/administrative on the one hand and grand and political on the other, are often used interchangeably.[30]

There are examples in the literature of the usefulness of distinguishing between different types of corruption, in terms of scale, cause, context and method. A good illustration of the usefulness of the last of the above distinctions, administrative corruption vs. state capture, is presented by the World Bank's analysis of the data from their Business Environment and Enterprise Performance Survey (BEEPS).[31]

2.2.2 Causes and Costs of Corruption

Although it is difficult to generalise about causes of corruption in sub-Saharan Africa,[32] but some that have been reviewed share some factors that have been identified and perceived as instrumental to enthroning corrupt practices in Kenya and Nigeria.[33] These include poor incentive and reward structure, a lack of transparency and accountability, ineffective legal frameworks, an ineffective judicial system, and tolerant attitudes and lack of public awareness about the costs and consequences of corruption. The above positions have been corroborated by some scholars such as Ninalowo[34] that low civil service salaries and poor working conditions, with few incentives and rewards for efficient and effective performance, are also strong inducement for corruption.

According to Diamond,[35] the overall poor culture of governance has also played an important role in institutionalising corruption in sub-Saharan Africa. Most of the African leaders and eminent bureaucrats are bequeathing unenviable examples of self-enrichment over public ethics thereby luring the lower level officials and members of the public into corrupt practices. Informal rules are found to be superior to formal ones, thereby making strict legal principles and procedures to weaken. Hence, bribery and corruption are taken by many Africans as norm even in the face of anti-corruption initiatives aimed at supporting good governance.

Poverty is also said to be the root cause of corruption and that without poverty, there would be no corruption. These views have been espoused by some scholars such as Khawaja[36] and others. It has been observed that in many poor countries like

Pakistan, the wages of public workers is not sufficient for them to survive. Many people therefore engage in petty corruption to make ends meet. However, it seems that poverty thesis cannot be sustained given the involvement of rich people and rich countries in corruptible transactions. It has been documented that:

> Recent World Bank estimates of the wealth, which corrupt African leaders have stashed away in European banks stands at several billion of US dollars. None of these leaders can be described as victims of poverty. Yet, by plundering national treasuries, these African leaders have unquestionably deepened the poverty of their people. [37]

There is also the suggestion that corruption is part of the culture of many developing countries. This line of argument is mostly canvassed by Eurocentric scholars. They argue that:

> What is regarded as corruption in Africa is a myth because it is expected that a beneficiary should show appreciation for a favour granted him/her. If a government official offers one a job or contract, the beneficiary would be obliged to show appreciation either in kind or cash to the government official just as he would do to a village chief if granted a land to cultivate crops or build a house. Corruption is a myth because 'one's culture's bribery is another's mutual goodwill.[38]

Aside this, Maduagwa,[39] argues that a culture of affluent and ostentatious living that expects much from "big men," extended family pressures village/ethnic loyalties, and competitive ethnicity are also a contributive factor. Although this line of thought could not be totally dismissed as such was the case of the majority political leaders in Kenya and Nigeria where political appointees are always under pressure to loot national treasuries for personal benefits and kith and kin.

However, it has been argued that African society frowns at corruption or stealing of anything that does not legally belong to one and there are strong community sanctions for such behaviour. As Maduagwa has argued,

> It is mere trivialisation of the serious issue of corruption in the modern society for anyone to suggest that corruption or embezzlement of public funds or extortion of money (bribes) from people looking for jobs or contracts or other benefits from government could be equated to the customary requirement of bringing presents to the chief for permission to cultivate a land and such things.[40]

Obasanjo also attacked the notion that corruption is part of African culture when he stated that:

> I shudder at how an integral part of our culture could be taken as the basis for rationalising otherwise despicable behaviour. In the African concept of appreciation and hospitality, the gift is usually a token. It is not demanded. The value is usually in the spirit rather than in the material worth. It is usually done in the open and never in secret. Where it is excessive, it becomes an embarrassment and it is returned. If anything, corruption has perverted and destroyed this aspect of our culture.[41]

Furthermore, every society has ways of showing appreciation, which is quite different from corruption as we have defined above. In Europe and America, the giving of tips to bar attendants is an accepted way of showing appreciation akin to appreciation shown to a chief, who gives permission for land to be cultivated.

Related to the myth of culture is the argument that in Africa, there is allegiance to the extended family and community. As a result, when one climbs up the social and political ladder, he/she is expected to and under pressure to give gifts, money, job and contracts to people of his/her community. Therefore, when people bow to these pressures, they slip into corruption. It must, however, be noted that in any society, there are different kinds of pressures. Succumbing to negative pressures in any society cannot be accepted as the norm.

Another argument that has been advanced by Marxist scholars is that corruption is the method that the capitalist class that emerged from colonialism uses to accumulate wealth. They argue that inflation of contacts, over-invoicing, collection of kickbacks and buying off of public enterprises at give away prices are primitive means of accumulation of capital that the emergent bourgeoisie in post colonial countries utilise.

Finally, some scholars have attributed corruption in the African continent to the legacy of colonialism. They argue that the colonial state lacked transparency and accountability to the African people. If there was any iota of accountability, it was to the metropolis in London, Paris, Lisbon or elsewhere but definitely not to African people and institutions. This is why after independence; the post colonial state and government have remained alien to the African.

It has been argued elsewhere that colonised people saw government as oppressive and alien; and “this is why in most African languages, government work is

described as white person's job."[42] In our view, corruption is a problem, which is multifaceted. It is caused by a complex of factors and relations ranging from poverty to greed and primitive accumulation conditioned by colonial heritage.

There are two opposing approaches in the literature on corruption, regarding the costs of corruption: efficiency enhancing and efficiency reducing. Advocates of the efficiency-enhancing approach, like Leff, [43] Nye,[44] Huntington[45] and Friedrich[46], argue that corruption greases the wheels of business and commerce and facilitates economic growth and investment. Thus, corruption increases efficiency in an economy. Some of these positions have been highlighted at the beginning of this chapter.

As regards efficiency reducing position and the costs of corruption, Githongo[47] argues that most sub-Saharan African states are characterised by what is termed "embedded levels of corruption," involving inter-woven networks of politicians, bureaucrats, the private sector and security sectors. Coupled with high poverty rates and weak democratic institutions, the effects of corruption are particularly visible in sub-Saharan Africa. As one commentator put it:

> Africa is a "cemetery of white elephants, still-born projects and drained of funds... larded with abandoned motorways eaten away by the savannah, factories that went down the drain barely a year after opening, rail lines impassable due to lack of maintenance, hydro-electric dams that have been abandoned owing to non-profitability". [48]

With approximately 50 % of sub-Saharan Africa living below the poverty line, the impact of corruption on the poor is particularly devastating.[49] The African Union estimates that corruption increases the cost of goods by an average of 20 percent.[50]

Furthermore, it is the poor who are the most reliant on public services but the least capable of paying the prices associated with bribery and other forms of corrupt activity to attain those services. Corruption also undermines the very delivery of these public services: roads are not built, hospitals are under-resourced, and schools are inadequately supplied. As regards the costs of corruption, it has a lot of negative impact on every sphere of societal development: social, economic and political.

As Ikubaje[51] has argued, corruption is a global phenomenon and its effects on individual, institutions, countries and global development have made it an issue of universal concern. In the same vein, the cost of corruption include the erosion of the moral fabric of society, violation of the social and economic rights of the poor and vulnerable, undermining of democracy, subversion of the rule of law, retardation of

development and denial of society, particularly the poor, of the benefits of free and open competition.[52]

Bello-Imam,[53]on the other hand, has outlined the negative consequences of corruption to include: retardation of economic growth, misallocation of talent, limitation of aid flows, loss of tax revenue, adverse budgetary consequences, negative impact on quality of infrastructure and public services and negative composition of government expenditure.

Eigen[54] correctly noted, "corruption doesn't just line the pockets of political and business elites; it leaves ordinary people without essential services such as life saving medicines and deprives them of access to sanitation and housing. In short, corruption costs lives."

2.2.3 Understanding Anti-Corruption Strategies

The term 'anti-corruption' was felt to be too heavily associated with the corrective aspects of controlling corruption and enforcing anti-corruption legislation. It could come in different from such as crusades, reforms, setting up anti-corruption agencies, commissions of enquiry, ombudsman, asset declaration strategy and host of others. From the perspective of those involved in state reforms, the process of ensuring integrity was regarded as one that begins by positively involving the broad base of a country's population, and, in a sense stressing country ownership, particularly when related to the respect, use and strengthening of local norms and value systems.[55] In contrast, the anti-corruption approach was perceived to be a top-down process, prescriptive and driven by international standards, translating less easily into local norms and systems (including the use of informal systems).[56]

However, generally, anti-corruption strategies involve comprehensive set of instruments embarked upon by government in power to combat corruption. It is about prioritising, sequencing, and combining reforms design for most effective initiatives targeting at the main sources of the persistence of corruption. It has to do with realistic expectations regarding the necessary time horizon of reforms in different contexts.[57]
Anti-corruption strategies are partly the pronouncements made or concerted actions taken by an institution to fight corruption. Usually, these types of campaigns commence at the national or sub-national government level or at the ministry or agency level. For instance, Kenya's anti-corruption campaign commenced when President was sworn and Nigeria's campaign from 2003-2008 on zero-tolerance for

corruption and the recovery of state assets lost through past corrupt acts is an example of a crusade at the national government level, with commitment voiced by the president. In Australia, several state-level governments set up commissions to investigate allegations of corruption and sought to publicise their findings and corrective actions in the past while many African governments have made several pronouncements to initiate anti-corruption measures. As for the ministry or agency level initiatives, those entities that are more prone to corruption by virtue of their functions often pronounce their commitment to in-house clean-up.[58]

However, anti-corruption crusades do not only belong to the sphere of governments. They can also be initiated by private sector organisations, such as a group of businesses, or by civil society organisations, such as religious institutions or non-governmental advocacy groups. In fact, many government crusades are a result of pressure by watchdog groups that demand accountability in the face of a scandal or exposed corrupt acts. In 1995, the Centre for Law and Research International (CLARION), purposefully decided to dare where, as the saying goes, angels dared not embarked on research into the extent, nature and impact of the phenomenon of corruption in Kenya; while an organisation called Mars Group of Kenya also only monitors corruption in the public sector. Nigeria's anti-corruption initiative was started and is operated by a non-governmental organisation (NGO), the Centre for the Study of Democracy, in cooperation with government institutions and a number of other NGOs. The founding of TI organisation with its country chapters can be seen as a very good example of a civil society anti-corruption strategy at the global level. As is the case with TI, generally it is the vision of a dedicated individual or a group of individuals that kicks off a crusade – whether initiated by the government, private sector, or civil society.

A government usually launches an anti-corruption crusade with lots of fanfare and pronouncements of lofty ideals. These types of exercises are usually greeted by a lot of hope and cynicism at the same time. An expectation is created that changes will come about to punish those persons who have carried out gross corrupt acts in the past and prevent others in the future from doing likewise. Sometimes these crusades do result in prominent and highly-placed public officials who have engaged in corruption are being punished and serving as a deterrent to others. Nigeria has got a lot of press coverage for making examples of high-ranking officials who have engaged in corrupt

practices. Other times, the anti-corruption crusades remain at the level of rhetoric and do not result in any significant changes.

2.2.4 Analytical Frameworks and Reforms

National integrity systems are a part of the frameworks popularised by Transparency International (TI). The TI's National Integrity System (NIS) is one of the earliest and most influential analytic frameworks for anti-corruption. The NIS is visualised as a Greek temple where the roof of National Integrity rests on sixteen "Pillars of Integrity."[59] (See Table 2.1).

Table 2.1. Sixteen Pillars National Integrity System (NIS)

Executive	Legislature
Political Parties	Electoral Commissions
Supreme Audit Institution	Judiciary
Public Service	Police and Prosecutors
Public Procurement	Ombudsman
Anti-corruption agencies	Media
Civil Society	Private Sector
Regional and Local Government	International Institutions

Sources**:** Disch, A., Vigeland, E. Sundet,G. (Scan team), Hussmann, K. and O'Neil T. (External Resource Persons). 2009. Anti-Corruption Approaches: A Literature Review Commissioned by Asian Development Bank (ADB), Danish International Development Assistance (Danida), Department for International Development (United Kingdom) (DFID), Norwegian Agency for Development Cooperation (Norad), SADEV - Swedish Agency for Development Evaluation Swedish International Development Cooperation Agency (SIDA).

The pillars in turn stand on a foundation of public awareness and society's values. The acknowledged strength of this system is that it recognises that fighting corruption requires a holistic approach that engages all sectors of the state, specialised institutions and non-state actors.[60] These studies have provided useful analysis of the various components of a country's integrity system, although their quality has varied from country to country[61].

A weakness of the NIS as an analytical framework is that it does not capture well the interaction between the various institutions, all of which are copied from Western states. It is not surprising that it has appealed to the international financial institutions and western countries, however, as the clean division between various sectors and partner institutions fits well with their views of what needs to be done. Examples of these are Public Service Reforms, Public Financial Management Reforms and Local Government Reforms, all of which tend to have parallel programmes of implementation through the various levels of government from the national to the local. The absence of horizontal linkages at each level is not very visible to donor officials who are concerned with their own sector portfolios.

2.2.5 Governance and Indicators

The measurement of corruption and governance is one of the major challenges confronting the evaluation of anti-corruption approaches. This is also an area where giant strides have been made in the years since anti-corruption became significant. There have been an escalating number of governance and corruption indicators being created to analyse corruption (see Table 2.3).

Table 2.2. Corruption-Related Indicators/Indices

Indicator/Index	Survey Informants	Available for Years	Countries	Scope
(1) Control of Corruption Index (COC)	Business leaders, opinion of general public and assessments by country analysts	1996, 1998, 2000, 2002 to 2006	212 countries and territories in 2006	The extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as capture of the state by elites and private interests.
(2)Corruption Perceptions Index (CPI)	Business leaders, and assessments by country analysts	1995 to 2007	180 countries in 2007	CPI asks questions that relate to the misuse of public power for private benefit (bribery of public officials, kickbacks in public procurement, etc) or questions that probe the strength of AC policies, thereby encompassing both administrative and political corruption.
(3) ICRG Corruption Risk Scores	Assessments by staff	1984 to 2006	140 countries in 2006	Potential corruption risks to international business operations that include actual and potential corruption in the form of excessive patronage, nepotism, job reservations, "favour for favours", secret party funding and suspiciously close ties between politics and business.
(4) Corruption Index	Executive opinion survey of over 11,000 business leaders and entrepreneurs	Yearly 1996 – 2007/08	131 economies in 2007/08	To the extent that corruption affects business (bribes for import and export permits, bribes for getting connected with public utilities, bribes in connection with annual tax payments).
(5)Global	Based on	2006,	76 countries	The index measures the existence

Integrity Report	independent social scientists and investigative journalists.	2007	in 2007	and effectiveness of practices that prevent corruption.
(6)Bribe Payers Index	11,200 business executives from 125 countries	1999, 2002 and 2006	Ranks 30 exporting countries in 2006	Asked two questions about the business practices of foreign firms operating in their country (part of World Economic Forum's Executive Opinion Survey 2006). Captures supply side of corruption – the propensity of firms from industrialised countries to bribe when operating abroad.
(7) Country Policy and Institutional Assessment (CPIA)	Expert rating (World Bank staff)	Annual, latest is 2006	All IDA eligible countries, 77 in 2006	Transparency, accountability and corruption in the public sector, primarily used to link to IDA resource allocation.

Sources: Asia-Pacific Human Development Report, UNDP (2008), pp. 222-223. (1): World Bank, info.worldbank.org/governance. (2) Transparency International, www.transparency.org (3) the Political Risk Service group, www.prsgroup.com (4) World Economic Forum, www.weforum.org (5) Global Integrity, www.globalintegrity.org

The best known corruption indicators are Transparency International's Corruption Perceptions Index (CPI) and the World Bank Institute's World Governance Indicators (WGI). The WGI divides governance into six areas, one of which is Control of Corruption (COC). Both the CPI and the WGI are composite indices, based on averages in the case of the CPI and weighted averages when it comes to the control of corruption, of a large number of surveys that largely refer to perceptions of levels of corruption. The CPI and COC are normally presented in tables that rank countries' performances relative to each other. These indices have been created for more than twelve years and are thus quite well recognised, the recent versions covering 180 countries in the case of the CPI and 212 in the case of the COC.[62] Others include Mo Ibrahim Index of African Governance, which is peculiar to Africa, while the World Economic Forum's Corruption Index, the Political Risk Service group, a private firm, publishes its International Country Risk Guide covering 140 countries.[63] This is also a weighted average of three underlying indices, but is prepared by its own staff rather than through external surveys.

Other indicators that are based on internal assessments rather than surveys of informant groups are the World Bank's Country Policy and Institutional Assessment (CPIA), Global Integrity's Global Integrity Report, and these indicators are all based on having some clearly identified dimensions or variables that are to be monitored with pre-defined "objective" criteria for assigning ratings, much like the Public Expenditure and Financial Accountability (PEFA) indicators do for the Public Financial Management assessments. In the case of the Global Integrity Index this is largely done by social scientists or investigative journalists, while the Open Budget Index is often done by NGOs. Both of these indices include industrialised countries, which allow for a more interesting discussion both about methodology but also substantive concerns regarding the kinds and causes of corruption that are common across groups of countries.

The criticism of the indicators can largely be seen to centre around two issues: the accuracy of the measurement (reliability), and if they in fact provide a fair representation of what they are intended to measure (validity). But the raised criticisms and others have been answered by Kaufmann and Kraay,[64] who vigorously defend their methodology of generating comparable measurements of governance and corruption. But the World Bank and Transparency International are very conscious of the fact that cross-territorial comparisons based on in-country subjective perceptions

are problematic at best. But this has been the most popular and most powerful use of indices, to tell "how bad corruption is" in a country. Year on year, changes within a country also attract considerable attention and this is by and large a safer comparison to make.[65]

2.3 The Empirical Literature

In recent years there has been large body of empirical research on corruption.[66] For our purpose the empirical literature has been structured around the seven related societal/thematic dimensions.

2.3.1 Political and Societal Dimensions: Systemic Corruption

When analysing the political systems in most of the sub-Saharan African countries, it was found that many of them could best be described as "neo-patrimonial", or that the public sector was subject to "state capture". In a neo-patrimonial system, politics and governance are oriented towards maintaining control and influence through personal or commercial/financial bonds (or directly through controlling the state's repressive apparatus). State capture denotes a situation where business and political elites are able to define policies and manage the state system to their advantage. In either of these systems, which are not mutually exclusive, coming to power and the maintenance of power is resource intensive. The ability to remain in power is thus dependent on access to considerable resources, which are accessed through various rent extraction activities (corruption). The introduction of multiparty systems and elections may increase the cost of maintaining or gaining power, meaning corruption levels in fact can increase. Under these circumstances regimes have little or no interest in implementing an anti-corruption agenda, as the overriding objective of those in power is to remain in power, which takes precedence over the achievement of national development goals if there is a conflict between the two. The noted lack of political will to pursue vigorously anti-corruption global agenda is therefore a rational choice since the existing system is dependent on the continued reproduction of corruption.

With the focus shifting towards the politics of a country, new tools were developed to analyse and inform development policy making. The two best known approaches are Department for International Development's (DFID), "Drivers of Change" emanated from a critical analysis of development and the governance agenda and provides a useful summary of the insights provided by the studies of the

characteristics of the state's analysed more or less pervasive forms of patron-client relations and neo-patrimonialism; 'corruption', state capture, wealthy and dominant elites determined to hold on to state power, the politicisation of businesses and the phenomenon of 'shadow states' (or polities); personalistic political parties; weak, divided, deferential or impotent civil society organisations, (though some show potential for exercising pressure); limited or weak political 'demand' for rapid or realistic institutional reform to improve conditions for growth, governance and service delivery; minimal or non-existent 'political will' although the notion of 'political will' is not adequately defined; the relative absence in many cases of any clear and agreed overarching national economic strategy, project or set of socio-economic goals (other than in rhetoric); low levels of 'stateness', and hence, governance, with demoralised and politicised bureaucracies, dubiously independent judiciaries and (sometimes) militaries. While Swedish International Development Cooperation Agency's (SIDA) "power analysis" deals with different approaches to analysing and understanding the political and institutional factors that shape development outcomes." [67]

2.3.2 Rule of Law: Control and Prosecution of Corruption

Since the 1990s, with the emergence of anti-corruption as a field, rule of law is – in addition to the "good governance" perspective – also seen as an anti-corruption means: clear rules of correct behaviour in conjunction with deterring prospects of disclosure, criminal investigation, prosecution and conviction (enforcement) are held to prevent corrupt behaviour in the public sector. Over the last ten years, a generation of new interventions has come in addition to the larger, pre-existing good governance and rule of law efforts, namely the focus on the introduction of more specialised anti-corruption legislation (anti-corruption laws) and institutions (anti-corruption commissions). Some of these strategies have been based on the need to put in place new and more modern organisations that are capable and have the mandate to address particularly difficult problems, such as economic crimes and corruption – specialised bodies that have become part of the rule of law system in many industrialised countries as well. But the rationale for many of these initiatives has also been to by-pass existing but often corrupted ordinary police and prosecutorial systems. This has often led to conflicts over roles and mandates, created the impression that many of the new bodies such as the KACC and the EFCC are in fact foreign-supplied and to a large extent obliged to the international community rather than to the local political system, and

thus have questionable legitimacy and credibility in the eyes of many local stakeholders. Within a neo-patrimonial context, however, it is not clear what other avenues are open for establishing within-the-state bodies that can begin addressing corruption.

Two aspects of rule of law are deemed mainly relevant in the anti-corruption discourse: good governance and corruption deterrence. Despite the obvious relevance of rule of law to anti-corruption objectives, according to Carothers,[68] Pelizzo and Stapenhurst,[69] OSI Justice Initiative,[70] Stapenhurst, Johnston and Pelizzo,[71] the literature does not provide much material on support of the developed countries in this field. Most of the interventions address two issues: support to the introduction of key laws such as anti-corruption legislation, and programmes and projects to strengthen the basic state institutions of enforcement, such as prosecutorial organs, the police, the courts; and more lately, to special anti-corruption entities.

Rule of law efforts in the development context are not recent.[72] For more than a quarter of a century through the so-called "law and development" movement, western countries and international financial institutions have sought to encourage the growth of rule of law in developing countries as part of a wider governance agenda. Much of the literature sees rule of law as a precondition, or a feature of, a healthy democracy, without rule of law the careful separation and balancing of powers in a democratic constitution is undermined, and the state machinery will be unable to provide good governance as intended, hindering development.

Consequently, rule of law has been a major element in good governance development cooperation strategies. It would appear that these strategies have sought to improve the processes (e.g. elections, legislation) and institutions (e.g. legislature, executive and judiciary) by which public authority is legally exercised in a country mandated in a democratic constitution. The literature emphasises the complexity of Western-style justice systems, with the various legal bodies across state branches, with all components being formally independent but functionally dependent on each other. At the core of the justice system lies the judiciary, others include the prosecution service the police and the lawyers, especially criminal attorneys.

2.3.3 Public Administration and Systems Reforms: Prevention

International financial institutions and Western countries support for improving public administration have typically focused on two issues: Public Sector Reform (PSR), and in particular better Public Finance Management (PFM).

A recent World Bank (WB) evaluation looks at its support to public sector reform (PSR), including anti-corruption.[73] The conclusions are quite positive as far as PFM is concerned but more mixed when it comes to PSR and anti-corruption work. It notes that direct measures to reduce corruption such as anti-corruption laws and commissions rarely succeeded since they usually lack support from political elites and the judicial systems. Indirect measures to reduce public sector corruption, such as simplifying procedures and regulations, moving to e-government, and rationalising and improving human resources management, were more successful. Even in these latter areas, however, there were weaknesses related to lack of diagnostic tools, poor tailoring of proposals to the specific situation on the ground, and therefore a lack of realism in terms of sequencing, speed and comprehensiveness of reform proposals- they tended to be too ambitious and thus exceeded the governments' capacities to implement. In addition, however, was the recognition that the major challenge was changing behaviour and corporate culture, and this requires time. Carrying out more careful analytical work before moving to PSR funding was found to be helpful, in part because it would ensure greater realism in the design of downstream lending operations, but also because joint analytical work could build trust between the parties and more local ownership to the loan-based reform programme.

An important component in many public administration reform processes has been civil service pay and grade reforms. The argument is that a well-paid civil service based on merit-based appointments and promotions will improve efficiency and effectiveness in public service provision. More specifically, an important argument for pay reform is the finding that in many countries the salaries for lower-level staff in the public sector are competitive with the private sector, but at the higher levels they differ, sometimes astronomically.

This latter finding, if correct, undercuts the argument that petty corruption is driven by 'need': lower level staff like traffic police and utility workers are not badly paid compared with what they could expect elsewhere. It is rather their bosses that should be driven to corruption by a 'relative need' situation. In their study on gender,

Swamy et al[74] note that "It is often claimed that public officials are more likely to seek bribes when they are poorly paid… Civil service pay turns out to be unrelated to corruption in our regressions". It is unclear which level of civil servants the Swamy study actually included, but this study along with comments in some others question the popular assertion that poorly paid civil servants are a major reason for "petty corruption" (the "need" theory of corruption).

Shah[75] provides a careful anthology on performance accountability and public finances. It addresses the intersection of political analysis with PFM, and like others underlines the need for situation specific understanding, to identify the structural problems, the real interests of the different actors, and thus designing accountability activities that have a chance of succeeding. It looks critically at different actors, and has a number of insights regarding systemic corruption and the difficulties in addressing this.

While Shah lays out the complexities of PFM corruption, others point to characteristics of the sector that may explain why there is in fact more identifiable progress here than for example public administration reforms in general.

One particular aspect of PFM that is receiving increased attention is fiscal decentralisation and corruption. Kolstad and Fjeldstad[76] run through the arguments for fiscal decentralisation, which in fact often centre on issues that are meant to address corruption, namely greater proximity to end-users and beneficiaries and thus potential for more accountability, transparency, more local competition and preference setting. But they note that a number of pre-conditions need to be met in order for these assumptions to hold – and in particular the capacity of local stakeholders to hold local government accountable. They note that two studies in fact found significant correlation between fiscal decentralisation and levels of corruption. A case study from Tanzania pointed to the problems of complex tax structures, inadequate controls and capacity, and poorly paid staff as key reasons for high local corruption.

2.3.4 Extractive Industries and Service Delivery: Sector Corruption

There are two sets of sector issues that seem to dominate the corruption debate. The first one is concerned with natural resources extraction. Focus has traditionally been on non-renewable resources like petroleum, gold, diamonds and mineral mining. But there are also studies that look at renewable resources like timber and fisheries.

The other has to do with sectors that provide services to the public: utilities (power and water) and social services (health and education).[77]

What is now referred to as the "resource curse" is largely based on the experiences with natural resource-rich regimes that receive large rent (unearned) income from those who are extracting the resources. Instead of entering the Treasury in a transparent manner, the funds go into the pockets of individuals, groups and/or political organisations as illicit income.

The Extractive Industries Transparency Initiative (EITI) has been set up to address this issue through basic rules regarding accounting for payments. Adhering to the EITI is becoming an important "seal of approval" by governments that want to attract serious investors.[78] EITI so far concentrates on non-renewable resources as does the Revenue Watch Institute.[79] The George Soros-funded Open Society Institute[80] has transparency and transparent budgeting as one component of its larger governance programme. Other groups look at renewable resources, in particular timber, where Global Witness[81] appears to be the most comprehensive in its tracking of illegal logging and corruption.

Most of the work on the issue of extractive industries and corruption classify this as "grand corruption" since it usually involves the sale of licenses and other permits that need to be approved at national or at least at regional level when it comes to local logging and small scale mining permits. But there are aspects of such corruption that often affect the poor as well. In the case of renewable resources like logging it often limits the local population's access to the resource, but even more importantly may destroy entire habitats that particularly more vulnerable groups depend on for their livelihoods. Furthermore, licenses for mineral extraction and other permits provide the permit holders political protection by the state. This is often used by the permit holders to deny workers who are hired to work in the mines or the logging concessions their due rights.

Most of the work on the fisheries sector is more concerned with the over-exploitation of the resource rather than the corruption surrounding things like sale of quotas, careless monitoring and non-prosecution of violations, etc, though these are known to be serious problems for a number of coastal countries, especially in sub-Saharan Africa.

A number of studies point to the dynamics between large natural resource income and corruption, where the key is the lack of transparency in revenue raising.[82]

This makes corruption less risky and thus more attractive. It makes it harder to use incentives to make public officials behave cleanly. The incentives furthermore are not to attract the best officials but those who are willing to accept "the rules of the game". The lack of access to information also gives the authorities an informational advantage that can systematically be manipulated to distort perceptions of what is going on. It provides more space for opportunistic rent-seeking by others who wish to share in the illicit gain and thus easily becomes a pillar in neo-patrimonial systems.

A lot of attention has been paid to petty corruption in connection with public service delivery, but in the last few years a lot more information has also been produced regarding large-scale corruption. The water sector has in particular become the focus of attention. The sector is important due to its size and provides important lessons regarding service sector corruption in general. The poor here face the problems of corruption in a direct way. Transparency International's (TI) most recent Global Corruption Report[83] focuses on water. It notes that 80% of health problems in developing countries can be linked to inadequate water and sanitation, leading to the loss of around 5% of GDP. It notes that the water crisis is one of governance and that corruption is a root cause, as it makes water inaccessible, unaffordable and undrinkable. It divides the larger water issue into four parts: (i) water resources management, (ii) drinking water supply and sanitation (WSS) services, (iii) irrigation; and (iv) hydropower.

Stalgren[84] has a series of recommendations largely in line with the above, including (i) align anti-corruption measures with national governance reform, (ii) mobilise political support and engage leaders as constructive anti-corruption partners, (iii) corruption is systemic so target the system, (iv) but when corruption takes on systemic proportions it may mean that targeted action is not feasible so then look for indirect approaches, (v) ensure that you protect the needs of the poor: anti-corruption actions may in the short run marginalise and affect them negatively.

The World Bank's draft sourcebook on "Deterring Corruption and Improving Governance in the Water Supply and Sanitation Sector"[85] presents some additional issues. One is that piped water is a natural monopoly, so providers do not have to lower costs or prices for fear of competition. Coupled with the fact that water is a basic need, providers thus face a "captive audience". The natural monopoly is furthermore the main reason for the highly political nature of the sector, so regulation and thus

politicians have an important role to play. This gives them an opportunity to interfere in various ways, including rent extraction.

Similarly, Plummer and Cross[86] provide an overview of corruption in the Water Supply and Sanitation (WSS) sub-sector in Africa, noting that "corrupt practices are endemic to most WSS institutions and transactions in Africa." As far as empirical material is concerned, they point out that there is a notable lack of information on the scope, nature, impact, and costs of corruption in the WSS sector. Good diagnostic work is therefore critical, though they cite a 2002 report that found that if African water utilities were operating in a corruption-free environment, their costs could be reduced by 64% - nearly two-thirds!

Forms of corruption in the WSS sector span the entire scale from petty to grand to state capture. They point to the major variations that can be found across the continent in terms of framework conditions that impact the sector: governance capacities (fragile, emerging or capable); political systems (authoritarian, emerging democracies or established democracies); how the sector itself is organised (national versus decentralised, nature of regulatory and provider agencies with or without autonomy); and the various delivery models that may exist within a country (public or privately managed utilities, municipal and district water department, large and small towns, small local providers, and community management). This complex set of actors and relations means that contextual understanding is critical for identifying what works and what does not in the water sector.

2.3.5 Non-state Actors: Transparency and Accountability

From a rights-based perspective, rights-holders in civil society both have a right and an interest in holding the public sector, as duty-bearer, accountable for the use of public funds. There is therefore both an expectation but also a democratic imperative that civil society plays its role as the ultimate controller of the public purse.

Holding the public sector accountable covers a wide range of issues and levels, however. There are examples revolving around local-level development where the public goods dimension is important. There are the issues of petty corruption at individual level that may be linked to a public sector quasi-monopoly of service delivery in some infrastructure and social sectors. There are the concerns about overarching policy formulation and the preparations of strategy documents like Poverty Reduction Strategy Papers where civil society needs to engage to avoid or

reduce the dangers of "state capture". The literature studied covers for the most part the first dimensions.

A recent UNDP report on corruption in Asia and the Pacific notes that the total costs to poor families of petty corruption are in fact very high – and that aggregating all the small sums over large populations also adds up to huge sums for those extracting the bribes.[87] In Bangladesh, 60% of urban households either paid money or exerted influence to get water connections, for example.

Other surveys like Afrobarometer[88] and many of the corruption perceptions indexes note the percentage of households that claim they have had to pay bribes for favours, so the empirical basis for looking at the extent of corruption appears good. What is less known is what share of a household income goes to paying bribes, and what are the longer-term implications to poverty reduction because of this reduction in discretionary household income and the cost of the disincentives to engage in small-scale economic activities where there is extortion.

It is known that Civil Society Organisations (CSOs) have been supported to become more involved in activities such as the Poverty Reduction Strategy Paper processes. The ability of CSOs to engage depends to a large extent on the political space that is actually available. In more authoritarian regimes, where rent extraction is usually an important part of the power structure, this is normally systematically constrained. Here some donors have been able to assist civil society expand their reach and voice by providing political support rather than financial.[89]

Swamy et al[90] look at the gender dimension, and present evidence that (i) women are less likely to condone corruption, (ii) women managers are less involved in bribery, and (iii) countries that have greater representation of women in government or in the market have lower levels of corruption. This is based on micro-level data from the so-called World Values Surveys and an enterprise survey in Georgia as well as cross-country macro-data. These findings are in line with criminology studies that find that embezzlement per 100,000 white collar workers are higher for men than for women in all age groups, and that men have higher crime rates across age groups, countries, and type of crime. There are several theories put forward for explaining these differences, but the authors note that the data do not permit a verification of any of the theories.

Access to information is a key pillar in many anti-corruption strategies. Access to basic data on public finances and knowledge regarding the decisions on budget

priority setting and other resource allocations are fundamental for accountability and transparency. The access to information agenda is fairly wide. Some international institutions have focused their support around strengthening media as a general approach, such as training of journalists, including in particular areas like investigative journalism. It is being argued that media are often strategic in pursuing this avenue since they generally would have a vested interest in as broad an access to information as possible. One study presenting a multi-pronged anti-corruption strategy considers freedom of information and role of the media as two of the three most important components of civil society participation.

Another issue is the nature and role of media themselves. Peters[91] looks at the "Media Sustainability Index", which contains five dimensions: quality of journalism; legal and regulatory environment; plurality of news sources; media's financial sustainability; and development of media-related associations, NGOs and unions. The legal and regulatory environment, and the quality of journalism, were seen as most important for media being willing to address corruption. But media themselves can be corrupt, lose their independence, or have an agenda that is not oriented to the common good.

While reduction in state control of media has been important for increasing coverage of corruption, concentration of media ownership in the private sector stifles critical reporting. Even in highly competitive media markets like the US, the coverage of the UN-managed "Food for Oil" in Iraq with a possible USD 160,000 pay-off to a UN official got much more extensive reporting than USD 23 billion of US tax funds unaccounted for in Iraq[92].

There is a growing body of literature on civil society, accountability and transparency at the level of individual, community and societal corruption.[93] Much of this is qualitative in its assessments, but recent studies are applying more rigorous quantitative methodologies. Based on the above, efficiency and effectiveness of civil society demands for accountability and transparency and the resultant impact on corruption are critical issues.

2.3.6 Capacity Building and Organisational Development

Considerable attention has also been given to new strategies for fighting corruption, as referred to earlier: national anti-corruption action plans, anti-corruption commissions and so on. Much of the support is in the form of capacity building and

organisational development for these bodies, partly for preventive functions but much of the funding is also intended to support the investigation and prosecution of corrupt actors and enforcement of basic laws and regulations related to fiduciary responsibilities.[94] These projects generally have fairly broad capacity development objectives, for the most part with no specific reference to corruption. Focus has therefore been on their mandates which tend to be linked to Good Governance or Rule of Law. The reviews and evaluations so far seen have therefore little to say on achievements in the field of the anti-corruption.

2.3.7 Structural and Normative Categories

It is by no chance that anti-corruption agencies have thrived in sub-Saharan Africa since the World Bank decided that public sector reform in general, and corruption control in particular, are crucial to ensuring the success of its economic liberalisation programme. The Bank and its collaborators seek to tackle corruption on two sides, structural and normative sides. On the structural side, the reform agenda starts with Klitgaard's[95] succinct observation that discretion plus monopoly minus accountability equals corruption. Reforms are consequently geared towards reducing discretion of public officials through privatisation and deregulation, reduce monopoly by promoting political and economic competition, and increase accountability by supporting democratisation, that is, for political accountability; and bureaucratisation, for administrative accountability. On the normative side, attempts by the Bank and Transparency International (TI) to raise awareness of the degree and harmful effects of corruption have been acknowledged as the first stage in the formation and diffusion of a global anti-corruption norm. The accumulation of legal policy instruments for tackling corruption is viewed as the second stage in the emergence of such a norm, but the survival of the norm is seen to be a function of effectual implementation and careful monitoring by civil societies advocates and the international community.[96] In a nutshell, this liberal approach involves in the reduction of prospects for corruption and making corrupt activities more dangerous for their perpetrators, while sending message to those who would engage in such activities to feel ashamed.

2.4. The Challenges of Assessing Corruption

From the foregoing, it becomes obvious that corruption as a field of study and work count with a multitude of different indicators. Their variety offers to those interested in understanding –scholars– or in fighting –practitioners– a clear advantage

because the weakness of some can be made up for the strengths of other. Indeed, the use of diverse indicators assures a more contrasted assessment and better available information for researchers and experts. Furthermore, the large quantity of information gathered in the last twenty years, and the increasing sophistication of theoretical models explaining the causes, effects and remedies of corruption, have also a positive effect in the conception of new indicators.[97]

Nonetheless, despite these major improvements, corruption assessment is still today facing some challenges like in the past. Notwithstanding increased complexity of indicators, the challenges remain resistant through time. Certainly, every indicator has to cope with its own challenges, and modern aggregate measurements reveal new dares. However, all these setbacks can be gathered under a few –but persistent– major problem groups.

These include the challenge of measurement: four main problem-types have been identified which summarise the challenges of corruption measurement: (1) the perception problem; (2) the error problem; (3) the insufficiency problem; and (4) the actionable problem;[98] political and administrative challenges. All these are discussed below.

2.4.1 The Perception Challenge: It is generally recognised that perception matters in corruption. There is understanding among investment bankers, risk assessment firms or political consulting firms that corruption perceptions' largely determine business and political operations every day. However, almost everyone also agrees that perception is not enough. Real data about actual corruption is a permanent demand from actors involved in corruption and governance issues. The availability, however, of such information is extremely limited, or simply unreal. This situation has led too often to read perception indices as "real" levels of corruption.[99]

Moreover, the complex statistical constructions of modern aggregate indicators can easily create an illusion of quantitative sophistication that leads to interpret them as actual corruption indicators. Actually, recent research has shown that the gap between perception of corruption and real corruption can be even larger than expected, "…implying that using corruption perception indices as a measure of corruption experience may be more problematic than suggested by the existing literature."[100] The necessity to rely on subjective factors –because of lack of better sources– cannot prevent the fact that even the best built perception-based surveys have a potentially very large margin of error, particularly when compared with actual corruption.[101] Such

criticism has generated an enormous pressure for obtaining what it was called "hard objective data" rather than "soft perception data." However, it is worth wondering if objective measurements are necessarily more helpful than perception-based indicators. As Kraay warns regarding governance issues:

> Even where objective measures are available, they provide only imperfect proxies for real conditions on the ground (of course the same is true for perception-based data which has potential problems of its own). For example, the constitutional limits on executive authority in a country, the laws governing judicial independence, or the regulations governing business entry may correspond very poorly with the actual application of those rules and procedures.[102]

Yet, users of perception-based indicators –both individual and aggregate– are aware of such a problem, and are consequently impelled to interpret them carefully. Alleged "objective data" could nevertheless include similar degrees of error (between the indicator reading and the actual corruption) and produce a nominal and rigid, –but still inaccurate– image of the reality.

2.4.2 The Error Challenge: The issue of error has posed several problems for corruption measurement, and it is today still one of the most challenging areas of debate. The fact that corruption indices are based on perceptions includes a supplementary difficulty to measure the error in models for assessing corruption. Social science has extensively coped with error. For instance, making predictions about neighborhood choice in relation with income level will always include a level of confidence and margin of error, obtained through statistical work. The sociologist in charge of such a research will need to take into consideration the uncertainty of social science when expressing his conclusions and forecasts. However, his data are precise (in the example, the level of income of people in different areas). Corruption assessment has by contrast to deal with data that already include large margins of error, making its work even harder.

Today, major corruption indices include different systems to manage error in their assessment. Both the Corruption Perception Index (CPI) and the World Governance Indicators (WGI) report measures of error. Kaufmann and Kraay have identified two main kinds of measurement error that affect corruption and governance assessment: (1) the error relative to the specific concept that is expected to measure, and (2) the imperfection by definition of any proxy for governance (or corruption)

regarding a broader concept of governance.[103] Hence, Kaufmann and Kraay's error are related first, to the inherent measurement problems in any social research (e.g. sampling error, operationalisation problems, etc.) and second, to the very nature of corruption assessment.

The WGI expresses the confidence interval as the country's score plus and minus 1.64 times its standard error. The standard error is obtained from on one hand, the number of sources taken into consideration for country, and on the other hand, the estimated precision of every source. So, for instance, the confidence interval for a country with only one source is about twice as large as the confidence interval for a country with seven sources.[104] The WGI have even incorporated error measurement in the construction of the aggregated indicators. Through a complex system of diverse stages, the WGI incorporates the different sources for building the final indicator. In the third stage of this process, the aggregation is not done trough a simple average, but sources on the contrary are weighted according to the strength of their correlation with one another.[105] Thus, error variance is estimated by the separation among the different individual indicators taken into consideration at this level. The smallest this difference is (smaller error variance), the more presence is granted in the final output of the aggregated indicator (more relative weight in the calculation). Arndt and Oman have thoroughly studied this procedure, revealing that such system is however based on:

> a crucial–and unrealistic–assumption: that different sources' errors are uncorrelated with one another, so that a high degree of correlation between the numbers shown by some sources is not a reflection of a correlation of these sources' measurement errors, but instead a reflection of their greater accuracy, compared to less closely correlated sources, in terms of the underlying reality of governance they are designed to reflect.[106]

Arndt and Oman proposes four main reasons to show how sources' errors are effectively correlated: (1) sources that provide data used in the WGI are usually informed and influenced by the WGI themselves, (2) are influenced by other colleagues, (3) perceptions are often influenced by crises, long-term trends, or other exogenous factors such as foreign direct investment, and (4) interpretation of survey questions is specific to every context and culture, so it is likely that perception differences are smaller because they share a similar background.[107] These four reasons effectively show how the supposed independence of the sources is much smaller than

expected, and therefore, small variance among inputs –and accordingly, increased weight in the indicator- can easily been overestimated.

2.4.3 The Utility Challenge: As explained before, one of the main reasons for the boost in corruption research is due to the enhanced interest of major international development agencies upon the issue. Corruption rapidly evolved from a marginalised topic on the development agenda, to a paramount must in almost any foreign aid institution, from multilateral banks, to large NGOs or bilateral donors. However, this kinship between corruption studies and the practitioners has not been translated into an explosion of policy-oriented measurements. On the contrary, corruption indicators have been largely criticised for offering too broad corruption assessments, difficult to convert into concrete anti-corruption efforts. Once again, the ubiquitous uncertain nature of corruption prevents measurement to be an easy source for straightforward solutions. If we think about infrastructure development, it is clear that a comprehensive evaluation of a country's road network already contains direct measures to solve such a problem. Corruption assessment, by contrast, does virtually offer no direct-solutions for particular problems. Bad road condition may require investment and public works but state-capture at regional level, what it does need? Such a gap between measurement and solutions has led international agencies to push for a new category of governance indicators: the "actionable" indicators. This new kind of indicators measure specific features of corruption that are directly linked to policy decisions. Particular examples of actionable indicators include the Organization for Economic Cooperation and Development – Development Assistance Committee (DAC) Procurement Indicators or the Public Expenditure and Financial Accountability (PEFA) indicators.

Authors like Johnston have praised the utility of actionable indicators, when used in combination with other systems.[108] Nevertheless, actionable indicators arise several concerns. First, measurement does not necessarily mean utility; actionable indicators can easily lead to create a "reform illusion."[109] Second, because of the very nature of actionable indicators (linked to clear and identifiable policy components), national authorities interested in improving their corruption ranking –but not necessarily in really fighting corruption– can 'act' on those elements (for instance, the creation of a commission for the modernisation of the civil service) without effectively change the situation of corruption in the country.

2.4.4 Political Challenge: Politically, there are many reasons why anti-corruption reforms do not take root. First, it may be that the crusade was never a serious attempt at reform, with the government simply reacting to a scandal or, in the case of many developing countries, external pressure from donors. If a government is simply going through the motions, it may not put the right people or adequate resources into the crusade. This will result in the crusade not having any serious impact or simply fizzling out. For instance, in January 2006, a damning dossier was issued which implicated and named four high-ranking Kenyan government officials in corruption on a massive scale: David Mwiraria, Finance Minister; Kiraitu Murungi, Energy Minister; Vice-President Moody Awori; and Chris Murungaru, former National Security Minister. The main purpose of the corruption, the dossier alleged, was to raise party funds with which to fight elections by siphoning off government money into non-existent companies. After the report was published, three of the Ministers concerned were fired from the cabinet and Kibaki's fragile Rainbow Coalition collapsed.[110]

Second, a government may use the excuse of an anti-corruption crusade to carry out witch hunts of its opponents. Under such circumstances, people will become uneasy about whistle-blowing or exposing corruption as they do not know the real motives for such an exercise. In fact, the seeming singling out or framing of innocent individuals would quickly blow the credibility of such a "reform." Taken a step further, anti-corruption crusades can be used to justify military coups to undermine, weaken and topple democratic governments. In the recent past, Nigeria under Obasanjo administration publicised its adoption of a tough anti-corruption law and setting up an anti-corruption commissions. But later, there were hue and cry that followed the anti-corruption initiatives due to billions of naira that were lost to corruption under the administration and the president was eventually accused of witch-hunting of his political opponents.[111]

Third, a government may be very serious about fighting corruption but do not take the time and the effort to consult and get the buy-in of its social partners, businesses and civil society entities. Without a national consensus, even a genuine anti-corruption crusade driven by a government may be misconstrued or not be supported by the rest of society. In Bolivia, a national anti-corruption plan had been drawn up by experts within the past several years. But because there had not been wide consultations, some of the church groups were not in total support. The government

had to step back from implementation to try to call for a national policy dialogue. In Kenya and Nigeria too, anti-corruption initiatives of the governments on one hand and the civil societies on the other hand are not only uncoordinated but also at variance.

Fourth, a government may genuinely start an anti-corruption campaign and be put out of power or shift its political priorities. This type of scenario calls for a need to also ensure that opposition is also on board of anti-corruption crusades. Then, even when there is a transition of power or a shift in political priorities, the opposition will either come into power or put pressure on the government to continue on with reforms. The importance of involving the opposition parties is illustrated by what happened in Japan. The opposition-proposed bill to prevent political corruption through banning lawmakers from receiving goods in return for political favours spurred some members of the ruling party to agitate for their party to take action on this front.

2.4.5 Administrative Challenge: Even if serious political will is in place to combat corruption, often costly administrative mistakes, both in resources and time, can deter a long lasting effect of reforms. First, it is often very tempting for both donors and recipient governments to take on "wholesale" solutions from other countries, without really taking the time to adapt them to specific country conditions. Although most professionals in the aid business know this at an intellectual level, when faced with project deadlines, time constraints, and logistical difficulties of providing technical assistance - both the providers and recipients fall into this trap of simply just putting “something” in place. For example, technical assistance projects such as computerising accounting procedures that are supposed to streamline and simplify public financial transactions. These activities are supposed to detect and deter embezzlement and other forms of financial fraud. However, when the focus has been mostly on the hardware and software of such assistance without due attention to personnel training needs, the computerised system falls into disuse or creates even more disorder and confusion.

Second, lasting reforms involve often what may seem to be unglamorous, tedious work. For instance, many anti-corruption advocates suggest that countries begin their campaigns with a national integrity workshop. And this is absolutely crucial. These types of workshops mobilise interest, publicity, often involve international participants, etc. But when it comes to implementing the recommendations, such as rewriting regulations, manuals, disseminating policy changes, and training of staff – these activities can take a very long time and often

higher levels of resources than were initially anticipated. It is often at this stage that reforms become derailed. Hence, it has argued that there is need to be constant, long-term monitoring of these types of "housekeeping" activities in order for them to be completed. This is what building up sound public administration is all about.

Third, some micro-level anti-corruption prescriptions may have unintended consequences or simply not thought out properly. For example, the introduction of user fees for certain services that was very bribery-prone may result in unfair discrimination of certain population groups. Often, the knee-jerk reaction is to roll-back the reform measure rather than refining it to filter out these types of distortions. The administrative difficulties should not be overlooked as they are, in some measure, somewhat easier to control than mobilising political will.

In conclusion, corruption assessment has proved to be a complicated task subject to several difficulties such as the lack of objective data, the error measurement both endogenous and exogenous to corruption, and the complexity to build effective bridges from measurement, political and administrative challenges. However, even if the goal of obtaining simple and completely reliable indicators is impossible by the very nature of corruption and political and administrative intricacies, the efforts deployed by scholars and practitioners prove that corruption measurement and reforms have not only positively evolved but that they are still today extremely dynamic and stimulating challenges.

2.5 Why Global Strategies on Corruption?

Global strategies on corruption are direct and indirect interventions that set the scope and objectives for the universal concern for menace of a devastating phenomenon calls corruption. Corruption now strikes at the core of the priority concerns of the United Nations. The links between corruption and organised crime, terrorism, conflict, human rights abuses, environmental degradation and poverty are now universally recognised and consequently give impetus to overwhelming urge to curb it. These strategies also serve as meeting point for all financial institutions such as the World Bank, International Monetary Fund, (IMF), African Development Bank and other related bodies that have shown genuine concern for the control and eradication of corruption since 1970s.

Before now, issue of internationalisation of concern for corruption had manifested in the early 1970s as a consequence of political events in the United States

which led to the Watergate investigations and eventually generated a high level of public awareness regarding the questionable conduct of some of the nation's political and business elite[112]; and this led to other investigations into the role of major United States corporations in financing domestic political campaigns.

Since then, it has metamorphosed into various resolutions, proposals, conferences and reports championed by the United Nations through its General Assembly and the Economic and Social Council (ECOSOC). But these efforts did not materialise because of the West-East and North-South struggles of the 1970s and 1980s. The issue of global concern for corruption did not return to the United Nations until the 1990s.[113]

Before 1990s, corruption issue continued to be considered not only as a cultural and political issues but also being perceived as nearly impossible to measure or get rid of. Thus, elimination of corruption was not usually a major objective of development reforms. Instead, it was taken as part of the nature of a country, "endogenous perhaps as its geography and part of challenges of development", especially for developing countries.[114] However, it was the statement made at the annual meeting of the International Monetary Fund in 1996 that for developing countries to achieve growth and poverty reduction, "we need to deal with the cancer of corruption."[115] With that, problem of corruption was set to be boldly addressed. This kick-started the challenge of confronting the phenomenon of corruption which development community had long continuously ignored. Therefore:

> Corruption no longer seems to be just a temporary disease of modernising societies that literacy, development and good public ethics will cure. The debilitating economic, political and social effects of both petty and grand corruption can be felt everywhere. As a result, the evidence of commitment to good government and thus good governance that may have been assumed to be implicit has now become explicit both with detailed programmes for reform…[116]

Since then, fighting corruption has moved to the forefront of all national and international development dialogues. In fact, several recent global public opinion polls indicate that corruption is seen as a major issue all around the world, affecting people's lives everywhere. For example, in a 2003, Global Poll covering forty-eight countries, corruption ranked third among the most important development issues facing the world.[117] In 2005, Transparency International Global Corruption Barometer Survey

covering sixty-nine developed and developing countries, seventy percent of respondents said that corruption affects political life in their countries to a moderate or large extent; 65 percent said the same thing about the business sector, and fifty-eight percent said that corruption affects them personally.[118]

Therefore, since 1990s, various international, regional and financial institutions such as the Organisation of American States (OAS), the Organisation for Economic Co-operation and Development (OECD), several bodies within the United Nations, the European Union, the Africa Union (AU); the International Bank for Reconstruction and Development (IBRD), also known as the World Bank Group (WB); several non-governmental organisations, such as Transparency International and the International Chamber of Commerce have intensified efforts not only to combat corruption but also publicise and internationalise it. In 1995, TI published its first Corruption Perceptions Index, which compares levels of corruption across countries, and the TI Source Book, which introduced the concept of a "national integrity system" and reports on global best practice in fighting corruption. These seminal tools were followed by annual reports documenting the organisation's activities and thrusts; the Bribe Payers Index (starting in 1999), which "measures the propensity of leading exporting countries to bribe abroad"; and the Global Corruption Report (starting in 2001), which "provides an overview of the 'state of corruption' around the globe." TI's tool, the Global Corruption Barometer (based on Gallup International's Voice of the People survey) measures international attitudes, experiences, expectations, and priorities on corruption.[119]

It is to be noted that a multitude of international anti-corruption agreements exist, however their implementation has been uneven and only moderately successful.

Aside the foregoing, other factors have also snowballed corruption into global reckoning are enumerated below. From our understanding of the proliferated and sometimes confusing factors unfolded in the extant literature, the factors that have snowballed corruption into global reckoning are interrelated and not mutually exclusive. These factors could be categorised mainly into political, economic and security.

Politically, the desirable political clout being exhibited by the United States, particularly through its overwhelming influence in some international institutions to outlaw the bribing of foreign officials to secure official favour or win contracts, has been significant. American policy makers have severally made a case that American

exporters have lost out in foreign deals because they have not been permitted by law to bribe foreign officials. This is because it is a criminal act for American companies to pay bribes to foreign officials and by implication; the bribes paid cannot be deducted as costs for tax purposes.[120] The Halliburton bribery scandal in Nigeria becomes handy here.

As a matter of fact, the end of the Cold War was one of the factors that stopped the political hypocrisy that had made the decision makers in some industrial countries ignore the political corruption that existed in particular countries, such as Zaire (now the Democratic Republic of Congo)[121] which eventually snowballed corruption into global reckoning and had since been regarded as global issue, eliciting a global response since 1990s. That is, the "end of Cold War has taken away the tutelage system under which some of these states operated. Under the new system, corruption that was earlier ignored can no longer be done so."[122]

Moreover, the driving global concern about corruption is that it undermines key institutions of society and more often than not leads to political instability. Results published in Transparency International's Global Corruption Barometer 2005[123] show that people in 69 countries believe that corruption affects all key governance-related sectors and key institutions in society. As a consequence, public trust in governments, corporations, and global institutions is declining.[124]

The demand for controlling corruption globally and nationally in turn shaped by policies that increase transparency in the public, corporate, and international financial arenas, and by the extent to which ongoing research contributes new remedies for corruption as well as credible information on its incidence, its causes and consequences, and the effectiveness of global advocacy efforts are crucial and interloping forces accounted for placing corruption on global agenda.

In addition, the high level of attention to corruption has led to extensive analysis in conjunction with the elaboration of anti-corruption strategies and programmes. Academics and practitioners, both independently and collaboratively, have developed definitions, models, taxonomies, and explanations of corruption. These in turn have informed the development of strategies, interventions, and toolkits that have been tried out in various countries;[125] and empirical analysis. [126] Examples range from system-wide procedural overhauls of the civil service and public agencies; to targeted reforms of procurement, tax, and customs policies; to motivation enhancement, such as integrity seminars and public pledges to resist venality. In

practice, the challenges have proven to be enormous, sustained success has been elusive. Some progress has been made, though too often resistance and backsliding have whittled away at what were promising starts, leading to disappointing results. [127] Likewise, empirical studies of corruption like that of Kauffman et al,[128] Soreide[129] Durlauf, [130] and host of others have contributed to a greater awareness of the costs of this problem.

Also, worldwide trends toward democratisation have opened the door to citizen demands for a more active say in the "what and how" of governance. Citizens are no longer tolerant of abuses of public trust and of the malfeasance of the past; they expect accountability and transparency. In Mali, for example, local community representatives participated in national conferences on democratisation and decentralisation, and with the new knowledge gained communities no longer tolerate abuses by local officials as was common in the past. [131] In fact, the newly democratic countries, especially in sub-Saharan Africa, are experiencing a rush of freedoms, among them the freedom of press. These new freedoms have helped expose corrupt practices that were endemic for a long time. That is, the spread of political reforms, the contemporary worldwide unique moves against corruption, have "swept like a firestorm across the global political landscape."[132]

Economically, the newly industrialised economies of Asia and the transition economies of Central and Eastern Europe now find themselves in a world in which rules are set by market parameters rather than by geopolitical factors.[133] Directly related to economic growth, the evidence is clear that corruption can retard investment and private sector economic activity. The unpredictable outcomes, uncertain property rights, and variable contract enforcement that are associated with corruption constitute significant impediments to the private investment necessary to development. Furthermore, corruption can reduce tax revenues, lower the quality of infrastructure, and skew incentives away from productive endeavours and toward rent-seeking. Governments, donors, and the private sector are confronting the fact that corruption feeds a downward spiral of ultimately unproductive economic activity, decreasing productivity, shrinking investment, and loss of confidence in the effectiveness of government. The old calculus of building corruption into the costs of doing business has given way to a growing international coalition that has pledged to oppose corruption, recognising it as ultimately harmful.

Hence, raising up of corruption to an issue of global significance and being regarded as a "global public bad"[134] and mainstreaming a concern for anti-corruption strategies was inevitable. On the part of developing countries, aid fatigue has led foreign donors and international institutions to be impatient with government corruption, as most development aid to sub-Saharan African countries has not yielded the desired results;[135] and now provide continuous financial support based on conditionality of evidence of improving democracy, good governance and accountability. Globalisation necessitates progressively more open borders such that the (economic) security of one nation can be affected by the domestic practices of other nations; with globalisation, information about corrupt practices has become more available due to the internet and exposure by the media of corrupt regimes.

To be sure, a steady flow of information from credible sources on the incidence and consequences of corruption as a result of globalisation, coupled with increased awareness of the involvement of international actors using international systems in this illicit behaviour, is increasingly shaping public opinion and inspiring outrage, increasing the pressure on public officials to control corruption. The results of global and national opinion surveys and other research by international organisations such as Transparency International, the World Bank Institute, and the International Finance Corporation have continued be pivotal rendezvous for strengthening the information arsenal in the fight against corruption[136].

In terms of security, corruption also raises global concerns because of how it facilitates international criminal activity, especially money laundering, drug trafficking and terrorism. Hence, international community is not only conscious of reports on how corruption in sub-Saharan Africa has served to fund global terrorism [137] but also wary of how financial crimes have deprived citizens of the world their own resources. Money laundering can have significant collateral economic and security effects including the liberalisation of the financial markets around the world have contributed to its escalating growth. However, the main concern is the criminal activity spawned by this phenomenon and how a reduction in corruption can clearly help. As a corollary, the acts of terrorism that brought about the events on September 11, 2001 of the planes-turned-missiles that saw the destruction of the World Trade Centre towers and damage of the Pentagon in the United States also snowballed into unprecedented actions against global corruption.

However, all these aggregate efforts yielded their positive peak when the United Nations Convention Against Corruption (UNCAC) was adopted on October 31, 2003 and came into force on December 14, 2005.[138] Hence, UNCAC is the first legally binding, international anti-corruption instrument which provides not only a unique opportunity to mount a global response to a global problem, but also creates the opportunity to develop a global language about corruption and coherent implementation strategies. The UNCAC gives the global community the opportunity to address the inherent aforementioned weaknesses and begin establishing an effective set of benchmarks for effective anti-corruption strategies.

The adoption and entry into force of UNCAC seem to be sending a clear message that the issue of corruption is no longer confined to domestic jurisdiction and that the international community is determined to prevent and control corruption. Hence, reaffirmation of the importance of core values, such as honesty, respect for the rule of law, accountability and transparency, in promoting development and making the world a better place for all become relevant again. The Convention intends to eradicate all forms of corruption and requiring countries to return contaminated assets to the nation they were stolen from on the long run. It represents a crucial step in building a worldwide framework to combat corruption.

Since the adoption of the UNCAC which is expected to rub-off on anti-corruption strategies in sub-Saharan Africa countries, there seems to be unfolding challenges in the areas of implementation and doubts abound whether this Convention has been able to transform the strategies of the anti-corruption agencies in Kenya and Nigeria. The renewed strategies adopted by the Kenya and Nigerian anti-corruption agencies have continued to raise many important questions, especially the extent of its compliance and implementation in line with the UNCAC framework. This remains the focus of this work.

2.6 Nature of Corruption in Sub-Saharan Africa

This section attempts to capture the phenomenon of corruption in sub-Saharan Africa with a view to substantiating its prevalence. In addition, prior to the emergence of the UNCAC, diverse anti-corruption strategies had been introduced by several international bodies to curb its menace, attempts are also made in this section to identify and analyse some of these major strategies.

As stated earlier, the mixture of abundant natural resources, despotic and unaccountable government characterised the pre-cold war era in sub-Saharan Africa partly due to lack of commitment shown by the developed world to assist in controlling corruption. Then, discord, catastrophe and misgovernance culture stood particular challenges to governance and the fight against corruption in sub-Saharan Africa to the point that several countries have become nearly synonymous with corruption.

Therefore, immediate post-cold war served as a reviewing period on the part of the international aid community, whereby Western government donors no longer needed the support of corrupt regimes for tactical purposes, and further realised that the effectiveness of aid programmes depended on fiscally responsible leaders.[139] Anti-corruption projects presently appear in the action plans of some of the largest government aid agencies, including those of the United Kingdom, the United States, Denmark, the Netherlands, Ireland and Canada.[140] Assistance for such projects ranges from funding infrastructure and construction to providing technical assistance in domestically implementing international anti-corruption obligations to providing capacity building in the training of law enforcement and prosecutors in the handling of anti-corruption cases.[141]

But despite this, the development challenges faced by sub-Saharan Africa are still enormous:

> It is the only region of the world where poverty has increased in the past 25 years and half of the continent's population of 840 million people lives on less than 1 USD per day. Thirty-two of the world's 38 highly indebted poor countries (HIPC) are in Sub-Saharan Africa. In addition to corruption, protracted armed conflict, the HIV/AIDS pandemic and declining terms of trade for non-mineral primary products continue to exacerbate the many challenges facing the region.[142]

In spite of the recent advancement made in democracy and human rights in a number of sub-Saharan Africa countries, corruption remains one of the fundamental challenges facing it.[143] It is to be noted that vast natural resources in some of these countries have proven too tempting to some elites and international business concerns. Aid resources provided by multilateral and bilateral agencies have not been impervious to corruption and misappropriation. Public services are erratically provided and of poor

quality. The relevant institutions that are anticipated to offer checks and balances within the system are generally under-funded and deficient of independence.[144]

However, it is important to mention that corruption is not unique to sub-Saharan Africa; it is present in some form in all countries regardless of their level of development.[145] Even within sub-Saharan Africa, there are varied levels of corruption. Botswana, for example, has significantly lower corruption perception levels than some EU countries, whereas countries such as Nigeria, Kenya, the Democratic Republic of the Congo, and Côte d'Ivoire are consistently placed in the bottom ranks of Transparency International's Corruption Perception Indexes.[146]

But, sub-Saharan Africa is widely considered among the world's most corrupt places, a factor seen as contributing to the stunted development and impoverishment of many African states.[147] That corruption has become one of the most notoriously persistent and progressively worsening social problems afflicting virtually all sub-Saharan Africa today is evident. The practice has permeated virtually all institutions, public and private, governmental and non-governmental. Having reached endemic proportions, corruption has become not only a way of life but also a principal method for the accumulation of private property. For instance, in countries such as Kenya and Nigeria, how much money an individual has defrauded the state appears to have become the yardstick for gauging "who is who" in society.[148] Various corruption perception indexes and other indicators have persistently rated sub-Saharan Africa to be corruption infested sub-continent (See Table 2.3).

Table 2.3. Corruption Perception Indexes of Sub-Saharan Africa 2003-2008

S/N	Country	CP1 AVERAGE 2003 – 2008						Total
		2003	2004	2005	2006	2007	2008	Average
1	Botswana	5.8	5.4	5.6	5.9	6.0	5.7	5.73
2	Mauritius	5.5	4.7	5.1	4.2	4.1	4.4	4.67
3	South Africa	4.9	5.1	4.6	4.5	4.6	4.4	4.69
4	Namibia	4.5	4.5	4.1	4.3	4.1	4.7	4.37
5	Ghana	3.9	3.7	3.3	3.5	3.6	3.3	3.55
6	Burkina Faso	3.5	2.9	3.2	3.4	NA	NA	3.25
7	Lesotho	3.2	3.3	3.2	3.4	NA	NA	3.28
8	Malawi	2.8	2.7	2.7	2.8	2.8	2.8	2.77
9	Liberia	2.4	2.1	2.2	NA	NA	NA	2.23
10	Madagascar	3.4	3.2	3.1	2.8	3.1	2.6	3.03
11	Senegal	3.4	3.6	3.3	3.2	3.0	3.2	3.29
12	Zambia	2.8	2.6	2.6	2.6	2.6	2.5	2.62
13	Benin	3.1	2.7	2.5	2.9	3.2	NA	2.88
14	Gabon	3.1	3.3	3.0	2.9	3.3	NA	3.12
15	Gambia	1.9	2.3	2.5	2.7	2.8	2.5	2.45
16	Niger	2.8	2.6	2.3	2.4	2.2	NA	2.46
17	Mali	3.1	2.7	2.8	2.9	3.2	3.0	2.95
18	Sao-Tome and Principe	2.7	2.7	NA	NA	NA	NA	2.7
19	Solomon Islands	2.9	2.8	NA	NA	NA	NA	2.85
20	Togo	2.7	2.3	2.4	NA	NA	NA	2.47
21	Ethiopia	2.6	2.4	2.4	2.2	2.3	2.5	2.4
22	Eritrea	2.6	2.8	2.9	2.6	2.6	NA	2.7
23	Tanzania	3.0	3.2	2.9	2.9	2.8	2.5	2.88
24	Mauritania	2.8	2.6	3.1	NA	NA	NA	2.83
25	Mozambique	2.6	2.8	2.8	2.8	2.8	2.7	2.75
26	**Nigeria**	**1.4**	**2.2**	**2.2**	**1.9**	**1.6**	**1.4**	**2**
27	Uganda	2.6	2.8	2.7	2.5	2.6	2.2	2.57
28	Cameroon	2.3	2.4	2.3	2.2	2.1	1.8	2.18
29	**Kenya**	**2.1**	**2.1**	**2.2**	**2.1**	**2.1**	**1.9**	**2.08**

30	Sierra Leone	1.9	2.1	2.2	2.4	2.3	2.2	2.18
31	Zimbabwe	1.8	2.1	2.4	2.6	2.3	2.3	2.25
32	Cote D'Ivoire	2.0	2.1	1.9	2.0	2.1		2.06
33	Papua New Guinea	2.0	2.0	2.4	2.3	2.6	2.1	2.23
34	Central Africa Republic	2.0	2.0	2.4	NA	NA	NA	2.13
35	Angola	2.2	1.9	2.2	2.0	2.0	1.8	2.01
36	Democratic Rep. of Congo	1.8	1.9	2.0	2.1	2.0		1.96
37	Guinea Bissau	1.9	2.2		NA	NA	NA	2.05
38	Burundi	1.9	2.5	2.4	2.3	NA	NA	2.28
39	Republic of Congo	1.9	2.1	2.2	2.3	2.3	2.2	2.16
40	Equatorial Guinea	1.7	1.9	2.1	1.9	NA	NA	1.9
41	Guinea	1.6	1.9	1.9	NA	NA	NA	1.8
42	Chad	1.6	1.8	2.0	1.7	1.7		1.76
43	Sudan	1.6	1.8	2.0	2.1	2.2	2.3	2
44	Somalia	1.0	1.4	2.1	NA	NA	NA	1.5
45	Seychelles	4.8	4.5	3.6	4.0	4.4	NA	4.26
46	Rwanda	3.0	2.8	2.5	3.1	NA	NA	2.85
47	Comoros	NA	NA	NA	NA	NA	NA	2.3

Source: The Transparency International's Corruption Perception Indexes (CPI) from 2003-2008, adapted, aggregated and averaged by the Author.

Table 2.3 represents the Corruption Perception Indexes (CPI) of the sub-Saharan African countries from 2003 to 2008. To encourage reform and point out the right direction, Transparency International (TI) conducts a number of surveys. Two of these surveys are very popular yet widely misinterpreted and misunderstood. They are the Corruption Perception Index (measuring perception about bribe takers) and the Bribe Payers Index. Political leaders, public officers, the private sector and non-governmental organisations have spent a lot of time, energy and resources in trying to eradicate the deadly disease of corruption in since 1999; but the efforts have yielded little results. This is evident in the outcome of a number of surveys conducted by various organisations. The CPI Table shows that there has not been improvement or marginal one in the positions of the sub-Saharan African countries on TI's (CPI) within the focused period, except few countries like Botswana, Mauritius, South Africa and Namibia that have managed to score above average or close to average region.

The notes accompanying the publications by TI of its CPI provide the following information which is well-worth noting. First, the country with the lowest score on the CPI is not the world's most corrupt country. The accurate interpretation is that it is the country that is perceived to be the most corrupt of those included in the index for that year. Second, it is the country's score, not its serial placing on the index that is the important index of the perception of the level of corruption. Third, it should be stressed that the methods and techniques used in the survey were not designed to favour any state, or was it biased against any country in any way.[149]

African Union (AU) study estimated that corruption cost the continent roughly $150 billion[150]. To compare, developed countries gave US$22.5 billion to sub-Saharan Africa in 2008 and nothing substantial came out of it.[151] Corruption in sub-Saharan Africa ranges from high-level political graft on the scale of millions of dollars to low-level bribes to police officers or customs officials.[152] While political graft imposes the largest direct financial cost on a country, petty bribes have a corrosive effect on basic institutions and undermine public trust in the government. For instance, over half of East Africans polled paid bribes to access public services that should have been freely available.[153]. Academic researchers have shown that a one-point improvement in a country's Transparency International corruption score is correlated with a productivity increase equal to 4 percent of Gross Domestic Product (GDP). But at least twenty-three of those countries experienced negative growth in GDP in that period.[154]

In addition, majority of the global corruption indicators point to the fact that corruption in sub-Saharan Africa has reached an alarming stage. Transparency International's Corruption Perception Index for 2004 rated 146 countries on a 10 point scale from low "corruption" (Finland 9.7) to high "corruption" (Bangladesh and Haiti 1.3). Of the 30 countries Transparency International (TI) surveyed in sub-Saharan Africa, only one country (Botswana 6.0) scored above the mid-range point of 5. The World Bank Institute (WBI) corruption rankings, based on a larger sample (17 sub-Saharan Africa countries than TI), showed an even gloomier picture. It found that 36 of the 47 sub-Saharan countries it surveyed were below the world median score.[155] According to Transparency International's the released Global Corruption Barometers, corruption continues to wreak havoc on sub-Saharan Africa's governance record. Notably countries such as Sierra Leone, Uganda, Kenya, Nigeria, Ghana, and Zambia, numbered among the states most afflicted by petty bribery.[156]

In all of these countries, over 23 percent of the respondents reported paying a bribe within the last year.[157] Also, in line with this finding, respondents in most of the countries named the civil service as one of the most corrupt sectors, with the majority labeling it the single most corrupt institution. In sub-Saharan Africa, despite 64 per cent of respondents expressed satisfaction with their governments' anti-corruption programmes, it has been stated elsewhere that the political will to combat corruption in these countries is swiftly fading.[158] In addition, the positive public perceptions in comparison to the generally bleak picture of rampant regional corruption painted by the report.

While there have been both external and internal pressures on African governments to act against corruption, little significant progress seems to be have been made. The prospects for systematic reforms which could counter corruption vary considerably among sub-Saharan African countries. Unfortunately, in most of the region, governments are either unenthusiastic or incapable to address corruption effectively, and progress is slow even in those countries where the political will to reform exists.[159]

2.7 Inventory of Global Anti-Corruption Strategies

In this era of globalisation and economic interdependence, corruption has a variety of cross-border features. Frequently, corruption in one country concerns both its neighbours and trading partners, requiring joint efforts and common solutions.

Global strategies in this thesis are conceived as anti-corruption conventions and other international anti-corruption instruments that are useful establishing commonly agreed standards and requirements in the prevention, detection, investigation and sanctioning of acts of corruption. The conventions are binding written international agreements between groups of states. Non-binding agreements (instruments) take the form of recommendations, guidelines, principles, model codes and the like. Both binding and non-binding agreements carry weight by virtue of the fact that they have been discussed and agreed among multiple governments. They are an expression of high-level commitment.

The UNCAC is the most recent global and comprehensive anti-corruption treaty. There are also numerous other anti-corruption conventions and instruments that are in existence, some of the main ones are listed in Table 2.4. In particular, there are regional anti-corruption conventions in Africa, Europe and the Americas and additional non-binding instruments for Asia and the other regions. Some conventions have a very broad scope; others are narrower and may cover only a limited number of countries or anti-corruption measures. Anti-corruption conventions are especially useful in providing a framework for addressing cross-border issues. They facilitate international cooperation in law enforcement by requiring countries to make the same conduct illegal, harmonising the legal and institutional frameworks for law enforcement and establishing cooperative mechanisms. They also establish, to varying degrees, valuable common standards for domestic institutions, policies, processes and practices which buttress anti-corruption strategies at national level. More specifically, conventions can be used to hold governments accountable on matters of anti-corruption performance. This can be done by: peer pressure (government to government), pressure at international level, public pressure at international level, especially in intergovernmental meetings to discuss the convention and public pressure at domestic level.

As already enunciated, although anti-corruption has a long history in Africa, but the year 1996 is a good marker for the start of developed world interest.[160] In that year World Bank President, James Wolfensohn, and IMF Managing Director, Michael Camdessus controversially announced that from henceforth they would utilise their donor leverage with African countries to stamp out "corruption."[161] The new internationalisation of the fight against corruption began with World Bank interventionist programmes in Uganda and Tanzania.[162]

It is now evident in the number of international treaties and conventions on "corruption" that have materialised in the last fifteen years, for instance, Southern African Development Community Protocol on Corruption, which is usual for foreign aid agreements and development, contracts to contain specific anti-corruption conditions and the UNCAC for the global crusade against corruption. Corruption, once the concern of moralists, is now confronted by a politics driven by economic and political interests. Simply put, the new mantra is seen to distort the cash nexus, requires expensive regulatory regimes, shelters inefficiency and retards competition.

The global commitment to stem corruption is evidenced by the plethora of corruption-specific instruments at both the international and regional level, not to mention domestic legislation and other mechanisms set up to deal with the vice. Anti-corruption strategies have been supported, on several different grounds, by International Finance Institutions, Multinational Organisations of various types, and non-governmental organisations. During the past decade, the problem of corruption has received increasing attention by international finance institutions, multilateral donors and NGOs.

Often the problem of corruption is addressed by these institutions in the context of the broader issue of good governance. Global initiatives to fight corruption include the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Trans-national Organised Crime.[163] Efforts at the African regional and sub-regional level include the African Union Convention on Preventing and Combating Corruption, the Southern African Development Community (SADC) Protocol against Corruption,[164] and the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption. Other regional mechanisms include the Inter-American Convention against Corruption[165] and the Council of Europe's Criminal and Civil Law Conventions on Corruption.[166]

These international instruments seek to set standards in the prevention and criminalisation of corruption, as well as facilitate international cooperation in effecting prosecutions and asset recovery. Many of these institutions and actors have taken upbeat roles in this anti-corruption fight. Some of these institutions are overviewed below.

2.7.1 The World Bank

In the case of the World Bank, the strategy for combating corruption has been based on four pillars: a) strong policy of fraud prevention in own financed projects and programs; b) support for countries that request help in fighting corruption; c) preventing corruption inside the Bank's analysis and lending decisions; and d) supporting international anti-corruption efforts.[167] In addition, the World Bank includes anti-corruption policies, as a component, in many of its economic reform lending operations, with more than 40 percent of the Bank's lending operations, including public sector governance components.[168] In addition, the World Bank has a special team, devoted to do research and provide advice on "Governance and Anti-corruption" issues. This team has been able to offer, to interested parties, a wide range of resources, including the Bank's publications, research papers, and reports on corruption issues, newsletters archives, and interactive datasets.[169]

2.7.2 The International Monetary Fund (IMF)

The International Monetary Fund (IMF) is also addressing corruption issues through its technical assistance and financial support activities. One of the IMF's steps to promote transparency and accountability in government is the development of standards and best practice codes such as: The Code of Good Practices on Fiscal Transparency, and the Code of Good Practices on Transparency in Monetary and Financial Policies. IMF's anticorruption initiatives also include the development of reports and assessments, which reveal weaknesses of the financial sector and lack of observance of international standards. Some examples are the Report on the Observance of Standards and Codes, the Financial System Stability Assessments, and the Financial Sector Assessment Programme.[170]

2.7.3 The United Nations (UN)

The United Nations (UN) has taken important steps in relation to fighting corruption in international transactions (that is, transnational bribery). One of the most important steps forward, in this area, has been the signing of the United Nations Convention Against Corruption, by leaders of more than 100 countries.[171] This document addresses issues such as bribery, embezzlement, misappropriation, money-laundering, protection of whistle-blowers, and makes explicit the intention of cooperation among countries in combating corruption.[172]

A detailed analysis of the UNCAC is to be undertaken in the subsequent sections given its pivotal relevance to this thesis. But suffice to state here that this is the first document of its kind, since it encompasses countries of all the different regions in the world. Also, the U.N. Global Programme Against Corruption aims to build from the pilot projects that it establishes, and learn from the successes and failures of those countries taking the first steps in combating corruption through an integrated U.N. effort.

The United Nations has developed anti-corruption tool kits, and hold fora to discuss the difficulties inherent in such a process. As a result, the United Nations has been working to develop an integrated approach that is based upon "six pillars": (1) democratic reforms; (2) a strong civil society with a mandate to monitor the state; (3) the rule of law; (4) a system of checks and balances; (5) partnerships facilitating advocacy of the implementation of anti-corruption policies; and (6) partnerships facilitating the development strategies, for the implementation of anti-corruption policies.

2.7.4 The European Union (EU)

The European Union (EU) has also strengthened anti-corruption efforts. For instance, with the signing of the Convention on the fight Against Corruption Involving Officials of the European Communities in 1997, and the technical cooperation and support for anticorruption issues provided by institutions such as the European Court of Auditors, the European Organization of Supreme Audit Institutions, and the European Ombudsman, the EU has stepped up its crusade against corruption within and outside the Union. Also, the Organisation for Economic Cooperation Development (OECD), and the Organisation of American States (OAS), have not relented with the signing of the United Nations type of convention like the Inter-American Convention Against Corruption, an initiative of the OAS signed by American countries in 1996, and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, an initiative of the OECD, which entered into force in February 1999.[173]

2.7.5 Bilateral Donor Agencies

Bilateral donor agencies, such as United States Agencies for International Development (USAID), Department for International Development (DFID), Danish International Development Assistance (DANIDA) and Regional Development Banks,

such as the Inter American Development Bank (IDB), the Asian Development Bank (ADB), and African Development Bank (AFDB), have also developed their own anticorruption strategies and funded different types of anticorruption programmes around the world. For example, USAID has been a leading institution fighting corruption with programmes as diverse as financial management improvement in sub-Saharan Africa.

2.7.6 Transparency International (TI)

Increasingly, non-governmental organisations (NGOs) are being recognised for their active participation in combating corruption. In particular, the international NGO, Transparency International (TI), has been a leader with its efforts in the collection of data on corruption across countries, publishing them in widely available sources, such as the Corruption Transparency Index and the Bribe Payers Index. TI's "national chapters", on more than 85 countries, represent a leading initiative for corruption awareness and a source of practical anti-corruption strategies.[174] TI also provides a wide variety of literature on anticorruption guides, toolkits, and best practice source books. In particular, the Global Corruption Report (available for the years 2001, 2003, 2004, 2005, 2006, 2007 and 2008) is a useful tool of discussion that gathers countries and regional experiences; and reports anti-corruption progress around the world. Other NGO's that have made significant contributions, in this area, are the International Chamber of Commerce and Global Transparency.

2.7.7 The African Union (AU)

The African Union (AU) Convention on Preventing and Combating Corruption and Related Offences, which was adopted by African Heads of State in Maputo, Mozambique, in July 2003, provides an ideal platform for regional cooperation among African states in the fight against corruption. It has the potential to become an effective means of assisting governments in implementing practices that will promote accountability and transparency. It is also expected to assist African countries in living to their New Partnership for Africa's Development (NEPAD) promises.[175]

The adoption of the Convention by the Heads of State and Government was a significant landmark in the history of the AU. The Convention paves the way for an African regional anti-corruption instrument which is expected to assist African states to live up to their NEPAD promises. It also presents a unique opportunity for anti-corruption activists, media organisations and citizens at large to support the process.

Additionally, the Convention would provide citizens of various African countries with the necessary tool to hold their governments accountable in the area of corruption. [176] It also defines the framework and prerequisites of national anti-corruption strategies. Perhaps more significantly, this is the first concrete political step to be taken by African leaders to address the issue of corruption and its impact on socio-economic development.

2.7.8 Economic of West African States (ECOWAS) Protocol on the Fight Against Corruption

This ECOWAS Protocol was adopted by the sixteen members of the sub-regional body in December 2001 with the objective of strengthening effective mechanisms to prevent, suppress and eradicate corruption in each of the State parties through mutual co-operation.[177] It has not yet entered into force. Just like the AU Convention, the obligations on State parties involve the following:

a) Ensuring preventive measures to combat corruption in the public and private sectors. These include requirements in the public service declarations of assets and establishment of codes of conduct. Also included are requirements of access to information, whistleblower protection, procurement standards, transparency regarding political party funding, civil society participation and establishing, maintaining and strengthening independent national anti-corruption agencies;

b) Criminalising a wide range of offences, including trading in influence and illicit enrichment. It also includes offences relating to public and private sector corruption as well as the liability of legal persons;

c) It also establishes an international cooperation framework, which has the potential to improve mutual law enforcement assistance within Africa. It also provides a framework for the confiscation and seizure of assets; and

d)Follow-up mechanism, in respect of which the Protocol calls for the establishment of a Technical Commission to monitor the implementation at both national and sub-regional levels, as well as gathering and disseminating information, organising training programmes and providing assistance to State parties.[178]

2.7.9 South African Development Community (SADC) Protocol Against Corruption

The adoption of the SADC Protocol by Southern African Heads of States was in recognition of the extent to which corruption has become a problem in the region. In

August 2001, the Heads of States of SADC met in Malawi and adopted the SADC Protocol against Corruption.[179]

To date nine Southern African States have ratified the Protocol namely, Botswana, Lesotho, Malawi, Mauritius, South Africa, Tanzania, Zambia, Zimbabwe and Namibia, making the requisite number of countries required for the Protocol to come into force, which it did on the 6th of July 2005.[180]

The purpose of the Protocol is:

a) to promote and strengthen the development by each of the State Parties of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector;

b) to promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the public and private sectors; and

c) to foster the development and harmonisation of policies and domestic legislation of the State Parties relating to the prevention, detection, punishment and eradication of corruption in the public and private sectors.[181]

Taking note of the fact that corruption varies amongst countries, which are also at different levels of development, the Protocol seeks to identify traits and forms of corruption that are characteristic to SADC member countries.

Based on the provisions of the protocol, most anti-corruption institutions have made efforts to review the legislation that governs their operations to be in line with the provisions of the protocol as well as to suite their environments of operate.

The SADC Protocol Against Corruption provides for provisions dealing with corruption at trans-boundary level in SADC. The establishment of anti-corruption agencies by most of the SADC countries is another positive result of the protocol and continued lobby efforts of stakeholders. To date the SADC can boast of ten established institutions.

Table 2.4. Major Global Strategies to Fight Corruption

Coverage	Adoption	Signatories	Parties
United Convention Against Corruption (UNCAC)	2003	140	117
United Convention Against Transitional Organised Crime (UNTOC)	2001	147	144
Revised Recommendation of the Council of the OECD on Combating Bribery in International Business Transactions	1997	This Recommendation adds strength to the effects of the OECD Anti-Bribery Convention	
OECD Guidelines for Multinational Enterprises	2000	It is legally non-binding annex to the OECD Declaration on International Investment and Multinational Enterprises	

Africa

Coverage	Adoption	Signatories	Parties
AU Convention on Preventing and Combating Corruption (AU Convention)	2003	41	26
SADC Protocol Against Corruption (SADC Protocol)	2001	14	9
ECOWAS Protocol on the Fight Against Corruption (ECOWAS Protocol)	2001	1	

Americas

Coverage	Adoption	Signatories	Parties
The Inter-American Convention Against Corruption (OAS Convention)	1996	34	33

Asia

Coverage	Adoption	Signatories	Parties
ADB-OECD Action Plan for Asia Pacific	2001	28 Endorsing Countries	

Europe

Coverage	Adoption	Signatories	Parties
Council of Europe Criminal Law Convention	1998	49	41
Council of Europe Civil Law Convention	1999	42	33
Resolution 5 of the Committee of Ministers of the Council of Europe: Agreement Establishing the Group of States Against Corruption	1999		46 Members (as of December 2007).
Resolution 24 of the Committee of Ministers of the Council of Europe: Guiding Principles for Fight Against Corruption	1997		It invites national authorities to apply Guiding Principles in their domestic legislation and practice.
European Union Convention on the Protection of the Communities' Financial	1995		25 EU Member

Interests (with two Protocols from 1996 to 1997)			States are Parties to the Convention.
European Union Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States	1997		25 EU Member States are Parties to the Convention.

Source: Water Integrity Network (WIN). 2007. Retrieved July 28, 2009, from www.waterintegritynetwork.net

Table 2.5. UNCAC Ratification According to Region

Sub-Saharan Africa	Middle East and Northern Africa	America and the Caribbean	Asia and Pacific	West and Central Europe	Eastern Europe and Central Asia
18	5	10	5	7	5
Benin	Algeria	Brazil	Australia	Austria	Belarus
Burundi	Yemen	Bolivia	China	Croatia	Azerbaijan
Cameroon	Jordan	Ecuador	Mongolia	France	Kyrgyzstan
Djibouti	Libya	El Salvador	Seychelles	Hungary	Latvia
Egypt	UAE	Honduras	Sri Lanka	Romania	Turkmenistan
Kenya		Mexico		Serbia & Montenegro	
Lesotho		Nicaragua		United Kingdom	
Liberia		Panama			
Madagascar		Paraguay			
Mauritius		Peru			
Namibia					
Nigeria					
Senegal					
Sierra Leone					
South Africa					
Tanzania					
Togo					
Uganda					

Source: United Nations Office on Drugs and Crimes (UNODC) 2006. Retrieved July 28, 2009, from http://www.unodc.org/unodc/en/crime_signatures_corruption.html

2.8 Models of Anti-Corruption Agencies

The provisions of the UNCAC requiring the establishment of specialised anti-corruption bodies do not stipulate a blueprint or a favoured model. In essence, states can fulfill these obligations by authorising specialised personnel within existing branches of government. The Convention has left it open for States Parties to find the most suitable institutional framework to combat corruption according to their domestic specificities.[182] In sub-Saharan Africa, and in most developing countries, this has been achieved through the establishment of anti-corruption agencies.

The Organisation for Economic Cooperation and Development (OECD) has identified three models of anti-corruption commissions:

I. Multi-purpose with law enforcement powers
II. Law enforcement
III. Preventive, policy and coordination

The functions of the "preventive, policy and coordination" model focus on a limited mandate of preventing corruption through research, monitoring and implementing national anti-corruption strategies, implementing codes of ethics, training officials and personnel, facilitating international cooperation, raising awareness and liaising with civil society.[183] The law enforcement model incorporates corruption detection and investigation and prosecution under one body, and may also undertake prevention, coordination and research roles. A number of the anti-corruption commissions in emerging European economies have assumed this model, including Hungary, Romania and Croatia.[184]

The "multi-purpose with law enforcement" model combines corruption prevention, investigation and education functions, and is largely based on the model of the Hong Kong ICAC. The ICAC is divided into three departments: the Operations Department, which investigates violations of laws and regulations; the Corruption Prevention Department, which conducts training and seminars for both public and private sectors; and the Community Relations Department, which raises awareness through various campaigns and educates the public of any changes in the laws and regulations.[185]

The ICAC has experienced significant success in curbing Hong Kong's history of systemic corruption.[186] The extant literature in the area also identifies models of anti-corruption commissions based on the above-mentioned functions.[187] However,

this author proposes that a fourth model should also be identified: the "multi-purpose with law enforcement and prosecutorial powers" model. The OECD notes that prosecution remains a separate, external function in "the multi-purpose with law enforcement" model.[188] However, anti-corruption commissions with investigative, preventive, educative *and* prosecutorial functions do exist. The Nigerian Economic and Financial Crimes Commission (EFCC) is one such example, where the Establishment Act of the EFCC (2004) grants all such powers and functions.[189] The final sub-section will present the case for why anti-corruption commissions based on this specific model may be the most effective for sub-Saharan African states.

2.9 The Efficacy of Anti-Corruption Agencies

Anti-corruption agencies form just one component of a government's anti-corruption strategy. As discussed previously, an effective strategy should undertake a holistic approach aimed at strengthening all pillars of a national integrity system. Accordingly, it is difficult to isolate whether a reduction in corruption can be attributed to an anti-corruption commission or to other factors. Nevertheless, the literature has advanced a number of factors that contribute to the effective functioning of anti-corruption agencies. These include:[190]

i. Broad political support
ii. Manageable (medium) levels of corruption
iii. Clear mission, sufficient powers and performance measurement systems
iv. Support from complementary branches of government
v. Economic stability (which reduces the incentives and opportunities for corruption)
vi. Adequate financial resources
vii. Trained staff
viii. High standards of integrity on the part of leaders and staff
ix. Independence and freedom from political interference
x. Public awareness and confidence

According to Khemani,[191] it is worth singling out more specific factors related to those advanced in the literature. These include:

i. Adequate technological support
ii. A widely-respected and prolific head of the anti-corruption commission
iii. Early success in cases and convictions

iv. Support from civil society organisations

In connection with adequate financial resources, the effectiveness of anti-corruption agencies also depends on adequate technological support; corruption investigations often require sophisticated interception of communications and surveillance devices, as well as financial intelligence software for the tracing of assets and the prevention and detection of advance fee fraud. In connection with high levels of integrity of staff and gaining public confidence, it is also worth noting the impact a widely respected and prolific head of an anti-corruption agency can have on its effectiveness and success. The general public awareness and positive reputation of the former head of the Nigeria's EFCC, Nuhu Ribadu, played a significant role in the agency's relative successes.

Furthermore, an anti-corruption agency will be able to operate more effectively if it proves successful in securing convictions at an early stage; this will not only assist in gaining public confidence and greater political support, but will also strengthen its deterrent effect. Finally, it is crucial that anti-corruption agencies have strong partnerships with civil society organisations; this raises public awareness and creates a sense of ownership and empowerment that combating corruption is a society-wide endeavour. A strong relationship with civil society not only facilitates the detection and reporting of corruption, but also may importantly serve as a check to prevent political interference in the operations of an anti-corruption agency.

Another method of assessing whether anti-corruption agencies are effective is by looking at whether they suffer from one or more of what has been termed the "Seven Deadly Sins:"[192]

i. Political Sins:

a. A lack of genuine political commitment;

b. Weak anti-corruption efforts undertaken to feign compliance with international obligations and/or to simply placate donors and investors.

ii. Economic Sins:

a. Instability caused by a macro- or micro-economic factors that lead to instability;

b. A lack of funding and adequate resources of the anti-corruption commission.

iii. Governance Sins:

a. A lack of effective coordination with other branches of government;

b. A generally weak institutional environment.

iv. Legal Sins:

a. Operation of the anti-corruption commission under a weak legal framework;

b. A weak system of Rule of Law, criminal justice system and judiciary.

v. Organisational Sins:

a. A weak organisational structure;

b. Neglect of certain functions and excessive focus on others.

vi. Performance Sins:

a. Unskilled and inexperienced staff;

b. Unrealistic benchmarks and objectives, creating unattainable public expectations.

v. Public Confidence Sins:

a. Weak public awareness and education campaigns;

b. Unestablished or weak relationships with civil society and the media.

What is to be reiterated here is that agencies dedicated to anti-corruption are likely to be established where corruption is perceived to be widespread, or where existing institutions cannot be adapted to develop and implement the necessary reforms, or where the existing institutions are themselves considered corrupt.[193] However, not all countries have opted for specialised anti-corruption agencies or commissions. South Africa is one example that has opted for incremental improvements to existing structures for combating corruption. It has established an Anti-Corruption Co-ordination Committee to co-ordinate the work of the different agencies. The anti-corruption mandate has thus been divided between the police, the Auditor-General, the South Africa Revenue Services, the Public Service Commission and the key role lies with the National Prosecuting Agency.[194]

From the reviewed literature, it is a settled issue that corruption is now being viewed to have adverse effects on socio-political and economic well-being of any nation. There is an avalanche of research on the global dimension of corruption and agreement to curb it with the emergence of the UNCAC has been underscored. As matter of fact, various analytical and empirical frameworks have also been used to capture different dimensions of corruption. Corruption causes and effects and the need to strategise to overcome its menace through the establishment of anti-corruption agencies is non controversial in the related literature. However, there has been a dearth of research in the area of comparison of the UNCAC's corruption prevention prescription in the context of establishing anti-corruption agencies in sub-Saharan African countries since its emergence 2003 and coming into force in 2005. The extent to which the Convention has shaped the anti-corruption strategies of Kenya and

Nigeria's agencies has not been fully explored. That is, there is paucity of comparative studies devoted to the evaluation of the nexus between the Convention and the strategies being used by the Kenya and Nigeria's anti-corruption agencies. The need to fill this observed gap duly motivated this research.

2.10 Theoretical Framework

A theoretical framework provides the structural basis upon which a research is laid. This study adopted the good governance model and contingency theory as its theoretical framework. The good governance model would help to comprehend and apprehend the principles that focus on the effective functioning of governments of Kenya and Nigeria in the context of the UNCAC. While some central premises of contingency theory can aid not only in understanding the relationship of the KACC and the EFCC and the environment in which they operate but also dissect the core issues for implementing anti-corruption strategies of both agencies.

The good governance principles consist of respect for rule of law, openness, transparency and accountability to democratic institutions, fairness and equity in dealing with the citizens. The model posits that for the modern state to function competently, voice and accountability, political stability, government effectiveness, regulatory quality, rule of law and control of corruption must be aptly visible.[195] Thus, competent management of a country's resources and affairs in a manner that is open, transparent, accountable, equitable and responsive to people's needs is not negotiable.[196] In essence, the model stresses the notion that the absence or partial existence of the stated principles in any polity encourages corruption and the contention that the "quality of governance of a nation is the factor that plays the main role in its ability to deter corruption"[197] and "strongly correlated with various development outcomes across countries".[198]Corruption is viewed as a major hindrance to good governance and that any state which implements these good governance principles or dimensions is expected to achieve success.[199]

Generally, there is now an implicit consensus that strict adherence to good governance prescriptions and compliance to the UNCAC should not only be the take-off point, particularly for developing countries like Kenya and Nigeria, but also significant for any meaningful and acceptable level of analysis of corruption. Thus, the principles and main pillars of the UNCAC vis-à-vis good governance prescriptions are now viewed as the cornerstones of political and economic development in Africa.[200]

The good governance model therefore, is about simultaneously addressing institutional reforms that improve the stability of the rule of law, anti-corruption reforms and among others to improve the accountability of governments[201] in Kenya and Nigeria; while the main pillars obligate them to put their houses in order in line with the spirit and letters of the UNCAC. Good governance model is therefore essential for this study and was adopted given its consensus-oriented and pragmatic adherence to universally acclaimed principles as stated above.

On the other hand, contingency theory was first proposed by Lawrence and Lorsch.[202] It was shown through their empirical study that "different environments place different requirements on organisations".[203] The environments marked by uncertainty and rapid change in market conditions and technological areas since these kinds of environments present different demands, both positive and negative, than relatively stable environments were specifically emphasised.[204]

While contingency theory has been greatly elaborated over years, the general orienting hypothesis of the theory suggests that design decisions depend on environmental conditions, meaning that organisations like the KACC and the EFCC need to match their internal features to the demands of their environments in order to achieve the best adaptation[205] *vis-à-vis* UNCAC's compliance and implementation. In other words, "driving force behind organisational change is the external environment, particularly the task environment with which an organisation is confronted."[206]Scott points out two assumptions proposed by Galbraith[207]22 that underlies contingency theory, and adds a third one himself.

The following assumptions that constitute the central premises of the contingency theory can be utilised to address the challenges being encountered by the KACC and the EFCC in the compliance and implementation of the UNCAC provisions: (i) there is no one best way to organise, (ii) any way of organising is not equally effective; and (iii) the best way to organise depends on the nature of the environment to which the organisation relates.[208]

The first assumption challenges the traditional view that certain general rules and principles can be applied to organisations in all times and places.[209] Scott argues that second assumption challenges the conventional wisdom of early economists that organisational structure is not relevant to organisational performance. Today, it is commonly held that organisation form is associated with the performance of the organisation. In the making use of the different strategies by anti-corruption agencies

like the KACC and the EFCC, however, importance of organisation structure is often ignored or underestimated. Effective anti-corruption strategies often require certain changes in the organisational structure of the anti-corruption agencies. The third assumption is particularly important in that it explains most of the factors that lead to problems of the anti-corruption strategies in the compliance and implementation of the UNCAC provisions by the two anti-corruption agencies. As stressed by Scott[210], organisations are as successful as they are successful in adapting to their environments. In applying this to the present situation, when implementing a policy related documents like the UNCAC, specific features of the environment and characteristics of the relevant country are often not taken into account, which is a major threat to the success of its implementation and compliance. Hence, contingency theory suggests that the environment task of an organisation determines its structure and activities.

From all indications, strong theoretical framework should be supported with interdisciplinary perspective to develop an effective public policy. An interdisciplinary approach can achieve to consider and analyse relations and interplay among complex and intertwined factors, which is crucial to establish an effective anti-corruption agencies with strong capacity to comply and implement the global template for anti-corruption strategies. However, arguably, the theoretical models are more or less abstraction of reality; but in spite of the vagueness of the concept and of the normative judgement criteria involved in good governance[211] and the domestication challenge being faced by the UNCAC, these limitations do not prevent the study from using them as its theoretical framework; giving the fact that they provide the basis for a robust, logical analysis and meaningful conclusion. This is because no theoretical model is error free. In addition, though, contingency theory has been perceived to lack explanatory power of the theory and fails to explain how and why different organisations can achieve success even when they respond to the contingent factors in different ways.[212] But this does not diminish its utility and relevancy in this thesis.

2.11 Conclusion

Corruption in sub-Saharan Africa has been identified as a serious obstacle to social and economic development as it limits economic growth through the reduction of public resources, which results in the inefficient use of revenue. Corruption is tied

with the issue of governance and hence to a certain extent issues of governance have to be addressed if corruption is to be dealt with effectively.

The question of understanding corruption is central to the grasp of its prevalence and challenges in Kenya and Nigeria within anti-corruption strategies context. Corruption is exclusively often prone to different and changing patterns in an environment with multiple, often competing sets of rules, norms and expectations regarding positions of public office.

While the global anti-corruption strategies are guided by their own set of increasingly harmonised rules and standards, these may be quite different to the predominant local norms, rules and expectations. Furthermore, there may also be significant differences in local perceptions of what is acceptable and unacceptable behaviour, according to the differing viewpoints among various local factions holding a strong personal, group or sectional interest. Every society tends to share a particular understanding of what, in each context constitutes corruption.

However, the eventual emergence of varied anti-corruption strategies put in place by the concerned agencies; notwithstanding their limitations have signified the clear commitment from the international community in placing anti-corruption strategies on the UNCAC agenda.

Such international instruments like UNCAC simply set the benchmarks for Kenya and Nigeria which in the long run are expected to rub-off on renewed domestic anti-corruption strategies of the both countries agencies. In essence, while this is a common feature of international agreements, which allow States Parties to tailor treaty requirements to fit the specificities of their domestic needs, it may also serve as a means for non-committal governments to establish weak institutions while simultaneously claiming that they have implemented their international obligations.

From all indications, anti-corruption strategies are a complex and multi-faceted issue that requires contextual analysis and understanding. However, the success of the UNCAC instruments depends on the coincidence of political will in individual countries to make the required legislation in ways that make them easily interface with the mechanisms of combating corruption that is found in the Convention.[213]

That is, focusing specifically on the anti-corruption strategies of each country's agency will go a long way in identifying their peculiarities in terms of their dynamics, utilities and challenges. This will be the subject of discussion in the next two chapters.

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i. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties,

in order to obtain or retain business or other improper advantage in the conduct of international business.
ii. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party. The Convention entered into force on 15 February 1999. Retrieved July 23, 2008 from http://www.oecd.org/document/21/0,3343,en264934859_2017813_1_1_1_1,00.html

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CHAPTER THREE

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)

3.1 Introduction

Corruption, previously a social and political problem at the national level, has been added to the list of global concerns along with environment, labour rights, intellectual property and, of course, trade. Corruption has become significant even for countries usually judged not to be affected by this malaise. United Nations, for instance, has adopted the Convention against corruption because, it was felt, corruption poses a serious threat to the stability and security of nations and "corruption is a transnational phenomenon that requires international cooperation.

The United Nations, acknowledging that an all-embracing international legal instrument against corruption is *de rigueur*, set up an ad hoc committee in 2001 for thorough discussion of such an instrument.[1] The Ad Hoc Committee after seven negotiating sessions held between January 2002 and October 2003, finally, approved the UNCAC, which was adopted by the General Assembly on 31st October, 2003.[2]

The Convention was opened for signature at the High-level Political Conference held in Merida, Mexico on 9th December 2003. The UNCAC was negotiated and agreed among approximately 129 nations. It represents international consensus about what states should do in the areas of corruption prevention and criminalisation, as well as international cooperation and asset recovery. It recognises the commonality and complexity of the problem among all nations and shared responsibilities in cases of cross-border corruption activities.

The Convention entered into force on 14th December 2005, when it received 137 ratifications (as of 8th September 2009) and had 140 signatories as of 23rd July 2009. The UNCAC is the first global agreement comprehensively addressing corruption

3.2 Main Objectives of the UNCAC

The objective of the UNCAC, as the Preamble and the Statement of purpose declares, is to promote and strengthen measures to combat corruption domestically and internationally.[3]

The UNCAC has as its main objective, the elimination of corruption in order to enhance the efficient and effective management of "public affairs and public property."[4] Specifically, the UNCAC aims:

(i) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(ii) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(iii)To promote integrity, accountability and proper management of public affairs and public property.[5]

3.3 Overviewing the Measures and Provisions of the UNCAC

The UNCAC covers five main areas: prevention, criminalisation and law enforcement measures, international cooperation, asset recovery, and technical assistance and information exchange. It includes both mandatory and non-mandatory provisions (For the text of the Convention see the appendix).

1. General Provisions (Chapter I, Articles 1-4)

The opening Articles of the UNCAC include a statement of purpose (Article1) which covers both the promotion of integrity and accountability within each country and the support of international cooperation and technical assistance between States Parties. They also include definitions of critical terms used in the instrument. Some of these are similar to those used in other instruments, and in particular the United Nations Convention against Transnational Organised Crime, but those defining "public official", "foreign public official", and " official of a public international organisation" are new and are important for determining the scope of application of the UNCAC in these areas. The UNCAC does not provide for a definition of corruption. In accordance with Article 2 of the UN Charter, Article 4 of the UNCAC provides for the protection of national sovereignty of the States Parties.[6]

2. Preventive Measures (Chapter II, Articles 5-14)

The first Conference of the States Parties recognised the importance of prevention to fight corruption by going far beyond the measures of previous instruments in both scope and detail. The preventive measures cover both the public and private sectors. The chapter includes model preventive policies, such as the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. Anti-corruption bodies should implement the anti-corruption policies, disseminate knowledge and must be independent, adequately resourced and have properly trained staff. States are also obliged to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be bound by codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures.

Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement. Since the combating of corruption also depends on cooperation between the State and society, the UNCAC places particular emphasis on the involvement of civil society and on the general reporting process through which the public administration reports to the people. The requirements made for the public sector also apply to the private sector – it too is expected to adopt transparent procedures and codes of conduct.[7]

3. Criminalisation and Law Enforcement (Chapter III, Articles 15-44)

Chapter III calls on States Parties to establish or maintain a series of specific criminal offences including not only long-established crimes such as various forms of bribery and embezzlement, but also conduct which may not already be criminalised in many States, such as trading in official influence and other abuses of official functions.

The broad range of ways in which corruption has manifested itself in different countries and the novelty of some of the offences pose serious legislative and constitutional challenges, a fact reflected in the decision of the Ad Hoc Committee to make some of the requirements either optional on the part of States Parties ("…shall consider adopting…") or subject to domestic constitutional or other fundamental requirements ("…subject to its constitution and the fundamental principles of its legal system…").[8] Specific acts that States Parties must criminalise include active bribery

(the offer or giving of an undue advantage) of a national, international or foreign public official, and passive bribery of a national public official and embezzlement of public funds.

Other mandatory crimes include obstruction of justice, and the concealment, conversion or transfer of criminal proceeds (money laundering). Sanctions extend to those who participate in or attempt to commit corruption offences.[9] The Convention goes thus beyond previous instruments of this kind which criminalise only basic forms of corruption. States are encouraged – but not required – to criminalise, inter alia, passive bribery of foreign and international public officials, trading in influence, abuse of function, illicit enrichment, private sector bribery and embezzlement, money laundering, and the concealment of illicit assets.

Furthermore, States Parties are required to simplify the provision of evidence of corrupt behavior by, inter alia, ensuring that obstacles that may arise from the application of bank secrecy laws shall be overcome. This is especially important as corrupt acts are very difficult to prove before a court. Particularly important is also the introduction of the liability of legal persons. In the area of law enforcement, the UNCAC calls for better cooperation between national and international bodies and with civil society. There is a provision for the protection of witnesses, victims, expert witnesses and whistleblowers, in order to ensure that law enforcement is truly effective.[10]

4. International Cooperation (Chapter IV, Articles 43-49)

Under Chapter IV of the UNCAC, States Parties are obliged to assist one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Particular emphasis is laid on mutual legal assistance, in gathering and transferring evidence for use in court, and extradition of offenders. A key issue in developing the international cooperation requirements arose with respect to the scope or range of offences to which they would apply. The broad range of corruption problems faced by many countries resulted in proposals to criminalise a wide range of conduct. This, in turn, confronted many countries with conduct they could not criminalise (as with the illicit enrichment offence discussed in the previous segment) and which were made optional as a result.[11]

Many delegations were willing to accept that others could not criminalise specific acts of corruption for constitutional or other fundamental reasons, but still wanted to ensure that countries which did not criminalise such conduct would be

obliged to cooperate with other States which had done so. The result of this process was a compromise, in which dual criminality requirements were narrowed as much as possible within the fundamental legal requirements of the States which cannot criminalise some of the offences established by the Convention.

According to the Convention, the principle of dual criminality can only be insisted on where the assistance would require coercive action such as arrest or search and seizure, and States Parties are encouraged to allow a wider scope of assistance without dual criminality where possible. Also, where dual criminality is required, it is sufficient that the conduct at issue constitutes a crime in both jurisdictions; the language of the laws need not coincide exactly. Cooperation in criminal matters is mandatory. In civil and administrative matters, States Parties are encouraged to do so.[12]

5. Asset Recovery (Chapter V, Articles 51-59)

The agreement on asset recovery is considered a major breakthrough and many observers claim that it is also the reason for why so many developing countries have signed the UNCAC.[13] Asset recovery is indeed a very important issue for many developing countries where high-level corruption has plundered the national wealth. Reaching an agreement on this Chapter involved intensive negotiations, as the needs of countries seeking the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance was sought.

Generally, countries seeking assets sought to establish presumptions which would make clear their ownership of the assets and give priority for return over other means of disposal. Countries from which return was likely to be sought, on the other hand, had concerns about the language which might have compromised basic human rights and procedural protections associated with criminal liability and the freezing, seizure, forfeiture and return of such assets.[14]

Chapter V of the UNCAC establishes asset recovery as a "fundamental principle" of the Convention. The provisions on asset recovery lay a framework, in both civil and criminal law, for tracing, freezing, forfeiting and returning funds obtained through corrupt activities. The requesting state will in most cases receive the recovered funds as long as it can prove ownership. In some cases, the funds may be returned directly to individual victims.

If no other arrangement is in place, UNCAC signatories may use the Convention itself as a legal basis for enforcing confiscation orders obtained in a

foreign criminal court. Specifically, Article 54(1) (a) of the UNCAC provides that: "Each State Party (shall)... take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another state party"[15] United Nations Convention against Corruption Article 54 Section 1A,2A. Indeed, Article 54(2) (a) of the UNCAC also provides for the provisional freezing or seizing of property where there are sufficient grounds for taking such actions in advance of a formal request being received.[16]

Recognising that recovering assets once transferred and concealed is an exceedingly costly, complex and all-too-often unsuccessful process, this Chapter also incorporates elements intended to prevent illicit transfers and generate records which can be used where illicit transfers eventually have to be traced, frozen, seized and confiscated (Article 52). The identification of experts who can assist developing countries in this process is also included as a form of technical assistance (Article 60(5)).

6. Technical Assistance and Information Exchange (Chapter VI, Articles 60-62)

Chapter VI of the UNCAC is dedicated to technical assistance, meaning support offered to developing and transition countries in implementing the Convention. The provisions cover training, material and human resources, research, and information sharing.

The Convention also calls for cooperation through international and regional organisations (many of who already have established anti-corruption programmes), research efforts, and the contribution of financial resources both directly to developing countries and countries with economies in transition, and to the United Nations Office on Drugs and Crime, (UNODC), which is the Secretariat to the Conference of the States Parties.[17]

7. Mechanisms for Implementation (Chapter VII, Articles 63-64)

Chapter VII deals with international implementation through the CoSP and the United Nations Secretariat.

8. Final Provisions (Chapter VIII, Articles 65 – 71)

The final provisions are similar to those found in other United Nations treaties. Key provisions include those which ensure that: the UNCAC requirements are to be interpreted as minimum standards, which States Parties are free to exceed with measures which are “more strict or severe” than those set out in the specific provisions; and the two Articles governing signature, ratification and the coming into

force of the Convention.[18] The figure 3.1 below highlights the main pillars of the UNCAC.

3.4 Implementation of the UNCAC and Monitoring Mechanism

Article 63 of the UNCAC establishes a Conference of State Parties (CoSP) with a mandate to, inter alia, promote and review the implementation of the Convention. In accordance with Article 63(7), "the Conference shall establish, if it deems necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention".[19] At its first session, held in Jordan in December 2006, the CoSP agreed that it was necessary to establish an appropriate and effective mechanism to assist in the review of the implementation of the Convention (Resolution 1/1).

The Conference established an open-ended intergovernmental expert group to make recommendations to the Conference on the appropriate mechanism, which should allow the Conference to discharge fully and efficiently its mandates, in particular with respect to taking stock of States' efforts to implement the Convention. The Conference also requested the Secretariat to assist States in their efforts to collect and provide information on their self-assessment and their analysis of implementation efforts and to report on those efforts to the Conference. In addition, several countries, already during this session of the CoSP, expressed their readiness to support, on an interim basis, a review mechanism which would combine the self-assessment component with a review process supported by the Secretariat.[20]

The "Pilot Review Programme" was established to offer adequate opportunity to test possible means for the implementation review of the UNCAC, with the overall objective to evaluate efficiency and effectiveness of the tested mechanism(s) and to provide to the CoSP information on lessons learnt and experience acquired, thus enabling the CoSP to make informed decisions on the establishment of the appropriate mechanism for reviewing the implementation of the UNCAC.

The Pilot Programme is an interim measure to help fine-tune the course of action. It is strictly voluntary and limited in scope and time. The methodology used under the Pilot Review Programme was to conduct a limited review of the implementation of UNCAC in the participating countries using a combined self-assessment / group / expert review method as possible mechanism(s) for reviewing the implementation of the Convention. Throughout the review process, members of the

Group engage with the individual country under review in an active dialogue, discussing preliminary findings and requesting additional information. Where requested, country visits are conducted to assist in undertaking the self-assessments and/or preparing the recommendations. The teams conducting the country visits will be composed of experts from two prior agreed upon countries from the Group and two members of the Secretariat.[21]

The scope of review under the Pilot Review Programme includes Articles: 5 (preventive anti-corruption policies and practices); 15 (bribery of national public officials); 16 (bribery of foreign public officials and officials of public international organizations); 17 (embezzlement, misappropriation or other diversion of property by a public official); 25 (obstruction of justice); 46 (mutual legal assistance), particularly paragraphs 13 and 9; 52 (prevention and detection of transfers of proceeds of crime); and 53 (measures for direct recovery of property).[22]

Figure 3.1. Pillars of the United Nations Convention Against Corruption

Source: Commonwealth Secretariat and Chatham House. 2006. The UN convention against corruption implementation & enforcement: Meeting the challenges. Anti-Corruption Conference, London, 24-25, April.

3.5 UNCAC Coalition of Civil Society Organisations

The "UNCAC Coalition," established in 2006,[23] is a network of more than 50 civil society organisations (CSOs) that is committed to promoting the ratification, implementation and monitoring of the UNCAC. It aims to mobilise broad civil society support for the UNCAC and to facilitate strong civil society action at national, regional and international levels in support of the Convention. The Coalition is open to all organisations and individuals committed to these goals. The breadth of UNCAC means that its framework is relevant for a wide range of CSOs, including groups working in the areas of human rights, labour rights, governance, economic development, environment and private sector accountability.

3.6 Substance and Uniqueness of the UNCAC

The UNCAC was intended to serve as a far-reaching international legal instrument against corruption. Its seventy-one articles deal with virtually all aspects of corruption and cover both the demand for and supply of corruption.[24] However, it is evident the UNCAC's main emphasis is on "prevention," "criminalisation," and "enforcement."

Acknowledging that global corruption cannot be effectively fought against without the help and cooperation of national legal systems, the UNCAC imposes mandatory duties on States Parties-they must develop and implement effective anti-corruption policies and strategies. Specifically, each State Party shall, "in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability."[25]

The Convention recognises the fact that in many countries, an important problem associated with fighting corruption is the fact that quite often, national legal systems do not adequately constrain counteracting agencies (e.g., the police and the judiciary). Hence, the UNCAC specifically requires States Parties to "take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary."[26] For example, studies of corruption in several African countries show that civil servants, who include judges, other judicial officers, and the police, are among some of the most corrupt public servants in these countries.[27]

The UNCAC also recognises that efforts at corruption control cannot be successful without the participation of civil society. Thus, the convention specifically calls for States Parties to enhance the ability of civil society, grassroots organisations, as well as other non-governmental organisations, to participate fully and effectively in combating corruption. Part of the effort to enhance private-sector participation in corruption control requires national governments to ensure transparency in the management of public resources.[28]

To further strengthen the national government's ability to fight corruption, the UNCAC criminalises certain practices, whether committed in the private or public sectors. These include bribery, extra-legal or illicit enrichment, embezzlement, and ''prostitution'' of one's public office.[29]

A very important part of the UNCAC is international cooperation in the fight against corruption. The Convention provides specific guidelines that deal with substantive and procedural issues associated with the various aspects of fighting global corruption. The most important of these include (1) extraditions,[30] (2) mutual assistance in investigations, prosecutions, and judicial proceedings.[31]

One of the most important costs of monumental corruption in sub-Saharan Africa is that much of the money illegally appropriated by civil servants and politicians is usually deposited in numbered accounts in foreign banks. Thus, the UNCAC's emphasis on asset recovery is very important for many poor countries, whose corrupt and opportunistic leaders have illegally appropriated national financial resources and have either deposited them in foreign banks or have used them to purchase foreign real property.[32] Article 51 states specifically that ''[t]he return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard."[33] In fact, asset recovery was considered so critical and fundamental an issue that the States Parties devoted an entire chapter of the Convention (Chapter V, Articles 51-59) to dealing with it.[34]

The UNCAC provides detailed procedures on how States Parties can initiate action in the courts of a State Party where the illegally obtained assets are currently located in order to recover them.[35] The UNCAC also establishes a Conference of the States Parties to the Convention "to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation."[36] The Conference is expected to review, on a periodical

basis, the extent to which States Parties are implementing the UNCAC and to make recommendations for improving the Convention's role in combating global corruption.[37]

The UNCAC, of course, is an international agreement entered into voluntarily by the majority of the world's sovereign nations, with the aim of tackling one of the most intractable development constraints of this century-corruption. Nevertheless, it is important to realise, especially in the case of sub-Saharan Africa, that while many countries may be willing to cooperate fully in the global fight against corruption, they may not be able to do so either because ruling elites in these countries are the direct beneficiaries of the "corruption enterprise," national institutions (e.g., the police and the judiciary) are simply incapable of functioning as effective counteracting agencies, or countries fear that international cooperation against corruption involves surrender of a certain level of national sovereignty. Where the national government is considered by most people as illegitimate,[38] it is not likely that civil society will cooperate with such a government in the fight against corruption.

Moreover, the UNCAC requires establishment of a number of offences as crimes in their domestic law, either by enacting new laws and amend the existing laws, if these are not already crimes under domestic law. The unique feature of the Convention is that it goes beyond previous instruments of this kind, criminalising not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and "laundering" of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. The Convention offences also deal with the problematic areas of private-sector corruption.[39]

(i) Active and passive corruption by a public official

Passive corruption or bribery has been described as the acceptance of any undue advantage by a public official in exchange for performing a corrupt act relating to his or her public functions. Active corruption on the other hand, could be described as the granting of any undue advantage by a public official for himself or herself in exchange for performing an act of corruption relating to his or her public functions.[40] Article 15 of the Convention prohibits passive and active corruption and mandates the States to take measures to establish as criminal offences:

(a) active bribery, defined as the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties.[41]

(b) passive bribery, defined as the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties.[42]

The elements that are necessary to constitute active offence are those promising or offering or actually giving something to a public official. An undue advantage may be something tangible and intangible, whether pecuniary or non-pecuniary.[43] The undue advantage, however, must be linked to the official's duties. On the other hand, passive bribery requires soliciting and accepting the bribe to constitute an offence. Both offences could be committed either directly or indirectly. Similar provisions could be found in most other anti-corruption treaties as well.[44]

(ii) Corruption by a foreign public official and official of a public international organisation

A "foreign public official" has been defined as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization".[45] The UNCAC which drew inspiration from the OECD Convention, however, distinguishes between an "official of a foreign state" (foreign public official) and "official of a public international organization". It states that "foreign public official" to means "any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise". On the other hand, an "official of a public international organisation" is defined as "an international civil servant or any person who is authorised by such an organization to act on behalf of that organisation".[46]

The Convention under Article 16 covers both passive and active by a corruption foreign public official and official of a public international organisation. Article 16(1) deals with active corruption, whereas Article 16(2) deals with passive corruption.[47]

The elements of both these offences are similar to those listed in the case of active and passive bribery of national public officials. The only difference is that

article 16(1) and (2) applies only to foreign public official or official of an international organisation, instead of national public officials, and the offence is linked to the conduct of international business, including international aid. While the State parties must implement active corruption by a foreign public official and official of a public international organisation, the obligation is optional in the case of passive bribery.

Also, this article does not intend to affect the immunities that the foreign public officials or officials of public international organisations may enjoy under international law.

The UNCAC, unlike the Organisation for Economic Co-operation and Development (OECD) Convention, criminalises both active and passive bribery of foreign public officials or officials of public international organisations. On the other hand, the OECD Convention criminalises only active bribery. Further, the OECD Convention makes important exception to active corruption. The OECD Commentaries note that signatories should not treat bribery as an offence where the advantage "was permitted or required by the written law or regulation of the foreign public official's country, including case law".[48] Nor is it a criminal offence to make "small facilitation payments," which "does not constitute payments made to, obtain or retain business or other improper advantage". Such payments are made to induce public officials to perform their functions, such as issuing licenses or permits.[49]

(iii) Embezzlement, misappropriation or diversion of property by a public official

Article 17 of the UNCAC deals with diversion[50] of property[51]by a public official.[52] This provision provides that:

> each State Party shall adopt such … measures as may be necessary to establish as criminal offences, … the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

The offence must cover instances where these acts are for the benefits of the public officials or another persons or entity. The UNCAC establishes an obligation on the State parties to criminalise diversion of property by a public servant. This article has very wide scope of application. The Convention not only deals with the diversion of property, but also with the embezzlement and misappropriation of property.[53]

However, this article does not require the prosecution of *de minimis* offences.[54] Also, the UNCAC deals extensively with the 'embezzlement, misappropriation or other diversion' by a public official of any property, public or private funds or securities.[55]

(iv) Trading in influence

Trading in influence generally means the payment of money to public officials/decision makers/politicians to influence, for example, not only their vote in Parliament or committees/commissions of which they are members, but also for asking particular questions or raising issues not related to public interest. Article 18 of the UNCAC deals with improper influencing of any person in public or private sector relating to such person's decision-making functions. This Article criminalises:

> (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;
> (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

The prohibition under this article is applicable to persons performing functions in the public or private sector. This offence covers both active and passive corruption committed by a person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector. Further, a distinction has to be drawn between the offence covered under Articles 15 and 18. While Article 15 deals with an act or refraining to act by public officials in the course of their duties, under Article 18, the offence involves using ones' real or supposed influence to obtain undue advantage for a third person from an administrative or public authority of that State.

(v) Abuse of functions

Article 19 of the UNCAC criminalises the active corruption committed by a public official. This Article provides as follows:

> Each State Party shall consider adopting such … measures as may be necessary to establish as a criminal offence, … the abuse of functions or position, that is,

the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.[56]

This offence may encompass various types of conduct such as improper disclosure by a public official of classified or privileged information.[57]

The obligation imposed upon the States Parties under this provision is optional. The States must only to "'consider adopting' such … measures as may be necessary to establish as a criminal offence" active bribery. This in effect means that the State may "consider" the issue, but may or may not legislate on the issue.

(vi) Laundering of Proceeds of Crime (Money laundering)

The UN Convention deals in detail with the use or concealment of property derived from acts of corruption. Article 23 of the UN Convention deals with the "laundering of proceeds of crime" and Article 24 deals with the "concealment or continued retention" of property derived from corrupt activities. According to Article 23 States parties must establish the following four offences as crimes:

(a) Conversion or transfer of proceeds of crime;[58]

(b) Concealment or disguise of the nature, source, location, disposition, movement or ownership of proceeds of crime;[59]

(c) acquisition, possession or use of proceeds of crime;[60] and

(d) participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counseling the commission of any of the offences mandated by article 23.[61]

In the case of first two offences, the State Parties must establish those offences as crime within their domestic law. In the case of latter two offences, the establishment of these offences within the domestic law is subject to the basic concepts of their legal systems. While implementing or applying these provisions, each State Party shall seek to apply this article to the widest range of predicate offences[62] and shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention. In this context, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question.

However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal

offence under the domestic law of the State Party implementing or applying this article had it been committed there.[63]

Similarly, Article 24, which deals with the "concealment or continued retention" of property derived from corrupt activities, each Sate Party shall consider establishing as a criminal offence, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention. In the case of laundering of proceeding of crime, provisions in the UNCAC are preferred over similar provisions in other similar Conventions. This is because in the UNCAC, the offences are prescribed in much more detail and encourages States to apply the provision "to the widest range of predicate offence". Another aspect of the UNCAC is that it also urges State Parties to prevent, detect and deter international transfers of illicitly acquired assets in a more effective manner, and to strengthen international cooperation in asset recovery. Articles 23 and 24 are in line with these objectives of the Convention.[64]The UNCAC also requires that the person who launders or conceals the proceeds of crime must have "knowledge" that such property is the proceeds of crime before that person commits the crime.

(vii) Participation as accomplice, assistant or instigator and attempt to commit an offence

Article 27 of the UNCAC criminalises participation as accomplice, assistant or instigator and attempt to commit an offence. According to this article, the State parties shall establish the following three criminal offences:

(a) participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

(b) any attempt to commit an offence established in accordance with this Convention.

(c) the preparation for an offence established in accordance with this Convention.

Although the foregoing provision makes specific reference only to accomplices, assistants or instigators as possible offenders, the term "participation in any capacity" in an offence is prohibited. However, under this formulation, States are obligated only to criminalise 'participation' within their domestic law. Whereas, criminalising attempt and preparation for offences are optional obligations. Further, implementation of this provision is subject to the 'domestic law' of the implementing State. Furthermore,

Article 23(1) (b) (ii) of the UNCAC prohibits the "participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences" established in accordance with Article 23.[65]

(viii) Illicit enrichment

The term "illicit enrichment" has been defined in the 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".[66] The definition provided under this Convention is much stronger as it reverses the burden of proof.[67]

In a criminal case of illicit enrichment, which involves unjustified wealth, the prosecution carries the burden of proof and must therefore show beyond reasonable doubt that acquired wealth is not justified by the earnings. However, under the Convention, the prosecution is not legally obligated to show beyond reasonable doubt that wealth exceeds income. Nor does the prosecution necessarily have to show that unjustified earnings are the result of corruption, as it is automatically presumed that unjustified earnings derive from a corrupt source. If implemented, such provisions are likely to face legal challenges, particularly in countries where the presumption of innocence is constitutionally enshrined.

(ix) Funding of political parties

Financing of political parties and corruption in election are the two issues which are of crucial importance in the anti-corruption debate. The problem of political funding is that there is a temptation to divert the funds for personal use, they could be used to purchase vote, and would encourage favouritism towards the fund giver. The UNCAC, unfortunately, does not contain a prohibition relating to the use of funds acquired through illegal and corrupt practices to finance political parties.

However, a diluted version of deleted draft Article 10 was incorporated in paragraph 3 of Article 7 (Corruption in Public Sector). Article 7(3) requires each State Party to consider taking appropriate measures to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties. Furthermore, Article 7(4) of the UNCAC requires that each State party must endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.[68]

(x) Obstruction of justice

Obstruction of justice is another act of corruption provided under Article 25 of the UNCAC which requires State parties to adopt measures necessary to establish obstruction of justice as a criminal offence. The provision covers the following two criminal offences:

(a) 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 UN Convention.

(b) 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 UN Convention.

The first offence relates to efforts to influence potential witness and others in a position to provide the authorities with relevant evidence. The second offence requires States to establish is the criminalisation with of interference with the actions of judicial and law enforcement officials.

(xi) Knowledge, intent and purpose as elements of an offence

Article 28 of the UNCAC provides that "knowledge, intent or purpose required as an element of an offence established in accordance with the UN Convention may be inferred from objective factual circumstances". This is similar to the "willful ignorance standard" in the United States that is used in many criminal contexts, including corruption and money laundering.

(xii) False and malicious reporting

As in the case of protection of reporting person (whistleblowers protection) there is also need to safeguard the officials against frivolous, vexatious and malicious allegations. In this regard, a law should make punishable those indulging in false and malicious reporting. However, it should be made clear that false and malicious reporting in 'good faith' will not be punishable. The UNCAC does not provide that State Parties must undertake to adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences, unlike under Article 5(7) in the AU Convention. However, the UNCAC contains provisions which require adoption of such measures against:

(a) the use of false documents,[69] and

(b) 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.[70]

(xiii) Consequences of acts of corruption

Article 34 of the UNCAC is considered to be a very important article that breaks new ground in international anti-corruption instruments. It deals with the obligations of States to address consequences of corruption, including through the annulment or rescission of contracts, withdrawal of concessions, or other similar instruments that may have been tainted by corrupt practices. This provision is written in mandatory language. But States are directed to give due regard to the rights of third parties acquired in good faith. This provision could be a significant deterrent to corrupt practices in international and domestic business.

(xiv) Preventive Measures

Preventive measures are one of the most important pillars on which the UNCAC rests upon. The Convention dedicates an entire chapter of the Convention for prevention, with measures directed at both the public and private sectors.[71] This chapter requires each State party to develop and maintain preventive anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability, and preventive anti-corruption body or bodies with necessary independence.

The preventive anti-corruption measures that need to be adopted under this Convention shall broadly be applicable to both public and private sector. The preventive measures in the public sector requires the State Party to maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants. For this purpose, the State Party shall provide for code of conduct for public officials, appropriate system for public procurement and management of public finances, transparency in public administration (public reporting), measures relating to the judiciary and prosecution services.[72] And in the private sector, the State Party shall take measures to prevent corruption by enhancing accounting and auditing standards and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures. The

preventive measure in the private sector shall also be through prevention of money laundering and participation of society.

Preventing public corruption also requires an effort from all members of society at large. For these reasons, the Convention calls on countries to promote actively the involvement of non-governmental and community-based organisations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption.

The Convention mandates the Members to develop and implement or maintain effective, coordinated anti-corruption policies and to establish and promote effective practices aimed at preventing corruption. States Parties shall also collaborate with each other and with relevant international and regional organisations in promoting and developing the preventive measures.[73]

Furthermore, each State Party shall ensure the existence of preventive anti-corruption bodies with necessary independence, to enable the bodies to carry out its functions effectively and free from any undue influence. The name and address of such authority shall be communicated to the Secretary-General of the UN.[74]

(xv) Corruption in Private Sector

A "private sector" means the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government.[75]

Corruption in private sector should be subject to preventive measures and should be criminalised just like corruption in the public sector. This is because private sector is becoming larger than public sector, and the line between the two sectors is blurred by privatisation, outsourcing and other developments.[76]

Furthermore, the Multinational Corporations (MNCs) because of their sizeable share in a State's national income and resource endowments are in an advantageous position to manipulate/influence and make deals with developing countries.[77]Again, private corruption in long run is detrimental to fair trade and the smaller businesses are more likely to be affected.

While negotiating the UNCAC, criminalisation of private sector was one of the most contentious issues faced by the participating States. The European Union (EU) supported by the Latin American and Caribbean States on the one side pushed forward

this provision as they felt that adopting a limited approach that would only target public sector would adversely affect the implementation of the future convention. The US on the other hand, opposed this by stating that private sector bribery is not a crime in US and many other jurisdictions.[78] Though the US succeeded in diluting the provisions on private sector corruption, the participants of the Convention were able to retain provisions on preventive measures in private sector and criminalise bribery and embezzlement in the private sector.[79] In the Preamble itself, the UNCAC reiterates that its objective is not only preventing public sector corruption but also private sectors corruption.

(xv) (a) Measures to prevent corruption in private sector

Article 12 of the UNCAC is a unique feature of this Convention. It requires State Parties to take three types of preventive measures in accordance with the fundamental principles of their law. The first is a general obligation to take measures aimed to prevent corruption in private sector. The second and third obligations are steps towards the achievement of this goal. The second obligation is to enhance accountability and auditing standards in the private sector. This is to enhance transparency and detect malpractices in the private sector. The third requirement is to undertake effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with the accountability and auditing standards.

The State Parties are also required to take some specific measures relative to accounting practices which may include establishment of *inter alia*: off-the-books accounts; the recording of non-existent expenditure; the use of false documents etc. Further, each State party shall disallow the tax deductibility of expenses that constitute bribes.[80] The article also outlines a number of good practices, which could be effective in the prevention of corruption in the private sector and enhance transparency and accountability.[81]

(xv) (b) Active or passive corruption in private sector

Article 21 of the UNCAC criminalises active and passive corruption in private sector. This article is a new innovation compared to other conventions and other international anti-corruption instruments. This Article is intended to bring in integrity and honesty in economic, financial or commercial activities. Accordingly, the provision requires each State Party to consider adopting measures as may be necessary to establish as criminal offences, when committed intentionally in 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;[82]

(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, 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.[83]

The elements of this offence are similar to active and passive corruption committed by a public official, and thus the discussion regarding Article 15 applies here *mutatis mutandis*.[84]

However, language used in the case of private sector is non-obligatory and the State Party needs only to 'consider' adopting legislative and other measures to establish this act of corruption as a criminal offence. This article as well as the Article 22 on embezzlement of property discussed below, intends to cover conduct confined entirely within the private sector, where there is contract to the public sector at all.[85]

(xv) (c) Embezzlement of property in the private sector

Apart from criminalising active and passive corruption in private sector, the UNCAC also urges States to consider criminalising "embezzlement of property in the private sector".[86]According to this article each State Party must consider establishing as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of their position. The said offences are very similar to the offence established according to Article 17, which address the same types of misconduct when committed by public official.

The UNCAC goes further and prohibits embezzlement of any property, private funds or securities or any other thing of value entrusted to a person working in the private sector. However, the only drawback is that the UNCAC provisions are optional and the State Party needs only to "consider" adopting legislative and other measures to establish this act of corruption as a criminal offence. The Conventions provision on the private right to action, even through restricted, follows the CoE Civil Convention by empowering victims of corruption to take action on their own initiative. The Council of Europe (CoE) Criminal Law Convention also provides for a provision on

criminalising private bribery, however, a country may take a reservation to this obligation.

Apart from these two offences described above, the Convention also recommends the criminalisation of concealment of property derived of corruption by any person.[87]

This is an offence which facilitative of or furthering all other offences established in accordance with the Convention.

(xvi) Asset Recovery

Recovering proceeds of corruption has become a pressing issue for many States, especially for the developing countries, as it is in the developing countries where high-level corruption has plundered the nations' wealth. This illegal practice undermines foreign aid, drains currency reserves, reduces the tax base and increases poverty levels.[88] The problems that hamper recovery of the proceeds of corruption may generally be attributed to the following:

(a) the absence or weakness of the political will in the victim country as well as in the countries to which the assets have been diverted;

(b) the lack of an appropriate and solid legal framework to allow for related actions of an efficient and effective sort;

(c) the lack of specialised technical expertise in the victim country to deal with pertinent cases, including by means of filing charges against the perpetrators and preparing mutual legal assistance requests; and

(d) difficulties encountered by victim States in improving their national institutional infrastructure and anti-corruption legislation. In addition, legal issues arising in practice differ significantly depending on the jurisdiction in which the recovery effort is pursued (common or civil law countries) and the procedure followed (civil or criminal recovery).[89]

To successfully recover illegally obtained assets, it may always be preceded by three stages:

(a) investigative measures to trace the assets;

(b) preventive measures to immobilise the assets (freezing, seizing); and

(c) confiscation, return and disposal.[90]

The legal proceeding for complying with these three stages may be instituted in jurisdiction where the offence took place, in the jurisdiction where the assets are located or in both places simultaneously.

The UN General Assembly while considering the resolution[91] for negotiating the UNCAC also considered a draft resolution, from Nigeria on behalf of the Group of 77 and China, on the illegal transfer of funds and the reparation of such funds to their countries of origin. Though originally the draft resolution called for negotiation of a separate instrument on that subject, it was included in the draft terms of reference of the Ad Hoc Committee for the negotiation of UNCAC.[92] During the negotiation, the sensitive and complex nature of the asset recovery became evident. There was intense debate as to how to reconcile the needs of the countries seeking the return of the assets with the legal and procedural safeguards of the countries whose assistance is needed. [93] The need for a provision on asset recovery was in UNCAC strengthened by the United Nations Security Council (UNSC) resolution deciding that all UN member States should take steps to freeze funds removed from Iraq, and immediately transfer them to the Development Fund for Iraq.[94]

In the end, a full chapter of the Convention was devoted to asset recovery. The provisions on asset recovery were indeed a major breakthrough in the international fight against corruption, and were considered as "a fundamental principle" of the UNCAC.[95] The importance of this provision could never be overstated. The UNODC remarked as follows:[96]

> This is a particular important issue for developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.[97]

The preamble to the UNCAC emphasises that the State Parties to the Convention are determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and the State Parties shall afford one another the widest measure of co-operation and assistance in this regard. Chapter V titled 'Asset Recovery' of the UNCAC set forth procedures and conditions for asset recovery. It requires three measures to be undertaken by the States. They are:

(a) measures for direct recovery of property;

(b) mechanisms for recovery of property through international cooperation in confiscation; and

(c) return and disposal of assets.

As regards the first measure already mentioned, that is, "prevention and detection of transfers of proceeds of crime",[98] the States parties must require financial institutions within their domestic jurisdiction to (i) verify the identity of customers, (ii) take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and (iii) scrutinise accounts sought or maintained by or on behalf of individuals who are, or have been entrusted with prominent public functions, their family members and close associates.[99]

Such enhanced scrutiny shall reasonably be designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.[100]

The State parties must also prevent the establishment of banks that have no physical presence and that are not affiliated with regulated financial group.[101] The States parties must also consider establishing financial disclosure systems for appropriated public officials and permitting their competent authorities to share that information with authorities in other State parties.[102]

However, this requirement is optional. In the case of the 'measures for the direct recovery of property,'[103] it requires state parties to undertake three specific measures, in accordance with domestic law:

(a) to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence;[104]

(b) to permit its courts to order to pay compensation or damages to another State Party that has been harmed by such offences;[105]

(c) to permit its courts to recognise another State Party's claim as a legitimate owner of property acquired through commission of an offence.[106]

The Convention also provides mechanisms for recovery of property through international cooperation in confiscation.[107] The State Parties shall take measures:

(a) to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;[108]

(b) to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering.

For this purpose, each state party shall permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation.

A request from another State Party for confiscation of proceeds of crime, property, equipment or other instrumentalities shall be given effect to the greatest extent possible.[109] The requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities. The copies of its laws and regulations, and subsequent changes if any, which give effect to this article, shall be furnished to the Secretary-General of the United Nations.

If a State Party elects to make the taking of the measures conditional on the existence of a relevant treaty, that State Party shall consider this Convention as the necessary and sufficient treaty basis. Co-operation may be refused or provisional measures lifted of the requesting State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value.[110] In case of lifting of any provisional measures, the requesting State Party shall be given an opportunity to present its reasons in favour of continuing the measure. This provision shall not be construed as prejudicing the rights of bona fide third parties. Property confiscated by a State Party shall be disposed of, including by return to its prior legitimate owners. It shall enable competent national authorities to return confiscated property when acting on the request made by another State party.[111]

Furthermore, the requested State Party shall, in the case of embezzlement of public funds or of laundering of embezzled public funds when the confiscation was executed in accordance with Article 55 of this Convention and on the basis of a final judgment in the requesting State Party, return the confiscated property to the requesting State Party.[112] States Parties shall consider establishing a financial intelligence unit responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions. It is said that though the UNCAC, may not signify a conceptual revolution on recovery of assets but rather the fullest possible extension of ideas and legal practices coined along the last 15 years in the requesting State Party, return the confiscated property to the requesting State Party.[113] States Parties shall consider establishing a financial intelligence unit responsible for receiving, analysing and disseminating to the competent authorities

reports of suspicious financial transactions. It is said that though the UNCAC, may not signify a conceptual revolution on recovery of assets but rather the fullest possible extension of ideas and legal practices coined along the last 15 years.

3.7 Relevance of the UNCAC in Fighting Corruption

Fighting corruption internationally is a means of defending the stability of democratic institutions, the rule of law, human rights and social progress. It also provides states with international standards, procedures and methods that will help them to assess the efficacy of measures taken and facilitate the promotion of compatible efforts against corruption.[114] Global strategies to fight corruption are diverse. But for purposes of this study, the focus is limited to the United Nations Convention against Corruption which Kenya and Nigeria have ratified. The other international and sub-regional instruments are applied for comparative purposes particularly in assessing the best practices and drawing lessons from countries that have ratified them.

The UNCAC has been the most comprehensive in the sense that it aims to fight corruption in both the private and the public sectors. Its prescribed preventive measures include the establishment of anti-corruption bodies, enhanced transparency in campaign and political party financing, safeguards to ensure efficient and transparent delivery of public goods and services, codes of conduct and financial disclosure for public servants, and transparency and accountability in public finance transactions and in critical areas such as procurement and the judiciary. The convention also encourages participation by civil society and the general public in their efforts to prevent and fight corruption. [115]

The UNCAC goes beyond the previous instruments of its kind in that it does not only criminalise bribery and embezzlement. Its provisions also cover trading in influence and the concealment of any gains from corrupt acts, as well as any support of corruption, money laundering, or obstruction of justice in the prosecution of such crimes. The convention also emphasises cross border cooperation in gathering and transferring evidence for use in court and requires signatories to support the tracing, freezing, seizure, and confiscation of the proceeds of corruption.[116]

Finally, the asset recovery provisions of the convention were a major breakthrough. Their inclusion will allow developing countries to recover much-needed development resources illegally taken from their coffers. Hence, UNCAC is the first

legally binding, international anti-corruption instrument which provides not only a unique opportunity to mount a global response to a global problem, but also creates the opportunity to develop a global language about corruption and a coherent implementation strategy. The UNCAC gives the global community the opportunity to address both of these weaknesses and begin establishing an effective set of benchmarks for effective anti-corruption strategies.

The adoption and entry into force of UNCAC seem to be sending a clear message that the international community is determined to prevent and control corruption, and reaffirmation of the importance of core values, such as honesty, respect for the rule of law, accountability and transparency, in promoting development and making the world a better place for all. The Convention intends to eradicate all forms of corruption and requiring countries to return contaminated assets to the nation from where they were stolen from in the long run. The UNCAC represents a crucial step in building a worldwide framework to combat corruption.

In a nutshell, the relevance of the UNCAC is manifested in the following areas. First, it guarantees the right to access to information thereby promoting transparency and accountability. Second, it ensures protection for whistle-blowers thereby increasing revelations and disclosure about corruption. Third, it encourages fighting corruption in the public service. Fourth, it encourages more accountable and transparent contract awards. Fifth, it ensures that illegal money is not used for political campaigns and that law regulates campaign financing. Sixth, it checks corruption and ensures ethical practices in the private sector. Seventh, it promotes public education about the causes and effects of corruption including ethical education for the youth and children. Eighth, it promotes greater collaboration between government and Civil Society Organisations (CSOs) in the fight against corruption. Ninth, it reduces safe havens for stashing away looted assets and ensures repatriation of stolen assets from foreign countries. Tenth, it obliges foreign countries to cooperate with Kenya and Nigeria in investigation and tracking foreign assets. Eleventh, it facilitates the extradition of corrupt persons who escape to other countries. Lastly, it ensures the independence of the anti-corruption agencies such as the KACC and the EFCC.

3.8 Challenges of the UNCAC

Despite the overwhelming coverage of facets of corruption and global acceptance of the Convention, there some challenges facing it and effective measures needed to put in place so as to make it more effective. The main ones are discussed below.

Firstly, the Convention lacks an implementation review mechanism to evaluate signatory members' degree of implementation of the Convention. In November 2009 however, the Conference of the State Parties to the UNCAC agreed on such a mechanism, although only on a voluntary base. The Conference established that the review mechanisms will run in 2 phases of 5 years each and that each phase will cover specific and limited issues and articles of the UNCAC.

The review requires the volunteering country to compile a self-assessment checklist, which are then evaluated by a team of experts from other signatory countries. The results of the review are consolidated in a country report which highlights accomplishments as well as challenges. The country report is drafted by the review team, but then finalised in collaboration with the country under review, which also has the ultimate decision as to publish the report or not.[117]

Also, the UNCAC negotiators were unable to agree on a set of mandatory requirements and thus the Convention is a mixture of mandatory and discretionary provisions. The discretionary provisions allow individual States discretion in relation to the offences of illicit enrichment and abuse of function, even though the availability of such offences has shown itself to be effective in countering corruption. This might be seen as unfortunate as in the absence of political will and/or sufficient resources; a consistent trans-national approach to combating corruption may be inhibited. Moreover, a patchwork of differing laws and regulations may result.

In general, the adoption of an effective follow-up monitoring mechanism is often considered to be one of the biggest challenges faces the Convention. Many developing countries also face the challenge of implementing the demanding provisions of the UNCAC into national law, and above all into the reality of daily life. Effective technical assistance, as foreseen in the UNCAC, is therefore crucial for the successful implementation of the Convention.

3.9 The UNCAC and Establishment of Anti-Corruption Agencies

As stated earlier, there are currently many African States Parties to UNCAC, including Kenya and Nigeria, which entered into force in 2005. Articles 6 and 36 of the Convention provide for the establishment of preventive anti-corruption bodies and specialised authorities:

Article 6

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, which prevent corruption by such means as:

> (a) Implementing the policies referred to article 5 of this Convention and, where appropriate, overseeing and co-coordinating the implementation of those policies;
> (b) Increasing and disseminating knowledge about the prevention of corruption.
> 2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions, should be provided.
> **Article 36**
> Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Anti-corruption agencies are within the purview of "watchdog agencies" in the context of a national integrity system as explained in the literature review. Watchdog agencies refer to those institutions within a government structure that are explicitly mandated with anti-corruption functions.[118] Unlike commissions of inquiry, judicial investigations or "blue ribbon commissions" which are provisional or momentary in nature and investigate specific occurrences of corruption, watchdog agencies in the context of a national integrity system are intended to have a more permanent

standing.[119] The provisions of UNCAC referred to above also point to a more focused and permanent role for such bodies. The main anti-corruption functions cited in the international instrument include investigation and prosecution, prevention; education and dissemination of information, coordination; and monitoring and research.[120]

Anti-corruption agencies signify the most current mode of a watchdog agency. Anti-corruption agencies are well-defined, independent, permanent bodies generally mandated with preventive, investigative and educative functions. In short, they assume most if not all the roles of the multi-agency approach and place them under one roof.

The first anti-corruption commissions could be traced to Singapore and Hong Kong in the 1950's and 1970's respectively.[121] The success of Hong Kong's Independent Commission Against Corruption (ICAC) served as an impetus for a number of states to establish their own anti-corruption commissions, many of which are modeled after its structure.[122] For example, in sub-Sahara Africa, Botswana, Uganda and Zambia, specifically aimed to model their anti-corruption agencies after Hong Kong's ICAC.

3.8 Conclusion

The UNCAC represents a major step forward in the global fight against corruption, and constitutes the culmination of efforts of the international community to put in place a normative instrument against corruption of a global range. The UNCAC, as a powerful manifestation of the collective political will of the international community to put in place a benchmark and a source of aspiration in the fight against corruption, attaches great importance, among others, to the adoption and implementation of measures geared towards curbing corruption both at the domestic and international levels, more efficient.

However, the main challenge for States parties is to improve the capacities of genuine implementation to effectively combat corruption domestically, co-operate internationally in the investigation, prosecution, and adjudication of corruption related offences and further enhance asset recovery mechanisms to return the proceeds of crime to the country of origin.

END NOTES

[1] In its resolution 56/260, the General Assembly decided that the ad hoc committee established pursuant to resolution 55/61 should negotiate a broad and effective convention, and to adopt a comprehensive and multidisciplinary approach, and to consider, *inter alia*, the following indicative elements: definitions; scope; protection of sovereignty; preventive measures; criminalisation; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation.

[2] UNGA Resolution 58/4, 31 October 2003. See details of the negotiations in the Ad Hoc Committee in Yearbook of the Asian African Legal Consultative Organisation, Vol. I (2003), II (2004), and III (2005) (AALCO, New Delhi).

[3] Schulz, J., 2010, The UNCAC compliance review in Kenya: process and prospects, U4. Retrieved July 7, 2011, from http://www.u4.no/document/publication.cfm?3788=t he-uncac-compliance-review-in-kenya

[4] United Nations 2003.United Nations convention against corruption. U.N. doc. a/58/422, Oct. 7, 2003.

[5] Ibid.

[6]UNODOC. 2006. United nations convention against corruption. Retrieved July 7, 2011, from http://www.unodc.org/unodc/en/crime_signatures_corruption.html

[7] Ibid.

[8] Ibid.

[9] United Nations Office on Drugs and Crime. 2006. Legislative guide for the implementation of the United Nations Convention against Corruption. Retrieved July 7, 2011, from http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Utstein Resource Centre. 2006. Conventions Overview. United Nations: UNCAC. Retrieved July 7, 2011, http://www.u4.no/themes/conventions/unconvention.cfm

[14] Ibid.

[15] United Nations Office on Drugs and Crime. 2004. Legislative guide for the United Nations convention against transnational organised crime and the protocols thereto. United Nations New York. http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf

[16] Ibid.

[17] Ibid.

[18] Utstein Resource Centre. 2006. Anti-Corruption conventions and treaties. Retrieved July 7, 2011, from http://www.u4.no/document/treaties.cfm

[19] Ibid.

[20] Ibid.

[21] United Nations Office on Drugs and Crime. 2007. UN Convention against Corruption: http://www.unodc.org/unodc/en/crime_convention_corruption.html

[22] Ibid.

[23] Ibid.

[24] Schulz, J., 2010, The UNCAC compliance review in Kenya: process and prospects, U4. Retrieved July 7, 2011, from http://www.u4.no/document/publication.cfm?3788=t he-uncac-compliance-review-in-kenya

[25] Ibid.

[26] Ibid.

[27] German Technical Cooperation (GTZ) 2007. UNCAC compliance review: why and how? Retrieved July 7, 2011, from http://www.gtz.de/de/dokumente/en-gtz-uncac-compliance-review-why-and-how-2007.pdf

[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid.
[33] Ibid.
[34] United Nations Development Programme (UNDP). 2010. Guidance note on UNCAC self-assessments: going beyond the minimum. Retrieved July 7, 2011, http://www.gopacnetwork.org/Docs/UNCAC/Guidance_Note-UNCAC_Self% 20Assessments.pdf
[35] Ibid.
[36] Ibid.
[37]United Nations Office on Drugs and Crime (UNODC). 2006. Legislative guide for the implementation of the UNCAC. Retrieved July 7, 2011, http://www.unodc.org/unodc/en/treaties/CAC/legisla tive-guide.html
[38] United Nations Office on Drugs and Crime (UNODC). 2009. Technical guide to the UNCAC. Retrieved July 7, 2011, from http://www.unodc.org/unodc/en/treaties/CAC/techni cal-guide.html
[39] The Acts of Corruption included under the Convention include: Bribery of National Public Officials (Art.15); Bribery of foreign public officials and officials of public international organization (Art. 16); Embezzlement, misappropriation or other diversion of property (Art. 17); Trading in Influence (Art. 18); Abuse of functions (Art. 19); Illicit enrichment (Art. 20); Bribery in Private Sector (Art. 21); Embezzlement of property (Art. 22); Laundering of proceeds of crime (Art. 23); Concealment; Obstruction of Justice (Art. 25); Participation and attempt (Art. 27) and Knowledge, intent and purpose as element of offence (Art. 28).
[40] As a public official commits both active and passive bribery in the performance of his or her public functions, it would be pertinent to the definition of "public official" is also relevant in respect of this act of corruption.
[41] Article 15 (b), UNCAC.
[42] Article 15 (a), UNCAC.
[43] Draft legislative guide for the ratification and implementation of the UN convention against corruption UNODC, 2005.
[44] See Article 8, TOC convention. Also see AU Convention, OAS Convention.
[45] The OECD Convention defines the term "foreign country" to include all levels and subdivisions of government, from national to local).
[46]Article 2 (c), UNCAC.
[47] Article VIII, OAS Convention criminalizes the offering or granting by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. However, this is a non mandatory obligation and also the scope of this provision is limited to foreign governmental officials only, and does not include officials of intergovernmental organisations.
[48] The Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions, article 1. Retrieved July 28, 2009, from www.oecd.org/daf/nocorrpution/20nov2e.htm.
[49] Alejandro Posada, "Combating Corruption under International Law," Duke Journal of Comparative and International Law, 2000, p. 387
[50] The *travaux preparatoires* shall indicate that the term "diversion" is understood in some countries as separate from embezzlement" and "misappropriation", while in others "diversion" is intended to be covered by or is synonymous with those terms.
[51] Article 2 (d), UN Convention defines: "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets."
[52] The *travaux preparatoires* will indicate that this article is not intended to require the prosecution of *de minimis* offences.
[53] The *travaux preparatoires* of the UN Convention indicates that the term "diversion" is understood in some countries as separate from "embezzlement" and "misappropriation", while in others "diversion" is intended to be covered by or is synonymous with those terms.
[54] See the *travaux preparatoires* of the UNCAC.
[55] Ibid. p. 19.
[56] Article 19, UNCAC.
[57] Interpretative Note, A/58/422/Add.1, para.31.
[58] Article 23, para. 1 (a) (i), UNCAC.
[59] Article 23, para. 1 (a) (ii), UNCAC.

[60] Article 23, para.1 (b)(i), UNCAC
[61]Article 23, para.1 (b) (ii), UNCAC.
[62] "Predicate offence" is defined as "any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention (Article 2 (h)).
[63] The *travaux preparatoires* will indicate that money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered.
[64] Article 23(1)(a) and (b) of the UNCAC, Article 6 of the AU Convention and Article VI (d) of the OAS Convention.
[65] The AU Convention (Article 4(1)(i)) contains a similar provision. Although differently worded the AU Convention and the UN Convention contain similar provisions relating to the type of offenders committing or attempting to commit acts of corruption.
[66] Article 20, UNCAC. At the negotiating stage, the delegations of the Russian Federation, the Member States of the European Union and others had expressed their strong wish to delete this article, (A/AC.261/L.183).
[67] The AU Convention has adopted a similar definition except that the significant increase in the assets may be that of a "public official" or "any other person" (Article 1, AU Convention). The OAS Convention also contains a similar definition.
[68] See also Articles 8(5), and 12(2) (e), UNCAC.
[69] Article 12 (3), UNCAC.
[70] Article 25 (a), UNCAC.
[71] Chapter II, UNCAC.
[72] The provisions dealing with "Funding of political parties" (public sector) and "Accounting standards (private sector) was deleted by the Ad Hoc Committee. However, a diluted version of deleted Article 10 (Funding of Political Parties) was incorporated in paragraph 3 of Article 7 (Public Sector).paragraph 3 of Article 7 (Public Sector).
[73] Article 5, UNCAC.
[74] Article 6, UNCAC.
[75] Article 1, AU Convention.
[76] Privatisation not only increases the number of public oriented activities being conducted in the private sector, but also creates opportunities for corruption through the very process of transferring assets of large state enterprises. See Webb, P. 2005.The United Nations convention against Corruption. *Journal of International Economic Law*, (8):1, p. 213.
[77] On the basis of GDP, in the top 100 combined country-company list for 2000, there were 29 MNCs.
[78] The US business were concerned that extending the Convention to the private sector could create a private right of action that would open the door to lawsuits in foreign courts over contract and procurement irregularities. Webb, P. 2005. Op. cit., p. 214.
[79] Ibid.
[80] Article 12 (3), UNCAC.
[81] Article 12 (2), UNCAC
[82] Article 21, UNCAC
[83] Article 21, UNCAC
[84] See discussion on Article 15 (Active and Passive corruption in public sector)
[85] Draft *Legislative Guide for the Ratification and Implementation of the UN Convention against Corruption*, 2005.
[86] Article 22, UNCAC.
[87] Article 23, UNCAC.
[88] The IMF estimated that the total amount of money laundered on an annual basis is equivalent to 3 to 5 percent of the worlds GDP (between $600 billion and $1.8 trillion). See Global Study on the transfer of funds of illicit origin, especially funds derived from acts of corruption, *Ad Hoc Committee for the Negotiation of a Convention against Corruption, fourth Session*, A/AC.261/12, 2002.
[89] Guillermo Jorge. 2003. Notes on asset recovery in the U.N. convention against corruption. Retrieved Jan. 9, 2007, from www.abanet.org/intlaw/hubs/ programs/Annual0316.03-16.06.pdf.
[90] Ibid.
[91] *UNGA Resolution* 55/61, 2001.
[92] Vlassis, D. 2002. The negotiation of the draft United Nations convention against corruption. *Forum on Crime and Society*, December, 2 (1): p. 154.
[93] At the first session, Group of 77 and China, EU, Africa and Latin America stressed the need to a provision in this regard. The United States also supported this initiative. At the First Session of the Ad

Hoc Committee, it was decided to organize a one-day technical workshop on asset recovery during the second session of the Ad Hoc Committee. The major themes for the workshop were: Transfer abroad of funds or assets of illicit origin, efforts to identify the location of such funds or assets and confiscation; Return of
funds or assets of illicit origin and Prevention of the transfer of funds or assets of illicit origin. See A/AC.261/6.

[94] Security Council Resolution 1483. 2003. At para.23 and 7. The United Nations convention against corruption: Global achievement or missed opportunity?
Webb, P. *Journal of International Economic Law*, vol. 8, no.1, 2005, p. 207.

[95] Article 51, UNCAC. The *travaux preparatoires* indicate that the expression "fundamental principle" has no legal consequences on the other provisions of the chapter.

[96] As part of the activities to commemorate the first International Anti-Corruption Day, UNIS hosted press briefing to launch the United Nations *Office on Drugs and Crime's* (UNODC) Asset Recovery Initiative. As part of the Asset Recovery Initiative, UNODC will be offering technical assistance to the Governments of Nigeria and Kenya, to help them recover assets lost to corruption. See website http://www.unis.unvienna.org/unis/en/pressconf/2004/pb20041209.html.

[97] See website: http://www.unodc.org/unodc/en/crime_convention_corruption.html.

[98] Article 52, UNCAC.

[99] The *travaux preparatories* of the UNCAC will indicate that the expression "discourage or prohibit financial institutions from doing business with any legitimate customer" are understood to include the notion of not endangering the ability of financial institutions to do business with legitimate customers.

[100] The *travaux preparatories* of the UNCAC indicates that the expression "discourage or prohibit financial institutions from doing business with any legitimate customer" are understood to include the notion of not endangering the ability of financial institutions to do business with legitimate customers.

[101] Article 52, para. 4, UNCAC. The *travaux preparatories* of the UNCAC indicates that the expression "physical presence" is understood to mean meaningful mind and management" located within the jurisdiction. Management is understood to include administration, that is, books and records.

[102] Article 52, para 5, UNCAC.

[103] Article 53, UNCAC.

[104] Article 53, subpara. (a), UNCAC

[105] Article 53, subpara. (b), UNCAC.

[106] Article 53, subpara. (a), UNCAC.

[107] Article 54, UNCAC

[108] The *travaux preparatoires* will indicate that the reference to an order of confiscation in paragraph 1(a) of this article may be interpreted broadly, as including monetary confiscation judgments, but should not be read as requiring enforcement of an order issued by a court that does not have criminal jurisdiction.

[109] Article 55, UNCAC.

[110] The *travaux preparatoires* will reflect the understanding that the requesting State party will consult with The requesting State Party on whether the property is of *de minimis* value.

[111] Article 57, UNCAC.

[112] The *travaux preparatoires* will indicate that the requested State Party should consider the waiver of the requirement for final judgment in cases where final judgment cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

[113] The *travaux preparatoires* will indicate that the requested State Party should consider the waiver of the requirement for final judgment in cases where final judgment cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

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[122] Johnston, M. 1999. Op. cit

CHAPTER FOUR

STATE OF CORRUPTION IN KENYA AND NIGERIA

4.1 Introduction

Kenya and Nigeria have been challenged by the prevalence phenomena of corruption since independence. Successive governments in both countries have also embarked on varied anti-corruption strategies. This chapter examines various anti-corruption strategies in Nigeria to curb the menace of corruption with a particular to the EFCC.

4.2 Background Information on Kenya and Nigeria

The Republic of Kenya, a country in East Africa, got its independence from Britain on December 12, 1963 and turned republic within the Commonwealth on December 12, 1964; while the Federal Republic of Nigeria, a country in West Africa, got hers from the same British colonial authority in October 1, 1960 and turned republic within the Commonwealth in October 1, 1963.

Kenya has a total area of 582,650 sq. km. It is bordered by Ethiopia to the North, Somalia to the East, Tanzania to the South, Uganda to the West, and Sudan to the Northwest, with the Indian Ocean running along the southeast border.[1] Kenya's population as at 2011 according to the United Nations as at 2011 was 41.6 million[2]. Nigeria on the other hand covers an area of 923,768 sq. km. more significantly than that of Kenya on the shores of the Gulf of Guinea in West Africa. It has Benin on its Western side, Niger on the North, Chad to the North-East and Cameroon to the East and South-East. Nigeria with the population of 162.4 million as at 2011[3] is Africa's most populous country and the 9th most populous country in the world. [4]

With its largest city in the central capital Nairobi, and the second Mombassa, a port and tourist centre on the Indian Ocean. It is blessed with abundance natural resources such as gold, limestone, and host of others while it also has the capacity of industry production of small-scale consumer goods and agricultural products processing like oil refining, cement and tourism.[5] From 2006 to 2007, Kenya enjoyed robust economic growth with a real G.D.P. average of 5.4 %. In 2007, the real GDP

reached 7.1%. The service sector, led by the tourism and telecommunications industry, was one of the main drivers of growth, indicating increased employment. However, strong economic growth had done little to reduce the country's widespread poverty because distribution was skewed in favour of the already affluent. In 1998 - 2002, the poorest 20% of the population received only 6% of the national income, while the richest 20% took 49%. In addition, the population suffered from generally high consumer price inflation, averaging around 11% in 2003-2007.[6]

Nigeria, on the other hand, is also blessed with abundant resources such as oil, cocoa, rubber, bitumen and others while major beehive of its economic activities take place in Lagos, and its political capital is in Abuja. Nigeria possesses a stark paradox of wealth and poverty. In spite of the country's vast oil wealth, the majority of Nigerians are poor with 71% of the population living on less than one dollar a day and 92% less than two dollars a day.[7] Although the country is rich in natural resources, its economy cannot yet meet the basic needs of the people. Such disparity between the growth of the GDP and the increasing poverty is indicative of a skewed distribution of Nigeria's wealth. The 2007 United Nations Human Development Index ranks Nigeria 158 out of 177 countries**;** this is a significant decrease in its human development rank of 151 in 2004.[8]

At independence, Kenya inherited a colonial model with a strongly centralised state and a dominant executive[9] because the President at independence, Jomo Kenyatta established a patrimonial state and oversaw the informal establishment of patron-client networks, where clients were rewarded with land, state contracts and other preferential treatment.[10] Hence, most institutions, including the judiciary, parliament, and the electoral commission, are subservient to the president till today.[11] Members of parliament are elected by the general population but parliament has little power to address public grievances. The president appoints high court judges and electoral commissioners, has the power to dissolve parliament, and controls the federal budget. The extent of presidential power is a relic from the colonial period, but seemed to have changed little since independence in 1963.[12]

Unlike Kenya, Nigeria, though at independence inherited a colonial model of administration, but the political scene was neither dominated by single political figure nor controlled by just one political party. There existed political gladiators from the major regions that existed then. However, like Kenya, the informal establishment of patron-client networks, where clients were rewarded with state contracts and other partisan treatments before the military struck in 1966 existed in Nigeria.

With a written constitution, Kenya used to be a one-party state unlike Nigeria though with also a written constitution but where multi-party system existed. Multi-party system was introduced in 1992 by Daniel Arap Moi, who had been ruling since 1978.[13] However, the politics of Kenya take place in a framework of a semi-presidential representative democratic republic with a unicameral legislature, whereby the President of Kenya is both head of state and head of government.

Recent constitutional amendments have enabled sharing of executive powers between the President and a Prime Minister[14] after disputed elections in late December 2007 spurred outbreaks of violence which made parts of the country ungovernable for several weeks.[15]. Executive power is exercised by the government, with powers shared between the President and a Prime Minister, who coordinates and supervises the cabinet. Legislative power is vested in both the government and the National Assembly. The judiciary is independent of the executive and the legislature.

On the other hand, Nigeria operates real presidential system of government modelled after the American system with bicameral legislature in place and seemingly functional judiciary a multi-tier structure with the Supreme Court at the apex and the customary and Islamic courts at the base. The country has a mixed legal system comprising the received English Law, Customary and Islamic laws. [16]

From the foregoing, what could be deduced is that Kenya and Nigeria, to a very large extent, have similar backgrounds though dissimilar in certain aspects. Both countries have similar political and socio-economic backgrounds evident in terms of colonial experience, written constitutions and political giants in their own rights in East and West Africa sub-region, charaterised by ethnic diversity and tensions, endowed with major natural resources and making economic gains from them, but with sheer contradiction of wealth and poverty. Hence, the proceeds from the abundant resources have been misappropriated by the ruling class which has been the major source of corruption in the contemporary Kenya and Nigeria.

4.3 Phenomena of Corruption in Kenya and Nigeria

The roots of corruption in Kenya can be traced to the country's history. It emerged in tandem with the systematic distortion of social cultural values that governed the African way of life. Chweya observes that in the pre-colonial epoch, there existed 'laws' and 'constitutions' in African societies like Kenya and elsewhere in Africa that outlined punishments that befell in particular political leaders for acts that included corruption and abuse of power.[17]

However, corruption continues to take a notorious place in Kenya's political and governance discourse since the 1990s, since development partners suspended aid to the country alluding to immense corruption.[18] That the problem of corruption remains a significant issue is evidenced in the President's inaugural speech in 2003 when he observed that: corruption will now cease to be a way of life in Kenya ... there will be no sacred cows under my government. The era of "anything goes" is gone forever. Government will no longer be run on the whims of individuals.[19]

Similarly, the African Peer Review Mechanism's (APRM) report on Kenya expansively cites corruption as one of the main obstacles to good governance. The Country Self Assessment Report (CSAR) admits that: "Corruption still pervades the Executive, Legislature, Judiciary and military, as well as the Civil Service. The general public perception is that corruption is endemic in Kenya, and that public confidence in government's commitment to fighting corruption has waned."[20]

The APRM Country Review Mission (CRM) goes on to identify corruption as one of the germane issues that warrant urgent action because of its wider effect on the quality of governance in all ramifications.[21]

Corruption is also cited in Kenya's Poverty Reduction Strategy Paper (PRSP 2003-2007) as the singular factor responsible for poor governance in the country, and a major impediment to Kenya's economic development. It observes that persistent corruption has slowed down growth and intensified the poverty levels in the country. Corruption reduction will make available substantial resources for investment in infrastructure and in programmes that deliver services to the poor.[22]

Kenya's Economic Recovery Strategy for Employment and Wealth Creation (ERSEWC) notes that:

> The poor management, excessive discretion in government, appointments of people of dubious characters and political interference and lack of respect for professionalism led to

> widespread corruption, gross abuse of public office in many government departments and incorrigible tolerance…For these reasons the solution of the current national crisis is to be found in our ability to reclaim professionalism and confidence in public officers, and guaranteeing efficiency.[23]

The Kenya National Anti-Corruption Plan concedes that:

> Corruption continues to pose one of the greatest challenges facing Kenya. It continues to undermine good governance and distort public policy, leading to misallocation of resources. It has contributed to slow economic growth as well as discouraged and frustrated both local and foreign investors.[24]

The phenomenon of corruption in Kenya which has become a matter of serious concern is further evidenced in the Kenya's poor performance in the various indices that have been developed to gauge governance and corruption. The statistics of TI's Corruption Perception Index (CPI) reveals that Kenya has primed itself as one of the countries perceived to have the highest incidence of corruption, scoring an average of 2.05 since 2002.

The 2007 Kenya Bribery Index reveals that Kenyans encounter bribery in 54% of their interactions with both public and private institutions, up from 47% in the previous year.[25] Although it performs impressively in the 2007 Ibrahim Index of African Governance, having been ranked 15 out of 48 African states with an average score of 59.3%.[26] Closer scrutiny shows that Kenya still groans under the yoke of corruption, scoring 24% on its efforts to curb public sector corruption.[27] The TI CPI profiles from 2003 to 2009 also reveal that corruption in Kenya is phenomenal (See Table 4.1).

From the foregoing, it is unassailable that corruption has been a major social, political and economic stumbling block such that it was even said to have permeated the institutional bastion of democracy, that is, the judiciary. To be sure, in October 2003, there was a major probe and removal of members of the judiciary on allegations of endemic corruption.[28]Other high-profile corruption cases in Kenya include the infamous Goldenberg scandal and recently the Anglo-Leasing scandal. The Goldenberg scandal "involved a fictitious export compensation scheme allegedly to export gold and diamonds while the most intriguing aspect of the matter is that Kenya has little or no gold mines and diamond fields."[29] The Anglo leasing scandal hinges on a government tender involving amounts in excess of 90 million Kenya shillings allegedly awarded to a non-existent company.[30] This led to the unsuccessful

prosecution of six senior government officials in court. These two scandals illustrate the extent corruption is entrenched within government structures and how this ultimately erodes the basic principles of good governance.

Also, annually corruption is said to cost Kenya as much as $1bn.[31] Theft, misappropriation of public resources and fraud by public officials reduces the availability of government funds for development-related activities. The resultant limited finances impact negatively on the provision of essential services. Such was the case where the Kenya National AIDS Control Council (NACC) which was set up to coordinate the prevention and control of HIV/AIDS was discredited when it was discovered that senior staff had paid themselves inflated salaries and allowances, and there were irregularities in its procurement procedures. This led to the withdrawal of much required US $15 million AIDS grant by the Global Fund to Fight HIV/AIDS, Tuberculosis and Malaria.[32]

Similarly, corruption in Nigeria is as old as the country itself, though its nature, scope, and consequences have varied considerably over the years. Indeed, from the late colonial period to date, commentators have expressed concern about the level of profligacy in the country. Since Nigeria's independence in 1960, almost every government from the military to the civilian promised to raise ethical standards and restore accountability and transparency in governance that culminated into various anti-corruption initiatives. Instead, monumental looting of the nation's wealth and resources by high ranking state officials has remained a constant trait of the country's anti-corruption crusade and political life. Evidently, over the years, many Nigerian political leaders have generally sought after the wealth they needed to make them the wealthiest in order to gain political base, influence, legitimacy and identity.[33]

The effects of corruption in Nigeria have been very significant. From multi-internal effects such and poor governance, misuse of natural resources, mediocrity, high unemployment rates, the even widened gap between the rich and the poor to the international effects such as the distorted image of Nigeria in the comity of nations. Owing to prevalence corruption in Nigeria, doing business with Nigerians by foreign nationals calls for caution thereby destabilising the economic sector of the country.[34]

Notwithstanding the commendable efforts of the administration to curtail the menace of corruption, both President Obasanjo and Vice President Atiku Abubakar took millions of dollars from the PTDF Account to service the interests of their business partners. Both of them also got involved in the primitive accumulation of

wealth including the establishment of multi-billion naira private universities.[35] Even though some highly placed public officers were removed from office and prosecuted; the determined efforts of the EFCC to expose other corruptly appointed and elected officials and make them face the law were frustrated by the Presidency. Unfortunately, the two attempts made by the National Assembly in 2003 and 2007 to guarantee the autonomy of the anti-graft agency were abortive because of the egoistic tendencies of the leaders of both legislative houses.[36]

For example, between 2003 and 2006, a total sum of US$13.2 billion was squandered from three special escrow accounts illegally opened and maintained by a former President, Obasanjo, in connivance with top officials of the Central Bank of Nigeria (CBN), some Nigerian National Petroleum Corporation (NNPC) Executives and others (Joint Senate Committee on Finance, Appropriation and National Planning, 2006). The Vice President, Abubakar Atiku, shockingly released nine cheques and bank drafts totaling N432million (US$3,085,710) allegedly paid from the controversial MOFAS Account at Trans International Bank Plc, Abuja, on behalf, and personal use of the president, Obasanjo. [37]

The NNPC that was under the personal control of the former President Obasanjo for 8 years, could not account for the sum of N555 billion (US$4.4 billion) from the Federation Account from December, 2004 to April, 2007.[38] Again, during the same period, the top officials of the NNPC under the ministerial control of the President, embezzled another N502 billion (US$4 billion) through various frauds including producing barrels of crude oil far in excess of assigned Organisation of Petroleum Exporting Countries (OPEC) quota and converting part of the proceeds to political electioneering and laundering the balance into private bank accounts abroad.[39]

In all, thirty-one out of thirty-six state governors were indicted by the EFCC for corruption related offences such as money laundering; financial crimes and possession of illegal assets in foreign countries which are believed to be worth more than $17 billion.[40] In the words of the former helmsman of the country's anti-corruption agency, corruption in Nigeria is 'endemic, pandemic and systemic.[41] The systemic aspect is evident in the fact that corruption pervades the entire society and has become so routinised and accepted as a means of conducting everyday transactions that many people have few practical alternatives to dealing with corrupt officials. No doubt, Arizona Ogwu observed that:

> Corruption now appears to have become a permanent feature of Nigeria national policy, it now has a home address and a zip code, it has its own policy, boundary, television stations and newspapers, it has its own labour and corporate leaders, it has its council of elders, NGOs and gender-sensitive groups and lately it has appointed its own "Attorney General" and consulates to defend its cases all over Nigeria and enhance its diplomacy beyond Nigeria. It had become completely institutionalized, entered into the realm of our core culture and the value systems; it is now normality and no longer an aberration. The young ones are born into it, grow up in it, live with it, and possibly will die in it. The aged are not left out as they are re-socialized, re-engineered and refitted to conform to it. Corruption has virtually turned Nigeria into the land of starvation and a debtor nation in spite of the nation's enormous resources.[42]

In the same vein, it has been painfully observed by the ICPC Chairman, Justice Emmanuel Ayoola, that "corruption has become a hydra-headed monster ravaging not only the public sector but also spreading its poisonous tentacles to the private sector. Every form of corruption, be it public or private, retards the growth of our economy."[43]

According to Dike, corruption wastes skills because time is often wasted to set up anti-corruption agencies to fight corruption and also to monitor public sectors. Hence, corruption in Nigeria has been able to divert scarce public resources into private pockets, weakened good governance, threatened democracy and eroded the social and moral fabrics.[44] All these negatives effects keep stressing on the importance of combating corruption via anti-corruption strategies adopted by the EFFC.

Moreover, Nigeria was assessed as the most corrupt nation in the world by Transparency International (TI) in 1996 and 1997. In 1999, it was rated the second most corrupt country while in the year 2000 it reclaimed its position as the most corrupt nation in the world out of 90 countries. In 2001 and 2002, she was the second most corrupt nation out of 91 and 102 countries assessed respectively while in 2005 it moved to position number 152 out of 159 countries (see Table 4.1). In 2009 the global corruption perception index revealed that Nigeria occupied the 130th position out of 180 countries surveyed.[45]

Table 4.1. Corruption Perception Profiles of Kenya and Nigeria 2003-2009

Country	CPI 2003 Rank (Out of Countries 133)	CPI 2004 Rank (Out of Countries 145)	CPI 2005 Rank (Out of Countries 158)	CPI 2006 Rank (Out of Countries 163)	CPI 2007 Rank (Out of Countries 179)	CPI 2008 Rank (Out of Countries 180)	CPI 2009 Rank (Out of Countries 182)
Kenya	123	131	144	142	150	147	130
Nigeria	132	144	152	142	147	121	146

Adapted Sources: TI Reports on Global Corruption Perception Indexes from 2003 to 2009.

4.4 Conclusion

Form the above discussion, it is revealed that there is no significant difference between pervasiveness of corruption in Kenya and Nigeria. The incidence of corruption is endemic in Kenya just like Nigeria. It is therefore not suprising that Kenya and Nigeria are soaring high among the comity of nations that have been ranked to be ravaged with the scourge of corruption. It is this problem of corruption that chiefly explains why Kenya and Nigeria's ratings continued to be fluctuating among the corruption infested nations going by the statistics provided by the TI and elsewhere, which have also accounted for the positions of the two nations to be at the lower cadre of all the human and material development indexes despite their obvious abundant human and material resources.

END NOTES

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[20]See chapter 7 of the APRM Country Review Report of the Republic of Kenya. Retrieved June 13, from http://www.aprmkenya.org/downloads/Kenyareport.pdf

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[22] See Chapter 5, Kenya's Poverty Reduction Strategy Paper: 2003-2007, dated March 2004. Retrieved June 13, from http://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf

[23] See Chapter 3.1 of Kenya's Economic Recovery Strategy for Employment and Wealth Creation. Retrieved June 13, http://www.ke.undp.org/ERS.pdf

[24]See Kenya's National Anti-Corruption Plan. Retrieved June 13, 2008, from http://www.kacc.go.ke/Docs/Ntional%20Anti-%20Corruption%20Plan.pdf

[25]See Transparency International. 2007. Kenya: Kenya Bribery Index. Retrieved June 13, 2008, from http://www.tikenya.org/documents/KBI_2007.pdf. The survey captures corruption as experienced by ordinary citizens in both public and private organisations. Respondents provide information on their experience with bribery in the last year— in which organizations they encountered bribery, where they paid bribes, how much they paid and what they paid for.

[26]See Ibrahim Index of African Governance. Retrieved June 13, 2008, from http://www.moibrahimfoundation.org/index/index2. The Index is based on five categories of essential political goods: Safety and security; Rule of Law, Transparency and Corruption; Participation and

Human Rights; Sustainable Economic Development; Human Development. Each country is assessed against 58 individual measures, capturing clear, objective outcomes.

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CHAPTER FIVE

STRATEGIES OF KENYA AND NIGERIA'S ANTI-CORRUPTION AGENCIES

5.1 INTRODUCTION

As discussed and concluded in the last chapter, there was a high incidence of corruption in Kenya and Nigeria during the period under focus. This led to the emergence of the various institutional and non-institutional anti-corruption strategies. Among the institutional strategies is the establishment of anti-corruption agencies in both countries. The objective of this chapter is to therefore examines *inter alia* in detail various anti-corruption strategies in Kenya and Nigeria with special focus on the institutional anti-corruption strategies as regards the Kenya Anti-Corruption Commission (KACC) and the Economic and Financial Crimes Commission (EFCC) of Nigeria respectively highlighting their achievements and challenges.

5.2 Institutional and Non-Institutional Anti-Corruption Strategies Of Kenya

5.2.1 Institutional Anti-Corruption Strategies

5.2.1.1 The Kenya Anti-Corruption Commission (KACC)

The commitment to fight corruption was strongly articulated by the National Rainbow Coalition (NARC) in the electoral campaign that brought it to power in December 2002, and featured prominently immediately after the elections. In May 2003, Parliament passed what is now Kenya's main anti-corruption legislation, that is, ACECA establishing the Kenya Anti-Corruption Commission (KACC). The speedy enactment of the legislation, the establishment of an anti-corruption department within the government (under the Permanent Secretary/Presidential Advisor, Ethics and Governance) and Kenya being the first country to sign and ratify the UNCAC in December 2003, were all cited as evidence of renewed commitment to the fight against corruption.

The adoption of corruption-specific legislation saw the creation of an independent anti-corruption agency and the strengthening of other existing mechanisms in the fight against graft. The establishment of KACC as the principal anti-corruption agency in May, 2003 marked a high point in a long, complex road of the anti-corruption crusade that began in 1997 with the creation of KACA. The agency commenced operations in 2005; a year after its Management was constituted.

The KACC as a body corporate empowered to investigate any matter that, in its opinion, raises suspicion that any conduct constituting or liable to allow or encourage corruption or economic crime is about to occur. It also assumes an advisory, educative and restitutionary function.

5.2.1.1.1 KACC Mandate

The mandate of the agency spelt out in section 7 of The Anti-Corruption and Economic Crimes Act[1]

specifically as follows:

a) to investigate any matter that, in the Commission's opinion, raises suspicion that any of the following have occurred or are about to occur:

   i) Conduct constituting corruption or economic crime;

   ii) Conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;

b) conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime;

c) to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime;

d) at the request of any person, to advise and assist the person on ways in which the person may eliminate corrupt practices;

e) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures that in the opinion of the Commission, may be conducive to corrupt practices;

f) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such bodies that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt practices;

g) to educate the public on the dangers of corruption and economic crime and to enlist and foster public support in combating corruption and economic crime;

h) to investigate the extent of liability for the loss of or damage to any public property and:

(i) to institute civil proceedings against any person for the recovery of such property or for compensation; and

ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya; and

i) to carry out any other functions conferred on the Commission by or under the Act or any other law.

To effectively deliver its mandate, the Commission is organised into four directorates: the Directorates of Investigation and Assets Tracing;[2] Legal Services and Asset Recovery; [3] Research, Education, Policy and Preventive Services;[4] and the Directorate of Finance and Administration.[5]

5.2.1.1.2 KACC Anti-Corruption Strategies

The KACC overall strategy is mainly defined by the legislative mandate given to it by the ACECA. It is based upon a vision of attaining a society with a zero tolerance for corruption. The Kenya Anti-Corruption Commission realises that the attainment of this vision entails a clear, systematic, practical, sustained and a well-coordinated approach to combating corruption. The Commission also realises that no single individual or agency can eradicate corruption in Kenya. Combating corruption is therefore the responsibility of every Kenyan hence the need for encouraging societal and institutional synergy in the fight against corruption.

The agency uses a four-pronged strategy in the fight against corruption. These are: investigation, prevention, asset recovery and mobilisation of public support (Public Education).

This strategy is reflected in the mandate given to the agency by law to investigate corrupt conduct, trace and recover corruptly acquired public property, advise on corruption prevention mechanisms and educate the public on the dangers of corruption. This mandate is carried out through three Directorates: The Directorate of Investigations and Asset Tracing; the Directorate of Legal Services and the Directorate of Preventive Services.

(a) Investigative and Asset Recovery Strategies

As part of the investigative strategy, there exists the Forensic Investigation Department is made up of two divisions, namely: Forensic Investigation Division and Asset Tracing Division. The department comprises a multi-disciplinary team of officers who are sufficiently qualified and experienced in their areas of specialisation.[6] The Forensic Investigation Division is charged with the function of carrying out investigation of cases reported and approved for investigations by the agency.

The Asset Tracing Division is engaged in tracing of assets suspected to have been irregularly obtained or those that are related to any matter under investigation by the Commission or other agencies. It is also charged with reviewing and analysing Asset Declaration Forms submitted by public officers, in accordance with the requirements of the Public Officer Ethics Act No. 4 of 2003. It also analyses declarations made to KACC by suspects in the course of investigations.[7]

Lastly, the division deals with asset tracing and realisation of value, or liquidation of corruptly acquired assets. The Forensic Investigation Department is charged with the responsibility of carrying out forensic audit in cases under investigation by the Commission and other agencies. It also undertakes the same exercise in areas of general public concern.[8]

What is needed to be added here is that to enhance its investigative strategy, the agency encourages anonymous reporting of corrupt activities and has rolls out internet based whistle blowing system that protects the identity of whistle blowers. This electronic reporting system is a break from the traditional methods of email, fax, mobile phone short message service, telephone calls and letters to KACC. This system of corruption reporting, known as Business Keeper Monitor System (BKMS) is currently accessible in the KACC website.[9]

(b) Preventive Strategy

The overall objective of the preventive strategy is to promote and sustain good governance in public organisations through interventions that pre-empt corrupt practices and promote integrity and accountability in the way organisations are run and managed by making it difficult to perpetrate acts of corruption, making it easier to detect such acts when committed, and ultimately making the punishment of such acts certain.[10]

Preventive activities therefore focus on reforming policies, practices, and procedures with a view to seal corruption loopholes and other inefficiencies that may lead to loss, poor service delivery and other malpractices. This approach attempts to reach the majority of the population who, given an environment where ethical values and good governance practices are institutionalised, will not engage in corrupt practices. This approach clearly differentiates prevention from investigation as the latter is mainly carried out after a crime has been committed or is about to be committed. The importance of corruption prevention cannot be underrated as it has been recognised internationally as the most effective strategy in fighting corruption.[11]

Corruption loopholes exist in almost all management and operational systems in many organisations. Such loopholes may be found in the law, policies and procedures. For example, where the law vests certain individuals with discretionary powers, such powers may be abused if there is no system of checks and balances in exercising such discretion.

(c) Public Education Strategy

Typically, public education strategy of the KACC has been through radio jingles, billboards, signs, and host of others. The agency claimed that it has "sensitised" and educated 4.9 million Kenyans through the media and Information, Education and Communication (IEC) materials; a Bible Study Guide has been developed for use in religious organisations etc. Under its public education strategy, the KACC has distributed in the 2008/9 period a total of 98,763 IEC materials to the public; these included Frequently Asked Questions (FAQ) Bulletins, leaflets promoting integrity to schools, and brochures about the Commission.[12]

5.2.2 Achievements of the KACC's Anti-Corruption Strategies

Despite the teething problems associated with newly established institutions, the Commission was able to build the requisite capacity to effectively combat corruption and has for the short time it has been in existence made substantial gains in the fight against corruption in the following areas:

i. Corruption Prevention

The KACC is mandated under Section 7 of ACECA to undertake preventive measures against corruption. This mandate includes examination of policies, systems, procedures and practices in public bodies to identify and seal loopholes for corruption; educate the public and enlist their support in the fight against corruption; carry out research on corruption and governance issues and to enlist the support and cooperation of other persons and bodies in the war against graft. The agency also gives advice to any person or body upon request on matters relating to anti-corruption and economic crimes.

During 2008/2009 periods, the agency undertook examinations and risk assessments in various public bodies and recommended measures to seal identified corruption loopholes. Among the examinations carried out, one involved the Local Authority Transfer Fund, wherein it identified a host of loopholes. These include lack of guidelines on disbursement of the funds, inadequate monitoring and control of the funds, failure to adhere to procurement procedures, and lack of mechanisms to detect over or under disbursement of funds to local authorities or even transfer of funds to unauthorised accounts. After identifying the loopholes, the agency recommended a raft of measures to seal them.[13]

Following a request by the Director of the Kenya Maritime Authority, the agency carried out a corruption risk assessment at the Authority and identified various loopholes for corruption among them the lack of a maritime policy for management of marine source of pollution. The agency then recommended measures to plug the corruption loopholes.[14]

During the period under review, the agency presented a report to the Ministry of Finance on the examination it carried out earlier into the policy, systems and procedures at the Pensions Department. While presenting the report, which the Ministry of Finance is expected to implement, the agency undertook to follow up on the implementation of the various recommendations made in the report.

The agency also made follow up on the implementation of its previous reports to ascertain the status of implementation of the various recommendations in some public bodies such as the National Registration Bureau and the City Council of Nairobi.

The agency also provided advice to various public bodies on development of corruption prevention strategies like corruption prevention guidelines, anti-corruption policies and prevention plans, codes of conduct, service charters and baseline surveys. The table below gives a synopsis of the advisory services provided by the Commission during this period.

Table 5.1. Corruption Prevention Advisory Services provided by the KACC 2008/2009

No	Institution	Nature of Advice
1.	Kenya Utalii College	Developing Corruption Prevention Plan
2.	Jomo Kenyatta Foundation	Preparation of an Institutional Anti-Corruption Policy
3	Agricultural Finance Corporation	Development of an Anti- Corruption Policy
4.	Lake Victoria Water Services Board	Development of an Anti-Corruption Policy
5.	Kenya National Library Services	Development of an Anti-Corruption Policy
6.	Kenya Rural Electrification	Development of Code of Conduct
7.	National Coordinating Agency for Population and Development	Development of Corruption Prevention Guidelines in Project Management
8.	Kenya Film Corporation	Development of an Anti Corruption Policy
9.	Thika Technical Training Institute	Development of an Anti Corruption Policy and Code of Conduct

Source: Kenya Anti-Corruption Commission (KACC) 2009. Country Report on the Fight Against Corruption. Retrieved Oct. 3, 2009, from http://www. kacc.go.ke/archives/ pressreleases/ performance-statement.pdf.

Table 5.2. Summary of Files Forwarded to the Kenyan Attorney-General 2008/2009

Recommendations to the AG	**Quarter 1 2008/09**	**Quarter 2 2008/09**	**Quarter 3 2008/09**	**Quarter 4 2008/09**	**July 2009-23rd Oct 2009**	**Total**
No. of files Recommended for Prosecution	26	26	23	19	19	113
No. of files Recommended for administrative or other action	2	3	0	4	0	9
No. of files Recommended for Closure	5	8	1	5	4	23
Total	**33**	**37**	**24**	**28**	**23**	**145**

Source: Kenya Anti-Corruption Commission (KACC) 2009. Country Report on the Fight Against Corruption. Retrieved Oct. 3, 2009, from http://www. kacc.go.ke/archives/ pressreleases/ performance-statement.pdf.

Table 5.3. Corruption/Criminal Cases Presented Before Court Particulars of Charge 2008/2009

Number of cases	**Total**
Soliciting & receiving of benefit	67
Impersonating an investigator	1
Unlawful acquisition of public property/benefit	4
Abuse of office	5
Conflict of interest	3
Willfully failing to comply with procurement procedures	6
Fraudulent payment for services not rendered	1
Irregular sale of public property	1
Conspiracy to defraud	1
Uttering false document	1
Fraudulent disposal of public property	1
Fraudulent disposition of mortgaged property	1
Failing to comply with notice to provide information and documents on person suspected of corruption	1
Total	**93**

Source: Kenya Anti-Corruption Commission (KACC) 2009. Country Report on the Fight Against Corruption.Retrieved Oct. 3, 2009, from http://www. kacc.go.ke/archives/ pressreleases/ performance-statement.pdf.

From the reports recommending prosecution, 93 criminal cases were presented before court and the suspects charged with various corruption and corruption related offences as set out in the table 3.3 above.

The agency filed 173 investigatory applications in court and obtained warrants in 133 of them to investigate banks accounts. It also obtained warrants in 40 applications to search premises of persons and their associates suspected of engaging in corruption, economic crime or related offences.

ii. Enforcement of Anti-Corruption Laws: Investigations and Asset Tracing

The agency has over the years continued to enhance its investigative capacity. This includes information and intelligence gathering, asset tracing and improving its corruption reporting facility. The agency has put in place state of the art investigative systems, besides acquiring top of the range surveillance equipment. This, complemented by highly skilled and experienced investigators has enabled the agency to effectively carry out its investigative mandate.[15]

Between 1st July 2004 and 30th June 2005, a total of 3,234 complaints of suspected and alleged corruption and economic crime were received at the agency. Of this number, only 384 (11.9%) were found to merit further investigation by the agency under its statutory mandate to address corruption and economic crime. The need for the office of Ombudsman is therefore very clear to the agency of which 23 were recommended for prosecution and 12 for closure.[16] The agency continues to enjoy a close working relationship with the Attorney General and the State's investigative agencies, such as the Criminal Investigations Department (CID).

A total of 120 corruption prosecutions are pending before Court as at November, 2004. They include those of 7 Permanent Secretaries and 14 Chief Executives of State Corporations. As at 30th June 2005, the agency had 167 cases under active investigation[17].

As at June 2007, the agency had since its inception received and processed a total of 19,310 complaints of suspected corruption and economic crimes from which a total of 3,145 cases were taken up for full investigation leading to various recommendations made to the Attorney-General, such as prosecution of suspects, administrative action against suspects and closure of investigation files for want of evidence. The agency notes that a

large part of the complaints it receives (80%) are outside its mandate. This has been addressed through the establishment of the office of Ombudsman.

As at 31st August 2007, 332 complete investigation files have been forwarded to the Attorney General. By June 2007, 231 of these files (75%) recommended prosecution of suspects of which, 107 cases have been finalised through the judicial process, with a conviction rate of 30% (32 convictions).[18] To encourage anonymous reporting of corrupt activities, the agency has rolled out an internet based whistle blowing system that protects the identity of whistle blowers. This electronic reporting system is a break from the traditional methods of email, fax, mobile phone short message service, telephone calls and letters to KACC. This system of corruption reporting, known as Business Keeper Monitor System (BKMS) is currently accessible in the KACC website.[19]

From July 2008 to October 2009, the agency received 5,877 corruption reports, out of which 1,731 fell within its mandate. All the reports falling within the agency's mandate have been fully investigated or are at various stages of investigation. Files in respect of reports that did not disclose offences upon preliminary investigations were closed.[20]

Out of the completed investigations, the agency arrested and arraigned in court 118 persons suspected of committing various corruption offences. Meanwhile, the agency traced corruptly acquired assets of an estimated value of Kshs. 5.61 billion during the year under review. Investigations involved amongst others, the following assets:

• Landed property comprising 13 houses belonging to the Municipal Council of Eldoret, 5 acres of land illegally carved out of Eldoret State Lodge and 5 acres of prime within the Nairobi Business District belonging to the National Social Security Fund, all estimated to be worth 3.8 billion Kenya shillings.[21]

• Irregular or fraudulent payments from public coffers, unsurrendered imprests, monies obtained through corruption and revenue lost through tax evasion, all amounting to 1.5 billion Kenya shillings.

• Assorted unexplained assets held by public officers in the form of cash, buildings, motor vehicles and land worth 252 million Kenya shillings. Through its proactive strategy, the agency disrupted several corruption networks, among them a tender involving Kenya Ports Authority for procurement of cranes at a cost of Kshs. 1 billion, one involving Kenya Sugar Board for Kshs. 2.2 billion and another involving East African Portland

Cement relating to irregular procurement of clinker at a cost of Kshs. 1 billion. Besides these, the agency also disrupted embezzlement of Kshs. 300 million belonging to the Youth Enterprise Development Fund.[22]

As is the case in the previous years, during 2008/2009 periods, some of the cases that the agency recommended for prosecution involve high ranking and former high-ranking public officials. The agency in its quest to strengthen the anti-corruption legislative framework, made proposals for amendment and participated in the review of the Evidence Act, Chapter 80 Laws of Kenya. The proposed amendments would ease the burden of proving corruption cases by providing for admissibility of evidence captured on audio and visual devices, while providing for admissibility of electronic records and information.

Besides these, the agency also made proposals, which culminated in the amendment of the Criminal Procedure Code to provide for plea-bargaining. It also carried out a comparative analysis of anti-corruption laws in select countries and continued to undertake research on pertinent legal issues touching on its operations and cases involving it.

iii. Enforcement of Anti-Corruption Laws: Legal Services

Form the year period July, 2008 to October 2009, the agency filed one hundred and sixty-four (164) suits for the recovery of public property lost through corruption and economic crimes as follows:

• 146 suits for recovery of public land some of which have government houses thereon, all valued at an estimated Kshs. 1.6 billion.

• 6 suits for recovery of embezzled funds amounting to Kshs. 10.5 million and

• 12 suits for recovery of Kshs. 31.5 million illegally paid to Members of Parliament.[23]

Besides filing suits for recovery, the agency filed injunction applications in various recovery suits to preserve the suit properties, pending determination of the suits.

In the discharge of its mandate to recover unexplained assets, the agency filed suits for forfeiture of property by public officers whose known legitimate sources of income is not commensurate with their wealth. During the period, the agency recovered corruptly acquired assets estimated to be worth Kshs. 144.5 million.[24] It also defended several constitutional references and judicial review applications filed by persons charged with

corruption or economic crime and those against whom the Commission has filed civil recovery suits.

Pursuant to an amendment to the ACECA mandating the agency to enter into out of court settlements, the agency recovered assets worth an estimated Kshs. 3.9 million through this avenue. Besides the recovery suits, the agency continued to contribute to the development of anti-corruption jurisprudence through several court decisions involving it. Although the agency does not have powers to prosecute criminal cases, it is obligated under section 35 of the Act to prepare reports of the findings of investigations carried out by it and forward the same to the Attorney General.

Such reports may include recommendations that persons suspected of corruption or economic crime be prosecuted. During the period under review, the agency forwarded to the Attorney-General 145 reports on concluded investigations. Out of these, 113 reports recommended the prosecution of named suspects, 23 recommended closure, while 9 recommended administrative action.[25]

iv. Partnerships and Coalitions

The Commission continued to forge partnerships with both the public and private sectors, while engaging in collaborative activities with the said sectors with a view to enhancing the anti-corruption network through participatory preventive activities. It has also conducted an examination of systems, policies, procedures and practices of institutions such as the Department of Immigration and various local authorities.[26]The Commission has also partnered with religious bodies, government agencies[27] and national anti-corruption agencies in Botswana, Namibia, Uganda and Tanzania.[28]

The agency participated in conjunction with the Public Sector Reforms and Performance Contracting Secretariat, Public Procurement Oversight Authority, Ministry of Local Government, Ministry of Lands and Kenya National Archives and Documentation Services, Ministry of Finance, Cabinet Office, Association of Professional Societies of East Africa (APSEA), Association of Kenya Insurers, and Institution of Certified Public Accountants of Kenya. These collaboration and initiatives aimed at enhancing implementation of anti-corruption strategies in the public sector through development and implementation of anti-corruption policies, codes of conduct, corruption prevention plans and establishment of corruption prevention committees.[29]

In view of the trans-boundary nature of corruption and the need to cast the net beyond Kenya's territorial limits, Kenya constituted an Inter-Ministerial Committee on Mutual Legal Assistance Legislation, in which the agency participated as member. The Committee prepared the Mutual Legal Assistance Bill, 2009. The Bill has elaborate provisions on mutual legal assistance and proposes the agency as one of the competent authorities.

v. Public Education, Training and Awareness Creation

As regards the Commission's public education programmes, it has been able to make impact in conducting seminars and meetings on corruption, sensitisation, exhibitions, creating and distributing information and education materials, initiating community-based programmes and sending out anti-corruption messages through radio programmes.[30] Within the focused period, the Commission trained 113 community based corruption monitors and facilitators drawn from Non-Governmental Organisations, Community Based Organisations and Faith Based Organisations as anti-corruption monitors and facilitators at the grassroots level. With a view to instilling integrity among the youth, the agency cosponsored and trained 250 youth under the auspices of the Young Farmers of Kenya on integrity, corruption prevention and community participation in service provision at the grassroots.

In an effort to enlist the support of the Muslim clerics in the fight against graft, the Commission also held training workshops for 253 Imams and Muslim scholars on how to mainstream anti-corruption, ethics and integrity content in their sermons and training programmes. The agency also disseminated a total of 294,574 Information, Education and Communication materials within various sectors during the period under review.[31]

In addition, the agency collaborated with the Ministry of Education in developing curriculum support materials and helped in mainstreaming ethics and integrity through drama and music under the auspices of the Kenya National Schools and Colleges Drama Festivals. The agency also collaborated with the Kenya Institute of Education and the Kenya National Examinations Council on mainstreaming ethics and integrity in national examinations, besides training various players in the education sector like drama adjudicators, school board members and managers on ethics and integrity.[32]

In recognition of the importance of awareness in corruption prevention, the agency carried out various training and sensitisation workshops for various institutions within the public, private and civil society sectors. It also conducted two national perception surveys, namely; National Corruption Survey 2008 and the 2009 National Enterprise Survey on Corruption. These surveys came up with various findings, which will inform anti-corruption interventions.

Moreover, as part of its corruption prevention mandate, the agency trains Integrity Assurance Officers and members of various anti-corruption committees set up in different institutions, besides training senior managers on corruption prevention strategies. This training is at times targeted at remedying corruption loopholes identified by the Commission pursuant to systems examinations undertaken by it.

During 2008/2009, the Commission trained 835 Integrity Assurance Officers drawn from diverse institutions and 624 corruption prevention committee members and senior managers.[33]

vi. International and Regional Engagements

On the international front**,** the Commission took part in several international anti-corruption initiatives. Regionally, the Commission participated in the African Public Service Exhibition in Dares Salaam, Tanzania. The Commission also joined other stakeholders in the review of the Draft East African Community Protocol on Preventing and Corruption, which draft is ready and awaiting adoption by the EAC Summit. The initiative brings together the five East African Countries in the fight against corruption at the regional level.

During the period under review, the UNCAC Gap Analysis spearheaded by the Commission was finalised. The report and action plan drawn pursuant to the process is ready for implementation. The implementation of this plan will see Kenya comply fully with the requirements of UNCAC.

vii. Institutional Capacity

The Commission continued to maintain highly skilled staff by training them in various specialised fields and recruiting others to fill vacant positions. The diverse mix of skills and experience among the staff equips the Commission with the relevant human

resource capacity to discharge its mandate. The Commission presently has a staff complement of 258 employees out of an approved establishment of 273.

5.2.3 Challenges of the KACC Anti-Corruption Strategies

Aside other anti-corruption legislation and policies, KACC remains major anti-corruption agency in Kenya, though faced with some challenges. Prominent among the challenges are discussed below.

i. Absence of Policy and Legislative Framework

Notable among these challenges is the lack of a national anti-corruption policy to guide the fight against corruption and economic crime. In addition, the anti-corruption legislative framework remains weak in various aspects, particularly the lack of power by the Commission prosecute persons for crimes falling within its ambit. Many constitutional references filed by persons charged with corruption and those against whom the Commission has instituted civil suits continue to delay the finalization of cases pending in court. Although public officers are obliged to declare their wealth, the Commission is unable to access the wealth declarations particularly those of key public officials. The need to have a national anti-corruption policy to give strategic direction to the fight against corruption and economic crime is recognized in Kenya's Kenya is yet to develop a policy that ensures coordination of anti-corruption initiatives by various public institutions and stakeholders. This has in effect impaired the fight against corruption.

ii. Absence of Prosecutorial and Enforcement Preventive Recommendations

Lack of prosecutorial powers by KACC has hampered the struggle against graft. Upon identification of corruption loopholes after examining systems, the Commission ordinarily makes recommendations for remedial measures to be undertaken by the concerned institutions. The lack of legal sanction and powers to ensure compliance with the recommendations however hampers the agency's efforts to prevent corruption.

iii. Limited Access and Public Ignorance of the Agency's Functions and Inadequate Support

In most cases, all reports are received in Nairobi thereby limiting access to the Commission by members of the public who live outside Nairobi. Aside this, most of the cases (80 per cent) reported were not corruption related, or covered under the Anti-Corruption and Economic Crimes Act 2003 and were therefore referred to relevant

agencies for appropriate action. This shows that members of the public do not clearly understand the mandate of KACC. Therefore, the need for more public education exists.[34]

The KACC has never enjoyed universal public support. Initial problems arose from the difficulties experienced when establishing the KACC, with sections of the public failing to support the leadership of the Commission. The appointment process of directors became the subject of controversy between Parliament, the President and the leadership of the KACC Advisory Board, leading to the resignation of its first Chairperson. Soon after, KACC was sucked into the controversies surrounding the Githongo fallout, with suggestions that the Commission was insincere in the discharge of its functions.

Furthermore, failure to ensure accountability in the Anglo Leasing scandal has partly been seen as a manifestation of the lack of independence on the part of KACC, further eroding public confidence. KACC has had to spend a considerable amount of time, effort and public resources in countering negative public perceptions. As justified as these views may be, the limitations that the KACC faces in the discharge of its functions are largely unlear to the public.

iv. Poor Public Perception and Low Credibility

Perceptions are an important part of public credibility in anti-corruption. One of the more significant credibility challenges that the KACC continues to face, is its management of information. The KACC uses its website to provide some information to the public regarding cases it is pursuing, and also incorporates into the statutory reports some information which could form a basis for accountability. However, there is no mechanism for the public to know the cases that the KACC opts not to pursue, and the reasons for such a decision. In the absence of a method by which the public will be able to independently assess the decision-making processes within the KACC, the Commission will not receive unqualified public support.

v. Harassment and Intimidation of Whistle Blowers at their Places of Work

Section 65(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 attempts to protect informers but does not penalise those who breach this section, hence the need for amendment to provide punishment for offenders. The Official Secrets Act, (Cap. 187 Laws of Kenya) is an impediment to public servants who would wish to report

corruption, since it bars public officers from disclosing information that they come across in the course of their duties. There is need to amend the Act to protect whistle blowers.

vi. Haunt of Grand Regency Shady Deal

The difficulties with the management of information were demonstrated in the sale of the Grand Regency Hotel. Although the KACC presented this as an unqualified success story, the public viewed the sale as a scandal. Other than the legal documents which the public gained access to, the sale was short of rationale and the public agencies involved, including the KACC, never considered it necessary to provide an explanation of the circumstances surrounding the sale. Quite clearly, a lengthy and undisclosed process of negotiation and planning went into the transaction outside the public view.

The first time there was a public indication of the sale was at the time the Central Bank of Kenya (CBK) and the KACC triumphantly announced the transaction, which by then had been concluded. In the absence of an explanation as to why the option of selling the Hotel was preferred to any other possible options, the public was not enabled to ascertain that the best option had been exercised. The transaction failed completely to meet an acceptable threshold of transparency, which was at the heart of all the questions that were raised. In a press release, KACC thereafter denied involvement in the disposal of Grand Regency.

vii. Low Accountability despite Regular Reporting

The KACC has been making an annual report for each year starting from 2003. In addition, the Commission has published a quarterly report for each of the four quarters for the years 2003 to 2008, effectively meeting its reporting requirements under the ACECA. The available quarterly reports broadly indicate recommendations made to the Attorney-General on prosecution or closure, and the actions taken, where known. The reports, however, are not expressed as being made under any statutory requirement, which points to an absence of a realisation that they are not merely promotional information, but a serious basis for accountability to the National Assembly.

It is not possible, from the information provided, to independently evaluate the claims contained in the reports by the agency to the Attorney-General. This scenario is replicated in the annual reports, whose format changes from year to year. That said, the 2007/08 and 2008/09 annual reports are more useful as they contain a large amount of

information on the status of the cases that the agency is handling in the various courts, including the outcomes of those that have been concluded. Further, there is no mechanism within the reporting for updating information contained in previous reports.

For example, the report for 2005/06 documents investigations contemplated by the Commission at the time, into "allegations of massive tax evasion by several private companies through use of secret bank accounts maintained at a local Bank. The investigations are being done in collaboration with the Kenya Revenue Authority and Central Bank of Kenya." There is, however, no mention of the outcome of the investigations in subsequent reports, or in any other place. Instead, the reports for subsequent years tend to emphasise new developments rather than reporting on developments affecting old cases. In these circumstances, it is difficult to establish accountability on the basis of the reports. The reports risk becoming a forum for providing sensational information which may ultimately be of limited use.

Under ACECA, the KACC is obliged to submit quarterly reports to Parliament on cases under investigation, and an annual report on all its work. None of its reports makes any mention of foreign investigations. Whereas it is understandable that disclosure of information on foreign investigations related to asset tracing may possibly jeopardise those investigations, it can however be expected that a measure of general public information should be available on this activity on which considerable public resources are spent.

In general, it would be more illuminating if information covering the whole anti-corruption chain were available; from KACC, to the AG, to the Judiciary. For instance, information from the Judiciary on the fate of the cases might allow the public to make better judgements, for example on the quality of investigations by KACC or on the value for money of investment of public resources in anti-corruption.

viii. Legal Constraints

The slow judicial process has adversely affected the agency's efforts to recover public assets acquired corruptly. Furthermore, the frequent transfers of Special Magistrates appointed to try corruption cases have compounded the problem of the slow criminal justice system. Also, judicial decisions continue to adversely affect the operations of the

Commission, as some of the crucial provisions of the ACECA have been declared unconstitutional.

In 2007, amendments to ACECA saw the introduction of a new sub-section which in effect significantly curtails KACC'S investigative process. Through the Miscellaneous Amendment Statute 2007, a new Section (Section 25A) was introduced which became known as the 'Amnesty Clause'. The Section gives power to the Minster, AG and KACC Director to determine whether to terminate or continue investigations on cases already instituted. Since this far-reaching, substantive amendment was buried in numerous other amendments to various Acts, proper scrutiny was subverted. In the same context, Section 56B was introduced giving KACC the legal authority to negotiate a settlement with persons against whom it intends to bring or has already brought a civil claim or application in court. The unclear process of approving this amendment led to accusations of the entrenchment of impunity.

ix. Judicial Challenges

Aside from the judicial challenges presented earlier relating to the recovery of assets of corruption, the Judiciary presents a profound challenge in the enforcement of anti-corruption laws generally. The agency has found itself on the receiving end of adverse judicial interpretation of its powers. The first assault on the agency was the Judiciary's interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65) with respect to offences committed before the ACECA came into force is still varied and the courts have not settled the law on the matter. Although Section 42(k) of Limitations of Actions Act has been introduced, it is unlikely to help the Commission in cases which were already before the courts before it was enacted.

x. Constitutional References

KACC has often cited the multiplicity of constitutional references filed by corruption suspects as a hindrance to its work. In its view, Constitutional Courts, which should be the courts of last reference, are often misused by corruption suspects to delay and ultimately subvert justice. The 2007/08 Annual Report lists over 37 such applications. In 2008/09, the Commission reported 9 significant cases. Again, the poor presentation of information from year to year makes it difficult to make conclusive assessments on the numbers and impact of these challenges.

5.3 Other Institutional Anti-Corruption Strategies in Kenya

Aside the aforementioned anti-corruption instruments, a number of anti-corruption interventions have also been undertaken to complement the work of the anti- corruption commission. These are discussed below.

i The National Anti-Corruption Campaign Steering Committee (NACCSC)[35] comprising representatives from the government, religious organisations, media, civil society, universities, women's organisations and the private sector is chiefly mandated to establish a broad based framework for a nationwide campaign against corruption that will in the long run effect fundamental changes in the attitudes of Kenyans, creating a strong anti-corruption culture.[36] To this end, it works in close concert with other anti-corruption and law reform bodies such as the KACC and Governance, Justice, Law and Order Sector (GJLOS) Programme. The GJLOS is an ambitious governance reform programme that adopts a sector-wide approach to dealing with problems affecting the justice, law and order sector institutions. It was launched in November 2003; it principally seeks to create corruption-free institutions that can render effective and efficient services to the public. One of its key thematic areas deals with ethics, integrity and anti-corruption. The programme covers four key ministries and up to 32 government departments and agencies. It has representation from the civil society and the private sector which is represented by the Kenya Private Sector Alliance.[37]

ii. The Efficiency Monitoring Unit in the Office of the President is tasked to *inter alia*, review the existing management systems and practices in public organizations with a view to improving their effectiveness and efficiency. The unit has been keenly involved on the evaluation of the public officers' wealth declaration exercise.[38]

iii. The Anti-Corruption, Serious Fraud and Asset Forfeiture Unit was set up under the State Law Office as a specialised prosecution unit to deal with corruption, serious crime, fraud and asset forfeiture.[39]

iv. Special Anti-Corruption Courts have been established under the Anti-Corruption and Economic Crimes Act 2003 to try cases of corruption and economic crimes. The special anti-corruption courts established under the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) are to be presided over by a special magistrate.[40] The innovative special anti-corruption courts are established to deal with the corruption cases as a matter

of priority. By appointing specific magistrates to adjudicate corruption matters, the Judicial Service Commission[41] is making special efforts to build the capacity of judicial officers in these courts to better handle anti-corruption cases. Section 4 of the ACECA emphasises that, 'notwithstanding anything contained in the Criminal Procedure Code or in any other law for the time being in force, the offences in this Act shall be tried by special magistrates only'. Recommendations to establish special courts for corruption cases have been marking the agendas of various governments including Nigeria, Morocco, Romania and special anti-corruption courts have been established in countries in South Asia.[42]

v. The reforms in the Police force to increase efficiency and integrity. The Kenya Police has been singled out as one of the most corrupt public institutions in the country. The police reforms were targeted at among other things addressing the question of corruption within the police.

v. The establishment of an Ethics and Integrity Committee to look into the extent of corruption in the Judiciary. This led to a historic, far reaching "radical surgery" of the Judiciary, in which, 6 out of 11 judges of the Court of Appeal, 17 out of 36 High Court judges and 82 out of 252 magistrates were suspended on allegations of corruption.[43]

vi. The Parliamentary Public Accounts and Public Investment Committees are oversight bodies that call on government to account from time to time particularly on its anti-corruption efforts..[44]

5.4 Non-Institutional Anti-Corruption Strategies in Kenya

As a matter of fact, Kenya lacks comprehensive National Anti-Corruption Policy. But there exists the development and implementation of some policy documents relating to corruption. These include:

i. The Economic Recovery Strategy (2003-2007)
ii. Medium Term plan (2008-2012) for the Kenya Vision 2030
iii. The National Anti-Corruption Plan (NACP)

In addition, corruption prevention practices have been adopted through assorted programmes such as the Public Service Integrity Programme (PSIP), and examinations carried out in various public bodies to identify and block corruption loopholes in their work practices. To support the foregoing policy documents and practices, Kenya enacted

several anti-corruption legislations which provide for, *inter alia*, prevention of corruption in its various manifestations.

Of the particular significance are:

i. The Anti-Corruption and Economic Crimes Act (ACECA) 2003
ii. The Public Officer Ethics Act (POEA) 2003
iii. The Public Audit Act 2003
iv. Government Financial Management Act 2004
v. Public Procurement and Disposal Act 2005
vi. Public Procurement and Disposal Regulations 2006
vii. Privatisation Act 2005
viii. Witness and Protection Act 2006
ix. The Procurement and Supplies Management Act 2007
x. The Penal Code

5.4.1 The Anti-Corruption and Economic Crimes Act (ACECA)

The Anti-Corruption and Economic Crimes Act (ACECA) is the principal anti-corruption legislation in Kenya. It sets out to provide for 'the prevention, investigation and punishment of corruption, economic crimes and related offences.'[45] It adopts a descriptive definition of corruption, and casts a wide net on acts constituting the offence of corruption. Under the Act, corruption means any of the offences listed or referred to under section 2(1) (a) to (g). Section 2(1) (a) states that corruption is an offence under section 39 to 44, 46 and 47 of the Act.[46]

Offences listed as corruption under section 2(1) (b) to (g) of the Act include 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.

With reference to economic crime, section 2 of ACECA defines it as: (a) an offence under section 45, [47] or (b) an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue.' The Act creates Anti-Corruption Commission and special magistrates' courts to try corruption and economic crimes.

The special anti-corruption courts established under the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) are to be presided over by a special magistrate.[48]

The innovative special anti-corruption courts are established to deal with the corruption cases as a matter of priority. By appointing specific magistrates to adjudicate corruption matters, the Judicial Service Commission[49] is making special efforts to build the capacity of judicial officers in these courts to better handle anticorruption cases. Section 4 of the ACECA emphasises that, 'notwithstanding anything contained in the Criminal Procedure Code or in any other law for the time being in force, the offences in this Act shall be tried by special magistrates only'. Recommendations to establish special courts for corruption cases have been marking the agendas of various governments including Nigeria, Morocco, Romania and special anti-corruption courts have been established in countries in South Asia.[50]

5.4.2 The Public Officer Ethics Act (POEA)

The main objective of this legislation is to "advance the ethics of public officers by providing for a Code of Conduct and Ethics and requiring financial declarations from certain public officers." [51] It is thus intended to inculcate a culture of honesty, hard work and rejection of corruption in the public service. According to the Act, the term "public officer" refers to any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any government department, national assembly, local authority, cooperative society, public university or any other body that exercises a public function pursuant to any written law.[52]

The Act designates eight responsible commissions for various categories of public officers, charged with ensuring compliance with and adherence to its provisions.[53] Each of these commissions is required to establish a specific code of conduct and ethics for the public officers under its authority, which must include all the requirements in the general Code of Conduct and Ethics provided for in the Act.[54]

The code promotes values such as professionalism, integrity and respect for the rule of law, and explicitly forbids improper enrichment, conflict of interest, trading in influence, nepotism and sexual harassment.[55]

A notable feature of the Act is the provision for the mandatory declaration of income, assets and liabilities by public officers. Section 26 requires all public officers to submit to their respective responsible commissions, declarations of income, assets and liabilities within 30 days of appointment as such, annually for the duration of their

appointment, and within 30 days of ceasing to function as public officers. This extends to the officers' spouses and dependent children. A public officer making such a declaration is obliged to ensure the declared information is correct to the best of their knowledge. [56] Once collected, the declarations of wealth remain confidential and may only be disclosed to authorised commission staff, the police or other law enforcement agency, the author of the declaration, or to any other person authorised by an order of the High Court.[57] However, the Act does not set the terms under which such an order would be granted or denied or grounds for such an application. Failure to submit declarations or the submission of false information attracts a fine not exceeding one million shillings or imprisonment for one year or both.[58] The wealth declaration exercise used to be conducted. Officers who did not comply faced among other sanctions, removal from the payroll.[59] The various responsible commissions are empowered to enforce the general code of conduct including thorough investigations and taking disciplinary action against errant officers.[60]

5.4.3 The Public Audit Act 2003

This is one of the supplementary acts to fight corruption in Kenya. The Act provides for the audit of government, state corporations and local authorities, to provide for economy efficiency and effectiveness examinations, to provide for certain matters relating to the Controller and Auditor-General and the Kenya National Audit Office, to establish the Kenya National Audit Commission and to provide for other related matters.

5.4.4 Government Financial Management Act 2004

This is also a supplementary Act providing for the management of government financial affairs and making certain provisions with respect to the exchequer account and the Consolidated Fund. It also provides for persons to be responsible for government resources and to provide for other related mat5ters and consolidating, improving and streamlining key government financial processes previously scattered in separate codes.[61]

5.4.5 Public Procurement and Disposal Act 2005

The Public Procurement and Disposal Act (PPDA), effective as of 1st January 2007, vide Public Procurement and Disposal Regulations, 2006. It applies to all procurement of goods, works and services, as well as the disposal of assets by public entities. Public entities are those entities that procure goods, services or works utilising public funds. The definition of public funds includes donor funds in so far as donor stipulations do not

supersede the Act. If they do, the donor terms and conditions take precedence. As such, the definition includes the central and local governments, courts, commissions, state corporations, cooperatives, and educational institutions such as colleges, schools and universities. This Act does not directly seek to regulate the private sector, though it does regulate its interaction with public entities.[62]

5.4.6 Witness and Protection Act 2006

It is an Act of Parliament to provide for the protection of witnesses in criminal cases and other proceedings to establish a Witness Protection Agency and provide for its powers, functions, management and administration, and for connected purposes. The Witness Protection Act of 2006 was adopted to respond to the difficulties the country had experienced over the years in investigating and prosecuting those involved in high-level corruption (e.g. the Goldenberg Case) and other related issues.[63] The law provides for the protection of witnesses in criminal cases including whistle blowers by concealing their identities so as to shield them from victimisation. It establishes a witness protection programme, which would be coordinated by the Attorney-General on behalf of the police and other law enforcement agencies.[64]

Under the programme, a new identity is established for the witness and the person and his/her family relocated to guarantee their safety. It vests in the High Court the authority to order the appropriate officer to make new entries in the register of births, deaths or marriages. The law imposes a sentence of seven years to any person convicted of blowing the cover of an individual who is a beneficiary of the programme. Among them include the nature of the risk posed and whether the witness, in view of his/her background or character, would pose a danger to society if shielded.[65]

5.4.7 The Procurement and Supplies Management Act 2007

This Act was assented to law on 22nd October 2007 and commenced on 30th October 2007. This Act regulates both public and private sector procurement practitioners and strives to professionalise procurement practice in Kenya. In terms of the Act, Kenya Institute of Supply and Management (KISM) is tasked with registering and licensing all supplies practitioners operating in Kenya.[66]A supplies practitioner is defined as any person or procuring agent engaged in public or private procurement, purchasing, stores management, logistics, supply chain or related activities. In order to be registered, supplies

practitioners are required to satisfy the registration board that they are of good conduct, have paid the registration fee and have undergone and passed a certificate, diploma or research course of instruction in the prescribed field. Persons engaged in supplies practice immediately before the enactment of the Act will be eligible to be registered if they convince the council they are of good conduct, have met the professional qualifications prescribed by the council and have paid the prescribed fee.[67]

5.4.8 The Penal Code

The Penal Code under section 101(1) stipulates the offence of abuse of office. Notably the Act defines the offence as a misdemeanour and where the act is done for gain then it is a felony and the sentence a maximum of three years. Under the Penal Code, prejudice is a necessary ingredient of the offence. Offences on corruption set out in the Penal Code can only be investigated by the Police Department.[68]

On the legislative side, other anti-corruption instrument includes the Privatisation Act 2005to ensure transparent and accountable transfer of public assets.

Table 5.4. Matrix of Recent Anti-Corruption Strategies in Kenya

KENYA ANTI-CORRUPTION STRATEGIES
➢ Anti-Corruption Police Unit (ACPU) 2001 ➢ Establishment of several bodies under Anti-Corruption and Economic Crimes Act (ACECA) 2003 e.g. KACC, Public Complaints Office and Public Service Integrity Programme, Special Anti-Corruption Courts ➢ Enactment of the Public Officer Ethics Act (POEA) ➢ Launch of National Anti-Corruption Steering Committee (NACCSC) in 2004 ➢ Policy Measures from the Central Bank to mainstream corporate governance in the country ➢ The Public Audit Act 2003 ➢ Government Financial Management Act 2004 ➢ Public Procurement and Disposal Act 2005 ➢ Public Procurement and Disposal Regulations 2006 ➢ Privatisation Act 2005 ➢ Witness and Protection Act 2006 ➢ The Procurement and Supplies Management Act 2007 ➢ The Penal Code

Source: The Author's Compilation, 2010

Others include:

i. The re-launch of the Public Service Integrity Programme in 2003. Through the programme, public institutions are trained on how to create an internal culture of integrity through the assistance of Integrity Assurance Officers and Corruption Prevention Committees;

ii. Codes of Conduct for Cabinet Ministers calling for ethics, integrity and collective responsibility of all Cabinet ministers;

5.5 Institutional and Non-Institutional Anti-Corruption Strategies in Nigeria

5.5.1 Institutional Anti-Corruption Strategies

5.5.1.1 The Economic and Financial Crimes Commission (EFCC)

Like its Kenya counterpart, there was no specific comprehensive National Anti-Corruption Policy in Nigeria, except the recent elaborate anti-corruption strategies put in place by Obasanjo Administration when it came on board in 1999.

Given scope of corruption and the stained image of Nigerian in international circles, the Nigerian government in 2002 created an anti-corruption agency with the mission:

> to curb the menace of corruption that constitutes the cog in the wheel of progress; protect national and foreign investment in the country, imbue the spirit of hard work in the citizenry and discourage ill gotten wealth; identify illegally acquired wealth and confiscate it; build an upright workforce in both public and private sectors of the economy and; contribute to the global war against financial crimes.[69]

The creation of the EFCC marked was not only innovative and revolutionary but marked a significant shift from rhetoric about fighting corruption to actually fighting corruption.

The objectives of the EFCC are:

i. to prepare human resources training to enhance capacity and skills of civil servants, who are responsible for law enforcement, to fulfill their job effectively;

ii. to strengthen the investigation mechanism and having the tools to obtain sufficient evidence for fairly, predictably, and effectively convicting or punishing anyone who commits corruption;

iii. to strengthen and monitor the implementation of the sub-decree on Public Procurement Management;

iv. to strengthen and control the implementation , and existing regulations of the EFCC and state institutions in order to assure integrity, effectiveness, transparency and accountability;

v. to take strict measures to reduce corrupt practices in any system and procedure that provide the opportunity for corruption;

vi. to promote the establishment of an independent anti-corruption institution where the support from the public can be sought through organising seminars at national and international levels and creating programme to disseminate the EFCC principles on preventing, obstructing and combating corruption to the make public aware of them, and in particular, to ensure civil servants understand the issue and have adequate skills and means to perform their job properly, effectively and fairly;

vii. to sensitise and educate all Nigerians on corruption and its negative effects on their daily lives;

viii. to mobilise opinion leaders and all Nigerians both within and outside the country against corrupt tendencies and practices; and

ix. to create a sustained multi-stakeholder movement for integrity in the public and private spheres through the establishment of a network of volunteers in all communities, local government areas, states, federal, capital territory and among Nigerians in Diaspora.[70]

Important core values of the EFCC are to make all Nigerians buy into the anti-corruption war thereby ensuring public ownership of the war. Some of these values are integrity, inclusiveness and non-partisanship, accessibility, accountability, transparency, patriotism and courage, fairness and respect for human rights, volunteerism and dignity.

The Commission shall be responsible for:

i. the enforcement and the due administration of the provisions of this Act;

ii. the investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam, etc.;

iii. the co-ordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other person or authority;

iv. the adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crimes related offences or the properties the value of which corresponds to such proceeds;

v. the adoption of measures to eradicate the commission of economic and financial crimes;

vi. the adoption of measures which includes coordinated preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial related crimes;

vii. the facilitation of rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes;

viii. the examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies or groups involved;

ix. the determination of the extent of financial loss and such other losses by government, private individuals or organizations;

x. collaborating with government bodies both within and outside Nigeria carrying on functions wholly or in part analogous with those of the Commission concerning;

(a) the identification, determination, of the whereabouts and activities of persons suspected of being involved in economic and financial crimes;

(b) the movement of proceeds or properties derived from the commission of economic and financial and other related crimes;

(c) the exchange of personnel or other experts;

(d) the establishment and maintenance of a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved;

(e) maintaining data, statistics, records and reports on person, organisations, proceeds, properties, documents or other items or assets involved in economic and financial crimes;

(f) undertaking research and similar works with a view to determining the manifestation, extent, magnitude, and effects of economic and financial crimes and advising government on appropriate intervention measures for combating same;

xi. dealing with matters connected with the extradition, deportation and mutual legal or other assistance between Nigeria and any other country involving Economic and Financial Crimes;

xii. The collection of all reports relating suspicious financial transactions, analyse and disseminate to all relevant Government agencies;

xiii. taking charge of, supervising, controlling, coordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offenses connected with or relating to economic and financial crimes;

xiv. the coordination of all existing economic and financial crimes, investigating units in Nigeria;

xv. maintaining a liaison with office of the Attorney-General of the Federation, the Nigerian Customs Service, the Immigration and Prison Service Board, the Central Bank of Nigeria, the Nigeria Deposit Insurance Corporation, the National Drug Law Enforcement Agency, all government security and law enforcement agencies and such other financial supervisory institutions in the eradication of economic and financial crimes;

xvi. carrying out and sustaining rigorous public and enlightenment campaign against economic and financial crimes within and outside Nigeria; and

xvii. carrying out such other activities as are necessary or expedient for the full discharge of all or any of the functions conferred on it under this Act.

The legal instrument backing the Commission is the attached EFCC (Establishment) Act 2002 and the Commission has high-level support from the Presidency, the Legislature and key security and law enforcement agencies in Nigeria. The Act mandates the EFCC to combat financial and economic crimes. The Commission is empowered to prevent, investigate, prosecute and penalise economic and financial crimes and is charged with the responsibility of enforcing the provisions of other laws and regulations relating to economic and financial crimes, including:

i. Economic and Financial Crimes Commission Establishment Act (2004);

ii. The Money Act 1995;

iii. The Money Laundering (Prohibition) act 2004;

iv. The Advance Fee Fraud and Other Fraud Related Offences Act 1995;

v. The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994;

vi. The Banks and other Financial Institutions Act 1991; and

vii. Miscellaneous Offences Act In addition, the EFCC is the key agency of government responsible for terrorism.[71]

The EFCC which is today the arrow-head in the fight against corruption in Nigeria was established as part of a national reform programme to address corruption and money laundering. The EFCC is an inter-agency Commission comprising a twenty-two member Board drawn from all Nigerian Law Enforcement Agencies (LEAs) and Regulators. As stated earlier on, the Commission is empowered to investigate, prevent and prosecute offenders who engage in

> Money laundering, embezzlement, bribery, looting and any form of corrupt practices, illegal arms deal, smuggling, human trafficking, and child labor, illegal oil bunkering, illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes, and prohibited goods.[72]

The agency is also responsible for identifying, tracing, freezing, confiscating, or seizing proceeds derived from terrorist activities. EFCC is also a host to the Nigerian Financial Intelligence Unit (NFIU), vested with the responsibility of Collecting Suspicious Transactions Reports (STRs) from financial and designated non-financial institutions, analysing and disseminating them to all relevant government agencies and other FIUs all over the world. In addition to any other law relating to economic and financial crimes, including the criminal and penal codes, EFCC is empowered to enforce all the pre 1999 anti-corruption and anti-money laundering laws. Punishment prescribed in the EFCC Establishment Act range from combination of payment of fine, forfeiture of assets and up to five years imprisonment depending on the nature and gravity of the offence. Conviction for terrorist financing and terrorist activities attracts life imprisonment.[73]

5.5.1.1.1 The Powers of the EFCC

The Establishment Act of 2002 (as amended in the EFCC Establishment, Act, 2003), bestows on the EFCC the broadest and most current laws against financial and economic crimes and terrorism in Nigeria. As a financial intelligence unit, the EFCC is mandated to coordinate the various institutions involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes, and terrorism.[74]

Under its broad economic and financial crime and terrorism mandate, the EFCC is charged with preventing, investigating, prosecuting, and penalising financial and economic crimes such as illegal oil bunkering, terrorism, capital market fraud, cyber crime, advance fee fraud (419 or obtaining through different fraudulent schemes), banking fraud and economic governance fraud (transparency and accountability).[75]

The EFCC has extensive special and police powers including the power to:

(a) investigate persons and/or properties of persons suspected of breaching the provision of the Establishment Act of 2002 and any other law or regulation relating to economic and financial crimes in Nigeria;[76]

(b) cause investigations to be conducted as to whether any person, corporate body or organisation has committed any offence under this Act or other law relating to economic and financial crimes;

(c) cause investigations to be conducted into the properties of any person if it appears to the Commission that the person's lifestyle and extent of the properties are not justified by his source of income.

The EFCC has enabling powers under the Establishment Etc. Act 2003 and 2004 to deal with terrorism and terrorist offences including: willful provision or collection of money from anyone, directly or indirectly, to perpetrate an act of terrorism; committing or attempting to commit, participate, or facilitate the commission of a terrorist act; and making funds, financial assets, or economic resources available for use by any person or persons to commit or attempt to commit, facilitate, or participate in the commission of a terrorist act.[77]

5.5.1.1.2 The Structure of the EFCC

The EFCC is an independent agency headed by an Executive Chairman under the direction of a Board. The Chairman, supported by the Directors of the five operations units, financial crimes and intelligence; advance-fee fraud and other economic crimes, enforcement, and general operations; prosecution and legal counsel; organisation and support; and training school, is the Chief Executive and accounting officer.[78]

The agency receives support from the presidency, the legislature, and the judiciary. The agency also cooperates with like organisations from other countries to uncover corruption and money laundering activities involving Nigerians. In terms of its structure and organisation, the agency is committed to containing economic and financial crimes, generating and disseminating effective economic and financial crimes intelligence to assist law enforcement, and inculcating prudent and sincere dealing amongst Nigerians via a transparent value system and preventive measures.[79]

The organisational structure reflects the major broad activity areas of the commission, namely, economic and financial crimes intelligence, investigation and enforcement, prosecution, crime prevention through mass communication and advocacy, and proactive and reactive execution of anti-terrorism operations. The head office is in Abuja, with regional offices in Lagos, Enugu, and Port Harcourt.

5.5.1.1.3 Achievements of the EFCC's Anti-Corruption Strategies

The EFCC was created against the backdrop of previous failed schemes to combat corruption and the need to repair Nigeria's image to attract foreign investment. The agency

major achievements in pursuant of its strategies and fulfilling its mandate are discussed below:

i. **Prevention of Corruption**

The EFCC Act 2004 also creates a Commission to focus on financial and economic crimes, with extensive powers to implement and enforce several laws and to put in place mechanisms for prevention and education against financial and economic crimes.

EFCC has been able to undertake some tasks suggesting that its mandate of corruption prevention has to a large extent been upbeat. This has manifested in its overt and positive disposition towards partnering with relevant private organisations in onerous task of preventing corruption. For instance, the Nigerian Financial Intelligence Unit (NFIU) is domiciled within the EFCC (as an autonomous unit), and serves as the country's central agency for the collection, analysis and dissemination of information regarding money laundering and the financing of terrorism.[80] The EFCC and the Money Laundering Acts provide several reporting requirements for financial and other designated non financial institutions including a) Know your customer (KYC); b) Customer Due Diligence; c) Currency Transaction Reports; and d) Suspicious Transactions reports. The NFIU collates and analyses the various financial reports, from relevant organisations in accordance with FATF recommendations. The amendment to the EFCC law in 2004 widened the sectors and businesses covered by these regulations and reporting systems to include designated non-financial institutions, like casinos, professional firms, hotels, jewellery dealers, cars & luxury goods dealers and supermarkets. Nigeria, as a result of some of these efforts was taken off the list of non co-operative countries by the FATF.[81]

To improve citizen participation in corruption prevention, the EFCC Strategy and Reorientation Unit (SARU) focuses on multi-sectoral collaborations and currently runs what it calls an Anti-Corruption Revolution (ANCOR) coalition with branches in all States of the Federation. These branches provide the geographical spread needed for SARU to reach citizens of each state with initiatives that improve anti-corruption knowledge and skills. [82] At the moment SARU is engaged in a project to build capacity of the State Chapters of ANCOR and provide them with tools to begin monitoring and reporting on public procurement activity in all federal MDA's in their states. The sensitisation and enlightenment of Nigerians and the world at large on government's

efforts in the prevention of financial crimes via reorientation of the minds and inculcating acceptable societal values through the medium of films have also been focus on. This manifested, for instance, in the inauguration of the "EFCC/NOLLYWOOD working group" made up of executives from Nigeria film industry associations and officials of the EFCC. The working group is to fashion out ways of working together to achieve the prevention and public enlightenment mandates of the Commission.[83]

ii. Investigation and Prosecution

The EFCC as an investigative and prosecutory agency has made some inroads in the fight against corruption among public officers. By investigating and prosecuting corrupt public officials accused of corruption and publishing an advisory list of corrupt and unfit candidates in the past, the EFCC hopes to deter Nigerians from engaging in corrupt activities. Hence, the EFCC's indictments, arrests, and reports on corruption involving high profile public officials were indicative of the distance high level public officials in Nigeria were willing to go to exploit, loot, steal, misappropriate and launder public money for personal aggrandisement instead of improving the well-being of the people.[84]

There have been a number of high profile convictions since the EFCC inception. Many advance fee fraud ("419") kingpins have been detained, judges have been sacked and others suspended, while several legislators (including a past Senate president and the Speakers) lost their legislative posts and were prosecuted. In addition, ministers were dismissed, a former Inspector General of Police, the top law enforcement official in the country was tried, convicted and jailed for corruption charges with some state governors impeached by their states' Houses of Assembly on the ground of corruption.[85] Through the government anti-corruption strategy, about N84 billion was recovered from the family of the late Head of State, Sani Abacha as at 2001.[86]

Other notable cases include the former Chairman of the Nigeria Ports Authority, Bode George who was later jailed for corruption; the bribery scandal and fraud involving members of the National Assembly Committee and the Minister for Education over budget matters; the former governor of Bayelsa State, Chief Depreye Alamieyeseigha; the investigation of all state governors and local government officials as of December 2006; the thirty-year imprisonment of civil servant fraudsters in 2008; the trial of the Chairman of the National Electricity Regulatory Commission; and the trial of Mallam Nasir Ahmed

El-Rufai, the Minister of the Federal Capital Territory, Abuja, in 2009.[87] The 2006 indictment of the serving Vice President, Atiku Abubakar for abuse of office, fraud, and embezzlement by both the EFCC and the Administrative Panel of Inquiry is indicative of how deep and pervasive corruption has permeated the Nigerian society.[88] The agency was also responsible for the arrest of Hon. Morris Ibekwe (Imo State) for allegedly obtaining under false pretences the sum of $300,000 from a German national and head of the Munich System Organisation Company.[89] The list is almost inexhaustible.

In addition to its investigative power, the EFCC has the power to bring charges of corruption so that accused persons can be brought to court for criminal trial. In 2006, the EFCC had received 4,200 petitions on illegal corruption, investigated 1,200 cases, and taken 406 cases to the court.[90] After months of investigation of the petitions and allegations of corruption against thirty-one out of thirty-six states in Nigeria, the EFCC decided to indict fifteen governors and gave a clean bill to only six state governors. [91] The Commission prosecuted a fraud case involving $242 million arising from a bank fraud in Brazil in 2005. More than 5,000 people have been arrested over the past four years. There have been about 91 convictions for various corruption crimes.[92]

iii. Asset Recovery

Lack of annual adequate information on the assets recovered by the EFCC like that of KACC has made it difficult to know the detailed and precise amount of assets recovered under the reviewed period. But what is glaring, as stated earlier on, is that the agency has made appreciable progress in this area. For instance, former inspector general of Nigeria Police, Tafa Balogun, who was accused of stealing more than $121 million was jailed for six months, fined $30,000, and had property worth $150 million seized.[93] Also, between May 2003 and June 2004, the EFCC in Nigeria recovered money and assets worth over $700 million, as well as recovering £3 million through the British Government. Assets worth over $55 billion have been seized, confiscated and refunded to the state and various victims of crime.[94] The body has increased the revenue profile of the nation by about 20% due to its activities in the Federal Inland Revenue service and the seaports, recovered billions to government in respect of failed government contracts.[95] Despite the existence of these laws and institutions, corruption remains a way of life in Nigeria. There is more than enough documentary evidence to show that corrupt practices permeate nearly every

stratum of Nigerian society. The Nigeria's anti-corruption agency, the EFCC, recently provided stunning evidence, which put the total amount of money stolen by past and present Nigerian rulers at US$521 billion.[96]

v. Convictions

The number of convictions EFCC's convictions of prominent political figures is not all that encouraging. Between 2003 and July 2009, only four convictions were made. While only one of the four convictions was obtained at trial, with the others obtained through plea bargains that involved dropping some of the most serious charges against the accused. But it is to be noted that seven of the cases against former state governors and other related cases have been hindered in the courts by procedural delays and may yet result in important convictions.[97]

Table 5.5. Plead Bargain and EFCC Convictions 2003-2009

Convict's Name	**Nature of Trial**	**Year Convicted**
Tafa Balogun	• Charged to court in April 2005. • Ultimately pleaded guilty of failing to declare his assets. • His front companies were convicted of eight counts money laundering. • Sentenced to six months in prison. • Court ordered the seizure of his assets worth in excess of $150 million.	November 2005
Diepreye Alamieyeseigha	• Arrested by British authorities in London in September 2005. • The London Metropolitan Police found about £1 million in cash at his home. • Charged with money laundering and released on bail. • Managed to flee the UK • Impeached three months by his state legislature. • EFCC charged him with embezzling about $55 million in public funds • Pleaded guilty to failing to declare his assets. • His front companies were convicted of money laundering and his assets seized. • Sentenced to two years in prison and released, for time served, the day after his sentencing.	July 2007
Lucky Igbinedion	• EFCC prosecutors in January • Charged in January 2008 for siphoning off more than $25 million of public funds.	December 2008

	• Pleaded guilty to failing to declare his assets and • Given very light sentence that included no jail time. • Paid the equivalent of a $25,000 fine. • Agreed to forfeit some of his property.	
Olabode George	• Charged by the EFCC in August 2008 with contract-related offences dating back to his time at the NPA. • Convicted and sentenced to two and a half years in prison. • The EFCC's first and so far only conviction at trial of a major political figure.	October 2009

Source: Human Rights Watch. 2011. Nigeria: Corruption on Trial? The record of Nigeria's economic and financial crimes commission. Retrieved June 24, 2012 from http://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf.

vi. International Co-operation and Legal Assistance

In co-operation and collaboration with other states and global actors such as the US Federal Bureau of Investigation, the UK's Office of Fair Trading and Metropolitan Police, and international actors such as the World Bank, the IMF, Egmont, and Microsoft, the EFCC is not only significantly contributing to the fight against corruption but is also helping revive the previously negative image of Nigeria in the international arena. Nigeria's image has for too long been synonymous with corruption, and the EFCC is working hard to change this image. For example, in May 2007, Nigeria became a member of the internationally acclaimed Egmont Group of Financial Intelligence Units.[98]

In essence, the foregoing indicates that the EFCC certainly achieved in many areas, especially in the key areas of prosecution and recovery of illegally acquired wealth. Between April 2004 and June 2006, EFCC recovered over $5 billion (or N725 billion) from financial criminals in form of cash and assets. The recovered proceeds were returned to individuals who have been duped, or to the public treasury, in the case of assets seized from corrupt officials or private companies who had duped the government in the areas of tax evasion, contract inflation and others.[99]

Table 5.6. Nationally Prominent Political Figures Charged for Corruption (2003 – 2009)

Defendant	Office Held	Date Charged
Tafa Balogun	Inspector General of Police (2002 – 2005)	April 2005
Diepreye Alamieyeseigha	Governor, Bayelsa State (1999 – 2005)	December 2005
Abubakar Audu	Governor, Kogi State (1999 – 2003)	December 2006
Joshua Dariye	Governor, Plateau State (1999 – 2007)	July 2007
Orji Kalu	Governor, Abia State (1999 – 2007)	July 2007
Saminu Turaki	Governor, Jigawa State(1999 – 2007)	July 2007
Jolly Nyame	Governor, Taraba State (1999 – 2007)	July 2007
Chimaroke Nnamani	Governor, Enugu State (1999 – 2007)	July 2007
James Ibori	Governor, Delta State (1999 – 2007)	December 2007
Ayo Fayose	Governor, Ekiti State (2003 – 2006)	December 2007
Lucky Igbinedion	Governor, Edo State (1999 – 2007)	January 2008
Iyabo Obasanjo-Bello	Senator, Ogun State (2007 – 2011)	April 2008
Adenike Grange	Minister of Health (2007 – 2008)	April 2008
Gabriel Aduku	Minister of State for Health (2007 – 2008)	April 2008
Babalola Borishade	Minister of Aviation (2005 – 2006)	July 2008
Femi Fani-Kayode	Minister of Aviation (2006 – 2007)	July 2008
Michael Botmang	Governor, Plateau State (2006 – 2007)	July 2008
Boni Haruna	Governor, Adamawa State (1999 – 2007)	August 2008
Rashidi Ladoja	Governor, Oyo State (2003 – 2007)	August 2008
Olabode George	Chairman, Nigerian Ports Authority (1999 – 2003)	August 2008
Nicholas Ugbane	Chairman, Senate Committee on Power	May 2009
Ndudi Elumelu	Chairman, House of	May 2009

	Representatives Committee on Power	
Igwe Paulinus	Chairman, House of Representatives Committee on Rural Development	May 2009
Jibo Mohammed	Deputy Chairman, House of Representatives Committee on Power	May 2009
Attahiru Bafarawa	Governor, Sokoto State (1999 – 2007)	December 2009

Source: Human Rights Watch. 2011. Nigeria: Corruption on Trial? The record of Nigeria's economic and financial crimes commission. Retrieved June 24, 2012 from http://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf.

5.5.1.1.4 Major Challenges of the EFCC Anti-Corruption Strategies

The EFCC faces some major challenges as regards strategies to fight against corruption in Nigeria. Some of these impediments are systemic while others are self-inflicted. These impediments are briefly discussed below.

(i) Immunity from Arrests

This has been a major stumbling block to anti-corruption strategy in Nigeria. There is immunity clause in the subsections 308(1) and 308(2) of 1999 Constitution which gives absolute immunity to the president, vice president, state governors and their deputies from criminal prosecution while in office. As a result of this, many state governors have hidden under this clause to loot the treasury. Hence, it has been difficult for the EFCC to prosecute these governors and also the vice president and the president while in office. This claim of immunity is absurd because it was not the intention of the framers of the constitution to allow elected officials to steal and plunder the nation's wealth. However, although claiming immunity under subsection 308(1), governors can be prosecuted under civil law as provided by subsection 308(2).

(ii) Legal Constraints

The substantial delays, frustrations, and waste of resources in the prosecution regime of the EFCC constitute another challenge. It has become an art for defence counsels to ensure that financial crime cases do not continue, and substantive cases are never tried on their merits. Defence counsels usually delay and prolong cases by legal technicalities for stays on proceeding. Where such application is not granted, the defence counsels more often than not accuse the judges of bias and therefore grounds for application to transfer their cases to other judges.[100]

In relation to the foregoing challenge, there also the problem of congestion and delays of court proceedings caused by an insufficient number of courts and judges and outdated manual recording system. Cyber nature of financial crimes also poses serious challenge to the EFCC owing to jurisdictional challenge and the attendant increased costs of investigation and prosecution which always almost unbearable.[101]In addition, inadequacy of the existing procedural laws in Nigeria that question the evidential status and admissibility of computer and electronically generated documentation remains a challenge to the EFFC. This is connected with the absence of keeping pace with evidential

value of information generated by the cyber revolution in the Nigerian legal procedural system.[102]

iii. Political Interference in Anti-Corruption Cases

Structurally, the EFCC is extremely susceptible to the caprices of the presidency. There is no security of tenure for the agency Chairman as can be removed exclusively by the president.[103] This has led to the unceremonial exit of the past two heads of the EFCC. Hence, frequent changes in the leadership of the EFFC driven by partisanship without sufficient cause have endangered the agency's efficacy and sowed the seed of uncertainty and instability.

Related to this is the massive political pressures brought to bear on the agency. The case in point was the selective prosecution of corrupt politicians under Obasanjo administration which led to the purported disqualification of the former vice president, Atiku Abubakar from contesting the 2007 presidential election. Also, the attempt by the former EFCC chairman, Nuhu Ribadu, to prosecute James Ibori led to his removal from the agency by the Yar'dua administration.[104]

iv. Error, Incompetence and Media Trial

It is undisputable that the EFCC indeed confronts an avalanche of external obstacles to its work. However, the agency has also contributed to its own misfortune. This is so because it has undermined some of its own prosecutions through error, incompetence and unnecessary media exposure. For instance, under Ribadu, the EFCC was from time to time criticised for its preference for high-profile arrests and public "invitations" of prominent suspects to appear for questioning before the completion of investigations. While these strategy earned headlines and may have sent jitters to the spine of some corrupt public officials, critics argued this also damages underlying investigations as it affords the culprits to cover their tracks.[105]

5.5.2 Other Institutional Anti-Corruption Strategies in Nigeria

Aside the EFCC, other institutional anti-corruption strategies include:

i. The Independent Corrupt Practices and Other Related Offences Commission (ICPC) and its Act 2000
ii. The Code of Conduct Bureau (CCB)
iii. The Nigeria Extractive Industries Transparency Initiatives (NEITI)
iv. Budget Monitoring Price Intelligence Unit (BMPIU)

v. Criminal Intelligence Department (CID)

The above are the other anti-corruption institutions that were introduced or strengthened in the Fourth Republic.[106] Each of the institutions is discussed in the next section.

5.5.2.1 The Corrupt Practices and Other Related Offences Commission (ICPC) and Its Act

The Independent Corrupt Practices and Other Related Offences Commission was inaugurated on the 29th of September, 2000 by President Olusegun Obasanjo. As provided for in Section 3(3) of the Act 2000, the Commission consists of a Chairman and twelve (12) members, two of whom represent each of the six geo-political zones of the country. The membership is drawn from the following categories of Nigerians as spelt out by the Act: a retired police officer not below the rank of Commissioner of Police, a legal practitioner with at least 10 years post-call experience; a retired Judge of a superior court of record; a retired public servant not below the rank of a director; a woman; a youth not being less than 21 or more than 30 years of age at the time of his or her appointment; and a chartered accountant.[107]

The Act provides that the Chairman and members of the Commission, who shall be persons of proven integrity, shall be appointed by the President upon confirmation by the Senate and shall not begin to discharge their duties until they have declared their assets and liabilities as prescribed in the Constitution of the Federal Republic of Nigeria. The tenure of office for the Chairman is five (5) years while that of the Members is four (4) years in the first instance.

The Act also provides for the position of a Secretary to the Commission who is to be appointed by the President. The Commission is granted the powers to appoint, deploy, discipline and determine the conditions of service of its staff. Section 3 (14) of the Act enshrines the independence of the Commission by providing that "the Commission shall in the discharge of its functions under this Act, not be subject to the direction or control of any other person or authority".[108]

The law that establishes the Independent Corrupt Practices and other Related Offences Commission-The ICPC, and confers on the Commission the general powers to receive, investigate and prosecute corrupt practices and other related offences as well as

carry out public education.[109] This Commission is a dedicated anti-corruption agency with full powers of investigation and prosecution. Offences created under the Act include the following: Gratification by an official;[110] Corrupt offers to public officers; Corrupt demand by persons; Fraudulent acquisition of property; Gratification through agents; Bribery of public officer; Using position for gratification; Dealing with, holding, receiving and concealing proceeds of corruption. The Commission also has the power of search and seizure[111] and effecting forfeiture[112] of the proceeds of corruption.

5.5.2.2 Code of Conduct Bureau (CCB)

The code of conduct Bureau (CCB) and its twin sister, the Code of Conduct Tribunal are extra-ministerial Department set up by the federal government under the Code of Conduct Bureau and Tribunal Act, Cap 56, LFN 1990. The 1979 and 1999 constitutions, fifth schedule part 1 – stipulate clearly the code of conduct for public officers and it has been operating under the constitution as extra-ministerial department since 1979.[113] However, Decree 1 of 1989 gave the bureau additional teeth for action yet the military continued to subtly suppress it till 1999 when an enabling law known as the Code of Conduct Bureau and Tribunal Act 1999 was enacted by the National Assembly. Though as earlier mentioned, the 1999 constitution gives it powers but the later Act gave the Bureau a distinct right and independency. It has been effectively prosecuting offending public officers who failed to declare their assets and liabilities during their occupation of public offices. Civil servants (Federal, State and Local government) are part of public officers as such are directly affected by the Bureau's investigation code of conduct (Bureau Hand book 2003)[114]. The Bureau stipulates the conduct of a public officer and the ethical behaviour of such public officer.

5.5.2.3 Nigerian Extractive Industries Transparency Initiative (NEITI)

NEITI is an affiliate of the Global Initiative i.e. the Extractive Industries Transparency Initiative (EITI). It is aimed at due process and transparency in payments by Extractive Industrial (EI) companies to government and government linked entities. It is also aimed at improving transparency and independent auditing of the oil and gas revenues in Nigeria. NEITI was established in 2004 as it has been working through the National Stakeholders Working Group (NSWG). NEITI bill was signed into law in 2007 thereby giving its activities legal backing and also recognizing it as subset of the Global

Extractive Industries Transparency Initiative (GEITI). In fact by the 2007 Act, NEITI is recognized as an official candidate of EITI. NEITI Act 2007 mandated the Nigerian Extractive Industrials Transparency Initiative (EITI) to provide due process and transparency in extractive revenue paid to and received by government as well as ensures transparency and accountability in the application of extractive revenues.[115] Going by the antecedent of NEITI leadership headed by Prof. Assisi Asobie, the world and indeed the Global Extractive Industries Transparency Initiative may have confidence in the integrity and transparent activities of oil and gas companies and the accrued revenue.

5.5.2.4 Public Complaints Commission (PCC)

The public complaint commission also called Office of the Ombudsman is really the Nigerian ombudsman. It was established in 1999 and it has commissioner as the head. Such commissioner whose appointment is subject to the National Assemblies' ratification is usually a retired high court Judge. The report of the commission is usually public. By 2004, the commission is reported to have had 5,604 pending cases having discharged 5539 cases of the total complaint of 11,143.[116] Though there has been criticism on its snail pace of discharging cases, the commission is attributing the lack of expedition to unavailability of required resources. However it is practically clear that the government rarely acts on the findings of the agency.

5.5.2.5 Budget Monitoring Price Intelligence Unit (BMPIU)

The Budget Monitoring and Price Intelligence Unit (BMPIU) mechanism is initiated to ensure strict compliance with the openness and cost accuracy rules and procedure that would guide contract award and project execution within the federal government of Nigeria. It was established in 2001 by the former president Obasanjo with the aim of insuring probity, transparency and accountability in budgetary and public expenditure management. It is applied and enforced in the federal government and agencies. It is popularly called Due Process. Due process has improved the method of contract award which hitherto associated with corrupt and sharp practices. With the establishment of BMPIU i.e. Due Process contract awards were reviewed and acceptable and transparent process of contract award was instituted with a view to ensure that public contracts are awarded in a transparent and competitive bidding which is usually held publicly.[117]

5.5.2.6 Criminal Investigation Department (CID)

This is an arm of the Police that investigates crimes of any sort. It investigates all cases and complaints and prosecutes the culprits or anybody that is found wanting by the Police Force. Having enumerated some of the public agencies for anti-corruption crusade the private anti-corruption initiatives have also been operating with vigour, with the aim of fighting corruption.

Apart from the Transparency International, other agency like Zero Corruption Coalition (ZCC) is an anti-corruption agency working with Transparency and Accountability in Nigeria. It advocates with government anticorruption agencies on the need to domesticate and implement both the UNCAC and AU convention against corruption.

Others include:

vi. The Establishment of Due Process Office

vii. The Establishment of Anti-corruption Departments in some of the Federal Ministries and Parastatals

viii. The Establishment of the Technical Unit on Governance and Anti-Corruption Reform (TUGAR).

5.5.3 Non-institutional Anti-corruption Strategies in Nigeria

The major non-institutional anticorruption strategies initiated, especially under Obasanjo Administration include:

i. The Procurement Act

ii. The Fiscal Responsibility Act.

Table 5.7. Matrix of Recent Anti-Corruption Strategies in Nigeria

NIGERIA'S ANTI-CORRUPTION STRATEGIES
➢ Establishment of the Independent Corrupt Practices and Other Related Offences Commission and its Acts 2000 ➢ Economic and Financial Crimes Commission and its Act 2002 and the Commission charged with the responsibility of enforcing the provisions of other laws and regulations relating to economic and financial crimes such as the Money Act 1995, the Money Laundering (Prohibition) Act 2004, the Advanced Fee Fraud and Other Fraud Related Offences Act 1995 and host of others ➢ Establishment of Nigerian Extractive industries Transparency Initiatives (NEITI) 2004 ➢ Reinvigoration and Development of Code of Conduct Bureau (CCB), Public Complaints Commission (PCC), Criminal Investigation Unit (CID), etc. ➢ The development of a number of anti-corruption initiatives e.g. the Fix Nigeria Initiative (FNI), Zero Tolerance Initiative as well as the Leadership, Effectiveness, Accountability and Professionalism (LEAP) project ➢ Commendable results regarding the due diligence process of its Budget Monitoring and Price Intelligence Unit (BMPIU)

Source: The Author's Compilation, 2010

5.6 Conclusion

The recent introduction of varied anti-corruption strategies in Kenya and Nigeria is a right step in the right direction. In particular, the KACC and EFCC re-defined anti-corruption strategies in both countries given the fact that they are the arrow heads of the fight against the menace. This manifested in a series of distinct strategies put in place by these agencies with common features and developing explicit broad national strategies of which contain several administrative and legal measures. More selective strategies of the KACC and the EFFC focused on improving integrity, ethics, transparency, prosecution of offenders as well as ensuring accountability in a variety of key areas of the public administration. In addition, both agencies also opted for embedding anti-corruption measures in broader public sector reforms including transparency and anti-corruption strategies aimed at improving systemic weaknesses in their legal infrastructure while implementation was also pursued. But both anti-corruption agencies have been constraint largely by systemic and self-inflicted bottlenecks in its quest to fulfill their mandates.

However, reality tells a very different story. While it is fair to argue that the international community has been extremely successful in drawing attention to a previously neglected problem, as well as promoting formal institutional and legal reform in a large number of developing countries, most observers agree that these anti-corruption efforts have not reached the same level of success when it comes to actually curbing corruption. That is, despite extensive resources being channelled into strategising the fight against corruption via the establishment of the KACC and EFCC in Kenya and Nigeria respectively, there seems to be very few success stories to tell when it comes to the actual *implementation* of anti-corruption policies by these agencies given the challenges being faced by both agencies. Then, to what extent did the UNCAC framework shape the renewed strategies adopted by the Kenya's KACC Nigeria's EFCC? This leads us to the next chapter which tries to answer this question.

[1] The Anti-Corruption and Economic Crimes Act. Retrieved Jan. 10, 2011, from http://www. kacc.go.ke /archives/pressreleases/ performance-statement.pdf.

[2]This Directorate is responsible for receiving and investigating corruption reports, recommending cases for prosecution, arresting and arraigning suspects in court and liaising with the Attorney General's office to ensure effective prosecution of corruption or economic crimes. It has four departments, namely: Report and Data Centre, Forensic Investigations, Special Operations and Intelligence Production.

[3]The Directorate coordinates the preparation of all statutory reports on behalf of the Commission; audits completed investigation files and forward the reports to the Attorney General, and also undertakes litigation on behalf of the Commission. It is also responsible for investigating the extent of liability for the loss or damage to any public property and instituting civil proceedings against any person for the recovery of such property or compensation. The Directorate of Legal Services is divided into three Departments, namely, Civil Litigation, Crime Reading and Research & Documentation.

[4] The Directorate's function is aimed at preventing corruption in the short, medium and long term. Its preventive strategy entails identifying weaknesses, loopholes, avenues and opportunities for corruption in public and private bodies and making recommendations on how to seal them. Its education programme seeks to create public awareness on the causes and dangers of corruption and economic crime and solicits public support in the prevention of corruption. The Directorate also partners with local, regional and international organisations in the development and implementation of collective strategies in the fight against corruption. The Directorate has three departments, namely the education department, the Partnerships, Coalitions and Interventions (Prevention) Department and the Research and Policy Department.

[5]The Directorate of Finance and Administration is responsible for internal housekeeping matters and as a liaison between the Commission and other stakeholders.

[6] Kenya Anti-Corruption Commission (KACC) 2005. Annual report and accounts financial year 2004-2005 Retrieved Dec. 3, 2009, from http://www.kacc.go.ke

[7] Ibid.

[8] Ibid.

[9] See generally http://www.kacc.go.ke

[10] Kenya Anti-Corruption Commission (KACC) 2009. Country report on the fight against corruption presented to EAAACA Annual General Meeting in October. Retrieved Dec. 3, 2009, from http://www. kacc.go.ke /archives/pressreleases/ performance-statement.pdf.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Kenya Anti-Corruption Commission (KACC) 2005. Op. cit.

[17]Ringera, A.G. 2004. Kenya – Restoring efficiency, accountability and integrity in the management of public affairs: The role of the Kenya anti-corruption commission. A Paper Presented On The Occasion Of The Nairobi Stock Exchange Golden Jubilee Conference And The 8th African Stock Exchanges Association Conference In Nairobi, Kenya On 25th November

[18] See Kenya Anti-Corruption Commission: Press statement on the performance of the Kenya Anti-Corruption Commission dated 18 September 2007. Retrieved Oct. 3, 2009, from http://www. kacc.go.ke /archives/pressreleases/ performance-statement.pdf.

[19]See generally http://www.kacc.go.ke

[20] Kenya Anti-Corruption Commission (KACC) 2009. Country report on the fight against corruption presented to EAAACA Annual General Meeting in October. Retrieved Dec. 3, 2009, from http://www. kacc.go.ke /archives/pressreleases/ performance-statement.pdf.

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26]KACC has conducted systems examination for the Nairobi City Council, Municipal Council of Mombasa, Department of Immigration, practices in the registration and licensing of motor vehicles, and the enforcement of traffic laws. Retrieved Oct. 3, 2009, from http://www. kacc.go.ke/default .asp? pag id=86.
[27]The Commission has partnered with the Kenya Institute of Administration, the Institute of Education Administration Police Training College, the Ministry of Education and the Kenya National Examinations Council. It also works in concert with the Supreme Council of Muslims in Kenya(SUPKEM) and the Kenya Episcopal Conference. Retrieved Oct. 3, 2009, from http://www.kacc.go.ke/repps.asp?article=8.
[28] KACC has been working jointly with Botswana's DCEC and Namibia's NACC. It has also signed a joint declaration with the Uganda's Inspectorate of Government and Tanzania's Bureau on Prevention and Combating Corruption envisaging the creation of an East African Anti-Corruption Association and calling for the conclusion of a Protocol on corruption under the East African Community. Retrieved Oct. 3, 2009, fromhttp://www.kacc.go.ke/archives/pressreleases/East_African_Anti-Corruption_Association.pdf
[29] Kenya Anti-Corruption Commission (KACC) 2009. Country Report on the Fight Against Corruption.
[30]Information from the KACC website indicates that it broadcasts 15-minute anti-corruption messages in 3 radio stations (KISSFM, Classic FM and KBC English Service). It is observed that there is need to increase the coverage of the programmes and their frequency. Moreover, there is need to also broadcast in vernacular radio stations that have sprung up and gained popularity particularly in the rural areas. Retrieved Oct. 3, 2009, from http:// www.kacc.go.ke/default.asp?pageid=80&section=repps
[31] Kenya Anti-Corruption Commission (KACC) 2009. Country Report on the Fight Against Corruption.
[32] Ibid.
[33] Ibid
[34] Kenya Anti-Corruption Corruption. 2005. Annual Report and Accounts Financial Year 2004 – 2005.
[35]The National Anti-corruption Campaign Steering Committee (NACCSC) was formally appointed through a Gazette Notice No 4124 of 28May 2004.
[36] Retrieved Oct. 6, 2009, from http://www.naccsc.go.ke/
[37] See http://www.gjlos.go.ke/default.asp
[38]For more on the mandate of the Efficiency Monitoring Unit please refer to http://www.cabinetoffice.go.ke/index.php?option=com_content&task=view&id=22&Itemid=24.
[39]See World Bank. Reforms in Governance in Kenya: Establishing / strengthening anti-corruption institutions, creating the enabling policy/legal environment and enhancing the rule of law. Retrieved Oct. 6, 2009, from http://siteresources.worldbank.org/INTKENYA/Resources/governance_brief.pdf.
[40]Anti-Corruption and Economic Crimes Act 2003 (ACECA) section 3.
[41] Constitution of Kenya section 61. The Judicial Service Commission is responsible for appointing officers of the court.
[42] Namely in the Philippines, Bangladesh, Pakistan and Nepal. U4 Anti-Corruption Resource Centre 'Special courts for corruption cases' Retrieved Jan. 10, 2011, from www.u4.no/helpdesk/helpdesk/queries/query19.cfm.
See also Transparency international 'Building political will to fight corruption vital in South Asia national integrity systems. Retrieved Jan. 10, 2011, from www.transparency.org/news_room/latest_news/press_releases/2004/2004_12_23_nis_southasia
[43] Ibid.
[44] U4 Anti-Corruption Resource Centre
[45] See Preamble to the ACECA. Op. cit.
[46] These provisions relate to bribery of agents, secret inducements for advice, deception of a principal by an agent, conflict of interest, breach of trust, bid rigging, abuse of office and dealing with suspect property respectively.
[47] 112 This provision forbids inter alia unlawful acquisition of public property, damage to public property, failure to pay taxes, fees or levies payable to any public body, fraudulent payment for sub standard or nonexistent goods in public procurement.
[48]Anti-Corruption and Economic Crimes Act 2003 (ACECA) section 3.
[49] Constitution of Kenya section 61. The Judicial Service Commission is responsible for appointing officers of the court.
[50] Namely in the Philippines, Bangladesh, Pakistan and Nepal. U4 Anti-Corruption Resource

Centre 'Special courts for corruption cases' Retrieved Sept. 25, 2008 from www.u4.no/helpdesk/helpdesk/queries/query19.cfm
See also Transparency international 'Building political will to fight corruption vital in South Asia national integrity systems. Sept. 25, 2008 from www.transparency.org/news_room/latest_news/press_releases/2004/2004_12_23_nis_southasia

[51] See preamble to POEA.

[52] See POEA section 2.

[53] 123 Section 3 of POEA provides a mechanism for determining which body is the responsible commission for a public officer and further provides in 3(10) that the responsible commission for a public officer for which no responsible commission is otherwise specified is the commission , committee or body prescribed by regulation.

[54] See POEA section 5(2).

[55] See generally POEA sections 7 to 25.

[56] See POEA section 29.

[57] See POEA section 30.

[58]See POEA section 32.

[59]See Karua, E.G.H, 2007. MP, Minister for justice and constitutional affairs, Kenya. Paper presented at The Global Forum on Fighting Corruption and Safeguarding Integrity. 2nd – 5th April, 2007. At the Sandton Convention Centre, Johannesburg, South Africa. Retrieved Oct. 3, 2009 from http://www.nacf.org.za/global_forum 5/presentations1/020_Karua.doc .

[60] See generally POEA sections 35-38.

[61]Government Financial Management Act : No. 5 of 2004, Laws of Kenya.

[62] Financial Sector Deepening (FSD). 2008. Procurement and Supply in Kenya: The market and medium enterprises. Retrieved Oct. 3, 2009 from www.fsdkenya.org

[63] National Council for Law Reporting. 2010 Laws of Kenya: The witness protection act, chapter 79.

[64] Witness Protection Act, 2006. Laws of Kenya.

[65] Kichana, P. 2006. Kenyan laws cannot protect whistle blowers. *Transparency International, Adili*. 81. Retrieved June 15, 2010 from http://www.tikenya.org

[66] Kenya Institute of Supply and Management (KISM). 2008. Procurement and supply in Kenya: The market for small and medium enterprises. Retrieved Oct. 3, 2009 from www.fsdkenya.org

[67] Ibid.

[68] The Kenyan Section of the International Commission of Jurists. 2004. Strengthening judicial reforms in Kenya: The anti-corruption court in Kenya. Retrieved Oct. 3, 2009, from http//: www.icj-kenya.org

[69] Economic and Financial Crimes Commission, 2004. Structural and operational profile. Stratecon International, Abuja, Nigeria.

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CHAPTER SIX

COMPARATIVE ANALYSIS OF THE STRATEGIES OF KENYA AND NIGERIA'S ANTI-CORRUPTION AGENCIES

6.1 Introduction

As observed and concluded in the last two preceding chapters, it is evident that not the absence of laws and institutions, but their effectiveness and impact have direct implication for corruption control. Hence, despite good avalanche of legislation, which paints an impressive picture, their effectiveness has remained uncertain in fighting corruption in Kenya and Nigeria via the KACC and the EFCC coupled with other agencies. As a result, the UNCAC emerged at an auspicious period to reinvigorate the anti-corruption domestic laws and strategies of the anti-corruption agencies of the state parties. As pointed out earlier, the Convention represents the first truly global anti-corruption instrument to curb corruption. It is unique not only in its global coverage but also in the extent and detail of its provisions.

Having examined their various institutional anti-corruption strategies, especially those ones put in place via the KACC and the EFCC, attempt to highlight the areas of differences in their styles, their achievement benchmarks and challenges vis-à-vis the UNCAC constitutes the burden of this chapter. We shall discuss the points of comparison under appropriate subheadings. These areas of comparison may have been widely reported and almost exhaustively debated. But the aim of the present exercise is to draw attention to, and underline, some issues whose significance, in our view, has not been sufficiently highlighted. A greater appreciation of these issues will bring about better analyses and judgments.

In line with the research questions raised in this thesis which concern (i) the extent of the UNCAC framework shaping the renewed strategies adopted by Kenya and Nigeria's anti-corruption agencies; (ii) whether the strategies of the anti-corruption agencies of Kenya and Nigeria have achieved their objectives vis-à-vis the UNCAC pillars and (iii) the visible comparative changes induced by the Convention in the

context of the strategies of Kenya and Nigeria's anti-corruption agencies, the initial section of this chapter focuses on the thematic summarised responses generated from the interviews and supporting them with direct quotations from respondents which were structured along the UNCAC pillars in the context of the strategies of Kenya and Nigeria's anti-corruption agencies. The significance of direct quotation in research was underscored by Patton when he stated that "direct quotation is a basic source of raw data in qualitative evaluation."[1] Other subsequent sections analysed the strategies of the anti-corruption agencies of both countries in line with the UNCAC pillars bringing out the visible comparative changes induced by the Convention.

6.2 Comparison of the Thematic Discussion of the Conducted Interviews on the Anti-Corruption Strategies of the KACC and EFCC in the Context of the UNCAC

The UNCAC adopts a comprehensive approach aimed at both preventing and combating corruption. It obliges the signatories to implement a wide range of detailed anti-corruption measures, affecting their laws, institutions, and official practices. These measures aim to promote the prevention, detection, and punishment of corrupt individuals and syndicates, as well as to strengthen international cooperation among the signatories on these matters.

In line with these provisions and among other strategies, Kenya and Nigeria established anti-corruption agencies in the names of Kenya Anti-corruption Commission (KACC) and Economic and Financial Crimes Commission (EFCC) respectively to curb corruption in their countries. This chapter, therefore, comparatively analyse the strategies embarked upon by the Kenya and Nigeria's anti-corruption agencies in line with the main pillars of the UNCAC.

Structured interviews were conducted with the representatives of three major anti-corruption organisations each from Kenya and Nigeria. The interview of thirty (30) officials purposively selected from the two countries, nine (9) from the Kenya Anti-Corruption Commission (KACC), nine (9) from Nigeria's Economic and Financial Crimes Commission (EFCC) and three (3) officials each from four non-governmental anti-corruption organisations in both countries: Transparency International, Kenya and Mars Group on one hand and Transparency International, Nigeria and Anti-Corruption Awareness Organisation Nigeria (ACAON) on the other hand. In line with the research questions and objectives of the thesis, the interview

focused on the convention's pillars: prevention, criminalisation and law enforcement, asset recovery and international co-operation and technical/information exchange while the overall views on compliance and implementation of the UNCAC framework were also sought.

I. Pervasiveness and Prevention of Corruption

The responses generated from the conducted interviews with the officials of the three selected anti-corruption institutions (i.e. KACC[2], TI Kenya[3] and Mars Group[4]) in Kenya were similar in the areas of corruption pervasiveness in public service. All the officials and the experts of the anti-corruption institutions agreed that corruption is still prevalent in the public service in Kenya and has impacted negatively on good governance. For instance, Mr. Mwangi Kibathi of TI Kenya stated that: and others "We in TI, Kenya see corruption as prevalent in Kenya…corruption is still very high in public sector in Kenya." [5] As regards Nigeria, the responses generated from the conducted interviews with the officials of the three selected anti-corruption institutions in Nigeria (i.e. the EFCC[6], and TI, Nigeria[7] and Anti-Corruption Awareness Organisation Nigeria (ACAON)[8]) also showed similarities in the areas of corruption prevalence in the public sector with that of Kenya. It is clear from the interviewees that the level of corruption is still very high in the Nigeria's public service and which has affected good governance. That is, the likes of Mr. Kola Williams of the EFCC[9], and Professor Assisi Asobie[10] concurred that it is undisputable that there is high level of corruption in the public sector. This opinion reiterates the general stance in the extant literature where it is incontestable that corruption is rife in both countries. However, this does not suggest that the opinion of the respondents interviewed represents fully the opinion of the entire population. However, any discerning mind on the conditions in African political system will not agree less with the above submission on the pervasiveness of corruption in Kenya and Nigeria.

However, the views on whether these anti-corruptions agencies are doing enough, successes and challenges of deployed strategies as expected varied in Kenya while that of Nigeria showed more similarities though slight difference. The officials of the KACC expressed optimism that they are doing what they are expected to do. And that government is doing enough through the setting up of anti-corruption agency and anti-corruption courts and ready to take other related measures to curb corruption. The only challenges they see facing the body are inadequate public support and negative perception of anti-corruption strategies. But achievements recorded are

commendable if compared to former anti-corruption bodies put in place by the past administrations. The officials of the EFCC led by Mr. Kola Williams also expressed similar views like their Kenya counterpart by stating that the EFCC has significantly impacted positively on corruption prevention through its strategies.

Contrary to the views expressed by the officials of the KACC, the officials of the Transparency International, Kenya led by Mr. Mwangi Kibathi,[11] expressed their reservations as regards the effectiveness of the renewed anti-corruption strategies in Kenya, especially in the area of the KACC's absence of prosecutorial power. They believed that this has impaired the effective functioning of the KACC, making it a "body that can bark but cannot bite". Officials of the Mars Group led by Mr. Mwalimu Mati also towed the TI's line of thought but added that anti-corruption efforts have been marred by selective prosecution of corrupt officials. That "big men," allies and friends of government have been spared, hence the public views anti-corruption war with disdain. What they see as the major achievement of the anti-corruption initiatives is the awareness creation.[12] In Nigeria, those interviewed believed that the EFCC has significantly prosecuted its mandate by fighting corruption through investigation, prosecution of corrupt persons, awareness creation and instilling fears into potential corrupt officials though not without some hitches. For instance, Professor Assisi Asobie (the former TI Nigeria Head) and Scp. Bode Olawoye (Director ACOAN, Ondo State) acknowledged this but raised the issue political interference in the operations of the EFCC as major snag in its bid to prevent corruption in Nigeria.

II. Criminalisation and Law Enforcement

There was a general consensus on the question of corruption criminalisation in Kenya and Nigeria. All the respondents agreed that corruption was *ab initio* a criminal offence in Kenya Penal Code as well as Nigerian Criminal/Penal Codes. But there is general perception that both codes and other relevant laws had either being ineffective of deliberately ignored. And the Convention gave bite to the existing anti-corruption laws. To quote Mr. Kibathi, "it cannot be argued that corruption in Kenya from the onset has been taken to be an offence against the state, especially if you are a public servant… but the laws had not been able to deal decisively with the offenders, it was either the case that the enforcers were incapacitated or the laws are weak… where loop holes had been exploited…but the TI coupled with the emergence of the UN anti-corruption convention have assisted a lot in this direction…"[13] In the same vein, Mr.

Kola Williams of the EFCC emphasised that "there were existing anti-corruption laws in Nigeria…but the existing laws were ineffective… people used to manipulate the laws to their advantage…But the emergence of the Convention gave leverage to the EFCC anti-corruption strategies where gaps had been to a large extent blocked…[14]

III. Asset Recovery

There were divergent responses as regards the asset recovery, though the positive influence of the UNCAC in this direction was acknowledged. Responses from Mr. Mati of Mars Group indicated that KACC failed woefully in this area and that stolen assets recovered so far are child's play if compared to those gargantuan assets of the Kenyan people stolen in the Goldenberg saga, Anglo Leasing scandal and the Grand Regency Hotel affair which are yet to be recovered. In addition, the interview revealed that the details of attempts at recovery of assets held abroad are scanty due to some reporting weaknesses of the KACC. For instance, despite the availability of some estimates, it is not clear how much money is held abroad as proceeds of crime, by whom this money is held and in which countries it is stashed away. There is also uncertainty as to what attempts have been made so far by the KACC to repatriate this money and with what degree of success. There was evidence that a small number of prominent political families in Kenya had between them more than $4 billion in foreign bank reserves. However, Mr. Simani of the KACC expressed positive opinion that investigation in this area is not yet finalised and if there is any lead to reopen the case, the agency will not hesitate to do so. That was why Kroll and Associates, a professional UK-based firm specialising in tracing assets, was once hired by the Kenya government to assist in this area. Aside this, courts have also outlawed attempts by the KACC to seek mutual legal assistance abroad, declaring that only the Attorney General can seek mutual legal assistance.[15]

But Mr. Kibathi of the TI Kenya shared the views of Mr. Mati that inability of the KACC to conclude investigations due to legal technicalities and other reasons "to fish out those behind the Goldenberg, Grand Regency Hotel and Anglo Leasing Scandals left a scar on the anti-corruption strategy of the agency…" It was added that "signing into law of the tabled Mutual Legal Assistance Bill in Parliament recently, which is part of the UNCAC provisions, is expected to remedy this challenge."[16]

In Nigeria too, the opinion of the EFCC officials, chiefly championed by Mr. Williams, expressed the success story of recovery of individuals and public assets stolen from the culprits and references were made to the beneficial emergence of the

Convention, where is yet to be fully domesticated. However, the views expressed by Professor Assisi Asobie presented a kind of mixed grill. While acknowledging the positive disposition of the EFCC towards recovery of assets and other laudable achievements made in this direction, he expressed doubt over the ability of the EFCC to investigate and recover stolen assets from the serving so-called "big guns" politicians who the public perceived had one time or the other looted the national treasury over the years. Mr. Bode Olawoye of Anti-Corruption Awareness Organisation Nigeria (ACAON) shared this view by stating that "there are so much corruption allegations levied against the present and past Nigerian rulers which EFCC and other anti-corruption agencies refused to investigate though within its mandate.[17] The meddlesomeness of the presidency to shield the highly placed persons who involved in the corrupt practices is also worrisome. The view was shared elsewhere by a private lawyer and EFCC prosecutor Festus Keyamo when stated that:

> You don't go picking (arresting) a high-profile serving government official without clearing from the president. Whoever is the EFCC chairman, he can't go beyond the wish of the president. If he does, he would be removed the next day. At the end of the day, anyone who is the chairman of the EFCC will have to read the body language of Mr. President to do what he wants[18]

But there was a general consensus on the wherewithal of the UNCAC to correct these inherent anomalies stating the recovery of the money stolen by Abacha family and others as good omen.

III. International Co-operation

The UNCAC requires signatories to lend one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings under the relevant domestic laws. There were no divergent views on the new found international c-operation on fighting corruption, recovery of stolen assets, repatriation of run-away corrupt suspects to face trials and host of others due to the emergence of the Convention which has strengthened ties among the State parties. However, a noteworthy pessimism could be gleaned from the responses of the KACC officials as regards the KACC attempts to conduct investigations abroad which used to be devoid of necessary cooperation needed from a significant number of the foreign authorities as envisaged by the UNCAC. Mr. Kibathi of the TI Kenya emphasised that "the TI has been forthcoming in this area by assisting the KACC indirectly."[19] This is because the

agency has experienced significant delays in processing requests for mutual legal assistance by some foreign authorities.

In the EFCC's situation, meaningful co-operation has been experienced in the area of mutual legal assistance by some foreign authorities though not without a hitch. The case of James Ibori, former Governor of Delta state was cited as an example in Nigeria. However, emphasis was laid by all the interviewees in Kenya and Nigeria on the needed genuine co-operation and sincerity from the developed countries where the stolen money is usually kept. This they said would prevent the KACC and the EFCC from spending money and resources unnecessarily on the repatriation of stolen assets and investigations.

IV. Technical/Information Exchange

All the interviewees agreed that there has been a significant progress in this direction. Mr. Simani of the KACC expressed improvement on the technical support and training of the agency's staff by foreign partners and non-governmental organisations such as TI, Kenya through workshops on capacity building, seminars and working visits to other anti-corruption agencies outside Kenya including the exchange of information among the signatories to the UNCAC.[20] According to Mr. Williams, the EFCC has tremendously benefited from the technical and financial support from foreign partners and bodies such as the United Kingdom, United States and the European Union. To attest to this, the Human Rights Watch, Nigeria, reported that between 2006 and 2010, the European Union, the EFCC's largest donor, provided US$23.5 million of assistance to the agency while foreign law enforcement agencies, such as the US Federal Bureau of Investigation (FBI) and the London Metropolitan Police have also trained key EFCC investigators. [21]

But the emergence of the UNCAC has been able to give leverage and direction to the anti-corruption initiatives in Kenya. The compliance and implementation levels of the domestic anti-corruption laws were rated high. But despite the pessimistic view points, they all agreed that certain areas of the anti-corruption laws need modification and that proper domestication of the UNCAC would be a right step in the right direction and would have positive implications for good governance in Kenya.[22]

V. Compliance and Implementation of the UNCAC

There was general expression of optimism by all the interviewees in the area of compliance and implementation. It was acknowledged that the UNCAC framework has been able to chart a new course for anti-corruption strategies and reinvigorate the anti-

corruption agencies and other related agencies in fighting corruption in Nigeria.[23] Messer Kimathi and Mati of the TI, Kenya and the establishment of the KACC and other anti-corruption instruments are part of the Convention compliance and tremendous implementation framework has been put in place. Mr. Kimathi specifically mentioned role of the TI, Kenya in assisting the KACC in terms of putting the agency on its toes at all times to comply and implement international anti-corruption minimum requirement standards; for instance in the area of prevention, protection of whistle-blowers. Mr. Mati of the Mars Group felt that the relevance of the UNCAC is seen more in the vigilance of the civil society groups.[24] Officials of the EFCC also expressed optimism in the areas of the compliance and implementation of the provisions of the UNCAC. But the ex-TI (Nigeria) forerunner, Professor Assisi Asobie was cautious on the issue. But what emerged from this cautious position was the fact that prolonged domestication of the provisions of the UNCAC may serve as a hindrance to anti-corruption strategies' achievements in Nigeria. However, the efforts of the NEITI, according to him, fit into the UNCAC framework.[25] The issue of immunity granted by the constitution to political office holders such as the president, vice-president, governor and deputy governor was also viewed as a serious challenge to the fight against corruption. Aside this, inadequate funding of the anti-corruption agency as well as delay in the prosecution of indicted political officials through court processes were also seen as major challenges.[26] However, it was agreed that some remarkable successes have been made in the area of investigation and prosecution and education of the public on the negative impact of corruption.

6.3 Comparing UNCAC Pillars and Compliance of the KACC and EFCC's Anti-Corruption Strategies

Although the UNCAC contains eight chapters, but for the purpose of this study, our analysis in the context of compliance and domestication of the UNCAC in Kenya is done on the basis of the six relevant chapters in the Convention. Our comparative analysis is undertaken within the context of the available relevant chapters and articles of the UNCAC and the anti-corruption strategies embarked upon by the KACC and the EFCC to see their level of compliance and domestication in tandem with the acts of corruption that have been addressed by the Convention. However, it is to be noted that Kenya was the first nation to sign and ratify the Convention on December 9, 2003,[27]

while Nigeria signed the Convention on December 9, 2003 and ratified it on December 14, 2004.[28]

The objectives of the UNCAC stated in Chapter I Article 1 under general provision[29] are geared towards meeting some specific goals, for instance, criminalise an array of corrupt practices; develop national institutions to prevent corrupt practices and to prosecute offenders; cooperate with other governments to recover stolen assets; and help each other, with technical and financial assistance, to fight corruption, reduce its occurrence and reinforce integrity.

But in line with the objectives of this study and the UNCAC, the KACC and the EFCC's anti-corruption strategies are to be evaluated under the following criteria tagged the "five pillars";

I. Prevention of Corruption

II. Criminilisation of Corruption and Law Enforcement

III. International Co-operation and Legal Assistance

IV. Asset Recovery

V. Technical Assistance and Information Exchange

However, to ensure clarity, incisiveness and prevent verbosity, only the UNCAC relevant articles that give directions to the operations of the KACC and the EFCC will be examined.

6.3.1 UNCAC and Prevention of Corruption by the KACC and EFCC

The purposes or objectives of the UNCAC were captured and shared in the chapter 9 of Kenyan new constitution and other legislation enacted to combat corruption. For instance, the new constitution states in chapter three, that one of the national values, principles and goals of the Republic of Kenya is "taking effective measures to eradicate all forms of corruption".[30] Again, the preamble to the Kenya Anti-corruption and Economic Crimes Act (ACECA) 2003 states that it is 'An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters related thereto and coincidental thereto'.[31] Also, the Public Officer Ethics Act 2003 declares that it is 'An Act of Parliament to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers and to provide for connected purposes'.[32] These clauses tend to show that the

government of Kenya has done sufficiently well in domesticating the Convention. It is remarkable that the new constitution is to "eradicate all forms of corruption".

Similarly in Nigeria, the purpose or objectives of the UNCAC are also captured and shared in the 1999 constitution of Nigeria. Nigeria's 1999 Constitution contains several provisions geared towards good governance, supported by the enactment and judicial validation of accountability and transparency which augmented anti-corruption legislations. Section 15(5) provides "Government must eradicate all corrupt practices and abuse of power." Section 22 imposes an obligation on the mass media to "highlight the responsibility and accountability of the Government, to the people." The Legislature is conferred with Powers and Control over Public Funds, Audit supervision over public accounts, and power to conduct investigations in sections 80 – 89. There are other legislations enacted to combat corruption in Nigeria. For instance, the Economic and Financial Crimes Commission (EFCC) (Establishment Act) 2004 was established the EFCC with the mandate to investigate financial crimes.

Moreover, the issue of preventive anti-corruption policies and practices is addressed in Chapter 5, from Articles 5 to 14 of the UNCAC. In Kenya, legislation has been enacted providing for the fight against corruption. In April, 2003, the Parliament passed a new law, the Anti-Corruption and Economic Crimes Act (ACECA), 2003.

The UNCAC provides for a preventive anti-corruption body or bodies by State Parties in Article 6 of UNCAC. Under it, State parties are required to ensure the existence of a body or bodies, as appropriate, which prevent corruption by such means as implementing the policies referred to in article 5 of the UNCAC and, where appropriate, overseeing and coordinating the implementation of those policies; and increasing and disseminating knowledge about the prevention of corruption. Article 6 requires such bodies to be given necessary independence to enable them carry out their functions effectively and to be free from any undue influence. The necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions, should be provided. The government of Kenya established the Kenya Anti-Corruption Commission (KACC) as an anti-corruption agency. The KACC is set up under section 6 of the Anti-Corruption and Economic Crimes Act as a body corporate. The appointment of the senior staff of KACC was approved by the Parliament before they were appointed by the President. However, one person who had been appointed with Parliament's approval was not named as an Assistant Director by the President on the grounds that he had been previously involved in corrupt activities.

The President's decision in this case was controversial because it appeared to contradict the provisions in the first schedule to the Anti-corruption and Economic Crimes Act. The Act stipulates an elaborate process of appointment and removal of the officials of the Commission which, is meant to shield the process of fighting corruption from actions of the Executive which are dictated upon by the exigencies of the moment and political expediency. It is also meant to protect the holders of the offices from removal on flimsy grounds, totally unrelated to their competence or performance of their duties in investigating corruption. [33]

In the same vein, in compliance with Article 6 of UNCAC which provides for a preventive anti-corruption body or bodies by States Parties, there exists the establishment of similar anti-corruption agencies in Nigeria. The EFCC Establishment Act established the Economic and Financial Crimes Commission with the mandate to investigate financial crimes and coordinating agency for the enforcement of other acts aforementioned under Article 1.

Furthermore, Article 7 of the UNCAC makes provisions on fighting corruption in the "public sector" and "public service". States Parties are obligated under Article 7(1) of the UNCAC to fortify the public sector against corruption by "strengthening systems for recruitment, hiring, retention, promotion and retirement of civil servants". Adequate remuneration and equitable pay scales are proposed; in so far as State Parties can afford them. Article 7(2) of the UNCAC requires States Parties to enact legislation prescribing criteria concerning candidature for an election to public office; and to "proscribe the use of funds acquired through illegal and corrupt practices to finance political parties". States parties are also required to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties. Finally, States parties are urged to "endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest". [34] In compliance with Article 7 (1) of the UNCAC, both the KACC and the EFCC have significantly beamed their search on public service to fight corruption.

In compliance with Article 7(2), the Kenya Law Reform Commission prepared a Political Parties Bill to provide for their transparent and accountable funding. This was necessitated by the trend, in particularly the multiparty era elections, where parties were privately funded and lacked a broad scope and grounding in ideology. Most political parties in Kenya do not have clear financing mechanisms for fund their own elections and participation in the general elections. Corruption has thrived as a source

of financing. The Bill proposed a regulatory framework for the funding of political parties to curb corruption in the financing of politics. It provides mechanisms for disclosure of sources of funding and accountability for party funds. A ceiling on campaign financing was also proposed. It may be useful to add that under the Public Officer Ethics Act, 2003, public officers are required to be neutral to political parties in the performance of their duties. However, in reality, the KACC has not really demonstrated the wherewithal to control the funding of political parties as a source of corruption in public life.

Comparatively, though the Nigerian Constitution prescribes criteria for qualification for election into elective offices such as that of State and Federal Legislatures, State governors and their deputies as well as the President and Vice President. The Electoral Act also provides regulations in respect of political party financing, sanctions for breach, and empowers the Independent National Electoral Commission (INEC) to monitor and enforce the regulations therein. But the EFCC has not also been successful in addressing the issue of party funding as a veritable source of corruption. As matter of fact, the inclusion of the provision for the control political parties funding generated controversy among the state parties when the Convention was to be ratified.

However, a diluted version of deleted draft Article 10 was incorporated in paragraph 3 of Article 7 (Corruption in Public Sector). Article 7(3) requires each State Party to consider taking appropriate measures to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties. Furthermore, Article 7(4) of the UNCAC requires that each State party must endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.[35]

Article 9 of the UNCAC provides for public procurement and management of public finances. This also is line with prevention of corruption. Kenya has enacted The Public Procurement and Disposal Act, 2005[36] derived from a model by the United Nations Commission on International Trade Law (UNCITRAL). The Act received Presidential assent on 26 October, 2005 and shall come into force through a Ministerial notice in the Kenya Gazette. The KACC is also part of watchdog agencies that provisions of the Act are not violated.

In the same manner, in the area of public procurement, following an extensive review of public procurement systems, the government introduced a Value for Money

audit, or Due Process mechanism, in public contracts. The Due Process mechanism has promoted an open tenders process with competitive bidding for government contracts. Any projects exceeding N50 million (US$400,000) also require approval (i.e. a due process certification). To ensure competitive costing of contracts, a database of international prices was developed (from bona fide internet sources) to serve as a guide during the bidding process. The government also publishes a public tenders' journal periodically as a means of reducing patronage in the award of contracts.[37] Finally, certification of completed government projects is also required before final payments are made. With the introduction of the Due Process mechanism, there has been a notable improvement in the efficiency of capital spending. The federal government saved over N200 billion (about US$1.5 billion) between 2001and 2007 in the form of reductions from inflated contract prices. Further, initial prices quoted by various government contractors have also declined significantly. The Due Process reform, one of the most hated and resisted in the comprehensive reform package, has also been one of the most successful, bringing more sanity, transparency, and competition into a previously opaque area in Nigeria.[38] There also exists Public Procurement Act, 2007 which also provides for public procurement and management of public finances in Nigeria. The EFCC is one of the two major anti-corruption agencies that see to the compliance of the provisions of the Act.

Article 10 of the UNCAC makes provision for public reporting. It requires each State party to take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes, where appropriate. Such measures may include, *inter alia*: adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and publishing information, which may include periodic reports on the risks of corruption in its public administration.

In this regard, section 7(g) of the Anti Corruption and Economic Crimes Act empowers the Kenya Anti Corruption Commission (KACC) to educate Kenyans on the dangers of corruption and economic crimes and encourage them to report any acts of

corruption by making available telephone lines, official websites and other means. In addition, the Kenya government has made some efforts in public reporting but those efforts fell short of what article 10 of UNCAC requires.[39] In Nigeria, there was no such law or articulated administrative process on public reporting. But the recent enactment of the Freedom of Information Law points towards such direction. The EFCC has also been enhanced in direction via opening channels for multiple sources of information on corrupt acts.[40] Aside this, the EFCC has also provided and popularised to the public via its official website the process of making official complaints about corruption and petitions against public officials.

Article 12 of the UNCAC makes provision for States Parties to take measures to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures. The private sector is the biggest supplier of goods and services to the government. In this regard, it can be deduced that the Act is intended to reduce corruption by its own servants on the one hand and private entities on the other hand. Both the KACC and the EFCC have taken rights in this direction. To be sure, the Public Procurement and Disposal Act in Kenya applies to the most part to private entities (individuals and corporations) on the one hand and government agencies on the other hand and the KACC is also mandated to take measures to prevent corruption in the private sector. Equally, major mandate of the EFCC is placed in the private domain. That is to prevent 'economic and financial crime' which is defined in the EFCC Act as "the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally". According to the Act, such crimes include "any form of fraud, narcotic drugs…any form of corrupt malpractices"; illegal arms deal; smuggling; human trafficking and child labour; illegal oil bunkering and illegal mining; and tax evasion; Yet other examples are: "foreign exchange malpractices, including counterfeiting of currency; theft of intellectual property and piracy; open market abuse; dumping of toxic wastes and prohibited goods. [41]

Article 13 of the UNCAC deals with the broad subject of participation of civil society in combating corruption; in relation to this article, the KACC and the EFCC have tried to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption and to raise public

awareness regarding the existence, causes and gravity of, and the threat, posed by corruption.

Article 14 of the UNCAC makes provision for "measures to prevent money laundering" whereas article 23 thereof makes it an offence to launder proceeds of crime under the heading "laundering of proceeds of crime". This article requires States Parties to take measures to prevent money-laundering and to establish as offences money laundering and laundering of the proceeds of crime. Certain legislations exist in Kenya and Nigeria that have provisions that appear to meet the minimum standard set by the Conventions. The KACC in collaboration with the Central Bank of Kenya via its Act provide a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions. It is a requirement under Kenyan law that persons remitting money include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator and such information is maintained throughout the payment chain; and there are enhanced checks and scrutinies to transfers of funds that do not contain complete information on the originator or that are too large for a given account in relation to its history. This happens with regard to both banks and other institutions that provide money transfer services like the Western Union Money Transfer that operates in conjunction with some selected Kenyan banks. At the rhetorical level, KACC endeavours to develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

On the other hand Regarding the Article 14 of the UNCAC as regards its compliance, the Economic and Financial Crimes Commission (EFCC) Act 2004 has now broadened the definition of corruption.[42] The EFCC Act empowers the Commission to investigate, prevent and prosecute offenders who engage in:

> Money laundering, embezzlement, bribery, looting and any form of corrupt practices, illegal arms deal, smuggling, human trafficking, and child labour, illegal oil bunkering, illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic, wastes, and prohibited goods.[43]

In addition to other law relating to economic and financial crimes, including the criminal and penal codes, EFCC is empowered to enforce all the pre-1999 anti-corruption and anti-money laundering laws. Punishment prescribed in the EFCC

Establishment Act range from combination of payment of fine, forfeiture of assets and up to five years imprisonment depending on the nature and gravity of the offence. Conviction for terrorist financing and terrorist activities attracts life imprisonment. Also, to prevent money laundering, the EFFC collaborates with the Central Bank of Nigeria and other financial institutions. It is mandatory for banks to report all transactions with their customers that are above certain amount to the EFCC.

6.3.2 UNCAC, Criminilisation of Corruption and Law Enforcement by the KACC and EFCC

Chapter three of the UNCAC deals extensively with the criminalisation and law enforcement on corruption. The chapter comprises of 44 related articles (Articles 15-44). For instance, Article 15 of the UNCAC makes provisions for States Parties on bribery of national public officials. Kenya has created criminal offences under the ACECA which created the KACC. Sections 38 to 50 coincide with the provisions of Article 15 of the UNCAC. By extension, the KACC mandate criminalise such offences ranging from the usage of bribery agents to solicit for or receive bribery; bending or stretching the law to accommodate a person who has induced a bribe; bid rigging; and fraudulent acquisition of public property and revenue. As Kenya is an African country, there are many African practices under which many prospective accused persons may seek a defence; section 49 of the Act however nips this in the bud by stating that 'in prosecution of an offence under this Part, it shall be no defence that the receiving, soliciting, giving or offering of any benefit is customary in any business, undertaking, office, profession or calling.

Like its Kenyan counterpart, the Nigeria's EFCC Act is a major departure from the past enabling laws for fighting economic and financial crimes in Nigeria, in terms of powers, functions and responsibilities. The Act lists and defines offences that are punishable or warrant prosecution. Section 46 of the EFCC Act 2004 coincides with Article 15 of the UNCAC and defines Economic and Financial Crimes to mean:

> the non – violent criminal and illicit activity committed with the objective of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing economic activities of Government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting, and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractice including counterfeiting currency, theft of intellectual

> property and piracy, open market abuse, dumping of toxic wastes and prohibited goods e.t.c.[44]

Article 16 of the UNCAC deals with bribery of foreign public officials and officials of public international organisations. Unfortunately, except the normal existing laws, the Kenyan legislations variously referred to above do not criminalise the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly. They therefore, give undue advantage, to the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business. Just like in Kenya, no Nigerian legislation deals with bribery of foreign public officials and officials of public international organisations that are clearly stated under Article 16 of the UNCAC. This is one of the areas where Kenyan and Nigerian legislators need to update the nations' laws.

Article 17 of the UNCAC deals with embezzlement, misappropriation or other diversion of property by a public official. As part of the mandate of the KACC, Section 45 of the ACECA of Kenya protects public property and revenue. It states that:

> a person is guilty of an offence if the person fraudulently or otherwise unlawfully acquires public property or a public service or benefit; mortgages, charges or disposes of any public property; damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service…[45]

As stated under Kenya's compliance analysis, Article 17 of the UNCAC focuses on embezzlement, misappropriation or other diversion of property by a public official. In Nigeria too, the EFCC (Establishment) Act, 2004 require conviction before assets can be forfeited. However, the laws provide for interim forfeiture of the assets under investigation through an ex-parte process. The EFCC Act 2004 requires a person arrested for corruption or other economic and financial crimes to declare all his assets. Any false information furnished regarding this is an offence and is punishable by 5 years imprisonment. The disposal of forfeited assets is only upon a final order of court and such assets payable to the Consolidated Revenue Fund of the Federation. All instrumentalities of crime directly or indirectly connected to the commission of the offence are liable to forfeiture.

Article 18 of the UNCAC requires States Parties to enact legislation, criminalising trading in influence by public officials. The ACECA makes provision for such trade in influence by Kenyan public officials. Therefore, the KACC is empowered to deal with such corrupt acts. Section 42 thereof makes it a criminal offence for any person who while acting as an agent who has an interest in a decision that the principal is about to make fails to reveal his interest if the principal is unaware. In a few words, section 46 states that 'a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence'. A person who is found guilty by the courts of law is liable to a fine not exceeding Kenya Shillings 1 (one) million or to imprisonment for a term not exceeding ten years or both. In addition, if the person received a quantifiable benefit or any other person suffered quantifiable benefit, the court has no discretion and must fine the person an amount equal to 2 (two) times the benefit or loss as the case may be. Moreover, if the offence caused both a benefit and a loss, then the public officer shall be fined an amount equal to two times the benefit and the amount of the loss. The peddling of influence by public officers is the most likely form of corruption that is growing today and that should be looked out for in the future, as the assaults on more direct forms of corruption seem to gain ground. However, unlike available provision in Kenya's ACECA, none of the Nigerian anti-corruption laws expressly stated this.

Article 19 of the UNCAC requires States Parties to criminalise the intentional abuse of function or position by public officers. Kenya has made it a criminal offence, when committed intentionally, 'the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity'. Section 46 of the Anti-Corruption and Economic Crimes Act, states that 'a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence'. It is supported by other provisions in the Anti-Corruption and Economic Crimes Act and sections 99 and 101 of the Penal Code[46], Laws of Kenya. Under the Penal Code provisions, a public official must act reasonably and refrain from abusing the function or position he holds. He/she must also refrain from directing anyone else to abuse the position he holds in public office. The offence committed is a misdemeanor if the public officer abuses his office or directs somewhere else to do so. It is a felony, if the act is done for the purpose of gain and the public officer is liable to imprisonment for

three years. The obstacle to operationalising the two provisions in the penal code is that any prosecution under them can only be instituted by or with the sanction of the Attorney General. Similarly, in Nigeria, aside the various sections of the Criminal and Penal Codes, sections 15, 16 and 17 of the EFCC Act[47] expressly criminalise the intentional abuse of function or position by public officers. The foregoing shows that the KACC and the EFCC have to a reasonable complied with the Article 19 of the UNCAC.

Article 20 of UNCAC deals with illicit enrichment and proposes measures to be taken by States Parties. The UNCAC requires States Parties to consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment. Illicit enrichment is defined as a situation where there a significant increase in the assets of a public official that he or she cannot reasonably account for in relation to his or her legitimate income. Under section 2 of The Anti-Corruption and Economic Crimes Act corruption is defined to 'include: bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust or an offence involving dishonesty in connection with taxes and/or rates', among others. [48]All these are within the mandate of the KACC.

In Nigeria, criminalising the laundering of proceeds of crime under Article 23 of the UNCAC falls within the jurisdiction of the EFCC, who is charged with among others responsibilities by the Money laundering Act of 1995 and the Commission has been up to perform the task. For instance, Section 16 of the EFCC Act states that A person who:

> (a) whether by concealment, removal from jurisdiction, transfer to nominees or otherwise retains the control of the proceeds of a criminal conduct of an illegal act on behalf of another person knowing that the proceeds is as a result of criminal conduct by the principal, or (b) knowing that any property is in whole or in part directly or indirectly represents another person's proceeds of a criminal conduct, acquires or uses that property or has possession of it, commits an offence and is liable on conviction to imprisonment for a term not less than 5 years to a fine equivalent to 5 times the value of the proceeds of the criminal conduct or both such imprisonment and fine.

However, in this context, combating money laundering in Kenya and Nigeria may become even more complex for most developed capitalist world apostles of "accountability", "good governance" and "transparency". This is because it has been

observed that the banks in the developed capitalist countries, most of which operate in secrecy, are a part of the capitalist establishments which seek to secure inward investments from Nigeria.[49] Although the fight against advance fee fraud (419) and identity theft has been aggressively pursued, leading to the prosecution and conviction of kingpins including the celebrated $242 million case involving a Brazilian bank. Much of the amount was recovered and returned to the bank in Brazil. The EFCC also recovered and returned the sum of $4 million to a victim of 419 in Hong Kong and seized and returned over $ 500,000 to US citizens. It is in the process of returning $1.6 million (already blocked) to a victim in Florida.[50]

Articles 21 and 22 of the UNCAC target bribery in the private sector and embezzlement of property in the private sector respectively. In Kenya, the ACECA, 2003 applies to both the public and private sectors and empower the KACC to act accordingly. For instance, Section 39 of the ACECA states that if any person intentionally in the course of governmental or private sector economic, financial or commercial activities promises, offers or gives, directly or indirectly, 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, that person shall be in contravention of the section of the Act.

Similarly, the Act that established the EFCC targets bribery and outlaws embezzlement of property in the private sector. As a matter of fact, in carrying out this mandate, the EFCC, for instance, continues to beam its searchlight on the bribery and other corrupt acts in the banking sector. This has resulted into the trials and convictions of high ranking bank officials in the past. The EFCC Act too deals with the embezzlement of property in the private sector and the EFCC has handled cases which involved the embezzlement of property in the private sector. One cannot forget in a hurry the trials and convictions of bank heavyweights in Nigeria.

Article 23 of the UN Convention makes provisions for criminalising the laundering of proceeds of crime while Article 24 makes provisions for States Parties to deal with concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with either Convention. As at time of this study, Kenya does not have legislation to regulate the laundering of proceeds of crime. However, a money bill which is to criminalise money laundering and proceeds of crime has been prepared and is awaiting

Parliament's deliberation. However, the closest legislation that would deal with laundering proceeds of crime as expounded under the UN Convention is section 322 of the Kenyan Penal Code which criminalises the handling of stolen property. It is proposed that a clear and unambiguous provision be added to the Anti-Corruption and Economic Crimes Act, to define laundering in proceeds of crime and to provide a suitable punishment for it. As required by article 23 of the UNCAC, Kenya should furnish the Secretary-General of the United Nations with copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof. However, in Nigeria, section 5 of the EFCC Act *inter alia* empowers the EFCC to adopt measures to investigate, identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crimes related offences or the properties the value of which corresponds to such proceeds.

As regards Article 24 of the UNCAC, there is an attempt to provide for such situations by giving the Kenya Anti-Corruption Commission (KACC) the right to make an application to the High Court of Kenya, which may in turn, if it is satisfied on a balance of probability, make an order prohibiting 'the transfer, disposal or other dealings with property that was acquired through corrupt conduct'. While section 16 (a) and (b) of the EFCC act deals with such occurrence.

Furthermore, Article 25 of the UNCAC makes provision for obstruction of justice. It requires States Parties to adopt such legislative and other measures as may be necessary to establish as criminal offences:

> "(a) 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; and (b) 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".[51]

Section 66 of the ACECA of Kenya empowers the KACC to prosecute any person that hinders, assaults, or threatens, a person acting pursuant to the Act without justification or lawful excuse. Section 66(1)(c) of the ACECA incorporates obstruction of justice by providing that: 'no person shall destroy, alter, conceal or remove documents, records or evidence that the person believes, or has grounds to believe, may be relevant

to an investigation or proceeding under the Act'.[52] A person who is found guilty of concealment is liable to a fine not exceeding five hundred thousand shillings.

In the purview of the EFCC Act too, Section 38 falls within the context of Article 25 of the UNCAC which makes provision for obstruction of justice. It states *inter alia* that:

> A person who-
> (a) willfully obstructs the Commission or any authorised officer of the Commission in the exercise of any of the powers conferred on the Commission by this Act; or
> (b) fails to comply with any lawful enquiry or requirements made any authorised officer accordance with the provisions of this Act, commits an offence under this Act and is liable on conviction to imprisonment for a term not exceeding five years or to a fine of twenty thousand naira or to both such imprisonment and fine.

Article 27 of the UNCAC requires states parties to make provisions in their domestic legislation that criminalise:

> a) participation, preparation and attempt to commit any of the offences heretofore mentioned in the Convention; and b) to define participation as being inclusive of participation in any capacity such as an accomplice, assistant or instigator any attempt to commit an offence established in accordance with this Convention.

> Although the Penal Code of Kenya has dealt ably with the issues of attempt and preparation and to a certain extent the issue of participation as an accomplice. It is not clear whether this definition can be superimposed on the ACECA which does not have a similar provision.

As far as participation in crime is concerned, both the Evidence Act and the Anti-Corruption and Economic Crimes Act make it possible for an accomplice to testify but take the precaution that the evidence of an accomplice must be corroborated because it is evidence of a weak kind. Like the Kenyan Penal Code, Section 4 of the Nigeria's Criminal Code Act coincides with Article 27 of the UNCAC and fills the gap that would have been created by the EFCC Act which requires states parties to make provisions in their domestic legislation that criminalise participation, preparation and attempt to commit any of the offences mentioned in the Convention.

Article 30 of the UNCAC makes provision for diverse issues ranging from prosecution, to adjudication of case and sanctions. Article 30(9) protects the principle that the description of the offences established in accordance with the UN Convention and of the applicable legal defences or other legal principles controlling the lawfulness

of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law. That qualification means that States Parties are called upon to consider this article but their domestic system of defining offences and dealing with corruption is respected.

In Kenya, criminal sanctions take into account the gravity of that offence, hence the free hand given to magistrates and judges in the majority of cases. The legislations that create offences are tailored in such a way that they stipulate the highest punishment leaving it to the court, in view of extenuating circumstances and mitigation, to give a suitable sentence. However, there are certain offences in which the magistrates and judges have no discretion, a fact which coincides with article 30(3) of the UNCAC. In this respect, the KACC Act (ACECA) creates a mandatory punishment for those found guilty of corruption: where a person is convicted he will be subject to punishment of a fine not exceeding one million Kenya shillings or to imprisonment for 10 years or both depending on the gravity of the offence; and an additional mandatory fine where, as a result of the corrupt act, the person received a quantifiable benefit or any other person suffered a quantifiable loss. The mandatory fine shall be equal to two times the amount of benefit or loss. If the corrupt act resulted in both a benefit and a loss the mandatory fine shall equal to two times the sum of the benefit and the amount of the loss.[53]

Kenya has many of the laws proposed in the UN Convention in place. Some of these laws predate the Convention. However, the discretionary legal powers under section 26 of the Constitution of Kenya which give the Attorney General the exclusive and discretionary power to prosecute have not been used effectively. There are far too few prosecutions and law enforcement measures encourage those bent on reaping where they have not sowed. Therefore, although beautiful anti-corruption legislation exists, it is a mere decoration, a toothless bulldog. Section 72(5) of the Constitution of Kenya states that:

> if a person arrested or detained … is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial.

It is clear that Kenya has complied with article 30 of the UN Convention Kenya has established procedures through which a public official accused of an offence

established in accordance with the Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence. Section 77(2)a of the Constitution of Kenya declares that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. Section 62 of the ACECA provides for the suspension of a public officer if he is charged with a corruption offence and requires such an officer is to be paid half of his basic salary effective from the date of the charge. However, the public officer's other allowances will continue to be paid.

The suspension of the public officer is automatically annulled once proceedings against him are discontinued or if he is acquitted. Section 66 declares that it 'does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed'. The Act therefore merely fills the gap, where there is no legislation; where a law already exists that prescribes a more severe punishment, then that law takes precedence over section 66 and thereby coincides with article 30 paragraph 9, which provides that, Paragraph 1 of article 30 'shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants'. Section 64 of the ACECA disqualifies any person who is convicted of a corruption or economic crime from being elected or appointed as a public officer for ten years. At least once a year, the KACC shall cause names of all disqualified persons to be published in the Kenya Gazette. It is not clear how Kenya tries to promote the reintegration into society of persons convicted of offences established in accordance with the UN Convention because there have been no convictions under the anti-corruption legislation.

However, there are certain categories of officials in Nigeria there are immune from prosecution while in office. Section 308 of the 1999 Nigerian Constitution, which is the *grundnorm*, confers immunity from both civil and criminal prosecution on certain categories of public officers while they are in office.[54] These categories of officials have control of public resources and are therefore vulnerable to corrupt practices. Shielding them from prosecution will seriously undermine the campaign against corruption and encourage impunity. It is therefore critical to comply with Article 30 by removing the immunity clause.

Article 31 of the UNCAC provides for measures to be undertaken by States Parties in relation to proceeds and instrumentalities of corruption. These measures

include freezing, seizure and confiscation of the said proceeds and instrumentalities of corruption. Kenya has partly complied with these two articles. Section 48 of the ACECA outlines the penalty for engagement in a corrupt practice as double payment of the derived payment (and double payment of the loss as well if it does occur). Section 30 of the same Act provides, in further compliance, that anything seized during a search into corruption cases should be retained by the investigating Commission to be used as evidence in the prosecution of those involved. The other relevant Kenya law on the matters referred to above are section 75 of the Constitution of Kenya, the Penal Code and sections 51 to 56 of the ACECA. Section 75 of the constitution of Kenya provides that no property of any description may be taken compulsorily from any person unless it is for public safety, public health or public defence. However, Section 75(6) (i) and (ii) allow the state authorities to take possession or acquisition of property in satisfaction of any tax, duty, rate, or other impost and by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya, are permitted.

Like the Kenyan anti-corruption laws, it is unambiguously and extensively stated in the Nigeria's EFCC Act in Sections 19, 20, 21, 22, 23, 24, 25, 26, 27,28, 29, 30, 31, 32, and 33. For instance, Section 27(4) states that:

> Subject to the provisions of section 24 of this Act, whenever the assets and properties of any person arrested under this Act are attached, the General and Assets Investigation Unit shall apply to Court for an interim forfeiture order under the provisions of this Act.

It goes further to state in Section 28 that:

> Where- (a) the assets or properties of any person arrested for an offence under this Act have been seized; or (b) any assets or property has seized by the Commission under this Act, the Commission shall cause an application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that prima facie evidence that property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

And in Section 29, it is stated that:

> Where an arrested person is convicted of an offence under this Act, the Commission or any authorised officer shall apply to the Court for the order of Confiscation and forfeiture of the convicted

> person's assets and properties acquired or obtained as a result of the crime already subject to an interim order under this Act.

Article 31 paragraph 7 of the UNCAC outlaws the defence of bank secrecy for States Parties. Instead in conjunction with article 55 of the UNCAC, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. Kenya has partially complied with these two provisions. Section 28 of the ACECA empowers the KACC to require through a written notice, the attendance and production of records, which include bank statements by a person being investigated for an act of corruption. The information to be provided in bank statements should be six months old. A person who refuses to comply with the Commission's notice is guilty of an offence and liable to a fine not more than Kenya Shillings 300,000 (three hundred thousand) or to a term of imprisonment for 3 (three) years. In the same vein, it is stipulated in Section 33 (1) of the EFCC Act that through application to the Federal High Court, the Chairman of the Commission can

> … instruct a bank examiner or such other appropriate regulatory authority to issue an order as specified in Form B of the Schedule to this Act, addressed to the manager of the bank or any person in control of the financial institution where the account is or believed by him to be or the head office of the bank or other financial institution to freeze the account.

Article 32 of the UNCAC is about protection of witnesses, experts and victims. States Parties are required to 'provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the UN Convention and, as appropriate, for their relatives and other persons close to them'.

In compliance with the article, Kenya has published the Witness Protection Bill whose objective is to protect potential witnesses from those against whom they have adverse information and to allow them to testify without fear. Also, it makes provision for their protection after testimony, when their identity and location can be changed. The bill, which is geared towards protection of witnesses in serious cases, for example, fraud, terrorism and money laundering, does not, unfortunately include protection for whistleblowers. It is proposed that the bill be enacted and that the protection of whistleblowers be incorporated. In addition, Section 65 of the ACECA protects

individuals from any action or proceeding, including disciplinary, that may be instituted or maintained against them for giving assistance to the KACC or an investigator. Section 65(3) states that 'in prosecution for corruption or economic crime or proceeding under this Act, no witness shall be required to testify, or provide information that might lead to the identification of, a person who assisted or disclosed information to the Commission or an investigator'. The section requires the court to ensure that information that identifies or might lead to the identification of a person who assisted or disclosed information to the Commission or an investigator is removed or concealed from any documents to be produced or inspected in connection with the proceeding. It is clear therefore that Kenya has met most of the measures stipulated in article 32 of the UNCAC. The EFCC Act does not make any provision in this regard. However, this gap has been has been filled by the Corrupt Practices and Other Related Offences Act 2000 that established the ICPC.

Article 34 of the UNCAC tackles the consequences of acts of corruption and makes recommendations on measures states parties may take. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States 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. Under Kenya's law of contract Act, chapter 23 Laws of Kenya, contracts which are illegal because they involve transactions in corruptly acquired property are unenforceable. In Nigeria, some anti-corruption laws have also taken care of the consequences of acts of corruption; Section 22 (1-6) and Section 23 (1-3) of the Corrupt Practices and Other Related Offences Act 2000, dwell extensively on this issue. The law provides *inter alia* that officers of the Commission shall not be compelled to disclose the identity of informants.[55] It also provides for protecting documents which might lead to the disclosure of identity of informants. But it should be noted that the EFCC Act has insufficient provisions for protecting witnesses, informants and reporting persons.

Article 35 of the UNCAC requires States Parties to take such measures as may be necessary, in accordance with the principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. In this regard, Part VI of the ACECA deals with

'compensation and recovery of improper benefits'. Section 51 thereof declares that a person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result of an amount that would be full compensation for the loss suffered. Moreover, The Criminal Law (Amendment) Act, No 5 of 2003 now empowers a court to order compensation for civil liability proved against the accused in the course of the criminal trial. Thus under section 175(2) thereof a court which convicts an accused and finds on the facts that he or she has by virtue of the offence a civil liability to the complainant or another party may order the convicted person to pay to the injured party such sum of money as it considers could justly be recovered as damages in civil proceedings brought by the injured party. Where an order for compensation has taken place upon conviction, the amount is recoverable as a judgment debt.

But from the available Nigeria's anti-corruption laws, none, including the EFCC Act, focuses on this area; that the Criminal Justice System in Nigeria has no provision for compensating victims of crime. Thus the Criminal Procedure Act and the Criminal Procedure Laws of the various states of the Federation need to be amended to include provisions for the compensation of the victims of crime. It is hoped that the ongoing review of the Criminal Procedure laws of the Federation and some states will redress this situation.[56] This will ensure compliance with Article 35 of the UNCAC. Except in some instances where the Chairman of the EFCC tried to return money defrauded to concerned victims. For instance, an 86-year-old woman, Juliana Ching, was on 26th September, 2005 presented with a cheque of $4,481,909.94m in Hong Kong, by the former EFCC Chairman, Mallam Nuhu Ribadu. The money was in part of the funds recovered from a fictitious transaction initiated by one Basil Nkenchor, a Nigerian, purporting to be Alhaji Ibrahim Abba, the Group Managing Director of the Nigerian National Petroleum Corporation, (NNPC), sometime in June, 1995.[57]

Article 36 of the UNCAC deals with the need for each State Party to the Convention to ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons should operate independently, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

The government of Kenya established the KACC and was set up under section 6 of the ACECA as a body corporate. The senior staff of KACC (the Director and his assistants) was approved by the Parliament before appointment by the President. The Commission is empowered 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 have occurred or are about to occur; to investigate the conduct of any person that, in the opinion of the commission is conducive to corruption or economic crime; examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure revision of methods of work that may be conducive to corrupt practices and to educate the public on the dangers of corruption and economic crime and to enlist and foster public support in combating corruption and economic crime.

The Act lays down an elaborate process of the appointment and removal of the officials of the Commission which is meant to shield the process of fighting corruption from actions of the Executive which are dictated upon by the exigencies of the moment and political expediency. It is also meant to protect the holders of the offices from removal on flimsy grounds, totally unrelated to their competence or performance of their duties in investigating corruption. It is important to note that the officials of both the Kenya Anti-Corruption Commission and the Kenya Anti-Corruption Advisory Board are protected in the Act from directions or control from any quarter in the performance of their statutory mandates. In addition, section 11 of the ACECA states that the State Corporations Act shall not apply to the Commission, thereby securing further its independence from the control of the government. In addition, to the Commission, the government has also established the following bodies:

(a) The State Law Office/Department of Public Prosecutions – The Department is responsible for all prosecutions of criminal cases. It has undergone far-reaching reforms through which special units to deal with corruption have been established. The Anti-Corruption, Serious Fraud and Asset Forfeiture Unit has been set up as a specialised prosecution unit to deal with corruption, serious crime, fraud and asset forfeiture.

(b) The Judiciary/Special Anti-Corruption Courts – These have been established under the ACECA, 2003. Special efforts were made to build the capacity of the judicial officers in these courts in order to be able to handle anti-corruption cases better and more effectively.

Obviously, the establishment of the EFCC has partly fallen in line with the provisions of the Convention. For instance, the law that established the EFCC confers on it the general powers to receive, investigates, and prosecutes corrupt practices, economic crimes, money laundering and other related offences as well as carry out public education.[58] This Commission is a dedicated anti-corruption agency with full powers of investigation, prosecution and enforcement with the support of the courts and law enforcement agencies.

Article 37 of the UNCAC makes provision for co-operation between individuals and/with law enforcement authorities. It requires states parties to put in place laws which would facilitate any person who has participated in the commission of an offence established in accordance with the UN 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. Kenya has made provision for the protection of informants. Section 65 of the ACECA, provides protection to informants but excludes from protection those who make statements to enforcement authorities that they do not believe to be true. States parties should take measures to put in place mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with the UNCAC.

Sections 216 and 329 of the Criminal Procedure Code of Kenya empower the court which has convicted an accused person, before sentencing him or her or making any other order to receive such evidence as it thinks fit, in order to determine the appropriate sentence or order to be made. The purpose of mitigation is to enable the accused person show why the Court should be lenient to him/her. The court ought to establish the history, character, antecedents and all matters relevant to punishment before assessing sentence. One way of doing this is if the prosecution says to the court that an accused person has been co-operative with them, the court should be lenient. Other things that States Parties are required to do are to grant immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with the UN Convention. Kenya has taken the policy decision to grant immunity to persons who provide substantial co-operation by giving total or partial immunity to those who return the whole or part of the property they are accused of stealing or otherwise acquiring corruptly.

However, the Criminal Justice System Nigeria does not have provisions for plea bargaining or other forms of co-operation which enables the accused persons to negotiate their charges and sanctions. There is therefore the need to amend the Criminal Procedure Laws of the Federation and the component States to incorporate this provision. Although, some attempts were made in past by the EFFC in this direction with some indicted public officials which was widely condemned as being strange to anti-corruption laws in Nigeria.

6.3.3 UNCAC, International Co-operation and Legal Assistance by KACC and EFCC

From Articles 38 to 49, UNCAC make, inter alia, provisions for cooperation between national authorities and the private sector and between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with the UN Convention; requiring states parties to adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another state of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with the UN Convention; giving States Parties jurisdiction over acts of corruption and related offences, in cases where such acts are committed wholly or partially in the States Parties' territory; making provision for international cooperation; dealing with extradition of suspects in corruption cases.

Kenya is party to the Commonwealth Scheme Relating to Mutual Legal Assistance in Criminal matters (Harare Scheme). Kenya has put in place laws under the ACECA and the Witness Protection Bill, measures to encourage persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with the Convention. As stated, Kenya was a founding member and has been a key player in the implementation of the New Partnership for African Development (NEPAD).

The concept of jurisdiction is also provided for in section 67 of the ACECA[59]. In addition, Kenya has domesticated the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which makes offences committed on board of Kenyan national carriers offences on the Kenyan territory. Furthermore,

under Kenya laws, the terminology used in legislation is invariably "every person" meaning any human person whether he or she is a Kenyan citizen or not. It is suggested that it might be useful to import from the Penal Code, its provisions, on territorial application of the Code, into the ACECA. Unless Kenya has an extradition treaty with another State, persons who commit crimes are tried in Kenya and not handed over to other states on the ground only that they involve non Kenya nationals. Section 35 of the Public Officer Ethics Act (POEA) provides that the Commission responsible for investigating a public officer for breach of the Code of Conduct and Ethics has to inform the public officer concerned, after investigations, of any action it intends to take before it takes the action or within 30 (thirty) days after it does so. Kenya has therefore met the requirement of providing a guarantee for a fair trial on corruption related charges.

Kenya has already incorporated this under section 67 of the ACECA, which states that 'conduct by a citizen of Kenya that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence under this Act'.[60] This is a very wide provision because it only requires that the crime committed would be a crime under the Act and not necessarily identical or the same in the Act as in the foreign country. After the 1997 bombing of the American Embassy in Nairobi, the suspects arrested on suspicion of having carried out the bombing were handed over to the American Government for trial. This trend can easily be followed by the authorities in anti-corruption cases.

As for Nigeria, it is important to note that the fight against money laundering, terrorism and terrorist financing has heightened with the establishment of the Nigerian Financial Intelligence Unit (NFIU) by the EFCC. This has helped in the detection of suspicious transactions in financial institutions. The EFCC is coordinating the implementation of the National Strategy Plan Against Money Laundering and Terrorist Financing. This has no doubt impressed the Financial Action Task Force (FATF) of the G8 whose review team only recently concluded an on-site visitation to the country with a view to assessing her level of compliance in order to have her de-listed from its list of Non-Cooperating Countries and Territories (NCCTs). Nigeria is fully in compliance with the UN Convention against corruption and UN Resolutions on terrorism and terrorist financing particularly Resolution 1247. EFCC maintains a database of terrorist groups, individuals, non-governmental organisations (NGOs) and

host of others and constantly keeps a weather look on them. In compliance with the UNCAC's article 4.

Nigeria has also criminalised conduct by a citizen that takes place outside Nigeria if the conduct would constitute an offence if it took place in Nigeria, it seems that the state will exercise jurisdiction only in Nigeria upon the citizen's return. It does not therefore confer any exercise of jurisdiction on Nigerian authorities in a foreign state. This also applies to Nigeria's situation. For illustration, there were a lot of corruption cases (money laundering) that involved Nigerian ex-governors, for instance, Alamieyeseigha, Dariye, Ibori, which bothered on the issue of sovereignty between Nigeria and the United Kingdom which made these ex-governors had to face corruption charges upon their return from the said foreign country.

However, unlike Kenya, Nigeria's anti-corruption laws face some challenges as regards the provisions of the above article that bother on international co-operation among State Parties. From all indications, EFCC Act does not make adequate provisions for international co-operation on corruption issues like majority of Nigerian anti-corruption laws. In what could be impliedly referred to as international co-operation on anti-corruption strategies, Section 66 (3) of the of the Corrupt Practices and Other Related Offences Act states that "the Commission shall have the power to engage the service of INTERPOL, or such local or international institution, body or persons possessing special knowledge or skill in the tracing of properties or detection of cross border crimes." But the EFCC Act does not permit extradition in cases where the offence is not punishable in the domestic laws of Nigeria.

Article 50 of the UNCAC is on the usage of special investigative techniques. Admissibility of evidence in Kenya is covered by the Evidence Act chapter 80, Laws of Kenya. Kenyan criminal investigation authorities and the KACC are allowed to use controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within Kenya, and this is admissible in court so long as whatever evidence that is produced in court is presented by the maker. All major banks in Kenya have surveillance equipment installed to assist in investigations of a fiscal nature. It is unclear at this stage whether Kenya has entered into any bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. This may yet take effect upon the UN Convention coming into force. Otherwise, Kenya shall be entitled to use such special

investigative techniques at the international level on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

On the other hand, it is not clearly stated in the known anti-corruption laws in Nigeria, unlike in Kenya where other investigative techniques, such as electronic or other forms of surveillance and undercover operations exist.

6.3.4 UNCAC and Asset Recovery by the KACC and EFCC in Kenya

Chapter V (Articles 51-59) of the UNCAC focuses on asset recovery. The agreement on asset recovery is considered a major breakthrough and many observers claim that it is also the reason why many developing countries signed the UNCAC.[61] Asset recovery is indeed a very important issue for many developing countries where high-level corruption has plundered the national wealth. Reaching an agreement on this Chapter involved intensive negotiations, as the needs of countries seeking the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance was sought.[62] Generally, countries seeking assets sought to establish presumptions which would make clear their ownership of the assets and give priority for return over other means of disposal. Countries from which return was likely to be sought, on the other hand, had concerns about the language which might have compromised basic human rights and procedural protections associated with criminal liability and the freezing, seizure, forfeiture and return of such assets.

Chapter V of the UNCAC establishes asset recovery as a "fundamental principle" of the Convention. The provisions on asset recovery lay a framework, in both civil and criminal law, for tracing, freezing, forfeiting and returning funds obtained through corrupt activities. The requesting state will in most cases receive the recovered funds as long as it can prove ownership. In some cases, the funds may be returned directly to individual victims.

If no other arrangement is put in place, UNCAC signatories may use the Convention itself as a legal basis for enforcing confiscation orders obtained in a foreign criminal court. Specifically, Article 54(1)(a) of the UNCAC provides that: "Each State Party (shall)... take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another state party". Indeed, Article 54(2)(a) of the UNCAC also provides for the

provisional freezing or seizing of property where there are sufficient grounds for taking such actions in advance of a formal request being received.

Recognising that recovering assets once transferred and concealed is an exceedingly costly, complex and all-too-often unsuccessful process, this Chapter therefore incorporates elements intended to prevent illicit transfers and generate records which can be used where illicit transfers eventually have to be traced, frozen, seized and confiscated (Article 52). The identification of experts who can assist developing countries in this process is also included as a form of technical assistance.

Although Kenya has signed and ratified the UNCAC, there is no evidence in practice that the state authorities have liaised with the banks to enhance scrutiny as envisaged in article 52 (paragraph 1) of the Convention. It is suggested that Kenya closes the existing gap by (a) Issuing advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and concerning such accounts; and (b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

Just like ACECA, the EFCC Act has no provisions to facilitate asset recovery or transfer of proceeds of crime to other State Parties. The Act has no provisions for recovery of property through International Co-operation and confiscation. The UNCAC has provisions to facilitate the recovery of properties which are proceeds of crime.

There is the need to modify the laws in order to give effect to Article 54 UNCAC. This will facilitate giving effect to orders for confiscation, freezing or seizure made by the courts of another State Party; and allow confiscation without criminal conviction in cases where the offender cannot be prosecuted by reasons of death, absence or other appropriate cases.

Moreover, As regards Article 57 which deals with return and disposal of assets, neither the ACECA nor the EFCC Act contains provision to facilitate the return of proceeds of crime or corruption to another State Party in accordance with Article 57 UNCAC.

However, as for Nigeria, there is an extradition Act which provides for the extradition of persons from and into Nigeria subject to bilateral treaties. The Act is

applicable to all the Commonwealth countries provided their domestic laws accord the same privilege to Nigeria.[63] The Act provides that a fugitive criminal may only be returned for a "returnable offence" which is described in the EFCC Act as an offence punishable by imprisonment for two years or a greater penalty both in Nigeria and in the other State Party seeking the surrender.

6.3.5 UNCAC, Technical Assistance and Information Exchange in Kenya

Chapter VI (Articles 60-62) of the UNCAC is devoted to technical assistance, meaning support offered to developing and transition countries in implementing the Convention. The provisions cover training, material and human resources, research, and information sharing. The Convention similarly calls for co-operation through international and regional organisations (many of which have already established anti-corruption programmes), research efforts, and the contribution of financial resources both directly to developing countries and countries with economies in transition, and to the United Nations Office on Drugs and Crime,(UNODC), which is the Secretariat to the Conference of the States Parties.

Article 60 of the UNCAC requires states to parties initiate, develop or improve on specific training programmes for their personnel responsible for preventing and combating corruption, Article 61 of the UNCAC deals with the collection, exchange and analysis of information on corruption while Article 62 of the UNCAC suggests other measures for the implementation of the Convention through economic development and technical assistance.

As stated in the earlier on, the Governance Justice Law and Order Sector (GJLOS) reform programme has helped Kenyan authorities acquire land and buildings for the Kenya School of Law which shall be the centre for the training envisaged. Already the Attorney General's chambers have introduced specialised training in money laundering, asset recovery and forfeiture in their readiness to combat corruption. The KACC also has its own staff training programmes under which it will facilitate refreshing the knowledge and expertise of its officers.

In like manner, Section 7 of the EFCC Act which deals with Standing Orders empowers the Chairman of the Commission to issue administrative orders on issues such as training and other matters that will be expedient for the running of the Commission. The Commission may through the powers conferred on it under this

section comply with Articles 60-62 UNCAC. The Nigeria's EFCC Commission has established a Training and Research Institute for the training of its staff and those of sister agencies, Financial Regulators and Operators in the Banking and Finance sub-sector in the country. The Institute also undertakes research in finance, economy and policy formulation to improve the nation's records and statistical requirements. This became inevitable because none of the existing law enforcement institutions presently offer the comprehensive and all embracing training envisaged to effectively combat economic and financial crimes. The Institute, which commenced operation in 2005, has capacity to train 100-120 persons at a time. The long term objective of the Institute is to serve as a Regional Training Academy in West Africa to serve the law enforcement needs of other ECOWAS member states in the fighting and enforcement of economic and financial crimes law, rules and regulations.

Also, collaboratively, the European Commission (EC) once approved the sum of 24.7 million Euro (about N3.8 billion) to support the EFCC and other relevant law enforcement institutions, which aimed at enhancing good governance and financial accountability, and to check fraud, waste and corruption by providing the EFCC with the required equipment and technical support; to further improve the knowledge of the EFCC staff through training, in-country and overseas; and strengthen the capacity of the judicial system to prosecute and try economic and financial crimes. The United Nations Office on Drugs and Crime (UNODC) will implement the European Commission's support to the EFCC and the Judiciary in the areas of equipment, the Financial Intelligence Unit (FIU) and the training centre and the overall staff training

From the foregoing, our analysis on the domestication and compliance levels of the KACC and the EFCC anti-corruption strategies to the UNCAC is encouraging. This is due to the fact that some of the existing laws of both countries coincide with the relevant provisions of the UNCAC, although most of the initiated anti-corruption laws have been largely influenced by the UNCAC. However, our analysis also reveals that despite this cheering compliance and domestication levels, there are still some impediments and gaps that stand between the successful implementation of the UNCAC *vis-à-vis* anti-corruption strategies in Kenya and Nigeria. This is the focus of the next section.

6.4 ANTI-CORRUPTION STRATEGIES IN KENYA AND NIGERIA AND THE EXTENT OF CONSISTENCY WITH THE UNCAC

Despite the frantic efforts made towards the implementation of the UNCAC, there exist some inconsistencies that cannot be overlooked. Some of these major inconsistencies are briefly highlighted below.

1. **Non-Independence of the KACC and EFCC:** Article 6 requires such bodies to be given necessary independence to enable them carry out their functions effectively and to be free from any undue influence. But this is not to be for both anti-corruption agencies. They still face the challenge of being independent. More often than not, the sitting presidents of both countries influence the activities of the agencies. This is inconsistent with the spirit and letters of the UNCAC.

2. **Inadequate Funding:** Article 6 also requires such bodies to be provided with the necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions, should be provided. This article has not been fully complied with in Kenya and Nigeria. The KACC and the EFCC continue to face the challenge of funding in the core areas of their mandates such as training of staff, investigations and prosecutions suspects. This is also inconsistent with the relevant provisions of the UNCAC.

3. **Funding of Political Parties:** Articles 7(2) and Articles 7(3) provide for the selection and funding of political parties. But none of the anti-corruption bodies in Kenya and Nigeria has been mandated in this area not to mention any effective laws. Hence, funding of political parties through public funds continue to a major source of corruption that anti-corruption agencies of both countries have been unable to deal with. This also points to another area of inconsistency with the UNCAC provisions. It must be noted that financing of political parties and corruption in election are the two issues which are of crucial importance in the anti-corruption debate. The problem of political funding is that there is a temptation to divert the funds for personal use, they could be used to purchase vote, and would encourage favouritism towards the fund giver.

4. **Bribery of Foreign Public Officials:** Article 16 of the UNCAC deals with bribery of foreign public officials and officials of public international organisations. Unfortunately, except the normal existing laws, the Kenyan legislations variously referred to above do not criminalise the promise, offering or giving to a foreign public

official or an official of a public international organisation, directly or indirectly. Just like in Kenya, no Nigerian legislation deals with bribery of foreign public officials and officials of public international organisations that are clearly stated under Article 16 of the UNCAC. This is one of the areas where Kenyan and Nigerian legislators need to update the nations' laws.

5. **No Provisions to Facilitate Asset Recovery or Transfer of Proceeds of Crime:** This largely an area which needs full compliance by the KACC and EFCC to curb the common practices of corruption via siphoning money stolen. Unfortunately, these are the areas of provisions of the UNCAC that both countries have not been able to comply with. This is because over the years public office holders in both countries have embezzled billions of dollars and stacked such in foreign banks and part of the proceeds are also used to acquire assets. However, just like ACECA, the EFCC Act has no provisions to facilitate asset recovery or transfer of proceeds of crime to other State Parties.

The foregoing are the major areas of inconsistencies of the Kenya and Nigeria's anti-corruption strategies identified vis-à-vis the UNCAC. However, our subsequent analysis will show similarities and differences as regards the extent of the consistency of the Kenya and Nigeria's anti-corruption agencies strategies with the provisions of the UNCAC. It is to be noted that our emphasis in this thesis is on anti-corruption agencies' strategies and not general anti-corruption laws *per se*.

6.5 The UNCAC: Comparison of Compliance and Implementation Matrix of the Anti-Corruption Strategies of the KACC and EFCC

As earlier enunciated, UNCAC is a landmark convention as it is the first global treaty ever that provides a framework to harmonise anti-corruption efforts worldwide.

The implementation of international anti-corruption legal instruments such as the as the UNCAC is a complex task, which requires integrating international standards into domestic legislation as well as introducing policies and institutional structures to implement them. Implementation more specifically implies enacting a broad range of anti-corruption laws covering criminalisation, law enforcement, prevention and international co-operation.[64]

Today, UNCAC is widely recognised as not only the global template but also the most promising initiative to curb corruption. Among other things, the UNCAC

requires from the complying governments to criminalise corruption offences including bribery and money laundering and to work together in cross-border law enforcement. It also calls on states to provide technical assistance in the field of anti-corruption to countries needing it. The governments of Kenya and Nigeria that signed up to UNCAC have made a number of important commitments in line with the UNCAC provisions. The induced commitments are summarised below in Table 5.3 indicating the extent of both countries' compliance and implementation which also serves as the synthesis of the preceding sections' discussion.

Table 5.1 represents the matrix of analysis and synthesis undertaken to highlight the extent of compliance and implementation of the UNCAC by Kenya and Nigeria as adopted by both countries anti-corruption agencies. What remains to be added here is the fact that the matrix shows that the both countries' anti-corruption strategies were substantially induced by the UNCAC, though with some variations. These variations unfolded in the course of our discussion on gap analysis of the UNCAC implementation in the following sections.

Table 6.1. Comparison of Kenya and Nigeria's Anti-Corruption Strategies' Compliance and Implementation Matrix of the UNCAC

UNCAC Chapters	Kenya	Nigeria
Chapter 1 (General Provisions): Articles 1-4: Focus on the statement of purpose, definition of terms, the scope of application and protection of sovereignty.	Fully Complied and Implemented	Fully Complied and Implemented
Chapter 2 (Preventive Measures): Articles 5-14: Require state parties to take number of measures including setting up anti-corruption bodies, preventing corruption in finance, procurement, appointment in public administration, encouraging and supporting public reporting and participation of civil society and the private sector in preventing corruption.	Partially Complied and Partially Implemented	Significantly Complied and Significantly Implemented
Chapter 3 (Criminalisation and Law Enforcement): Articles 15-42: List acts of corruption that should be investigated and punished as crimes in public and private sectors; and emphasise the criminalisation of bribery of foreign public officials and officials of public international organisations; while also imputes criminal responsibility of legal persons and recognise the importance of protecting witnesses, victims and whistle blowers in corruption cases.	Significantly Complied and Significantly Implemented	Significantly Complied and Significantly Implemented
Chapter 4 (International Cooperation): Articles 43-50: Highlight mutual legal assistance and extradition which include bilateral/multilateral agreements and transfer of prisoners, criminal proceedings, cooperation between law enforcement agencies and the use of special investigative techniques.	Partially Complied and Partially Implemented	Partially Complied and Partially Implemented
Chapter 5 (Asset Recovery): Articles 51-59: Specify how cooperation and assistance are to be provided, how the proceedings of corruption are to be returned to requesting State Party, and how the interests of other victims or legitimate owners are to be considered.	Partially Complied and Partially Implemented	Partially Complied and Partially Implemented
Chapter 6 (Technical Assistance and Information Exchange): Articles 60-62: Highlight the composition needed to develop the national capacity (training) to implement various	Partially Complied and	Significantly Complied

aspects of the UNCAC and provide for technical cooperation in connection with investigations or asset recovery.	Partially Complied	and Significantly Complied
Chapters 7 & 8 (Mechanisms for Implementations & Final Provisions): Articles 63-64 &65-71: Chapter Seven establishes and makes provisions for the Conference by State Parties to the Convention, and the Secretariat while Chapter Eight gives the final provisions touching on implementation of the Convention, settlement of disputes, signature, ratification, acceptance, approval and accessions, entry into force, amendment, denunciation, and languages.	Substantially Complied and Substantially Implemented	Substantially Complied and Substantially Implemented

Source: Researcher's Analysis and Synthesis

6.6 Comparative Analysis of the Performance and Effectiveness of the KACC and EFCC's Anti-Corruption Strategies in the Era of UNCAC in Kenya and Nigeria

In this section, attempt is made to undertake a comparative analysis of the anti-corruption strategies in Kenya and Nigeria in terms of their performance and effectiveness *vis-à-vis* the UNCAC. The analysis is divided into nine areas:

6.6.1 Similarities

i. Emergence of the Struggle for Anti-corruption Crusade
ii. Emergence of Anti-corruption Agencies

6.6.1.1 Emergence of the Struggle for Anti-Corruption Crusade

Prior to the emergence of Mwai Kibaki in 2002 as the President of Kenya, Daniel Arap Moi, who succeeded Jomo Kenyatta as the President upon the latter's death in 1978 ruled Kenya with an iron hand under a one-party state until 1992 when Moi was forced by the international community to institute a multiparty political system. Under Moi's rule corruption became entrenched in Kenya's socio-political and economic systems. Between 1992 and 1997, several opposition candidates in presidential elections emerged which eventually led to the support of a single candidate, Mwai Kibaki campaigned on a reform platform, committing him to fight rampant corruption. Hopes within the donor community that Kibaki's election would mark a new era in Kenyan politics and a real effort to combat corruption were innocently high, and soon dashed.[65]

Like Kibaki, former Nigerian President Olusegun Obasanjo was elected as a reformer with deep links to the pre-transition political/military class in Nigeria. Also like Kibaki, Obasanjo came to power in the context of an unprecedented corruption that began at the top. The intense political struggles of the 1990s took a toll on the Nigerian state and society. A long and carefully managed transition programme to democracy was aborted by the military government in 1993, as electoral results were coming in. State institutions and the social fabric were in dire need of repair after Obasanjo's election in 1999 due to the prolonged military rule and its aborted democratic transition programme. Nigeria's oil wealth gives it significant insulation from donor demands, but this is offset by the country's perennial desire to be seen as a regional power, which was reinforced by Obasanjo's abiding personal interest in acting as president both in and out of office. Always hovering near the bottom, Nigeria had

the dubious distinction of finishing last on the Corruption Perceptions Index in 2000 (TI CPI 2000), the first full year of Obasanjo's administration and the new 'democratic' regime.

6.6.1.2 Emergence of Anti-Corruption Agencies

President Kibaki's anti-corruption programme was a response to internal and external demands for reform, a fulfilment of his own campaign promises, and a means of unfreezing $1 billion in foreign aid. The appointment of John Githongo, an anti-corruption crusader of significant pedigree and the founding Executive Director of the Kenya Chapter of Transparency International, to head the new Department of Governance and Ethics sent the positive message to local and international audiences.

Obasanjo's anti-corruption campaign was, like Kibaki's, a response to internal and external pressures. The first bill Obasanjo presented to the National Assembly for consideration, and thus the first bill in the Fourth Republic, was the Corrupt Practices and Other Related Offences Act, which was signed into law in June 2000. The Act established the Independent Corrupt Practices and Other Related Offences Commission (ICPC), with its membership drawn from the civil society, and designed to reflect relevant public and private experience.[66] Later, there emerged the EFCC Act which is all embracing.

6.6.2 Differences

i. The Anti-corruption Agencies and their Prosecutionary Powers
ii. Effectiveness of the Anti-corruption Agencies
iii. Political Will and the Influence of the Sitting Presidents
iv. Public Support of the Anti-corruption Agencies
v. Individual/Leadership Style of Anti-corruption Agencies
vi. Legal and Judicial Challenges; and
vii. Global Anti-corruption Ratings.

6.6.2.1 The Anti-Corruption Agencies and their Prosecutionary Powers

In addition to the Department of Governance and Ethics in Kenya headed by formerly by John Githongo was the Anti-Corruption Commission (KACC) established by the Anti-Corruption and Economic Crimes Act in April 2003 and began operation in October of the same year, but it lacks prosecutionary power. The least it could do is to make recommendations to the Attorney-General. However, EFFCC was established in 2002. Its mandate is to prevent, investigate and prosecute a range of financial crimes

in the public and private sectors, including internet fraud, oil bunkering, terrorist financing and government corruption. It is largely an intra-governmental organisation, [67] but does have authority to investigate wrongdoing that predates it, and thus has the sole responsibility to investigate corruption of the previous regime and can also prosecute through the established law courts. The EFCC has been the headline-grabbing agency from the outset, as it has beamed its searchlight on ubiquitous Nigerian internet fraudsters on the one hand, and public resources looted by the former Head of state, Sani Abacha on the other.

6.6.2.2 Effectiveness of the Anti-Corruption Agencies

The efficacy of the KACC was tested by the Goldenberg Affair and Anglo Leasing scandal in Kenya. The Anglo Leasing scandal involved similar dealings like that of Goldenberg Affair, which began towards the end of the Moi administration and carried over into the Kibaki administration. Like the Goldenberg Affair, Anglo Leasing was typical of a much broader assemblage of similar deals. This case involved government contracts for goods and services that were paid for but never received from companies that did not exist. The Anglo Leasing scandal first became public in May 2004.[68] Multiple investigations of the scandals indicate that these deals were standard operating procedure, and that knowledge, if not direct involvement, was widespread among the highest echelons of elected officials and civil servants.[69]

The Goldenberg Affair was handled by a Judicial Commission of Inquiry, while Anglo Leasing was investigated by Githongo and the KACC. The focus here is thus on the latter. After all underhand dealings, maneourverings and power plays, despite the overwhelming evidence against those top civil servant s and ministers that were involved, the then Attorney General, Amos Wako returned all the five files to the KACC for further investigation, refusing to prosecute anyone on the basis of the evidence presented. Apparently getting the message, the KACC produced its report on the accusations in Githongo's report, concluding that there was no firm evidence to support them and recommending that the case against the former ministers be closed. This recommendation was accepted by Attorney General Amos Wako.[70] Kenyans were left wondering whether Amos Wako was frustrating the work of the KACC or the KACC was not doing its job. In the Kenyan case, neither Githongo's principled approach nor Ringera's pragmatic one unleashed any real assault on grand corruption. Despite intense struggles among competing networks of politicians in the government and in the parliamentary opposition, as a class the politicians have held anti-corruption

agencies at bay in the face of incontrovertible evidence of their involvement in massive corruption.

The efficacy of the EFCC in Nigeria revolves largely around its campaign against the country's former thirty-six powerful state governors. The EFCC investigated all of them in 2005 and filed their dossiers with the Attorney General. It repeatedly claimed publicly that almost all of them are corrupt. However, because the governors, along with the president and vice-president, enjoyed constitutional immunity from prosecution while in office, they could not be charged while in office.

In the year between November 2005, when the third-term amendment was tabled, and November 2006, when Atiku Abubakar[71] lost his bid to stand as the People's Democratic Party (PDP) presidential candidate and left the party, five governors were impeached. They were immediately charged with corruption by the EFCC. Four were members of the PDP, and the fifth displaced as the sitting PDP governor as a result of a Supreme Court ruling that reversed the 2003 election outcome. That there were so many impeachments in such a short time indicates a centrally coordinated campaign.

The spate of impeachments and EFCC charges in 2005 and 2006 was foreshadowed by the case of Plateau State Governor Joshua Dariye (PDP) in 2004 and later the money laundering charges in London against the then Bayelsa State Governor Diepreye Alamieyeseigha (PDP) (touted to be a close political ally of Atiku Abubakar); also Oyo State Governor Rasheed Ladoja (PDP) (another 'Atiku's ally) was impeached and charged by the EFCC in January 2006;[72] while the then Ekiti State Governor, Ayo Fayose (PDP) was impeached and charged by the EFCC in October 2006. But Fayose's supporters maintained that he was targeted because of his falling out with Obasanjo.[73] Obasanjo's blatant use of the EFCC as an instrument against political opponents in general, and Atiku Abubakar in particular, left Ribadu and the EFCC battered and weakened.

But despite this, the subsequent efforts of the EFCC to fight corruption in the arrest Ibori's and others seemed to resolve the debate over the EFCC, demonstrating its autonomy from political interests, its commitment to its institutional mandate, and its capacity to touch the untouchable. Ribadu himself noted that it sent 'a clear message to everybody that we are damn serious about fighting corruption,'[74] unlike its Kenyan counterpart.

6.6.2.3 Political Will and the Influence of the Sitting Presidents

The struggle between political interests and the Kenya Anti-Corruption Commission (KACC) between 2003 and 2008 was won by the politicians, while the Economic and Financial Crimes Commission (EFCC) in Nigeria made a surprisingly strong showing. The explanation for this lie in variations in the way the anti-corruption game ensued in the two countries. In Kenya, President Kibaki and his inner circle marginalised the KACC, while the KACC leadership did little to improve its bargaining position *vis-à-vis* the political elite.

In Nigeria, former President Obasanjo and his inner circle instrumentalised the EFCC, while the EFCC leadership took a number of steps to strengthen its bargaining position *vis-à-vis* the political elite. The comparative analysis suggests that instrumentalisation rather than marginalisation is necessary but not sufficient for broadening of the political will of the sitting presidents campaign over time, and that the political will of the sitting presidents agencies' own capacity building initiatives are the critical factor facilitating a real, if still limited, assault on grand corruption.

6.6.2.4 Public Support of the Anti-Corruption Agencies

The KACC has never enjoyed universal public support. Initial problems arose from the difficulties experienced when establishing the KACC, with some sections of the public failing to support the leadership of the Commission. The appointment process of its directors became the subject of controversy between the Parliament, the President and the leadership of the KACC Advisory Board, leading to the resignation of its first Chairperson. Soon after, KACC was sucked into the controversies surrounding the Githongo fallout, with suggestions that the Commission was insincere in the discharge of its functions. Further, failure to ensure accountability in the Anglo Leasing scandal has partly been seen as a manifestation of the lack of independence on the part of KACC, further eroding public confidence. KACC has had to spend a considerable quality of time, effort and public resources in countering negative public perceptions. As justified as these views may be, the limitations that the KACC faces in the discharge of its functions are largely unclear to the public.[75]

However, the key to the EFCC's success was that it was home-grown and popularly supported by the masses, and had proved that it could tackle corruption on its own before seeking international support 'to guarantee that these efforts do not falter'.[76] Although opportunities for collaboration are more limited domestically, the EFCC has nevertheless reached out, sharing resources and expertise with civic

organisations committed to good governance. In September 2007, a coalition of civic groups announced that it would mobilise 500 lawyers, including twenty-five from the Senior Advocates of Nigeria, to support EFCC prosecutions of corrupt public office holders.[77] The EFCC also committed itself to collaboration with the Association of National Accountants of Nigeria on training of forensic accountants.[78]

6.6.2.5 Individual/Leadership Style of Anti-Corruption Agencies

Ribadu enjoyed some level of political protection from his president than Ringera and Githongo did not, and he understood the limits of his purview. He stated publicly that for him the issue was always whether targets of investigation are guilty or not guilty of corruption. He did not prosecute the innocent. However, since virtually all the governors were guilty, prosecuting those stripped of their immunity by the political machinations of Obasanjo and his allies politicised his principled approach, even if indirectly. Nevertheless, Ribadu was driven by an interest in promoting himself and his personal crusade, and in building a viable institution, within the limits imposed upon him by the political environment. Accomplishing that required something of the pragmatic approach adopted by Ringera in Kenya, if only to buy time to build an institution capable of successfully implementing a principled assault on the 'big fish'.

Indeed, Ribadu admits to being 'very strategic' about the selection of targets and the timing of investigations. [79] He may have expected more genuine cooperation from Obasanjo, who promised but never delivered legal reforms that would have lifted blanket immunity and cleared the way for EFCC prosecutions of governors (and potentially presidents). Instead, his Attorney General sat on the files prepared by the EFCC on the governors, likely using them to keep the governors in line, much as Kibaki's government must have used the Kroll report to discipline Moi's loyalists. So Ribadu bided his time and built his institution.

6.6.2.6 Legal and Judicial Challenges

In 2007, amendments to ACECA saw to the introduction of a new sub-section which in effect significantly curtails KACC'S investigative process. Through the Miscellaneous Amendment Statute 2007, a new Section (Section 25A) was introduced and became known as the 'Amnesty Clause'. The Section gives power to the Minster, Attorney General and KACC Director to determine whether to terminate or continue investigations on cases already instituted. Since this far-reaching substantive amendment was buried in numerous other amendments to various Acts, proper scrutiny was subverted.

In the same context, Section 56B was introduced giving KACC the legal authority to negotiate a settlement with persons against whom it intends to bring or has already brought a civil claim or application in court. The unclear process of approving this amendment led to accusations of the entrenchment of impunity.[80] The Judiciary also presents a profound challenge in the enforcement of anti-corruption laws generally. The Commission has found itself on the receiving end of adverse judicial interpretation of its powers.

The first assault on the Commission was the Judiciary's interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65) with respect to offences committed before the ACECA came into force is still varied and the courts have not settled the law on the matter. Although Section 42(k) of Limitations of Actions Act has been introduced, it is unlikely to help the Commission in cases which were already before the courts before it was enacted. The court held in *Nairobi High Court Petition No. 199 and 200 of 2007 Deepak Kamani v. AG and Another* that citizens have freedom of movement and therefore Section 31 of ACECA is null and void as it impeded the citizen's right movement and was therefore inconsistent with Section 81 of the Constitution of Kenya.

Similar challenges were faced by the EFCC. The Nigerian political system does not yet sufficiently hold the president, governors and other important officer holders accountable. Experience shows that political immunity is at the heart of many of the corruption cases involving politicians in Nigeria. The former EFCC boss once stressed that while there are reasonable grounds for granting some degree of immunity to politicians, immunity, however, should only protect the office that the politicians hold and not the politicians. "Immunity cannot be a shield against justice and I hope that there would soon be constitutional opportunities through which immunity can be lifted for serious crimes such as abuse of power or gross mismanagement in office".[81]

In essence, high level public officials in Nigeria usually hide under constitutional technicality or immunity to shirk their constitutional obligation of declaration of assets, but encourage the Code of Conduct Bureau to hound low and the middle level civil servants for failing to declare their own. High political office holders flaunt their business companies and profit oriented universities in the face of all and sundry, but still preach the message of respecting the constitutional injunction against indulgence in acts of conflict of interest.

It was once observed that the systematic "lootocracy" will never stop while Section 308 of our 1999 Constitution, which grants blanket immunity to our 74 "Untouchables" exists – that is immunity from civil and criminal prosecution of the President, Vice-President, the 36 State Governors and the 36 Deputy-Governors. That is, the EFCC and Due Process notwithstanding, until and unless Section 308 is expunged from our Constitution, the President while protecting himself has no moral right to question the impropriety of the state governors, neither do the state governors have any right over the council chairmen. This mutual blackmail was not lost to the assemblymen of Plateau State when it refused to investigate Governor Dariye despite the president's prodding.[82]

6.6.2.7 Global Anti-Corruption Ratings

Prior to the emergence of the UNCAC, corruption in Kenya and Nigeria, as analysed in this study, flourished and eventually became endemic with poorly-developed, non-viable and weak institutional arrangements where colonially-imposed institutional arrangements, all of which were primarily "structures of exploitation, despotism, and degradation.[83]

Perceptions of the effectiveness and efficacy of the two agencies are reflected in Transparency International's Global Corruption Barometer survey results, although the reliability of these must not be overstated. In 2003, when the EFCC was in the process of being established, 38.6% of Nigerians surveyed believed that corruption was likely to decrease over the next three years, while 52.7% believed it would increase. The numbers worsened in 2004, the statistics fell to 27% and 61%, respectively. However, the proportions essentially reversed in 2005 and 2007 (the question was not included in the TI survey in 2006). In 2005, 36% expected corruption to increase in the next three years, while 51% expected it to decline. In 2007, the figures improved with 29% expecting an increase in corruption and 62% expecting a decline.

Kenya has been included in the TI surveys less consistently, so we have survey data only for 2004 and 2005, at a time Kenyan respondents also indicated a dramatic re-evaluation of the prospects for future corruption. In 2004, 40% expected it to increase, and 11% expected it to decrease, while in 2005 25% expected an increase and 50% a decline in the next three years. A more direct comparison is available for 2006, when TI included a specific question about the effectiveness of government's fight against corruption in its survey. A simple majority of Nigerians (52%) believed that

the government's fight against corruption was effective, while 45% saw it as being ineffective (or disingenuous). The proportions were reversed in Kenya, where 43% saw government's anti-corruption campaign as effective and 56% believed it to be ineffective (or disingenuous). These are not significant differences. In the 2007 survey, in which Kenya was not included, positive evaluations of anti-corruption efforts increased significantly in Nigeria, from 52% to 64.32%.

Similarly, there was sketchy indirect evidence indicating modest improvement in the war against corruption in Nigeria and no change in Kenya.[84] In 2003, Kibaki's first year in office which was the year that both anti-corruption agencies were finding their feet, Nigeria ranked 132nd out of 133 countries on the index, while Kenya ranked 122nd. Consistent with the Global Corruption Barometer findings above, there was little change in either country throughout 2005.

But in 2006, Nigeria and Kenya tied for 142nd out of 158 countries, and Nigeria then moved ahead in 2007 being ranked 143rd of 180, with Kenya slightly behind at 150th. The gap widened in 2008, with Nigeria ranked 121st out of 180, and Kenya 147th. Nigeria's rise from the rear in 2000 to the thirty-third percentile in 2008, and from an index of 1.2 to 2.7 (out of a possible 10), was notable if hardly revolutionary. Kenya's index score was 2.1 in 2000 and 2008.

6.7 Comparative Analysis of the Success and Failure Rates of UNCAC's Inspired Anti-Corruption Strategies of the Kenya and Nigeria's Anti-Corruption Agencies

It is evident from the foregoing that in one way or the other performance and effectiveness of anti-corruption strategies were hampered by some inherent factors in Kenya and Nigeria. But that notwithstanding, success and failure have been recorded via the UNCAC inspiration in Nigeria than Kenya.

In Kenya, within the period covered in this study, the KACC was inhibited under the new 'national unity' government. Where the EFCC had a clear strategy of building dossiers and in the process creating public interest and support, the KACC continues to respond only to reports received, to move at a snail's pace, and seems to have entered a vicious circle while the EFCC established something of a virtuous one. The lack of progress and failure to even talk tough on grand corruption undermines the KACC's ability to build institutional capacity and to draw support externally or internally, while its continued marginalisation by political interests undermines its

ability to win legal reforms that might give it more autonomy. Each of these failures has negative effects on the others.

The KACC reached its full operating capacity of 270 staff only in 2007, four years after its establishment.[85] The staff size is small, but not disproportionately so compared with Nigeria, which has a population four times that of Kenya and a much larger political class as a result of its federal structure. However, there is no indication that the KACC staff have received significant training or developed a sense of mission. In June 2008, it fired three of its own staff for corruption.[86] Local media response to Ringera and the KACC contrasts sharply with that to Ribadu and the EFCC. While most coverage in Nigeria celebrated Ribadu and the EFCC, there was a significant minority that rejected what it saw as his willing instrumentalisation by Obasanjo administration. But all agreed that his EFCC was doing something. In Kenya, the majority decried the lack of success of Ringera and the KACC, some questioning his integrity, others seeing him as a victim of the political elite, but all agreeing that the KACC is not really doing anything.[87] Where Ribadu was successful in winning legal reforms, including the designation of special judges to handle EFCC cases that reinforced his prosecutorial powers, Ringera had no such success, failing in his bid to win prosecutorial powers for the KACC and barely surviving a parliamentary move to limit its mandate to crimes committed since its creation, which would have excluded the Goldenberg and Anglo Leasing cases.

Similarly, the KACC was unable to build a network of international financial, investigative and/or moral support. Total receipts from foreign donors remain under $500,000, with $9 million that had been allocated by the US and Germany withdrawn early 2005 in response to its failure to establish itself as a credible institution capable of standing up to the political elite.[88] Investigative cooperation, along the lines pioneered by the EFCC, has been blocked by the Kenyan courts, reflecting both KACC's political marginalisation and the absence of autonomy that flows from its lack of independent prosecutorial powers. Ringera has decried the fact that 'foreign governments and agencies are ready and willing to assist (KACC investigations) but our courts have put a lid on such investigations', even after 'foreign agencies swung into action in Switzerland, the United Kingdom and Spain at the request of KACC'.[89] But he has taken no concrete action to increase his room for manoeuvre. Perhaps for this reason above all others, potential local partners have distanced themselves from what they see as an ineffectual anti-corruption institution at best and a facilitator of

corruption at worst. The Kenyan Human Rights Commission has gone so far as actually to target the KACC as part of its public accountability campaign.

All of this made it quite easy for government officials in Kenya to close ranks and marginalise the KACC. Even those who criticise recent moves to undermine it conclude that the KACC has proved ineffective and susceptible to politicisation, and should be scrapped in favour of some other institutional approach to the problem of corruption.[90] At the end of May 2008, the KACC had hundreds of cases pending, but only thirty-seven convictions, with no 'big fish', and had recovered less than $5 million in illicitly acquired property and cash.[91] Whereas in Nigeria, about the same period, the EFCC made more than 2,000 arrests, 2,103 cases under investigation, 306 cases under prosecution, convicted more than 88 persons[92] and recovered more than $5 billion in assets and cash.[93]

6.8 The Implications of the UNCAC Induced Strategies for Anti-Corruption Agencies in Kenya and Nigeria

The UNCAC represents a crucial step in building an international framework to combat corruption. In today's global economy, corruption has become a worldwide phenomenon making it essential to have an international convention that binds all countries. Because of its universal reach, UNCAC makes it possible to tackle problems that cannot be addressed through existing regional conventions.

Evidently, this recent development portends some implicit and explicit implications for strategies anti-corruption of Kenya and Nigeria. Some of these implications are discussed in this section.

6.8.1 Political Implication

The political implication for anti-corruption strategies in Kenya and Nigeria is a huge one and intertwined for KACC and EFCC. First and foremost, the agencies of both countries cannot afford to downplay the importance of war against corruption, even if they are unwilling, they must pretend to be fighting against this public menace. Achievable international relations measures of both agencies will partly depend on whether they have put their internal fronts in order in terms of anti-corruption strategies. For instance, the United Kingdom has continued to help both countries' agencies to investigate and deal with alleged corruption through the courts – especially where money has flowed through United Kingdom jurisdictions. By extension, it also

means that member countries of the UNCAC are now in a better position to review the performance of one another using good governance as the yardstick.

By the same token, both countries have embarked on series of political and administrative reforms to reflect the new global realities of corruption championed the anti-corruption agencies. To be sure, more than ever before, through the Public Officer Ethics Act 2003, Kenyan government abolished Harambee in Government offices, proscribed public servants from engaging in Harambee by administrative fiat, and the immediate end of 'land-grabbing' and promotion of transparent effective systems of public procurement and public finance management. Again, the recent trend in the Nigeria's bureaucracy has been the promotion of integrity, honesty and responsibility among public officials, seeking technical assistance to re-invigorate codes of conduct and systems for preventing conflict of interest, introduction of financial transparency and accountability to public funds, and introduction of reforms to election procedures. The salutary development is that these anti-corruption strategies are constantly evaluated. The continental review mechanism has been introduced by the NEPAD's African Peer Review Mechanism (APRM) commitment to good governance. The implication of all of these is that Kenyan and Nigerian anti-corruption agencies can no longer hide under any pretext not to continue to embark on anti-corruption strategies because the issue of corruption is beyond local jurisdiction.

On the part of the citizens, the emerging trend is that there is no more hiding place for any corrupt person(s), wherever such person(s) run into in any part of the world, the long arm of anti-corruption law will reach them. Once a victim state has a *prima facie* case against the person(s) who have perpetuated a crime in any of the areas of international corruption, it becomes imperative to make the concerned states in which the money may have been transferred aware of the investigation and particularly of the desirability of cooperation on the matter. Such matters are nearly always dealt with confidentially and undertaken by anti-corruption agencies in collaboration with other related agencies.

6.8.2 Legal Implication

Despite the fact that both countries have not domesticated the UNCAC, they have undertaken series of legal reforms to reflect the realities of the UNCAC. For instance, Kenya has developed a series of legal instruments as the enactment of the foundational legislation to fight corruption – The Anti-Corruption and Economic Crimes Act, 2003 and The Public Officer Ethics Act, 2003. This is a ground-breaking

innovation in the quest to fight corruption in Kenya. Nigeria has embarked on several legislative agenda to bridge the gaps in the implementation of the UNCAC. The Freedom of Information Bill (recently signed into law), while the Non-Conviction Based Asset Forfeiture Bill and the Anti-Terrorism Bill are pending before the National Assembly waiting for passage into law, and a working group was set up by the Ministry of Justice to draft a Witness Protection Bill in collaboration with other relevant agencies, to ensure protection for witnesses and whistle-blowers. In the studied history anti-corruption laws of both countries, it was revealed that most of these laws had not only been one-sided but their substance in terms of global significance cannot be reckoned with.

But now, varied domestic anti-corruption laws of both countries also have global interconnectedness and relevance. This is because there is a moral and legal imperative and burden imposed upon all states now to assist vulnerable states like Kenya and Nigeria break the symbiotic triangular relationship and interaction between their corrupt ruling elite classes, rogue multinationals corporations and the banking and financial institutions of foreign receiving nations. Hence:

> There are enough bases in international law and practice to assert that stolen national funds can be traced across the entire globe and the monies involved returned to the victim state. The principles of criminal jurisdiction are sufficiently elaborate and permissive to give victim states and receiving states the powers of 'jurisfaction' and 'jurisaction' to cope with those persons and corporations that engage in the peddling of noxious funds. This is however, not to say that the law is close to perfect. The various national laws, regional treaties and international treaties addressing the problem of corruption in international business have significant blind spots that may make prosecution difficult and/or repatriation of stolen funds. The *UNCAC* is an important treaty with the potential of preventing many of the problems…[94]

Moreover, vigorous prosecution of corrupt public officials, especially, the so- called "heavyweights" in both countries as it was never done before is the fallout of the global intolerance for corruption in the context of the UNCAC. The implication of this is that the anti-corruption agencies have no choice than to investigate and prosecute highly placed public officials if found liable. If they refuse or pretend to do so, it will definitely mar their anti-corruption efforts and attract public criticisms. This may also jeopardise their ties with international bodies in their nation-building efforts. For

instance, following the release of the Githongo report, Justice and Constitutional Affairs Minister Kiraitu Murungi and his counterpart in the finance ministry, David Mwiraria, resigned - and the Parliamentary Accounts Committee issued a report recommending urgent investigation and prosecution of those implicated in the scam.[95] Part of these implications is radical surgery on the judiciary where 50% of Judges in the Court of Appeal, 50% of Judges in the High Court and 50% of the Magistracy were removed through the Ringera Committee. In fact, the criticism of non-granting of prosecutorial power to the KACC is also part of the direct challenges posed by the UNCAC to anti-corruption efforts in Kenya.

Likewise in Nigeria, there have been a number of high profile convictions, many advance fee fraud ("419") kingpins have been detained and convicted. Again, several judges have been sacked and others suspended, while several legislators have lost their legislative posts and others being prosecuted, some ministers have been dismissed. More importantly, a former Inspector General of Police, the top law enforcement official in the country was tried, convicted and jailed for corruption, and three former state governors have been impeached by their state assemblies for corruption. EFCC investigations have made good use of the monthly revenue share publications earlier discussed above, highlighting the importance of information and transparency in the fight against corruption.

As a matter of fact, the EFCC and ICPC are seriously making efforts in removing the concept of the untouchable "big man" in Nigeria and in re-establishing the rule of law for all. Overall, as at 2007, over 350 persons were arraigned and more than 145 convicted while over N725 billion or assets worth over $5 billion have been seized, confiscated and refunded and returned to the state and various victims of crime.[96] This was unprecedented in the history of anti-corruption war in Nigeria, notwithstanding the political dimension that later ensued.

6.8.3 Economic Implication

Now, people are very familiar with the negative consequences of corruption on any nation's economy. Given this negative relationship, international financial institutions and developed aid-given countries have now taken it as their responsibilities to make sure that aid money and internal resources are used for the intended purposes. In deciding how to provide assistance to developing country partners as regards debt rescheduling or cancellation, one of such principles that guide their responsiveness is upholding international obligations, commitment to improving

public financial management, promote good governance and transparency, and the fight against corruption. The fight against corruption is being intensified and public financial reforms are making a difference while a recent assessment of 26 Heavily Indebted Poor Countries (HIPC) shows that improvement is possible. For example, twice as many countries now produce expenditure reports showing how they are using their resources which reduce the risk of funds being misused. In short, corruption has now become a central part of developed countries' discussions with developing countries governments when agreeing and reviewing Country Assistance Plans, while the assessment their partners' commitment and actions to reduce corruption when deciding how to provide aid and what safeguards are required.

Nigeria was at the bottom of the Transparency International Corruption Perceptions Index before 2003. But with willing political leadership and help from its international partners, the country has inched its way up the ladder. Unlike before, revenue allocations to the country's 36 states and 774 local governments have been made public since 2004, so people could see how much money their government has to spend. The National Assembly has been considering new laws to strengthen budget controls and public contracting. The EITI in Nigeria is helping track the production of oil and gas and the public revenues it generates. The lack of transparency in the Nigerian oil and gas sector, particularly under previous military administrations, also presented a major challenge for economic governance. In 2003, Nigeria was among the first countries to adopt the Extractive Industries Transparency Initiative (EITI) to help improve governance of the sector. President Obasanjo personally enrolled the country in the initiative. One of the key acts of the EITI aimed at improving transparency was to commission an independent audit of the oil and gas sector from 1999 to 2004. This was an unprecedented exercise domestically, and Nigeria was the first country in the EITI initiative to commit itself to such an undertaking. The audit presented a number of instructive findings. Overall, 99.8 percent of revenues in the sector were accounted for. About 0.02 percent of aggregate revenue was unaccounted for, although this remains within the conventional margin of error for such audits.[97] However, the audit showed a history of poor data keeping. In the financial audit, only minor disparities were observed between revenues that oil companies reported as paid and the actual amounts received by the central bank. Although, challenges remain, particularly in making information on government spending more widely available –progress is being made. Above all, despite existing challenges, recent governance reforms appear to

have yielded some concrete results. Recent survey data from Kaufman et al[98] indicates that there has been a steady reduction in the perception of corruption by Nigerian firms in obtaining trade permits, in paying taxes, in procurement, in the judiciary, in the leakage of public funds, and in money laundering.

6.8.4 Social Implication

It has been argued elsewhere that "Africa's prospects for democracy depend critically on whether state elites can establish a reputation for probity and honesty in the eyes of ordinary people."[99] In essence, now that every segment of the society is well informed about all the negativities associated with corruption and at the same time prepared to make sacrifices, strategies of anti-corruption agencies in both countries must be seeing to follow the paths that will exude people's confidence and reinforce governments' legitimacy. Efforts of the youths are noticeable in this direction. The involvement of youths in the fight against corruption has been to bring in new and fresh ideas that can replace older and out-of-date policies. The digital social networkings in terms of "facebook", "twitter", "YouTube" and host of others via the internet have been the veritable tools to expose corruption.

Also, since the emergence of the UNCAC, civil societies locally and internationally have seriously engaged and continued to monitor the execution of anti-corruption strategies embarked upon by the KACC and EFCC. The TI Kenya and Nigeria, the Mars Group in Kenya and host of others have been directly involved in the evaluation of anti-corruption strategies in both countries.[100] Therefore, the serious involvement of the civil society groups, grassroots organisations and the media in generating public debate about corruption, by campaigning against it and demanding for concrete action against high profile corruption cases have serious implication for anti-corruption strategies in Kenya and Nigeria; and failure to respond is likely to undermine the legitimacy of such government domestically and internationally.

6.9 Conclusion

Given the importance and relevance of this chapter, we have extensively dwelled on comparative analysis of the strategies of Kenya and Nigeria's anti-corruption agencies revealing the extent to which the UNCAC has inspired anti-corruption strategies of the KACC and EFCC. From the analysis of the provisions of the Convention, one can say that it generally prescribes measures that are primarily aimed at the prevention and criminalisation of corruption, and mutual legal assistance,

as well as recovery of assets. The Convention is thus commendable in many respects and researchers have extrapolated its many benefits in this direction.[101]

Kenya and Nigeria's decision to join the growing trend of combating corruption by signing and adopting the UNCAC is a remarkable step. It was noted that in both countries, remarkable attempts were geared towards compliance and implementation of the UNCAC but hampered mainly by the inability of the countries to domesticate aspects that do not coincide with the domestic laws of both countries. Therefore, concrete results in terms of compliance and implementation require strong commitment to domestication, clarification of obligations, and proper, harmonised, and consistent implementation and enforcement of the norms set forth under the Convention.

The foregoing has serious political, legal, economic and social implications within the content and context of anti-corruption initiatives in Kenya and Nigeria. It is our conviction that the trends and issues of corruption are now beyond local jurisdictions and that whether both countries like it or not, towing the line of the UNCAC is the beginning of wisdom. This is because any country that fails to put in place necessary anti-corruption initiatives and seeing to their implementation will not only be left out in the global scheme of things, but will always be treated as a pariah state. At best, any sub-Saharan African country that wants to be or remains relevant in the international community must not only be striving to curb corruption through anti-corruption initiatives, but must also be seen to be implementing them.

END NOTES

[1] Patton, M.Q. 1987. *How to use qualitative methods in evaluation*. London: Sage, p.11

[2] A structured interview was conducted with Mr. Nicholas Simani and others of Kenya Anti-Corruption Commission (KACC) to elicit relevant information by the researcher at Integrity Centre, Nairobi, Kenya on the 18th August, 2009.

[3] The structured interview was conducted with Mr. Mwangi Kibathi of Transparency International, Kenya in the company of others to elicit relevant information by the researcher at A.C.K. Garden House, Ngong, Kenya on the, 19th August, 2009.

[4] A structured interview was conducted by the researcher with Mwalimu Mati of Mars Group, Kenya on 21st August 2009 to elicit relevant information.

[5] For instance Mr. Mwangi Kibathi of TI Kenya and others were of the opinion that: *"We in TI, Kenya see corruption as prevalent in Kenya" and that "Corruption is still very high in public sector in Kenya",* when asked whether corruption is widespread and its level in public sector in Kenya in the interview conducted in Kenya on the 19th August, 2009.

So also, Mr. Mwalimu Mati of the Mars Group when he stated *inter alia* that: *...I believe that corruption in Kenya is akin to a terminal cancer that has become malignant, and the government doctors attending the patient are administering placebo treatment, allowing the cancer to spread institution by institution."* (Excerpt from the interview conducted in Kenya on 21st August 2009).

Mr. Nicholas Simani of the KACC also expressed the same opinion when he stated that: *"Corruption is perceived to be widespread"* and that *"The level of corruption in the public sector in Kenya is on the high side."* (Excerpt from the interview conducted in Kenya on 18th August, 2009).

[6] A structured telephone interview was conducted with Mr. Kola Williams, Director-General, Economic and Financial Crimes Commission (EFCC) to elicit relevant information by the researcher on October 22nd, 2009.

[7] A structured interview was conducted via the telephone with Professor Assisi Asobie, former President of TI Nigeria and the Chairman, NEITI, also corroborated this in an interview granted me on the 24th March, 2009, although he reiterated the need to domesticate the UNCAC in Nigeria.

[8] The telephone interview was conducted with Scorpion Bode Olawoye, ACAON State Director, Ondo state on November 12, 2007.

[9] Mr. Kola Williams of the EFCC stated that: *"The level of corruption in the public sector in Nigeria is still, but we are up to the task."* (Excerpt from the telephone interview conducted in Nigeria on 22nd October, 2009).

[10] Professor Assisi Asobie, former President Transparency, Nigeria and Chairman Strategy Work Group (SWG) of the Nigeria Extractive Industries Transparency Initiative (NEITI) stated that: *"Corruption is still common in public sector" and "It is very high."* (Excerpt from the telephone interview conducted in Nigeria on the 24th March, 2009).

[11] Mr. Mwangi Kibathi of TI Kenya expressed his reservation on the renewed anti-corruption initiatives in Kenya by stating this in the conducted interview: …"*the effects of these anti-corruption bodies are still marginal given the various reports of independent anti-corruption bodies. For instance, Kenya remains the most corruption country in East Africa based on the based on recent TI Kenya regional reports on anti-corruption initiatives. But this may as a result of some impediments like no-prosecutorial power of the KACC, non-domestication of the major provisions of the UNCAC, impunity and lack of political will."* (Excerpt from the interview conducted in Kenya on 19th August, 2009).

[12] According to Mr. Mwalimu Mati "… *You find it hard to think of ministries without scandals. KACC is not blameless. It purports to be frustrated in its worldwide search for suspects in the Anglo Leasing scandal yet their whereabouts and assets are notoriously unhidden. Nothing has come of its asset tracing and recovery push…"* (Excerpt from the interview conducted in Kenya on 21st August 2009).

[13] Mr. Mwangi Kibathi of Transparency International, Kenya. Op. cit.

[14] Mr. Kola Williams of the EFCC. Op cit.

[15] Africa Centre for Open Governance 2009. How effective is the KACC in the fight against corruption? Retrieved Feb. 17, 2010 from http://www.africog.org

[16] Mr. Mwangi Kibathi of Transparency International, Kenya. Op. cit.

[17] According to Scp. Bode Olawoye "…there have been hue and cries about the corruption allegations levied against our present and former *rulers which the EFCC and other anti-corruption bodies are competent to investigate but refused… only God knows why… May be the fear of unknown…"* (Excerpt from the interview conducted on November 12, 2007).

[18] Human Rights Watch 2011. Interview with Festus Keyamo, Lagos, February 21. Retrieved Feb. 17, 2010 from http://www.africog.org

[19] Mr. Mwangi Kibathi of Transparency International, Kenya. Op. cit.
[20] Mr. Nicholas Simani of the KACC: "To a very large extent the UNCAC has helped. At least it has given the anti-corruption initiatives in Kenya a focus through technical support and the rest". (Excerpt from the interview conducted in Kenya on 18th August, 2009).
[21] Human Rights Watch. 2011. Nigeria: Corruption on trial? The record of Nigeria's economic and financial crimes commission. Retrieved June 24, 2012, from http://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf.
[22] On whether the emergence of the UNCAC has been able to give leverage to the anti-corruption initiatives and its gains in Kenya, all the interviewees' responses were positive but needs improvements. Mr. Mwangi Kibathi of TI Kenya: "*…the Kenyan government has started putting in place some anti-corruption measures in line with the provisions of the UNCAC... Anyway, to my mind, the UNCAC has given direction and may intensify the anti-corruption initiatives in Kenya".* (Excerpt from the interview conducted in Kenya on 19th August, 2009).
[23] According to Mr. Kola Williams of the EFCC: *"Like I said, Nigeria now has indices to judge its anti-corruption strategies whether they conforming to international standard or not. The UNCAC is now a centre of attention for every country that is genuinely ready to fight corruption." "There is no doubt that the UNCAC has rubbed off on our fight against corruption in EFCC, especially its adoption, although marginal, has helped to recover some public assets stashed away in foreign land. It has given our anti-corruption initiatives a new direction and has helped in the area of international cooperation on anti-corruption efforts. But we are still facing some impediments to recover large chunk of stolen assets. But if the UNCAC is properly domesticated we will surmount majority of these impediments."* (Excerpt from the telephone interview conducted in Nigeria on 22nd October, 2009).
[24] Mr. Mwalimu Mati of the Mars Group: "To be honest with you, although the main objective of the UNCAC is commendable, but I don't think Kenya government and the KACC are serious with fighting corruption … But the public is being more vigilant and civil society groups are more determined than ever before to take on government and its agencies on anti-corruption issues because of the role accorded it by the UNCAC." (Excerpt from the interview conducted in Kenya on 21st August 2009).
[25] According Professor Assisi Asobie: *"The UNCAC has done a lot despite its non-domestication. For instance, all what we are doing at the NEITI is in line with the UNCAC…" "The positive impact of the UNCAC is salutary. For instance, the implementation of EITI has resulted in the recovery of much revenue for the government and discovery of new money to be recovered. It has also contributed to the improvement of global perception of Nigeria as country beset by corruption."*
[26] According Professor Assisi Asobie: "*…the issue of implementation and domestication of the UNCAC should be taken seriously so as not to impede the tempo of the renewed anti-corruption initiatives. If taken seriously, the challenges of immunity granted by the constitution to political office holders, inadequate of anti-corruption agencies and delay in the prosecution of indicted political officials through court processes will be surmounted."* (Excerpt from the telephone interview conducted in Nigeria on the 24th March, 2009).
[27] See United Nations Office on Drugs and Crime (UNODC). Signatories to the United Nations convention against corruption. Retrieved Jan. 24, 2008, from http://www.unodc/en/contact-us.html
[28]United Nations Office on Drugs and Crime (UNODC) 2004. Signatories to the United Nations convention against corruption. Retrieved Jan. 24, 2008, from http://www.unodc/en/contact-us.html
[29] (a) to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery; and (c) to promote integrity, accountability and proper management of public affairs and public property. United Nations Information Service (UNIS). 2004. United Nations convention against corruption. Fact Sheet /CP/484. Retrieved June 16, 2009**,** from http://www.unis.unvienna.org.
[30] United Nations Information Service (UNIS) 2004. United Nations convention against corruption. Fact Sheet /CP/484 10 May. Retrieved Jan. 24, 2008, from http://www.unis.unvienna.org.
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[31] Schultz, J. 2007. Op. cit.
[32] United Nations Office on Drugs and Crime (UNODC): Signatories to the United Nations convention against corruption. Retrieved Jan. 24, 2008, http://www.unodc/en/contact-us.html
[33] Ibid.
[34] Mutonyi, J. 2002. Fighting corruption: Is Kenya on the right track?' *Police, Practice and Research* 3: 21-39.
[35] See also Articles 8(5), and 12(2) (e), UNCAC.

[36] The preamble states that it is "an Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters."
[37] Okonjo-Iweala, N. and Osafo-Kwaako, P. 2007. Nigeria's economic reforms: progress and challenges. Global economy and development program. Washington D C: The Brookings Institution, March.
[38] Ibid.
[39] Matlhare, B. 2006. An evaluation of the role of the Directorate on Corruption and Economic Crime (DCEC). Dissertation for the award of a Master degree in Public Administration in the School of Government, Faculty of Economic and Management Sciences, University of the Western Cape.
[40] Ekeanyanwu, L.2006. Women to the rescue in the accountability processes-case study Nigeria. Retrieved April 12 2009, from, http://www.google.com/search?q=cache:duc8XgSfulMJ:www.12iacc.org/archivos/ws_2.2lilianekeanyanwu
[41] See Section 46 of the Anti-Corruption and Economic Crimes Act, 2003.

[42] The ICPC Act definition of corruption in section 2 and other sections has been severely criticised as vague and scanty by Paul D. Ocheje, 2001. Law and social Change. A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000. *Journal of African Law, (45): 2* 173 – 195.
[43] Section 46 of the EFCC Establishment Act 2004. This wide range of enumeration of offences has been criticized, among other over-reaching provisions of the Act.
[44] See United Nations Convention Against Corruption 2003. Retrieved Feb 12, 2009, from http://en.wikipedia.org/wiki/United_Nations_against_Corruption
[45] See Section 45 of the Anti-Corruption and Economic Crimes Act, 2003.
[46] Section 101 states as follows: '(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour. (2) If the act is done or directed to be done for the purposes of gain, he is guilty of a felony and is liable to imprisonment for three years. (3) A prosecution for any offence under this section or either sections 99 and 100 shall not be instituted except by or with the sanction of the Attorney General.'
[47] See Economic and Financial Crimes Commission Act 2004.
[48] Kichana, P. 2006. Country review of legal and practical challenges to the domestication of the anti-corruption conventions. Transparency International Kenya. Retrieved June 16, 2008, from http://www.transparency.org
[49] See BBC News, October 10, 2002.
[50] Ribadu, N. 2006. Nigeria's struggle with corruption. A paper presented to US Congressional House Committee on International Development, Washington, DC on 18th May. Retrieved Feb 6, from, http://ippanigeria.org/efcc.pdf.
[51] United Nations Convention against Corruption (UNCAC) 2003. Adopted by the General Assembly by resolution 58/4 of 31 October. 2003.
[52] See Section 24 of the Anti-Corruption Law of 2000.
[53] Sections 109 and 62 respectively of the Constitution of Kenya.
[54] Section 153(1) of the 1999 Constitution of Nigeria
[55] See Section 64 Corrupt practices and other related offences Act 2000.
[56] Ekeanyanwu, L. 2006. Review of legal and political challenges to the domestication of the anti-corruption conventions in Nigeria." Lagos: Transparency International, Nigeria\ Zero Corruption Coalition, March.
[57] Zero Tolerance. http://www.efccnigeria.org/index.php?option=com_docman&task=doc_view&gid=8.
[58] Section 6 Corrupt Practices and other Related Offences Act 2000.
[59] The section states that "Conduct by a citizen of Kenya that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence under this Act if it took place in Kenya."
[60] Section 67, Kenya Anti-Corruption and Economic Crimes Act.
[61] Wikipedia, the Free Encyclopedia. 2009. United Nations Against Corruption. Retrieved Feb. 16, 2009, from http://en.wkipedia.org/wiki/International_asset_recovery
[62] See GTZ article on Asset Recovery. Retrieved Feb. 16, 2009, from http://en.wkipedia.org/wiki/International_asset_recovery
[63] Ekeanyanwu, L. 2006. Op. cit.

[64] Chêne, M., 2010, *International good practice in anti-corruption legislation*, Transparency International/U4. Retrieved July 20, 2011 from http://www.u4.no/helpdesk/helpdesk/query.cfm?id=233

[65] The World Bank and International Monetary Fund suspended aid to Kenya in 1997 over corruption concerns. They agreed to reinitiate aid in 2000, citing progress on corruption, but then suspended it again the next year after the parliament rejected a bill, allegedly drafted by the Bretton Woods Institutions, intended to reinvigorate the Kenya Anti-Corruption Authority (KACA) (*BBC News* 17.8.2001). President Kibaki held meetings with IMF officials within weeks of assuming office, and announced that the IMF would seek an early engagement with Kenya (*BBC News*, 16th Jan.2003). In British Broadcasting Corporation (BBC). 2003. News, 23rd July. In July 2003, World Bank President James Wolfensohn praised anti-corruption efforts under Kibaki and announced that the Bank was 'ready to resume (lending) and anxious to do so' In November, the IMF unfroze aid to Kenya and British Broadcasting Corporation (BBC). 2003. News, 22nd Nov. approved a $250 million loan. British Broadcasting Corporation (BBC). 2004. News, 15th July. The next month, the government of Kenya granted former President Moi immunity from prosecution on corruption charges, despite allegations that he absconded with billions of dollars during his tenure. In July 2004, Sir Edward Clay, British High Commissioner to Kenya, claimed that officials of the Kibaki government were behaving 'like gluttons' and 'vomiting on the shoes' of donors.
British Broadcasting Corporation (BBC). 2005. News, 3rd Feb. In the aftermath, Clay said that he regretted three things: 'Not speaking out much earlier than July; underestimating the scale of the looting afoot; and the moderation of the language I used then: that was clearly inexcusably polite in relation to what we see going on.'
British Broadcasting Corporation (BBC). 2005. News, 13th April, Much of the renewed aid promised in 2003 remained undelivered, as corruption soared before it could be delivered.

[66]It includes a retired police officer, a legal practitioner, a retired judge, a retired public servant, a woman, a youth between the ages of twenty-one and thirty, and an accountant.

[67]Its membership includes a full-time chairman and a secretary, and part-time members representing the Central Bank, Foreign Affairs, Finance, and Justice, the Drug Law Enforcement Agency, National Intelligence, State Security, Security and Exchange Commission, Deposit Insurance Corporation, Insurance, Postal Services, Customs, Immigration, and Police, as well as four 'eminent Nigerians' with experience in finance, banking or accounting. Retrieved June 16, 2009 from www.efccnigeria.org

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[69] (Githongo 2005; Kenya 2005)

[70] Kenya Anti-Corruption Commission (*KACC).* 2006. *Quarterly Report*, October–December.

[71] The EFCC targeted Atiku Abubakar directly, and tried unsuccessfully to have those against whom it had evidence of corruption disqualified from the 2007 parliamentary and president elections.

[72] *Daily Champion*. 2006.13th , February.

[73] British Broadcasting Corporation (BBC) News. 2006. 16th , October.

[74] Financial Times. 2007. 12th , December.

[75] Africa Centre for Open Governance (AfriCOG) Report. 2009. Five years on: How effective is the KACC's in the Kenya's fight against corruption? December. Retrieved August 16, 2009 from http://publications.marsgroupkenya.org/pubs/GAP3_Report_Web_Version.pdf

[76]*allafrica.com* 18th April, 2007

[77] *Daily Trust* 3rd Sept., 2007.

[78] *Daily Trust* 25th Feb., 2008.

[79] World Bank, 2007. 'Close-up on Nigeria's corruption fighter. Retrieved August 16, 2009 from http://web.worldbank.org/ WBSITE/ EXTERNAL/ NEWS/0, content MDK: 21288004 ypage PK:3470 ypiPK:34424y theSitePK:4607,00.html.

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[81] Nigerian Tribune. 2007. Corruption and Nigeria's democracy. May 21.

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[84] (TI CPI 2003–2008).
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[86] *Business Daily.* 2008. 12th June.
[87] A typical press report begins: 'The beleaguered Kenya Anti-Corruption Commission', devotes half the story to the news – KACC intervention in a port development deal – and the other half to the myriad shortcomings of the organisation (*East African*, 9th October, 2007).
[88] Kenya Anti-Corruption Commission (*KACC). Annual Report* 2005–6.
[89] *Business Daily*.2008. 12th .June
[90] *Business Daily.* 2007. 17th. Sept.
[91] Kenya Anti-Corruption Commission (*KACC). Annual Report* 2006–7.This figure excludes the 'recovery' of the Grand Regency Hotel in April 2008, which was negotiated out of court and had been in the works for nearly 10 years. It was actually 'recovered' to cover Ksh 2.4 bn. the owner acknowledged owing to the Central Bank of Kenya, rather than as illicitly acquired property.
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[99] Bratton, M. 2004. Statebuilding and democratization in sub-Saharan Africa: Forwards, backwards, or together?" *Afrobarometer Working Paper No. 43.*
[100] In the interviews granted me on 19th and 21st August, 2009 by Messers Mwangi Kibathi of TI Kenya and Mwalimu Mati of Mars Group, it was confirmed that UNCAC has provided a platform for engagement of anti-corruption initiatives in Kenya. Also Professor Assisie Asobie of TI Nigeria also corroborated this in an interview granted me on the 24 March, 2009, although he reiterated the need to domesticate the UNCAC in Nigeria.
[101] See Babu, R. 2007. The United Nations convention against corruption: a critical review. Retrieved June 16, 2009, from http://new.gdnet.ws/fulltext/Babu_Corruption.pdf

CHAPTER SEVEN

PRESENTATION OF FINDINGS

7.1 Introduction

This study sets out to examine the anti-corruption strategies of KACC in Kenya and EFCC in Nigeria between 2004 and 2008 to determine the extent of implementation and compliance to UNCAC within the contingency theory and good governance framework. For the purpose of better understanding and in line with the objectives of this study, our findings on both agents' anti-corruption strategies in the context of the UNCAC are compared highlighting their similarities, differences, limitations and areas for further studies.

7.2 General Findings on the Similarities of the Operational Environment and Strategies of the KACC and EFCC

(i) The Antecedents of the Social, Political and Economic Environment: The environments in which the Kenya's KACC and Nigeria's EFCC operate are characterised by relatively complex social and political interests which affect their operations. Politics in each environment has been largely defined by competing patron-client networks operating along ethnic lines. While both countries of the anti-corruption agencies are economic and political powerhouses in their respective sub-regions.

(ii) Corruption Antecedents of Kenya and Nigeria: The countries in which the KACC and the EFCC operate have chequered histories of prevalent corruption since independence which usually keeps both agencies under pressure. Global Integrity rates anti-corruption laws 'very strong' and anti-corruption agencies 'strong' in both; and they were tied for 142nd (out of 180) in TI's 2006 Corruption Perception Index, when the effectiveness of their respective anti-corruption agencies began to be tested. Anti-corruption agencies' investigations of grand corruption in the two countries have involved the stealing of state resources by high-level government officials using comparable rent-seeking and money-laundering practices. The range of opportunities

for corruption is broader in Nigeria than in Kenya, given that Nigeria's main economic asset, that is petroleum, which is state-owned. However, the processes of converting public assets to private assets are largely the same. For instance, officials enter into government contracts with private companies for goods and services that are vastly over-priced, never delivered, or both. In some cases, such as that of the former Nigerian state governors, whose companies were owned by the officials or their families. Likewise, such as the Anglo Leasing contracts in Kenya, their companies were actual companies owned by private accomplices of government officials, who shared in the profits of the illicit activity.

(iii) Influencing Factors of Anti-corruption Strategies: Our findings show that most of the anti-corruption strategies put in place by laws and being implemented by the KACC and the EFCC were largely influenced by three main related factors.

First, in Kenya, the Kibaki government was elected first and foremost on the conviction that corruption would cease to be a way of life just like its Nigerian counterpart, Obasanjo government.

Second, government was motivated by the insistence of bi-lateral donors to ensure good governance and enact anti-corruption legislation as part of aid conditionalities; also in Nigeria, the drive towards debt cancellation sought by Nigeria from the international financial institutions played a crucial role in implementing its anti-corruption strategies championed by the KACC.

The third factor is the influence of the UNCAC which Kenya became the first country to sign and ratify, while in Nigeria the UNCAC indirectly influenced the EFCC's anti-corruption strategies not only because it signed and ratified it, but it was also faced with the challenge of repatriating billions of dollars stolen by Nigerian elites and stashed away in foreign banks.

(iv) Responses and Stages Attained in Anti-corruption Strategies by the KACC and EFCC: It was also discovered that aside legal, political, economic and civil responses, five linear stages constitute these responses (see Figure 6.1). These stages include official denial, provision of corruption evidence, admittance of prevalence of corruption and phony action, demands for concrete action and initiation of anti-corruption strategies.

At official denial stage, especially in the 1990s, it was common for the Kenyan and Nigerian governments to deny through government spokespersons that corruption was rife.

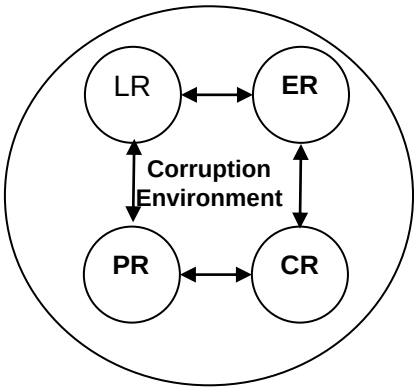
The next stage manifested in the provision of corruption evidence by international non-governmental organisations such as Transparency International (TI), civil society organisations and the private media and host of others. This was possible through the overabundance of comprehensive surveys that have documented the pervasiveness of corruption in Kenya and Nigeria. For instance, Kenya and Nigeria were at different periods in the 1990s rated as most corrupt countries in the world by the TI.

After confronted with overwhelming evidence, then there was eventual admittance in Kenya and Nigeria and other sub-Saharan African countries that corruption was indeed prevalent. This culminated into the establishment of various anti-corruption agencies and strategies which not only failed to curb corruption because of their insincerity and pretensions but were later became moribund.

This unacceptable situation led to the demands for concrete action. At this stage was the emergence of international anti-corruption policies and strategies such as the UNCAC that demanded for genuine efforts to curb corruption internationally and domestically.

The foregoing led to the initiation of various anti-corruption strategies in sub-Saharan African countries. Kenya established the KACC through the ACECA of 2003 while Nigeria set up the EFCC via the EFCC Act of 2003. Incidentally, this is the stage that this study tried to examine and drew relevant conclusion. Our findings reveal that Kenya and Nigeria were in this stage within the focused period, which is the hardest stage, where *inter alia* enactment and implementation of laws on anti-corruption, freedom of information, and the protection of whistle-blowers, followed by prosecutions, sanctions unfold (see Figure 6.2).

Figure 7.1. Responses to Corruption in Nigeria and Kenya



LR = Legal Response

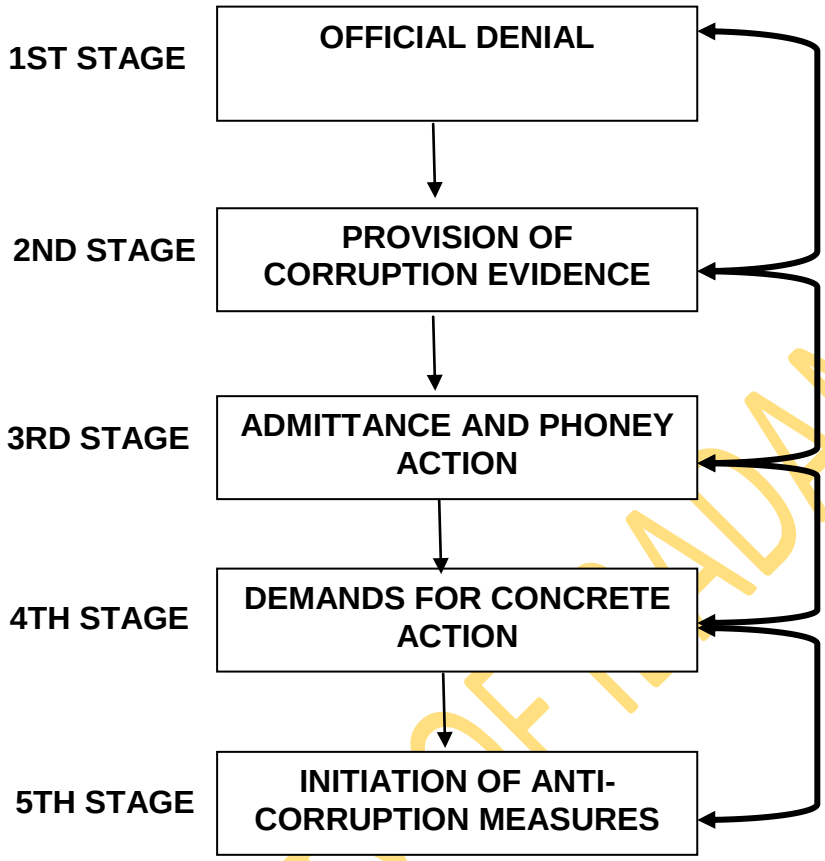
ER = Economic Response

PR = Political Repose

CR = Civil Response

Source: Researcher's Field Analysis, 2009

Figure 7.2. Stages in Responses to Curb Corruption in Kenya and Nigeria



Source: Researcher's Field Analysis, 2009

7.3 Specific Findings on the Similarities in the Anti-corruption Strategies of the KACC and EFCC

(i) Extent of Compliance and Implementation of the UNCAC: In this direction, Kenya and Nigeria to a large extent, have complied and implemented certain anti-corruption strategies in line with UNCAC. In the area of prevention, Kenya has enacted the Anti-Corruption and Economic Crimes Act 2003 (ACECA) to provide a legal framework to guide the prevention, investigation and punishment of corruption and economic crimes as prescribed by the UNCAC. This led to setting up of Anti-corruption courts, the enactment of the Public Officer Ethics Act 2003 to provide for a code of conduct and ethics for public officers. All these are to operate in line with the workings of the KACC, the major anti-corruption agency in Kenya. Likewise in Nigeria, the Economic and Financial Crimes Commission (Establishment Act) 2004 established the EFCC, as a leading anti-corruption and dedicated anti-corruption agency, with the mandate to prevent, investigate and prosecute corruption and other financial and economic related offences.

(ii) The Criminalisation of Corruption: Kenya has created criminal offences under the same ACECA in sections 38 to 50 that coincide with the provisions of article 15 of the UNCAC. The KACC is to ensure that the commission of such offences are investigated and brought to book. The offences range from usage of bribery agents to solicit for or receive bribery; bending or stretching the law to accommodate a person who has induced a bribe; bid rigging; and fraudulent acquisition of public property and revenue. Also, in Nigeria, offence of corruption is already criminalised but agency to see to the proper investigation and prosecution has been absent. However, the EFCC Act was a major departure from the past enabling laws for fighting economic and financial crimes in Nigeria, in terms of powers, functions and responsibilities. The Act lists and defines offences that are punishable or warrant prosecution. Section 46 of the EFCC Act 2004 coincides with Article 15 of the UNCAC.

(iii) Technical Assistance and Information Exchange: Both Kenya and Nigeria have made various bi-lateral co-operations on anti-corruption assistance and information exchange respectively through their anti-corruption agencies. The KACC has its own staff training programmes under which it facilitates refreshing the knowledge and expertise of its officers through exchange programmes with other developed countries. In Nigeria, the EFCC have various training institutes that are

supported technically by advanced countries. In fact, the EFCC has excellent working relationship with major Law Enforcement Agencies all over the world. These include the INTERPOL, the UK Metropolitan Police, Federal Bureau of Investigation (FBI), Canadian Mounted Police, the Scorpions of South Africa and others. The relationship with the FBI has been particularly special. This has manifested in the joint controlled delivery operations and investigations with officers of the US Postal Inspections Service, joint investigations and collaboration with the Resident Regional Agent of the United States Secret Service, Pretoria, South Africa, especially in cases of document and currency counterfeiting.

Table 7.1. Comparative Matrix Showing Corruption Antecedents and Similarities of the Strategies of Anti-Corruption Agencies of Kenya and Nigeria

Variables	Kenya and Nigeria
Antecedents of Social, Political and Economic Environment	Both countries have complex social and political interests; politics defined by competing patron-client networks; less aid-dependent than most countries in the region; economic and political powerhouses in their sub-region.
Corruption Antecedents	Global Integrity once rated anti-corruption laws 'very strong' and anti-corruption agencies 'strong' in both countries; they were tied for 142nd (out of 180) in TI's 2006 Corruption Perception Index; the stealing of state resources by high-level government officials using comparable rent-seeking and money-laundering practices were prevalent.
Influencing Factors of the Emergence of Anti-corruption Agencies	Presidential pledges to fight corruption in both countries, external driven anti-corruption strategies; and the influence of the UNCAC.
Responses and Stages Attained in Anti-corruption Initiatives	Both countries have responded to fight corruption via legal, political, economic and civil means; both also at the fifth stage of the anti-corruption responses through the activities of the KACC and the EFCC.
Compliance and Implementation of parts of the UNCAC provisions	In the areas of prevention, criminalisation and technical assistance, both countries via the KACC and the EFCC have significantly complied and implemented anti-corruption strategies in line with the UNCAC provisions.

Source: Author's Findings

7.4 General Findings on the Differences in the Anti-corruption Strategies of the KACC and EFCC

(i) Success Rates of Anti-Corruption Agencies: It was also found out that the EFCC was more successful in its efforts to curb corruption than the KACC. The struggle between political interests and the KACC was won by the politicians, while the EFCC in Nigeria made a surprisingly strong showing. The explanation for this lies in variations in the way the anti-corruption game has been played in the two countries. In Kenya, aside the fact that the KACC does not have prosecutionary power, but can only make recommendations to the Attorney-General, President Kibaki and his inner circle also marginalised the KACC, while the KACC leadership did little to improve its bargaining position vis-à-vis the political elite.

In Nigeria, former President, Olusegun Obasanjo, and his inner circle instrumentalised the EFCC, while the EFCC leadership under Nuhu Ribadu took a number of steps to strengthen its bargaining position vis-à-vis the political elite. The comparative analysis suggests that instrumentalisation rather than marginalisation is necessary but not sufficient for broadening the anti-corruption campaign over time, and that the anti-corruption agencies' own capacity building strategies are the critical factor facilitating a real, if still limited, assault on grand corruption.

(ii) Special Anti-Corruption Court: The UNCAC under article 6 is line with this requirement to ensure the existence of a body or bodies, as appropriate, which prevent corruption by such means as implementing the policies referred to in article 5. In line with this, the Anti-Corruption Court is an institutional arrangement that was set up to try those people investigated and accused of corruption by the KACC. The court is meant to ensure a fast track hearing of cases brought by the KACC via the Attorney-General. In essence, the special anti-corruption court has been in the forefront in complementing the KACC's efforts towards the eradication of corruption and ensuring that corruption cases are addressed expeditiously and effectively.

However, the Nigeria's EFCC lacks such anti-corruption to fast-track the prosecution of the persons accused of corrupt practices. What is obtainable is the presence of the conventional courts to try the offenders.

(iii) Prosecutorial Powers: Corruption prevention is the major purpose for the emergence of the UNCAC. And for corruption to be prevented, prosecution of offenders to serve as deterrence is essential. Article 6 requires anti-corruption agencies

to be given necessary independence to enable them carry out their functions effectively and to be free from any undue influence. Unfortunately, the operation of the KACC as its anti-corruption strategies has been put in precarious situation. In Kenya, the Attorney-General is the only office vested with powers under Section 26 of the Constitution to institute and undertakes proceedings against any person. Hence, the KACC can only investigate corruption charges and recommend to the Attorney-General for prosecution. Under Section 26(4), the Attorney-General may require the Commissioner of Police to investigate a matter that relates to any offence. The Anti-Corruption Act stipulates that in the performance of their functions the Director and investigators shall have all the powers of a police officer to arrest any person for and charge them with an offence. This power to charge suspects is a contradiction to Section 35 of the Act, which provides that the Commission's powers are no more than preparing a report and recommendations to the Attorney General.

However, in Nigeria, the Act that established the EFCC empowers it in line with the UNCAC framework. The EFCC, therefore, possesses prosecutorial powers to investigate and prosecute any person suspect of corrupt acts in the conventional courts.

(iv) Provision for the Protection of Witnesses: The Kenyan Government has made provision for the protection of witnesses. The Witness Protection Bill whose objective was to protect potential witnesses from those against whom they have adverse information and to allow them to testify without fear. Also, it makes provision for their protection after testimony, when their identity and location can be changed. The bill was geared towards the protection of witnesses in serious cases like fraud, terrorism and money laundering. The reverse is the case in Nigeria.

7.5 Specific Findings on the Differences in the Anti-corruption Strategies of the KACC and EFCC

(a) International Co-operation on Law Enforcement: For anti-corruption strategies to be successful, Articles 44 to 50 of the Convention which deal with international corruption and law enforcement have to be complied with and implemented. Kenya already has section 67 of the ACECA which states that conduct by a citizen of Kenya that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence under the Act. This is a very wide

provision because it only requires that the crime committed would be a crime under the Act and not necessarily identical or the same in the Act as in the foreign country.

In Nigeria, the criminal justice system in Nigeria does not contain provisions for such, and the EFCC Act has no provisions for mutual legal assistance and international co-operation in respect of the offences created under the Act. The Attorney-General and Minister for Justice has absolute powers to decide to prosecute a crime or stop prosecution by entering a *nolle prosequi.* But despite this, it must be noted that there were reported instances of the EFCC returning proceeds of crime to victims outside Nigeria than Kenya.

(b) Asset Recovery: The return of assets is a fundamental pillar of the UNCAC. Indeed, the agreement on asset recovery is considered a major breakthrough and may have been responsible for the signing of the UNCAC by many developing countries. Asset recovery is indeed a very important issue for many developing countries where high-level corruption has plundered the national wealth. Majority of the provisions in this area have been complied with in Kenya anti-corruption laws, for instance, the ACECA, but in practice there are still grey areas which call for adjustments and total compliance.

But in Nigeria, the EFCC Act has no provisions *per se* to facilitate asset recovery or transfer of proceeds of crime to other state parties. No provisions were made for the recovery of property through international co-operation and confiscation. Further, there are no provisions to permit other state parties to initiate civil proceedings to establish ownership of properties which are proceeds of crimes; compensation for damages to other state parties; and enabling the courts to recognise another state party's claim as a legitimate owner of a property acquired through an offence under these Acts. However, in spite of the absence of the asset recovery provision in the EFCC Act, the agency has been able to blaze the trail using the other anti-corruption laws to recover assets from corrupt public officials.

Table 7.2 Comparative Matrix Showing Differences in Anti-Corruption Strategies in Kenya and Nigeria in Line with some of the Specific Provisions of the UNCAC

Variables	**Kenya**	**Nigeria**
Success Rates of Anti-Corruption Agencies	Marginal	Significant
Special Anti-Corruption Court	Present	Absent
Level of Compliance and Implementation Rate of the UNCAC Provisions on: **International Co-operation on Law Enforcement**	Significant	Marginal
Level of Compliance and Implementation Rate of the UNCAC Provisions on: **Prosecutorial Powers**	Not Significant	Significant
Level of Compliance and Implementation Rate of the UNCAC Provisions on: **Asset Recovery**	Marginal	Significant
Level of Compliance and Implementation Rate of the UNCAC Provisions on: **Protection of Witnesses**	Significant	Not Significant
Level of Compliance and Implementation Rate of the UNCAC Provisions on: **Freedom of Information Law**	Not Significant	Not Significant

Source: Researcher's Findings, 2009

7.6 General Challenges Facing Strategies of Anti-Corruption Agencies in Kenya and Nigeria

While significant progress has been made towards improving on governance and the fight against corruption in the recent past in Kenya and Nigeria, through its anti-corruption like KACC and EFCC, there remain some general challenges which are common to agencies which should form the basis for the implementation of further reform measures.

(i) Inadequate Funding of Anti-Corruption Agencies

There have been capacity constraints, including limited manpower, financial and physical resources and technological capabilities of the anti-corruption agencies in the front-line of the war against corruption in Kenya and Nigeria. In an era of high technology crimes, corporate and bureaucratic corruption, it would be fatally erroneous to assume that one can fight a war of this magnitude without adequate provisions and funding. A comparison with foreign counterparts in the Western part of the world will show that the defence and security sectors of these nations receive priority attention of their and are usually the best equipped with state of the art technological equipment for investigation, database and up to date training of personnel. KACC and EFCC still trail significantly behind in this aspect.

(ii) Delay in Prosecuting Suspects and other related Issues

Efforts towards the fight against corruption have particularly experienced challenges in the area of prosecution the KACC and EFCC in line with the UNCAC. These challenges have adversely affected the realisation of zero-tolerance for corruption championed by these anti-corruption agencies from the constitutional challenges to the powers of the agencies to compel suspects to provide it with information required for investigation, lack of adequate capacity and effective co-ordination with other anti-corruption in the front-line of the war against corruption.

These include the office of the Attorney-General, the Judiciary and the KACC on the one hand and the office of the Minister for Justice and Attorney-General of the federation, the Judiciary, the EFCC and the ICPC on the other hand. Also, delays by suspects and their lawyers who have doggedly resisted the work of the anti-corruption institutions through the court process is another challenge. For example, a review of the Laws, Institutions and Judicial Processes for dealing with corruption in Kenya by the National Council for Law Reporting (October 2006) found that corruption cases

typically have more adjournments than other types of cases (mostly by the defence but almost often by the prosecution and by the courts). The politicisation of the war against corruption, with political leaders supporting suspects from their ethnic communities against the anti-corruption agencies and dismissing the anti-corruption efforts as a witch hunt against their supporters is another related challenge which are very rampant in Nigeria.

(iii) Capacity-Related Impediments and Inability to Recover Stolen Assets

Despite progress made in the corruption investigation fronts by the KACC and the EFCC, especially capacity-related and institutional co-ordination challenges, remain a major obstacle to effective investigation by the agencies and reduction of corruption in Kenya and Nigeria.

Specific challenges experienced in the recent past, included inadequacies in the legal frameworks especially for cross-border investigations and restitutions of corruptly acquired assets; lack of effective co-ordination among agencies responsible for investigation and prosecution; and capacity constraints in the form of limited skilled manpower, underdeveloped technological capabilities to tackle modern and sophisticated corruption and economic crime cases. The KACC and the EFCC will continue to be haunted by their inability to recover stolen public assets from those involved. The Goldenberg and Anglo Leasing scandals in Kenya and the inability to fully recover the stolen public assets from Sani Abacha family and other past heads of state in Nigeria continue to be reference points of the incapacities of the anti-corruption agencies in both countries.

7.7 Peculiar Challenges to Anti-Corruption Agency's Strategies in Kenya

Although the UNCAC remains a global strategy to fight corruption, but it was discovered that Kenya has a unique experience which affects the policy options that are being employed as anti-corruption initiatives owing to the evidence that corruption manifests itself in different ways and intensities which require differentiated responses. Kenya has some peculiar challenges owing to the mandate given to the anti-corruption commission and other intervening factors. These included:

(i) Lack of Anti-corruption Agency's Prosecutorial Power

One of the biggest obstacles to the successful implementation of the anti-corruption agenda is the failure in law to grant the KACC power to prosecute cases on

the basis of its investigations and findings. The agency is required to prepare dossiers and hand them over to the Attorney-General and give an annual report to the Parliament. This is because the constitutional mandate to prosecute still rests with the Attorney-General under section 26(3) of the constitution. In accordance with the constitution, in the exercise of his prosecutorial powers, the Attorney-General is not under the control or direction of any other person or authority. However, the Attorney-General is empowered under the Criminal Procedure Code to delegate his prosecutorial powers to other public officers. In that respect, the Attorney-General may delegate these powers to some officials of the KACC. However, such action may undermine the independence of the agency in carrying out its activities.

7.8 Peculiar Challenges to Challenges to Anti-Corruption Agency's Strategies in Nigeria

(i) Problem of Immunity

The peculiar challenges facing the EFCC in Nigeria at the moment is the issue of immunity. Article 30(2) UNCAC provides that State Parties should take measures to strike a balance between the immunity and jurisdictional privileges granted to public officials for the performance of their functions on the one hand, and the need to investigate, prosecute and adjudicate offences under the Convention. However, Section 308 of the 1999 Constitution confers immunity from both civil and criminal prosecution on certain categories of public officers while they are in office. These categories of officials have control of public resources and are therefore vulnerable to corrupt practices. Protecting them from prosecution has seriously discouraged those in the vanguard of the campaign against corruption, encourages impunity and willful looting of public fund by corrupt political class.

(ii) Lack of Protection for Whistle Blowers

The EFCC Act and other anti-corruption laws in Nigeria have insufficient provisions for the protection of witnesses, informers and reporters of corrupt acts. This has essentially impaired the needed volunteered information for the detection of corrupt practices in Nigeria. What obtains are non-compulsion of the disclosure of informants' identity and the protection of documents which might lead to the disclosure of identity of informants. These provisions are inadequate as it does not provide for protection of witnesses and informants in situations where their identities are disclosed despite these rudimentary precautions. It also fails to take cognisance of

situations where witnesses must necessarily give evidence in open court. Hence, passing a Whistle-Blowers Protection Law with the components for physical protection, relocation of victims and their families and compensation is highly desirable.

(iii) Absence of Special Anti-corruption Courts

It is evident from our findings that absence of special anti-corruption constitutes an obstacle towards anti-corruption drives of the EFCC and other related agencies in Nigeria. There are instances that conventional courts have been overwhelmed with cases, hence corruption cases are being delayed in these courts. However, the few cases that eventually manage to get to court are usually frustrated by a combination of legal and procedural technicalities, delay, and the peculiarities of an antiquated court system. This has been a major impediment to legal process of corruption cases that need speedy trials by the EFCC.

However, despite the overwhelming significance of the Convention, there are several weak areas of the UNCAC as well. For example, there is no obligation to make bribery and embezzlement in the private sector a criminal offence. It also fails to forcefully tackle political corruption which is a major source of worry to anti-corruption campaigners in sub-Saharan Africa. In fact, Global Corruption Barometer 2006, which surveyed 60,000 people in 62 countries, found that respondents were mostly concerned about corruption in political parties and parliaments. At the insistence of some negotiators, notably the United States, transparency in political party financing was downgraded to a mere recommendation. Whether these identified weaknesses will eventually render the UNCAC ineffective is not the concerned of this study but it is left for further studies.

(iv) Plea Bargaining

A plea bargain refers to the process whereby the accused and the prosecutor in a criminal suit agree on a mutually satisfactory disposition of the case subject to court approval. It usually bothers on the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment so as to get lighter sentence than that possible for the more severe charge.[1]

Plea bargaining also remains a major challenge to the EFCC anti-corruption strategies. Though the provision of section 13 (2) of the EFCC Act indeed supports plea bargaining, but this has generated a lot of controversy in handling various

celebrated corruption cases by the EFCC which boils down to fact that it should not constitute part of the EFCC anti-corruption law.

The EFCC's romance with plea bargaining started with the case of Diepreye Alamieyeseigha, the ex-Governor of Bayelsa State in 2005 who was arraigned on a six-count charge of official corruption and ultimately found guilty and sentenced to two years' imprisonment on each count to run concurrently on account of plea bargaining, having entered a guilty plea and accepted a lighter sentence and confiscation of most of his loot. In the event, he spent only a few days in incarceration, having been in custody for nearly two years before his conviction.

Tafa Balogun, ex-Inspector-General of the Nigeria Police who was accused of stealing over 18 billion naira of Police funds enjoyed the benefit of a plea bargain by being sentenced to only 6 months in jail running from the time of his arrest such that he spent only a brief period on a hospital bed, having had most of his property confiscated. The case of former Governor of Edo State, Lucky Igbinedion, was even more dramatic as he was merely fined 3 million naira as sanction for the humungous sums he was accused of stealing from the coffers of his State, a fine he paid immediately without having to endure the pain and shame of life in jail.

The case of Cecilia Ibru, former Oceanic Bank CEO is, no doubt, a celebrated one. After accepting to plead guilty to criminal abuse of office and mismanagement of depositors' funds, acquisition of about 190 landed properties all over the world and unconscionable approval of loans from her bank, Oceanic Bank International to herself, proxies and companies, she was slapped on the wrists with a 6-month jail term on each of counts 14, 17, 23 and 25 as well as 15 of the Failed Banks (Recovery of Debts and Financial Malpractices in Banks) Act, 2004, all to run concurrently. It later came to light that she enjoyed her respite at a well-appointed hospital in Lagos.

The application of plea bargaining in corruption cases have thrived in connection with the transnational corporations, Halliburton and Siemens. First, the construction giant, Julius Berger was let off the hook after agreeing to pay the government 4 billion naira for complicity in the Halliburton bribe scandal. Then, news broke to the effect that Siemens had agreed to pay the government 7 billion naira for its malfeasance in connection with the payment of 17.5 million Euros to some avaricious and corrupt Nigerian officials in exchange for the *nolle prosequi* of the Attorney-General of the Federation

Moreover, recently, the issue of plea bargaining came to the fore on January 28, 2013 when a High Court of Nigeria, Abuja convicted John Yakubu Yusuf, a former Assistant Director in the Police Pension Office, of the offence of criminal appropriation to the tune of N27.2 billion belonging to Police Pension Office in conniving with others after pleading guilty to some of the count charges. And was subsequently sentenced to two years imprisonment with an option of fine of N250,000 for each of the three counts in a twenty-count amended charge, to which the accused had specifically pleaded guilty. Since the sentences were to run concurrently, he was in effect sentenced to a cumulative prison term of two years with an option of N750,000 fine.[2] However, in addition to the custodial punishment or fine, he was to forfeit to the State, 32 real property and sum of N325, million, proceeds of his crime stashed away in banks and frozen. The general public reacted negatively and condemned the sentence as just a gentle slap on the wrist of John Yakubu Yusuf as a result of plea bargaining.

7.9 Conclusion

On a progressive note, the anti-corruption strategies of the KACC and the EFCC cover a wider breadth essentially spanning the provisions of the UNCAC. It appears that aside the existence of laws that coincide with most of the provisions in the Convention, a lot still need to be done, especially in the area of asset recovery to make both anti-corruption bodies more relevant and receive necessary support from the public. By and large, the inability of the KACC and the EFCC to recover stolen assets from foreign domains put a serious question mark on the potency of their anti-corruption strategies. This in the long run has accounted for the varying degrees of successes and challenges being experienced by both anti-corruption bodies in terms of compliance and domestication of the UNCAC in their respective countries.

[1] Oyebode, A. 2011. Plea bargaining, public service rules and criminal justice in Nigeria. *NBF News.* Retrieved April 28, 2013 from www.nigerianbestforum.com

[2]Ogunye, J. 2013. Police pension scam sentence: Criminal law inadequacy, charge perfidy, plea bargain sham, or sentence inequity? *Premium Times*, Feb., 1.

CHAPTER EIGHT

SUMMARY AND CONCLUSION

8.1 Introduction

Corruption points to the fact that something has gone wrong in the management of the state which triggered off an avalanche of analytical and empirical anti-corruption analyses. In spite of the fact that it lacks specific definitions, strong consensus emerged between 2003 and 2008 as to what it constitutes, given the global concern, its internationalisation and the adoption of the UNCAC and other related anti-corruption measures which brought corruption into the front burner. However, the extent to which the Convention has shaped the anti-corruption strategies of these agencies has not been fully explored. There is paucity of comparative studies devoted to the evaluation of the nexus between UNCAC and anti-corruption strategies in these countries. Hence, the gap this study sought to fill.

8.2 Summary

This study has reiterated that the roots of corruption are embedded in a country's social and cultural history, political and economic development, bureaucratic traditions and policies. To generalise, it tends to flourish when institutions are weak and economic policies are distorted. Irrespective of the country context, evidence from across the globe confirms that corruption hurts the poor excessively and hinders economic development, decreases social services and frustrates investment in infrastructure, institutions and social services. Moreover, it encourages an anti-democratic environment nurtured by uncertainty, unpredictability and declining moral values and disrespect for constitutional institutions and authority which are no respecter of good governance. Corruption, therefore, reflects a good governance deficit that negatively impacts on poverty and human security. Available evidence in the literature also shows that if corruption is not contained, it will continue to grow. In essence, corruption has continued to damage and impoverish the daily lives of many millions of souls in sub-Saharan Africa.

Despite overwhelming evidence of the negative effects of corruption, for too long, the developed world has looked the other way while corrupt elites in sub-Saharan Africa looted their countries of billions of dollars, thereby generating economic chaos and depriving citizens of education, health services, basic infrastructure and functioning public services. Even when good governance is seemed to be restored or attained, officials have been spending much time longer than necessary attempting to retrieve funds that are often urgently needed to redress the social and economic damage inflicted on the citizenry by their corrupt predecessors.

Given its damaging and acidic nature, the incidence of corruption in sub-Saharan Africa in general and Kenya and Nigeria in particular, it became a matter of global concern in the 1990s while efforts at mainstreaming the fight against this massive phenomenon by the world bodies such as the African Union (AU), the World Bank, International Monetary Fund (IMF), the United Nations (UN), to mention but a few have been tremendous. Hence, the intense global response and pressure via the final codification of the United Nations Convention Against Corruption (UNCAC) to assist the anti-corruption strategies, especially in most developing countries. Against this background, fighting corruption became more urgent than ever before. This finally brought about the strategies on corruption which metamorphosed into the UNCAC to deal with corruption globally and offers new challenges and prospects for fighting corruption.

In essence, UNCAC constitutes the benchmark that sets the scope and objectives for the universal concern for tackling the menace called corruption. Corruption now strikes at the root of the priority concerns of the United Nations. The link between corruption and organised crime, terrorism, conflict, human rights abuses, environmental degradation, poverty, governance deficit and human insecurity is now universally recognised and has consequently given impetus to overwhelming urge to curb it and ensure good governance. This framework also serves as a meeting point for all international financial institutions such as the World Bank, International Monetary Fund, (IMF), African Development Bank (AfDB) and other related bodies that have shown genuine concern for the control and eradication of corruption since 1970s as a consequence of Watergate investigations in the United States which eventually generated a high level of public awareness regarding the questionable conduct of some of the nation's political and business elite.

Before the emergence of the UNCAC, corruption in Kenya and Nigeria remained rife although at varying degrees. Development efforts were not yielding the desired result and good governance was at its lowest ebb as corrupt leaders in both countries continued to steal public wealth and stashed same away in foreign banks. As expected, the pervasiveness of corruption continued to undermine all the efforts made to improve governance in Kenya and Nigeria, and in reality improved governance was critical to reducing the scope of corruption. But unfortunately, the corruption control in both countries was patterned along typical unproductive anti-corruption strategies.

However, appreciable progress was made through the KACC and the EFCC renewed anti-corruption strategies via the prosecution of the UNCAC's mandate, though with wide-ranging level of accomplishments. This has not only raised public awareness concerning the damage done to human welfare caused by corruption and the complexities of confronting it, but also has also renewed efforts to prevent corruption and bring culprits to book; though not without varied degrees of inherent challenges.

8.3 Research Contribution

This research has taken us to a voyage of academic discovery and certain findings were equally made as shown in the previous section. What remains here is to highlight the relevance of the thesis in the existing body of knowledge. It is evident from the part of our discoveries that there has been an explosion of scholarly literature on corruption and strategies to combat it in sub-Saharan Africa. Hence, a new work in this area has to justify its appearance that it is not a mere rehash of previous research works by stressing what it has added to the existing body of knowledge on the subject.

To state that the reviewed literature on corruption and anti-corruption strategies which has been classified as analytical and empirical in this work, at least those we were privileged to peruse, show a discrepancy in magnitude of insight, objectivity and bias is like stating the obvious. This work however, differs in the sense that its focus is rather on the international dimension and strategies to combat corruption and the emerging trends to combat its menace in sub-Saharan Africa where corruption has almost become a culture.

These adverse effects of corruption on the development of States and sub-Saharan Africa in particular have raised global concerns for its control leading to the adoption of the United Nations Convention Against Corruption (UNCAC) in 2003. Despite this global concern for its control, there has not been only the paucity of

comparative studies devoted to the evaluation of the nexus between the Convention and the emerging strategies of these established anti-corruption agencies in sub-Saharan Africa, but also the extent to which the Convention has shaped the anti-corruption strategies of these agencies has not been fully explored.

This thesis however, stands out and fills that gap, hence its devoted search for how can sub-Saharan African countries utilise the emergence of the Convention maximally through the revitalisation of their castrated anti-corruption agencies. The potency of any research and its contribution to knowledge lie in its ability to explore new avenues. In this direction, notwithstanding the author's financial and other logistics constraints, we were able to achieve most of that by conducting the detailed comparative case studies of the anti-corruption strategies of Kenya's KACC and Nigeria's EFCC in the context of compliance and implementation the UNCAC. To the best of our knowledge, the emerged anti-corruption strategies of the agencies from both countries have never been analysed comparatively this way. The comparative analysis and case studies were deliberately limited to two agencies in order to achieve a realistic on-the-ground field work assessment in line with the emerged Convention, which would have been more difficult with a broader study area.

The thesis is a product of a field research in two countries. This included interviews of the relevant personnel of government and non-government organisations where majority of them had not been interviewed on this subject before, and this, we believe, is part of the new avenues and therefore, strengthens our claims to originality. Thus, part of the strength of this thesis is located, not only in the interview data but in the area of contributing to theory-building and practical understanding on the relevance establishing durable anti-corruption institutions as canvassed by the UNCAC provisions.

Normally, for any government to set up anti-corruption agencies should be viewed as a way through which the given administration seek to underline the importance the government attaches to accountability and a curb any form financial hemorrhage and impropriety. But establishing anti-corruption agencies in Kenya and Nigeria to bring into fruition the objectives of the anti-corruption initiatives, turned out to be a subject of a vigorous controversy in both countries. This has further established that anti-corruption strategies making is not a highly rational process with static goals in which technocrats have the control to achieve predicted or stated outcomes. While

this applies to other fields of public policies as well, anti-corruption policies are a particularly complex undertaking as they crisscross different sectors and multiple institutions of a country's governance system. These policies are usually created by a variety of actors with multiple, often conflicting and at times changing political objectives and they can complement, strengthen, or compete with each other.

Finally, this work has added to the understanding that the task of combating corruption in a society where it is "outlawed" but tolerated is challenging. Stepping on powerful toes is inevitable. And contrary to a common belief, anti-corruption policy making does not follow a linear model where implementation is conceived as simply putting government documents into practice. On the contrary, policy processes are dynamic interactions with multiple feedback loops permeated by politics and power issues that influence or even dominate technocratic approaches. Hence, interactions between reformers and opponents, who fear for restrictions of their vested or illegitimate interests and access to power, create unanticipated consequences for the policy objectives and require adjustments and corrective measures throughout the implementation process.

Hence, the UNCAC framework has been pursued by the KACC and the EFCC through a series of cross-cutting anti-corruption strategies. During focused period and the political cycles of governments of both countries, these anti-corruption strategies appeared to have moved up in significance on the political agenda and remain the main priorities of the moment and the leadership of the responsible institution.

8.4 Conclusion

In line with its objectives, this thesis has contended that good governance is a precondition and vital tool in curbing corruption. Upholding good governance is part of a holistic anti-corruption approach that can contribute to the fight against corruption and economic crimes in Kenya and Nigeria. Indeed, good governance calls for a responsive governmental and administrative framework where rule of law and accountability prevail.

Essentially, corruption thrives where it is tolerated and where the possibility of detection and consequent punishment is tenuous. It is so sad to note that no matter how beautifully conceived policies are, their implementation always faces an uphill task. This underscores Kenya and Nigeria special challenges in the context of the worldwide phenomenon and anti-corruption strategies *vis-à-vis* the implementation of UNCAC

provisions. Corruption in the public sectors of both countries has become such a monster that those fighting it faced uphill tasks due to the identifiable impediments such as inadequate funding of the anti-corruption agencies, delay in prosecuting suspects, inability to recover stolen assets from proven cases, lack of protection for whistle blowers and so on.

Fighting corruption through the adoption and implementation of effective legislative and institutional frameworks in the context of the UNCAC is considered a priority in Kenya and Nigeria. The overall capacities of the KACC and the EFCC tackle corruption are a function of well-defined and effective anti-corruption policies which must fall within the UNCAC's implementation and compliance. As envisaged, political leaders in both countries responded not only with strong statements on the need for transparency in government and by pledges to improve governance. But the extent of their commitment to these pledges varied.

Fundamentally, prior to the emergence of the UNCAC, corruption control in Kenya and Nigeria were patterned along typical unproductive anti-corruption strategies. However, the Convention shaped the KACC and EFCC's strategies in the realm of compliance to prevention and criminalisation. This reflected in the enactment and emergence of anti-corruption laws and agencies in both countries; namely, Anti-Corruption Economic Crimes Act, Witness Protection Act and Anti-corruption Court in Kenya and Nigeria Extractive Industries Transparency Initiatives and Money Laundering Prohibition Act and similar acts . International co-operation in prosecution and asset recovery was visible. Thirty-seven convictions were secured and $5 million in assets and cash recovered by KACC while the EFCC made three hundred and fifty convictions and recovered assets and cash worth $5 billion between 2004 and 2008. Major differences in the strategies of both agencies included the existence of the Special Anti-Corruption Court and provision for the protection of witnesses in Kenya but absent in Nigeria. The EFCC has prosecutionary power but the KACC can only make recommendations to the Attorney-General. The UNCAC's partial domestication, inadequate funding, delay in prosecuting suspects and inability to recover stolen assets from proven cases were identified as constraints to both agencies' anti-corruption strategies.

The advent of the United Nations Convention Against Corruption transformed the anti-corruption initiatives in Kenya and Nigeria. However, a more effective corruption

control within the framework of the Convention requires proper domestication and the dismantling of the identified constraints.

8.5 Recommendations

For the UNCAC to have consequential impact on domestic anti-corruption initiatives in Kenya and Nigeria, the following areas are to be seriously looked into:

(i) Proper Domestication of the UNCAC

Kenyan and Nigerian authorities should domesticate the UNCAC. This should be followed by a rigorous implementation of the resultant legislation. It has been established that unless the UNCAC provisions are domesticated, its effects on anti-corruption initiatives in both countries will remain marginal.

(ii) Adequate Funding of the Anti-Corruption Agencies

This study also discovers that part of the bane of anti-corruption strategies in Kenya and Nigeria is the inadequate funding of the anti-corruption agencies. Most often than not, these agencies are left at the mercy of the presidency for financial survival. Hence, this situation should be discouraged. If anti-corruption strategies are to be taken serious, the funding of the anti-corruption agencies should be provided for independently in the both countries consolidated or special fund.

(iii) Quick Prosecution of Suspects

The delay of suspects' prosecution was also observed as part of quick dispensation of justice in the area of court trials, especially in Nigeria. Therefore, without any delay, special anti-corruption courts should be established so as to prevent delay in prosecuting suspects accused of corruption. The merits of this are in two ways. First, speedy trials will send warning signals to would-be suspects. Finally, it will also prevent the infringement on the rights of suspects that may warrant its acquittal at the end of the day.

(iv) Recovery of Stolen Assets

To show that both countries are serious about the anti-corruption war, concerted efforts should be geared towards the recovery of stolen assets domestically and internationally. All cases of stolen public assets that have been closed because of political pressure and the calibre of persons should be reopened. If this is not done, some segments of the public will continue to view the anti-corruption strategies in both countries as one-sided and a charade. The application of the asset recovery provisions in the UNCAC could also assist if domesticated by both countries.

(v) Protection of Whistle Blowers

Corruption detection and reportage are mainly a function of effective and responsive whistle blowing. For instance, the Witness Protection Act in Kenya was designed to take care of whistle-blowers through making arrangements necessary to allow the witness establish a new identity or otherwise to protect the witness, relocate the witness, provide accommodation for the witness, provide transport for the property of the witness, provide reasonable financial assistance to the witness, provide to the witness services in the nature of counseling and vocational training, do anything else the Attorney General considers necessary to ensure the witness's safety and welfare. Nigeria should also borrow a leaf from this by putting appropriate machinery in motion to amend the Corrupt Practices and Other Related Offences Act which has insufficient provisions for protecting witnesses, informers and reporting persons.

(vi) Demonstrating Political Will

Finally, governments of Kenya and Nigeria should be bold enough to implement the above recommendations if the agencies' anti-corruption are to be meaningful and salutary. Political will, in this context, is the established credible intention of actors to attack the perceived causes and/or effects of corruption at a systemic level, via sincere and adequate implementation of anti-corruption strategies.

8.6 Methodological Challenges and Limitations to the Study

In order to appreciate the methodological approach employed in the study, it is necessary to highlight a few, intractable, methodological challenges confronting the study of this nature.

One of the challenges that particularly used to confront researchers who seek the "Holy Grail" of what will work to alleviate public sector corruption is how does one measure the incidence and seriousness of corruption where the giver and the recipient are both accomplices? Owing to the fact that corruption, particularly bribery, involves mutually satisfying relations between parties involved, it is often difficult to accurately capture its incidence or seriousness as reportage is often low.[1]

An excellent summary of the difficulties connected to the measurement of corruption is found in one of the World Bank publications:

> Although much progress has been made over the last few years in measuring corruption, analysts increasingly recognise how difficult it is to measure the phenomenon adequately, especially over time. In one country, the amount of bribes paid may be declining while other less explicit forms of corruption become more prominent—like compulsory use of consultants with ties to politicians or demands for jobs for a bureaucrat's relatives. In another country, demands for bribes may be the same, but increased economic growth and greater predictability have led firms to perceive this as less of an obstacle to their business. In still another country, the frequency of demands for bribe payments might go down as corruption becomes more predictable and "efficient," though the amount of bribes collected might stay the same or even increase. These are difficult issues, both conceptually and empirically, that do not have simple answers. Corruption is a dynamic phenomenon; it develops and mutates, reacts and transforms to changing circumstances. We need to be aware of the limits of measurement. Measurements that focus on one dimension might miss relevant and even contradictory changes in other dimensions. The more effective that existing measurement efforts are at shedding light on corrupt practices in a society, the more efforts will be made by corrupt members of that society to transform those practices into less visible and measurable forms.[2]

In addition to the above challenge is the issue of an appropriate research design to accurately capture such a complex topic without compromising the ethicality of the research. Should such a design be quantitatively or qualitatively based? As these reflect a few of the confusing set of challenges which confronted the researcher during the study, the ensuing paragraphs detail the methodological approach used to capture the globalised anti-corruption initiatives towards public sector corruption.

Besides the methodological challenges, there are also other limitations. Apart from the not too clear-cut concepts, and financial incapacity, the study is limited by the following factors:

First, it focuses predominantly on corruption, especially in the public sector. This does not imply that other aspects of corruption are not important; rather, the aim of this study is to examine the extent of this sudden global response as regards re-shaping the anti-corruption initiatives in public sector which dictates the state of affairs in every part of the world.

Second, the study focuses on the global strategies by international, multilateral and non-governmental institutions on corruption. And lastly, the study looks at some specific cases of some sub-Saharan African countries' responses to corruption within global context and good governance, as it does not have the capacity to examine every country in the sub-Saharan Africa and does not pretend to do so

Lastly, this study as a matter of fact, recognises the diverse and complex nature of the countries in the sub-Saharan Africa and their peculiarities in the implementation of anti-corruption strategies which give room for further studies. But the findings of this study are applicable to some other countries in the region, because it is our intention in this study to delve into factors that are common to all the countries. Therefore, there is no doubt that some of the findings and recommendations can be applied to other countries in the region.

END NOTES

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APPENDIX

TEXT OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 2005

PREAMBLE

The States Parties to this Convention,

Concerned *about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,*

Concerned *also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,*

Concerned further *about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,*

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,*

Convinced *also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,*

Convinced *further that the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively,*

Convinced *that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law,*

Determined *to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery,*

Acknowledging *the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights,*

Bearing *in mind that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society,*

non-governmental organisations and community-based organisations, if their efforts in this area are to be effective,

Bearing *also in mind the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption,*

Commending *the work of the Commission on Crime Prevention and Criminal Justice and the United Nations Office on Drugs and Crime in preventing and combating corruption,*

Recalling *the work carried out by other international and regional organisations in this field, including the activities of the African Union, the Council of Europe, the Customs Cooperation Council (also known as the World Customs Organization), the European Union, the League of Arab States, the Organisation for Economic Cooperation and Development and the Organization of American States,*

Taking note with appreciation *of multilateral instruments to prevent and combat corruption, including, inter alia, the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997, the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999, and the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003,*

Welcoming *the entry into force on 29 September 2003 of the United Nations Convention against Transnational Organized Crime,*

Have agreed as follows:

CHAPTER I GENERAL PROVISIONS

Article1

Statement of purpose

The purposes of this Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(c) To promote integrity, accountability and proper management of public affairs and public property.

Article 2

Use of terms

For the purposes of this Convention: (a) "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

(b) "Foreign public official" shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;

(c) "Official of a public international organisation" shall mean an international civil servant or any person who is authorized by such an organisation to act on behalf of that organisation;

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

(h) "Predicate offence" shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention;

(i) "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

Article 3

Scope of application

1. This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention.

2. For the purposes of implementing this Convention, it shall not be necessary, except as otherwise stated herein, for the offences set forth in it to result in damage or harm to state property.

Article 4

Protection of sovereignty

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

CHAPTER II PREVENTIVE MEASURES

Article 5

Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organisations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

Article 6

Preventive anti-corruption body or bodies

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as: (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies; (b) Increasing and disseminating knowledge about the prevention of corruption 2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The

necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Article 7

Public sector

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude; (b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions; (c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party; (d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialised and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.

3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

Article 8

Codes of conduct for public officials

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organisations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

Article 9

Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

(a) Procedures for the adoption of the national budget;

(b) Timely reporting on revenue and expenditure;

(c) A system of accounting and auditing standards and related oversight;

(d) Effective and efficient systems of risk management and internal control; and

(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to

preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

Article 10

Public reporting

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

Article 11

Measures relating to the judiciary and prosecution services

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.

Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

Article 12

Private sector

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

2. Measures to achieve these ends may include, inter alia:

(a) Promoting cooperation between law enforcement agencies and relevant private entities;

(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;

(c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;

(d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the

maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

(a) The establishment of off-the-books accounts;

(b) The making of off-the-books or inadequately identified transactions;

(c) The recording of non-existent expenditure;

(d) The entry of liabilities with incorrect identification of their objects;

(e) The use of false documents; and

(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

Article 13

Participation of society

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

(b) Ensuring that the public has effective access to information;

(c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;

(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

(i) For respect of the rights or reputations of others;

(ii) For the protection of national security or order public or of public health or morals.

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

Article 14

Measures to prevent money-laundering

1. Each State Party shall:

(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

(b) To maintain such information throughout the payment chain; and

(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organisations against money-laundering.

5. States Parties shall endeavour to develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

CHAPTER III CRIMINALISATION AND LAW ENFORCEMENT

Article 15

Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 16

Bribery of foreign public officials and officials of public international organisations

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public

international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another

person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 17

Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

Article 18

Trading in influence

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

Article 19

Abuse of functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

Article 20

Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, 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.

Article 21

Bribery in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in 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;

(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, 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.

Article 22

Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who

directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

Article 23

Laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question.

However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under

the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

Article 24

Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

Article 25

Obstruction of justice

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) 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 this Convention;

(b) 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 this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

Article 26

Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 27

Participation and attempt

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

Article 28

Knowledge, intent and purpose as elements of an offence

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

Article 29

Statute of limitations

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence

established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

Article 30

Prosecution, adjudication and sanctions

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

2. Each State Party shall take such measures as may be necessary to establish or maintain,

in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this 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.

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and

(b) Holding office in an enterprise owned in whole or in part by the State.

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

Article 31

Freezing, seizure and confiscation

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

9. The provisions of this article shall not be so construed as to prejudice the rights of bonafide third parties.

10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 32

Protection of witnesses, experts and victims

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, nondisclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 33

Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

Article 34

Consequences of acts of corruption

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States 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.

Article 35

Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Article 36

Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Article 37

Cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this 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.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

Article 38

Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

Article 39

Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

Article 40

Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate

mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

Article 41

Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

Article 42

Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or(b) (i), of this Convention within its territory; or

(d) The offence is committed against the State Party.

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

CHAPTER IV INTERNATIONAL COOPERATION

Article 43

International cooperation

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

Article 44

Extradition

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at

all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article 45

Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

Article 46

Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures, and freezing;

(d) Examining objects and sites;

(e) Providing information, evidentiary items and expert evaluations;

(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the

receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality,

shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal

assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties.

This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness

or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, order public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a

substantial or extraordinary nature are or will be required to fulfill the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

Article 47

Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

Article 48

Law enforcement cooperation

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organisations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

Article 49

Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Article 50

Special investigative techniques

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

CHAPTER V ASSET RECOVERY

Article 51

General provision

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

Article 52

Prevention and detection of transfers of proceeds of crime

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organisations against money-laundering, shall:

(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate

records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

Article 53

Measures for direct recovery of property

Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

Article 54

Mechanisms for recovery of property through international cooperation in confiscation

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55

International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

Article 56

Special cooperation

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

Article 57

Return and disposal of assets

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

Article 58

Financial intelligence unit

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

Article 59

Bilateral and multilateral agreements and arrangements

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

CHAPTER VI TECHNICAL ASSISTANCE AND INFORMATION EXCHANGE

Article 60

Training and technical assistance

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption.

Such training programmes could deal, inter alia, with the following areas:

(a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;

(b) Building capacity in the development and planning of strategic anticorruption policy;

(c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;

(d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;

(e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;

(f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;

(g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;

(h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;

(i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and

(j) Training in national and international regulations and in languages.

2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialised knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.

3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organisations and in the framework of relevant bilateral and multilateral agreements or arrangements.

4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.

5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.

6. States Parties shall consider using sub regional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.

7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.

8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

Article 61

Collection, exchange and analysis of information on corruption

1. Each State Party shall consider analysing, in consultation with experts, trends in corruption in its territory, as well as the circumstances in which corruption offences are committed.

2. States Parties shall consider developing and sharing with each other and through international and regional organisations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption. 3. Each State Party shall consider monitoring its policies and actual measures to combat corruption and making assessments of their effectiveness and efficiency.

Article 62

Other measures: implementation of the Convention through economic development and technical assistance

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development.

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organisations:

(a) To enhance their cooperation at various levels with developing countries, with a view

to strengthening the capacity of the latter to prevent and combat corruption;

(b) To enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement this Convention successfully;

(c) To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this

Convention, to contributing to that account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

(d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of corruption.

CHAPTER VII MECHANISMS FOR IMPLEMENTATION

Article 63

Conference of the States Parties to the Convention

1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.

2. The Secretary-General of the United Nations shall convene the Conference of the States Parties not later than one year following the entry into force of this Convention. Thereafter, regular meetings of the Conference of the States Parties shall be held in accordance with the rules of procedure adopted by the Conference.

3. The Conference of the States Parties shall adopt rules of procedure and rules governing the functioning of the activities set forth in this article, including rules concerning the admission and participation of observers, and the payment of expenses incurred in carrying out those activities.

4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:

(a) Facilitating activities by States Parties under articles 60 and 62 and chapters II to V of this Convention, including by encouraging the mobilization of voluntary contributions;

(b) Facilitating the exchange of information among States Parties on patterns and trends in corruption and on successful practices for preventing and combating it and for the return of proceeds of crime, through, inter alia, the publication of relevant information as mentioned in this article;

(c) Cooperating with relevant international and regional organisations and mechanisms and non-governmental organisations;

(d) Making appropriate use of relevant information produced by other international and regional mechanisms for combating and preventing corruption in order to avoid unnecessary

duplication of work;

(e) Reviewing periodically the implementation of this Convention by its States Parties;

(f) Making recommendations to improve this Convention and its implementation;

(g) Taking note of the technical assistance requirements of States Parties with regard to the implementation of this Convention and recommending any action it may deem necessary in that respect.

5. For the purpose of paragraph 4 of this article, the Conference of the States Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the States Parties.

6. Each State Party shall provide the Conference of the States Parties with information on its programmes, plans and practices, as well as on legislative and administrative measures to implement this Convention, as required by the Conference of the States Parties. The Conference of the States Parties shall examine the most effective way of receiving and acting upon information, including, inter alia, information received from States Parties and from competent international organisations. Inputs received from relevant non-governmental organisations duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties may also be considered.

7. Pursuant to paragraphs 4 to 6 of this article, the Conference of the States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.

Article 64

Secretariat

1. The Secretary-General of the United Nations shall provide the necessary secretariat services to the Conference of the States Parties to the Convention.

2. The secretariat shall:

(a) Assist the Conference of the States Parties in carrying out the activities set forth in article 63 of this Convention and make arrangements and provide the necessary services for the sessions of the Conference of the States Parties;

(b) Upon request, assist States Parties in providing information to the Conference of the States Parties as envisaged in article 63, paragraphs 5 and 6, of this Convention; and

(c) Ensure the necessary coordination with the secretariats of relevant international and regional organisations.

CHAPTER VIII FINAL PROVISIONS

Article 65

Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.

Article 66

Settlement of disputes

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States

Parties are unable to agree on the organisation of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 67

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open to all States for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at United Nations Headquarters in New York until 9 December 2005.

2. This Convention shall also be open for signature by regional economic integration organisations provided that at least one Member State of such organisation has signed this Convention in accordance with paragraph 1 of this article.

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organisation may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organisation shall declare the extent of its competence with respect to the matters governed by this Convention. Such organisation shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organisation of which at least one member State is a Party to this Convention.

Instruments of accession shall be deposited with the Secretary- General of the United Nations. At the time of its accession, a regional economic integration organisation shall declare the extent of its competence with respect to matters governed by this

Convention. Such organisation shall also inform the depositary of any relevant modification in the extent of its competence.

Article 68

Entry into force

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organisation shall not be counted as additional to those deposited by member States of such organisation.

2. For each State or regional economic integration organisation ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organisation of the relevant instrument or on the date this Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

Article 69

Amendment

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and transmit it to the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the States Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.

2. Regional economic integration organisations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Convention. Such organisations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.

Article 70

Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary- General.

2. A regional economic integration organisation shall cease to be a Party to this Convention when all of its member States have denounced it.

Article 71

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Convention.

2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.