

The Dragon's Trap

Kenya's Politicized Anti-Corruption Architecture



Africa Report
july 20, 2015



International Policy Group
Promoting Peace and Justice

Executive summary

espite declaring war on corruption on December 31, 2014 and subsequently taking some of the boldest policy measures ever to fight corruption, President Uhuru Kenyatta has to take yet another audacious step to streamline specialized anti-corruption institutions if Kenya is to “slay the dragon of corruption.”

Ideologically, Kenyatta’s anti-corruption drive marked a radical departure from his earlier policy priorities—he never mentioned it even once in his inaugural speech in April 2013. However, upon coming to office he soon realized that corruption threatened his larger development agenda and legacy for Kenya. When he was forced to sign off a colossal Ksh1.4 billion to firms associated with the infamous Anglo-Leasing corruption scam before his government could float the Eurobond in May 2014, he prioritized the war on corruption as an obstacle to the national development agenda and declared that it “must and will be won.”

However, although he cleaned his office of corrupt officials, ordered fresh investigations into Anglo Leasing cases, and tabled in parliament a list of 175 government and opposition officials suspected of corrupt practices, he has realized that the country’s anti-corruption institutions are in dire crisis, caught in the trap of the dragon of corruption. In April, Parliament, one of the corruption watchdogs, disbanded its Committee on Public Accounts Committee following investigations into bribery cases involving its PAC chairman and other members. Kenyatta’s anti-corruption agenda has become hostage to corruption cartels, which have penetrated and compromised specialized agencies created to investigate, prosecute and try corruption cases, including the Ethics and Anti-Corruption Commission (EACC), the Directorate of Public Prosecutions (DPP) and the Judiciary. Ahead of the coming 2017 election, the opposition, sections of the media and civil society have intensely politicized anti-corruption, blatantly turning it away from the logic of an evidence-driven judicial process to overt witch-hunting and public lynching of state officials.

The Government now faces the immediate challenge of pursuing an anti-corruption agenda through largely uncoordinated, dysfunctional or corrupted institutions and in a politically hostile environment. Nevertheless, it is still possible to win the war on corruption if the following measures are immediately taken:

- **Restore the integrity of anti-corruption institutions:** The Government must stay the course and step up the fight against corruption

by decidedly moving to dismantle corruption cartels and networks and taking concrete measures to restore the integrity of anti-corruption institutions. It should ensure the specialization and coordination of the activities of these institutions in order to mainstream corruption offenses into the Criminal Justice system established by the 2010 constitution.

- **Establish a Specialized Anti-Corruption Unit:** In view of the above, the Government should establish a Specialized Anti-Corruption Unit with investigative and prosecutorial powers within the mainstream criminal justice system preferably located within the office of the Director of Public Prosecutions and with clear links to the Criminal Investigations Department and the police and tapping into the work of a reformed Ethics and Anti-Corruption Commission (EACC).
- **Investigative Research and Advocacy Capacity:** The Government should work with parliament to ensure research, investigative and advocacy capacity within the anti-corruption institutions by reforming the EACC along the lines of the Kenyan National Human Rights Commission (KNHRC) or the National Gender and Equality Commission (NGEC) to provide credible investigative research knowledge and advocacy to underpin evidence-based prosecution of corruption offenses and depoliticize anti-corruption in Kenya.
- **Investigate cartels:** Parliament, especially its Committee Justice and Legal Affairs Committee (JLAC), should investigate and take action regarding allegations of subversion of anti-corruption institutions by cartels and interest groups which compromise justice relating to corruption cases.
- **Implement the Anti-corruption Inspectorate Unit** within judiciary The Chief Justice should expedite the speedy implementation of the newly created Anti-corruption Inspectorate Unit within Judiciary to stem corruption within the Judicial system, including investigating new allegations of corruption involving judges and the emergence of syndicates that corrupt judicial processes to produce desired outcomes.
- **Depoliticize Anti-Corruption:** Opposition leader, Raila Odinga, and his CORD partners should support the investigation and prosecution of corruption cases involving opposition parliamentarians and leaders rather than shielding them and politicizing their cases. Similarly, the Opposition chiefs should agree to politicize the war on corruption,

return to the narrative of anti-corruption as a moral and criminal issue rather than a political one and work with the government to protect anti-corruption institutions from corrupt cartels.

- **Promote evidence-based Advocacy:** Kenya's civil Society organizations should promote evidence-driven anti-corruption advocacy through the mainstream judicial investigative and trial processes. The advocacy should be based on a comprehensive and inclusive approach that focuses on the all categories of actors involved in corruption in Kenya, including government officials, the private sector, the opposition and international corporations.

Map of Kenya



Acronyms

CEO	Chief Executive Officer
CID	Criminal Investigations Department
CORD	Coalition of Reform and Democracy
CS	Cabinet Secretary
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
ICC	International Criminal Court
IFMIS	Integrated Financial Management Information System
KACC	Kenya Anti-Corruption Commission
KNHRC	Kenya National Human Rights Commission
NGEC	National Gender and Equality Commission
NYS	National Youth Service
ODM	Orange Democratic Movement
PAC	Parliamentary Accounts Committee
PNU	Party of National Unity
PS	Principal Secretary
PSC	Public Service Commission
SGR	Standard Gauge Railway

Contents

Executive summary.....	ii
Map of Kenya.....	v
1. Introduction.....	1
2. Kenyatta’s New War on Corruption.....	3
2.1. In the Dragon’s Den.....	3
2.2. Slaying the Dragon.....	4
2.3. The List of Shame.....	6
3. The Dragon Strikes Back.....	8
3.1 The Opposition Corruption Strategy	9
3.2 Corrupt Business Cartels.....	11
3.3 Politicization of Corruption: The Case of NYS.....	12
4. Impact of Politicization on Anti-Corruption Institutions.....	14
1.1. Interference with the EACC	14
4.2. The Office of the DPP.....	15
4.3. The Judiciary.....	16
4.4 . A Compromised Law-Maker.....	16
5. Conclusions.....	17
About the International Policy Group.....	19

Politicization of anti-corruption is “an increase in the polarization of opinions, interests, or values about judicial investigations and the extent to which this polarization is strategically advanced towards the political debate by parties, political leaders, and media.”

— Salvatore Sberna and Alberto Vannucci(2013)

1. Introduction

During his New Year's Eve Address to the nation on December 31, 2015, President Uhuru Kenyatta declared that "the war on corruption must and will be won." Describing graft as "a major obstacle to our national development agenda", Kenyatta called upon all Kenyans to join him in "slaying the dragon of corruption."¹ Ideologically, this renewed focus on corruption marked a radical departure from the policy orientation of Kenyatta's government since coming to power nearly two years earlier. Notably, in the President's inauguration Speech on April 9, 2013, the President did not mention corruption even once. However, no sooner had Kenyatta assumed the reins of power than he became convinced that corruption was a mortal threat to his ambitious development agenda signified by mega-development projects in security, energy and communication (including his legacy project of the Standard Gauge Railway (SGR)).² He realized that his own office in Harambee House was the temple of the gods of corruption. In February 22, 2014, the President publicly declared that his office was a den of corruption. Worse still, in May 2014, his government was forced to pay a colossal Ksh1.4 billion to firms associated with the infamous Anglo-Leasing scam before his government could float the Eurobond. He had to act.

His government ordered fresh investigations again into Anglo Leasing cases, leading to the prosecution of former high-profile government officials and international actors. In his annual State of the Nation Address before the Kenyan Parliament on March 26, 2015, Kenyatta unveiled a list of 175 suspects of corruption that comprised of both senior government and opposition officials.³ In April, Parliament started investigations into corruption cases involving its own departmental committees, and disbanded the Committee on Public Accounts Committee (PAC) led by the Secretary-General of the main opposition party, the Orange Democratic Movement (ODM).⁴

Despite this spirited assault on corruption, Kenyatta realized that corruption was a many-headed hydra, almost difficult to slay. Corruption struck back. The opposition, business cartels and former Government officials suspended or removed from power for suspected involvement in graft closed ranks against

1. President Uhuru Kenyatta's New Year's Eve Address available at <http://www.capitalfm.co.ke/eblog/2014/12/31/uhuru-kenyattas-new-year-message-to-kenyans/>, retrieved July 16, 2015.

2. President Uhuru Kenyatta's Inauguration Speech, available at <http://www.capitalfm.co.ke/eblog/2013/04/09/president-kenyattas-inauguration-speech/>, retrieved July 16, 2015.

3. Annual State of The nation Address 2015 available at <http://www.the-star.co.ke/news/president-uhuru-kenyatta-speech-during-state-nation-address-parliament>, retrieved July 16, 2015.

4. "Namwamba-led PAC disbanded", Daily Nation (Nairobi), April 14, 2015, available at: <http://mobile.nation.co.ke/news/Namwamba-led-PAC-disbanded/-/1950946/2685888/-/format/xhtml/-/r36yh1z/-/index.html>, retrieved July 16, 2015.

the government in what has become one of Africa's best examples of the politicization of corruption and its transformation into a pervasive ideology in the run-up to the 2017 elections.

Confronted by the challenge of politicization as an emerging threat to anti-corruption globally, scholars defined the phenomenon as “an increase in the polarization of opinions, interests, or values about judicial investigations and the extent to which this polarization is strategically advanced towards the political debate by parties, political leaders, and media.”⁵ The politicization of corruption in Kenya completely undermined the country's institutions charged with fighting corruption, including the Ethics and Anti-Corruption Commission (EACC), Parliament, Judiciary, the Directorate of Public Prosecutions and the media, which became compromised and rendered dysfunctional, unable to take credible action on corruption.

The President's anti-corruption agenda became hostage to corruption syndicates which compromised of the whole legal system and institutions created to investigate, prosecute and try corruption cases. The wheels had come off Kenya's anti-corruption machine. Tragically, a new unholy alliance of the opposition, corruption suspects, the Harambee House corruption syndicates of former bureaucrats who had fallen out with Kenyatta's Government started turning tables on the Government, accused it of not being serious in tackling corruption and alleging that its top leadership was involved in sleaze.

The Government was caught in the dragon's trap. Under these circumstances, it is unlikely that Kenyatta's anti-corruption drive will deliver justice in the manner it was officially and initially conceived. The immediate challenge is to restore the integrity of anti-corruption institutions, then slay the dragons of cartels and secure his development agenda. The Government soon realized that it had to win the confidence of the population to its anti-corruption agenda for President Kenyatta to be re-elected. This report examines the politicization of the war on the war on corruption in Kenya, its impact on institutions charged with making policies on corruption, investigating and prosecuting graft cases. Methodologically, the report is based on extensive interviews with ordinary Kenyans, civil society actors, academics, business personalities, governmental actors and participation in many forums and debates on corruption in Kenya in 2015.

5. Salvatore Sberna and Alberto Vannucci, “It's the politics, stupid!': the politicization of anti-corruption in Italy”, *Crime Law and Social Change*, 2013, 60, 5(2013): 565-593.

2. Kenyatta's New War on Corruption

Not even once did President Kenyatta mention the word corruption in his Inauguration Speech on April 9, 2013 that was mainly weaved around his development goals and the regional and international strategies to achieve these. As in other elections between 1992 and 2013, anti-corruption agenda remained a political tool of opposition parties and civil society activists, riding on the dominant unidirectional narrative of corruption that focuses on those in positions of power in governments to the exclusion of the often culpable opposition elite.⁶ Moreover, the indictment of Uhuru Kenyatta and his running-mate, William Ruto, by the Hague-based the International Criminal Court (ICC) overshadowed corruption as the pivot of the 2013 Presidential contest. All this, however, changed, and corruption reverted to being the pivot of Kenya's electoral politics.

2.1. In the Dragon's Den

Two developments forced President Kenyatta's government on the war path against corruption. First, Kenyatta realized that his own office was the epicentre of corrupt officials linked to business cartels, which had operated from the since the days of Goldenberg and Anglo-Leasing mega-corruption scams in the 1990s. In that regard, on February 6, 2014, Kenyatta astonished the public when he declared that his office in Harambee House was a 'den of major corruption'. Corruption was presenting a huge hurdle to his development agenda. It dawned on the president that the whole procurement and bureaucratic infrastructure was in the hands of corrupt syndicates which were determined to use every trick in the book to sabotage government tendering processes if business did not go their way. Jubilee's flagship projects—such as the laptops Jubilee had promised to Primary School Pupils as part of its election Manifesto—became difficult to implement. Kenyatta realized that the fight against corruption would have to start in his own house.⁷

The second development was the forced payments of Ksh1.4 billion to Anglo-Leasing firms before Kenya could feasibly float the Eurobond issue in May of 2014. Two cases decided in both the UK and Switzerland had ruled that the government owed Mercantile Finance Corporation of Switzerland Ksh1.4 billion

6. This narrative dominated the 2007 campaign with the Orange Democratic Movement (ODM) on the attack against the Party of National Unity (PNU), See, "President Mwai Kibaki's Speech during Jamuhuri Day Celebrations, December 12, 2007, available at: www.statehousekenya.go.ke/speeches/kibaki/dec07/2007121201.html/, retrieved July 17, 2015.

7. "Uhuru Takes Graft Fight to State House," Daily Nation, February 8, 2014, available at: <http://www.nation.co.ke/news/politics/Uhuru-takes-graft-fight-to-State-House/-/1064/2198316/-/w2cked/-/index.html>, retrieved July 14, 2015.

emanating from a loan the government had obtained in 2003 in the security related contracts. Kenya was targeting to raise Ksh174 billion for payment of an earlier loan and for plugging the 2014 budget. What irked the Jubilee Administration was that Kenya was forced to pay the Ksh1.4 billion (0.8% of the sum to be raised) before the bond could proceed.

Now pushed to a corner, the Government was forced to clarify why it had to sign the money away to the Anglo Leasing companies: “Resolution of the outstanding judgement debts is crucial in order to alleviate the risks to the Kenyan economy. The Government has exhausted all judicial options to forestall payment of the judgement debts and the way forward is for the Government to settle to minimize further loss as the outstanding awards continue to accrue interest. It is therefore imperative that these debts are settled.”⁸ Kenya floated the bond, which was oversubscribed, but the event revealed that corruption was a real drain to resources the Government needed to implement its development projects.

2.2. Slaying the Dragon

President Kenyatta’s determination to eradicate corruption became crystal clear during his 2015 New Year’s message to the nation. “The war on corruption must and will be won. In 2015, I urge all Kenyans to join me in slaying the dragon of corruption,” he said.⁹

Harambee House Clean-up: Earlier on, his government had embarked on a silent but massive shake up of personnel in the finance and procurement departments at his office. Senior and seasoned bureaucrats, some reputed to have aided in his election, were either suspended or transferred to different Ministries. In a decisive move in September 2014, the President created a separate docket of Chief of Staff and Head of Public Service and appointed a loyalist, former Treasury PS Joseph Kinyua, to the new powerful office, which significantly clipped the immense powers of Francis Kimemia who confined to the less powerful Secretary to the Cabinet slot.¹⁰

8. “Government Statement on Payment of Anglo Leasing Debts”, May 15, 2014, available at: <http://mobile.nation.co.ke/news/-/1950946/2316374/-/format/xhtml/item/1/-/wci68gz/-/index.html>, retrieved July 10, 2015.

9. President Uhuru Kenyatta’s New Year Message for 2015 <http://mobile.nation.co.ke/news/Uhuru-Kenyatta-New-Year-Message-Full/-/1950946/2574934/-/format/xhtml/-/9hrwtrz/-/index.html>

10. Stephen Makabila, “Francis Kimemia sacking ends long career in civil service”, The Standard, April 19, 2015, available at: <http://www.standardmedia.co.ke/article/2000158891/francis-kimemia-sacking-ends-long-career-in-civil-service>, retrieved July 10, 2015.

The Anglo Leasing Cases: The Anglo-Leasing cases, together with the Goldenberg mega-corruption in the early 1990s, remain Kenya's unfinished business in the war on corruption. In a nutshell, the "Anglo Leasing Scandal" referred to a series of interwoven scams that started with the contracting of a loan in December 2003 to the Department of Immigration, then under the Office of the Vice President and Ministry of Home Affairs, to enhance security by modernising the issuance of secure passports and purchase of security equipment for use at Kenya's borders. The procurement process was, however, abused and a company going by the name "Anglo Leasing and Finance Company Ltd" was awarded the tender and Ksh93 million paid upfront. This became public on May 4, 2004 when the matter was raised in Parliament. Subsequent review revealed that in the external public debt database, there were a total of 18 contracts similar to the one arranged by the Anglo Leasing and Finance Company Ltd and from then on these loan contracts were labelled "Anglo-Leasing".

As earlier stated, the Anglo-Leasing Cases came to the attention of President Kenyatta when Kenya was forced to pay Ksh1.4 billions before it could secure a targeted Ksh174 billion by floating the Eurobond in May 2014. As President Kenyatta signed off the 'loans' to Anglo Leasing firms, he ordered fresh investigations into the cases. State House exuded optimism that "Kenya now has a fully constituted Ethics and Anti-Corruption Commission which can and should take this process forward. There are also other agencies, including parliament that could play a role."¹¹ As it dawned on Jubilee later, Kenya's anti-corruption system was still work in progress and potentially a serious impediment to the war on corruption in Kenya.

On October 17, 2014, the EACC handed over five files to the Director of Public Prosecution (DPP) on Anglo-Leasing cases it had been working on afresh since 2006. Although both the DPP and the Attorney-General had been working on the files before, upon receipt of the cases the DPP was cautious and never named anyone perhaps to avoid attracting many court orders and injunctions by suspects. Instead, he appointed a team within his office to probe the files away from the glare of the media.

After reports of poor cooperation between the EACC and DPP emerged, a joint meeting of the two concluded with the formation of a joint committee to go over outstanding issue in the five cases submitted to the DPP. After five months of work, on March 2, 2015 the joint committee presented a report to the DPP who ordered the prosecution of 13 individuals and 3 companies involved in the Anglo leasing scandal. One of the three files received by the DPP related to

11. Government Statement on Payment of Anglo Leasing Debts May 15, 2014. <http://mobile.nation.co.ke/news/-/1950946/2316374/-/format/xhtml/item/1/-wci68gz/-/index.html>

E-Cops project which dealt with computerisation of the Kenya Police amounting to Euros 59,688,200.¹² In the second file, which related to supply of equipment and services to the Postal Corporation of Kenya, the DPP recommended charges against a former Finance Minister, former Permanent Secretary in the Transport and Communication Ministry, former Managing Director of a parastatal and a former director at the Treasury. The contract referred to as VISAT was awarded at a cost of US dollars 11,787,000. The last file was on modernisation of police equipment and accessories and was valued at Euros 40,000,000.

The thirteen individuals and companies were charged with seven offences, including conspiracy to commit economic crimes, fraudulent acquisition of property and engaging in a project without planning. They would also face charges of abuse of office, breach of trust and a charge of wilful failure to comply with procurement laws and regulations and 'disobedience of statutory duty'¹³

On March 5, 2015 seven Anglo Leasing fraud suspects were charged before a Nairobi court with abuse of office and conspiracy to defraud the government. Those charged included the Kisii County Senator, Chris Obure; former postmaster-general, Francis Chahonyo; and former permanent secretaries, Dave Mwangi and Sammy Kyungu. Others were former Financial Secretary, Samuel Bundotich, and former State officials, Joseph Magari and David Onyonka.

Further, the magistrate issued an international warrant of arrest against two foreign Anglo Leasing suspects, Brian Mills and Bradley Birkenfeld. Others also charged were Deepak Kamani and his brother, Rashmi Kamani, and their father, Chamanlal Kamani who were linked to 13 of the 18 contracts under Anglo Leasing.

Significantly, the Anglo Leasing contracts were the first high profile corruption cases that were tried under the Jubilee Administration. It must be noted that the Anglo Leasing scam took place under both President Moi and Kibaki between 2001 and 2003. Even then, President Kenyatta picked them up because the same corruption networks behind the scandal were now standing on the way of Jubilee's development agenda.

2.3 The List of Shame

President Kenyatta moved the war on corruption to a higher scale in the wake

12. E-Cops (Police Computerisation) project was signed on November 19, 2003 between Office of the President and Info talent Ltd (Swiss).

13. Contrary to section 130 of the Penal Code

of his annual State of the Nation Address on March 26, 2015.¹⁴ In the speech, he pin-pointed security, disunity and corruption as the unholy trinity that bedevilled his government.¹⁵ “I have outlined a number of initiatives that demonstrate the work that the Jubilee government has done to drive the transformation of Kenya. This progress notwithstanding, our country is today faced with a number of daunting challenges that slow our progress, obscure our achievements and chip away at the legitimacy of the state. The most pressing of these challenges are insecurity, disunity and corruption,” he said. Mentioning the word corruption fifteen times, the President declared graft as “a cancer eating at the soul of our motherland” and the greatest threat to Kenya’s security, fundamental rights and social economic transformation.

He unveiled to the public a confidential report forwarded to him by the Chief Executive Officer (CEO) of the EACC, containing the names of 175 top officials in Government and the opposition alike who were being investigated for suspected involvement in corruption. While handing over the report to Parliament, Kenyatta said, “I direct that all Officials of the National and County governments that are adversely mentioned in this report, whether you are a Cabinet Secretary, Principal Secretary, or Chief Executive of a state institution, to immediately step aside pending conclusion of the investigations of the allegations against them.”¹⁶ He asked “the other arms of Government, namely the Legislature and the Judiciary, to do the same.”

The unveiling of what has come to be known as “The-List-of-Shame” was the boldest move “from above” by any sitting President in Kenya’s fight against corruption.

Twenty days after the Anglo leasing Suspects were presented in court, the President presented to parliament a list of individuals suspected of corruption given to him by the EACC Chief Executive. While this list contained suspected offenders from cases under President Kibaki’s regime, the gist of the cases were on cases that had taken place under his regime and by Cabinet and Principal Secretaries. The list in total had 175 people, covering his cabinet and Principal Secretaries, opposition members, Governors and county officials and others in

14. In line with the President’s constitutional duty to address a special sitting of Parliament, to outline “the State of the Nation” in relation to values and principles of governance, as elaborated in Article 10; the state of the nation’s security, as provided for in Article 240; and the status in fulfilling our international treaty obligations, under Article 132 of our constitution. 15. Speech available at <http://m.news24.com/Kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326>.

16. President Uhuru Kenyatta, “State of the Nation Address,” Thursday June 26, 2015, Parliament Chambers, Nairobi, available at: <http://m.news24.com/Kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326>, retrieved July 16, 2015.

Parastatal and other state agencies.

Cabinet Secretaries¹⁷, the Secretary to the Cabinet, Francis Kimemia, and a number of Principal Secretaries¹⁸ stepped aside to allow for investigations. Despite efforts by the opposition to derail the process,¹⁹ the report was tabled and made public with all the 175 names and allegations against them listed. The perceived shallowness of the report immediately came up as an issue and started dismissal cries. Traps had been laid all along the path to defeat the anti-corruption agenda.

On April 1 2015, Muranga Governor, Mwangi wa Iria, became the first to be arrested and questioned at integrity house. The offense he was arrested for was not in the scope of grand corruption, but a mere misdemeanour and an issue that had apparently been cleared before a Judge.

The first step after the publication of the list seemed to have been a misstep, a point that would contribute to the trivialization of the whole issue.

3. The Dragon Strikes Back

In launching his war on corruption, Kenyatta had under-estimated the determination of the dragon of corruption to fight back and derail his Government's efforts. As the Government launched the anti-corruption fight, a renowned anti-corruption activist aptly remarked in March 2014 that: "embedded graft networks make even the most well-meaning goals of an administration extremely challenging to achieve within the time allocated and at a cost that doesn't drive the poor deeper into penury. They also poison key governance institutions such as the Security Services, Judiciary and Legislature."²⁰

Similarly, during his 2015 State of the Nation address, Kenyatta also hinted that his anti-corruption efforts were facing frustration from corrupt networks and cartels. He reminded Kenyans that:

"When our Treasury was processing our first sovereign bond, this country was forced to settle a foreign court judgement to pay shadowy entities 1.4 billion Kenya shillings. When I addressed the nation on this matter, I pledged that my government would do everything in its power to ensure that

17. These included Felix Koskei, Davis Chirchir, Michael Kamau, Kazungu Kambi and Charity Ngilu.

18. These include Nduva Muli, Mutea Iringo and Teko.

19. See section on the "politicization of anti-corruption."

20. John Githongo, "Propaganda, Perception and the Fight Against Corruption", March 30, 2014, available at <http://nisisikenya.com/2014/03/propaganda-perception-the-fight-against-corruption/#.VZ43svmqko>, retrieved July 20, 2015.

we recover all that was due to the Republic. From that moment, I took a personal interest and asked to be briefed on a regular basis of the progress on Anglo Leasing related investigations. My administration also supported the investigating authorities in obtaining support from a number of friendly foreign governments.”²¹

While appreciating that these investigations bore fruit, Kenyatta, however, revealed that:

“Obstacles have appeared threatening the prosecution of the perpetrators. The Ethics and Anti-Corruption Commission is now embroiled in infighting and finger-pointing, a state of affairs likely to cripple the investigative capacity of the institution with the likely outcome of subverting the course of justice. From reports I have received, I strongly believe that this is a further attempt to subvert the successful prosecution of the Anglo Leasing cases.”²²

The Government soon realized that its anti-corruption campaign was heavily politicized and subverted by a powerful coalition of actors, including aggrieved former government officials, power-brokers, business cartels and the political opposition.

3.1. The Opposition Corruption Strategy

The government’s anti-corruption agenda came as a blow to the opposition, threatening the central pillar of its 2017 election strategy. It viewed Kenyatta’s new anti-corruption crusade as an affront to its own 2017 strategy by removing the rag under its feet.

Opposition stepped up its counter-offensive, hyping its own anti-corruption rhetoric and declaring that “Jubilee is too corrupt to rule.” Odinga called for the Government to resign and call a snap election claiming that “the national system has collapsed and only fresh elections would save the country.”

Depicting the government in power as too corrupt to rule has been the central plank of successive opposition political parties since Kenya’s return to multi-party democracy in 1991. As a result, this has contributed to intense politicization of the war on corruption, turning anti-graft into a highly divisive

21. “President Kenyatta’s State of The Nation Address,” March 26 2015.

22. “President Kenyatta’s State of The Nation Address,” March 26 2015.

ideology. This instrumental use of anti-corruption as an ideology reached a dangerous peak in 2007 and largely contributed to the 2008 conflict and the subsequent paralysis of the Kenyan state.²³

After 2013, Raila Odinga and the opposition embraced the anti-corruption ideology as a perfect moral counterpoise to Jubilee's economic development agenda. Even before Jubilee settled to power, the opposition and allied civil society organizations were already alleging corruption in the nascent administration. Soon, the instrumental use of anti-corruption as a political tool rather than an evidence-driven judicial process would take a life of its own. The opposition did not have the burden of proof of its corruption allegations; it just needed to create "a perception of a corrupt government."

In July 2014, OKOA Kenya, an alliance of donor-funded NGOs and the Opposition Coalition for Reforms and Democracy (CORD), listed corruption as a key issue to drive its 2017 campaign for the election of Raila Odinga.²⁴ Anti-corruption has climbed to the apex of Cord's 2017 campaign trinity: corruption, security and human rights.

CORD had managed to effectively turn corruption into an ideology and the sharpest weapon for the 2017 contest. But when Kenyatta unveiled the list of 175 corruption suspects, Odinga realized that he and his loyalists were vulnerable to a robust and targeted anti-corruption campaign.

It struck back, making a remarkable comeback in recapturing the political initiative on anti-corruption. Moments before the list of 175 names of corruption suspects was tabled in parliament, the opposition moved to fight it. Its MPs and Senators tried to stop the report from being tabled before the house, arguing that the process through which it was introduced was unlawful and the fact that it had not been published in the Kenya Gazette made it a foreign document. However, the Speaker ruled against them.

This was the first in a series of actions that would effectively defeat judicial investigations into corruption and the possible prosecution arising from this. Odinga would follow this by instructing opposition stalwarts appearing in the list of shame, including his chief strategists, James Orengo, and ODM Secretary-General, Ababu Namwamba, not to step aside. As a result, Raila was hailed as "better in protecting" his loyalists than Uhuru Kenyatta, whose supporters

23. See Peter Kagwanja, *Corrupting Power Sharing: Kenya's Democratic Recession and the Stalled War on Corruption*, Nairobi: Africa Policy Institute, March 2009.

24. SabaSaba Declaration in the Okoa Kenya campaign

stepped aside and some faced charges.

3.2. Corrupt Business Cartels

Besides the opposition, Jubilee blamed the fight back against its anti-corruption campaign to two other forces: First were some senior officials determined not to go down alone and to implicate senior Government officials in fabricated corruption scams; and second were business cartels involving businessmen who felt that they were losing out on tenders in the new dispensation. As one Government official observed, these former bureaucrats and business cartels closed ranks with elements of the Opposition, forging a strong front against the government's agenda. They also tapped into the grievances of sections of the Jubilee parliamentarians and bureaucrats, effectively politicizing the Government's anti-corruption initiatives ahead of the 2017 election and holding it hostage.

To its credit, the opposition cobbled together a powerful informal alliance of intellectuals, civil society organizations, and kingpins of business cartels, power-brokers and bureaucrats in the Government of former President Mwai Kibaki who were named in the list of shame and suspended or edged out of the Jubilee administration.²⁵

This alliance used four tactics of subversion to derail the Government's anti-corruption campaign. First, it trashed all anti-corruption measures by the government as not good enough. It trivialized the Government's anti-corruption measures, likening them to such failed anti-corruption initiatives as the 'war on Magendo' (corruption) by former President Moi way back in the 1980s and the 'zero tolerance to corruption' campaign by his successor, Mwai Kibaki after 2003. Second, it attacked the credibility of the process used to arrive at the List of shame, claiming that the due process was not followed. Third, the alliance targeted the media, with its syndicates either buying out the media or using the judiciary to silence any attempt by media anchors to expose corruption syndicates.²⁶

Fourthly, the opposition and its allies managed to penetrate and 'captured' or derail institutions charged with investigating, prosecuting and trying cases of corruption. Government sources indicated that the cartels managed to hijack the Directorate of Prosecution (DPP), enabling them to determine the outcomes of

25. IPG interview with a senior Government official, Nairobi, July 10, 2015.

26. The case of Tony Gachoka and Jeff Koinange is widely viewed as a case in point, see "The Case of Jeff Koinange and Tony Gachoka", available at: <http://mobile.nation.co.ke/news/Jeff-Koinange-Tony-Gachoka-in-soup/-/1950946/2715266/-/format/xhtml/-/b78ff6/-/index.html>, retrieved July 14, 2015.

judicial investigations. The corruption syndicates also hired a legal point-man who was well-networked in Kenya's judicial system to influence and determine the judge(s) to hear a specific case in order to pre-determine the outcomes of the trial: acquittal or conviction. The systematic war of attrition by these syndicates effectively shut down the anti-corruption institutions.

Finally, they took the war to the Government's corner by making claims of its involvement in new fabricated corruption scandals. This is the context in which corruption claims relating to the NYS (discussed in the next section) emerged in July 2015.

3.3. Politicization of Corruption: The Case of NYS

Allegations of corruption against the National Youth Service and pressure on the Government to sack the Devolution Minister signify a classic case of the intense politicization of corruption. At the heart of the allegations is the intra-elite scramble for the huge resources devoted to the NYS. As a department within the Ministry of Devolution and Planning, the NYS received Ksh17 billion in the 2014-2015 budget and Ksh25 billion in this year's budget.

The politicisation of alleged corruption involving the NYS occurred in two stages. First, the media, mainly the *Daily Nation*²⁷ ran an article on the expenditure of the National Youth Service running to Ksh669 million quoting well-known companies or companies with well-known names, which are also easy to politicize because of their ethnic and political affiliation to the Jubilee administration. The media was central to fuelling perceptions of corruption in cases may be purely professional and non-corrupt. The first case cited by the article is that of Transcend Media Group, led by one John Kiarie, a former Raila Odinga ally and a popular figure in the creative industry who reportedly received Ksh161 million for services rendered to NYS. The second the Consulting House of Mutahi Ngunyi—aroused the ire of the opposition by his famous “Tyranny of Numbers” thesis, which correctly predicted that Raila and Cord would lose the 2013 Presidential election in round one—which was paid Ksh38 million for consultancy services. Third was the Ms Things of Desire who was listed as having been paid Ksh37.5 million for delivery of rice to the NYS. Fourth was the Brand Associates, which was paid Ksh113 million for media buying. Finally was the Alpha Mercantile, which was paid Ksh17 million for supply of sugar. No one-on-one corruption link was made, except that some of these companies have names associated with the Jubilee alliance. Curiously, while expenditure was

27. How Firm made Kshs 50 Million from one 5 hour Event, Daily Nation. <http://www.nation.co.ke/news/NYS-Tenders-Procurement-Event-Kibera-Payment/-/1056/2775612/-/112uf2u/-/index.html>

listed, no audit queries or suspicion of corruption was alleged. In none of the five listed examples was it shown that the services were not offered or goods not delivered. Pro-opposition activists in the cyber space and gutter press picked up the story and made broad corruption allegation without any basis.²⁸ The insinuation here was that just the mere fact of incurring expenditure amounts to a corruption offense!

Table 2: NYS Corruption Allegations		
Company name	Directors	Amount
1. Form Homes Builders	Josephine Kabura Irungu	154,950,000
2. Draco Capital	Peter Omari Otwoma Caroline Jambi Kinuthia	115,800,000
3. Roof and All Trading	Josephine Kabura Irungu	77,250,000
4. Reinforced Concrete Technologies	Josephine Kabura Irungu	115,800,000
5. Tegmen Trading	Peter Omari Otwoma Caroline Njambi Kinuthia	115,800,000
6. Grumum Engineering	Peter Omari Otwoma	115,800,000
		695,400,000

The second case reported was an attempt to pay some companies Ksh826 million through the IFMIS platform, which was uncovered and stopped before payments could go through²⁹. Here, six newly registered companies that seemed to share directors were awarded tenders for the supply of road building materials (see table 2). Before payment was made, anomalies were detected and the Criminal Investigation Department (CID) was invited to investigate the case. There is no evidence that taxpayers' money has been lost to corruption,

28. "Uhuru Political Advisor Mutahi Ngunyi Pocketed Millions in the Alleged Ksh669 million NYS Corruption Scam," Kenya Today, available at <http://www.kenya-today.com/politics/uhuru-political-advisor-mutahi-ngunyi-pocketed-millions-alleged-kshs-669-million-nys-corruption-scam>, retrieved July 20, 2015.

29. Here is List of Companies and Directors in Kshs 826 Million Scam <http://www.the-star.co.ke/news/here-list-six-companies-and-directors-sh826m-nys-scam>

and the relevant institutions are pursuing criminal investigations.

Despite this, both cases have been widely used to create the erroneous perception of corruption in the NYS, spearheading the youth empowerment agenda of the Jubilee administration and empowering neglected settlements of the poor. The opposition has upped the ante, calling on the Government to sack the Cabinet Minister, Anne Waiguru. The politics of the 2017 elections rather than corruption fuelled this pressure.

4. Impact on Anti-Corruption Institutions

The impact of the politicization of corruption on institutions charged with fighting corruption has been extremely dire. Kenyatta became aware of this debilitating effect when he noted in March 2015 that: “Rather than unite against this common enemy of our people, these institutions have elected to be mired in personal and institutional conflicts that have chipped away at their legitimacy and brought disrepute to the State.”

Further, he observed that “From the commission charged with the responsibility in the fight against corruption, Parliament’s premier oversight committee, the corridors of justice, and the security organs charged with the safety of this nation, Kenyans are witness to the betrayal of their trust.”³⁰ None of Kenya’s five institutions directly charged with investigating and prosecuting corruption has been spared by the scourge of politicization of corruption.

4.1. Interference with the EACC

The foremost institution in investigating cases of corruption is the Ethics and Anti-Corruption Commission (EACC). The Commission harkens back to the activism of the 1990s, which envisioned an independent body with investigative and prosecutorial powers to rein in runaway corruption. However, its powers have been greatly contested. Although it has been technically the institution vested with the responsibility of investigating corruption cases, it has no capacity to prosecute. Although the new constitution placed it within the pantheon of chapter 15 commissions which are protected by the law, it failed to explicitly give it prosecutorial powers, leaving it to parliament to determine its scope. Although the Commission has been at the centre of the fight against corruption, it has also become a battle ground between various interests, leading to its failure to effectively and credibly investigate cases and forward them for prosecution. Its investigative capacity has also been weak, sometimes limited to speculation.

30. The State of The Nation Address, March 26, 2015.

Yet, cases are won or lost at the investigation stage; and, therefore, interference at this point ensures that a case is poisoned **ab initio**.

The functions of the EACC are defined by the act of parliament (Cap 65 of the laws of Kenya).³¹ However, its history and that of its predecessors is one of interference and manipulation by interested parties in the activities of the Commission.³² The legality of the constitution of the EACC came into question on June 1, 2015. Senate launched an inquiry into the legality of the commission on grounds that it is not properly constituted. It did not help matters that a week later on June 7, 2015, Jubilee Mps from Nairobi cried foul that EACC selectively prosecuting suspects, claiming that there are businessmen directing the processes at both the EACC and the DPP on who is to be charged and who is let free. They threaten to name the businessmen in court.

This was followed by a proposal to reform the Ethics and Anti-corruption commission in early July. In its gist, the proposal suggested an increase in the number of commissioners to five and making them part time instead of full time. The commissioners would also be appointed by the PSC instead of a special panel. The bill is sponsored by Parliament's Legal Affairs and Justice Committee. Ultimately, parliament passed the Bill with an amendment to fire the heads of the secretariat, the CEO and his Deputy on grounds that a new commission deserves a new secretariat. However, the secretariat will stay in office in an acting capacity until a new secretariat is recruited by the new commission. The decision needs to be made to determine what exactly the EACC should do. Under the current constitution, its comparative advantage is to borrow a leaf from the Kenya National Human Rights Commission (KNHRC) and specialize in research, oversight and advocacy on corruption rather than getting entangled in judicial investigations.

4.2. The Office of the DPP

The second institution is the Office of the Director of Public Prosecutions (DPP). Kenya's 2010 constitution created the office with immense powers in the judicial investigation and criminal justice system. The office is, therefore, a major platform in the war on corruption. With regards to corruption, the DPP has independent power to prosecute any accused persons.³³ In the exercise of these powers, there have been allegations that the DPP has prosecuted certain

31. Ethics and Anti Corruption Commission Act Cap 65A Laws of Kenya

32. These include the Kenya Anti-Corruption Agency (KACA) headed by Harun Mwau, the Kenya Anti-Corruption Commission (KACC) headed by Justice Aaron Ringera, The Kenya Anti-Corruption Commission (KACC) headed by P.L.O Lumumba and the Ethics and Anti-Corruption Commission (EACC) headed by Mumo Matemu.

33. Republic of Kenya, The Constitution of Kenya, 2010, Article 157.

people and consciously left others out of the loop following intense lobbying and inducements for either cause of action.³⁴ A petition to the Public Service Commission by a Civil Society Group, Concerned Citizens of Kenya, sought to remove the Director of Public Prosecutions, Keriako Tobiko, from Office on grounds that he had violated Chapter six of the Constitution of Kenya.³⁵ On June 9 2015, the Raila Odinga-led ODM claimed that there were plans afoot to unduly remove the DPP from office by those cornered in the fight against corruption, keen on dismantling anti-corruption institutions to defeat their capacity to prosecute graft cases. To be effective in investigating and prosecuting corruption, a department specializing in and with the state-of-the-art technology to investigate and prosecute corruption needs to be created drawing from the research and investigative work of the EACC.

4.3. The Judiciary

Kenya's Judiciary is the ultimate institution in the war on graft that decides on any corruption cases that end up in court. But it has not escaped the manipulation by corrupt individuals and cartels, which have misused the court's powers to issue pre-emptive injunctions, make conservatory orders and prohibitory orders to frustrate the execution of the war on corruption.

Cartels have also hired well-networked lawyers who are also crafty and conversant with the processes in the corridors of justice to influence which judges to hear specific cases, thereby pre-determining and compromising the outcomes of the trials. As a platform of anti-corruption, Kenya's judiciary is captured by syndicates and has become increasingly unable—or seen to—provide justice. In May 2014, the Judiciary established an anti-corruption inspectorate unit with funding from the World Bank designed to stem the vice.³⁶ The Unit, which is initially under the chairmanship of Supreme Court Judge Dr Smokin Wanjala, who previously served as deputy director at the now defunct Kenya Anti-Corruption Commission (KACC), the predecessor of the Ethics and Anti-Corruption Commission (EACC), has heavy lifting to do to investigate and eradicate the impact cartels compromising trials on corruption.

4.4. A Compromised Law-Maker

Parliament has powers to make laws, including those to curb or punish corrupt practices. However, in the context of politicization of corruption

34. .Republic of Kenya, The Constitution of Kenya, 2010, Article 157.

35. Chapter Six of the Constitution of Kenya deals with Integrity and Values in Leadership

36. Moses Njagih, "Judiciary sets up anti-corruption unit," Standard Digital, May 21, 2015, available at: <http://www.standardmedia.co.ke/article/2000121835/judiciary-sets-up-anti-corruption-unit>, retrieved July 20, 2015.

parliament has become a hostage of corrupt cartels who have lobbied parliamentarians to vote in ways that undermine the war on corruption. Recently, the Kenya Parliament passed an amendment on July 9, 2015 which effectively disbanded the Ethics and Anti-Corruption Commission (EACC) Secretariat and complicated the fight against corruption.³⁷ This has amounted to subversion and disruption of institutions, which has thrown confusion over cases in the pipeline for investigation, prosecution or judicial evaluation.

5. Conclusions

On the whole, in the wake of renewed judicial investigations and trials of Anglo Leasing scam cases and those relating to the List of Shame, institutions of corruption and administration of justice have suffered a serious erosion of credibility and trust. The politicisation of anti-corruption has stalled Kenya's anti-corruption architecture and undermined their capacity, efficiency and credibility, thus making the war on graft increasingly difficult to win under the current state of affairs. The Government's anti-corruption agenda has been held hostage by powerful corruption cartels and syndicates abetted by the political class, which has no qualms politicizing corruption ahead of the 2017 elections.

As such, the Jubilee Government needs to synchronize the institutions dealing with corruption, including the EACC, the Judiciary, the DPP and corruption to effectively tackle corruption. On its part, despite the current setbacks, the executive must stay the course and continue to fight corruption and to dismantle corruption cartels and networks within the Government, the opposition and business. It is prudent that the Government create a Special anti-corruption Unit within the Police under the Criminal Investigations Department to return corruption offenses to mainstream Criminal Justice systems. The powers and space given to the EACC by the constitution of Kenya only allows for a strong and efficient research and advocacy institution to underpin evidence-based prosecution of corruption and to end the era of McCarthyism and witch-hunting that now characterize the corruption debate in Kenya. The Jubilee leadership needs to re-engineering political discourse on corruption within the ruling alliance to ensure that all leaders in parliament, senate, government and affiliated political parties are reading from the same script on fighting corruption. Any discord or ambiguity creates space for the corrupt segments of the political class and cartels to exploit and continue subverting efforts to root out corruption.

Kenya's judiciary should investigate new allegations of corruption in the

37. How Cartels Conspired to Send Anti-Graft Team home <http://www.nation.co.ke/news/politics/MPs-Cartels-EACC-Secretariat/-/1064/2784354/-/upxn60z/-/index.html>

judiciary and the emergence of syndicates that determine the allocation of cases to certain judges calibrated to manipulate and pre-determine the outcome of judicial processes: conviction or acquittal. The Chief Justice should expedite the hearing of corruption cases that have been brought before the courts to deal with the issue of expediency in the administration of justice and, finally, ensure that the newly created anti-corruption inspectorate unit is up and running with the requisite capacity to stem corruption within the Judiciary.

The executive and parliament to agree to revise and should transform the Ethics and Anti-Corruption Commission (EACC) into an efficient and well-oiled oversight, research and advocacy institution on corruption and economic crimes along the lines of the Kenyan National Human Rights Commission (KNHRC) or the National Gender and Equality Commission (NGEC). In this regard, as soon as the new commissioners and the secretariat are in place, urge and facilitate them to under-take robust investigative research to inform evidence-driven prosecution of all corruption cases. The investigation and research on corruption should go beyond the current focus on the role of government officials to a plethora of other actors in private business, opposition parties and international actors to comprehensively deal with the spectre of corruption.

The executive and the Director of Public Prosecutions to work to form a special unit on corruption under the office with a substantive head to take charge of and fast-track corruption related cases.

The Opposition CORD should return to the narrative of anti-corruption as moral and criminal issue rather than a political one and cease politicizing the war on corruption and, instead deal firmly with corruption within its own ranks and members.

Kenya's civil Society organizations should promote a comprehensive and inclusive approach to anti-corruption that focuses on all actors in government, the private sector and the opposition and push for evidence-driven anti-corruption advocacy based on the narrative of corruption as a moral and criminal problem to be tackled through the mainstream judicial investigative process rather than through the media.

In this regard, parliament, especially its committee on Justice, should investigate and take action in allegations of interference in institutions charged with the war on corruption such as the EACC by interests and cartels. It should also expedite reform through legislation in the anti-corruption architecture to ensure the bodies involved are given roles based in their comparative advantage.

About the International Policy Group

The International Policy Group (IPG) is a nongovernmental organization dedicated to sustainable Peace and Justice. Its mission is to generate and share knowledge on peace and justice to positively influence policies and politics. IPG is primarily concerned with the governance, policy and institutional dynamics that impact on Peace and justice, especially in poor countries worldwide.

Broadly, IPG is motivated by recognition that the existing global peace and justice policy system has not adhered to the principle of equality of nations. It largely reflects the hegemonic structure of the post-1945 world order and has not adjusted to the reality of fundamental changes in the international system. These rise of new powers and the mounting influence of non-state actors has provided opportunities to promote peace and justice, but also posed new challenges that might endanger these values. Scholarly and policy communities need to be informed of the challenges and opportunities to sustainable peace and justice. The IPG pursues its mandate by:

- Engaging in research aimed at promoting peace and justice by address specific national, regional and global challenges and sharing knowledge through books, articles, reports, and other outlets;
- Convene influential policymakers and scholars working on issues of peace and justice to debate the merits of frameworks through which peace and justice are promoted;
- Hosting roundtable series to inform the policy and scholarly communities of emerging challenges and solutions to peace and justice at national and regional levels;
- Providing a dynamic Web presence as a resource to researchers and policy communities on the issues related to the future of peace and justice.

©International Policy Group, July 2015