

A RADICAL CHANGE TO FIGHTING CORRUPTION IN KENYA

Kenya has just finished its 2022 elections. The promise of change leads us to write the following.

Any past attempts in the economic sector to elevate Kenya into middle income nation status have floundered on the dire state of the country's famed corruption. In fact, corruption is such a drain on its economic life presently that no sane investor will – under the current scenario – set up multi million dollar projects in Kenya unless the GOK is a partner thereto. That is anathema to many investors weaned on the Chicago School & Friedman Milton's economic theories, and thus Kenya has achieved pariah status due to its inability to conquer the corruption dragon.

Much ink has been wasted on thirty years of active failure in making a difference in corruption statistics in Kenya. We have a more radical solution, whose *sine qua non* is the direct and active participation of the Office of the Presidency ('OTP'). H.E. The President Dr. Ruto has recently personally taken responsibility for fighting corruption and the resultant loss of resources in Kenya, stating "No one will be allowed to steal the republic's resources...you try and you will encounter me personally ... action will declare my intentions louder."

The main institutions in Kenya that have the constitutional mandate to protect citizens' life and property are the (i) Judiciary, (ii) Police and (iii) Directorate of Public Prosecution ("DPP"). Without wanting to place lipstick on a pig, let us bluntly state that all three have and are continuing and shall continue to violate that constitutional trust in unimaginable ways. Bribed judges, bribed police and bribed prosecutors. What a disaster. Anyone denying this either is not engaged in service delivery in these sectors, or lives with fairies.

The UNODC in its *Technical Guide to the United Nations Convention Against Corruption*^[1] maintains that in implementing the "Corruption Convention" Article 6 which requires the the establishment of preventive anti-corruption body or bodies, "attention needs to be paid also to article 36 which foresees the need for establishment of a specialist investigative anti-corruption agency."^[2] While we accept that the EACC has an existing mandate to address corruption, we note that the EACC's results to date have been less than optimal, particularly in the law and order sector, for whatever reason that we will not seek to explain here. We do not wish to underestimate the magnitude of the task. We therefore adopt the attitude that the war is real, that fresh untried strategies will need to be employed. We note in this respect the UNODC's guidance which sets out the following factors in favour of a new anti-corruption body:

- Its establishment would represent a new beginning and a demonstration of a new commitment.
- Existing bodies may have lost credibility and the inertia of their existing unsuccessful practices may be difficult to change.
- Existing bodies may have staffs that do not have the skills required for the new mandate.
- A new body can be given new powers appropriate to current circumstances.

As a result, we propose the establishment of a specialized Unit in the OTP with a mandate to investigate – specifically and exclusively – the Judiciary, Police and DPP. It should be obvious why these three institutions are the proposed targets. They are supposed to be the State’s teeth in the broader fight against corruption, but if the teeth of a simba are rotten, then surely we all know that eventually the simba will starve.

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Brief Outline of Methodology/Rationale Therefor

It should be clear that since the targets of this note are the three main organs of the law & justice sector, it should be equally obvious that the unit proposed (the “Unit”) to be the backbone of the investigation/prosecution of these three organs cannot be placed institutionally within these three organs. Functional independence is paramount. The underlying philosophy behind the proposed Unit is that it is operating within hostile territory against a numerically superior target, which holds the historical and legal high ground – a target that is intellectually advanced and ruthless in its ability to use all resources at its disposal to protect itself and those who work for it, and therefore all possible security measures will need to be taken in advance in order to maintain operational silence and prevent leaks of vital information/evidence to the target institutions.

In addition, since the Judiciary is one target, any prosecution mounted by the Unit will need to be based on watertight evidence. The accuracy and evidential burdens of the investigations done by the Unit will need to pass severe internal review prior to arrest of suspects. Further, the targets need to be selected primarily on the ability of the Unit’s prosecution arm to seize the assets of the target prior to any arrest being effected. This means the investigations need to be guided by a strategic prosecutor [either seconded from the ODPP or an external special prosecutor] with the goal being to identify via forensic audit the target’s attachable assets.

Proposed Administrative/Operational Structure

The Unit should be established as a Forensic Unit situated in the OTP and comprising four (4) sub-units, each sub-unit led by an administrative Coordinator.

The Unit’s top strategic/oversight organ should be the Field Command [“FC”], composed of three members, being designated representatives of i) the President, ii) the Director/DPP and iii) the National Intelligence Service [“NIS”]. The designates of the OTP/NIS should be ex-military, at the level of Brigadier General or above.

The Unit’s Operational Command [“OC”] should be the person responsible for administration and oversight of the Unit, including sub-units comprised of technicians in various disciplines required

for undertaking forensic investigation. The OC should have the rank of a Deputy Inspector General of the Police Service.

There should be three dedicated sub-Units having responsibility for investigating the Judiciary, Police and ODPP respectively, each having a minimum of four investigators, comprised of persons with sufficient forensic, audit and I.T. skills to competently and ethically fulfill assigned tasks. All tools for the gathering of forensic evidence should be availed to the sub-Units.

The Unit's targets, as explained above, are persons in the Judiciary, Police and ODPP who have been selected on criteria based on inconsistency between lifestyle, declared wealth forms and intelligence reports. The decision to launch full scale investigation (for eg. a lifestyle audit) on a particular target will be exclusively made by the FC, upon recommendation of the OC.

There should be a Prosecution sub-Unit that is operationally and financially independent from the ODPP, comprised of the following:

A Strategic Prosecutor ["SP"], being a lawyer with established prosecution skills who will advise and guide the OC through the pre-prosecution stages of investigations, including preliminary investigations undertaken to determine whether a defined threshold has been reached to continue with a full scale investigation. The SP shall write the final advice to the OC on every "decision to prosecute" after all the evidence has been collected. This advice must be approved by the FC prior to any arrest being effected.

A Tactical Prosecutor ["TP"], being a lawyer with established prosecution skills who is responsible for properly acquiring any required search warrants and undertaking other legal processes that may be required prior to initiation of a prosecution. The TP will be supervised by and report to the SP.

A Litigation Prosecutor, being a special prosecutor responsible for undertaking prosecutions after the FC has determined that an arrest and prosecution should be initiated.

Establishment and Operationalisation of the Unit

The recruitment and selection of the Unit members, SP and TP must be based on NIS vetting. The initial terms of members should be for two years, renewable for a further two years. The office location of each sub-Unit must be secret. Its' members must sign forms under the NIS Act and/or Official Secrets Act and/or Leadership and Integrity Act (as may be applicable) swearing them to secrecy as to their job functions. The NIS officials responsible for vetting must also be sworn to secrecy and face immediate dismissal from the Service, and criminal prosecution should they be determined to have violated any oath/declaration and/or terms of service. The sub-units must be kept operationally separate in order to enhance operational security. Only the OC and SP should know the composition and location of all the sub-units.

Further, NIS must have independent authority and responsibility to review the credibility/integrity of the Unit members on a quarterly basis. The possibility of Unit members

being corrupted by the targets is live and real, and only strict control by NIS will ensure operational security and control leaks from the Unit.

We recommend full use of I.T. resources, including controls of information flows, anti-intrusion tools, etc. The Nairobi office of Mossad will be more than happy to provide these intelligence tools to the Unit.

The work assignment/directives of the Unit should be in writing by the FC and records thereof maintained by the OC. Based on these written directives, the Unit will be responsible for developing a work plan to implement each directive.

Firearms, where judged appropriate by the OC, may be issued to the Unit members who must be properly trained and licensed for their use as required by law.

Funding of the Unit should be from the FC, the members of which can easily find and dedicate the necessary financial resources/budget should the political will exist. The financial resources will be required for salaries and allowances, equipment/transportation, rent and utilities for any required office space, travel expenses related to investigations and supplementary emoluments based on dangerous or remote assignments.

Summary

The overall purpose of the Unit is to bring accountability to the Law & Order sector. We hold the view that unless there is efficient and strategic investigation, asset seizure and prosecution of corrupt judicial officers, prosecutors and senior police officers for crimes of fraud and/or corruption, the government will continue to be viewed as a toothless (at best) or complicit (at worst) watchdog. If after four years, a significant number of investigations – within the range of ten to twenty for each target institution – leading to successful prosecutions have not been realized, the Unit should be disbanded.

We believe that once the news of the actual effective prosecution and tracing of the proceeds of crime belonging to these particular State officers reaches the general public and the donor/investor community, the actual economic rewards that Kenya will reap will be greater than any amount of IMF funding, SAP programs or other tools of the IFIs or bilateral financing models that currently serve to keep Kenya in poverty.

It should be obvious that the twinned issues of “rotting teeth” and “economic depression” are issues within the purview of a properly focused NIS. If NIS does not share that view, then we would recommend a radical house cleaning to begin there without delay.

We are available for consultation and elaboration of the above proposal and its place within the current anti-corruption regime, including our view regarding the utility of the Proceeds of Crime and Money Laundering Act 2009 [as revised 2022] and in particular section 75 thereof.[\[3\]](#)

[1] Online:

<https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf>.

[2] At pg.7.

[3] Section 75 provides for realization of a confiscation order relating to property seized as proceeds of crime.