



UNODC

United Nations Office on Drugs and Crime

Country Review Report of Kenya

Review by Cabo Verde and Papua New Guinea of the implementation by Kenya of articles 15 – 42 of Chapter III. “Criminalization and law enforcement” and articles 44 – 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015

I. Introduction

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

II. Process

5. The following review of the implementation by Kenya of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Kenya, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Cabo Verde, Papua New Guinea and Kenya, by means of telephone conferences, e-mail exchanges and any further means of direct dialogue in accordance with the terms of reference, and involving Mr. John Kithome Tuta from Kenya, Ms. Sara Boal and Ms. Edelfride Barbosa Almeida from Cabo Verde and Ms. Joan Arni and Mr. Mark Jumogot from Papua New Guinea. The staff members of the Secretariat were Ms. Tanja Santucci and Mr. Tim Steele.
6. A country visit, agreed to by Kenya, was conducted in Nairobi from 1 to 3 September 2014. During the on-site visit, meetings were held with: the Office of the Attorney General and Department of Justice (OAG & DOJ) (led by Mr. Njee Muturi, Solicitor General, on behalf of Prof. Githu Muigai, Attorney General); Ethics and Anti-Corruption Commission (EACC) (led by Mr. Mumo Matemu, Chairman, EACC); the Judiciary (led by Justice Richard Mwongo, Principal Judge of the High Court, on behalf of Hon. Justice Dr. Willy M. Mutunga, EGH - Chief Justice and President of the Supreme Court); Office of the Director of Public Prosecutions (ODPP) (led by Mr. Jacob Ondari, Deputy Director of Public Prosecutions, on behalf of Mr. Keriako Tobiko, Director of Public Prosecutions); National Police Service (NPS) (led by Mr. David Kimaiyo, MGH, CBS – Inspector General, NPS); Public Service Commission (PSC) (led by Amb. Peter O. Ole Nkuraiyia, Vice-Chairperson, PSC, on behalf of Prof. Margaret Kobia, CBS - Chairperson of PSC), Financial Reporting Centre (FRC) (led by Mr. Alex Nandi, Head of Analysis, on behalf of Mr. Jackson M. Kitili, Interim Director/Chief Executive Officer, FRC); the National Steering Committee on UNCAC Review (led by Mr. John K. Tuta, HSC - Chief State Counsel, OAG & DOJ/UNCAC Review Focal Point), on behalf of the Chairperson (Ms. Mary Ann Njau-Kimani, OGW - Secretary, Justice and Constitutional

Affairs, OAG & DOJ)); African Network of Parliamentarians Against Corruption (APNAC-Kenya Chapter) (led by Hon. Shakeel Shabbir Ahmed, MP, Chairperson of APNAC-Kenya Chapter), as well as representatives of civil society (led by Mr. Dalmas O. Okendo, Head of Programmes, Transparency International Kenya Chapter, and Mr. Morris Odhiambo, Centre for Law and Research International (CLARION), among others. Thus, the information contained in this report in terms of the measures taken by Kenya towards the implementation of UNCAC is valid as of 3 September 2014.

III. Executive summary

1. ***Introduction: Overview of the legal and institutional framework of Kenya in the context of implementation of the United Nations Convention against Corruption***

Kenya signed and ratified the Convention, and deposited its instrument of ratification, on 9 December 2003.

Generally accepted rules of international law and treaties or conventions in force form part of Kenya's domestic law (Article 2(5) and (6) of the Constitution). Accordingly, UNCAC could, in theory, be applied directly, except in respect of the criminalization provisions, which need domestic legislation to set out offences, penalties and related provisions.

Kenya is a member of the Commonwealth and follows the common law legal system. The Constitution of Kenya, 2010 is the supreme law (Article 2); other sources of law are Acts of Parliament, African customary law, general principles of international law, and treaties or conventions ratified by Kenya. Under the Constitution, judicial decisions have the same legal weight as laws.

Under Article 132(1)(c)(iii) of the Constitution, the President is required, once every year, to "submit a report for debate to the National Assembly on the progress made in fulfilling of the international obligations of the Republic", including this Convention. Further, Article 132(5) states, "The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries".

Key institutions in the fight against corruption include: the Ethics and Anti-Corruption Commission (EACC), Office of the Attorney General and Department of Justice (OAG & DOJ), Office of the Director of Public Prosecutions (ODPP), Asset Recovery Agency (ARA), Financial Reporting Centre (FRC), National Police Service (NPS), Directorate of Criminal Investigations (DCI), Witness Protection Agency (WIPA) and the Public Service Commission (PSC).

2. ***Chapter III: Criminalization and law enforcement***

2.1. ***Observations on the implementation of the articles under review***

A general observation is that different laws implementing UNCAC use different terminology in defining the categories of public officials to which they apply, which could hamper the application of the laws to all relevant categories of public officials in respect of UNCAC offences.

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Section 39 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) addresses bribery involving agents; it covers offering, giving, or agreeing to offer or give, as well as receiving, soliciting, or agreeing to

receive or solicit, bribes. Beyond the limitation to arrangements between agents and principals, the offence does not expressly cover bribery in relation to third party beneficiaries, or indirect bribery of public officials.

Kenya has not criminalized the bribery of foreign public officials and officials of public international organizations (active or passive).

Certain forms of trading in influence may be covered under the broad concept of corruption of officials and abuse of power (sections 39 and 46, ACECA). However, section 46 omits certain dimensions of trading in influence, including intermediary agents.

Kenya has not adopted a comprehensive offence of bribery in the private sector.

Money-laundering, concealment (arts. 23 and 24)

Money-laundering is criminalized, principally in sections 3 and 4 of the Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA), section 47 ACECA, and the Penal Code (Cap. 63) (PC). Participatory acts, including complicity, agreement, association and attempts, are covered (sections 47A ACECA, 20, 388, 389 and 393 PC). POCAMLA adopts an all-crimes approach to predicate offences, including foreign predicate offences that satisfy the dual criminality principle (section 2); self-laundering is not precluded (section 3). There are no statistics on money-laundering convictions because the legislation was recently adopted.

Concealment is criminalized (sections 322 PC, 47 ACECA and 3 POCAMLA).

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Provisions relevant to embezzlement include: section 45 ACECA, sections 101, 268 and 280 PC, and sections 127 and 275 PC. Theft (sections 268, 275, 280 PC) is limited to theft of tangible items.

The abuse of power offence has similar characteristics to article 19 of UNCAC. Relevant provisions are section 46 ACECA and sections 101, 128, 130, 268 and 280 PC.

Kenya has not criminalized illicit enrichment, although several provisions pursue the same goal, including Codes of Conduct and Ethics under the Public Officer Ethics Act, 2003 (POEA), Ethics and Anti-Corruption Commission Act, 2011 (EACC Act) and Leadership and Integrity Act, 2012 (LIA). These do not always include related sanctions but violations thereof may involve a recommendation to prosecute. POEA further provides for asset declarations by officials every two years.

PC offences relevant to private sector embezzlement include misappropriation in general, misappropriation by clerks or agents, directors or managers of companies, and principals, together with fraudulent use of trust assets and accounting fraud (sections 275, 281-283, 327-331).

Obstruction of justice (art. 25)

Interference with or influencing witnesses in judicial proceedings or obstructing or preventing the course of justice or the execution of legal processes is criminalized (sections 121 (f) and (g) and 117 (b) PC).

Interference with justice or law enforcement officials is criminalized in ACECA (section 66), PC (sections 117, 253 and 121), POCAMLA (section 15), the Witness Protection Act, 2006 as amended (WPA) (section 30C), POEA (section 40), LIA (section 46), and the National Police Service Act, 2011 (section 58).

Liability of legal persons (art. 26)

Section 23 PC, section 2 POCAMLA and common law principles establish the criminal liability of legal persons, which have been held criminally liable for corruption. The term "person" in the Laws of Kenya is interpreted to include legal persons (section 3 General Provisions and Interpretations Act, Cap. 2). The civil (sections 55 and 56 ACECA) and specified administrative (section 36A POCAMLA) liability of legal persons is also established without prejudice to the criminal liability of natural persons.

Legal persons are subject to more severe penalties than natural persons (section 16 POCAMLA) and may be debarred from participating in public procurement (sections 40 and 115, Public Procurement and Disposal Act, 2005 (PPDA)). Case law illustrates the application of these provisions.

Participation and attempt (art. 27)

Participation and attempt are criminalized (sections 20 and 389 PC, and 24 POEA). Attempt, conspiracy and incitement are also criminalized under ACECA. The preparation of an offence is not specifically covered.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Penalties under ACECA (section 48) consider the seriousness of offences by imposing significant prison terms and fines, which may be cumulative. Nonetheless, there are problems regarding the proportionality, consistency and adequacy of sentencing; a Judicial Task Force on Sentencing has been created to address the issue.

There is no immunity for public officials. Only the President of the Republic and any person acting in that capacity is immune from criminal prosecutions, except for offences recognized under Kenya's treaties that prohibit such immunity (article 143 Constitution).

The DPP must, in exercising his functions, consider the public interest and the administration of justice (article 157(11) Constitution). Article 157(8) reduces the discretionary powers of the DPP to interrupt criminal procedures in cases authorized by court.

Article 49, paragraph (1)(h) of the Constitution and sections 123, 356 and 357 of the Criminal Procedure Code (CPC) relate to the right of an accused person to be released on bail while awaiting charge or trial. The main judicial consideration is whether the accused is likely to turn up for trial or appeal, having regard to the gravity of the offence.

Early release of detained or convicted persons may be obtained by presidential pardon, following a recommendation of the Advisory Committee on the Power of Mercy established under article 133(2) of the Constitution, considering inter alia the nature and seriousness of the alleged crimes (section 22, Power of Mercy Act, 2011).

Disciplinary procedures provide for the dismissal or removal from office of public officers (article 75 Constitution). Section 62 ACECA makes

provision for suspension when a public officer is charged with corruption. Summary dismissal is provided for (section 44(4) Employment Act, 2007), but reassignment is not addressed. Disciplinary action may be taken in parallel to criminal proceedings (*Republic vs. Attorney General and 4 Others Ex parte Evans Arthur Mukolwe* (2013) eKLR). POEA and LIA establish a legal framework for disciplining public officers for breach of integrity.

Persons convicted of corruption or economic crime are disqualified from holding public office for ten years after the conviction (section 64(1) ACECA and article 75(3) Constitution). This includes disqualification from holding office in State-owned enterprises (section 2 ACECA).

Administrative measures by the Probation Department assist released prisoners to reintegrate back to society. However, capacity challenges were reported.

Under section 5 ACECA, a Special Magistrate can pardon persons who fully and accurately disclose the commission of offences and persons involved. Section 25A ACECA further permits EACC, in consultation with the Attorney General, to offer a commitment not to investigate persons who fully and accurately disclose the essential elements of an offence. Likewise, EACC can refrain from instituting criminal procedures, provided such commitment is recorded by the court (section 56B). Cooperation of an indicted person with law enforcement authorities may be taken into consideration during sentencing. Cooperating persons qualify for the same protection as witnesses in criminal proceedings.

Protection of witnesses and reporting persons (arts. 32 and 33)

WPA provides for the protection of witnesses in criminal and other proceedings. WIPA was established to administer the witness protection programme and determine applicable protection measures, including physical and armed protection, relocation, change of identity, advisory services and other measures necessary to ensure the safety of witnesses. WIPA may also request the courts to implement measures during proceedings, including closed sessions, redacting identifying information, using videolink, pseudonyms or measures to suppress the identity of witnesses. Protections are also available to experts, their relatives and other persons close to them. Nonetheless, there are significant reported challenges of witness protection and retaliation.

Victims are covered to the same extent as witnesses (section 3 WPA). The Victim Protection Act, 2014, which provides for the protection of victims of crime and abuse of power, commenced operation on 3 October, 2014. The Act is administered by WIPA. The views and concerns of victims are considered under the administrative procedures of WIPA. There are also provisions in the CPC concerning victim impact statements (sections 137I, 329C and 329D) and consultation with victims (137D).

There are no comprehensive measures to protect whistleblowers.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

POCAMLA provides for forfeiture of property of corresponding value under conviction and non-conviction based mechanisms. Under section 61, the court may make confiscation orders upon the application of the Attorney General, the Director of ARA or suo motu against a defendant for payment to government of any appropriate amount. This includes proceeds of crime and instrumentalities used or destined for use in offences (section

2 POCAMLA), as well as transformed, converted or intermingled property, income and benefits derived therefrom.

The court, on application by EACC, may issue freezing orders on proceeds of corruption and money laundering (section 55 ACECA). Parts IV and VI ACECA deal with investigations, including asset tracing, while Part VII deals with recovery and forfeiture. Other investigative measures are provided for (sections 23 and 26 to 30 ACECA, 118 CPC and 180 Evidence Act, sections 68 and 71 POCAMLA).

ACECA provides for the appointment of receivers and managers of frozen or confiscated property. Section 56C provides that recovered property be surrendered to the Principal Secretary, Treasury and monies recovered be paid into the Consolidated Fund. Section 112 POCAMLA sets out functions of ARA in the administration of the consolidated fund. Section 72 POCAMLA further provides for the appointment of a manager of property subject to a restraint order.

EACC can make applications before court for warrants to search bank accounts (section 23(4) ACECA). Section 17 POCAMLA provides that its secrecy provisions override provisions in any other law. Nonetheless, procedures to obtain access to bank and financial records for investigative purposes could be streamlined.

Section 55 ACECA addresses the forfeiture of unexplained assets. Sections 61 and 65 provide for confiscation of assets where the suspect has failed to prove their lawful origin.

Banking secrecy cannot be invoked against judicial authorities in ongoing proceedings. Section 28 ACECA allows for banking files to be obtained during investigations through a court order.

Statute of limitations; criminal record (arts. 29 and 41)

The limitations period does not apply to criminal proceedings or civil proceedings for the recovery of assets. However, inordinate delay in commencing prosecution proceedings may constitute a travesty of justice (Republic vs. Attorney General & 3 Others, ex-parte Kamlesh Mansuklal Damji Pattni (JR), Miscellaneous Application No. 305 of 2012). The courts look at the circumstances on a case-by-case basis.

Courts may consider prior foreign convictions (section 142 (3) CPC).

Jurisdiction (art. 42)

The jurisdictional reach of Kenya's laws covers offences committed within Kenya, but not all offences on board Kenyan ships or airplanes. Jurisdiction applies to offences committed by nationals outside Kenya that would violate ACECA if committed in Kenya (section 67), but not to offences against nationals. Kenyan law does not provide for jurisdiction where extradition is refused and the offender is present in Kenya, except in the case of nationals where the grounds for extradition are not met.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

Kenya does not have adequate provisions addressing different consequences of corruption. However, it provides for disqualification from procurement of persons involved in corrupt practices and for voiding of contracts by procuring entities (sections 40-41, PPDA).

Compensation for damages caused by corruption may be obtained (sections 51-54 ACECA).

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

Pursuant to the Constitution (article 79), Parliament enacted the EACC Act. Section 3 (1) establishes EACC, with the status, powers and independence of a commission under Chapter 15 (section 28 EACC Act).

Article 157 (1) of the Constitution establishes ODPP. Moreover, NPS have a mandate to investigate all crimes except offences under ACECA. ACECA crimes are investigated by investigators appointed by the Secretary/Chief Executive of EACC.

Sections 21-43 POCAMLA establish the FRC, funded by the National Treasury. Sections 52-55 establish ARA. Other specialized bodies include the Auditor-General, Public Procurement Oversight Authority and the Banking Fraud Investigation Unit.

Anti-corruption courts are established as an administrative division in the judiciary presided over by Special Magistrates (section 3, ACECA). Appeals therefrom go to the High Court.

Certain measures could strengthen the operations and mandates of the specialized authorities. A National Council on the Administration of Justice (NCAJ), established under the Judicial Service Act, 2011, has been created to reduce backlogs in courts and address delays in the adjudication of cases.

Cooperation between national law enforcement authorities takes place through administrative channels like the Kenya Leadership and Integrity Forum and inter-agency agreements. Investigative and prosecuting institutions cooperate through joint trainings, staff secondments and exchange of expertise.

FRC refers suspicious transaction reports (STRs) warranting further investigation to NPS, which transmits them to relevant authorities. FRC, as a new institution, faces challenges, including limited capacity, expertise and the development of operational guidelines.

EACC encourages the reporting of corruption, including anonymously.

2.2. *Successes and good practices*

- Kenya continues to strengthen its legal and institutional framework on witness protection, including through the witness protection programme.*
- The regional presence of EACC, its Constitutional anchor and operational mechanisms, including the Integrated Public Complaints Referral Mechanism (e-IPCRM), can be considered a good practice.*

2.3. *Challenges in implementation*

To further strengthen existing anti-corruption measures it is recommended that Kenya:

- Continue to strengthen data-collection systems for reporting on investigations, prosecutions and adjudications of corruption offences across institutions.*

- *Consider harmonizing the definitions of public officials in line with article 2 of UNCAC.*
- *Adopt measures more fully in line with UNCAC article 15, namely extending the bribery offence beyond arrangements involving agents and principals, expressly cover third party beneficiaries, and acts of indirect bribery.*
- *Criminalize the active bribery of foreign public officials and officials of public international organizations, and consider criminalizing solicitation and acceptance of bribes by such officials (article 16).*
- *Expand the theft offence to cover property, public or private funds, securities or other things of value entrusted to public officials by virtue of their position (articles 17, 22).*
- *Consider adopting a specific illicit enrichment offence (article 20).*
- *Consider extending the private sector bribery offence beyond principal-agent relationships, and focus on enforcement and awareness-raising (article 21).*
- *Monitor the application of the new money-laundering provisions to ensure effective enforcement and develop comprehensive statistics on investigations, prosecutions and convictions (article 23).*
- *Monitor the application of the prescription period, notwithstanding the absence of a limitations period for criminal and asset recovery matters, to ensure the timely prosecution of offences (article 29).*
- *The Judicial Task Force on Sentencing should address the proportionality, consistency and adequacy of sentencing, including by developing appropriate policy and considering the adoption of sentencing guidelines and international good practices (article 30, para. 1).*
- *Enhance measures promoting the reintegration of convicted persons into society, including through enforcement of existing regulations, and adopt record-keeping procedures for monitoring and reporting (article 30, para. 10).*
- *Maintain statistics relating to freezing, seizing and confiscation of and instrumentalities of crime (article 31, para. 1).*
- *Streamline procedures to obtain access to bank and financial records for investigative purposes to allow for warrants to be obtained expeditiously and effectively. Consider authorizing EACC to access financial records administratively (article 31, para. 7).*
- *Continue to strengthen the protection of witnesses and whistleblowers and protect those investigating, prosecuting and adjudicating corruption cases. (articles 32, 33). The reviewers welcome the swift implementation of the 2014 law on the protection of victims and its adequate enforcement (article 32).*
- *Adopt procedures to clarify the mandate and functions of ARA to avoid overlap with other institutions. Coordination mechanisms, like inter-agency agreements or procedures, would be useful (article 36).*
- *Strengthen the capacity and operations of specialized institutions (article 36), including to address:*

- *Challenges and technical assistance needs of the ODPF relating to capacity to prosecute corruption and economic crime; development of a case management system; law reform and development of prosecutorial policies; decentralization; and a facilitation and support programme for witnesses and victims of crime.*
- *Challenges of limited police capacity in forensic investigation and detecting emerging crime;*
- *Capacity-building in the judiciary, in particular further training of judges and magistrates in corruption cases.*
- *Continue devoting resources to capacity-building for law enforcement agencies investigating and prosecuting corruption offences. Consider inter-institutional arrangements and awareness raising involving prosecutors, investigators and the judiciary (article 36).*
- *NCAJ should continue to address the backlog of cases in the courts and delays in the adjudication of corruption cases (article 36).*
- *Adopt guidelines to ensure adequate transparency and predictability of out-of-court settlements and plea bargains, and maintain statistics to track the grant of immunity at the administrative level and by the DPP (article 37).*
- *Continue devoting resources to strengthen the capacity, operations and data-collection efforts of FRC. Given the large number of pending STRs, Kenya should consider a more streamlined reporting procedure from FRC to law enforcement agencies (article 39).*
- *Strengthen education and awareness-raising of corruption (article 39).*
- *Adopt measures in line with UNCAC article 42(1)(b), and consider expanding jurisdiction to acts committed by citizens outside Kenya that do not violate ACECA, and to cases where Kenya does not extradite alleged offenders present in Kenya. The reviewers welcome indications that Kenya will amend ACECA to establish jurisdiction over offences against citizens.*
- *Strengthen the collection and availability of statistical data on corruption-related investigations, prosecutions and adjudications.*
- *Kenya is encouraged to:*
 - *Adopt measures to more fully criminalize trading in influence. The reviewers welcome indications that Kenya wishes to modify ACECA accordingly (article 18).*
 - *Adopt measures to address the consequences of corruption, including remedial measures, outside of the procurement context (article 34).*
 - *Continue to enhance coordination among law enforcement institutions, noting the positive examples of inter-agency cooperation that exist (article 38).*

2.4. Technical assistance needs identified to improve implementation of the Convention

- *Legislative drafting, legal advice, model legislation (articles 16, 20, 23, 36).*
- *Good practices/lessons learned (articles 16, 21, 32).*
- *Capacity-building/on-site assistance to national authorities (articles 20, 22, 23, 32, 36, 37, 38, 39).*
- *Other technical assistance (articles 22, 23, 36).*
- *In consultation with development and technical assistance partners, undertake a comprehensive technical assistance needs assessment, using as a baseline the results of the UNCAC review, to develop a country-led and prioritized technical assistance action plan.*

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)

Extradition is governed principally by the Extradition (Commonwealth Countries) Act, Cap. 77 and the Extradition (Contiguous and Foreign Countries) Act, Cap. 76. Kenya has concluded 25 bilateral extradition treaties and is also party to multilateral agreements and arrangements with Commonwealth and foreign and contiguous States under Cap. 76 and 77 respectively. Kenya is party to the Intergovernmental Authority on Development (IGAD) Convention on Extradition and a member of the London Scheme on Extradition.

Kenyan law requires the existence of a bilateral extradition treaty between Kenya and another State. Kenya does not consider UNCAC as the legal basis for extradition.

Dual criminality is required for extradition, regardless of terminology used to designate offences. Extradition is therefore limited to the extent that not all UNCAC offences have been criminalized.

Kenya recognizes conditions on extradition and grounds for refusal. Cap. 77 sets out minimum conditions relating to punishment for offences to be extraditable (imprisonment for twelve months or greater under the law of the requesting country). No such period of imprisonment is established in Cap. 76. There is no legal restriction on extradition for fiscal matters.

Nationality is not a ground for refusal to extradite. While there have been no extraditions of nationals linked to corruption, there is a pending case (Samuel Gichuru and Chris Okemo).

There were only three reported incoming extradition requests in corruption-related matters. Kenya has reportedly not refused extradition to date.

Measures in Cap. 76, Cap. 77 and under the London Scheme simplify evidentiary requirements and streamline extradition procedures. Challenges include the reported use of Constitutional references as delaying tactics and backlog in the judiciary.

Kenya has adopted measures to ensure the fair treatment of persons in extradition proceedings. However, fair treatment objections have been raised in prior cases. The discriminatory purpose of a request is addressed in Cap. 77 with respect to race, religion, nationality or political opinions, but not gender; no such provision is included in Cap. 76.

Cap. 76 and Cap. 77 do not address a duty to consult before refusing extradition.

Kenya has developed a Transfer of Prisoners Bill 2014 and adopted one bilateral agreement with Rwanda. Kenya has reportedly received many requests for prisoner transfers not involving corruption, but none have been executed owing to the lack of a legal framework to facilitate transfers.

Although Kenya has received relevant requests, the transfer of criminal proceedings is not addressed in legislation.

Mutual legal assistance (art. 46)

Mutual legal assistance (MLA) is governed by the MLA Act, 2011 and POCAMLA for money laundering and other proceeds of crime. An affirmative decision or designation is required to apply the MLA Act to requesting countries (Section 9, MLA Act). Kenya applies the MLA Act also to requests from treaty countries.

Although a treaty is not required for MLA (Section 3, MLA Act), in practice Kenya insists on a treaty being in place. A full list of treaties could not be provided. MLA can be granted on a case-by-case basis on principles of reciprocity and comity, subject to the Constitution and laws of Kenya. Kenya also subscribes to the Commonwealth (Harare) Scheme. Kenya has applied UNCAC as a basis for MLA in an investigation involving corruption (Bailiwick of Jersey).

Dual criminality is strictly required for MLA (Sections 40 and 11, MLA Act) and Kenyan authorities consider the underlying conduct rather than the terminology of offences. The provision of non-coercive assistance in the absence of dual criminality is not addressed. MLA is limited to the extent that not all offences established under the Convention have been criminalized.

Requests are executed in accordance with domestic law and, where possible, procedures specified in the request (Sections 46 and 9(c), MLA Act).

Kenya allows for taking evidence or testimony using video technology (Section 22 MLA Act). A limitation on the use of information obtained through MLA (Sections 41, MLA Act; 116, POCAMLA) is adhered to.

The Office of the Attorney General (OAG) is the Central Authority for MLA (Section 5, MLA Act). OAG transmits and receives all requests via the Ministry of Foreign Affairs and International Trade and executes or arranges for their execution. In urgent circumstances, Kenya accepts requests through INTERPOL rather than diplomatic channels and by telephone, if confirmed forthwith in writing.

Section 8(4) MLA Act provides that assistance shall be granted as expeditiously as practicable. Kenya usually requires an average of six weeks to respond, depending on the complexity of the matter.

Regulations on MLA are being developed by OAG & DOJ in consultation with ODPP.

Kenya reports receiving nine incoming MLA requests in the last 3 years related to UNCAC offences. None have been refused to-date.

Kenya recognizes grounds for refusal (Section 11, MLA Act). There is no legal restriction on MLA for fiscal matters (Section 43, MLA Act).

Section 48 MLA Act provides a legal basis for spontaneous sharing of information.

The transfer of prisoners is possible subject to routine conditions (Section 16, MLA Act); the transfer of persons who are not detained is not addressed.

Confidentiality of requests and their content is maintained, except for disclosure in the criminal matter specified in the request and where otherwise authorized by the other State (Section 42, MLA Act).

MLA may be postponed if it would interfere with an ongoing investigation or prosecution (Section 10, MLA Act). Section 8 (6) of the MLA Act requires the competent authority to promptly inform a requesting State of the reasons for refusing MLA. A duty to consult before refusing or postponing assistance is not addressed.

Kenya's legislation addresses the issue of costs in line with UNCAC (Section 45, MLA Act).

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49, 50)

Kenyan authorities cooperate with their foreign counterparts through the Witness Summonses (Reciprocal Enforcement) Act (Cap. 78, currently only applicable in Uganda) and POCAMLA. MLA channels can be used for direct cooperation among law enforcement agencies. Kenya is a member of the East Africa Association of Anti-Corruption Authorities (EAAACA), the Eastern Africa Police Chiefs Cooperation Organisation (EAPCO), the Eastern & Southern Africa Anti-Money Laundering Group (ESAAMLG) and INTERPOL. EACC has concluded MOUs with its counterparts in the East African Community, and MOUs on police-to-police cooperation exist. Cooperation is sought and provided by the FRC, which has adopted one MOU (Seychelles, 2013) but is not party to the Egmont Group. ODPP is a member of the African Association of Prosecutors; International Association of Prosecutors; Commonwealth Regional Programme for DPPs; and Heads of Anti-Corruption and Money Laundering Agencies. Kenya's multilateral treaties provide a mechanism for law enforcement cooperation. Kenya partly considers UNCAC as the basis for such cooperation.

Kenya engages in the exchange of personnel and liaison officers with foreign law enforcement agencies through EACC, CID and KRA.

Joint investigations are possible in accordance with international arrangements, including EAACA, EAPCO and ESAAMLG. An example involving a tax evasion case was reported.

The reviewers welcome indications by Kenya on the need to adopt specific legislation on covert surveillance and other special investigative techniques.

3.2. Challenges in implementation

The following recommendations would further strengthen existing anti-corruption measures:

- Continue to devote adequate resources and attention to training/capacity-building for authorities responsible for international cooperation.*

- *Adopt measures to ensure that UNCAC offences are extraditable under Kenya's laws and treaties, considering that not all States are designated countries to which the extradition laws apply.*
- *Reviewers welcome indications that Kenya may review its position towards the application of UNCAC in extradition proceedings.*
- *Continue to ensure that fair treatment guarantees are applied at all stages of extradition proceedings.*
- *Take measures to address delays in extradition proceedings.*
- *More closely align its laws with art. 44(15) regarding the discriminatory purpose of requests.*
- *Adopt measures to provide for consultations before refusing extradition.*
- *The reviewers welcome the swift adoption of the Transfer of Prisoners Bill to provide greater legal certainty in corruption-related cases.*
- *The reviewers welcome the adoption of MLA Regulations to provide greater certainty in MLA cases and to address the recommendations of the present review.*
- *Consider taking steps towards a more flexible application or interpretation of the dual criminality requirement, to ensure that the widest measure of assistance be granted in respect of UNCAC offences, and ensure the provision of non-coercive assistance.*
- *Adopt measures to address a duty to consult before refusing or postponing assistance.*
- *Adopt measures to address the transfer of persons who are not detained for MLA.*
- *Adapt its information systems to compile relevant information on existing and future treaties on international cooperation.*
- *Since Kenya is not party to the Egmont Group, the reviewers welcome the conclusion of further MOUs by FRC.*
- *The reviewers welcome indications by Kenya on the need to adopt specific legislation providing for special investigative techniques, which could also clarify the admissibility of related evidence.*
- *The authorities are encouraged to maintain comprehensive statistics on the number of extradition and MLA requests received, the nature of such requests, and status of completion, including the number of requests rejected and reasons, as well as timeframes for responding to requests.*
- *Kenya is encouraged to maintain comprehensive statistics on law enforcement cooperation, including existing and future agreements.*

3.3. *Technical assistance needs identified to improve implementation of the Convention*

- *Legislative drafting, legal advice, model agreements/arrangements (articles 45, 47, 48, 50).*
- *Good practices/lessons learned (articles 46, 47, 48, 50).*

- *Development of an action plan for implementation (articles 46, 47, 48, 50).*
- *Capacity-building assistance to national authorities (articles 46, 47, 48, 50).*
- *On-site assistance by a relevant expert (articles 45, 46, 47, 48, 50).*
- *Other technical assistance (article 48).*

IV. Implementation of the Convention

7. Kenya provided the following information.

ABBREVIATIONS AND ACRONYMS:

- (a) ACECA - The Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)
- (b) ACPU - Anti-Corruption Police Unit
- (c) ADB - African Development Bank
- (d) AG - Attorney-General
- (e) APNAC - African Network of Parliamentarians Against Corruption
- (f) ARA - Asset Recovery Agency
- (g) ATPU - Anti-Terrorism Police Unit
- (h) AU - African Union
- (i) AUCPCC - African Union Convention on Preventing and Combating Corruption
- (j) BCLB - Betting Control and Licensing Board
- (k) BKMS - Business Keeper Monitoring System
- (l) CBK - Central Bank of Kenya
- (m) CID - Criminal Investigation Department (n) CLARION - Centre for Law and Research International
- (o) CMA - Capital Markets Authority
- (p) CMAIU - Capital Markets Authority Investigative Unit
- (q) COSP - Conference of States Parties
- (r) CPC - Criminal Procedure Code
- (s) CR - Crime Register
- (t) DCI - Directorate of Criminal Investigation
- (u) DOJ - Department of Justice
- (v) DPP - Director of Public Prosecutions
- (w) EAC - East African Community
- (x) EACC - Ethics and Anti-Corruption Commission
- (y) EAPCO - East Africa Police Chiefs Cooperation Organization
- (z) EKLR - Electronic Kenya Law Reports
- (aa) EMU - Efficiency Monitoring Unit
- (bb) ESAAMLG - Eastern & Southern Anti Money Laundering Group
- (cc) FATF - Financial Action Task Force
- (dd) FDIC - Federal Deposit Insurance Corporation (USA)
- (ee) FINCEN - Financial Crimes and Enforcement Network (USA)
- (ff) FRC - Financial Reporting Centre
- (gg) FSVS - Financial Services Volunteer Corps (USA)
- (hh) FRU - Financial Reporting Unit

(ii) GJLOS - Governance, Justice, Law and Order Sector Reform Programme
 (jj) ICC - International Criminal Court
 (kk) ICCPR - International Covenant on Civil and Political Rights
 (ll) IEBC - Independent Electoral and Boundaries Commission
 (mm) IGAD - Intergovernmental Authority on Development
 (nn) INTERPOL - International Police
 (oo) IRA - Insurance Regulatory Authority
 (pp) IRG - Implementation Review Group (of the United Nations Convention against Corruption)
 (qq) KACA - Kenya Anti-Corruption Authority
 (rr) KACC - Kenya Anti-Corruption Commission
 (ss) KBA - Kenya Bankers Association
 (tt) KEPSA - Kenya Private Sector Alliance
 (uu) KIF - Kenya Integrity Forum
 (vv) KLRC - Kenya Law Reform Commission
 (ww) KPLC - Kenya Power and Lighting Company Limited
 (xx) KRA - Kenya Revenue Authority
 (yy) KUTIP - Kenya Urban Transport Infrastructure Project
 (zz) MFAIT - Ministry of Foreign Affairs and International Trade
 (aaa) MLA - Mutual Legal Assistance
 (bbb) MOJCA - Ministry of Justice and Constitutional Affairs
 (ccc) MOJNCCA - Ministry of Justice, National Cohesion and Constitutional Affairs
 (ddd) MOU - Memorandum of Understanding
 (eee) MTP - Medium Term Plan
 (fff) NACCSC - National Anti-Corruption Campaign Steering Committee
 (ggg) NACP - National Anti-Corruption Plan
 (hhh) NESC - National Economic and Social Council
 (iii) NIP - National Integrity Plan
 (jjj) NIS - National Intelligence Service
 (kkk) NOCK - National Oil Corporation of Kenya
 (lll) NRB - National Registration Bureau
 (mmm) OAG & DOJ - Office of the Attorney General and Department of Justice
 (nnn) ODPP - Office of the Director of Public Prosecutions
 (ooo) PCCB - Prevention and Combating of Corruption Bureau (Tanzania)
 (ppp) POCAMLA - The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009)
 (qqq) POEA - Public Officer Ethics Act
 (rrr) PPOA - Public Procurement Oversight Authority
 (sss) PSC - Public Service Commission
 (ttt) RBA - Retirement Benefits Authority
 (uuu) SCAC - State Corporations Advisory Committee
 (vvv) SFO – Serious Fraud Office (United Kingdom)
 (www) TI(K) - Transparency International (Kenya Chapter)
 (xxx) UN – United Nations
 (yyy) UNCAC - United Nations Convention against Corruption
 (zzz) UNODC - United Nations Office on Drugs and Crime
 (aaaa) WIPA - Witness Protection Agency
 (bbbb) WPP - Witness Protection Programme

A. Ratification of the Convention

8. The United Nations Convention against Corruption (UNCAC) was signed and ratified by Kenya on 9 December 2003 (C.N.1404.2003.TREATIES-19) by the then Minister for Justice and Constitutional Affairs on behalf of the Government of Kenya. It is noteworthy that Kenya deposited its instrument of ratification with the Secretary-General of the United Nations on the same day it signed the Convention, 9 December 2003 (C.N.1404.2003.TREATIES-20). The signing and ratification of the Convention had been approved by the Cabinet (of the Government of Kenya), in line with the provisions of the former Constitution of Kenya, which allowed the Executive arm of the Government to enter into treaties or international agreements with other countries or international organizations without reference to any other arm of the Government. However, under the current Constitution of Kenya, and the provisions of the Treaty Making and Ratification of Treaties Act, 2012 (No. 45 of 2012), the approval of the National Assembly is required as a condition precedent to the ratification of a treaty by the Government.
9. On 14 August 2008, Kenya submitted a notification to the UN Secretary General, under articles 44(6)(a), 46 (13) and 46(14) of the Convention, as follows:

“In terms of Article 44(6)(a) of the Convention, the Republic of Kenya declares that it does not consider the Convention as a legal basis for co-operation on extradition with other States Parties since Kenya’s municipal law (especially The Extradition (Contiguous) and Foreign Countries Act (Cap 76) and the Extradition (Commonwealth Countries) Act (Cap 77)) requires the existence of a bilateral treaty between Kenya and another state as a condition precedent to extradition proceedings.

The Republic of Kenya declares that pursuant to Article 46 (13) above, the Central Authority responsible and authorized to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution shall be:

The Attorney General
State Law Office
Harambee Avenue
P.O. Box 40112-00100, Nairobi, Kenya
Tel: +254-20-2227461
Fax: +254-20 2211082
Website: <http://www.attorney-general.go.ke>
E-mail: info@ag.go.ke

Pursuant to Article 46 (14) of the Convention, the language acceptable to the Republic of Kenya for purposes of mutual legal assistance requests is English.”¹

10. The ratification of the Convention was in line with the Government’s anti-corruption initiatives which comprised, inter alia: preventing and combating rampant corruption in the country; cooperating with other countries and stakeholders in the global fight against

¹ <https://treaties.un.org/doc/Publication/CN/2008/CN.642.2008-Eng.pdf>

corruption, and benchmarking with other countries on best practices for fighting corruption and promoting ethics and integrity in the Public Service and the society generally.

11. Article 2(6) of the Constitution of Kenya, 2010, provides that, “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” Consequently, in theory, the provisions of UNCAC may be construed to apply directly in Kenya. However, since some of the provisions relate to criminalization, there is need for domestic legislation to set out the offences, the penalties and other related provisions. Under the former constitutional dispensation, once treaties were ratified, a domestic legislation had to be passed to incorporate the provisions of the treaty into the municipal law of Kenya.
12. In order to ensure that treaties ratified by Kenya can have the requisite force of law, Kenya has passed The Treaty Making and Ratification Act, 2012 (No. 45 of 2012), which sets out the procedure for negotiating treaties and their ratification. Under the current system, a proposal to ratify a treaty is initiated by the Executive, approved by the Cabinet, approved by the National Assembly and then the Cabinet Secretary for Foreign Affairs (equivalent of a Minister for Foreign Affairs in other jurisdictions) facilitates the deposit of the instruments of ratification. The Act provides for public participation in the treaty making process and dissemination of information on the implementation of treaty obligations.
13. Under Article 132(1)(c)(iii) of the Constitution, the President is required, once every year, to “submit a report for debate to the National Assembly on the progress made in fulfilling of the international obligations of the Republic”. In the same vein, Article 132(5) of the Constitution provides that, “The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries”. In essence, therefore, since Kenya is a State Party to UNCAC, it is under a constitutional obligation to implement the Convention and keep Parliament and the general public informed about the implementation process, for that Convention and any other international instrument Kenya is a State Party to.

The Convention and Kenya’s legal system

14. Article 2(5) and (6) of the Constitution provides that generally accepted rules of international law and the treaties or conventions that Kenya has ratified and that have come into effect shall form an integral part of Kenya’s domestic law. Accordingly, the UN Convention against Corruption has become an integral part of Kenya’s domestic law following signature by the then Minister for Justice and Constitutional Affairs on 9 December 2003, ratification of the Convention by the Cabinet in December 2003, and entry into force in accordance with Article 68 of the Convention. Under the Constitution of Kenya, judicial decisions have the same legal weight as the law.

B. Legal system of Kenya

15. Kenya was British protectorate and later a colony from 1 July, 1895 to 12 December, 1963, when the country attained its independence, with the Queen of England as the Head of State and Mzee Jomo Kenyatta as the Prime Minister.

16. On 12 December, 1964, Kenya became a Republic, with Mzee Jomo Kenyatta becoming the first President of the Republic. Thus, 12th December is celebrated as Kenya's Independence Day (Jamhuri Day). On 12 December, 2013, Kenya celebrated its Golden Jubilee (50 years after independence).
17. Due to its colonial history, Kenya is a member of the Commonwealth, and therefore, follows the common law legal system. The Constitution of Kenya, 2010, which was promulgated on 27 August, 2010, following a referendum held on 4 August, 2010, is the supreme law in Kenya. The supremacy of the Constitution is clearly set out under Article 2 of the Constitution.
18. It is noteworthy that Chapter Six of the Constitution is dedicated to Leadership and Integrity. Further, under Article 10, the Constitution provides for National Values and Good Governance which, are binding on all state officers, public institutions and all persons. For instance, Article 10(2)(c) of the Constitution identifies "good governance, integrity, transparency and accountability" national values and principles of governance, which have to be complied by all persons. Article 4(2) of the Constitution provides that, "the Republic of Kenya shall be a multi-party **democratic State founded on the national values and principles of governance referred to in Article 10.**" (Emphasis added).
19. Article 2 of the Constitution may be construed to mean that, besides the Constitution, the other sources of law in Kenya are: Acts of Parliament; African customary law; the general principles of international law, and any treaty or convention ratified by Kenya. The Article compliments the provisions of Section 3 of the Judicature Act (Cap. 8 of the Laws of Kenya), which provides for the "mode exercise of jurisdiction", thus:
- (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-
- (a) the Constitution;
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
- (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date: Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.
- (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard technicalities of procedure and without undue delay."
20. Section 3 of the Judicature Act should be read with the necessary modifications so that it conforms with Article 2 of the Constitution as well as Chapter Ten of the Constitution

(the Judiciary), which establishes a new court structure of superior courts (under Article 162) and subordinate courts (Article 169). The superior courts are: the Supreme Court; the Court of Appeal; the High Court, and other courts with the status of the High Court, established as per Article 162(2) of the Constitution, to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. The subordinate courts are: the Magistrates Courts; the Kadhis Courts; the Courts Martial, and other courts or tribunals provided for under Article 169(1)(d) of the Constitution.

21. Section 4 of the Judicature Act confers the High Court of Kenya with admiralty jurisdiction, thus: “(1) The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya. (2) The admiralty jurisdiction of the High Court shall be exercisable- (a) over and in respect of the same persons, things and matters; and (b) in the same manner and to the same extent; and (c) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations. (3) In the exercise of its admiralty jurisdiction, the High Court may exercise all the powers which it possesses for the purpose of its other civil jurisdiction. (4) An appeal shall lie from any judgment, order or decision of the High Court in the exercise of its admiralty jurisdiction within the same time and in the same manner as an appeal from a decree of the High Court under Part VII of the Civil Procedure Act.”
22. Soft copies of all the Laws of Kenya are available and may be downloaded for free from the National Council on Law Reporting (Kenya Law) website: <<http://www.kenyalaw.org>>. Hard copies of the same are available, at various competitive prices, from the Government Bookshop, Nairobi.
23. Under the former constitutional dispensation, Kenya followed the dualist approach to the application of international law in the municipal sphere. For instance, in the case of ***Okunda vs. Republic* (1970) EALR 18** the Court held that international law and principles did not form part of Kenyan law unless they were domesticated. Thus this dualist principle of international law, which is prevalent among common law countries, is one that has faithfully been affirmed and re-affirmed by Kenyan courts over time in international law, under the former constitutional dispensation.
24. However, the position is different under the current constitutional dispensation, through judicial interpretation has been rather varied. Article 2(5) of the Constitution of Kenya, 2010, makes general rules of international law part of the laws of Kenya, while Article 2(6) grants the force of law to treaties or conventions ratified by Kenya. This monist approach, which is prevalent among civil law countries, is supported by the ruling of the Court in ***Re Zipporah Wambui Mathara*** (Milimani BC Cause 19 of 2010 (reported) where the court stated that:-

*“The provisions of the Constitution of Kenya 2010 was also invoked, and this ruling would not be complete without a commentary on those submissions. Principally I agree with counsel for the Debtor that by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, **International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law.**”*

25. However, this position is clarified further by the courts in the cases of *Diamond Trust Kenya Ltd vs. Daniel Mwema Mulwa* [2010] eKLR and *Beatrice Wanjiku & Anr. vs. AG & Anr.* [2012] eKLR, where it was stated that the international law contemplated under Article 2(5) and 2(6) would be subservient to local legislation.
26. This position is further buttressed by Article 94(5) of the Constitution, which provides that, “No person or body, other than Parliament, has power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation”.
27. In a nutshell, with regard to the application of international law or international instruments (such as UNCAC), Kenya is monist but with safeguards especially relating to treaty-making and ratification as per the provisions of The Treaty Making and Ratification Act, 2012. Granted that the Act commenced operation on 14 December 2012, it does not apply to treaties and Conventions that were ratified before the commencement of the Act. This is in line with the provisions of Section 3(1) of the Act. Consequently, UNCAC would not apply directly.
28. Kenya has passed a number of laws, which incorporate the provisions of UNCAC and create an enabling environment for the implementation of the Convention. These are summarized below.
29. Kenya provided the following list of relevant laws, policies and other measures.

A. LAWS

- a) The Constitution of Kenya, 2010
- b) The Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)
- c) The Banking Act (Cap 488)
- d) The Commission on Administrative Justice Act, 2011 (No. 23 of 2011)
- e) The Criminal Procedure Code (Cap. 75)
- f) The County Governments Act, 2012 (No. 17 of 2012)
- g) The Elections Act, 2011 (No. 24 of 2011)
- h) The Election Campaign Finance Act, 2013 (No. 42 of 2013)
- i) The Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011)
- j) The Evidence Act (Cap. 80)
- k) The Extradition (Commonwealth Countries) Act (Cap. 77)
- l) The Extradition (Contiguous and Foreign Countries) Act (Cap. 76)
- m) The Government Contracts Act, 2005 (No. 3 of 2005)
- n) The Judicial Service Act, 2011 (No. 1/2011)
- o) The Kenya Communications (Amendment) Act, 2008
- p) The Independent Offices (Appointment) Act, 2011 (No. 8 of 2011)
- q) The Leadership and Integrity Act, 2012 (No. 19 of 2012)
- r) The Limitation of Actions Act (Cap. 22)
- s) The Magistrates Courts Act (Cap. 10)
- t) The Mutual Legal Assistance Act, 2011 (No. 36 of 2011)
- u) The National Payment System Act 2011 (No. 39 of 2011)
- v) The National Police Service Act, 2011 (No. 11A of 2011)

- w) The National Police Service Commission Act, 2011 (No. 30 of 2011)
- x) The Office of the Attorney General Act, 2012 (No. 49 of 2012)
- y) The Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013)
- z) The Penal Code (Cap. 63)
- aa) The Petitions to Parliament (Procedure) Act, 2012 (No. 22 of 2012)
- bb) The Political Parties Act, 2011 (No. 11 of 2011)
- cc) The Power of Mercy Act, 2011 (No. 21 of 2011)
- dd) The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009)
- ee) The Public Appointments (Parliamentary Approval) Act, 2011 (No. 33 of 2011)
- ff) The Prevention of Organised Crimes Act, 2010 (No. 6 of 2010).
- gg) The Prisons Act (Cap. 90)
- hh) The Public Finance Management Act, 2012 (No. 18 of 2012)
- ii) The Public Officer Ethics Act, 2003 (No. 4 of 2003)
- jj) The Public Procurement and Disposal Act, 2005 (No. 3 of 2005)
- kk) The Public Service Commission Act, 2012 (No. 13 of 2012)
- ll) The Treaty Making and Ratification of Treaties Act, 2012 (No. 45 of 2012)
- mm) The Unclaimed Financial Assets Act, 2011 (No. 40 of 2011)
- nn) The Value Added Tax (Cap. 476)
- oo) The Vetting of Judges and Magistrates Act, 2011 (No. 2 of 2011)
- pp) The Witness Protection Act, 2006 (No. 16 of 2006)

B) REGULATIONS

- a) The Anti-Corruption and Economic (Amnesty and Restitution) Regulations, 2011 (Legal Notice No. 44 of 2011)
- b) The Public Officer Ethics (Management, Verification and Access to Financial Declarations), Regulations (Legal Notice No. 179 of November 2011).

C) POLICIES AND OTHER MEASURES

1. African Convention on Preventing and Combating Corruption
2. Constitution of the East African Association of Anti-Corruption Authorities (EAAACA).
3. East African Community (Draft) Protocol on Preventing and Combating Corruption.
4. Ethics and Anti-Corruption Commission: *Strategic Plan (2013-2018)*
5. Ethics and Anti-Corruption Commission: *Annual Report (2012/2013)*
6. Ethics and Anti-Corruption Commission: *National Survey on Corruption and Ethics, 2012.*
7. Ethics and Anti-Corruption Commission: Memorandums of Understanding (MOUs) between the EACC and various Investigative and Law Enforcement Agencies.
8. Ethics and Anti-Corruption Commission: Memorandum and Articles of Association of the East African Association of Anti-Corruption Authorities (EAAACA).
9. Kenya Anti-Corruption Commission: *National Anti-Corruption Plan* (Nairobi: KACC, 2006).
10. Office of the Director of Public Prosecutions: *Report on the prosecution of corruption and economic crime offences under the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)* (Nairobi: ODPP, 2012/2013).

11. The Republic of Kenya, *Sessional Paper on Devolved Government*, (Nairobi: Ministry of Devolution and Planning, 2014).
12. Republic of Kenya: *Organisation of the Government of the Republic of Kenya* (Executive Order No. 1/2013), Nairobi: Office of the President, May, 2013).
13. Republic of Kenya: *Medium Term Plan (MTP) for Kenya Vision 2030 (for 2013-2018)* (Ministry of Planning and National Development, Nairobi, 2013).
14. Republic of Kenya: *National Values and Principles of Governance Policy* (Nairobi: 2012).
15. Republic of Kenya, *A Sourcebook for Corruption Prevention in the Public Service* (Nairobi: Directorate of Personnel Management and Kenya Anti-Corruption Commission, 2011).
16. Republic of Kenya: *Medium Term Plan (MTP) for Kenya Vision 2030 (for 2008-2012)* (Ministry of Planning and National Development, Nairobi, 2008).
17. Republic of Kenya: *Kenya Vision 2030* (Ministry of Planning and National Development & National Economic and Social Council, Nairobi, 2007).
18. Republic of Kenya, *Handbook for Civil Service Staff Induction* (Nairobi: Office of the President, 2006).
19. Republic of Kenya, *Code of Regulations*, (Nairobi: Directorate of Personnel Management, 2006).
20. Republic of Kenya, *Report of the Judicial Commission of Inquiry into the Goldenberg Affair* (Chairman – The Hon. Mr. Justice S.E.O. Bosire, J.A.)(Nairobi: October, 2005).
21. Republic of Kenya, *Economic Recovery Strategy for Wealth and Employment Creation 2003-2007* (Nairobi: Ministry of Planning, 2003).

D) DRAFT BILLS

- a) The False Claims Bill.
- b) The Freedom of Information Bill.
- c) The Public Disclosures (Protection) Bill.
- d) The Public Service (Values and Principles) Bill.
- e) The Transfer of Prisoners Bill.

E) DRAFT POLICIES AND OTHER MEASURES

- a) Republic of Kenya: *Draft National Ethics and Anti-Corruption Policy*
- b) Republic of Kenya: *Draft National Human Rights Policy and Action Plan*
- c) Kenya Leadership and Integrity Forum (KLIF): *Draft Kenya Integrity Plan (KIP)*

30. Regarding previous assessments of the effectiveness of anti-corruption measures, Kenya indicated that it has in the past carried out various studies on the effectiveness of its anti-corruption measures. In some cases, the assessments have been done under the auspices of regional or international organizations, as illustrated below.

- **Kenya: UN Convention against Corruption (UNCAC) Gap Analysis Report and Implementation Action Plan (2009)**

Kenya carried out a Gap Analysis Assessment on its implementation of UNCAC. The review was carried out as from November 2007 and was concluded in October 2009. The review resulted in the publication of *Kenya: UN Convention against Corruption (UNCAC) Gap Analysis Report and Implementation Action Plan in 2009*. The report

was eventually launched during the International Anti-Corruption Day celebrations at Tononoka grounds, Mombasa on 9 December, 2010. The gap analysis study informed various changes to the legal, policy and institutional framework for fighting corruption. As a result some amendments have been affected to the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) and the Public Officer Ethics Act, 2003 (No. 4 of 2003) and was also taken into consideration during the development of: The Mutual Legal Assistance Act; the Proceeds of Crime and Anti-Money Laundering Act, and the Leadership and Integrity Act, 2012 (which operationalises Article 80 of the Constitution). Further, the development of the 2nd Medium Term Plan for Kenya Vision 2030 and the proposed National Ethics and Anti-Corruption Policy have taken into consideration the UNCAC gap analysis report.

b) Progress Report on the Implementation of the African Union Convention on Preventing and Combating Corruption (AUCPCC)

Kenya is a State Party to the African Union Convention on Preventing and Combating Corruption, having signed the Convention in July, 2003 and ratified the same in February, 2007. In 2011, Kenya carried out its review of AUCPCC implementation and produced a report which was eventually forwarded to the AU Commission in 2012. Most of the UNCAC provisions, especially with regard to criminalization and international cooperation are reflected in AUCPCC. Kenya is still awaiting feedback on its report from the AU Advisory Board on Corruption.

c) Mutual Evaluation by the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)

Kenya is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). The country underwent an evaluation by ESAAMLG and its Mutual Evaluation Report, was considered and approved by the Council of Ministers on 8 September 2011. The Report contains important information relating to Kenya's efforts towards anti-money laundering and the fight against corruption and economic crime in the country.

Institutional Framework

31. Kenya has a number of institutions involved in the fight against corruption. The principal state agency responsible for the fight against corruption is the Ethics and Anti-Corruption Commission (EACC). EACC is the designated body for purposes of Article 6(3) of UNCAC. The Ethics and Anti-Corruption Commission (EACC) is the principal dedicated anti-corruption agency of Kenya. It is an independent constitutional commission established pursuant to the provisions of Article 79 of the Constitution of Kenya, 2010. The Commission is composed of a Chairperson, two Members, and a Commission Secretary/Chief Executive of the Commission. EACC was preceded by other anti-corruption agencies which were established through statutory or administrative arrangements, such as: the Anti-Corruption Police Squad (1992); the Kenya Anti-Corruption Authority (KACA) (1997); the Anti-Corruption Police Unit (ACPU) (2001), and the Kenya Anti-Corruption Commission (KACC) (2003). Thus, EACC is more stable in the sense that its existence is entrenched in the Constitution. While Article 79 of the Constitution sets out the general framework for the establishment of EACC, the Ethics and Anti-Corruption Commission Act, 2011 (EACC Act), sets out in detail the

composition, functions, mandate and operations of EACC. Section 11(1) of Act provides for further functions of the Commission in addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution.

32. Besides EACC, there are a number of public bodies and law enforcement agencies which play a complementary but critical role in the fight against corruption in terms of policy, administrative, adjudication and enforcement work against corrupt or unethical conduct.
33. Some of these complementary bodies are:
- a) The Office of the Attorney General and Department of Justice (which is also the responsible body for purposes of Article 46(13) of UNCAC)
 - b) The Judiciary (especially through the institution of Special Magistrates. Cases investigated by EACC are heard and determined by Special Magistrates (who preside over Anti-Corruption Courts) as per the provisions of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)
 - c) The Office of the Director of Public Prosecutions (which conducts the prosecution of cases investigated by EACC, as per the provisions of Article 157 of the Constitution and the EACC Act, 2011)
 - d) The Office of the Auditor General
 - e) The Office of the Controller of Budget
 - f) The Asset Recovery Agency
 - g) The Financial Reporting Centre
 - h) The Kenya Police Service (Directorate of Criminal Investigations)
 - i) The National Intelligence Service (NIS)
 - j) The National Treasury
 - k) The Ministry of Devolution and Planning
 - l) The Public Service Commission
 - m) The Independent Electoral and Boundaries Commission (IEBC)
 - n) The Commission on Administrative Justice (CAJ)
 - o) The Kenya National Commission on Human Rights (KNCHR)
 - p) The National Anti-Corruption Campaign Steering Committee (NACCSC)
 - q) The Internal Audit Department (The National Treasury)
 - r) The State Corporations Advisory Council (SCAC)
 - s) The Witness Protection Agency (WPA)
 - t) The Efficiency Monitoring Unit (EMU)
 - u) The Kenya Revenue Authority (KRA)
 - v) The Public Procurement Oversight Authority (PPOA)
 - w) The Kenya Integrity Forum (KIF)
 - x) The responsible Commissions provided for under the Public Officer Ethics Act, and
 - y) The public entities provided for under the Leadership and Integrity Act, 2012.
34. Kenya is also part of the East Africa Association of Anti-Corruption Authorities (EAAACA) and, through the Inspector General of the National Police Service, to the Eastern Africa Police Chiefs Cooperation Organisation (EAPCO), as described further under article 48 of the Convention in this report. Kenya is also a member of the Eastern & Southern Africa Anti-Money Laundering Group (ESAAMLG).

Political System

35. Kenya is a constitutional multi-party democratic state. Article 4 of the Constitution of Kenya, 2010, declares that Kenya is a sovereign Republic and that, “The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10”. The National values and principles of governance set out in Article 10 of the Constitution are binding on all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law or make or implement public policy decisions. It is noteworthy that Article 10(2)(c) of the Constitution identifies “good governance, integrity, transparency and accountability” as some of the values and principles of good governance.
36. The structure of the government of Kenya is now organized at two levels which are both parallel and linear. These are the National and County governments. At the National Level, there is clear separation of powers between the Executive, Parliament and Judiciary. For the first time, the President and members of the Cabinet are not members of Parliament. This allows Parliament, in theory, to focus solely on its oversight function as well as developing and passing legislation. Parliament plays a critical role in vetting and approving all State officers who are to be appointed by the President.
37. The territory of Kenya is divided into 47 counties, each of which has a County Government elected by the people the same time when the election of the President of Kenya is being conducted. Article 6(2) of the Constitution states that “The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation”. In terms of the distribution of functions between the National Government and the County Governments, Part 1 of the Fourth Schedule to the Constitution provides that matters to do with foreign affairs, foreign policy, international trade, and criminal law, among others, belong to the National government. Consequently, issues to do with UNCAC implementation and review belong to the National Government.
38. Article 186(3) of the Constitution provides that a function or power that is not assigned by the Constitution or national legislation to a county is a function or power of the national government. Article 187 of the Constitution provides for the transfer of functions and powers between the two levels of government - national and county.
39. Article 187(2)(b) of the Constitution provides that even where a power or function is transferred to another level government, the constitutional responsibility for the performance of the function or the exercise of the power remains with the government to which it is assigned by the Fourth Schedule.
40. The President of Kenya is the Head of Government and State. Among other functions, the President is the President and the Commander-in-Chief of the Kenya Defence Forces. The President is elected for a period of five years and he is eligible for re-election for another single term of five years only. Currently, the President of Kenya is His Excellency Hon. Uhuru Kenyatta, CGH, who was elected into office following the 4 March, 2013 general elections. The Constitution of Kenya vests various obligations on the President to ensure that the international obligations of the Republic are implemented effectively. Article 132(1)(c)(iii) of the Constitution requires the President to “submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of

the Republic”. Further, under Article 132(5) of the Constitution, the President “...shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries”.

C. Implementation of selected articles

Chapter III. Criminalization and law enforcement

41. As a general observation concerning the implementation of the chapter it is recommended that Kenya continue to strengthen its data collection systems to allow for timely and accurate reporting on investigations, prosecutions and adjudications of corruption offences across institutions.

42. Kenya provided the following comparative crime statistics for 2004-2013.

FIGURES: COMPARATIVE CRIME FIGURES FOR 2004-2013

OFFENCE		2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
STEALING	a) Handling Stolen Property	341	389	619	345	423	367	350	466	794	465
		341	389	619	345	423	367	350	466	794	465
ECONOMIC CRIMES	a) Obtaining by False Pretence	1440	960	1253	1402	1151	1400	1826	2135	2492	2245
	b) Currency Forgery	210	119	297	195	398	469	202	243	261	159
	c) False Accounting	30	45	44	49	94	80	44	37	31	29
	d) Other Fraud/Forgery Offences	188	266	279	262	255	375	590	621	585	317
		1868	1390	1873	1908	1898	2324	2662	3036	3369	2750
CORRUPTION	a) Soliciting for Bribe	50	35	75	47	87	102	35	20	7	25
	b) Accepting Bribe	1	23	19	9	8	14	8	3	1	0
	c) Accepting Free Gifts	3	1	9	3	0	5	0	0	0	0
	d) Demanding by false pretence	12	11	12	18	19	14	8	15	8	8

	e) Other Corruption Offences	116	37	137	100	19	23	11	14	33	24
		182	107	252	177	133	158	62	52	49	57
OFFENCES INVOLVING POLICE OFFICERS	a) Soliciting for Bribe	0	20	18	19	14	14	5	4	0	8
	b) Accepting Bribe	0	0	2	1	3	17	0	0	0	0
	c) Accepting Free Gifts	0	0	0	0	1	2	1	0	1	0
	d) Demanding by false pretence	0	0	2	0	5	5	12	4	7	6

43. During the country visit, representatives of the judiciary provided the following statistics on corruption cases, relating to all cases filed in the anti-corruption court (at first instance level) for the last 14 years.

Total cases registered in court: 627

Convictions: 224 (approx. 35.7%)

Acquittals: 164 (approx. 26%)

Withdrawals: 216 (approx. 34.5%)

Pending total: 91

YEAR	TOTAL NO. OF CASES REGISTERED	CONVICTIONS	ACQUITTALS	WITHDRAWALS	TOTAL NO. OF PENDING CASES
2001	9	7	12	14	0
2002	31	7	8	13	1
2003	68	6	4	68	0
2004	36	9	2	7	1
2005	69	7	3	16	0
2006	119	36	16	29	0
2007	69	37	17	20	3
2008	41	26	21	22	1
2009	37	44	21	7	3
2010	49	26	29	9	15
2011	41	9	21	6	19
2012	18	9	9	5	12
2013	21	1	1	2	18
2014	19	0	0	1	18
TOTAL	627	224	164	216	91

The following is a breakdown of the number of accused persons by nature of offence.

2002

Case No.	No. of Accused Persons	Charges
ACC 5/2002	1	Obtaining Advantage

2003

Case No.	No. of Accused Persons	Charges
ACC 6/2004	1	Corruption in Office

2007

Case No.	No. of Accused Persons	Charges
ACC 67/2007	1	Abuse of Office
ACC 7550/2007	1	Procurement

2008

Case No.	No. of Accused Persons	Charges
ACC 35/2008	5	Acquisition of Public Property

2009

Case No.	No. of Accused Persons	Charges
ACC 6/2009	1	Acquisition of Public Property
ACC 18/2009	8	Conspiracy to defraud
ACC 22/2009	1	Abuse of Office

2010

Case No.	No. of Accused Persons	Charges
ACC 1/2010	6	Fraudulent Acquisition of Public Property
ACC 5/2010	8	Conspiracy to Defraud
ACC 10/2010	5	Fraudulent Acquisition of Public Property
ACC 11/2010	1	False Accounting
ACC 12/2010	1	Fraudulent Acquisition of Public Property
ACC 13/2010	1	False Accounting
ACC 17/2010	2	Procurement
ACC 18/2010	1	False Accounting
ACC 19/2010	13	Procurement
ACC 20/2010	4	Abuse of Office
ACC 28/2010	6	Fraudulent Failure to Pay Taxes
ACC 36/2010	1	Procurement
ACC 46/2010	1	Fraudulent Acquisition of Public Property
ACC 48/2010	1	Impersonation
ACC 44/2010	2	Procurement

2011

Case No.	No. of Accused Persons	Charges
ACC 2/2011	2	Forgery
ACC 3/2011	1	Fraudulent Acquisition of Public Property
ACC 6/2011	2	Abuse of Office
ACC 7/2011	2	False Accounting
ACC 13/2011	1	Fraudulent Acquisition of Public Property
ACC 14/2011	1	Knowingly Deceiving a Principal
ACC 19/2011	1	Knowingly Deceiving a Principal
ACC 20/2011	1	Fraudulent Acquisition of Public Property
ACC 23/2011	1	Fraudulent Acquisition of Public Property
ACC 24/2011	1	Knowingly Giving a False Document
ACC 27/2011	1	Knowingly Deceiving a Principal
ACC 28/2011	2	Abuse of Office
ACC 29/2011	1	Knowingly Giving a False Document
ACC 30/2011	3	Fraudulent Acquisition of Public Property
ACC 32/2011	1	Fraudulent Acquisition of Public Property
ACC 33/2011	1	Knowingly Giving a False Statement
ACC 35/2011	3	Making a False Document
ACC 36/2011	2	Deceiving a Principal
ACC 39/2011	3	Procurement

2012

Case No.	No. of Accused Persons	Charges
ACC 3/2012	5	Conspiracy to Defraud
ACC 4/2012	2	Forgery
ACC 5/2012	3	Uttering a False Document
ACC 6/2012	4	Abuse of Office
ACC 7/2012	1	Abuse of Office
ACC 10/2012	1	Fraudulent Acquisition of Public Property
ACC 11/2012	2	Procurement
ACC 12/2012	1	Unlawful Acquisition of Public Property
ACC 14/2012	7	Procurement
ACC 15/2012	1	Unlawful Acquisition of

		Public Property
ACC 16/2012	1	Soliciting
ACC 17/2012	1	Unlawful Acquisition of Public Property
ACC 18/2012	1	Failure to Disclose a Private Interest

2013

Case No.	No. of Accused Persons	Charges
ACC 1/2013	1	Soliciting
ACC 2/2013	3	Conspiracy to Commit an Offence
ACC 4/2013	2	Procurement
ACC 5/2013	1	Soliciting
ACC 6/2013	1	Unlawful Acquisition of Public Property
ACC 7/2013	1	Soliciting
ACC 9/2013	1	Soliciting
ACC 10/2013	1	Soliciting
ACC 11/2013	1	Soliciting
ACC 12/2013	6	Conspiracy to Defraud
ACC 14/2013	6	Abuse of Office
ACC 15/2013	1	Fraudulent Acquisition of Public Property
ACC 16/2013	4	Procurement
ACC 17/2013	1	Soliciting
ACC 18/2013	6	Conspiracy to Defraud
ACC 19/2013	8	Conspiracy to Commit an Offence
ACC 20/2013	1	Soliciting
ACC 21/2013	1	Soliciting

2014

Case No.	No. of Accused Persons	Charges
ACC 1/2014	1	Soliciting
ACC 2/2014	2	Abuse of Office
ACC 3/2014	1	Impersonating an Investigator
ACC 4/2014	4	Abuse of Office
ACC 5/2014	1	Soliciting
ACC 6/2014	1	Impersonating an Investigator
ACC 7/2014	1	Soliciting
ACC 8/2014	1	Soliciting
ACC 9/2014	1	Soliciting
ACC 10/2014	2	Soliciting
ACC 11/2014	1	Soliciting
ACC 13/2014	3	Fraudulent Acquisition of Public Property

ACC 14/2014	5	Fraudulent Acquisition of Public Property
ACC 15/2014	1	Soliciting
ACC 16/2014	2	Soliciting
ACC 17/2014	2	Soliciting
ACC 18/2014	1	Soliciting
ACC 19/2014	9	Wilful Failure to Comply with the Law

44. Following the discussions in the country visit, the reviewers make the following general observations on the implementation of the chapter under review.
45. The regulation of corruption in Kenya appears to be extensive and does not require, for now, the promulgation of significant new legislation. However, the enforcement of existing measures deserves attention in the country's efforts to curb corruption. In particular, the justice sector should continue to be firm with regard to sanctions and in its procedure against corruption.
46. Significant progress has been made in the development of the legal framework against corruption, enshrined in the Constitution, and the rapid growth of institutions, also in terms of manpower, including EACC and specialized prosecutors in the ODPP, as well as the creation of specialist institutions such as the Financial Reporting Centre and Asset Recovery Agency. These are very new agencies whose effectiveness remains to be assessed. Kenya has significantly enhanced inter-agency coordination and made progress in the development of its anti-money laundering regime in line with FATF and international standards, and progress has also been achieved in the area of international cooperation, although more work remains to be done. In addition, other challenges include up-skilling new staff, stabilizing and building new units in these institutions, and translating the legal and institutional advances into operational results (e.g., convictions and assets recovered).
47. To more effectively achieve the objectives of the Convention education and awareness-raising of corruption should be strengthened. In particular, awareness raising for citizens who are also taxpayers affected by fraudulent practices is desirable, so they can be well informed and exercise more oversight in this area. See UNCAC article 39 below.
48. Another avenue for improvement would involve significant government effort directed at judges and civil servants, whether state, local or elected, to raise awareness of the Convention and to strengthen capacity in the investigation, prosecution and adjudication of corruption cases. See UNCAC article 36 below.
49. It is desirable that Kenya adopt relevant measures on the collection and availability of statistical data.
50. Kenya is encouraged to strengthen cooperation between institutions that fight corruption, notably the EACC, the ODPP, FRC, CID-Police, AG and PPOA. See UNCAC article 38.
51. Finally, the reviewers acknowledge the high-level support given to UNCAC implementation and the UNCAC country review. The remarks of the Attorney General

(Prof. Githu Muigai, EGH, SC), read on his behalf by the Solicitor General (Mr. Njee Muturi) during the country visit, refer to the work of Kenya's National Steering Committee on UNCAC Review, appointed by the Attorney General in August 2013. He observed that the Committee had held consultations with various stakeholders as part of the UNCAC review, including EACC, Ministry of Foreign Affairs and International Trade, Parliament, African Network of Parliamentarians against Corruption (APNAC) (Kenya Chapter) and civil society organizations such as Transparency International (Kenya Chapter), Centre for Law and Research International (CLARION), and all member institutions of the National Steering Committee on UNCAC Review. The Committee was chaired by Ms. Mary Ann Njau-Kimani, OGW (the Secretary, Justice and Constitutional Affairs, Office of the Attorney General and Department of Justice), who was deputized by Mr. Michael Mubea (the Deputy Secretary of EACC). The Attorney General also indicated that on 31 October 2013, President of Kenya, H.E. Hon. Uhuru Kenyatta, CGH, led the Cabinet to formally approve the review of Kenya's implementation of UNCAC, and that on 18 March 2014, during the launch of EACC's Strategic Plan (2013-2018), the President announced that the Government would implement the recommendations of the UNCAC country review report of Kenya. The Attorney General noted that the UNCAC review, and alignment of Kenya's anti-corruption laws and institutions with UNCAC, would also facilitate the implementation of Article 132(1)(c)(iii) of the Constitution, which requires the President to report to the National Assembly on the extent to which Kenya has implemented its international obligations. The Attorney General's remarks indicated that the anti-corruption measures undertaken by Kenya demonstrated the country's commitment and political will from the highest office of the land to implement the outcome of the UNCAC review. The reviewers positively acknowledge these measures.

Article 15 Bribery of national public officials

Subparagraph (a)

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;

(a) Summary of information relevant to reviewing the implementation of the article

52. Kenya provided the following information.

Section 39 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (ACECA) criminalizes offering, giving, accepting or soliciting a bribe.

53. The section reads as follows:

Bribing agents.

39. (1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent-

(a) doing or not doing something in relation to the affairs or business of the agent's principal; or

(b) showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent's principal.

(2) For the purposes of subsection (1)(b), a benefit, the receipt or expectation of which would tend to influence an agent to show favour or disfavour, shall be deemed to be an inducement or reward for showing such favour or disfavour.

(3) A person is guilty of an offence if the person-

(a) corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or

(b) corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.

54. The term "public officer" is defined in Section 2 of the Anti-Corruption and Economic Crimes Act as follows:

Anti-Corruption and Economic Crimes Act

"public officer" means an officer, employee or member of a public body, including one that is unpaid, part-time or temporary;

"public body" means –

(a) the Government, including Cabinet, or any department, service or undertaking of the Government;

(b) the National Assembly or the Parliamentary Service;

(c) a local authority;

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition;

55. It was explained that this definition is consistent with the Constitution of Kenya, 2010 which provides for State and Public Officers, in light of Section 7 of the Sixth Schedule to the Constitution, which provides that the provisions of the Constitution shall prevail in case of any conflict with other domestic laws in place prior to its effective date.

56. For the purposes of anti-corruption in Kenya, a public officer is defined in Articles 259 and 260 of the Constitution of Kenya, 2010 as follows:

Constitution of Kenya, 2010

"public officer" means—

(a) any State officer; or

(b) any person, other than a State Officer, who holds a public office;

“public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;

“State office” means any of the following offices—

- (a) President;
 - (b) Deputy President;
 - (c) Cabinet Secretary;
 - (d) Member of Parliament;
 - (e) Judges and Magistrates;
 - (f) member of a commission to which Chapter Fifteen applies;
 - (g) holder of an independent office to which Chapter Fifteen applies;
 - (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;
 - (i) Attorney-General;
 - (j) Director of Public Prosecutions;
 - (k) Secretary to the Cabinet;
 - (l) Principal Secretary;
 - (m) Chief of the Kenya Defence Forces;
 - (n) Commander of a service of the Kenya Defence Forces;
 - (o) Director-General of the National Intelligence Service;
 - (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service;
- or
- (q) an office established and designated as a State office by national legislation;

57. Kenya provided the following examples of implementation.

In *R. vs. Ferdinand Waititu* ACC 35/2007 (CR 141/298/2007) the accused was arrested and charged with the offence of offering a bribe to a public official contrary to section 39(a) of the ACECA.

Similarly in *Republic vs. Jane Wanjiku Waigi & Others* (CR. 434/13/2014), the accused and five others were arrested and prosecuted for attempting to offer a bribe to a magistrate.

R vs. Mohamed Nur, Nbi. ACC No. 17 of 2007, where the accused was charged after offering a bribe to an EACC investigator.

R vs. Javan Ochieng' & Another, Nbi. ACC No. 34 of 2007, where the accused were also charged after offering a bribe to EACC investigators.

(b) Observations on the implementation of the article

58. In relation to corruption, Kenya has provided information to illustrate its application of the provision under review. The information allows us to conclude that corruption was the object of a special law (ACECA – Anti-Corruption and Economic Crimes Act), and that acts of corruption are criminalized.

59. It is noted, however, that the bribery offence in Section 39 is limited in that it applies to the bribery of agents, i.e. an arrangement between an agent and a principal, and not in relation to the public official's position. Moreover, the offence covers bribery "in relation to the affairs or business of the agent's principal," which does not expressly cover bribery in relation to third party beneficiaries. The indirect bribery of public officials also does not appear to be covered. It is recommended that Kenya adopt measures more fully in line with article 15 of the Convention.
60. It is further noted that the different laws implementing UNCAC use different terminologies in defining the categories of public officials to which they apply. For example, ACECA uses the term "public officer" for bribery offences (as quoted above), but "person employed in the public service" for abuse of office offences (e.g., section 46 quoted under UNCAC article 19 below). On the contrary, offences under the Penal Code apply to "public servants" (e.g., Section 280 on stealing by public servants and sections 101 and 128 on abuse of office and neglect of official duty), and the Constitution provides for State and Public Officers. It is recommended that Kenya consider harmonizing the various definitions and ensure that all public officers enumerated in article 2 of UNCAC (e.g., judicial officers) are covered.

Subparagraph (b) of article 15

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(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.

(a) Summary of information relevant to reviewing the implementation of the article

61. Kenya provided the following information.

Section 39 of ACECA criminalizes offering, giving, accepting or soliciting a bribe. The section reads as follows:

Bribing agents.

39. (1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent-

(a) doing or not doing something in relation to the affairs or business of the agent's principal; or

(b) showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent's principal.

(2) For the purposes of subsection (1)(b), a benefit, the receipt or expectation of which would tend to influence an agent to show favour or disfavour, shall be deemed to be an inducement or reward for showing such favour or disfavour.

(3) A person is guilty of an offence if the person-

(a) corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or

(b) corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.

62. Kenya provided the following examples of cases and case law.

In *Elizabeth Chelangat vs. Republic* [2011] EKLK, the Court of Appeal dismissed the appeal filed by Appellant and upheld the judgment and sentence of the Magistrate's and High Court in convicting the appellant for the offence of soliciting a bribe contrary to section 39(3)(a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. A copy of the judgment was provided to the reviewers.

63. With regard to indirect bribery, Kenya referred to the following case:

R. vs. Francisco Nguta Kauli, Mombasa ACC 3 of 2007, in which the accused was a clerk in Kwale County Council who solicited a bribe that was collected on his behalf by a private citizen (his friend). The accused was charged with the offence and the agent became a State witness.

64. With regard to the issue of gifts, Kenya cited the following measures.

Article 76, Constitution of Kenya

76. (1) A gift or donation to a State officer on a public or official occasion is a gift or donation to the Republic and shall be delivered to the State unless exempted under an Act of Parliament.

(2) A State officer shall not—

(a) maintain a bank account outside Kenya except in accordance with an Act of Parliament; or

(b) seek or accept a personal loan or benefit in circumstances that compromise the integrity of the State officer.

Sections 3 and 4, Leadership and Integrity Act

(3) Without limiting the generality of subsection (2), a State officer shall not—

(a) accept or solicit gifts, hospitality or other benefits from a person who –

(i) has an interest that may be achieved by the carrying out or not carrying out of the State officer's duties;

(ii) carries on regulated activities with respect to which the State officer's organisation has a role; or

(iii) has a contractual or legal relationship with the State officer's organisation;

(b) accept gifts of jewelry or other gifts comprising of precious metal or stones, ivory or any other animal part protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora; or

(c) any other type of gift specified by the Commission in the regulations.

(4) A State officer shall not receive a gift which is given with the intention of compromising the integrity, objectivity or impartiality of the State officer.

Section 2 of ACECA

2.(1) In this Act, unless the context otherwise requires —

“benefit” means any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage;

Section 11 of the Public Officer Ethics Act

No improper enrichment

(1) A public officer shall not use his office to improperly enrich himself or others.

(2) Without limiting the generality of subsection (1), a public officer shall not—

(a) except as allowed under subsection (3) or (4), accept or request gifts

or favours from a person who—

(i) has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;

(ii) carries on regulated activities with respect to which the public officer's organisation has a role; or

(iii) has a contractual or similar relationship with the public officer's organisation;

(b) improperly use his office to acquire land or other property for himself or another person, whether or not the land or property is paid for; or

for the personal benefit of himself or another, use or allow the use of information that is acquired in connection with the public officer's duties and that is not public.

(3) A public officer may accept a gift given to him in his official capacity but, unless the gift is a non-monetary gift that does not exceed the value prescribed by regulation, such a gift shall be deemed to be a gift to the public officer's organisation.

(4) Subsection (2)(a) does not prevent a public officer from accepting a gift from a relative or friend on a special occasion recognised by custom.

(5) Subsection (2)(c) does not apply to the use of information for educational

(c) or literacy purposes, research purposes or other similar purposes.

(b) Observations on the implementation of the article

65. The payments known as “facilitation payments” are not authorized in Kenya. To the degree that there is a causal relationship between the acts committed and the payment offered, acts of corruption may be prosecuted without difficulties under section 39 of ACECA. In this context, the observations made under article 15(a) above are referred to.

66. With regards to customary law, Kenya cited Section 49 of ACECA.

49. 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.

67. Kenya cited the case of *Elizabeth Chelangat vs. the State* [2011] EKLR, in which the Appeals Court confirmed the ruling and the penalty imposed by the Magistrate's and High Court convicting the appellant for having requested a bribe, in violation of section 39(3)(a) read jointly with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003, to illustrate the application of the law.

Article 16. Bribery of foreign public officials and officials of public international organizations

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 organization, 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 organization, 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.

(a) Summary of information relevant to reviewing the implementation of the article

68. Kenya indicated that it has not implemented the article.

69. There is no provision in Kenyan laws for bribery of foreign public officials and officials of public international organizations or soliciting and acceptance of bribes by such officials.

70. Kenya indicated that there is need to amend the law to criminalize bribery of foreign public officials and officials of public international organizations.

(b) Observations on the implementation of the article

71. Kenya indicated that it has not implemented the provisions of this article and no Kenyan law criminalizes the corruption of foreign public officials, or the solicitation or acceptance of 'facilitation payments' by said officials.

72. Kenya has expressed the need of an amendment to the legislation. It is recommended that Kenya take necessary legislative measures to implement the article under review, in particular in light of the case examples cited.

(c) Challenges, where applicable

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.): We do not have laws on this.

2. Limited capacity (e.g. human/technological/institution/other): Since there are no legal provisions on this offence, there is need to build capacity in this area. There is also need for technical assistance in the training of investigators and judicial officers.

(d) Technical assistance needs

1. Summary of good practices/lessons learned: Technical assistance from jurisdictions that have implemented this provision.
2. Model legislation from jurisdictions that have implemented this provision.

Kenya indicated that none of these forms of technical assistance have been previously provided.

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.

(a) Summary of information relevant to reviewing the implementation of the article

73. Kenya provided the following information.

Section 45 of Anti-Corruption and Economic Crimes Act has elaborate provisions for protection of public property and criminalizes fraudulent acquisition, charging, disposition, and damage of public property. It also criminalizes fraudulently making payment or excessive payment for sub-standard or defective goods, goods not supplied or not supplied in full, services not rendered or not adequately rendered, and engaging in projects without prior planning. It also criminalizes wilful or careless failure to follow any law or applicable procedures for procurement, sale or disposal of public property, and the management of funds and incurring of expenditures.

74. Section 45 of Anti-Corruption and Economic Crimes Act provides that:

Protection of public property and revenue, etc.

45. (1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully-

- (a) acquires public property or a public service or benefit;
- (b) mortgages, charges or disposes of any public property;
- (c) 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; or
- (d) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.

(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person-

- (a) fraudulently makes payment or excessive payment from public revenues for-
 - (i) sub-standard or defective goods;
 - (ii) goods not supplied or not supplied in full; or

- (iii) services not rendered or not adequately rendered;
 - (b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or
 - (c) engages in a project without prior planning.
- (3) In this section, “public property” means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.

75. Sections 101, 268 and 280 of the Penal Code provide for offences of abuse of office and theft by public servants, respectively. The said sections read as follows:

Abuse of office.

101. (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 felony.

Definition of stealing.

268. (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

Stealing by persons in the public service.

280. If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years.

76. Sections 275 and 127 of the Penal Code respectively criminalize theft, fraud and breach of trust by persons employed in the public service. The two sections read as follows:

General punishment for theft.

275. Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

Frauds and breaches of trust by persons employed in the public service.

127. (1) Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether the fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a felony.

(2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.

77. Kenya provided the following examples of cases and case law.

R. vs. Concilia Ooko Ondiek, Anti-Corruption Case No. 8 of 2010, Nairobi

The accused person was charged with two counts, 1st count was fraudulent Acquisition of Public Property contrary to Section 45 (1) (a) as read with section 48 of Anti-

Corruption and Economic Crime Act No.3 of 2003 with an alternative charge of abuse of Office contrary to section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The second count was false accounting by a public office contrary to section 331(1) as read with section 331(2) of the Penal Code. She denied all the charges against her. The court held that the prosecution failed to adduce sufficient evidence to support the particulars of the charges against the accused. The accused was acquitted under section 215 of the Criminal Procedure Code on all the counts for lack of evidence.

R. vs. Ong'onga Achieng & 3 Others, Anti-Corruption Case No. 17 of 2009, Nairobi

The accused persons were jointly and severally accused of several counts namely; conspiracy to defraud contrary to section 317 of the Penal Code, abuse of office contrary to section 46 as read with section 48 of ACECA, wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of ACECA, conflict of interest contrary to section 42(3) as read with section 48 of ACECA, fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48(1)(2) ACECA. In mitigation, the accused persons stated that they were all first time offenders and were public servants. The court found them guilty and issued custodial sentences and fines to their respective counts and in default the custodial sentences and the fines would run concurrently.

R. vs. Enosh Meshack Magwa, Anti-Corruption Case No. 9 of 2010, Nairobi

The accused was charged with several counts amongst them fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48(1) of ACECA, false accounting by a public officer contrary to section 331(1) as read with 331(2) of the Penal Code and uttering a false document contrary to section 353 of the Penal Code. The court found the accused guilty being a public officer entrusted with public funds and sentenced him to a custodial sentence and a fine.

R. vs. Patrick Lumumba Aghan, Anti-Corruption Case No. 14 of 2010, Nairobi

The accused was charged with four counts and one alternative charge, namely fraudulent acquisition of Public Revenue Contrary to section 45(1)(a) as read with section 48 of ACECA, knowingly deceiving a principal contrary to section 41(2) as read with section 48 of ACECA, uttering a false document contrary to section 353 of the Penal Code and false accounting by a public officer contrary to section 331 of the Penal Code. The court found that the prosecution had adduced sufficient evidence to the effect that the accused had presented and attached misleading documents thereby falsely accounting for the imprest. The accused was found guilty and convicted for an offence of false accounting contrary to section 331 of the Penal Code.

78. Kenya provided the following statistical information on investigations, prosecutions and outcomes of tax evasion cases from the Kenya Revenue Authority.

Action Taken	2012/2013	2011/2012	2010/2011	2009/2010	2008/2009
Reports on tax	572 Intelligence summaries	500 Intelligence summaries	564 Intelligence summaries	642 Intelligence summaries	680 Intelligence summaries

evasion					
No of investigations conducted on tax evasion	80 cases	60 DTD	48 DTD	84 cases	81 cases
No of cases prosecuted	13 cases to Anti-corruption Court & 59 to Penal Court	17 cases to Anti-corruption Court & 68 to Penal Court	11 cases to Anti-corruption Court & 196 to Penal Court	16 cases to Anti-corruption Court & 460 to Penal Court	21 cases to Anti-corruption Court & 219 to Penal Court
No of convictions /acquittals	59 penal court cases won	68 cases won (100%)	77 cases won (87%) and 10 acquittals	239 cases won and 3 cases lost	217 cases won and 2 cases lost

(b) Observations on the implementation of the article

79. Kenya reported that many forms of embezzlement are covered in section 45 of ACECA, in relation to the protection of public assets, and in relation to acts of fraud involving invoicing or over-invoicing of defective or poor quality goods, and also of services that were not rendered or poorly rendered.
80. It also provided the sections of the Penal Code sections 101, 268 and 280 which respectively cover the crimes of abuse of office and theft by an official, and sections 127 and 275 of the same Code, which deal with misappropriation committed by officials, and fraud and abuse of trust committed by officials.
81. It is noted that the offence of theft (sections 268, 275, 280) of the Penal Code is limited to theft of tangible items, which was confirmed in the country visit. It is recommended that Kenya expand the offence to cover 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, in line with the article under review.

Article 18. Trading in influence

Subparagraph (a) of article 18

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.

(a) Summary of information relevant to reviewing the implementation of the article

82. Kenya indicated that it has partially implemented the article.

83. There is no corresponding provision in Kenyan laws on this requirement. The proscribed conduct may, however, be captured under the wide rubric of bribing agents and abuse of office contrary to Sections 39 and 46 of Anti-Corruption and Economic Crimes Act respectively.

84. There is partial compliance with the obligation under this article because Section 46 of the Anti-Corruption and Economic Crimes Act quoted above does not entirely cover all aspects of trading in influence such as third party brokers. What is missing in the law is the criminalization of such conduct by intermediaries or brokers who are not in law agents of the public bodies wherein their influence is traded.

85. Sections 39 and 46 of the Anti-Corruption and Economic Crimes Act provide that:

39. (1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent-

(a) doing or not doing something in relation to the affairs or business of the agent's principal; or

(b) showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent's principal.

(2) For the purposes of subsection (1)(b), a benefit, the receipt or expectation of which would tend to influence an agent to show favour or disfavour, shall be deemed to be an inducement or reward for showing such favour or disfavour.

(3) A person is guilty of an offence if the person-

(a) corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or

(b) Corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.

46. A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

86. Moreover, Article 73 (2) (a) and (b) of the Constitution provides the normative framework for decision making by State and public officers. It provides that "the guiding principles of leadership and integrity include-

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices".

87. There have been no prosecutions for trading in influence.

88. To fully implement the provision, Kenya indicated that an amendment of Kenyan law, specifically the Anti-corruption and Economic Crimes Act, to criminalize trading in influence and specifically address third party brokers, is needed. Kenya indicated that it will seek to recommend amendments to the law to criminalize such conduct.

(b) Observations on the implementation of the article

89. With regard to trading in influence, Kenya indicated it partially implemented the provisions of the article, given that certain forms of said conduct may be covered under the broad concept of corruption of an official and abuse of power, in violation of sections 39 and 46 respectively, of ACECA.

90. However, section 46 of ACECA cited above omits certain dimensions of trading in influence, such as intermediary agents.

91. The reviewers welcome indications by Kenya that it wishes to modify ACECA to respond to the article under review and encourage Kenya to adopt relevant measures.

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 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.

(a) Summary of information relevant to reviewing the implementation of the article

92. Kenya indicated that domestically, the relevant offence is Abuse of Office, whose elements are similar to those of abuse of functions. This been criminalized through the Anti-Corruption and Economic Crimes Act and the Penal Code.

93. Section 46 of ACECA and Section 101 of the Penal Code provide for the offence of abuse of office. The two sections read as follows:

46. Abuse of Office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

101. Abuse of Office

(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 felony.

101. Abuse of office

(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 felony.

94. Section 128 of the Penal Code creates the offence of breach of trust by public officers. It reads as follows:

128. Neglect of Official Duty

Every person employed in the public service who wilfully neglects to perform any duty which he is bound either by common law or by any written law to perform, provided that the discharge of the duty is not attended with greater danger than a man of ordinary courage might be expected to face, is guilty of a misdemeanour

95. Section 130 of the Penal Code criminalizes disobedience of statutory duty without lawful excuse. It reads as follows:

130. Disobedience of Statutory Duty

Everyone who wilfully disobeys any written law by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, is guilty of a misdemeanour and is liable, unless it appears from the written law that it was the intention of Parliament to provide some other penalty for the disobedience, to imprisonment for two years.

96. In the same vein, Section 280 as read with section 268 of the Penal Code provide for the offence of stealing/theft by public servants, as follows:

268. Definition of Stealing

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –

- (a) an intent permanently to deprive the general or special owner of the thing of it;
 - (b) an intent to use the thing as a pledge or security;
 - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;
- and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it. (4) When a thing converted has been lost by the owner and

found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

280. If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years.

97. Kenya provided the following case example. A copy of the judgment was provided to the reviewers.

In the Case of ***R. vs. Ong'onga Achieng & 3 Others, Anti-Corruption case No. 17 of 2009, Nairobi***, the accused, faced three counts of abuse of office among other charges. Ms. Nabutola was at one time the Permanent Secretary in the Ministry of Tourism while her co-accused Dr. Achieng' Ongong'a was the Chairman of the Kenya Tourism Board (KTB). The particulars of the charges against Ms. Nabutola are that she used her office to improperly confer a benefit on M/s Maniago Safaris Limited (MSL) by directly appointing the said firm MSL to coordinate the trip by the Permanent Secretaries of the Government of Kenya to the Maasai Mara in October, 2007 and communicating such appointment to Catering and Tourism Development Levy Trustees (CTDLT) for purposes of payment. She was also accused of using her office to improperly confer a benefit on MSL by issuing instructions for the payment of Kenya Shillings 400,000 to the said MSL in respect of the trip by Permanent Secretaries to Maasai Mara whereas the said MSL had not accounted for the sum of Kshs. 8,925,444 that had been paid to it by CTDLT for the said trip.

The particulars of the charges against Dr. Ongong'a are that he used his office to improperly confer a benefit on MSL by instructing CTDLT to pay the said MSL a sum of Kshs. 8,925,444 on behalf of KTB before the procurement was sanctioned by the Tender Committee of KTB. At the conclusion of the trial, Ms. Nabutola and Mr. Ongong'a were found guilty and sentenced to three years imprisonment each and with fines.

(b) Observations on the implementation of the article

98. Kenya indicated the offence that corresponds to the provision under review within its own legal system is Abuse of power, an offence with similar characteristics to those of the abuse of function. This offence is sanctioned by section 46 of ACECA, and by sections 101, 128, 130, 268 and 280 of the Penal Code.

99. In addition, it is punishable by seven years' imprisonment if the offender is an official and the object of the misappropriation belongs to the State or if the offender stole it through of his/her official functions (section 280 PC).

100. As an example, Kenya informed that the Court condemned two women to three years of prison each, and fined them, in one of the cases (***R. vs. Ong'onga and 3 other persons***).

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.

(a) Summary of information relevant to reviewing the implementation of the article

101. Kenya indicated that it has not implemented the article.
102. There is no law that specifically criminalizes illicit enrichment.
103. Kenya relies extensively on codes of ethical conduct which may not have any criminal sanctions attached to them. Penalties in the Public Officer Ethics Act (POEA) are limited to disciplinary measures to be determined by the respective responsible agencies.
104. The EACC Act as well as the Leadership and Integrity Act No. 19 of 2012 (LIA) provide for the development of a code of ethics for State officers and codes of conduct for public officers. Such codes would cover the above requirements, among others. Violation of such codes may entail a recommendation for prosecution.
105. The Public Officer Ethics Act, 2003 provides for the declaration of wealth by all public officials once every two years as a means to keep track of the wealth of public officials in the course of employment, but does not prescribe an offence of illicit enrichment.
106. Kenya indicated that it can therefore be concluded that, despite lack of a direct legal provision which criminalizes illicit enrichment, Kenya has substantially complied with the obligations imposed under this article. The conclusion takes into account the constitutional principles such as the principle of presumption of innocence of a suspect and the right not to self-incriminate; and the burden of proof in criminal and civil proceedings.
107. The Kenya Constitution 2010 at Article 76(2)(b) provides that:-

“A State Officer shall not seek or accept a personal loan or benefit in circumstances that compromise the integrity of the State Officer”.
108. Section 12(1) of the Leadership and Integrity Act, 2012 provides:-

“A State Officer shall not use the office to unlawfully or wrongfully enrich himself, herself or any other person”

Section 12(2): Subject to Article 76(2)(b) of the Constitution, a State officer shall not accept a personal loan or benefit which may compromise the State officer in carrying out their duties”.

109. Section 15 of the Leadership and Integrity Act (LIA) further provides that a State officer shall not use the office to wrongfully or unlawfully influence the acquisition of property.

110. Under section 52 of the LIA, the above requirements also apply to public officers as if they were State officers.

111. Section 11 of Public Officer Ethics Act reads in part:-

11. (1) A public officer shall not use his office to improperly enrich himself or others.

112. Under section 55 of the ACECA, EACC is mandated to institute civil proceedings against public officials for forfeiture of unexplained assets (illicit enrichment). The section reads in part:-

55 (2) The Commission may commence proceedings under this section against a person if-(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

(3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

(4) In proceedings under this section-

(a) the Commission shall adduce evidence that the person has unexplained assets; and

(b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

(7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds-

(a) are held in trust for the person whose assets are in question or otherwise on his behalf; or (b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.

(8) The record of proceedings under this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime.

(9) This section shall apply retroactively.

113. Kenya indicated that the following cases are relevant:

(1) *Dr. Christopher Murungaru vs. KACC*, MSC Criminal Application No. High Court No. 54/2006

(2) *Dr. Christopher Murungaru vs. KACC*, Civil Application No. 43/2006, Court of Appeal

(3) *KACC vs. Stanley Mombo Amuti*, Nairobi HCCC Suit No. 448/2008.

In the three cases above, the anti-corruption body had commenced investigations against individuals on allegations of illicit acquisition of wealth. The individuals filed court proceedings challenging the constitutionality of their being required to explain the sources of their wealth. The court held that this amounted to self-incrimination by the accused person and also shifted the burden of proof from the prosecution to the accused contrary to the constitution.

(b) Observations on the implementation of the article

114. Under Kenyan law, there is no provision that criminalizes illicit enrichment as provided for in article 20 of the Convention. However, several provisions exist that pursue the same goal.

115. The country essentially depends on ethical conduct codes, which do not always include related sanctions. The penalties provided by the Public Officer Ethics Act (POEA) are limited to disciplinary measures that the Heads of each body are in charge of determining.

116. The EACC Act and the Leadership and Integrity Act (LIA) provide for the development of a code of ethics for State officers and codes of conduct for public officers, which would, among other things, partially address article 20. Infringing the said codes may involve a recommendation to prosecute.

117. It is important to note that the Public Officer Ethics Act (2003) provides that every official shall submit a declaration of assets every two years, in order to monitor the financial situation of the officials during their term.

118. As a conclusion, Kenya states that despite the lack of specific provisions criminalizing illicit enrichment, it has significantly met the obligations established by the article, considering Constitutional principles such as the presumption of the innocence of suspects, the right against self-incrimination, and the burden of proof, both in civil and criminal procedures.

119. To illustrate the application of the provision of the Convention under review, Kenya cited article 76-2b of the Constitution of 2010, sections 12-1, 12-2, 15 and 52 of LIA,

section 11 of POEA and section 55 of ACECA.

120. Kenya raised the question of reversal of the burden of proof. This issue which stems from the criminal procedure is common in many legal systems, above all in relation to the fight against economic crime, corruption offences and drug trafficking.
121. As long as this principle remains in place, and taking into consideration the presumption of innocence, any offences related to illicit enrichment will remain difficult to prosecute, unless there are other, strong means of proof.
122. In accordance with section 55-9 of ACECA, EACC may start civil procedures against officials for the confiscation of assets of doubtful origin, and it may be retroactive.
123. In light of the limitations under the existing codes of ethics, including the absence of criminal sanctions, the reviewers note that Kenya may wish to consider the adoption of a specific offence on illicit enrichment, to facilitate the detection and pursuit of ill-gotten wealth and related criminal activity.

(c) Challenges, where applicable

1. Specificities in its legal system
2. Constitutional principles such as the principle of presumption of innocence of a suspect and the right not to self-incriminate; and the burden of proof in criminal and civil proceedings have proved challenging to the monitoring and prosecution of suspects.

(d) Technical assistance needs

1. Legal advice
2. On-site assistance by an anti-corruption expert

Kenya indicated that there are several institutions that fight corruption in Kenya with different mandates and it is not clear at the moment whether there is any that has received any form of technical assistance as requested above.

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.

(a) Summary of information relevant to reviewing the implementation of the article

124. Kenya indicated that Section 39 of ACECA as read with Section 38 criminalizes bribery in both the public and private sectors.

125. Kenya referred to Sections 38 and 39 of Anti-Corruption and Economic Crimes Act, which read as follows:

38. (1) In this Part —

“agent” means a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person;

“principal” means a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts.

(2) If a person has a power under the Constitution or an Act and it is unclear, under the law, with respect to that power whether the person is an agent or which public body is the agent’s principal, the person shall be deemed, for the purposes of this Part, to be an agent for the Government and the exercise of the power shall be deemed to be a matter relating to the business or affairs of the Government.

(3) For the purposes of this Part —

(a) a Cabinet Minister shall be deemed to be an agent for both the Cabinet and the Government; and

(b) the holder of a prescribed office or position shall be deemed to be an agent for the prescribed principal.

(4) The regulations made under this Act may prescribe offices, positions and principals for the purposes of subsection (3)(b).

39. (1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent —

(a) doing or not doing something in relation to the affairs or business of the agent’s principal; or

(b) showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent’s principal.

(2) For the purposes of subsection (1)(b), a benefit, the receipt or expectation of which would tend to influence an agent to show favour or disfavour, shall be deemed to be an inducement or reward for showing such favour or disfavour.

(3) A person is guilty of an offence if the person —

(a) corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or

(b) corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.

126. Kenya provided the following case examples.

A motor Assessor at Blue Shield Insurance Company Limited, a private company, corruptly solicited and received a benefit from a complainant as an inducement to prepare an Assessor’s report to enable the complainant obtain an insurance claim. The suspect was charged in an anti-corruption court under section 39 of the ACECA.

R. vs. Charles Magundu & Others, Nbi. ACC No. 78 of 2006, where the accused who were employees of the Cooperative Bank were charged with soliciting bribes.

R. vs. Yabesh Nyandoro, Nbi. ACC No. 32 of 2002, where the accused was a clerk in a law firm who was charged with soliciting a bribe from a client.

(b) Observations on the implementation of the article

127. Kenya observed that a culture of reporting acts of corruption in the private sector does not exist, as this aspect is not rooted in the culture of the country. Awareness raising, training and education programs would be necessary to change behaviours and mentalities. Having indicated said difficulty, the reviewers recommend that Kenya consider extending its measures to criminalize bribery in the private sector to cover contexts not limited to principal-agency relationships, and give adequate attention to enforcement of the provisions and awareness raising on the ground.

(c) Challenges, where applicable

1. Other issues: Public reluctance to report private-to-private corruption.

(d) Technical assistance needs

1. Summary of good practices/lessons learned: There is need for benchmarking to identify strategies of tackling private-private corruption and sensitizing the public.

Kenya indicated that none of these forms of technical assistance has been previously provided.

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.

(a) Summary of information relevant to reviewing the implementation of the article

128. Kenya indicated that it has significantly complied with the obligations of the article under general criminal laws.

129. Section 275 of the Penal Code thereof criminalizes stealing generally. It reads as follows:

275. Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

130. Section 281 criminalizes stealing by clerks and agents. It reads as follows:-

281. If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.

131. Section 282 of the Penal Code criminalizes stealing by directors and officers of companies. It reads as follows:-

282. If the offender is a director or officer of a corporation or company, and the thing stolen is the property of the corporation or company, he is liable to imprisonment for seven years. Section 283 criminalizes stealing by agents. It reads as follows:-

283. Stealing by Agent, etc.

If the thing stolen is any of the things following, that is to say-

- (a) property which has been received by the offender with a power of attorney for the disposition thereof;
- (b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof;
- (c) property which has been received by the offender either alone or jointly with any other person for or on account of any other person;
- (d) the whole or part of the proceeds of any valuable security which has been received by the offender with a direction that the proceeds thereof should be applied to any purpose or paid to any person specified in the direction;
- (e) the whole or part of the proceeds arising from any disposition of any property which has been received by the offender by virtue of a power of attorney for such disposition, such power of attorney having been received by the offender with a direction that such proceeds should be applied to any purpose or paid to any person specified in the direction, the offender is liable to imprisonment for seven years.

132. Section 327 of the Penal Code deals with fraudulent disposal of trust property. It reads as follows:-

327. (1) Any person who, being a trustee of any property, destroys the property with intent to defraud, or, with intent to defraud, converts the property to any use not authorized by the trust, is guilty of a felony and is liable to imprisonment for seven years.

(2) For the purposes of this section, "trustee" includes the following persons and no others, that is to say -

- (a) trustees upon express trusts created by a deed, will, or instrument in writing, whether for a public or private or charitable purpose;
- (b) trustees appointed by or under the authority of any written law for any such purpose;
- (c) the heir or personal representative of any trustee as aforesaid and any other person upon or to whom any such trust shall devolve or come;
- (d) executors, including executors de son tort and administrators;
- (e) managers appointed under the authority of the Mental Treatment Act;
- (f) official managers, assignees, liquidators or other like officers, by whatsoever name

called, acting under the authority of any written law relating to bankruptcy or joint stock companies.

133. Section 328 of the Penal Code deals with fraudulent appropriation or accounting by directors or officers. It reads as follows:-

328. Any person who -

(a) being a director or officer of a corporation or company, receives or possesses himself as such of any of the property of the corporation or company otherwise than in payment of a just debt or demand, and, with intent to defraud, omits either to make a full and true entry thereof in the books and accounts of the corporation or company, or to cause or direct such an entry to be made therein; or

(b) being a director, officer or member of a corporation or company, does any of the following acts with intent to defraud, that is to say -

(i) destroys, alters, mutilates or falsifies any book, document, valuable security or account which belongs to the corporation or company, or any entry in any such book, document or account, or is privy to any such act; or

(ii) makes, or is privy to making, any false entry in any such book, document or account; or

(iii) omits, or is privy to omitting, any material particular from any such book, document or account, is guilty of a felony and is liable to imprisonment for seven years.

134. Section 329 of the Penal Code provides that:

Any person who, being a promoter, director, officer or auditor of a corporation or company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing, any written statement or account which, in any material particular, is to his knowledge false, with intent thereby to effect any of the purposes following, that is to say -

(a) to deceive or to defraud any member, shareholder or creditor of the corporation or company, whether a particular person or not;

(b) to induce any person, whether a particular person or not, to become a member of, or to entrust or advance any property to, the corporation or company, or to enter into any security for the benefit thereof, is guilty of a felony and is liable to imprisonment for seven years.

135. Section 330 of the Penal Code criminalizes fraudulent false accounting by clerk or servant. It reads as follows:-

330. Any person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the acts following with intent to defraud, that is to say -

(a) destroys, alters, mutilates or falsifies any book, document, valuable security or account which belongs to or is in the possession of his employer, or has been received by him on account of his employer, or any entry in any such book, document or account, or is privy to any such act; or

(b) makes, or is privy to making, any false entry in any such book, document or

account; or

(c) omits, or is privy to omitting, any material particular from any such book, document or account,
is guilty of a felony and is liable to imprisonment for seven years.

136. Kenya provided the following statistical data.

Statistics From Kenya Prisons Service as at 31 August 2013:

Cases which were successfully prosecuted, convicted and imprisoned:

2004 (10); 2005 (5); 2006 (6); 2007 (2); 2008 (5); 2009 (7); 2010 (7); 2011 (19); 2012 (11); 2013 (15).

The above statistics cover both private sector embezzlement and related crimes.

(b) Observations on the implementation of the article

137. Kenya has referred to the relevant articles of the Penal Code on the matter of embezzlement in the private sector. They address, in particular, misappropriation in general, misappropriation perpetrated by clerks or agents, by directors or managers of a company, by principals, as well as the fraudulent use of trust assets and accounting fraud, among others.

138. Based on the responses submitted and the statistical data on prosecutions, convictions and prison terms, the reviewers conclude that this provision of the Convention is adequately implemented insofar as Kenya has considered the adoption of relevant measures. However, the observations made under article 17 with respect to the types of covered property that are the subject of the theft offences are referred to.

(c) Challenges, where applicable

Limited capacity (e.g. human/technological/institution/other):

1. Limited human and technological capacity to investigate and prosecute cases of embezzlement of property in the private sector.
2. Limited technical capacity of the Judiciary to effectively handle cases of embezzlement of property in the private sector. Magistrates and Judges on Kenya that handle anti-corruption cases have little, if any training in anti-corruption matters.

(d) Technical assistance needs

1. On-site assistance by an anti-corruption expert
2. Other assistance: Training of judiciary staff (judges and magistrates through the Judiciary Training Institute).

Article 23. Laundering of proceeds of crime

Subparagraph 1 (a) (i) of article 23

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;

(a) Summary of information relevant to reviewing the implementation of the article

139. Kenya referred to the provisions of the Proceeds of Crime and Anti-Money Laundering Act, the Anti-Corruption and Economic Crimes Act and the Penal Code.

140. The offences of money laundering and laundering the proceeds of crime are provided for in various sections of POCAMLA. Section 3 POCAMLA provides that:

3. Money laundering

A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to-

(i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or

(iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.

141. Section 47 of ACECA also criminalizes dealing with property suspected to have been corruptly acquired. It reads as follows:

Dealing with suspect property

47. (1) A person who deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct is guilty of an offence.

(2) For the purposes of this section, a person deals with property if the person-

(a) holds, receives, conceals or uses the property or causes the property to be used; or

(b) enters into a transaction in relation to the property or causes such a transaction to be entered into.

(3) In this section, "corrupt conduct" means-

(a) conduct constituting corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which-

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

142. Kenya provided the following statistics of reports of suspicious activities under investigation.

53 cases of suspicious transactions referred to the Criminal Investigation Division (CID), 9 cases closed, 44 cases are still undergoing investigations.

(b) Observations on the implementation of the article

143. To illustrate the implementation of the provision under review Kenya has referred to provisions of section 3 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), section 47 of the Anti-Corruption and Economic Crimes Act (ACECA), and to the Penal Code.

144. Under the definition, laundering consists of facilitating, by any means, a false justification of the origin of the assets or the income of the perpetration of a crime or an offence that granted a direct or indirect profit.

145. The act of providing assistance to an act of placing, concealing or converting the direct or indirect proceeds of a crime or offence also constitutes laundering.

146. For information on the punishment of this crime, see the information provided under article 30, paragraph 1.

147. It is noted that in June 2014 Kenya was removed from the FATF monitoring process and is no longer in the FATF list of high-risk jurisdictions engaged in ongoing processes of improving their global compliance on anti-money laundering/countering financing of terrorism. Reference is made to the FATF public statement of 27 June 2014 at www.fatf-gafi.org.

148. During the country visit it was explained that there are no statistics on money laundering prosecutions because of the recent adoption of the legislative provisions. A dedicated asset recovery agency was created under the Office of the Attorney General and Department of Justice in August 2014.

149. One investigation into money laundering was referred to (*Manfred Walter Schmitt & Another v Republic & Another [2013] eKLR*). The case involved an investigation by the Banking Fraud Investigations Unit (BFIU) into certain financial transactions involving company accounts held by a German company and its director at a Kenyan bank, the Diamond Trust Bank Limited. The court determined that there was no basis for the grant of a warrant to investigate the accounts, under the provisions of section 118 of the Criminal Procedure Code and section 180 of the Evidence Act, due to the absence of any criminal suspicion. The case did not involve application of POCAMLA.

150. It is recommended that Kenya monitor the application of the new provisions to ensure effective enforcement of the measures. It is further recommended that Kenya ensure that all competent authorities keep comprehensive statistics on matters relevant to money laundering investigations, prosecutions and convictions.

Subparagraph 1 (a) (ii) of article 23

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:

(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;

(a) Summary of information relevant to reviewing the implementation of the article

151. Kenya indicated that the relevant conduct is criminalized under section 3(b) (i) of the Proceeds of Crime and Anti-Money Laundering Act.

152. Section 3 POCAMLA provides that:

3. Money laundering

A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and- ...

(b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to-

(i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; ...

commits an offence.

153. Section 47 of ACECA also criminalizes dealing with property suspected to have been corruptly acquired. It reads as follows:-

Dealing with suspect property

47. (1) A person who deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct is guilty of an offence.

(2) For the purposes of this section, a person deals with property if the person-

(a) holds, receives, conceals or uses the property or causes the property to be used; or

(b) enters into a transaction in relation to the property or causes such a transaction to be entered into.

(3) In this section, "corrupt conduct" means-

(a) conduct constituting corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which-(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

(b) Observations on the implementation of the article

154. For this paragraph, section 3(b)(i) of POCAMLA applies to this provision of the

Convention. The observations made above are referred to.

Subparagraph 1 (b) (i) of article 23

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:

(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;

(a) Summary of information relevant to reviewing the implementation of the article

155. Kenya cited Section 4 of POCAMLA, which provides that:

4. A person who-

(a) acquires;

(b) uses; or

(c) has possession of,

property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.

156. Section 322 of the Penal Code criminalizes handling or conveying stolen goods. The section reads as follows:

322. Handling stolen goods.

(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

(2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

(3) For the purposes of this section -

(a) goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and “steal” means so to obtain;

(b) no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the stealing.

(4) Where a person is charged with an offence under this section-

(a) it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods;

(b) at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal,

disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods -

- (i) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realization of, stolen goods from any offence taking place not earlier than twelve months before the offence charged;
- (ii) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of stealing or of receiving or handling stolen goods.

157. No examples of cases were provided.

(b) Observations on the implementation of the article

158. Regarding subparagraph (1)(b), Kenya cited section 322 of the Penal Code, which sanctions the concealment and handling of stolen goods, as well as section 4 of POCAMLA, without, however, providing statistics and examples of the application of this provision.

159. This article punishes the person who incurs in the concealment of misappropriated assets who may be found guilty of a felony and punished with a maximum prison term with hard labour for up to fourteen years.

160. The observations made above are referred to.

Subparagraph 1 (b) (ii) of article 23

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:

(b) Subject to the basic concepts of its legal system: ...

(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.

(a) Summary of information relevant to reviewing the implementation of the article

161. Kenya indicated that Section 47A (1) of the ACECA criminalizes any attempt to commit an offence involving corruption and economic crime. Section 47A (3) criminalizes the conspiring with another person to commit an offence of corruption or economic crime, while subsection (4) criminalizes incitement to do any act which would constitute an offence under the Act. The section reads as follows:

47A. (1) A person who attempts to commit an offence involving corruption or an economic crime is guilty of an offence.

(2) For the purposes of this section, a person attempts to commit an offence of corruption or an economic crime if the person, with the intention of committing the offence, does or omits to do something designed to its fulfilment but does not fulfil

the intention to such an extent as to commit the offence.

(3) A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

(4) A person who incites another to do any act or make any omission of such a nature that, if that act were done or the omission were made, an offence of corruption or an economic crime would thereby be committed, is guilty of an offence.

162. The Kenyan law that should be mentioned in this case is section 3 POCAMLA, read jointly with section 20 of the Penal Code, which deals with modes of criminal liability including participation, enabling or aiding, aiding or a betting, as well as counselling and procuring. Further, section 6 of the Prevention of Organised Crime Act, No. 59 of 2010 can also be invoked.

163. Section 20 (1) (b) and (c) of the Penal Code, as a general rule, stipulates that:

20. Principal offenders.

(1) When an offence has been committed, it will be considered that each of the following persons committed it, and is guilty and susceptible of prosecution for that reason:

(b) any person who performs, or fails to perform an act, to permit or assist another person to commit the offence;

(c) any person who assists or encourages another person to commit the offence;

(d) any person who counsels or procures any other person to commit the offence,

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

164. In addition to the above provisions, Sections 388, 389 and 393 of the Penal Code are relevant as they establish offences of attempts to commit an offence and conspiracy to commit felonies.

388. Attempt defined

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is

impossible in fact to commit the offence.

389. Attempts to commit offences

Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

393. Conspiracy to commit felony

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.

165. No examples of cases were provided.

(b) Observations on the implementation of the article

166. Kenya has indicated that section 47A (1) of ACECA criminalizes any attempted act of corruption or of an economic crime and that section 47A (3) sanctions collusion to commit a corruption offence or an economic crime, while paragraph (4) criminalizes any incitement to commit an act that would constitute an offence under this law, but these rules are not related to laundering.

167. Complicity, agreement and association are all dealt with under Section 20 of the Penal Code, but not the attempt. This is covered in Section 47A (1) of the ACECA and under the Penal Code.

Subparagraphs 2 (a) and 2 (b) of article 23

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;

(a) Summary of information relevant to reviewing the implementation of the article

168. Kenya indicated that the Proceeds of Crime and Anti-Money Laundering Act has adopted an “all offences” approach. This means that all offences are covered.

169. Section 2 of POCAMLA defines an offence as “an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision

of any law in Kenya”.

170. No case examples were provided.

(b) Observations on the implementation of the article

171. Kenya has indicated that the Proceeds of Crime and Anti-Money Laundering Act encompasses the relevant conduct, which is to say that it covers the prescribed conduct, and that section 2 POCAMLA adopts an all crimes approach with respect to predicate offences.

Subparagraph 2 (c) of article 23

2. For purposes of implementing or applying paragraph 1 of this article:

(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;

(a) Summary of information relevant to reviewing the implementation of the article

172. Kenya cited Sections 2 and 127 of POCAMLA:

2. Interpretation

“offence” in this Act, means an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya;

127. Conduct of person outside Kenya

The conduct of a person that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence against a provision of any law in Kenya if it occurred in Kenya.

173. No case examples were provided.

(b) Observations on the implementation of the article

174. Regarding subparagraph 2(c), the criminalization of laundering does not require the predicate offence to be committed in Kenya. It is equally applied if the predicate offence is committed abroad.

175. Kenya has implemented this subparagraph by Sections 2 and 127 of POCAMLA. Offences committed in Kenya or outside of Kenya are predicate offences for purposes of the Article.

Subparagraph 2 (d) of article 23

2. For purposes of implementing or applying paragraph 1 of this article:

(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;

(a) Summary of information relevant to reviewing the implementation of the article

176. Kenya reported that it furnished copies of its laws to the Secretary-General of the United Nations in March 2008, as prescribed above, but that a number of these laws have been amended since then.

177. Copies of all up to-date legislation were provided by Kenya and are also accessible online from the Kenya National Council for Law website www.kenyalaw.org.

(b) Observations on the implementation of the article

178. Kenya has implemented the provision.

Subparagraph 2 (e) of article 23

2. For purposes of implementing or applying paragraph 1 of this article:

(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.

(a) Summary of information relevant to reviewing the implementation of the article

179. Kenya indicated that a suspect can be charged with the offence of money laundering independent of a predicate offence. Section 3 of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2012 amends Section 4 of POCAMLA to provide for self-laundering. It covers laundering by any person with respect to proceeds of a crime committed by "him or by" another person.

180. There is no fundamental principle of Kenyan law that would require that persons who committed the predicate offences be exempted from criminal liability for the laundering offences. Accordingly, the provisions of the POCAMLA which criminalize the laundering of proceeds of crime apply to all participants in the offence whether or not they were involved in the commission of any predicate offence.

181. No case examples were provided.

(b) Observations on the implementation of the article

182. Regarding paragraph 2 (e), Kenya has indicated that a suspect may be accused of money laundering separately from a predicate offence, in accordance with Section 3 of

the 2012 amendment to the POCAMLA.

183. Kenya has therefore legislatively implemented this provision.

(c) Challenges, where applicable

1. Limited capacity (e.g. human/technological/institution/other): Full operationalization and capacity building of the recently established Financial Reporting Centre and the establishment of the Asset Recovery Agency.

(d) Technical assistance needs

1. Legal advice.
2. On-site assistance by an anti-corruption expert
3. Other assistance: Full operationalization and capacity building of the recently established Financial Reporting Centre and the establishment of the Asset Recovery Agency.

According to the ESAAMLG Mutual Evaluation Report, the World Bank entered into an agreement with Kenya's Ministry of Finance in April 2011 to provide technical assistance to support the establishment of an effective anti-money laundering and combating the financing of terrorism (AML/CFT) regime in Kenya, including support for setting up the Financial Reporting Centre (FRC), AML/CFT training and workshops on the Strategic Implementation Planning (SIP) and National Risk Assessment (NRA).

The United Nations Office on Drugs and Crime (UNODC), in conjunction with Kenya's Financial Reporting Centre (FRC) and the Kenya School of Monetary Studies, Nairobi, held a two day workshop on 17 and 18 September 2012 to sensitize the media on the provisions of POCAMLA. A national AML stakeholders' forum was also conducted on 5 October 2012.

The Financial Services Volunteer Corps (FSVC) has entered into a technical assistance program with the Kenyan authorities on AML/CFT and financial inclusion.

Moreover, two supervisors from the Central Bank of Kenya (CBK) were attached to the U.S. Federal Deposit Insurance Corporation (FDIC) between 5 November 2012 and 16 November 2012. The CBK examiners were exposed to AML/CFT supervision techniques for assessing the risk associated with commercial banks and other financial institutions.

Article 24. Concealment

Article 24

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.

(a) Summary of information relevant to reviewing the implementation of the article

184. Kenya indicated that Section 47 of Anti-Corruption and Economic Crimes Act criminalizes dealing with suspect property. It provides that:

Sec. 47 (1) A person who deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct is guilty of an offence.

(2) For the purposes of this section, a person deals with property if the person

(a) holds, receives, conceals or uses the property or causes the property to be used; or

(b) enters into a transaction in relation to the property or causes such a transaction to be entered into

185. Section 3 of POCAMLA criminalizes transacting in property that is proceeds from money laundering. Section 3 of POCAMLA provides that:

“A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to-

(i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or

(iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.”

186. Section 322 of the Penal Code criminalizes the handling of stolen property. Section 322 of the Penal Code provides:

322. (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

(2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

(3) For the purposes of this section -

(a) goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and “steal” means so to obtain;

(b) no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have

otherwise ceased as regards those goods to have any right to restitution in respect of the stealing.

(4) Where a person is charged with an offence under this section-

(a) it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods;

(b) at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods -

evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realization of, stolen goods from any offence taking place not earlier than twelve months before the offence charged;

(ii) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of stealing or of receiving or handling stolen goods.

187. No case examples were provided.

(b) Observations on the implementation of the article

188. For the criminalization of the concealment, disguising or illicit possession of assets, knowing that said assets are derived from one of the offences, as established in this article 24 of the Convention, Kenya cited section 322 of the Penal Code and the provisions of section 47 of ACECA and of section 3 POCAMLA, to demonstrate the alignment between the national laws and the provisions of the Convention.

189. No case example was submitted to demonstrate the implementation of this article, despite the provision of concealment in different legal texts. The article is legislatively implemented.

Article 25. Obstruction of justice

Subparagraph (a) of article 25

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;

(a) Summary of information relevant to reviewing the implementation of the article

190. Kenya indicated that the provisions of law that are relevant are section 121 (f) and (g) and section 117 (b) of the Penal Code, which provide as follows:

121. Offences relating to judicial proceedings

(1) Any person who – ...

(f) attempts wrongfully to interfere with or influence a witness in judicial proceeding, either before or after he has given evidence, in connection with such evidence; or

(g) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; ...

is guilty of an offence and liable to imprisonment for three years.

117. Conspiracy to defeat justice and interference with witnesses

Any person who -

(a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or

(b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or

(c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal, is guilty of an offence and is liable to imprisonment for five years.

191. The following case example was provided.

In *R. v. Lucy Wangui*, ACC No. 30 of 2008 or CR.141/443/08 the Accused was arrested and prosecuted for obstruction by bribing witnesses. Amount involved was Kshs. 20,000.

(b) Observations on the implementation of the article

192. Kenya has criminalized obstruction of justice in line with the provision under review.

Subparagraph (b) of article 25

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(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.

(a) Summary of information relevant to reviewing the implementation of the article

193. Kenya cited section 66 of the Anti-Corruption and Economic Crimes Act, 2003.

66. Obstructing persons under this Act, etc.

(1) No person shall —

(a) without justification or lawful excuse, obstruct or hinder, or assault or threaten, a person acting under this Act;

(b) deceive or knowingly mislead the Commission or a person acting under this Act;

- (c) 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 this Act; or
 - (d) make false accusations to the Commission or a person acting under this Act.
- (2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.

194. Kenya also referred to section 117 of the Penal Code (quoted above).

195. In addition, section 253 of the Penal Code provides as follows:

253. Other assaults

Any person who -

- (a) assaults any person with intent to commit a felony or to resist or prevent the lawful
 - (b) apprehension or detainer of himself or of any other person for any offence; or
 - (c) assaults, resists or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer; or
 - (d) assaults any person in pursuance of any unlawful combination or conspiracy to raise the rate of wages or respecting any trade, business or manufacture or respecting any person concerned or employed therein;
 - (e) assaults, resists or obstructs any person engaged in lawful execution of process, or in making a lawful distress, with intent to rescue any property lawfully taken under such process or distress; or
 - (f) assaults any person on account of any act done by him in the execution of any duty imposed on him by law,
- is guilty of a misdemeanour and is liable to imprisonment for five years.

196. Section 121 of the Penal Code provides that:

- (1) Any person who
- (c) causes an obstruction or disturbance in the course of a judicial proceeding; is guilty of an offence and is liable to imprisonment for three years.

197. Section 30 C of the Witness Protection Act provides that:

A person who assaults, resists or wilfully obstructs a member of staff of the Agency or a person acting under the direction of that member of staff in the due execution of his duties under this Act, commits an offence and is liable on conviction-

- (a) for a first offence, to a fine not exceeding one million shillings; and
- (b) for a second or subsequent offence, to imprisonment for a term not exceeding five years.

198. Under Section 46 (1) (a) of the Leadership and Integrity Act, a person will be guilty of an offence if he/she obstructs a person undertaking his/her duties under the Act. Under subsection (d) a person will be guilty of an offence if he/she provides false information to the Commission, a public entity or a person acting under this Act.

199. Section 15 of POCAMLA provides:

“A person who hinders a receiver, a police officer or any other person in the exercise, performance or carrying out of their powers, functions or duties under this Act,

commits an offence.”

200. Section 40 of the Public Officer Ethics Act provides that:

“A person who, without lawful excuse, obstructs or hinders a person acting under this Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.”

201. Section 58(b) of the National Police Service Act of 2011 provides that:

Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person- ...

who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;

202. Kenya provided the following case example.

In *R. v. Daniel Ndambiri & Others*, CR. 122/27/07 or ACC 34 /07, two Administration Police Officers were arrested and prosecuted for trying to obstruct KACC officers from arresting their boss, a Divisional Officer.

(b) Observations on the implementation of the article

203. For this paragraph (b) of article 25 of the Convention, Kenya cited section 66 of ACECA, sections 117 and 253 of the Penal Code, as well as laws for the protection of witnesses (section 30C), laws on the ethics of officials (section 40), on leadership and integrity (section 46), section 15 POCAMLA and, lastly, section 58 of the National Police Service Act (2011).

204. The provision under review is implemented.

Article 26. Liability of legal persons

Paragraphs 1 and 2 of article 26

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.

(a) Summary of information relevant to reviewing the implementation of the article

205. Kenya indicated that it relies on Section 23 of the Penal Code and the common law principles on criminal liability of legal persons to establish the criminal liability of legal persons. There are case law examples to demonstrate that legal persons have been held criminally liable with respect to corruption.

23. Offences by corporations, societies, etc.

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

206. Section 3 of the General Provisions and Interpretations Act, Chapter 2 of the Laws of Kenya, interprets the term "person" to include a company or association or body of persons, corporate or unincorporated. This Act and definitions provided therein apply to all laws. Therefore, legal persons are encompassed in any law that provides for criminal liability of "any person".

207. Kenya provided the following additional information.

Criminal Liability:

The Proceeds of Crime and Anti-Money Laundering Act provides for stiffer sanctions under Section 16 for legal persons that are found guilty of contravening the provisions of sections 3, 4, or 7 of the Act. It provides that:

16. Penalties

(1) A person who contravenes any of the provisions of sections 3, 4, or 7 is on conviction liable-

(a) in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; and

(b) in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.

Section 2 of POCAMLA defines a person to include a natural and legal person. It provides that: "person" means any natural or legal person".

Section 54 of the Anti-Corruption and Economic Crimes Act provides that :

54. Compensation orders on conviction

(1) A court that convicts a person of any corruption or economic crime shall, at the time of conviction or on subsequent application, order the person-

(a) to pay any amount the person may be liable for under section 51 or 52; and

(b) to give to the rightful owner any property acquired in the course of or as a result of the conduct that constituted the corruption or economic crime or an amount equivalent to the value of that property.

(2) If the rightful owner referred to in subsection (1)(b) cannot be determined or if there is no rightful owner, the court shall order that the property or equivalent amount be forfeited to the Government.

(3) In making an order under this section, a court may quantify any amount or may

determine how such amount is to be quantified.

(4) An order under this section may be enforced by the person in whose favour it is made as though it were an order made in a civil proceeding.

Civil Liability:

Sections 55 and 56 of the Anti-Corruption and Economic Crimes Act provide that:

55. Forfeiture of unexplained assets

(2) The Commission may commence proceedings under this section against a person if-
(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

(3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

(4) In proceedings under this section-

(a) the Commission shall adduce evidence that the person has unexplained assets; and

(b) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

56. Order preserving suspect property, etc

(1) On an *ex parte* application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct.

(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.

Proceedings under Section 56 of the Proceeds of Crime and Anti-Money Laundering Act are civil proceedings. Section 56 provides that:

PART VII – CRIMINAL FORFEITURE

Proceeds of Crime

56. Nature of proceedings

(1) For the purposes of this Part, proceedings on application for a confiscation order or restraint order are civil.

(2) The rules of evidence applicable in civil proceedings shall apply to proceedings on application for a confiscation order or a restraint order.

Section 81 of POCAMLA provides that:

PART VIII – CIVIL FORFEITURE

Recovery and Preservation of Property

81. Nature of proceedings

(1) All proceedings under this Part shall be civil proceedings.

(2) The rules of evidence applicable in civil proceedings shall apply to proceedings under this Act.

Administrative Action:

Section 36A of the Proceeds of Crime and Anti-Money Laundering Act provides that

36A. Responsibility for supervision of Reporting Institutions

(1) The Centre shall have the powers to regulate and supervise all reporting institutions, regarding the application of this Act.

(2) Subject to subsection (1), each supervisory body shall be responsible for supervising and enforcing compliance with this Act or any instruction, direction, guideline or rule made pursuant to or in terms of this Act by all reporting institutions regulated or supervised by it and to whom the provision of this Act apply.

(3) The obligation referred to in subsection (2) shall form part of the legislative mandate of any supervisory body and shall constitute a core function of that supervisory body.

(4) Any law which regulates a supervisory body or authorises that supervisory body to supervise or regulate any reporting institution to whom the provisions of this Act apply, shall take account of subsection (2), and a supervisory body may utilise any fees or charges it is authorised to impose or collect to defray expenditure incurred in performing its obligations under this Act or any order, determination or directive made in terms of this Act.

(5) A supervisory body, in meeting its obligation referred to in subsection (2), may -

(a) in addition to any powers it has under any other Act, exercise any power afforded to it in this Act;

(b) take any measures it considers necessary or expedient to meet its obligations as imposed by this Act or any order, determination, instruction, directive or rule made in terms of this Act, or achieve the objectives of the Centre of this Act;

(c) require a reporting institution supervised or regulated by it and to whom the provisions of this Act apply, to report on that institution's compliance with this Act Or any order, determination, instruction, directive or rule made under this Act in the form manner and within the period determined by the supervisory body;

(d) issue or amend any licence, registration, approval or authorisation that the supervisory body may issue or grant in accordance with any Act, to include the following conditions -

(i) compliance with this Act;

(ii) the continued availability of human financial, technological and other resources to ensure compliance with this Act or any order, determination or directive made under this Act; and

(e) in making a determination in accordance with any Act applicable to it as to whether a person is fit and proper to hold office in a reporting institution, take into account any involvement, whether directly or indirectly, by that person in any non-compliance with this Act or any order, determination, instruction, directive or rule made in terms of this Act, or any involvement in any money laundering activity.

(6) A supervisory body shall submit to the Centre, within such period and in such manner, as the Centre may prescribe, a written report on any action taken against any reporting institution in terms of this Act or any order, determination, directive, instruction, or rule made under this Act.

(7) The Centre and each supervisory body shall co-ordinate the exercising of their powers and performance of their functions under this Act to ensure consistent application of the Act, and may for such purpose; enter into a written memorandum of understanding in respect thereof.

208. Implementation of section 36A is overseen by regulatory bodies.

209. The Financial Reporting Centre is established under Section 21 of POCAMLA.

21. Establishment of a Financial Reporting Centre

There is established a centre to be known as the Financial Reporting Centre, (hereinafter

referred to as the “Centre”) which shall be a body corporate, with perpetual succession and a common seal and shall be capable, in its corporate name, of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property;
- (c) entering into contracts;
- (d) doing or performing such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate.

(b) Observations on the implementation of the article

- 210. Kenyan authorities indicated that the criminal responsibility of legal persons is covered in section 23 of the Penal Code and under the principles of common law and related laws. They have examples of jurisprudence on the subject of corruption where the criminal and civil responsibility of legal persons has been established.
- 211. Kenya adds that section 3 of the General Provisions and Interpretations Act (Chapter 2 of the Laws of Kenya) provides an interpretation of the term “person” that includes companies, associations and groups of individuals, constituted or not as a legal person, and that this law and the definitions therein apply to the ensemble of the laws; therefore, any law dealing with the responsibility of “any person” includes legal persons.
- 212. Section 16 of the Proceeds of Crime and Anti-Money Laundering Act provides heavier sanctions for legal persons that are found guilty of an infraction to the provisions of sections 3, 4 and 7 of the same law.
- 213. Section 2 POCAMLA offers a definition of the term “person” that includes both natural and legal persons, and said section 16 provides heavy sanctions for legal persons.
- 214. According to the responses submitted the reviewers confirmed that the procedures are of a criminal, civil and administrative nature. Based on the conjugation of sections 55 and 56 ACECA with sections 56 and 81 POCAMLA, there is civil responsibility, as well as confiscations and seizures.
- 215. From the administrative point of view, section 36A POCAMLA defines approaches, and regulation and control faculties for a Financial Reporting Centre.
- 216. In addition to these legal texts, during the country visit, Kenya reported that several companies have been charged with criminal offences, such as the *Eco Bank* case, the *Ombaki* case and the *Kimunya* case, but no further details were provided. In particular, it could not be ascertained whether any of these cases involved UNCAC offences.

Paragraph 3 of article 26

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

(a) Summary of information relevant to reviewing the implementation of the article

- 217. Kenya indicated that it does not have an express provision of the law on this matter. In Kenya proceedings may be brought against a company regardless as to whether its directors, employees or promoters were charged separately for offences relating to

corruption.

218. This scenario is evident in the cases of:

(1) *Republic vs. Benson Anyona Ombaki and 5 Others* (NAI ACC No. 2 of 2010).

(2) *Republic vs. Ongonga Achieng and 3 Others* (NAI ACC No. 17 of 2009).

(b) Observations on the implementation of the article

219. The response given by Kenya shows that despite the absence of specific legal provisions on the matter, it is possible to prosecute a company, as well as its directors, employees or promoters, both under civil and criminal law.

Paragraph 4 of article 26

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

(a) Summary of information relevant to reviewing the implementation of the article

220. Kenya indicated that companies found guilty of corruption in Kenya are debarred from participating in any public procurement. This is provided for in Part IX of the Public Procurement and Disposal Act, 2005 (No. 3 of 2005).

Section 40 of the Public Procurement and Disposal Act provides that:

40.(1) No person, agent or employee shall be involved in any corrupt practice in any procurement proceeding.

(2) If a person or an employee or agent of a person contravenes subsection (1) the following shall apply -

(a) the person shall be disqualified from entering into a contract for the procurement; or

(b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person, employee or agent who contravenes subsection (1) shall be guilty of an offence.

Section 115 of the Public Procurement and Disposal Act provides that:

115.(1) The Director-General, with the approval of the Advisory Board, may debar a person from participating in procurement proceedings on the ground that the person -

(a) has committed an offence under this Act;

(b) has committed an offence relating to procurement under any Act;

(c) has breached a contract for a procurement by a public entity;

(d) has, in procurement proceedings, given false information about his qualifications; or

(e) has refused to enter into a written contract as required under section 68.

(2) The Director-General, with the approval of the Advisory Board, may also debar a person from participating in procurement proceedings on a prescribed ground.

(3) A debarment under this section shall be for a period of time of not less than five years, as may be specified by the Director-General.

221. Section 16 of the Proceeds of Crime and Anti-Money Laundering Act provides for stiff penalties for companies found guilty of corruption including the option to pay a fine of up to Kshs. 25 million.

16. Penalties

(1) A person who contravenes any of the provisions of sections 3, 4, or 7 is on conviction liable — ...

(b) in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is higher.

222. The following case example was provided.

In ***Republic vs. Ongonga Achieng & 3 Others*** (ACC No. 17 of 2009). The company's Director was fined 4 million and the company fined 17 million respectively. A copy of the judgment in this case has been submitted to the reviewers.

(b) Observations on the implementation of the article

223. Kenya indicated that it has specific legal provisions on this matter that illustrate that, in its jurisdiction, any company that is found guilty of corruption may be excluded from public procurement for a minimum period of five years, as well as heavier pecuniary sanction. The main legislation is the Public Procurement and Disposal Act, particularly sections 40 and 115. Case law provided further illustrates the application of these provisions.

Article 27. Participation and attempt

Paragraph 1 of article 27

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.

(a) Summary of information relevant to reviewing the implementation of the article

224. Kenya indicated that it is an offence under the Anti-Corruption and Economic Crimes Act to attempt to commit a crime of corruption and/or economic crime. An attempt is described as any act of commission or omission to do something but does not fulfil the intention to such an extent as to commit the offence.

225. The Law further criminalizes conspiracy and incitement. Section 47A of ACECA provides for punishment of those who incite, attempt and conspire to commit various offences of corruption and economic crime. It states as follows:

47A Attempts, conspiracies, etc.

(1) A person who attempts to commit an offence involving corruption or an economic crime is guilty of an offence.

(2) For the purposes of this section, a person attempts to commit an offence of corruption or an economic crime if the person, with the intention of committing the offence, does or omits to do something designed to its fulfilment but does not fulfil the intention to such an extent as to commit the offence.

(3) A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

(4) A person who incites another to do any act or make any omission of such a nature that, if that act were done or the omission were made, an offence of corruption or an economic crime would thereby be committed, is guilty of an offence.

226. Section 20 of the Penal Code provides that

20. Principal offenders.

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence;

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

227. Section 24 of POEA provides that:

24. (1) A public officer contravenes the Code of Conduct and Ethics if-

(a) he causes anything to be done through another person that would, if the public officer did it, be a contravention of the Code of Conduct and Ethics; or

(b) he allows or directs a person under his supervision or control to do anything that is a contravention of the Code of Conduct and Ethics.

(2) Subsection (1)(b) does not apply with respect to anything done without the public officer's knowledge or consent if the public officer took reasonable steps to prevent it.

228. No examples of cases were provided.

(b) Observations on the implementation of the article

229. Regarding paragraph 1, Kenya cited in section 20 of the Penal Code the definition of participation in an offence in general and section 47A ACECA specifying and criminalizing instigating and participating, or the attempt to commit the different acts of corruption and economic crimes.

230. Last, section 24 POEA provides specific regulations for public officials that violate the Code of Conduct and Ethics.

Paragraph 2 of article 27

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.

(a) Summary of information relevant to reviewing the implementation of the article

231. Kenya referred to Section 47A of ACECA, which provides for punishment of those who incite, attempt and conspire to commit various offences of corruption and economic crime. It states as follows:

47A (1) A person who attempts to commit an offence involving corruption or an economic crime is guilty of an offence.

(2) For the purposes of this section, a person attempts to commit an offence of corruption or an economic crime if the person, with the intention of committing the offence, does or omits to do something designed to its fulfilment but does not fulfil the intention to such an extent as to commit the offence.

(3) A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

(4) A person who incites another to do any act or make any omission of such a nature that, if that act were done or the omission were made, an offence of corruption or an economic crime would thereby be committed, is guilty of an offence.

232. Section 24 of POEA provides that:

24. (1) A public officer contravenes the Code of Conduct and Ethics if-

(a) he causes anything to be done through another person that would, if the public officer did it, be a contravention of the Code of Conduct and Ethics; or

(b) he allows or directs a person under his supervision or control to do anything that is a contravention of the Code of Conduct and Ethics.

(2) Subsection (1)(b) does not apply with respect to anything done without the public officer's knowledge or consent if the public officer took reasonable steps to prevent it.

233. Section 389 of the Penal Code provides that:

389. Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

234. No case examples were provided.

(b) Observations on the implementation of the article

235. Regarding paragraph 2, Kenya has indicated that the attempt is always punishable in accordance with section 389 of the Penal Code, but the attempt to commit corruption offences is expressly provided for in section 47A paras. 1 and 2 ACECA.

Paragraph 3 of article 27

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.

(a) Summary of information relevant to reviewing the implementation of the article

236. Kenya indicated that this would be covered under the provisions on attempt in

Section 47A (1) of ACECA and Section 389 of the Penal Code (quoted above). Kenya does not distinguish between preparation and attempt.

237. Section 7 of POCAMLA further provides that:

7. Financial promotion of an offence

A person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.

238. No case examples were provided.

(b) Observations on the implementation of the article

239. To respond to this paragraph Kenya resorted to the texts mentioned in paragraph 2 of article 27. The reviewers conclude that the preparation of an offence is not specifically covered apart from the attempt.

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.

(a) Summary of information relevant to reviewing the implementation of the article

240. The statute of limitations in Kenya does not apply to criminal proceedings or in civil proceedings for the recovery of assets.

241. However, the Court has in some instances held that inordinate delay in commencing prosecution proceedings against an accused person amounts to a travesty of justice. See the case of **Republic vs. Attorney General & 3 Others, ex-parte Kamlesh Mansuklal Damji Pattni** (JR), Miscellaneous Application No. 305 of 2012, in which the conduct of the criminal case and three (3)-year period of collecting evidence were found to fail to meet the constitutional thresholds for a fair trial and the principle of equality of arms, thus rendering further prosecution unconstitutional.

242. In the case of **Tirop vs. AG**, Miscellaneous Application No. 1201 of 2011, the court held that the applicant could not expect a reasonable hearing after a delay of 7 years, whereas in the more recent case of **Joshua Kulei vs. Republic** (an anti-corruption matter)², the application to stop criminal proceedings against the defendant after a delay of 15 years before instituting proceedings was dismissed.

243. It is therefore clear that the courts will look at the circumstances on a case by case basis.

(b) Observations on the implementation of the article

² (Petition No. 66 of 2012 in the High Court of Kenya Nairobi, Constitutional and Human Rights Division)

244. It is observed that the prescription period does not apply to criminal procedures or civil procedures regarding the recovery of assets, in accordance with Kenya's legal system. This was also confirmed during the country visit.
245. Nonetheless, Kenya informs that in certain cases, courts have declined to try cases where they have considered and determined that the delay was excessive at the time of instituting prosecution against the defendant. It is clear that the Court will decide on a case-by-case basis, based on the circumstances.
246. The case examples submitted show that the Kenyan legal system is not insensible to the consequences of inordinate delay for criminal proceedings.
247. Based on the above, it is recommended that Kenya monitor the application of this article in practice, notwithstanding the absence of a statute of limitations for criminal and asset recovery matters, to ensure the timely prosecution of offences.

Article 30. Prosecution, adjudication and sanctions

Paragraph 1 of article 30

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.

(a) Summary of information relevant to reviewing the implementation of the article

248. Kenya referred to section 48 of the Anti-Corruption and Economic Crimes Act.

48. Penalty for offence under this Part

(1) A person convicted of an offence under this Part shall be liable to—

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—

(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

249. Kenya provided the following table of sanctions for UNCAC offences.

UNCAC ARTICLE/OFFENCE	CRIMINALIZATION UNDER KENYAN LAW	PENALTIES/SANCTIONS	
		MINIMUM	MAXIMUM
Article 15: Bribery of national public officials	Sections 38 and 39 of ACECA: Bribing agents	No minimum fine or jail term is provided for, left to the	Kshs. 1 million fine or jail term of 10 years or both fine and jail term

		discretion of court	
		Plus an additional mandatory fine equal to two times the value of the benefit that the convicted person acquired; or loss caused by, the accused person in the commission of the offence.	
Article 16: Bribery of foreign public officials	Sections 38 and 39 of ACECA: Bribing agents	As above	As above
Article 17: Embezzlement, misappropriation or other diversion of property by a public official	Section 45 of ACECA: Protection of public property and revenue	As above	As above
	Section 101 Penal Code: Abuse of office	As above	As above
	Section 268 Penal Code: Definitions for stealing, and things capable of being stolen		
	Section 275 Penal Code: Stealing generally	Imprisonment for (3) three years	
	Section 280 Penal Code: Stealing by persons in the public service	Imprisonment for seven (7) years if the offender is a public officer	
	Section 127 Penal Code: Frauds and breaches of trust by persons	No minimum fine or jail term is provided for, left to the discretion of court	Kshs. 1 million fine or Jail term of 10 years or both fine and jail term
Article 18: Trading in influence	<i>Has not been criminalized in Kenya</i>		
Article 19: Abuse of functions	Section 46 of ACECA: Abuse of office	No minimum fine or jail term is provided for, left to the discretion of	Kshs. 1 million fine or Jail term of 10 years or both fine and jail term

		court	
		Plus an additional mandatory fine equal to two times the value of the benefit that the convicted person acquired; or loss caused by, the accused person in the commission of the offence.	
	Section 128 PC: Neglect of official duty	No minimum fine or jail term is provided for, left to the discretion of court	Imprisonment for two (2) years with or without fine of unspecified amount.
	Section 130 PC: Disobedience of statutory duty without lawful authority	No minimum fine or jail term is provided for, left to the discretion of court	Imprisonment for two (2) years.
	Section 280 PC: stealing/theft by public servants	Imprisonment for seven (7) years if the offender is a public officer	
Article 20: Illicit Enrichment	<i>Has not been criminalized in Kenya</i>		
Article 21: Bribery in the private sector	Sections 38 and 39 of ACECA: Bribing agents	No minimum fine or jail term is provided for, left to the discretion of court	Kshs. 1 million fine or Jail term of 10 years or both fine and jail term
		Plus an additional mandatory fine equal to two times the value of the benefit that the convicted person acquired; or loss caused by, the accused person in the commission of the offence.	
Article 22: Embezzlement of	Section 275 PC: Stealing generally	Imprisonment for (3) three years	

property in the private sector	Section 281 PC: Stealing by clerks and servants	Imprisonment for seven (7) years	
	Section 282 PC: Stealing by Directors of companies	Imprisonment for seven (7) years	
	Section 283 PC: Stealing by agents	Imprisonment for seven (7) years	
	Section 327 PC: Fraudulent disposal of trust property	Imprisonment for seven (7) years	
	Section 328 PC: Fraudulent appropriation or accounting by directors or officers.	Imprisonment for seven (7) years	
	Section 329 PC: False statements by officials of companies	Imprisonment for seven (7) years	
	Section 330 PC: Fraudulent false accounting by clerk or servant	Imprisonment for seven (7) years	
Article 23: Laundering of the proceeds of crime	Section 3 POCAMLA: Money laundering	No minimum penalties are provided for	in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.
	Section 20 PC: General principles on parties to an		

	offence		
Article 24: Concealment	Section 47 of ACECA: Dealing with suspect property	No minimum fine or jail term is provided for, left to the discretion of court	Kshs. 1 million fine or Jail term of 10 years or both fine and jail term
		Plus an additional mandatory fine equal to two times the value of the benefit that the convicted person acquired; or loss caused by, the accused person in the commission of the offence.	
	Section 3 POCAMLA: Concealment/Disguising	No minimum penalties are provided for	in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.
	Section 322 PC: Handling stolen property	No minimum sentence provided	Imprisonment for a term not exceeding fourteen (14) years
Article 25: Obstruction of justice	Section 117(b) of the PC: Conspiracy to defeat justice and interference with witnesses.	Imprisonment for five (5) years	

	Section 121 of the PC: Offences relating to Judicial proceedings.	Imprisonment for three (3) years	
	Section 66 of ACECA: Obstruction of persons acting under the ACECA	No minimum sanctions	Fine not exceeding Kshs. Five thousand shillings; or imprisonment not exceeding five years, or both fine and imprisonment.
	Section 253 of the PC: Assaults against police officers, etc.	Imprisonment for five (5) years	
	Section 30(c) of WPA: Obstruction of persons acting under the WPA	No minimum sanctions	Fine not exceeding Kshs. 1 million for first offence; Imprisonment to a term not exceeding five (5) years for a second or subsequent offence
	Section 46(1) of the LIA: Obstruction/hindering of persons acting under the LIA	No minimum sanctions	Fine not exceeding Kshs. 5 million; or Imprisonment to a term not exceeding five (5) years or both
	Section 15 of POCAMLA: Hindrane of a police officer or receiver acting under the POCAMLA	No minimum sanctions	No maximum sanctions
	Section 40 of POEA: Obstruction of persons acting under the POEA		Fine not exceeding Kshs. 5 million; or Imprisonment to a term not exceeding five (5) years or both
	Section 103 as read with section 58 of the NPSA: Obstructing a police officer while in execution of duty	No minimum sanctions	fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both

250. Kenya provided the following example of sanctions imposed in a corruption case.

The magistrate's court judgment in *Republic vs. Faustin Kinyua*, Nairobi ACC No. 24 of

2007. The accused was charged with fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of ACECA. Sentence was Kshs. 800,000 or 3 years' imprisonment in default. Additional mandatory fine of Kshs. 3,661,956 pursuant to section 48(1)(b) of ACECA since the corporation suffered losses due to money in issue being retained in the accused's mortgage account.

(b) Observations on the implementation of the article

251. Regarding paragraph 1, Kenya reports that the penalties under ACECA (section 48 ACECA) consider the seriousness of the offence by imposing significant prison terms for all offences provided for in the Convention as well as fines; both penalties may be pronounced cumulatively. It was confirmed during the country visit in meetings with the judiciary that these penalties take into account the gravity of offences. This is also borne out by the table of sanctions provided for UNCAC offences.

252. Notwithstanding the existing legal provisions, it emerged during the discussion with the judiciary in the country visit that there are problems regarding the proportionality, consistency and adequacy of sentencing, as applied in the adjudication of cases. It was explained that the judiciary has been accused of not putting sentencing mechanisms into place and mechanically applying the law without imposing maximum sentences. In this context it was explained that a Judicial Task Force on Sentencing has been created that would address the issue in consultation with stakeholders.

253. The reviewers welcome the creation of the Judicial Task Force and recommend that it take steps to address the issue, including by developing appropriate policy and considering the adoption of sentencing guidelines and good practice examples from other countries.

Paragraph 2 of article 30

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.

(a) Summary of information relevant to reviewing the implementation of the article

254. Kenya indicated that the anti-corruption laws in Kenya are of general application in nature and apply to all persons regardless of status or position in government.

255. The President is the only person who is granted immunity from prosecution from criminal action during the term of his Presidency. Moreover, this immunity is limited in Sub-Article 143(4) and the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

256. Article 27 of the Constitution provides for equality of all persons:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

257. Immunity of the President under Article 143(1) of the Constitution:

143. (1) Criminal proceedings shall not be instituted or continued in any court against

the President or a person performing the functions of that office, during their tenure of office.

258. However, this is limited in sub-Article 143(4) which states that,

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

(b) Observations on the implementation of the article

259. Regarding paragraph 2, Kenya has provided that there is no immunity for public officials. Only the President of the Republic and any person acting in that capacity is immune from criminal prosecutions (article 143 of the Constitution). However, this immunity does not extend to crimes recognized under Kenya's treaties that prohibit such immunity (article 143 of the Constitution, paragraph 4).

260. During the country visit, Kenya referred to cases in which elected officials were charged with criminal offences. No further details were provided. The cases include:

- Member of Parliament for Kitutu Cache South constituency was charged with the offences of conspiracy to defraud the public and abuse of office relating to allegations of fraudulent failure to pay VAT amounting to Ksh. 21,250,628.
- Kenyan Central Bank Governor was to be prosecuted over a tender for security software that the Commission alleges led to the loss of more than 400 million shillings (\$4.6 million) of public funds. However, the Governor had filed an application in court challenging the intended prosecution.
- Two members of the Nairobi County Assembly have been charged with receiving bribes of Kshs. 680,000 from Elijah Muendo Mwau as an inducement so as to assist him to write a good report for Saika market not to be demolished by the Nairobi County Administration.

261. Based on the information provided it appears that Kenya addresses the issue of immunities in line with the Convention.

Paragraph 3 of article 30

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.

(a) Summary of information relevant to reviewing the implementation of the article

262. Kenya indicated that Article 157 (11) of the Constitution states that the DPP who is in charge of all public prosecutions is required to have regard to public interest and the administration of justice in the discharge of public duties.

263. Article 157 (8) has substantially reduced the discretionary powers of the DPP in discontinuing criminal proceedings. The DPP can only discontinue a prosecution with the permission of court.

264. The Court can, however, allow an application for a *nolle prosequi* in the event of substantial legal and procedural errors that would render the whole prosecution a nullity as was explained by Gikonyo J. in the case of ***Republic vs. Jared Wakhule Tubei & Another*** [2013] eKLR.

In this case arising from criminal proceedings relating to corruption that were before the Subordinate Court, the High Court among other things determined

Issues

- i. Whether discontinuance could have been granted where the prosecution had filed charges contrary to the procedure under the Anti - Corruption and Economic Crimes Act in prosecution of corruption offences.
- ii. Whether a discontinuance granted by the court amounted to an acquittal or conditional discharge of the case in the circumstances
- iii. What factors should the trial court have considered in the termination of criminal proceedings as underpinned under the Constitution of Kenya, 2010?

The Court in this case held inter alia that:

1. Under article 157(6) of the Constitution, the prosecution could have discontinued criminal proceedings at any stage before judgment was delivered. The discontinuance, however, must have been with the permission of the court, which was quite a departure from the notorious arbitrary practice of *nolle prosequi*.

265. Article 157 of the Constitution of Kenya provides in relevant part:

157. (1) There is established the office of Director of Public Prosecutions.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

266. The Constitution requires DPP to submit annual reports to Parliament on the prosecution of all corruption and economic crime cases. Since the commencement of the ACECA 2003, ten (10) reports have been submitted.

267. In order to strengthen ODPP's capacity to prosecute corruption and economic crime cases, the following have been undertaken:

- Establishment of Department of Economic International and Emerging Crimes in ODPP;
- Development of ODPP's Anti-Corruption Prosecution Guidelines, 2013;
- Development of Plea Bargain Regulations;
- Increased inter-agency cooperation with agencies that deal with anti-corruption;
- Formation of ODPP/EACC Committee that meets monthly to deal with issues affecting corruption cases;
- Establishment of Anti-Money Laundering and Combating the Financing of Terrorism Division in ODPP;
- Revised Code of Conduct and Ethics for Prosecutors, 2013. The Code was reviewed and revised to reflect the ethical and accountability requirements for all prosecutors envisaged in the Constitution 2010;
- ODPP has undertaken several prosecution led investigations in major cases, such as the Anglo Leasing scandal; and the questionable procurement of election materials by the Independent Electoral and Boundaries Commission (IEBC) following the March 2013 general elections.

268. ODPP prosecution of high profile cases include:

- *James Oswago & Wilson Shollei*, ACC No. 16 of 2013 (senior officials (Secretary and Deputy Secretary) of the Independent Electoral and Boundaries Commission)
- *Amos Kimunya & Others*, ACC No. 4 of 2014 (former Minister)
- Extradition case of *Republic vs. Samuel K. Gichuru and Chris Okemo* (former Head of a parastatal and former Minister)
- *Republic vs. Benson Anyona Ombaki & 5 others*, Nairobi ACC No. 2/2010 (senior public officers)
- *Republic vs. Ong'ong'a Achieng' & 3 others*, ACC No. 19/2009, Nairobi (former Head of a parastatal)
- *Republic vs. Rebecca Nabutola* (former Permanent Secretary)
- *Republic vs. Mwangi Thuita & others* (former Permanent Secretary)
- Directed prosecution of a Governor of the Central Bank of Kenya.

(b) Observations on the implementation of the article

269. Regarding paragraph 3, according to article 157 (11) of the Constitution, the DPP, who is in charge of all public prosecutions, must, in exercising his functions, consider the public interest and the administration of justice.

270. Kenya has likewise indicated that article 157 (8) has largely reduced the discretionary powers that allow the DPP to interrupt a criminal procedure, by determining the need of an authorization from the Court for the purpose.

271. The Court may authorize a request for dismissal, in the event of judicial errors or procedural flaws that are sufficiently important to justify the annulment of the prosecution.

272. With the example submitted (*Republic vs. Jared Wakhule Tubei and another person*) the reviewers noted that there could be procedural difficulties when not all the evidence is gathered; that is frequent in these kind of cases, considering the nature and the specificities of the offence of corruption. In this context, the Kenyan authorities provided information on a procedure for the discharge of a corruption suspect until new evidence is submitted. Specifically, the accused person is discharged under section 87(a) of the Criminal Procedure Code. Proceedings may then be reinstituted after sufficient evidence has been gathered; provided that the ODPP can provide compelling reasons as to why the evidence is not there, supporting the application for discontinuance and that the application is done before the accused is put to his defence.

87. Withdrawal from prosecution in trials before subordinate courts.

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney-General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal -

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted.

273. The information and observations under article 37 are also referred to.

Paragraph 4 of article 30

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.

(a) Summary of information relevant to reviewing the implementation of the article

274. Kenya indicated that Article 49 (1) (h) of the Constitution provides for the rights of an accused person to be released on bond on reasonable conditions pending trial unless there are compelling reasons not to be released.

275. Bail pending trial or appeal is provided for under sections 123, 356 and 357 of the Criminal Procedure Code (CAP 75) but it is granted or denied as a matter of judicial discretion. The main judicial consideration in all such cases is whether or not the accused person is likely to turn up for trial or appeal, having regard to the gravity of the offence, the possible penalty and the residence of the suspect.

276. The Constitution of Kenya under Article 49 provides for the rights of an accused person by stating:

49. (1) An arrested person has the right-
(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

277. Provisions of the Criminal Procedure Code (Sections 123, 356 and 357) are as follows:

123. (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

356. (1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.

(2) If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.

357. (1) After the entering of an appeal by a person entitled to appeal, the High Court,

or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.

278. Kenya provided the following examples of implementation.

Rebecca Mwikali Nabutola vs. Republic, (Miscellaneous Criminal Appeal Nos. 445, 448 & 452 of 2012 [2012] eKLR)

The three applicants were convicted of various offences, jointly and severally ranging from conspiracy to defraud contrary to Section 317 of the Penal Code, abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (ACECA), wilful failure to comply with the law relating to procurement contrary to Section 45 (2) (b) as read with Section 48 of ACECA aforesaid, fraudulently making payment from public revenues for services not rendered contrary to Section 45 (2) (a) (iii) as read with Section 48 of ACECA aforesaid, conflict of interest contrary to Section 42 (3) as read with Section 48 of ACECA and fraudulent acquisition of public property contrary to section 45 (1) (a) as read with Section 48 (1) and (2) of ACECA.

Upon conviction they were each sentenced to varying sentences of fines and imprisonment. Aggrieved by the said convictions and sentences, each of the three applicants lodged an appeal. The applicants filed applications, which were consolidated by the Court, for orders that the applicants be granted bail/bond pending the hearing and determination of the said appeals.

The Court issued orders that each applicant be released on executing a bond of Kshs. 1,000,000 (one million) with one surety of equal sum OR by depositing cash bail of Kshs. 500,000 (five hundred thousand) in addition to all applicants depositing their respective passport with the court. This was based on the grounds that there were errors in procedure during trial. The Learned Judge also noted that: "They are all Kenyan citizens and the fear that they are flight risk has not been properly justified. From the record, they never posed any threat of jumping bail during the trial in the lower court and so, the answer is yes. The three applications hereby succeed."

Republic Vs Muneer Harron Ismail & 4 Others, H.C. Criminal Revision No. 51 of 2009

In this case, the Court (Warsame, J.) stated that, "In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances; and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public."

However in *Aboud Rogo Mohamed & Another v Republic* [2011] eKLR the Court in determining the application for bail by two accused persons charged with the offence of engaging in an organized criminal activity, contrary to Section 3(3) as read with Section 4(1) of the Prevention of Organised Crimes Act, 2010, held that,

"For now, although the assertions of the state, that the applicants' had some connection with the suicide bomber are not baseless, the court is obliged, by Article 50 (2) (a), to uphold the legal presumption, that the applicants were innocent until the contrary was proved.....And if the legal presumption was to have tangible meaning, at this stage, I must interpret the Constitution in such a manner as to enhance the rights and freedoms granted, rather than in a manner that curtails the said right. In the result, I find that the respondent has not demonstrated any compelling reasons to warrant the denial of bail to the applicants herein. I do therefore allow the application."

(b) Observations on the implementation of the article

279. Regarding paragraph 4, Kenya submitted texts (article 49 paragraph (1)(h)) of the Constitution; sections 123, 356 and 357 of the Criminal Procedure Code) related to the right of the defendant to be released on bail while awaiting a charge or a trial, unless compelling reasons exist against it.
280. Among the criteria for provisional detention is the fact of "guaranteeing that the person being judged remains available to the authorities".
281. Based on the legal texts and examples submitted, Kenya satisfactorily meets the conditions required by this provision.

Paragraph 5 of article 30

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.

(a) Summary of information relevant to reviewing the implementation of the article

282. Kenya indicated that in Kenya an early release may be secured through a pardon granted by the President on recommendation of the Power of Mercy Committee. This Committee is established by Article 133 of the Constitution of Kenya and the Power of Mercy Act, 2011.
283. Amongst the criteria that the Committee applies in determining whether to recommend early release of a convicted prisoner under Section 22 (1)(d) is the nature and seriousness of the offence.
284. Section 22 of the Power of Mercy Act provides:

22. (1) The Committee shall, in making a recommendation under Article 133 of the Constitution and section 21(1)(c) consider-

- (a) the age of the convicted criminal prisoner at the time of the commission of the offence;
- (b) the circumstances surrounding the commission of the offence;
- (c) whether the person, for whose benefit the petition is made, is a first offender;
- (d) the nature and seriousness of the offence;
- (e) the length of period so far served by the convicted criminal prisoner;
- (f) the length of period served by the convicted criminal prisoner in remand;

- (g) the personal circumstances of the offender at the time of making the petition, including mental and physical health and any disabilities;
 - (h) the interest of the State and community;
 - (i) the post-conviction conduct, character and reputation of the convicted criminal prisoner;
 - (j) the official recommendations and reports from the State organ or department responsible for correctional services;
 - (k) where the petitioner has opted to pursue other available remedies, the outcome of such avenue; and
 - (l) the representation of the victim where applicable.
- (2) In addition to the requirements under subsection (1), the Committee may consider—
- (a) where applicable, a report of fellow inmates; or
 - (b) reports from probation services.

285. Section 5 of the Power of Mercy Act provides the following on the composition of the committee:

5. Composition of the Committee

- (1) The Committee established pursuant to Article 133(2) of the Constitution shall be an unincorporated body consisting of—
 - (a) the members appointed under Article 133(2)(a) and (b) of the Constitution; and
 - (b) seven other members appointed in accordance with the provisions of this Act.
- (2) The Attorney-General shall be the chairperson of the Committee.
- (3) The members under section 5(1)(b) shall serve on a part-time basis.

286. Article 133(2) of the Constitution of Kenya, 2010 provides as follows:

There shall be an Advisory Committee on the Power of Mercy, comprising—

- (a) the Attorney-General;
- (b) the Cabinet Secretary responsible for correctional services; and
- (c) at least five other members as prescribed by an Act of Parliament, none of whom may be a State officer or in public service.

287. Section 13 of the Power of Mercy Act provides for the tenure of the members of the Committee by providing that:

13. (1) Members of the Committee, apart from the Attorney-General, and Cabinet Secretary, shall hold office, for a single term of five years, and shall not be eligible for re-appointment.

288. Regarding examples of implementation, Kenya indicated that there have been no releases under the Power of Mercy Act.

(b) Observations on the implementation of the article

289. Kenya has indicated that the early release may be obtained by a presidential pardon, following a recommendation of the Advisory Committee on the Power of Mercy. This committee is created by Article 133 of the Constitution of Kenya and by the Power of Mercy Act (2011).

290. It adds that the nature and the seriousness of the alleged crimes are among the criteria considered by the Committee when deciding, and when recommending or not the early release of a detained or convicted person.

291. For example, the criteria considered are the age of the detained person at the moment of the offence, the conduct while in detention of convicted felons, their

character and reputation, the reports from the services in charge of their evaluation, among others.

292. There are no specific statistics of convicted persons who were released by way of the right to pardon.

Paragraph 6 of article 30

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.

(a) Summary of information relevant to reviewing the implementation of the article

293. Kenya cited Article 75 of Chapter Six of the Constitution of Kenya that deals with leadership and integrity of State officers. Under Article 260 of the Constitution, a State Officer is also a public officer. Special attention is paid to State officers owing to the high responsibilities they hold in the management of state affairs. The Leadership and Integrity Act, 2012, which is enacted pursuant to the provisions of Article 80 of the Constitution, provides detailed provisions regarding the conduct of State officers and extends certain provisions of the Act to other public officers generally.

Article 75 of the Constitution of Kenya specifically deals with the conduct of State officers and provides that:

- (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—
 - (a) any conflict between personal interests and public or official duties;
 - (b) compromising any public or official interest in favour of a personal interest; or
 - (c) demeaning the office the officer holds.
- (2) A person who contravenes clause (1), or Article 76, 77 or 78(2)—
 - (a) shall be subject to the applicable disciplinary procedure for the relevant office; and
 - (b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.
- (3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office.

294. Kenya further indicated that the Anti-Corruption and Economic Crimes Act provides for the suspension of public officers suspected and charged with acts of corruption pending hearing and determination of the case. Suspension in this regard is on half pay basis although the officers continue to receive full allowances where they are due.
295. In Kenya when a public officer is charged in court for corruption or an economic crimes offence, he is suspended from office. The officer remains on suspension at half pay until conclusion of the case. If convicted, the officer is suspended without pay pending appeal. However, if the conviction is upheld, the officer is dismissed. This provision does not apply to some Constitutional Office holders.
296. Section 62 of the Anti-Corruption and Economic Crimes Act gives provision for suspension when a public officer is charged with corruption. This Act takes into consideration the Constitutional principle of presumption of innocence until proven guilty.

62. Suspension, if charged with corruption or economic crime

(1) A public officer who is charged with corruption or economic crime shall be suspended at half pay, with effect from the date of the charge.

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.

(5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the Attorney-General -

(a) this section does not apply to the charge unless permission is given by the court or the Attorney-General to prosecute or the proceedings are taken over by the Attorney-General; and

(b) if permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.

(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(7) This section does not apply with respect to a charge laid before this Act came into operation.

297. Section 63 of the Anti-Corruption and Economic Crimes Act specifically addresses a situation where a convicted public official appeals against the conviction.

63. Suspension, etc. if convicted of corruption or economic crime.

(1) A public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of the conviction pending the outcome of any appeals.

(2) The public officer ceases to be suspended if the conviction is overturned on appeal.

(3) The public officer shall be dismissed if -

(a) the time period for appealing against the conviction expires without the conviction being appealed; or

(b) the conviction is upheld on appeal.

(4) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(5) This section does not apply with respect to a conviction that occurred before this Act came into operation.

298. Kenya also referred to section 44(4) of the Employment Act, 2007.

44. Summary dismissal

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his

duty, under his contract, to have performed carefully and properly;
 (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;
 (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
 (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty;
 or
 (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

299. Kenya cited the case of *Republic v. Attorney General and 4 Others Ex parte Evans Arthur Mukolwe* (2013) eKLR, in which the court held that Applicant cannot claim that the respondents are acting contrary to the law when it is clear that the law allows them to take disciplinary action against him notwithstanding the existence of the criminal proceedings in the magistrate's court.

300. In the *Outa* case, the High Court precluded a member of Parliament from holding public office on grounds of corruption. No further case details were provided.

(b) Observations on the implementation of the article

301. Kenya's law is aligned with paragraph 6 of this article. The applicable legal texts are sections 62 and 63 ACECA.

302. It was explained during the country visit that section 62(6) of ACECA applies to offices such as: Members of Parliament, governors, members of county assemblies, judges, the DPP, Controller of Budget, Auditor General and Chairpersons of Constitutional Commissions etc. whose procedure for removal is insulated in the Constitution and statute.

Paragraph 7 of article 30

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;

(b) Holding office in an enterprise owned in whole or in part by the State.

(a) Summary of information relevant to reviewing the implementation of the article

303. Kenya indicated that Article 75 (1) of the Constitution 2010 makes it mandatory that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids compromising any public or official interest in favour of a personal interest; or demeaning the office the officer holds.

304. A person who contravenes this provision may face disciplinary procedures including dismissal or otherwise removal from office. A person so dismissed or otherwise removed from office is disqualified from holding any other State office.

305. Under Article 260 of the Constitution, a State Officer is also a public officer and Article 80 of the Constitution mandates a law to be enacted with necessary modification to operationalise the provisions of Chapter 6 of the Constitution on the conduct of public officers.

306. A person convicted of corruption or economic crime in Kenya shall be disqualified from being elected or appointed as a public officer for ten years after the conviction, as provided for in section 64(1) of the Anti-Corruption and Economic Crimes Act.

307. Under Article 75 of the Constitution of Kenya,

(1) a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids - ...

(b) compromising any public or official interest in favour of a personal interest; or

(c) demeaning the office the officer holds.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)-

(a) shall be subject to the applicable disciplinary procedure for the relevant office; and

(b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.

(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions mentioned in clause (2) is disqualified from holding any other State office.

308. Section 64 of ACECA is more specific that:

64. Disqualification if convicted of corruption or economic crime

(1) A person who is convicted of corruption or economic crime shall be disqualified from being elected or appointed as a public officer for ten years after the conviction.

(2) This section does not apply with respect to an elected office if the Constitution sets out the qualifications for the office.

(3) This section does not apply with respect to a conviction that occurred before this Act came into operation.

(4) At least once a year the Commission shall cause the names of all persons disqualified under this section to be published in the Gazette

309. Kenya indicated that these provisions have not been applied so far.

(b) Observations on the implementation of the article

310. Regarding paragraph 7, Kenya has indicated that under ACECA, a person who is convicted of corruption or an economic offence may not be elected or appointed to a public office for ten years after the conviction.

311. It was explained during the country visit that this includes disqualification from holding office in a State-owned enterprise, according to the definition of public body in section 2.

“public body” means – ..

(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition;

312. Kenya has indicated that these provisions have not yet been implemented in practice.

Paragraph 8 of article 30

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

(a) Summary of information relevant to reviewing the implementation of the article

313. Kenya indicated that the Public Officer Ethics Act (Cap. 183) and the Leadership and Integrity Act, 2012, provide for a legal framework for disciplining public officers and State officers for breach of integrity.

(b) Observations on the implementation of the article

314. For paragraph 8, Kenya cited their Public Officer Ethics Act (chapter 183), which establishes a legal framework that allows sanctioning public officials and agents of the State for the infringement of the integrity laws.

315. Examples of implementation related to disciplinary cases were discussed during the country visit in meetings with the Public Service Commission, which is established under Article 233 of the Constitution.

Paragraph 10 of article 30

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

316. Kenya indicated that the prisons rehabilitate offenders in preparation for reintegration into the society. There are administrative measures by the probation Department to assist released prisoners to reintegrate back to society.

317. According to Section 74(1) of the Prisons Act, Cap 90 of the Laws of Kenya, the Commissioner of Prisons is empowered to make rules providing for, among other things, corrections, management and discharge of prisoners.

318. It was reported that no statistics on prisoner reintegration are available.

(b) Observations on the implementation of the article

319. Based on the information provided and the capacity challenges reported, it is recommended that Kenya enhance measures to promote the reintegration of convicted persons into society, including through effective enforcement of existing regulations. It is further recommended that Kenya adopt record keeping procedures for monitoring and reporting.

(c) Challenges, where applicable

320. Despite the existence of measures for the integration of released convicts back into

society, the Department of Probation and Aftercare services has faced difficulty in keeping up to date records because of capacity challenges countrywide.

Article 31. Freezing, seizure and confiscation

Subparagraph 1 (a) of article 31

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;

(a) Summary of information relevant to reviewing the implementation of the article

321. Kenya indicated that the Court on application by the Ethics and Anti-Corruption Commission may issue freezing orders on proceeds of corruption and money laundering under the provisions of Section 55 of the Anti-Corruption and Economic Crimes Act (quoted below).

322. Under Section 61 of the Proceeds of Crime and Anti-Money Laundering Act, the Court may make confiscation orders upon the application of the Attorney General, the Director of the Asset Recovery Agency or *suo motu* against the defendant for payment to government of any amount it considers appropriate.

61. Confiscation orders

(1) Whenever a defendant is convicted of an offence, the court convicting the defendant shall, on the application of the Attorney-General, the Agency Director or of its own motion, inquire into any benefit which the defendant may have derived from-

(a) that offence;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any criminal activity which the court finds to be sufficiently related to that offence, and, if the court finds that the defendant has so benefited, the court shall, in addition to any punishment which it may impose, make an order against the defendant for the payment to the Government of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

(2) The amount which a court may order the defendant to pay to the Government under subsection (1)-

(a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Part; or

(b) if the court is satisfied that the amount which is just as contemplated in section 63(1) is less than the value referred to in paragraph (a), the amount payable shall not exceed an amount which, in the opinion of the court might be so realized.

(3) A court convicting a defendant may, when passing sentence, indicate that it will hold an inquiry as contemplated in subsection (1) at a later stage if-

(a) it is satisfied that that inquiry would unreasonably delay the sentencing of the defendant; or

(b) the Attorney-General applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.

(4) If the judge or magistrate who convicted the defendant is absent or for any other reason not available, any judge or magistrate of the same court shall consider an application referred to in subsection (1) and hold the inquiry referred to in that

subsection and that person may, in the proceedings, take such steps as the judge or magistrate who is absent or not available could lawfully have taken.

(5) A court before which proceedings under this section are pending, may, in considering an application under subsection (1)-

(i) refer to the evidence and proceedings at the trial;

(ii) hear further oral evidence or take documentary evidence as the court may deem fit;

(iii) direct the Agency Director to tender to the court the affidavit referred to in section 64(1); and

(iv) direct a defendant to tender to the court an affidavit referred to under section 64(5).

(6) The amount ordered to be paid under a confiscation order shall be paid on the making of the order:

Provided that if the defendant indicates to the court that he needs time to pay the amount ordered to be paid, the court making the confiscation order may make an order allowing payment to be made in a specified period.

323. The realizable amount is defined in Section 63(1) and the definition of “realizable property” (Section 2) in POCAMLA.

Amount which might be realized.

63. (1) For the purposes of sections 61(2)(b) and 67(4)(a), the amount which might be realized at the time of the making of a confiscation order against a defendant shall be the amount equal to the sum of the values at that time of all—

(a) realizable property held by the defendant; and

(b) affected gifts made by the defendant,

less the sum of all obligations, if any, of the defendant having priority and which the court may recognize for this purpose.

2. Interpretation

"realizable property" means —

(a) property laundered;

(b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences;

(c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and

(d) property of corresponding value.

Section 57 of POCAMLA additionally states:

57. Realizable property

(1) Subject to the provisions of subsection (2), the following property shall be realizable in terms of this Part—

(a) any property held by the defendant concerned; and any property held by a person to whom that defendant has directly or indirectly made any affected gift.

(2) Property shall not be realizable property so long as a forfeiture order is in force in respect thereof.

Section 52(3) of POCAMLA provides that:

(3) For the purposes of Parts VI to XII, a person will have benefited from an offence if that person has at any time, whether before or after the commencement of this Act, received or retained any proceeds of crime.

324. Section 55 of ACECA provides:

55. Forfeiture of unexplained assets

(1) In this section, “corrupt conduct” means —

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which —

- (i) at the time, constituted an offence; and
- (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.
- (2) The Commission may commence proceedings under this section against a person if-
 - (a) after an investigation, the Commission is satisfied that the person has unexplained assets; and
 - (b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.
- (3) Proceedings under this section shall be commenced in the High Court by way of originating summons.
- (4) In proceedings under this section-
 - (a) the Commission shall adduce evidence that the person has unexplained assets; and
 - (b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.
- (5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.
- (6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.
- (7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds-
 - (a) are held in trust for the person whose assets are in question or otherwise on his behalf; or
 - (b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.
- (8) The record of proceedings under this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime.
- (9) This section shall apply retroactively.

325. Kenya indicated that the EACC has made a number of applications under section 55 of the Act. The statistics are available in the EACC annual reports.³

(b) Observations on the implementation of the article

326. Kenya indicated that the Court on application by the Ethics and Anti-Corruption Commission may issue freezing orders on proceeds of corruption and money laundering under the provisions of Section 55 of the Anti-Corruption and Economic Crimes Act.

327. Under Section 61 of the Proceeds of Crime and Anti-Money Laundering Act, the Court may make confiscation orders upon the application of the Attorney General, the Director of the Asset Recovery Agency or *suo motu* against the defendant for payment to government of any amount it considers appropriate.

³ <http://www.eacc.go.ke/default.asp?pageid=20>

328. The amount confiscated from a defendant shall be the amount equal to the sum of the values at that time of all realizable property held by the defendant; and affected gifts made by the defendant, less the sum of all obligations, if any, of the defendant having priority and which the court may recognize for this purpose.
329. Kenya's POCAMLA provides for forfeiture of property of corresponding value under conviction based forfeiture and non-conviction based (civil) forfeiture.
330. It is recommended that Kenya's authorities maintain statistics relating to freezing, seizing and confiscation of proceeds and instrumentalities of crime. This would allow for an assessment of the effectiveness of systems for combating money laundering and other predicate offences.

Subparagraph 1 (b) of article 31

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:

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

331. Kenya indicated that this is provided for under Section 55 of the Anti-Corruption and Economic Crime Act (quoted above).

332. Instrumentalities are specifically covered in Section 2(b) of POCAMLA.

"realizable property" means —

- (a) property laundered;
- (b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences;
- (c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and
- (d) property of corresponding value.

(b) Observations on the implementation of the article

333. No examples of confiscation involving instrumentalities were provided. The provision is legislatively implemented.

Paragraph 2 of article 31

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.

(a) Summary of information relevant to reviewing the implementation of the article

334. Under the ACECA, Part IV and VI deal with investigations, including asset tracing, while Part VII deals with recovery and forfeiture. Sections 23, 26, 27, 28, 29, 30 of ACECA, Section 118 of the CPC and Section 180 of the Evidence Act are the

investigative tools provided under Kenya's laws.

ACECA

PART IV - INVESTIGATIONS

23. Investigators.

(1) The Director or a person authorized by the Director may conduct an investigation on behalf of the Commission.

(2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Director or an investigator.

(3) For the purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has under this Part.

26. Statement of suspect's property.

(1) The Commission may by notice in writing require a person reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement —

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(3) The powers of the Commission under this section may be exercised only by the Director.

27. Requirement to provide information, etc.

(1) The Commission may by notice in writing require an associate of a suspected person to provide, within a reasonable time specified in the notice, a written statement of the associate's property at the time specified in the notice.

(2) In subsection (1), "associate of a suspected person" means a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.

(3) The Commission may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents in the person's possession that relate to a person suspected of corruption or economic crime.

(4) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(5) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act.

28. Production of records and property.

(1) The Commission may by notice in writing —

(a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and

(b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.

(2) A requirement under subsection (1)(b) may include a requirement to attend

personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

(4) The six month limitation in subsection (3) does not prevent the Commission from making further requirements for further periods of time as long as the period of time in respect of which each requirement is made does not exceed six months.

(5) Without affecting the operation of section 30, the Commission may make copies of or take extracts from any record produced pursuant to a requirement under this section.

(6) A requirement under this section to produce a record stored in electronic form is a requirement —

(a) to reduce the record to hard copy and produce it; and

(b) if specifically required, to produce a copy of the record in electronic form.

(7) In this section, “records” includes books, returns, bank accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.

(8) The Commission may by notice in writing require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person’s possession, being property of a person reasonably suspected of corruption or economic crime.

(9) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(10) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act.

29. Search of premises.

(1) The Commission may, with a warrant, enter upon and search any premises for any record, property or other thing reasonably suspected to be in or on the premises and that has not been produced by a person pursuant to a requirement under the foregoing provisions of this Part.

(2) The power conferred by this section is in addition to, and does not limit or restrict, a power conferred by section 23(3) or by any other provision of this Part.

30. Admissibility of things produced or found.

Anything provided by a person pursuant to a requirement under the foregoing provisions of this Part, or obtained on a search of premises, may be taken and retained by the Commission for such time as is reasonable for the purposes of the investigation concerned and is admissible in evidence in a prosecution of any person, including the person who produced it or from whom it was obtained, for an offence.

Criminal Procedure Code

118. Power to issue search warrant.

Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.

Evidence Act

180. Warrant to investigate.

- (1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.
- (2) Any person who fails to produce any such banker's book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.

335. POCAMLA provisions are also relevant.

68. Restraint orders

- (1) The Agency Director may apply to a court *ex parte* for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.
- (2) A restraint order may be made in respect of—
- (a) realizable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;
 - (b) all property which, if it is transferred to that person after the making of the restraint order, would be realizable property.
- (3) A court to which an application is made under subsection (1) may make a temporary restraint order if the court is satisfied that—
- (a) a criminal investigation has been started in Kenya with regard to an offence; or
 - (b) there is reasonable cause to believe that a person leads a criminal lifestyle and has benefited from his criminal conduct.
- (4) A restraint order shall provide for the period of the notice to be given to persons affected by the order. ...

71. Seizure of property subject to restraint order

- (1) In order to prevent any realizable property from being disposed of or removed contrary to a restraint order, a police officer may seize that property if he has reasonable grounds to believe that the property will be so disposed of or removed.
- (2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the court that made the relevant restraint order.

336. Regarding the specialized institutions for the identification, tracing, freezing or seizure of the assets, instrumentalities or proceeds to be confiscated, Kenya indicated that under the POCAMLA, there is an Asset Recovery Agency provided for under Part VI, an Asset Recovery Fund under Part XI and Part IX contains general provisions on preservation and forfeiture.

(b) Observations on the implementation of the article

337. The texts cited by Kenya refer to the general procedures for offences of this kind. No examples of implementation were provided. The provision is legislatively implemented.

Paragraph 3 of article 31

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.

(a) Summary of information relevant to reviewing the implementation of the article

338. Kenya indicated that the Anti-Corruption and Economic Crimes Act provides for the appointment of receivers and managers of property reasonably suspected to have been corruptly acquired.

56A. Appointment of receiver

(1) The Commission may, at any time with leave of the court, appoint a receiver for such property as is suspected by the Commission to have been acquired through corrupt conduct.

(2) The appointment of a receiver under subsection (1) above shall be in writing signed by the Director or Assistant Director.

(3) The receiver shall have powers of management, control and possession of the property for which he is appointed.

(4) The Commission or the receiver shall, at the time of the appointment or soon thereafter, serve a notice on the person who has or who appears to have custody or control of the property, and, where the property is required under any written law to be registered, a similar notice shall be served on the respective registrar:

Provided that where the property is situated outside Kenya, the notice shall not be necessary but the Commission shall have the power to liaise with foreign governments, government departments and international agencies for the confiscation, management, control and repatriation of the property.

(5) A person served with a notice under the foregoing subsection shall not, except by authority of a court order, deal with the property in any manner inconsistent with the instructions of the receiver.

(6) A person who contravenes subsection (5) shall be guilty of an offence and liable to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both for a first offence, and to imprisonment for a term not exceeding ten years without the option of a fine for a subsequent offence in respect of the same property.

(7) For avoidance of doubt, a receiver may be appointed under this section in respect of any kind of property whether tangible or intangible, movable or immovable, and including buildings, income, debts, bank deposits, business concerns, stocks and other properties.

(8) The receiver shall keep proper books of account and give quarterly reports to the Commission, and may pay the costs of receivership out of the property for which he has been appointed.

(9) A person aggrieved by the appointment of a receiver under this section may request the Commission in writing to set aside the appointment in return for an offer of deposit of some reasonable security, or he may apply to the High Court for setting aside or variation of the appointment on the ground that—

(a) he has offered to the Commission a reasonable security which has not been accepted by the Commission; or

(b) he has in his possession evidence to show that, on a balance of probabilities, he acquired the property otherwise than through crime or civil wrongs.

(10) An application to the High Court under subsection (9) shall be heard *inter partes*, and the Commission shall be entitled to cross-examine the applicant and to call evidence in rebuttal.

339. Section 56C of ACECA provides that both movable and immovable property recovered shall be surrendered to the Principal Secretary, Treasury and monies

recovered shall be paid into the consolidated fund.

56C. Recovery of funds and other assets

(1) Any funds recovered by the Commission shall be paid into the Consolidated Fund.

(2) Notwithstanding any provision in this Act or any other written law, any asset or property, whether movable or immovable, recovered either in the course of, or upon conclusion of investigations, or upon commencement of court action or proceedings, whether such proceedings are of a civil or criminal nature or upon conclusion of such proceedings, shall be surrendered to the Permanent Secretary to the Treasury.

340. Section 112 of POCAMLA provides that:

112. Functions of the Agency under this Part

In the administration of the Fund, the following shall apply—

(a) all monies derived from concluded confiscation and forfeiture orders stipulated in Parts VII to X shall be paid into the Consolidated Fund; and

(b) all property derived from concluded confiscation or forfeiture orders stipulated in Parts VII to X shall vest in the Government and be disposed of in accordance with relevant law relating to disposal of public property.

341. The Asset Recovery Agency has been established and an Acting Director has already been appointed.

342. Section 56A states as follows:

56A. (1) The Commission may, at any time with leave of the court, appoint a receiver for such property as is suspected by the Commission to have been acquired through corrupt conduct.

(2) The appointment of a receiver under subsection (1) above shall be in writing signed by the Director or Assistant Director.

(3) The receiver shall have powers of management, control and possession of the property for which he is appointed.

(4) The Commission or the receiver shall, at the time of the appointment or soon thereafter, serve a notice on the person who has or who appears to have custody or control of the property, and, where the property is required under any written law to be registered, a similar notice shall be served on the respective registrar:

Provided that where the property is situated outside Kenya, the notice shall not be necessary but the Commission shall have the power to liaise with foreign governments, government departments and international agencies for the confiscation, management, control and repatriation of the property.

(5) A person served with a notice under the foregoing subsection shall not, except by authority of a court order, deal with the property in any manner inconsistent with the instructions of the receiver.

(6) A person who contravenes subsection (5) shall be guilty of an offence and liable to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years or to both for a first offence, and to imprisonment for a term not exceeding ten years without the option of a fine for a subsequent offence in respect of the same property.

(7) For avoidance of doubt, a receiver may be appointed under this section in respect of any kind of property whether tangible or intangible, movable or immovable, and including buildings, income, debts, bank deposits, business concerns, stocks and other properties.

(8) The receiver shall keep proper books of account and give quarterly reports to the Commission, and may pay the costs of receivership out of the property for which he has been appointed.

(9) A person aggrieved by the appointment of a receiver under this section may request

the Commission in writing to set aside the appointment in return for an offer of deposit of some reasonable security, or he may apply to the High Court for setting aside or variation of the appointment on the ground that-

(a) he has offered to the Commission a reasonable security which has not been accepted by the Commission; or

(b) he has in his possession evidence to show that, on a balance of probabilities, he acquired the property otherwise than through crime or civil wrongs.

(10) An application to the High Court under subsection (9) shall be heard inter-parties, and the Commission shall be entitled to cross-examine the applicant and to call evidence in rebuttal.

343. Section 72 of POCAMLA further provides that:

72. Appointment of manager in respect of property subject to restraint order

(1) Where a court has made a restraint order, that court may, at any time—

(a) appoint a manager to do any one or more of the following on behalf of a person against whom the restraint order has been made—

(i) perform any particular act in respect of any or all the property to which the restraint order relates;

(ii) take care of the said property;

(iii) administer the said property;

(iv) where the said property is a business or undertaking, carry on, with due regard to any law which may be applicable, the business or undertaking; and

(v) in the case of property that is perishable, or liable to deterioration, decay or injury by being detained in custody, to sell or otherwise dispose of the said property;

(b) order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a receiver has been appointed under paragraph (a), into the custody of that receiver.

(2) A person affected by an order under subsection (1)(b) may at any time apply for the variation of—

(a) rescission of the order; or

(b) the terms of the appointment of the manager concerned or for the discharge of that manager.

(3) The court that made an order under subsection (1)(b)—

(a) may at any time—

(i) vary or rescind the order; or

(ii) vary the terms of the appointment of the manager concerned or discharge that manager;

(b) shall discharge the manager concerned if the relevant restraint order is rescinded;

(c) may make an order relating to the fees and expenditure of the manager as it considers fit, including an order for the payment of the fees of the manager from the confiscated proceeds, if a confiscation order is made, or by the Government if no confiscation order is made.

344. Kenya indicated that recovered properties are registered in the name of the Principal Secretary, Ministry of Finance. Examples of recovered properties include the Court Land in Mombasa, houses in Woodley Estate, Nairobi and forest land in Ngong' belonging to the Kenya Forest Services.

(b) Observations on the implementation of the article

345. Regarding paragraph 3, Kenyan law provides the seizure and the confiscation of any assets that constitute direct or indirect proceeds of the offence.

346. In addition, this transformation or conversion of the direct or indirect proceeds of the

offence crime may constitute the offence of laundering, both punishable with a maximum prison penalty of 10 years, which may be combined with a maximum fine of two million shillings, as well as the complementary penalty of confiscation.

347. Kenya has indicated that ACECA provides for the appointment of custodians for assets proceeding from acts of corruption. Section 56C ACECA stipulates that any movable or immovable property that is recovered shall be submitted to the First Secretary of the Treasury, while cash will be transferred to the Consolidated Fund.
348. Kenya has implemented paragraph 3 based on the examples cited, but no statistics were submitted.

Paragraphs 4 to 6 of article 31

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.

(a) Summary of information relevant to reviewing the implementation of the article

349. Kenya indicated that under Section 66 of the Proceeds of Crime and Anti-Money Laundering Act, the Court may make confiscation orders upon the application of the Attorney General, the Director of the Asset Recovery Agency or *suo motu* against the defendant for payment to government of any amount it considers appropriate.
350. The amount confiscated from a defendant shall be the amount equal to the sum of the values at that time of all realizable property held by the defendant; and affected gifts made by the defendant, less the sum of all obligations, if any, of the defendant having priority and which the court may recognize for this purpose.
351. The realizable amount is defined in Section 63(1) and the definition of “realizable property” (Section 2) in POCAMLA.

Amount which might be realized.

63. (1) For the purposes of sections 61(2)(b) and 67(4)(a), the amount which might be realized at the time of the making of a confiscation order against a defendant shall be the amount equal to the sum of the values at that time of all—

(a) realizable property held by the defendant; and

(b) affected gifts made by the defendant,

less the sum of all obligations, if any, of the defendant having priority and which the court may recognize for this purpose.

2. Interpretation

"realizable property" means —

(a) property laundered;

(b) proceeds from or instrumentalities used in, or intended to be used in money

laundering or predicate offences;

(c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and

(d) property of corresponding value.

352. Kenya referred to Section 61 of Proceeds of Crime and Anti-Money Laundering Act, 2009, which allows Court to make confiscation orders against the defendant for payment to government of any amount it considers appropriate.

353. Section 63 of POCAMLA states as follows:

(1) For the purposes of sections 61(2)(b) and 67(4)(a), the amount which might be realized at the time of the making of a confiscation order against a defendant shall be the amount equal to the sum of the values at that time of all-

(a) realizable property held by the defendant; and

(b) affected gifts made by the defendant,

less the sum of all obligations, if any, of the defendant having priority and which the court may recognize for this purpose.

(2) Notwithstanding the provisions of section 58(1) but subject to the provisions of section 59(2), the value of an affected gift at the time of the making of the relevant confiscation order shall be-

(a) the value of the affected gift at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or

(b) where subsection (3) applies, the value mentioned in that subsection, whichever is the greater value; or

(c) such amount as the court believes is just.

(3) If at the time of the making of the relevant confiscation order the recipient holds the property-

(a) other than in monetary instruments, which such person received, the value concerned shall be the value of the property at that time; or

(b) which directly or indirectly represents in their hands the property which that person received, the value concerned shall be the value of the property, in so far as it represents the property which that person received, at the time.

(4) For the purposes of subsection (1), an obligation has priority at the time of the making of the relevant confiscation order if it is an obligation-

(a) of the defendant, where the defendant has been convicted by a court of any offence to pay-

(i) a fine imposed before that time by the court; or

(ii) any other amount under any resultant order made before that time by the court;

(b) which-

(i) if the estate of the defendant had at that time been sequestrated; or

(ii) where the defendant is a company or other legal entity, if that company or that legal entity is at that time being wound up, would be payable in pursuance of any secured or preferential claim against the insolvent estate or against such company or legal entity, as the case may be;

(5) A court shall not determine the amounts which might be realized as contemplated in subsection (1) unless it has afforded all persons holding any interest in the property concerned an opportunity to make representations to it in connection with the realization of that property

354. No examples of implementation were provided.

(b) Observations on the implementation of the article

355. The definition of “realizable property” (Section 2) in POCAMLA covers value based confiscation.

356. Regarding paragraph 5, Kenya has indicated that under section 61 POCAMLA, the Court may issue confiscation orders against the defendant and for the benefit of the State, for any amount that he deems appropriate.

357. The amount confiscated from the defendant shall equal the value of the set of realizable assets and the fictitious donations that may have been realized, deducing, as the case may be, the amount of the financial obligations of the defendant, which will have priority and will be recognized as such by the Court.

358. Regarding paragraph 6, Kenyan law provides for the seizure and the confiscation the indirect proceeds of the offence. In cases where funds from licit origin are mixed with the proceeds of the offence, the confiscation shall only apply to the proportion of the value of said proceeds.

359. As for income derived from the direct or indirect proceeds of the offence, the confiscation shall likewise be possible, proportionally to the value of the proceeds of the offence with regard to the funds of licit origin.

Paragraph 7 of article 31

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.

(a) Summary of information relevant to reviewing the implementation of the article

360. Kenya indicated that under section 23 (4) of the Anti-Corruption and Economic Crimes Act, the Ethics and Anti-Corruption Commission has powers to make applications before court for the warrants to search bank accounts, and banks countrywide have facilitated the implementation of the warrants by the Commission.

361. Section 180 (1) of the Evidence Act also authorizes a judge or magistrate to issue a warrant for the investigation of any banker's book and for production of any banker's records for the purposes of an investigation.

362. Kenya referred to the EACC annual reports on reported applications seeking warrants to investigate accounts.⁴

FIGURES: Statistics on Applications for Orders of Preservation of Property (Freezing)

Period	Applications made
2012/2013	5
2011/2012	3
2010/2011	5

⁴ <http://www.eacc.go.ke/default.asp?pageid=20>

Source: EACC annual reports for the respective years

363. Section 17 of POCAMLA provides that its provisions on secrecy override any other provision in any other law.

364. The police can make applications for warrants to investigate bank accounts. This is common by the Banking Fraud Investigations Department under section 118 of the Criminal Procedure Code. Section 121 of the Criminal Procedure Code deals with detention of property seized. The texts are as follows:

118. Power to issue search warrant.

Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.

121. Detention of property seized.

(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.

(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.

365. Kenya cited the cases *Manfred Walter Schmitt & another vs. Attorney General & 3 Others* (2014) eKLR and *Timothy Isaac Bryan & 2 Others vs. Inspector General of Police & 7 Others* (2014) eKLR. No further details were available.

(b) Observations on the implementation of the article

366. Kenya indicated that, under section 23 (4) ACECA, the Ethics and Anti-Corruption Commission (EACC) is qualified to obtain by judicial request warrants that allow it to inspect bank accounts. Throughout the country, banks have collaborated with the enforcement of the warrants issued by the Commission.

367. Section 180 (1) of the Evidence Act likewise authorizes judges or magistrates to issue warrants to allow the inspection of any banking records as well as the production of banking files, for the purposes of an investigation.

368. Following the discussions during the country visit, it emerged that procedures to obtain access to bank and financial records for investigative purposes could be streamlined to allow for warrants to be obtained expeditiously and effectively. The reviewers recommend that Kenya take steps and adopt measures, as appropriate, to this effect. Consideration could also be given to authorizing EACC to have access to financial records administratively, as is the case in some jurisdictions.

Paragraph 8 of article 31

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.

(a) Summary of information relevant to reviewing the implementation of the article

369. Kenya indicated that in proceedings for the confiscation or recovery of assets which are suspected to be proceeds of crime and money laundering, and if the court is satisfied on a balance of probabilities and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

370. Section 55(5) of ACECA provides:

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

371. Section 61 and 65 of POCAMLA provide that:

61. Confiscation orders

(1) Whenever a defendant is convicted of an offence, the court convicting the defendant shall, on the application of the Attorney-General, the Agency Director or of its own motion, inquire into any benefit which the defendant may have derived from—

(a) that offence;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any criminal activity which the court finds to be sufficiently related to that offence,

and, if the court finds that the defendant has so benefited, the court shall, in addition to any punishment which it may impose, make an order against the defendant for the payment to the Government of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

(2) The amount which a court may order the defendant to pay to the Government under subsection (1)—

(a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Part; or

(b) if the court is satisfied that the amount which is just as contemplated in section 63(1) is less than the value referred to in paragraph (a), the amount payable shall not exceed an amount which, in the opinion of the court might be so realized.

(3) A court convicting a defendant may, when passing sentence, indicate that it will hold an inquiry as contemplated in subsection (1) at a later stage if—

(a) it is satisfied that that inquiry would unreasonably delay the sentencing of the defendant; or

(b) the Attorney-General applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.

(4) If the judge or magistrate who convicted the defendant is absent or for any other reason not available, any judge or magistrate of the same court shall consider an application referred to in subsection (1) and hold the inquiry referred to in that subsection and that person may, in the proceedings, take such steps as the judge or magistrate who is absent or not available could lawfully have taken.

(5) A court before which proceedings under this section are pending, may, in considering an application under subsection (1)—

(i) refer to the evidence and proceedings at the trial;

(ii) hear further oral evidence or take documentary evidence as the court may deem fit;

(iii) direct the Agency Director to tender to the court the affidavit referred to in section 64(1); and

(iv) direct a defendant to tender to the court an affidavit referred to under section 64(5).

(6) The amount ordered to be paid under a confiscation order shall be paid on the making of the order:

Provided that if the defendant indicates to the court that he needs time to pay the amount ordered to be paid, the court making the confiscation order may make an order allowing payment to be made in a specified period.

65. Evidence relating to proceeds of crime

(1) For the purpose of determining whether a defendant has derived a benefit in an inquiry under section 61(1), if it is found that the defendant did not, at the fixed date, have legitimate sources of income sufficient to justify the interests in any property that he holds, the court shall accept this fact as prima facie evidence that the interests form part of the benefit.

(2) For the purpose of an inquiry under section 61(1), if it is found that a court had ordered the defendant to disclose any facts under section 64(5) and that the defendant had without sufficient cause failed to disclose the facts or had, after being so ordered, furnished false information, knowing that information to be false or not believing it to be true, the court shall accept these facts as prima facie evidence that any property to which the information relates—

(a) forms part of the defendant's benefit, in determining whether he has derived a benefit from an offence; or

(b) is held by the defendant as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 61(1).

(3) For the purposes of determining the value of a defendant's proceeds of crime, in an inquiry under section 61(1) if the court finds that defendant

has benefited from an offence and that the defendant held property at any time, or since, his conviction, the court shall accept these facts as prima facie evidence that the property was received by him at the earliest time at which he held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 61(1).

(4) If the court finds that the defendant has benefited from an offence and that expenditure had been incurred by him since the beginning of the period contemplated in subsection (3), the court shall accept these facts as prima facie

372. No examples of implementation were provided.

(b) Observations on the implementation of the article

373. Regarding paragraph 8, Kenyan law provides for the confiscation and recovery of assets that are allegedly proceeds of a crime and of money laundering; if the Court considers, based on the probability and the evidence produced, that the suspect is in possession of assets of doubtful origin, it may require the suspect to prove that the assets were acquired without resorting to acts of corruption.

Paragraph 9 of article 31

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

(a) Summary of information relevant to reviewing the implementation of the article

374. Kenya indicated that common law principles relating to a purchaser for value without notice applies in Kenya by virtue of Section 3 of the Judicature Act (CAP 8)

375. Further Sections 93 and 94 of POCAMLA provide for the following:

93. Protection of third parties

(1) Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—

(a) that the person was not in any way involved in the commission of the offence; and

(b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—

(i) for sufficient consideration; and without knowing, and in circumstances such as not to arouse

a reasonable suspicion, that the property was, at the time he acquired it, tainted property,

the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

(2) Subject to subsection (3), where a forfeiture order has already been made directing the forfeiture of property, a person who claims an interest in the property may, before the end of the period of twelve months

commencing on the day on which the forfeiture order is made, apply under this subsection to the court for an order under subsection (1).

(3) A person who—

(a) had knowledge of the application for the forfeiture order before the order was made; or

(b) appeared at the hearing of that application, shall not be permitted to make an application under subsection (2), except with leave of the court.

(4) A person who makes an application under subsection (1) or (2) shall give not less than fourteen days written notice of the making of the application to the Agency Director who shall be a party to any proceedings in the application.

(5) An applicant or the Agency Director may in accordance with the High Court rules, appeal to the Court of Appeal against an order made under subsection (1).

(6) A person appointed by the court under this Act as a receiver or trustee shall, on application by any person who has obtained an order under subsection (1), and where the period allowed by the rules of court with respect to the making of appeals has expired and any appeal against that order has been determined—

(a) direct that the property or Part thereof to which the interest of the applicant relates, be returned to the applicant; or (b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

(7) The Court may—

(a) before making a confiscation order; or (b) in the case of property in respect of which a restraining order was made, where that order was served in accordance with section 68, or in the case of property in respect of which a court order has been made authorizing the seizure of the property, set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the restraining order, unless the conveyance or transfer was made for value to a person acting in good faith and without notice.

94. Exclusion of interests in property

(1) The High Court may, on application—

(a) under section 90(3); or

(b) by a person referred to in section 91(1), and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of crime if it finds, on a balance of probabilities, that the applicant for the order—

(a) has acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

(b) where the applicant had acquired the interest concerned after the commencement of this Act, that such person neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of crime.

(3) The High Court may make an order under subsection (1), in relation to the forfeiture of property which has been used or is intended for use in the commission of an offence, if it finds, on a balance of probabilities, that the applicant for the order had acquired the interest concerned legally and—

(a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held has been used or is intended for use in the commission of an offence; or

(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned in connection with the commission of an offence.

(4) If an applicant for an order under subsection (1) adduces evidence to show that he did not know or did not have reasonable grounds to suspect that the property in which the interest is held is tainted property, the Agency Director may submit a return of the service on the applicant of a notice issued under section 90(3) in rebuttal of that evidence in respect of the period since the date of such service.

(5) Where the Agency Director submits a return of the service on the applicant under subsection (4), the applicant shall, in addition to the facts referred to in subsections (2)(a) and (b), also prove on a balance of probabilities that, since such service, he has taken all reasonable steps to prevent the further use of the property concerned in the commission of an offence.

(6) The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the High Court deems appropriate, including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the High Court may determine, to prevent the future use of the property in connection with the commission of an offence.

376. A description of the Kenyan legal system is provided in the General Information section.

(b) Observations on the implementation of the article

377. Regarding paragraph 9, Kenya has indicated that on the subject of the acquisition for payment and without prior knowledge, it applies the principles of common law, under the Judicature Act (Cap. 8).

378. To better understand the application of the paragraph under review, Kenya refers to the General Information section.

379. No examples of implementation were provided. The provision appears to be legislatively implemented.

Article 32. Protection of witnesses, experts and victims

Paragraph 1 of article 32

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.

(a) Summary of information relevant to reviewing the implementation of the article

380. Kenya indicated that it has legislated the Witness Protection Act, 2006 (Act No. 16 of 2006) and the Witness Protection (Amendment) Act, 2010 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.

381. A Witness Protection Agency has been established for the purpose of setting up and administration of a witness protection programme and to determine the type of protection measures to be applied in any given case.

382. The Witness Protection Act as amended by the Witness Protection (Amendment) Act provides:

3A. (1) There is established an Agency to be known as the Witness Protection Agency.
(2) The Agency shall be a body corporate with perpetual succession and a common seal, and shall, in its corporate name, be capable of-
(a) suing and being sued;
(b) holding and alienating movable and immovable property; (c) borrowing and lending money; and
(d) doing or performing all such other acts or things as may be lawfully done by a body corporate.

3B.(1) The object and purpose of the Agency is to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their cooperation with prosecution and other law enforcement agencies.
(2) The nature of the special protection referred to in subsection (1) shall entail the power of the Agency to acquire, store, maintain and control firearms and ammunition and electronic or other necessary equipment, despite the provisions of any other law.

3C.(1) The functions of the Agency shall be to -
(a) establish and maintain a witness protection programme;
(b) determine the criteria for admission to and removal from the witness protection programme;
(c) determine the type of protection measures to be applied;
(d) advise any Government Ministry, department, agency or any other person on the adoption of strategies and measures on witness protection; and
(e) perform such other functions as may be necessary for the better carrying out of the purpose of this Act.

3D.(1) The Agency shall have power to-
(a) control and supervise its staff in a manner and for such purposes as may be necessary for the promotion of the purpose and the object for which the Agency is established;
(b) administer the funds and assets of the Agency;
(c) receive any grants, gifts, donations or endowments and make legitimate disbursement therefrom;
(d) enter into association with such other persons, bodies, or organizations within or

outside Kenya as it may consider desirable or appropriate in furtherance of its object and purpose;

(e) enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or international entities relating to the relocation of protected persons and other witness protection measures;

(f) open bank accounts for the funds of the Agency;

(g) collect, analyze, store and disseminate information related to witness protection;

(h) give such instructions to a protected person as the Agency may consider necessary;

(i) search the protected person and their property and seize items regarded by the Agency to be a threat to the protected person or another person or the integrity of the programme;

(j) summon a public officer or other person to appear before it or to produce a document or thing or information which may be considered relevant to the functions of the Agency within a specified period of time and in such manner as it may specify;

(k) invest the funds of the Agency not currently required for its purposes.

(2) A person who fails to comply with a direction of the Agency issued under subsection (1) (i), commits an offence and is liable, on conviction, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding one year or both.

383. Kenya indicated that the Witness Protection Programme (WPP) is established and operational as of 2011. The Witness Protection Programme came into operation on 1 September 2008 vide Legal Notice No. 110/2008 dated 19 August 2008 as amended by the Witness Protection (Amendment) Act (No. 2 of 2010).

384. Kenya indicated that the estimated cost per protected person is approximately Kshs. 2,500,000 or USD 30,000 per annum.

(b) Observations on the implementation of the article

385. Regarding paragraph 1, Kenya has referred to the provisions of the Witness Protection Act, 2006, amended in 2010, to ensure the protection of the witnesses in criminal cases and other procedures to constitute the Witness Protection Agency, with the necessary faculties, functions, direction and administration for these matters.

386. The Witness Protection Agency was created to implement and manage a witness protection program and to determine the kind of protection measures to be taken in all cases.

387. During the country visit it was confirmed that protections could also be available for experts who give testimony and, as appropriate, their relatives and other persons close to them.

388. Regarding examples of implementation, Kenya indicated that, at the time of the country visit, 20 witnesses were receiving protection in relation to corruption matters. Specifically, the Witness Protection Agency confirmed that nine applications for the protection of witnesses under the Witness Protection Act had been received at the time of the country visit, in regards to which 20 witnesses were included in the WPP. Protective measures provided include, inter alia, use of pseudonyms, redaction of identifying information in testimony and advisory services.

389. During the country visit it emerged that despite the legal and institutional measures that have been put into place there are still significant challenges of witnesses being unwilling to testify in corruption cases because of fear of reprisal and reluctance of being involved in the criminal justice system. There have also been physical threats on law enforcement officers and members of the judiciary. In this respect it is

recommended that Kenya continue to take measures to strengthen the protection of witnesses and whistleblowers on the ground and to ensure adequate protection for those investigating, prosecuting and adjudicating corruption cases.

Subparagraph 2 (a) of article 32

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, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(a) Summary of information relevant to reviewing the implementation of the article

390. Kenya indicated that measures for protecting witnesses envisaged under the Witness Protection Act include:

- physical and armed protection,
- relocation,
- change of identity or
- any other measure necessary to ensure the safety of witnesses.

391. The Procedures provided by the Act include requesting the Courts to implement protection measures during court proceedings.

392. Section 6 of the Witness Protection (Amendment) Act amends Section 4 of the Witness Protection Act and states:

4. (1) The Agency shall establish and maintain a witness protection programme and shall take such action as may be necessary and reasonable to protect the safety and welfare of the protected persons.

(2) Without prejudice to the generality of subsection (1), the action taken under subsection (1) may include but not be limited to-

- (a) physical and armed protection;
- (b) relocation;
- (c) change of identity; or
- (d) any other measure necessary to ensure the safety of a protected person.

(3) The Agency may request the courts, in support of the programme, to implement protection measures during court proceedings which measures may include but not be limited to-

- (a) holding in camera or closed sessions;
- (b) the use of pseudonyms;
- (c) the redaction of identifying information;
- (d) the use of video link; or
- (e) employing measures to obscure or distort the identity of the witness.

(4) The Agency shall put in place support measures to facilitate the integration of the protected person.

(b) Observations on the implementation of the article and good practice

393. To illustrate the implementation Kenya has indicated satisfactory and modern

witness protection measures. These include inter alia physical relocation and change or non-disclosure of identity, as necessary. Although no statistical data was available, examples of implementation (including the use of pseudonyms) were provided.

394. The reviewers acknowledge that Kenya is continuing to strengthen its legal and institutional framework on the protection of witnesses, including through the witness protection programme.

Subparagraph 2 (b) of article 32

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:

(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.

(a) Summary of information relevant to reviewing the implementation of the article

395. Kenya indicated that the Witness Protection Act allows the court to grant leave for witnesses to give evidence in camera or closed sessions; by using pseudonyms; by reducing identifying information; by using video link; or by employing measures to obscure or distort the identity of the witness.

396. Section 4 of the Witness Protection Act states:

(3) The Agency may request the courts, in support of the programme, to implement protection measures during court proceedings which measures may include but not be limited to-

(a) holding in camera or closed sessions;

(b) the use of pseudonyms;

(c) the reduction of identifying information;

(d) the use of video link; or

(e) employing measures to obscure or distort the identity of the witness.

(4) The Agency shall put in place support measures to facilitate the integration of the protected person.

397. Kenya referred to the case of *Republic versus Livingstone Maina Ngare* (Anti-Corruption Case No. 5/2002), Nairobi.

This case relates to corruption offences committed in 2001 partly in the United States of America and partly in Kenya, by a World Bank official (U.S) and a Kenyan. The corruption emanated from a World Bank-funded project, in which a World Bank official is alleged to have bribed the project manager in Kenya. The allegation was that the project manager of the Kenya Urban Transport Infrastructure Project (KUTIP) under the Ministry of Local Government Kenya and the World Bank Official in US overstated the cost of the contract for consultancy services, for their personal gain. The World Bank Official was charged with corruption-related offences in the U.S., whereas the Kenyan official (project manager) was charged with corruption offences in Kenya. Both the U.S. and Kenya provided each other mutual legal assistance in acquiring documents that were to be used in the respective trials. The U.S. official pleaded guilty by way of plea bargain and made a promise to testify against the Kenyan suspect. The Kenyan suspect pleaded not guilty, and the U.S. suspect and other officials were expected to testify against him.

When called upon to testify, the U.S. witnesses expressed fear for their safety while in Kenya. Faced with the predicament the prosecution made an application for the witnesses to testify via video link. The Kenyan High Court granted leave for their evidence to be taken via video conference.

398. Also in Mombasa Criminal Case 3141/2010 involving piracy, the Court allowed the prosecution to give evidence through the use of video link.

(b) Observations on the implementation of the article

399. Kenya has adopted measures allowing for a range of evidentiary protections to be provided during court proceedings. Although no statistical data was available, examples of implementation (including redaction of identifying information in testimony) were provided.

Paragraph 3 of article 32

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.

(a) Summary of information relevant to reviewing the implementation of the article

400. Kenya indicated that this is provided for under Section 3D of the Witness Protection Act as amended by the Witness Protection (Amendment) Act, which grants powers to the Witness Protection Agency to enter into agreements with regional or international entities for the relocation of protected persons.

401. Section 3D(1) (e) of the Witness Protection Act provides that the Witness Protection Agency shall have power to:

enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or international entities relating to the relocation of protected persons and other witness protection measures;

402. Kenya indicated that it is yet to relocate any witnesses to any other country under its Witness Protection Programme.

(b) Observations on the implementation of the article

403. It was confirmed during the country visit that no witness relocation agreements are in place.

404. Kenya has indicated that it has not yet relocated witnesses abroad under its Witness Protection Programme.

Paragraph 4 of article 32

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

(a) Summary of information relevant to reviewing the implementation of the article

405. Kenya indicated that a witness is defined in Section 3 of the Witness Protection Act

to include victims.

406. Section 3 of the Witness Protection Act provides.

3. (1) For the purposes of this Act, a witness is-

(a) a person who has given, or agreed to give, evidence on behalf of the State in-

(i) proceedings for an offence; or

(ii) hearings or proceedings before an authority which is declared by the Minister by order published in the Gazette to be an authority to which this paragraph applies;

(b) a person who has given or agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence against a law of Kenya;

(c) a person who has made a statement to-

(i) the Commissioner of Police or a member of the Police Force; or

(ii) a law enforcement agency, in relation to an offence against a law of Kenya; (d) a person who-

(i) for the purposes of any treaty or agreement to which Kenya is a party; or

(ii) in circumstances prescribed by regulations made under this Act, is required to give evidence in a prosecution or inquiry held before a court or tribunal outside Kenya; or

(e) a person who, for any other reason, may require protection or other assistance under this Act.

(2) A person shall be deemed to be a witness for the purposes of this Act if, because of a family or other relationship with, or any association with, a person to whom subsection (1) applies, he may require protection or other assistance under this Act.

(b) Observations on the implementation of the article

407. Kenya has indicated that the definition of a witness provided by section 3 of the Witness Protection Act includes victims. Representatives of the Witness Protection Agency explained during the country visit that the process of admission of victims into the Witness Protection Programme is the same under section 3 as for other witnesses.

408. They confirmed that there have been no cases to date of protection of victims under the Programme.

409. During the country visit, the Witness Protection Agency further explained that a specific Bill on the protection of victims had passed on 29 August 2014. The Victim Protection Act, 2014 (No. 17 of 2014), which provides for the protection of victims of crime and abuse of power, commenced operation on 3rd October, 2014, following the country visit. The Act is administered by WIPA. The reviewers welcome the swift implementation of the legislation, copies of which were not yet available, and its adequate enforcement on the ground.

Paragraph 5 of article 32

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.

(a) Summary of information relevant to reviewing the implementation of the article

410. Under the administrative procedures of the Witness Protection Agency, the views and concerns of the victim are considered. It should, however, be noted that victims do not directly present these views and concerns to the court but to the Witness Protection

Agency or law enforcement agency. For example, complaints may be made to the Ethics and Anti-Corruption Commission or Kenya police, who will initiate investigations as appropriate. Moreover, during the prosecution stage, plea agreements may be entered into following consultation with the victim. There are also provisions in the Criminal Procedure Code concerning victim impact statements (e.g., Sections 137I, 329C and 329D).

Criminal Procedure Code

137D. Consultation with victim, etc.

A prosecutor shall only enter into a plea agreement in accordance with section 137A –

- (a) after consultation with the police officer investigating the case;
- (b) with due regard to the nature of and the circumstances relating to the offence, the personal circumstances of the accused person and the interests of the community;
- (c) unless the circumstances do not permit, after affording the victim or his legal representative the opportunity to make representations to the prosecutor regarding the contents of the agreement.

137I. Address by parties.

(1) Upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with section 216.

(2) In passing a sentence, the court shall take into account –

- (b) a victim impact statement, if any, made in accordance with section 329C; ...

329C. When victim impact statements may be received and considered.

(1) If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender.

(2) If the primary victim has died as a direct result of the offence, the court shall receive a victim impact statement given by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate.

(3) Notwithstanding subsections (1) and (2), the court –

- (a) shall not consider a victim impact statement unless it has been filed by or on behalf of the victim to whom it relates or by or on behalf of the prosecutor; and
- (b) shall not consider a victim impact statement given by a family victim in connection with the determination of the punishment for the offence unless it considers that it is appropriate to do so.

(4) The court may make a victim impact statement available to the prosecutor, to the offender or to any other person on such conditions (which shall include conditions preventing the offender from retaining copies of the statement) as it considers appropriate.

329D. Victim impact statements discretionary.

(1) The giving of a victim impact statement is not mandatory.

(2) A victim impact statement shall not be received or considered by a court if the victim or any of the victims to whom the statement relates objects to the statement being given to the court.

(3) The absence of a victim impact statement shall not give rise to any inference that an offence had little or no impact on a victim.

(b) Observations on the implementation of the article

411. Kenya appears to have in place appropriate mechanisms for taking into consideration the views and concerns of victims during criminal proceedings. No examples of implementation were provided.

(c) Challenges, where applicable

1. Limited awareness of state-of-the-art programmes and practices for witness and expert protection
2. Limited resources for implementation (e.g. human/financial)

(d) Technical assistance needs

1. Summary of good practices/lessons learned
2. Capacity-building programmes for authorities responsible for establishing and managing witness and expert protection programmes
3. On-site assistance by a relevant expert
4. Capacity-building programmes for authorities responsible for establishing and managing witness, expert and victim protection programmes

UNODC has previously provided an on-site expert on witness protection.

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.

(a) Summary of information relevant to reviewing the implementation of the article

412. Kenya indicated that Section 65 of the ACECA provides a foundation for the protection of informers against retaliation for any assistance, or any disclosure of information given by the person to the Commission or an investigator. Kenya further indicated that the wording of Section 65 is wide enough to encompass all the requirements of the article under review.
413. Under Section 5 of the Witness Protection Act, the Director can admit potential witnesses into the witness protection programme, if they are intimidated or threatened.
414. The police also ensure that the identities of their informers are protected.
415. Section 65 of the Anti-Corruption and Economic Crimes Act reads:
 65. Protection of informers.
 - (1) No action or proceeding, including a disciplinary action, may be instituted or maintained against a person in respect of-
 - (a) assistance given by the person to the Commission or an investigator; or
 - (b) a disclosure of information made by the person to the Commission or an investigator.
 - (2) Subsection (1) does not apply with respect to a statement made by a person who did not believe it to be true.
 - (3) In a prosecution for corruption or economic crime or a proceeding under this Act, no witness shall be required to identify, or provide information that might lead to the identification of, a person who assisted or disclosed information to the Commission or an investigator.
 - (4) In a prosecution for corruption or economic crime or a proceeding under this Act, the Court shall 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.

(5) Subsections (3) and (4) shall not apply to the extent determined by the court to be necessary to ensure that justice is fully done.

416. There are mechanisms that encourage anonymous reporting. Section 20 of the Proceeds of Crime and anti-Money Laundering Act provides:

20. Protection of information and informers

(1) Where any information relating to an offence under this Act is received by the Centre or an authorised officer, the information and the identity of the person giving the information shall be kept confidential.

(2) Subsection (1) shall not apply to information and identity of a person giving the information—

(a) where it is for the purposes of assisting the Centre or the authorised officer to carry out their functions as stated under this Act; or with regard to a witness in any civil or criminal proceedings—

(i) for the purposes of this Act; or

(ii) where the court is of the opinion that justice cannot fully be done between the parties without revealing the disclosure or the identity of any person as the person making the disclosure.

417. Kenya indicated that the EACC has previously intervened to assist informers who have faced retaliation, for example through dismissal or punitive transfers at their places of work. This is done administratively, for example, by writing to the senior managers in the affected corporation or the Principal Secretary, if it is a ministry. An example is a case where EACC intervened to prevent the transfer of (and eventual attempt to dismiss) an employee of the National Oil Corporation of Kenya, who had made a report of grand corruption involving the parastatal.

(b) Observations on the implementation of the article

418. In the absence of comprehensive case examples and information on actual protective measures, there is little basis on which to assess the practical implementation of the article under review. Kenya is encouraged to continue to take measures to strengthen whistleblower protections through adequate enforcement on the ground.

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.

(a) Summary of information relevant to reviewing the implementation of the article

419. Kenya indicated that it has partially implemented the article. There is no statutory provision directly dealing with consequences of corruption as outlined under this Article, although the common law and the doctrines of equity are relevant.

420. Section 40 of the Public Procurement and Disposal Act (PPDA) provides that a

person who is involved in any corrupt practice in procurement shall be disqualified from signing a contract. The section provides as follows:-

Section 40. (1) No person, agent or employee shall be involved in any corrupt practice in any procurement proceeding.

(2) If a person or an employee or agent of a person contravenes subsection (1) the following shall apply-

(a) the person shall be disqualified from entering into a contract for the procurement; or

(b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2) (b) does not limit any other legal remedy the procuring entity may have.

(4) A person, employee or agent who contravenes subsection (1) shall be guilty of an offence. If the contract has already been signed then it shall be voidable (nullified) at the option of the procuring entity.

421. Section 41 of PPDA provides similar consequences for a person who is involved in fraudulent practice in the procurement process. It provides:-

Section 41. (1) No person shall be involved in a fraudulent practice in any procurement proceeding.

(2) If a person contravenes subsection (1) the following shall apply-

(a) the person shall be disqualified from entering into a contract for the procurement; or

(b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

422. Kenya indicated that there are no adequate provisions to address the consequences of corruption in all aspects of corruption.

423. Kenya provided the following data on the implementation of these measures by procurement entities in the country.

Debarred Firms

Case No.	Firm's Name and Registration Number	Address	Ineligibility period		Ground for debarment
			From	To	
6 of 2010	Collect Enterprises; BN 303465	P.O. Box 16891, Nairobi	25.10.2013	25.10.2018	Giving false information about her qualification in a procurement proceeding Section 115(1)(d)
Particulars of registered proprietor/s: Ernest Mungai Kamau					
Persons that signed procurement contract:					
1. Godfrey Mamati Sifuna,					
2. Winnie Tonui					

(b) Observations on the implementation of the article

424. Kenya indicated it does not have adequate provisions to address the different

consequences of corruption. However, it provides for disqualification in procurement of persons involved in corrupt or fraudulent practices and for voiding of contracts by the procuring entity. Kenya is encouraged to adopt measures to address the consequences of corruption, including remedial measures, outside of the procurement provisions cited above.

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.

(a) Summary of information relevant to reviewing the implementation of the article

425. Kenya indicated that it has adopted measures to ensure access to justice and compensation for offences of corruption through the Anti-Corruption and Economic Crimes Act (ACECA). Sections 51 to 55 of ACECA provide liability for compensation, liability for improper benefits, compensation orders on conviction, forfeiture of unexplained assets, and other measures. The sections read as follows:

Section 51. Liability for compensation

A person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered.

Section 52. Liability for improper benefits

A person who receives a benefit the receipt of which would constitute an offence under section 39, 40 or 43 is liable, for the value of the benefit, to the following persons-

- (a) if the receipt constitutes an offence under section 39, to the agent's principal; (b) if the receipt constitutes an offence under section 40, to the person advised; or
- (c) if the receipt constitutes an offence under section 43, to the persons beneficially entitled to the property.

Section 53. Liability - miscellaneous provisions

- (1) A person liable for an amount under section 51 or 52 shall also be liable to pay interest, at the prescribed rate, on the amount payable.
- (2) Nothing in section 51 or 52 affects any other liability a person may have.
- (3) An amount for which a person is liable under section 51 or 52 to a public body may be recovered by the public body or by the Commission on its behalf.
- (4) For greater certainty, nothing in the Government Proceedings Act prevents the Commission from instituting civil proceedings to recover amounts under subsection (3).
- (5) A person is not entitled to any amount under section 51 or 52 in relation to a particular instance of corruption or economic crime if that person was a party to the corruption or economic crime or that person did a related act that also constituted corruption or economic crime.

Section 54. Compensation orders on conviction

- (1) A court that convicts a person of any corruption or economic crime shall, at the time of conviction or on subsequent application, order the person-
 - (a) to pay any amount the person may be liable for under section 51 or 52; and
 - (b) to give to the rightful owner any property acquired in the course of or as a result of the conduct that constituted the corruption or economic crime or an amount equivalent

to the value of that property.

(2) If the rightful owner referred to in subsection (1)(b) cannot be determined or if there is no rightful owner, the court shall order that the property or equivalent amount be forfeited to the Government.

(3) In making an order under this section, a court may quantify any amount or may determine how such amount is to be quantified.

(4) An order under this section may be enforced by the person in whose favour it is made as though it were an order made in a civil proceeding.

426. Regarding examples of implementation Kenya indicated that some public entities whose assets were irregularly acquired have had their properties returned to them after recovery. Examples include the Mayors House which was returned to the City Council of Nairobi; the judiciary land in Mombasa was returned for use by the judiciary upon its recovery.

(b) Observations on the implementation of the article

427. Kenya meets the conditions required by this provision with sections 51-54 ACECA. Two examples are provided to this end.

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 specialized 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.

(a) Summary of information relevant to reviewing the implementation of the article

428. Kenya indicated that the Kenyan legal framework provides for the establishment of specialized agencies that are able to carry out their functions without any undue influence.

Specialized agencies

429. The Constitution 2010 provides for the establishment of commissions and independent offices. Under Article 79, it mandates Parliament to enact legislation to establish an independent ethics and anti-corruption commission, for purposes of ensuring compliance with, and enforcement of, the provisions of Chapter 6.

430. Pursuant to Article 79, Parliament enacted the Ethics and Anti-Corruption Commission Act No. 22 of 2011. Section 3 (1) thereof establishes an **Ethics and Anti-Corruption Commission**. The Commission (EACC) has since been established. It has the status and powers of a commission under Chapter 15.

79. Legislation to establish the ethics and anti-corruption commission

Parliament shall enact legislation to establish an independent ethics and anticorruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

3. Establishment the Commission.

(1) There is established an Ethics and Anti-Corruption Commission.

(2) In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to—

(a) acquire, hold, charge and dispose movable and immovable property; and

(b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution, this Act or any written law, as may lawfully be done or performed by a body corporate.

(3) The Commission shall ensure access to its services in all parts of the Republic accordance with Article 6 (3) of the Constitution.

431. The functions of the Ethics and Anti-Corruption Commission include:

Functions

- Ensuring compliance with, and enforcement of the requirements under Chapter Six of the Constitution.
- Develop and promote standards and best practices in integrity and anti-corruption.
- Investigation of corruption and violation of codes of ethics, and recommend prosecution or other action to the Director of Public Prosecutions.
- Investigate allegations of unethical conduct by public officials and recommend appropriate action.
- Institute court proceedings for recovery, protection, freezing or confiscation of proceeds of corruption.
- Monitor the practices and procedures of public bodies to detect corrupt practices and to secure revision of methods of work to eliminate loopholes.
- Educate and raise public awareness on ethical and corruption issues.
- Overseeing enforcement of codes of ethics.
- Advise any person on any of its functions.

432. Under Article 6 of the Constitution, a national State organ such as EACC is required to ensure reasonable access to its services in all parts of the Republic. To comply with this requirement, EACC has so far established five regional offices to complement the headquarters in Nairobi. These are at Mombasa, Kisumu, Eldoret, Nyeri and Garissa. The Commission is also ensuring its presence in a number of centres under the *Huduma* Centres programme established by the government. The eventual plan is to ensure the Commission has a presence in each of the 47 county governments.

433. The main challenges facing EACC are:

- Policy/Legal framework
- Slow judicial process
- Adverse court decisions
- Inadequate capacity

434. Sections 21-43 of the Proceeds of Crime and Anti-Money Laundering Act provide for the establishment, functions and operations of the **Financial Reporting Centre**, which is funded by the National Treasury. An Advisory Board advises on matters related to policy. Pursuant to Section 44 of POCAMLA (quoted under article 39 below), financial institutions have the obligation of reporting suspicious transactions to the Financial Reporting Centre, which is then in charge of transmitting the information to the investigative authorities where warranted. Additional information regarding the

operations of FRC is included under UNCAC article 39 below.

435. Sections 52-55 of the Proceeds of Crime and Anti-Money Laundering Act provide for the establishment of the **Asset Recovery Agency**. The agency was recently established and an Acting Director has been appointed. There are also other independent agencies which have a mandate under the anti-corruption and good governance sector.

53. The Agency and its Director

(1) There is established a body to be known as Asset Recovery Agency (hereinafter referred to as the “Agency”) which shall be a semi-autonomous body under the office of the Attorney-General.

(2) The Attorney-General shall appoint a fit, competent and proper person to be the Director of the Agency (hereinafter referred to as the “Agency Director”).

(3) For a person to be appointed as the Agency Director, the person shall—

(a) hold a degree in law, economics or finance from a recognized university;

(b) have at least seven years working experience in a relevant field, five of which shall have been at senior management level;

(c) have such other requirements that may be prescribed by the Attorney-General.

(4) The Agency Director may, with the approval of the Attorney-General, obtain such number of staff on secondment and on such terms and conditions of service as may be approved by the Attorney-General, and may make such arrangements for the provision of services, as he considers appropriate for or in connection with the exercise of his functions.

(5) Anything which the Agency Director is authorised or required to do may be done by—

(a) a member of staff of the Agency, or

(b) a person providing services under arrangements made by the Agency Director, if authorised by the Agency Director (generally or specifically) for that purpose.

54. Functions and powers of the Agency

(1) The functions of the Agency shall be to implement the provisions of Parts VII to XII inclusive and to exercise all powers set forth therein.

(2) The Agency shall have all the powers necessary or expedient for the performance of its functions.

55. Co-operation with the Agency

A person who or a body which has functions relating to investigation or prosecution of offences under this Act and the Agency shall co-operate in the exercise of their powers or the performance of their functions under this Act.

436. **Anti-Corruption Courts** are established by Section 3 of the Anti-Corruption and Economic Crimes Act which reads:

3. Power to appoint special magistrates

(1) The Chief Justice may, by notification in the Kenya Gazette, appoint as many special Magistrates as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely-

(a) corruption and economic crimes and related offences; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in paragraph (a).

4. Cases triable by special Magistrates

(1) Notwithstanding anything contained in the Criminal Procedure Code, or in any other law for the time being in force, the offences specified in this Act shall be tried by special Magistrates only.

(2) Every offence specified in this Act shall be tried by the special Magistrate for the

area within which it was committed, or, as the case may be, by the special Magistrate appointed for the case, or where there are more special Magistrates than one for such area, by one of them as may be specified in this behalf by the Chief Justice.

(3) When trying any case, a special Magistrate may also try any offence, other than an offence specified in this Act, with which the accused may, under the Criminal Procedure Code, be charged at the same trial.

(4) Notwithstanding anything contained in the Criminal Procedure Code, a special Magistrate shall, as far as practicable, hold the trial of an offence on a day-to-day basis until completion.

437. Other specialized bodies include the **Office of the Auditor-General, Public Procurement Oversight Authority, Banking Fraud Investigation Unit**, etc.

438. Article 157 (1) of the Constitution 2010 establishes the **Office of Director of Public Prosecutions (ODPP)**.

439. The functions of the ODPP are to exercise State powers of prosecution and it may-

- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

A specialized unit has been created in the ODPP, the Anti-Corruption and Economic Crimes Division to prosecute corruption-related cases. There is also a specialized unit on Anti-Money Laundering/Countering the Financing of Terrorism to prosecute money laundering-related cases.

ODPP was established following the promulgation of the Constitution in 2010 to ensure more accountability and transparency in the functions of the State in handling criminal matters. The Office was previously a department under the State Law Office discharging responsibilities in the criminal jurisdiction for the country on behalf of the Attorney General. ODPP was delinked from the State Law Office with effect from 1 July 2011, following the appointment of a DPP under the new Constitution. Consequently all prosecutorial powers and functions were transferred from the Attorney General's Office to the DPP. Further Parliament enacted the Office of the Director of Public Prosecutions Act, No. 2 of 2013 (ODPP Act), which took effect on 16 January 2013. The Act was passed to implement Articles 157 and 158 of the Constitution. The Act, among other things, establishes an Advisory Board that deals with the selection and recruitment of personnel.

ODPP has decentralized prosecution services to the county level. So far the ODPP has established offices in all 47 counties and 9 sub-counties in Kenya.

It was reported during the country visit that ODPP faces a number of challenges, namely:

- Inadequate capacity, shortage of professionals and support staff, poor terms and conditions of service, insufficient budgetary allocation, limited office space and library facilities, as well as research and other resources.
- Inadequate specialized training to handle corruption, economic crimes, money laundering and cybercrime cases, MLA and extradition matters.

- Constitutional petitions and judicial review applications which derail prosecutions.
- Hostile and compromised witnesses who weaken the cases.
- Manual process that make it hard to track cases.

Technical assistance needs for DPP include:

- (a) Capacity building – enhance capacity to prosecute corruption and economic crime.
- (b) Development of case management system and automation of processes and procedures
- (c) Decentralization of ODPP Service
- (d) Law reform and development of prosecutorial policies
- (e) Witness and victims of crime facilitation and support programme.

Additional information on ODPP is included under article 30(3).

440. Corruption cases are heard by Special Magistrates, who preside over anti-corruption courts, as per the provisions of ACECA (Part II). Part II of ACECA provides for the gazettment of special magistrates to preside over corruption matters. Anti-corruption courts are an administrative division created in the judiciary to facilitate these special magistrates. Appeals therefrom go to the High Court in the exercise of its appellate criminal jurisdiction.

Independence

441. Kenya indicated that the independence of the **EACC** is guaranteed under Chapter 15 of the Constitution. Article 249(2) provides for the independence of commissions and the holders of independent offices. Section 28 of the EACC Act provides for the independence of the EACC.

249. Objects, authority and funding of commissions and independent offices

(2) The commissions and the holders of independent offices—

- (a) are subject only to this Constitution and the law; and
- (b) are independent and not subject to direction or control by any person or authority.

28. Independence of the Commission.

Except as provided in the Constitution and this Act, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority.

442. Article 249(3) of the Constitution 2010 provides that “Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.”

443. The independence of the Ethics and Anti-Corruption Commission has been entrenched in the Constitution of Kenya, 2010 under Article 79 (quoted above) and Chapter 15.

444. The Constitution requires **DPP** to make annual reports to Parliament on the prosecution of all corruption and economic crime cases. Since the commencement of the ACECA 2003, ten (10) reports have been made.

445. The FRC reports administratively to the Ministry of Finance.

Staffing

446. Kenya provided the following information on staffing.

EACC

- At the time of the country visit, the Commission was engaged in a recruitment exercise to enhance its capacity.
- In post, the staff complement stands at approximately 280.
- The staff are distributed in the headquarters of the Commission, and the five regional offices.
- It is expected that the staff complement will be raised to approximately 500 by the end of the recruitment exercise, which was still ongoing at the time of review. Subsequent to the country visit, EACC had recruited additional staff bringing the total capacity to about 400.

ODPP

The Office of the Director of Public Prosecutions Act, 2013 provides that there is an Advisory Board that deals with the selection and recruitment of personnel, promotions and discipline. There is also a Human Resource and Training Department that deals with training of personnel in the office.

16. Advisory Board.

(1) There is established an advisory Board to the Office.

17. Functions and powers of the Board.

- (1) The principal functions of the Board shall be to advise the Office on—
- (a) recruitment and appointment of members of staff of the Office;
 - (b) promotions;
 - (c) discipline; and
 - (d) any other matters that may be referred to the Board by the Director.

To meet operational staffing levels, ODPP embarked on a major recruitment drive. This recruitment process for both technical and administrative staff is ongoing. From an initial staff of about 93 legal and 132 non-legal staff in 2011, the ODPP staff now stands at 344 legal and 335 non-legal staff. Recruitment of additional staff is ongoing.

Further, ODPP has trained and imparted professional skills for ODPP staff. This is an ongoing exercise.

FRC

Since it began operations in April 2012, 17 staff members have been seconded at the technical level from 11 State agencies. The hiring objectives at present are 40-60 staff.

(b) Observations on the implementation of the article

447. As for the detection of corruption, Kenya cited Sections 21-43 of the Proceeds of Crime and Anti-Money Laundering Act, which provide for the establishment, functions and operations of the Financial Reporting Centre (section 52 - 55).

448. Moreover, the Police have a mandate to investigate all crimes except offences under ACECA, which fall under the remit of the Ethics and Anti-Corruption Commission. In particular, this includes corruption offences under the Penal Code, e.g., Chapter X

(abuse of office, sections 99-104) and Chapter XXXII (fraud and false accounting, sections 327-331), money laundering, as well as other serious crimes. It was explained during the country visit that in practice, Penal Code offences can also be investigated by EACC if they amount to corruption, thus avoiding duplication in investigations.

449. The Asset Recovery Agency has been created by virtue of Section 53 of POCAMLA and an Acting Director has been appointed. This Agency is in the process of being operationalized. There are, however, many other agencies that have mandates related to the fight against corruption and good governance. It is recommended that Kenya adopt procedures to clearly delineate the mandate and functions of the Asset Recovery Agency to avoid overlap with other law enforcement institutions in practice. Coordination mechanisms, for example in the form of inter-agency agreements or procedures, would also be useful.

450. The different organs cited to respond to this article, and the answers provided for the articles of the Convention, show that certain measures might still be required for a more efficient implementation. In particular:

1. It was confirmed during the country visit that the police face challenges of limited capacity in forensic investigations and in detecting emerging crimes.
2. The challenges and technical assistance needs of the ODPP are also noted.
3. National authorities further indicated that capacity building in the judiciary, in particular for magistrates, on corruption cases is needed. During the country visit, representatives of the judiciary confirmed there is a need for further training of judges and magistrates in handling corruption cases.
4. In this context the reviewers recommend that Kenya, in consultation with its development and technical assistance partners, undertake a comprehensive technical assistance needs assessment, using as a baseline the results of the UNCAC review, in order to develop a country-led and prioritized technical assistance action plan, to address the identified needs.
5. It was confirmed during the country visit that there is a significant backlog of cases in the courts and delays in the adjudication of corruption cases. It was explained that this is often due to litigants seeking judicial review through making applications to the High Court and raising procedural unfairness claims. It was reported that a National Council on the Administration of Justice, consisting of judges, the Attorney-General, DPP and representatives from the Prisons Department, has been created to address the issue. The reviewers welcome the creation of the Council and recommend that it continue to take proactive steps to review issues of delay in the criminal justice system and to develop policy and institute necessary reforms, including considering international best practices from countries that have addressed the issue.
6. Another avenue for improvement would involve significant government effort directed at judges and civil servants, whether state, local or elected, to raise awareness of the Convention and to strengthen capacity in the investigation, prosecution and adjudication of corruption cases. It is recommended that Kenya continue to devote adequate resources and attention to training/capacity building for law enforcement agencies, in particular the police and ODPP, in the investigation and prosecution of corruption offences. Consideration should be given to inter-institutional arrangements involving prosecutors, investigators and the judiciary.

(c) Successes and good practices

451. The regional presence of EACC, its Constitutional anchor and operational mechanism as described under article 39 (e.g., through the Integrated Public Complaints Referral Mechanism (e-IPCRM)) can be considered a good practice.

Article 37. Cooperation with law enforcement authorities

Paragraph 1 of article 37

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.

(a) Summary of information relevant to reviewing the implementation of the article

452. Kenya indicated that Section 5 of the ACECA empowers the Special Magistrate to pardon persons who make a full true disclosure of all the circumstances of the commission of an offence and all the persons so involved.

453. Under Section 25A of the Anti-Corruption and Economic Crimes Act, the Ethics and Anti-Corruption Commission may, in consultation with the Attorney General tender an undertaking not to institute or continue with an investigation against any person, when the person makes a full and true disclosure of all material facts relating to an offence. Under Section 56B, the Commission can negotiate and enter a settlement with any person or tender an undertaking in writing not to institute criminal proceedings against a person. Such an undertaking must be recorded in Court. It is noted that, where the Anti-Corruption and Economic Crimes Act refers to the Minister this refers to the Attorney General, according to Executive Order No. 2 of May 2013 on the Organisation of the Government of the Republic of Kenya.

454. Section 5 of Anti-Corruption and Economic Crimes Act provides:

Section 5. Procedure and powers of special Magistrates

(1) A special Magistrate may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstance within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall be a pardon for purposes of section 77 (6) of the Constitution.

455. Section 25A of the Anti-Corruption and Economic Crimes Act provides:

25A. Cessation of investigations

(1) The Commission may, in consultation with the Minister and the Attorney General, tender an undertaking in a form prescribed by the Minister, not to institute or continue with investigations against any person suspected of an offence under this Act.

(2) Where the Commission intends to take action as specified in subsection (1), it shall by notice in the daily newspapers invite interested persons to approach it for such an undertaking within a period specified in the notice.

(3) An undertaking under this section shall only be made in cases where the suspected person-

(a) makes a full and true disclosure of all material facts relating to past corruption or economic crime;

(b) through the Commission, pays or refunds to, or deposit with, the Commission for, all persons affected, any property or money irregularly obtained, with interest thereon at a rate prescribed by the Minister;

(c) makes reparation to any person affected by his corrupt conduct; and (d) pays for all loss of public property occasioned by his corrupt conduct.

(4) The Commission shall publish its intention to make the undertaking by notice in at least two newspapers of national circulation-

(a) stating the name of the proposed beneficiary of the undertaking; (b) stating the offence of which the person is suspected;

(c) confirming that the person has fulfilled all the conditions set out in subsection (2); and

(d) inviting any person with an objection to the proposed undertaking to forward their objections to the Commission within a period specified in the notice.

(5) An aggrieved person may object to the proposed undertaking on the grounds that-(a) the suspected person has not fully satisfied the conditions set out in subsection (2); or (b) he has any other evidence relevant under this section which may affect the Commission's decision regarding the undertaking.

(6) The Commission shall consider all objections submitted and shall take such action as may be appropriate in the circumstances.

(7) The Commission shall not make any undertaking in respect of corrupt conduct or economic crime which leads to circumstances which cause a danger to public safety, law and order.

(8) Any person in respect of whom the Commission makes an undertaking under this section shall be disqualified from holding public office.

456. Section 56B of the ACECA provides:

56B. Out of court settlement

(1) In any matter where the Commission is mandated by this Act or any other law to institute civil proceedings or applications, it shall be lawful for the Commission to issue a notice or letter of demand to the person intended to be sued, and may, in such notice or letter, inform the person about the claim against him and further inform him that he could settle the claim within a specified time before the filing of court proceedings.

(2) The Commission may negotiate and enter a settlement with any person against whom the Commission intends to bring, or has actually brought, a civil claim or application in court.

(3) The Commission may tender an undertaking in writing not to institute criminal proceedings against a person who-

(a) has given a full and true disclosure of all material facts relating to past corrupt conduct and economic crime by himself or others; and

(b) has voluntarily paid, deposited or refunded all property he acquired through corruption or economic crime; and

(c) has paid for all losses occasioned by his corruption conduct to public property.

(4) A settlement or undertaking under this section shall be registered in court.

457. Reference is also made to sections 137A and 137B of the Code of Criminal Procedure.

137A. Plea agreement negotiation.

(1) Subject to section 137B, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of –

(a) reduction of a charge to a lesser included offence;

(b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

(2) A plea agreement entered into under subsection (1) (a) or (b) may provide for the payment by an accused person of any restitution or compensation.

(3) A plea agreement under sub-section (1) shall be entered into only after an accused person has been charged, or at anytime before judgement.

(4) Where a prosecution is undertaken privately no plea agreement shall be concluded

without the written consent of the Attorney General.

137B. Plea agreement on behalf of the Republic.

A plea agreement on behalf of the Republic shall be entered into by the Attorney-General, the Director of Public Prosecutions or officers authorised by the Attorney-General in accordance with section 26 (5) of the Constitution and any other person authorized by any written law to prosecute:

Provided that in any trial before a subordinate court, a public prosecutor may, with prior written approval of the Attorney-General, the Director of Public Prosecutions, or officers subordinate to him, as the case may be, enter into a plea agreement in accordance with section 137A (1).

458. The Witness Protection Programme established by Part II of the Witness Protection Act and the mechanisms for the protection and concealment of identity of witnesses provided under Part III of the same Act provide further mechanisms to enable cooperation of offenders with law enforcement agencies. Part III of the Witness Protection Act provides for these mechanisms and reads:

PART III—PROTECTING WITNESSES FROM IDENTIFICATION

13. Identifying documents.

Without limiting the powers of the Attorney General under section 4, he may apply for any documents necessary—

- (a) to allow a witness to establish a new identity;
- (b) otherwise to protect the witness; or
- (c) to restore a former participant's former identity.

14. Application for court order.

(1) The Attorney-General may, in a manner to be prescribed by rules of court, apply to the High Court for an order authorising a specified person, or a person of a specified class or description—

- (a) to make a new entry in a register of births or a register of marriages in respect of a witness;
- (b) to make a new entry in a register of deaths in respect of a witness or a relative (by blood or marriage) of a witness; or
- (c) to issue in the witness's new identity a document of a kind previously issued to the witness.

(2) The Attorney-General shall provide such evidence as the High Court may require to satisfy itself as to the matters specified in section 16.

15. Court proceedings under this Part to be closed to public.

All business of the High Court under this Part shall be conducted in camera.

16. Power of High Court to make order.

The High Court may make a witness protection order if it is satisfied that—

- (a) the person named in the application as a witness—
 - (i) was a witness to or has knowledge of an offence and is or has been a witness in criminal proceedings relating to the offence; or
 - (ii) is a person who, because of his relationship to or association with a person to whom subparagraph (i) applies, may require protection or other assistance under this Act;
- (b) the life or safety of the person may be endangered as a result of his being a witness;
- (c) a memorandum of understanding has been entered into by the witness in accordance with section 7; and
- (d) the person is likely to comply with the memorandum of understanding.

17. Effect of witness protection order.

On the making of an order of the kind referred to in section 14 (1) (a) or (b)—

- (a) a person authorised to do so by the order may make such entries in a register of births, deaths or marriages as are necessary to give effect to the order;
- (b) the appropriate registrar having charge of the register of births, deaths or marriages shall afford the person so authorised full access to the relevant register and give him such assistance as he may require; and
- (c) the Attorney-General shall maintain records showing details of the original birth, death or marriage of each person in respect of whom an entry is made under paragraph (a).

18. Effect of entries made under this Act.

- (1) An entry made under this Act in a register of births, deaths or marriages has effect as if it were a valid entry made in accordance with the law governing the register.
- (2) An entry made under this Act in a register of births, deaths or marriages can only be cancelled by the Registrar-General or an appropriate registrar if the High Court, after being satisfied that the witness is no longer included in the relevant programme, has made an order on the application of the Attorney-General directing that the entry be cancelled.

19. Special provision in case of marriage of participant.

- (1) A participant who has been provided with a new identity under the programme shall not marry unless—
 - (a) the participant has given to the Attorney-General evidence which establishes the identity of the participant and shows that the participant is of marriageable age;
 - (b) if the participant has been married previously—
the participant has given to the Attorney-General evidence which establishes that the contemplated marriage is not contrary to law; and
 - (c) the participant has given to the Attorney-General a statutory declaration to the effect that there is no legal impediment to the marriage and the Attorney-General is not aware of any such impediment.
- (2) A person who contravenes this section is guilty of an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.

20. Restoration of former identity.

- (1) Where—
 - (a) a participant has been provided with a new identity under the programme; and
 - (b) protection and assistance afforded to him under the programme have been terminated,the Attorney-General may, if he considers it appropriate to do so, take such action as is necessary to restore the former participant's former identity.
- (2) The Attorney-General shall take reasonable steps to notify the former participant of a decision under subsection (1).
- (3) If the Attorney-General—
 - (a) takes action under this section to restore the former identity of a person who was a participant; and
 - (b) notifies the former participant in writing that he is required to return to the Attorney-General all documents provided to the former participant that relate to the new identity provided under the programme,the former participant shall not, without reasonable excuse, refuse or fail to return those documents to the Attorney-General within fourteen days after receiving the notice.
- (4) A person who contravenes subsection (3) is guilty of an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.

21. Offences in relation to documents.

While an entry made under this Act in a register of births, deaths or marriages continues in force, a person in respect of whom the entry is made who uses or obtains any document issued by a registrar having charge of a register of births, deaths or marriages which is

based on the previous entry is guilty of an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.

22. Information not to be disclosed.

(1) A person who, either directly or indirectly, makes a record of, or discloses or communicates to another person, any information relating to the making of an entry under this Act in a register of births, deaths or marriages, unless it is necessary to do so—

(a) for the purposes of this Act;

(b) for the purposes of an investigation by the

Attorney-General, the Police Force or another law enforcement agency; or

(c) to comply with an order of the High Court, is guilty of an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years, or both.

(2) Notwithstanding subsection (1), the Attorney-General may disclose the former identity of a participant or former participant for the purpose of obtaining documents relating to the new identity of the participant or former participant.

23. Non-disclosure of former identity of participant.

(1) Where—

(a) a participant who has been provided with a new identity under the programme would, apart from this section, be required by or under a law of Kenya to disclose his former identity for a particular purpose; and

(b) the Attorney-General has given the participant permission, in the form prescribed by regulations made under this Act, not to disclose his former identity for that purpose, the participant is not required to disclose his former identity to any person for that purpose.

(2) If a participant has been given permission under subsection (1) not to disclose his former identity for a particular purpose, it is lawful for the participant, in any proceedings or for any purpose, under or in relation to the relevant law of Kenya to claim that his new identity is his only identity.

(3) It shall be the duty of each person who is or has been associated with the administration of the programme, and who has obtained access to information or a document relevant to the programme, not to disclose that information or publish that document except as authorised by the Attorney-General.

(4) In this section, “participant” includes a person who—

(a) was provided with a new identity under the programme; and

(b) is no longer a participant but retains that identity.

24. Identity of participant not to be disclosed in legal proceedings.

(1) If, in any proceedings in a court, tribunal or commission of inquiry, the identity of a participant is in issue or may be disclosed, the court, tribunal or commission shall, unless it considers that the interests of justice require otherwise—

(a) hold that part of the proceedings which relates to the identity of the participant in private; and

(b) make such order relating to the suppression of publication of evidence given before the court, tribunal or commission as, in its opinion, will ensure that the identity of the participant is not disclosed.

(2) If in any proceedings in a court, tribunal or commission of inquiry, a participant or former participant who has been provided with a new identity under the programme is giving evidence, the court, tribunal or commission may hold that part of the proceedings in camera.

(3) The court, tribunal or commission before which any proceedings referred to in subsection (1) or (2) are conducted may, if it thinks fit, by order direct—

(a) that no question shall be asked in the proceedings which might lead to the disclosure of a protected identity of a participant or former participant or of his place of abode;

(b) that no witness in the proceedings, including a participant or former participant, can be

required to answer a question, give any evidence, or provide any information, which may lead to the disclosure of a protected identity of the participant or former participant or of his place of abode; and

(c) that no person involved in the proceedings shall, in the proceedings, make a statement which discloses or could disclose a protected identity of a participant or former participant or his place of abode.

(4) In subsection (3), “protected identity” means an identity of a participant or former participant that is different from the identity under which he is known in or in connection with the proceedings concerned.

(5) This section shall have effect notwithstanding any provision of the Commissions of Inquiry Act or any other law or rule of evidence.

25. Documentation restrictions.

The Attorney-General shall not obtain documentation for a participant which represents that the participant—

- (a) has a qualification which he does not have; or
- (b) is entitled to a benefit to which he is not entitled.

26. Special commercial arrangements by Attorney-General.

The Attorney-General may make commercial arrangements with a person under which a participant is able to obtain a benefit under a contract or arrangement without revealing his former identity.

27. Dealing with rights and obligations of participant.

(1) If a participant has any outstanding rights or obligations or is subject to any restrictions, the Attorney-

General shall take such steps as are reasonably practicable to ensure that—

- (a) those rights or obligations are dealt with according to law; or
- (b) the person complies with those restrictions.

(2) Such action may include—

- (a) providing protection for the participant while the participant is attending court; or
- (b) notifying a party or possible party to legal proceedings that the Attorney-General will, on behalf of the participant, accept process issued by a court, a tribunal or a commission of inquiry and nominating an office for the purpose.

28. Avoidance of obligations by participant.

(1) If the Attorney-General is satisfied that a participant who has been provided with a new identity under the programme is using the new identity—

- (a) to avoid obligations which were incurred before the new identity was established; or
- (b) to avoid complying with restrictions which were imposed on the person before the new identity was established, the Attorney-General shall give notice in writing to the participant stating that he is so satisfied.

(2) The notice shall also state that, unless the participant satisfies the Attorney-General that the obligations will be dealt with according to law or the restrictions will be complied with, the Attorney-General will take such action as he considers reasonably necessary to ensure that they are dealt with according to law or complied with.

(3) Such action may include informing a person who is seeking to enforce rights against the participant of the details of any property, whether real or personal, owned by the participant under his former identity.

29. Payments under witness protection programme.

(1) The Attorney-General may, at his discretion, certify in writing that the whole or part of an amount held by a participant represents payments made to the participant under the programme.

(2) An amount so certified cannot be confiscated or restrained, and cannot be applied in payment of pecuniary penalties, under any law.

459. Kenya indicated that examples of property recovered arising from negotiation are the Grand Regency Hotel worth approximately Kshs. 7 billion. Others include the Woodley Estate houses. Furthermore, Hon. Noah Katana Ngala, a former Cabinet Minister, returned a house that had been acquired irregularly from the Nairobi City Council.

(b) Observations on the implementation of the article

460. Regarding paragraph 1, Kenya indicated that under section 5 ACECA, a special Magistrate has the power to pardon the persons who provide a full and accurate disclosure regarding the commission of an offence and the persons involved. Section 25A ACECA, permits EACC, in consultation with the Attorney General, to offer a commitment not to undertake or pursue an investigation against a person who provides a full and accurate disclosure of the essential elements of an offence.

461. Likewise, under section 56B, the Commission has the power to negotiate, to make a deal or to offer to any person a written commitment not to bring criminal procedures against that person. Such commitment must be recorded by the court. Complementary mechanisms are established to facilitate the cooperation between the law enforcement agencies.

462. In light of the administrative powers of ACECA to enter into out of court settlements, plea bargains and to discontinue investigations, it is recommended that Kenya adopt guidelines to ensure adequate transparency and predictability. The information under article 30(3) of the Convention in respect of discretionary powers of the DPP is referred to, also in the context of the implementation of the paragraph under review.

Paragraph 2 of article 37

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.

(a) Summary of information relevant to reviewing the implementation of the article

463. Kenya indicated that judicial policy in Kenya provides that a criminal court may consider an accused's cooperation with law enforcement agencies in mitigating the sentence which it would have otherwise passed.

(b) Observations on the implementation of the article

464. Regarding paragraph 2, Kenya indicated that its judicial policy provides that a criminal court could take into consideration the cooperation of the indicted person with law enforcement authorities to mitigate the sentence initially contemplated. Following the discussion in the country visit, it was confirmed that courts can impose mitigated sentences in appropriate circumstances.

Paragraph 3 of article 37

3. Each State Party shall consider providing for the possibility, in accordance with the 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.

(a) Summary of information relevant to reviewing the implementation of the article

465. Kenya indicated that it has partially implemented the provision.

466. There is no direct provision in Kenya's laws for granting immunity. Nevertheless, Section 5(1) of the Anti-Corruption and Economic Crimes Act (quoted above) empowers a special magistrate to grant pardon. (However, it is noteworthy that this happens in the lower courts whose decisions can still be subject to appeal).

467. Section 25A of ACECA (quoted above) grants the Commission the discretion, in consultation with the Minister and the Attorney General, to tender an undertaking in a form prescribed by the Minister, not to institute or continue with investigations against a person who has provided a full and true disclosure of information relating to an offence, and has complied with particular conditions set by the anti-corruption body, such as payment for damage or loss occasioned by the offence. Kenya indicated that, where the Anti-Corruption and Economic Crimes Act refers to the Minister this refers to the Attorney General, according to Executive Order No. 2 of May 2013.

468. In July 2011, the Kenya Anti-Corruption Commission (KACC), now EACC, published a request to all those who wanted to take advantage of amnesty provisions of Section 25A of ACECA. The Commission gave them 60 days to surrender their illegally acquired wealth or risk prosecution.

469. Kenya indicated that there are no statistics relating to the grant of immunity.

470. Kenya further indicated that this is a system which can expedite resolution of investigations on corruption, and may need to be implemented. To enable this, the concerned authorities should sensitize the public on the provisions, and ensure that the requisite mechanisms under the law have been established and operationalized.

(b) Observations on the implementation of the article

471. Kenya has indicated it partially implemented this provision because it does not have a specific provision to allow it to grant immunity; most of the responses submitted for paragraph 1 of this article apply to this paragraph 3 *mutatis mutandis*. However, section 5 ACECA qualifies special magistrates to grant a pardon and such a measure involves trials courts, courts in which the decisions may be subject to appeal.

472. Under section 25A of the ACECA, the Commission may, in consultation with the Attorney General and in accordance with the modalities established by him, offer a commitment to refrain from starting or continuing an investigation against a person who provides a full and accurate disclosure of the information available to the person in relation with an offence, and who has met the precise conditions established by the anti-corruption organ, such as the reparation of the damage and the losses caused by the offence.

473. Kenya is encouraged to maintain statistics on the matter, to track the grant of immunity at the administrative (i.e., EACC) level and by the ODPP.

Paragraph 4 of article 37

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

474. Kenya referred to the information provided under UNCAC article 32 above.

475. No examples of implementation were provided.

(b) Observations on the implementation of the article

476. Kenya refers to information submitted with regard to UNCAC article 32. It was clarified during the country visit that cooperating defendants qualify for the same protection as witnesses in criminal proceedings.

Paragraph 5 of article 37

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.

(a) Summary of information relevant to reviewing the implementation of the article

477. Kenya indicated that such a matter has not arisen in Kenya.

478. Kenya indicated that it does not have any bilateral legal agreements with other countries in this domain.

(b) Observations on the implementation of the article

479. Kenya has not adopted agreements or arrangements on the relocation of cooperating offenders.

(c) Challenges, where applicable

1. Limited resources for implementation (e.g. human/financial)
2. Limited awareness of state-of-the-art protection programmes and systems

(d) Technical assistance needs

1. On-site assistance by a relevant expert

Kenya indicated that such technical assistance has not been previously provided.

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.

(a) Summary of information relevant to reviewing the implementation of the article

480. Kenya indicated that national investigating authorities in Kenya cooperate and collaborate under the framework provided by the Kenya Integrity Forum. There are also various memoranda of understanding (MOUs) on cooperation between the various authorities. For example, the Witness Protection Agency has entered into Service Level Agreements and MOUs with law enforcement agencies. EACC also has MOUs with law enforcement agencies.

481. Kenya referred to Article 157 of the Constitution on cooperation between national law enforcement authorities, which is implemented administratively. The ODPP Act also provides for prosecution-led investigations.

157. Director of Public Prosecutions

(1) There is established the office of Director of Public Prosecutions. ...

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

482. EACC is one of the founders of the Kenya Integrity Forum (KIF) (later renamed Kenya Leadership and Integrity Forum (KLIF)), which brings together various sectors and 14 stakeholders of the National Anti-Corruption Plan (NACP). KIF was formed in May 2006 following the adoption of the National Anti-Corruption Plan (NACP) by delegates. The preparation of the National Anti-Corruption Plan started in 1999 spearheaded by the defunct Kenya Anti-Corruption Authority (KACA) and included stakeholders drawn from various sectors. When KACA was wound up in December 2000, the Anti-Corruption Police Unit (ACPU) revived the process. However, the Plan was completed in 2005 soon after the establishment of the Kenya Anti-Corruption Commission (KACC). The National Anti-Corruption Plan (NACP) was later adopted and eventually launched on 5 July 2006. After the national launch, the Plan was launched in all the 8 Provinces.

483. NACP is an inclusive anti-corruption framework with sectoral mapping on corruption and governance. It provides an opportunity for state and non-State actors to launch practical action-based initiatives that provide immediate reinforcement of anti-corruption reform efforts. It also provides a mechanism through which the stakeholders can provide input and participate in both the design and implementation of the overall plan and in individual sectoral projects and activities.

Objectives of NACP

484. The National Anti-Corruption plan has set the following objectives:

- To transform the situation where corruption was a low-risk high-gain undertaking to one where it is a high-risk low-gain venture;
- To involve all organizations and individuals in Kenya in fighting corruption

where they are , wherever it is;

- To create public awareness of the causes and effects of corruption, and on their role in public prevention & eradication of corruption;
- To promote good governance in all organizations in every sector in order to prevent and fight corruption;
- To enhance collaboration among Kenyans in ensuring that all corruption cases are reported, investigated and prosecuted properly;
- To encourage all organizations and individuals to develop in-house strategies for preventing and fighting corruption;
- To encourage all organizations and individuals to contribute towards the evaluation, improvement and reinforcement of the plan;

485. Apart from the KIF/NACP framework, EACC has established working relationships with specific investigative, law enforcement and oversight institutions in the country on cooperation, collaboration and sharing of information. Some of the working relationships have been reduced to formal MOUs. The institutions with which EACC has an existing arrangement evidenced by a formal MOU include the Kenya Revenue Authority and the Financial Reporting Centre. In addition, Kenya's National Task Force on Money-Laundering (TFML) has coordinated the country's AML efforts.

486. Pursuant to Section 44 of POCAMLA (quoted under article 39 below), financial institutions have the obligation of reporting suspicious transactions to the Financial Reporting Centre, which is then in charge of transmitting the information to the investigative authorities where warranted.

(b) Observations on the implementation of the article

487. Kenya has indicated that the country does not have direct legal provisions on the matter of the cooperation between national law enforcement authorities, as this kind of cooperation takes place by administrative channels. However, they refer to the Kenyan Integrity Forum.

488. The national investigative authorities cooperate and collaborate amongst them through memoranda of understanding (MOUs).

489. EACC is one of the founders of the Kenyan Integrity Forum (KIF), which gathers different sectors and fourteen parties of the National Anti-Corruption Plan (NACP), which was created in May 2006.

490. NACP provides an inclusive framework against corruption, with a sector-based mapping of corruption and governance. It allows governmental and non-governmental actors to launch concrete and pragmatic initiatives that allow for the immediate consolidation of the agreed reform efforts against corruption. NACP likewise offers a mechanism with which the stakeholders may deliver their contribution and participate both in the preparation and the implementation of the overall plan and in specific projects or actions.

491. The reviewers note that EACC currently has MOUs in place with the Kenya Revenue Authority and the Financial Reporting Centre, and this synergy represents a key ingredient for the effectiveness of the fight against corruption.

492. ODPP has increased its engagement with the National Police Service, EACC and other criminal investigative agencies, especially on anti-corruption, with a view to provide guidance during the investigation of major crimes. Some examples of joint initiatives include:

- Establishment of an inter-ministerial multi-agency task team to operationalize the Witness Protection Act 2006
- Formation of ODPP/EACC Committee (Joint Collaboration Committee) that meets monthly to deal with issues affecting corruption cases
- Embedding prosecutors from ODPP in EACC ongoing investigations
- National Steering Committee of the UNCAC Review on Kenya that includes inter alia ODPP and EACC
- Joint EACC/ODPP membership in the National Anti-Corruption Plan (NACP) and the Kenya Integrity Forum
- Constitution of an inter-agency team on Mutual Legal Assistance
- Collaboration with other agencies in the development of key legislation, including the Cyber Crime and Computer Related Crimes Bill, Money Laundering and Proceeds of Crime Act, Prevention of Terrorism Act 2012, and Prevention of Organized Crime Act 2010.
- ODPP has also held joint training on areas that touch on prosecuting corruption matters with partners such as EACC, UNODC, Governance Justice Law and Order Sector (GJLOS) and Kenya Revenue Authority (KRA) among others.

493. Moreover, the Financial Reporting Centre is in charge of transmitting information concerning suspicious transactions to the investigative authorities where warranted. FRC has MOUs in place with Central Bank of Kenya, Insurance Regulatory Authority (IRA), Capital Markets Authority (CMA) and EACC. Further MOUs are being negotiated with CID-police, KRA and the National Registration Bureau (NRB).

494. Following the discussion in the country visit, it was observed that, in general, national authorities appear to work in close cooperation. Particularly, prosecutors and police cooperate in major cases and this cooperation is positive. Examples include the provision of expertise, such as forensic document analysis and intelligence, by the Kenya police in EACC investigations and joint trainings among ODPP, police and EACC. There have also been staff secondments among the agencies. For example, the Kenya Police Service (Directorate of Criminal Investigations) has attached officers to EACC, the KRA, the Central Bank and CMA. Nonetheless, certain interlocutors the reviewers met with during the country visit reported that there continues to be poor coordination among justice sector players in practice. While noting the positive examples of collaboration that exist, the reviewers encourage Kenya to continue to take steps to enhance coordination among law enforcement institutions in the investigation and prosecution of corruption cases. Kenya is encouraged to strengthen cooperation between institutions that fight corruption, notably the EACC, the ODPP, FRC, KACC, CID-police, AG and PPOA.

(c) Challenges, where applicable

1. Limited capacity (e.g. human/technological/institution): There is need for training on 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; evaluation and strengthening of institutions like FRC for full operationalization.

(d) Technical assistance needs

1. On-site assistance by a relevant expert: There is need for training on surveillance of the movement of the proceeds of crimes established in accordance with the convention and the methods used to transfer, conceal, or disguise such proceeds, evaluation and strengthening of institutions like the Financial Reporting Centre is also necessary. An on-site expert would be necessary.

Article 39. Cooperation between national authorities and the private sector

Paragraph 1 of article 39

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.

(a) Summary of information relevant to reviewing the implementation of the article

495. Kenya indicated that in conducting investigations against any person, the Ethics and Anti-Corruption Commission may, by applying to the Court and following the procedure laid out in Section 28 of the Anti-Corruption and Economic Crimes Act, obtain orders compelling banks and other financial institutions to produce information relevant to an investigation. The section reads as follows:

28. Production of records and property

(1) The Commission may apply, with notice to affected parties, to the court for an order to-

(a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and

(b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.

(2) A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

(4) The six month limitation in subsection (3) does not prevent the Commission from making further requirements for further periods of time as long as the period of time in respect of which each requirement is made does not exceed six months.

(5) Without affecting the operation of section 30, the Commission may make copies of or take extracts from any record produced pursuant to a requirement under this section.

(6) A requirement under this section to produce a record stored in electronic form is a requirement-

(a) to reduce the record to hard copy and produce it; and

(b) if specifically required, to produce a copy of the record in electronic form.

(7) In this section, "records" includes books, returns, bank accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.

(8) The Commission may by notice in writing require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person's possession, being property of a person reasonably suspected of corruption or economic crime.

(9) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(10) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act.

496. Evidence secured through a warrant issued under Section 180 of the Evidence Act is

considered good evidence. This dispenses with elements of the banker/client relationships that would be a challenge to investigations. Section 180 of the Evidence Act provides as follows:

180. Warrant to Investigate.

(1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.

(2) Any person who fails to produce any such banker's book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.

497. The Banking Fraud Investigation Unit under the Directorate of Criminal Investigation has an arrangement with the Kenya Bankers Association, whereby proactive information sharing is encouraged.

498. Financial institutions have the obligation of reporting any suspicious transaction to the Financial Reporting Centre (FRC) pursuant to Section 44 of POCAMLA.

499. The Proceeds of Crime and Money Laundering Act, in Section 11(1), provides that a reporting institution that fails to comply with any of the requirements of Sections 44-46 or of any regulations commits an offence. At the time of the country visit there were 239 reporting entities registered.

500. The FRC started receiving and analyzing STRs from commercial banks and reporting entities with effect from 10 October 2012, and has received the following STRs:

October-December 2012: 34 STRs received

January-December 2013: 110 STRs received

January-August 2014: 154 STRs received

Total: 298 STRs received since inception (80% from Nairobi).

501. Since inception in October 2012, the FRC has submitted to the Directorate of Criminal Investigations 78 cases obtained from financial institutions for investigations, as follows:

Anti-Terrorism Police Unit (ATPU): 5, Capital Markets Authority Investigative Unit (CMAIU): 1; of which:

Cases finalized and to DPP: 5.

Cases closed by DPP: 5.

Cases pending in court: 1.

Cases pending under investigation: 67.

Possible predicate offences include:

Fraud: 39%

Terrorism: 19%

Smuggling: 18%

Drug trafficking: 12%
Forgery: 5%
Obtaining by false pretences: 4%
Theft: 3%

Very few (e.g., less than 1%) of the STRs received appear to relate to UNCAC offences and have been disseminated to investigative authorities for further investigation.

FRC refers all suspicious transactions that warrant further investigation to the Criminal Investigation Department (CID) in the National Police Service, which then transmits the file to the relevant authorities, e.g. EACC, ATPU, CMAIU, KRA and National Intelligence Service (NIS).

More than 90 percent of STRs received are from commercial banks and the balance from telecommunications companies or other entities.

Approximately 220 of the STRs received are at various stages of analysis, which has not yet been concluded.

502. Kenya provided the following statistics on incoming and outgoing requests for cooperation from/to the FRC at the domestic and international level in the last 2 years.

	Requests to FRC		Requests by FRC	
	2013	2014	2013	2014
Domestic law enforcement agencies	2 (CID-police)	1	0	0
Domestic regulatory bodies	3	0	0	1
Foreign FIUs	3	2	0	0

503. Section 44 of POCAMLA provides that:

PART IV – ANTI-MONEY LAUNDERING OBLIGATIONS OF A REPORTING INSTITUTION

44. Monitoring and Report by institutions

(1) A reporting institution shall monitor on an ongoing basis all complex, unusual, suspicious, large or such other transactions as may be specified in the regulations, whether completed or not, and shall pay attention to all unusual patterns of transactions, and to insignificant but periodic patterns of transactions which have no apparent economic or lawful purpose as stipulated in the regulations.

(2) Upon suspicion that any of the transactions or activities described in subsection (1) or any other transaction or activity could constitute or be related to money laundering or to the proceeds of crime, a reporting institution shall report the suspicious or unusual transaction or activity to the Centre in the prescribed form immediately and, in any event, within seven days of the date the transaction or activity that is considered to be suspicious occurred.

(3) Notwithstanding subsections (1) and (2), a reporting institution shall report all suspicious transactions, including attempted transactions to the Centre.

(4) A financial institution shall as far as possible examine the background

and purpose of the transactions referred in subsections (1) and (2) and shall set out its findings in writing.

(5) A reporting institution shall retain its findings under subsection (4) for at least seven years from the date of the making thereof, and shall make them available to the Centre, and to its supervisory body or auditors.

(6) Despite the provisions of this section, a reporting institution shall file reports on all cash transactions equivalent to or exceeding the amount prescribed in the Fourth Schedule, whether they appear to be suspicious or not.

(7) A report under subsections (2) and (3) shall be accompanied by copies of all documentation directly relevant to the suspicion and the grounds on which it is based.

(8) The Centre may, in writing, require the person making the report under subsection (2) or (3) to provide the Centre with—

(a) particulars or further particulars of any matter concerning the suspicion to which the report relates and the grounds upon which it is based; and

(b) copies of all available documents concerning such particulars or further particulars

(9) When a person receives a request under subsection (8), that person shall furnish the Centre with the required particulars or further particulars and copies of documents to the extent that such particulars or documents are available to that person within a reasonable time, but in any case not later than thirty days from the date of the receipt of the request:

Provided that the Centre may, upon written application by the person responding to a request and with the approval of the Director, grant the person an extension of the time within which to respond.

(10) A person who is a party to, or is acting on behalf of, a person who is engaged in a transaction in respect of which he forms a suspicion which, in his opinion, should be reported under subsections (2) or (3), may continue with and complete that transaction and shall ensure that all records relating to that transaction are kept, and that all reasonable steps are taken to discharge the obligation under this section.

Regulation 32 of POCAMLA provides that:

32. Reporting of suspicious activities by reporting institutions

(1) If a reporting institution becomes aware of suspicious activities or transactions which indicate possible money laundering activities, the reporting institution shall ensure that it is reported to the Centre immediately and within seven days of the date of the transaction or occurrence of the activity that is considered suspicious.

(2) Sufficient information shall be disclosed which indicates the nature of and reason for the suspicion, and where the reporting institution has additional supporting documentation that should also be made available.

(3) The Suspicious Activity or Transaction Report shall be in the form prescribed in the Schedule.

504. Within Kenya, the FRC has concluded MOUs with the IRA, CMA, CBK, and EACC. MOUs with the Retirement Benefits Authority (RBA) and Betting Control and Licensing Board (BCLB) are under negotiation.

(b) Observations on the implementation of the article

505. Kenya has indicated that, in all investigations, EACC may, through the procedure established by section 28 ACECA, request judicial warrants to require banks and other financial institutions to submit information that is useful for the investigation.

506. Regarding files and assets, the Commission may request a warrant from a court to require a person to submit certain files in their possession that are potentially necessary for an investigation, regardless of whether the person is suspected of acts of corruption or economic crimes, and that the person provides any explanations or information available to them in relation to the files, which may have been prepared by said person, or not.
507. These explanations and information may be submitted in an ongoing basis for a maximum period of six months, and the Commission shall not subsequently request supplementary periods, given that each of these periods shall not exceed six months.
508. The term “file” includes accounting books, statements, banking or other accounts, reports, legal or commercial documents and any correspondence that are not private matters.
509. However, the law provides that the person who fails to respect or who does not respect a request under this section, and the investigation mandate issued by the magistrate, will be fined and may be sentenced to a prison term, or both.
510. It is noted that FRC refers all suspicious transactions that warrant further investigation to the Criminal Investigation Department (CID) in the National Police Service, which then transmits the file to the relevant authorities. Given the large number of STRs pending further investigation, it is recommended that Kenya consider whether a direct referral by FRC to the law enforcement agencies may provide a more streamlined reporting procedure and allow for more timely conclusion of investigative steps. More generally, the reviewers welcome steps to strengthen the operations and data collection efforts of the FRC.
511. It was reported during the country visit that FRC, as a newly created institution, faces challenges, including limited knowledge of anti-money laundering measures, capacity building for staff and reporting institutions, the development of Guidelines in respect of designated non-bank financial institutions, and the inspection of non-regulated reporting entities. The reviewers recommend that Kenya continue to take steps to raise capacity and devote adequate resources to strengthen the capacity and operations of FRC and to address these issues.

Paragraph 2 of article 39

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.

(a) Summary of information relevant to reviewing the implementation of the article

512. Kenya indicated that the EACC has put in place an enabling environment for reporting corruption and unethical practices. Some of the measures taken include the following:
- Ensuring that its services are reasonably accessible in all areas by establishment of regional offices. Currently, regional offices of EACC are present in Mombasa, Kisumu, Nyeri, Eldoret and Garissa.
 - Putting in place various mechanisms and mediums through which members of

the public can make reports to EACC. Such include telephones, emails, the Business Keeper Monitoring System (BKMS), letters, etc. It has a fully-fledged report centre which also provides call-back services to customers. The BKMS protects reporters' anonymity completely.

- The establishment of a web based Integrated Public Complaints Referral Mechanism (e-IPCRM); EACC has partnered with other agencies in the e-IPCRM framework to enhance receiving and referral of reports on corruption and other forms of maladministration;
- A mobile report receiving facility which moves across the country, promoting regional reach.
- Establishment of offices within “*Huduma Centres*” in county headquarters.

513. Kenya indicated that EACC has five regional offices besides the headquarters.

- EACC hotline numbers for anonymous corruption reporting are (020) 2717468, 0727 285663, 0733520641.
- EACC Hot Fax is (020) 27117473
- EACC email address is report@integrity.go.ke.

514. Kenya does not provide financial incentives to encourage such reports.

(b) Observations on the implementation of the article

515. Kenya, through the EACC, has created an environment that leads to the reporting of acts of corruption and unethical practices. It guarantees access to the services of EACC throughout its territory with the creation of regional offices; it implements different mechanisms and channels that allow citizens to report the acts to the Commission, either by telephone, email, BKMS, letter, etc. Moreover, anonymous reports can be made to EACC.

516. Kenya provided the following figures on the number of reports of acts of corruption.

FIGURES: Corruption Reports Received and Processed By EACC

Period	Total Reports Received and Processed	Taken up for Investigation
2012/2013	3,355	1,423
2011/2012	5,230	2,183
2010/2011	7,106	2,445
2009/2010	4,372	1,281
2008/2009	4,335	1,270

517. It seems necessary to more effectively achieve the objectives of the Convention that education and awareness-raising of corruption should be strengthened. In particular, awareness raising for citizens who are also taxpayers affected by fraudulent practices is desirable, so they can be well informed and exercise more oversight in this area.

(c) Successes and good practices

518. The inter-agency collaboration through the web based Integrated Public Complaints Referral Mechanism (e-IPCRM) framework can be regarded as a good practice.

(d) Challenges, where applicable

1. Limited capacity (e.g. human/technological/institution/other; please specify) Capacity for witness protection.
2. Limited awareness of state-of-the-art reporting programmes and mechanisms
3. Limited access to of state-of-the-art reporting programmes and mechanisms

(e) Technical assistance needs

1. On-site assistance by a relevant expert
2. Capacity-building programmes for authorities responsible for regulating matters related to the private sector
3. Capacity-building programmes for authorities responsible for the establishment and management of reporting programmes and mechanisms

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.

(a) Summary of information relevant to reviewing the implementation of the article

519. Kenya referred to the information provided under UNCAC article 39(1) above. Moreover, as noted under article 31(7), the Ethics and Anti-Corruption Commission has powers, under section 23 (4) of the Anti-Corruption and Economic Crimes Act, to make applications before court for the warrants to search bank accounts, and banks countrywide have facilitated the implementation of the warrants by the Commission. In particular, Section 28 of the ACECA provides a mechanism to obtain bank records of whatever nature through court orders in the course of investigations.

520. Section 17 of POCAMLA further provides that its provisions on secrecy override any other provision in any other law.

FIGURES: Statistics on Applications for Warrants to Investigate Bank Accounts and Premises

Period	Applications made
2012/2013	<i>Not available</i>
2011/2012	61
2010/2011	<i>Not available</i>
2009/2010	<i>Not available</i>

2008/2009	<i>Not available</i>
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521. No examples of implementation were provided.

(b) Observations on the implementation of the article

522. Kenya has indicated that banking secrecy cannot be invoked against judicial authorities in ongoing proceedings, and it submitted the applicable information and texts. Section 28 ACECA allows for banking files to be obtained during investigations through a court order.

523. The observations and recommendation under article 31(7) are referred to.

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.

(a) Summary of information relevant to reviewing the implementation of the article

524. Kenya indicated that it may consider previous convictions under the wider rubric of the Criminal Procedure Code which requires that when such consideration is made the conviction must be proved.

525. Section 142 (3) of the Criminal Procedure Code provides that:

142. Mode of proof of previous conviction

(3) A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person so convicted, together with evidence that the finger prints of the person so convicted are those of the accused person.

(b) Observations on the implementation of the article

526. Kenya has indicated that it may take into consideration prior convictions under the broader perspective of the Criminal Procedure Code.

527. Section 142 (3) of the Criminal Procedure Code stipulates that a prior conviction outside of Kenya may be supported with a certificate submitted by a police officer from the country where the conviction took place, along with a copy of the conviction or the ruling, and fingerprints or photographs of fingerprints of the convicted person along with evidence supporting that the fingerprints really belong to the indicted person.

528. No case examples were provided. The article is legislatively implemented.

Article 42. Jurisdiction

Subparagraph 1 (a) of article 42

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

(a) Summary of information relevant to reviewing the implementation of the article

529. Kenya indicated that jurisdiction over criminal matters by a flag State is granted by international law principles which are recognized as part of Kenyan law by virtue of Article 2(5) of the Constitution of Kenya, 2010.

2. Supremacy of this Constitution

(5) The general rules of international law shall form part of the law of Kenya.

530. The jurisdiction by the Special Magistrates Court is then granted through the Anti-Corruption and Economic Crimes Act which provides for the jurisdiction for all corruption, economic crimes and related offences.

531. The relevant measures were summarized by Kenya as follows:

1. Recognition by the Constitution under Article 2(5) of the general principles of international law as forming part of the law of Kenya.

2. Conferment, upon the Chief Justice, of discretion to establish special Magistrates' Courts under the Anti-Corruption and Economic Crimes Act for the purpose of hearing and determining corruption matters.

532. Sections 3 and 4 of the ACECA provide as follows:

3. (1) The Chief Justice may, by notification in the Kenya Gazette, appoint as many special Magistrates as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely-

(a) corruption and economic crimes and related offences; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in paragraph (a).

(2) A person shall not be qualified for appointment as a special Magistrate under this Act unless he is or has been a chief magistrate or a principal magistrate or an advocate of at least ten years standing.

4. (1) Notwithstanding anything contained in the Criminal Procedure Code, or in any other law for the time being in force, the offences specified in this Act shall be tried by special Magistrates only.

(2) Every offence specified in this Act shall be tried by the special Magistrate for the area within which it was committed, or, as the case may be, by the special Magistrate appointed for the case, or where there are more special Magistrates than one for such area, by one of them as may be specified in this behalf by the Chief Justice.

(3) When trying any case, a special Magistrate may also try any offence, other than an offence specified in this Act, with which the accused may, under the Criminal Procedure Code, be charged at the same trial.

(4) Notwithstanding anything contained in the Criminal Procedure Code, a special Magistrate shall, as far as practicable, hold the trial of an offence on a day-to-day basis until completion. The relevant provision for purposes of this Article is section 67 of the ACECA which provides that conduct by a citizen of Kenya that takes place outside

Kenya constitutes an offence under the Act if the conduct would constitute an offence under the Act if it took place in Kenya.

533. Kenya indicated that there are no examples on the aspect.

(b) Observations on the implementation of the article

534. Kenya has indicated that it has Special Courts, established by the Chief Justice under ACECA, as needed, for the commission of acts of corruption, economic crimes and related offences, and for conspiracies to commit or attempt to commit an instigation to commit a crime or any other corruption related offence. The Special courts are appointed by the ACECA, while the Special magistrates are appointed by the Chief Justice through a gazette notice.

535. Notwithstanding any provision from the Criminal Procedure Code or any other law in effect, the offences specified by this law can only be tried by the special magistrates.

536. Whenever a region where the offence was committed has more than one special magistrate, one of them will be appointed for the purpose by the Chief Justice. In a region where there are several special magistrates any one of them may try the matter. Allocation is done according to the weight of the matter and seniority of the magistrates.

537. It should be noted that, under section 67 ACECA, an act committed by a Kenyan citizen outside Kenya is not considered a violation of this law except if said act would also be a violation of this law were it committed in Kenya.

Subparagraph 1 (b) of article 42

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:

(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.

(a) Summary of information relevant to reviewing the implementation of the article

538. Kenya indicated that it has partially implemented the provision and provided that Kenya is in compliance only to the extent of the crimes that are contained in the Penal Code (Cap. 63) which include abuse of office, bribery, fraudulent false accounting among others. Chapter III of the Penal Code deals with territorial application of the Code and provides under section 5 as follows:

5. Jurisdiction of local courts

The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.

Section 6 provides:

6. Offences committed partly within and partly beyond the jurisdiction

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

(b) Observations on the implementation of the article

539. Kenya has indicated it has partially implemented this provision, to the extent that it complies with it in relation to the crimes covered by the Penal Code Cap. 63. It is recommended that Kenya adopt measures to implement the provision under review.

Subparagraph 2 (a) of article 42

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

(a) Summary of information relevant to reviewing the implementation of the article

540. Kenya indicated that it has not implemented the provision. There is no direct provision under Kenyan law to meet this requirement.

541. In order to ensure full compliance with the provision under review, Kenya indicated that it will put measures in place to amend the Anti-Corruption and Economic Crimes Act to establish jurisdiction over offences committed against a Kenyan national.

(b) Observations on the implementation of the article

542. Kenya indicated that it has not implemented this provision because Kenyan law has no specific provision for this article.

543. In order to comply with the provision in question, Kenya has indicated that it will put measures in place to amend ACECA, in order to establish jurisdiction in the matter of the offences committed against Kenyan citizens. The reviewers welcome such an amendment.

Subparagraph 2 (b) of article 42

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(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

(a) Summary of information relevant to reviewing the implementation of the article

544. Kenya indicated that it has partially implemented the provision. Kenya's compliance with this section is limited to establishment of jurisdiction over corruption offences and the conduct of citizens of Kenya that takes place outside Kenya. In such cases, the law treats that conduct as if it took place in Kenya. There is therefore partial compliance to this requirement.

545. Section 67 of the Anti-Corruption and Economic Crimes Act provides as follows:

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.

546. Regarding examples of implementation, Kenya referred to the prosecution of offences arising out of the purchase of land for the Kenyan embassy in Japan in the case of *Republic vs. Thuita Mwangi & 3 others*, ACC No. 2 of 2013, Nairobi.

(b) Observations on the implementation of the article

547. Kenya indicated it partially implemented this provision. In such a situation, Kenyan law considers the behaviour as if it had taken place in the country, under section 67 ACECA. As an example of the implementation, Kenya cited the prosecution of the offences related to the purchase of land used by the Kenyan embassy in Japan. Kenya may wish to consider expanding jurisdiction in accordance with the provision under review.

Subparagraph 2 (c) of article 42

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(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 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

548. Kenya indicated that Section 47(A) of the Anti-Corruption and Economic Crimes Act criminalizes conspiracy and attempts to commit economic crimes. Furthermore, Section 127 of the Proceeds of Crime and Money Laundering Act 2009 establishes jurisdiction.

549. Section 47(A) of the Anti-Corruption and Economic Crimes Act provides that:

47A. (1) A person who attempts to commit an offence involving corruption or an economic crime is guilty of an offence.

(2) For the purposes of this section, a person attempts to commit an offence of corruption or an economic crime if the person, with the intention of committing the offence, does or omits to do something designed to its fulfilment but does not fulfil the intention to such an extent as to commit the offence.

(3) A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

(4) A person who incites another to do any act or make any omission of such a nature that, if that act were done or the omission were made, an offence of corruption or an economic crime would thereby be committed, is guilty of an offence.

550. Section 127 of The Proceeds of Crime and Money Laundering Act 2009 provides that:

The conduct of a person that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence against a provision of any law in Kenya if it occurred in Kenya.

In addition, the Act also provides under Section 115 that:

115. (1) For the purpose of an investigation or proceedings under this Act, the Attorney-General may request an appropriate authority of another country to arrange for-

- (a) evidence to be taken, or information, documents or articles to be produced or obtained in that country;
- (b) a warrant or other instrument authorizing search and seizure to be obtained and executed in that country;
- (c) a person from that country to come to Kenya to assist in the investigation or proceedings;
- (d) a restraint order or forfeiture order made under this Act to be enforced in that country, or a similar order to be obtained and executed in that country to preserve property that had it been located in Kenya would be subject to forfeiture or confiscation under this Act;
- (e) an order or notice under this Act to be served on a person in that country; or
- (f) other assistance to be provided, whether pursuant to a treaty or other written arrangement between Kenya and that country or otherwise.

(2) Requests by other countries to Kenya for assistance of a kind specified in subsection (1) may be made to the Attorney-General.

551. Kenya indicated that there have been no examples in this area to date.

(b) Observations on the implementation of the article

552. Kenya indicated that section 47 (A) ACECA sanctions both the attempt to commit an economic crime and the conspiracy to commit an economic crime, and that section 127 POCAMLA establishes the jurisdiction on the matter.

553. It also mentioned that the Attorney General may request the competent authorities of another country that they organize: the taking of evidence or information; the issuance of an order to conduct searches and seizures in said country; the transfer to Kenya of a person located in that country, in order to assist in an investigation or a procedure; the issuance of seizure or confiscation orders; other forms of assistance, or any other written arrangement between Kenya and said country, to illustrate the implementation of the provisions under review.

554. Kenya indicated that no such case has arisen to date.

Subparagraph 2 (d) of article 42

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(d) The offence is committed against the State Party.

(a) Summary of information relevant to reviewing the implementation of the article

555. Section 5 of the Criminal Procedure Code reads as follows:

5. The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.

556. The Anti-Corruption and Economic Crimes Act also provides for the jurisdiction for all corruption, economic crimes and related offences in Sections 3 and 4, which read as follows:

3. (1) The Chief Justice may, by notification in the Kenya Gazette, appoint as many

special Magistrates as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely-

(a) Corruption and economic crimes and related offences; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in paragraph (a).

(2) A person shall not be qualified for appointment as a special Magistrate under this Act unless he is or has been a chief magistrate or a principal magistrate or an advocate of at least ten years standing.

4. (1) Notwithstanding anything contained in the Criminal Procedure Code, or in any other law for the time being in force, the offences specified in this Act shall be tried by special Magistrates only.

(2) Every offence specified in this Act shall be tried by the special Magistrate for the area within which it was committed, or, as the case may be, by the special Magistrate appointed for the case, or where there are more special Magistrates than one for such area, by one of them as may be specified in this behalf by the Chief Justice.

(3) When trying any case, a special Magistrate may also try any offence, other than an offence specified in this Act, with which the accused may, under the Criminal Procedure Code, be charged at the same trial.

(4) Notwithstanding anything contained in the Criminal Procedure Code, a special Magistrate shall, as far as practicable, hold the trial of an offence on a day-to-day basis until completion.

(b) Observations on the implementation of the article

557. To illustrate their implementation of the provisions under review, Kenya indicated that, under its Criminal Procedure Code (section 5), and ACECA (sections 3 and 4), in any acts of corruption, economic crimes and other related offences, Kenyan courts have jurisdiction, and in said courts special Magistrates may judge the offences after being appointed by the Chief Justice, subject to certain conditions involving years of experience.

Paragraph 3 of article 42

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.

(a) Summary of information relevant to reviewing the implementation of the article

558. Kenya extradites its nationals, as described further under article 44.

559. Kenya also cited Section 67 of the Anti-Corruption and Economic Crimes Act, which provides as follows:

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.

560. Kenya indicated that an application of this principle under the quoted law has not been tried in Kenya. There is no requirement under Kenyan law that Kenya shall prosecute any suspect on the basis that it has refused to extradite that offender. This is by virtue of Cap 76 and 77. However, Kenya is contemplating reviewing this position.

(b) Observations on the implementation of the article

561. For the implementation of this paragraph, Kenya cited section 67 of ACECA, which stipulates that the behaviour of a Kenyan citizen outside Kenya is not considered a violation of this law except if said act would also be a violation of this law if committed in Kenya.
562. Despite the legal provision of ACECA (section 67), Kenya indicated it has never attempted to apply the principle established by the present provision.
563. The observations under article 44 are referred to.

Paragraph 4 of article 42

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.

(a) Summary of information relevant to reviewing the implementation of the article

564. Kenya indicated that there is no direct provision in Kenyan law to meet this requirement. There is no requirement under Kenyan law that Kenya shall prosecute any suspect on the basis that it has refused to extradite that offender. This is by virtue of Cap 76 and 77. However, Kenya is contemplating reviewing this position.
565. Moreover, there are certain legal grounds that can bar someone from being extradited, e.g., human rights, dual criminality, and others, as described under UNCAC article 44. Because of not extraditing on the aforementioned reasons, *if Kenya has jurisdiction* it can prosecute the person, as long as the grounds of the objection do not go to the core of the offence. However, there is no provision setting out the basis for this jurisdiction.

(b) Observations on the implementation of the article

566. Kenyan law does not have any specific provision that allows it to respond to such a request.
567. Kenya may wish to consider adopting measures in line with the provision under review.

Paragraph 5 of article 42

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.

(a) Summary of information relevant to reviewing the implementation of the article

568. Kenya indicated that it has partially implemented the provision and cited Section 49 of the Mutual Legal Assistance Act, which provides that:

(1) Where criminal proceedings are contemplated or pending in Kenya and a requesting state against the same person in respect of the same conduct, the states shall consider the appropriate venue for the proceedings to be taken in the interests of the proper administration of justice.

(2) In considering the appropriate venue for proceedings under subsection (1), account shall be taken of, but not limited to-

- a) Location of the accused;
- b) Location, protection and other interests of witnesses and third parties; c) Interests of any victims and third parties;
- d) Location of documents, exhibits and other relevant material; e) Availability and nature of sanctions in the event of conviction;
- f) Capability to address sensitive or confidential information or material; g) Delay;
- h) Evidential problems;
- i) Confiscation and proceeds of crime;
- j) Resources and costs;
- k) Any other issue of public interest.

569. Moreover, the role of the central authority for mutual legal assistance, the Attorney General, is to coordinate investigations.

570. Kenya indicated that there have been examples of implementation in cases relating to terrorism, drug trafficking and piracy, but no further details were provided. There have been no examples related to UNCAC offences.

571. To fully implement the provision, Kenya indicated that the establishment of frameworks and an enabling environment for consultation among agencies in several State parties would be needed.

(b) Observations on the implementation of the article

572. Kenya indicated it partially implemented this provision, citing section 49 of the Mutual Legal Assistance Act.

573. In this case, even if criminal proceedings are contemplated or are already in course, simultaneously in Kenya and in the requesting State, against the same person for the same acts, the two States shall decide the place where it will be most convenient to carry out the proceedings in the interest of a good administration of justice.

574. For the selection of the site, they may consider, among others: the place of residence of the indicted person; the place of residence for the protection, and the interests of witnesses and third parties; the place where most of the documents, and evidence is located; the nature of the sanctions in the event of a conviction; the capacity of the country to manage sensitive and confidential information or materials; the timeframes; any evidentiary problems; the confiscations and criminal prosecutions, matters related to costs and resources.

575. No example of its application related to UNCAC offences was provided. However, Kenya indicated that it would need to create a framework and an environment that favours contact between the competent authorities of the different State Parties in order to fully implement this provision. The reviewers welcome the adoption of such measures. Reference is also made to the observations under article 46.

Paragraph 6 of article 42

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.

(a) Summary of information relevant to reviewing the implementation of the article

576. The grounds for criminal jurisdiction over UNCAC offences in Kenya are described above.

(b) Observations on the implementation of the article

577. The criminal jurisdiction criteria for UNCAC related offences committed in Kenya are described in article 42 above, and are provided for in the Criminal Procedure Code, ACECA and POMCALA.

UNODC

Chapter IV. International cooperation

578. It emerged during the country visit that there continue to be challenges related to capacity of the institutions responsible for international cooperation, in particular in making and responding to requests for mutual legal assistance and during the extradition process. It is recommended that Kenya continue to devote adequate resources and attention to training/capacity building for the authorities responsible for international cooperation.

Article 44 Extradition

Paragraph1

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.

(a) Summary of information relevant to reviewing the implementation of the article

579. To implement the measures under this provision, Kenya has adopted a number of laws, such as: the Extradition (Commonwealth Countries) Act (Cap. 77); the Extradition (Contiguous and Foreign Countries) Act (Cap. 76); the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA); and the Fugitive Offenders Pursuit Act (Cap. 87), among other legal instruments.

580. Some of the key requirements in considering a request for extradition are that the offences set out in the request must be offences both under the laws of the requesting country and Kenyan law regardless of the terminology used. Kenyan law also requires the existence of a bilateral treaty on extradition between Kenya and another State, to form the basis of extradition. In Kenya, dual criminality is a *sine qua non* to granting any request for extradition.

581. Extraditable offences in Kenya are covered by the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) or the Extradition (Commonwealth Countries) Act (Cap.77) of the Laws of Kenya. However, the only offences that these two Acts cover under the UNCAC are bribery, corruption, theft, fraud, and money laundering.

582. POCAMLA amends Cap. 76 and Cap. 77 by providing for additional offences for which an extradition request may be considered. The offences covered in this Act relate to economic crimes.

583. However, in certain circumstances, a request for extradition may be granted on the basis of offences established under the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) (ACECA). It is important to note that the offences under this Act do not necessarily subsume all of the UNCAC offences, such as trading in influence and illicit enrichment.

584. Extraditable crimes under Kenyan laws are as follows:

(a) Extradition (Contiguous and Foreign Countries) Act (Cap. 76) under the Schedule states that:

SCHEDULE

[Section 2(1), Act No. 18 of 1970, s. 11, Act No. 11 of 1983, Sch., Act No. 9 of 2009, Act No. 6 of 2010.]

EXTRADITION CRIMES ...

Misappropriation, Fraud and Similar Offences

Theft, and offences relating thereto.

Fraudulent conversion.

Burglary and housebreaking, robbery, robbery with violence.

Threats by letter or otherwise with intent to extort; intimidation.

Obtaining money or goods by false pretences.

Perjury and subornation of perjury.

Bribery and corruption.

Offences by bankrupts against bankruptcy law, or any cognisable offence under the laws relating to bankruptcy.

Fraudulent misappropriations and fraud.

Receiving stolen property.

Organised Criminal Group Offences.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation is punishable by the laws of both High Contracting Parties.

(b) Extradition (Commonwealth Countries) Act Cap. 77 under Section 4 states that:

4. (1) For the purposes of this Act, an offence is an extradition offence if-

(a) it is an offence against the law of a requesting country which, however described in that law, falls within any of the descriptions contained in the Schedule and is punishable under that law with imprisonment for a term of twelve months or any greater punishment; and

(b) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Kenya if it took place in Kenya or, in the case of an extra-territorial offence, in corresponding circumstances outside Kenya.

(2) In determining for the purposes of this section whether an offence falls within a description contained in the Schedule, any special intent or state of mind or special circumstances of aggravating which may be necessary to constitute that offence under the relevant law shall be disregarded.

(3) The descriptions contained in the Schedule include in each case offences of attempting or conspiring to commit, of assisting, counselling or procuring the commission of or being an accessory before or after the fact to the offence described, and of impeding the apprehension or prosecution of persons guilty of those offences.

The Extradition (Commonwealth Countries) Act Cap. 77 Schedule provides:

SCHEDULE

[Section 4.]

[Act No. 18 of 1970, s. 11, Act No. 11 of 1983, Sch., Act No. 9 of 2009, Act No. 6 of 2010, s. 24.]

DESCRIPTION OF EXTRADITION OFFENCES

...

13. Bribery.
14. Perjury or subornation of perjury or conspiring to defeat the course of justice.
15. Arson or fire-raising.
16. An offence concerning counterfeit currency.
17. An offence against the law relating to forgery.
18. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences, receiving stolen property or any other offence in respect of property involving fraud. ...
31. Any offence that constitutes an offence of money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009.

(c) Section 133 of the Proceeds of Crime and Anti-Money Laundering Act amends Cap. 76 and Cap. 77 as follows:

“133. Consequential amendments

The Acts identified in the Sixth Schedule are amended as indicated in the Sixth Schedule.”

Amendments under the sixth schedule of the Proceeds of Crime and Money Laundering Act are:

1. Extradition (Contiguous and Foreign Countries) Act (Cap. 76)

1. (1) This paragraph amends the Extradition (Contiguous and Foreign Countries) Act (Cap. 76)
- (2) The schedule to the Act is amended by inserting at the end the following paragraph.
“any offence that constitutes an offence of money laundering under the Proceeds of Crime Anti-Money Laundering Act, 2009 (No. 9 of 2009).”

2. Extradition (Commonwealth Countries) Act (Cap. 77)

1. (1) This paragraph amends the Extradition (Commonwealth Countries) Act (Cap. 77)
- (2) The schedule to the Act is amended by inserting at the end the following paragraph:
“31. any offence that constitutes an offence of money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009).”

Offences under the POCAMLA

S. 4. Acquisition, possession or use of proceeds of crime

A person who-

- (a) acquires;
- (b) uses; or
- (c) has possession of property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by another person, commits an offence.

S. 5. Failure to report suspicion regarding proceeds of crime

A person who wilfully fails to comply with an obligation contemplated in section 44(2) commits an offence.

S. 7. Financial promotion of an offence

A person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.

585. Further, Kenya has the **Fugitive Offenders Pursuit Act, (Cap. 87 of the Laws of Kenya)**, which empowers the police authorities of Uganda and Tanzania to pursue fugitives from either country within Kenyan territory. This is based on reciprocal arrangements, meaning that Kenya police officers can also pursue fugitives into either of the two countries. It is a requirement that before a person is surrendered to either of the two countries, the fugitive should be presented before a Magistrate, for purposes of clearing the way for surrender. The Act would apply to corruption suspects and other offences for which surrender to an adjoining territory can be made under the Extradition (Contiguous and Foreign Countries) Act (Cap.76) (see Section 2).

(b) Observations on the implementation of the article

586. Kenya indicated that the following countries have been designated under the Extradition (Contiguous and Foreign Countries) Act (Cap. 76)⁵.

- a) Federal Republic of Germany
- b) United States of America
- c) Republic of Italy
- d) Kingdom of Greece
- e) Polish People's Republic
- f) Republic of Liberia
- g) State of Spain
- h) Republic of Finland
- i) Rwanda

587. Moreover, the following countries are designated countries under the Extradition (Commonwealth Countries) Act (Cap. 77).

- a) Gibraltar
- b) Gilbert and Ellis Islands Colony
- c) Hong Kong
- d) New Hebrides
- e) Pitcairn, Ducie and Oeno Islands
- f) Falkland Islands and Dependencies
- g) Saint Helena and Dependencies
- h) Seychelles
- i) The Bahamas Islands
- j) Bermuda

⁵ See: <http://www.kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%2076>

- k) British Honduras
- l) The British Indian Ocean Territory
- m) The British Solomon Islands Protectorate
- n) The British Virgin Islands
- o) The Sovereign Base Areas of Akrotiri and Dhekelia

588. Kenya provided the following list of 25 bilateral extradition treaties.

- a) Gibraltar
- b) Gilbert and Ellis Islands Colony
- c) Hong Kong
- d) New Hebrides
- e) Pitcairn, Ducie and Oeno Islands
- f) Falkland Islands and Dependencies
- g) Saint Helena and Dependencies
- h) Seychelles
- i) The Bahamas Islands
- j) Bermuda
- k) British Honduras
- l) The British Indian Ocean Territory
- m) The British Solomon Islands Protectorate
- n) The British Virgin Islands
- o) The Sovereign Base Areas of Akrotiri and Dhekelia
- p) The United Kingdom including Jersey
- q) Federal Republic of Germany
- r) United States of America
- s) Republic of Italy
- t) Kingdom of Greece
- u) Polish People's Republic
- v) Republic of Liberia
- w) State of Spain
- x) Republic of Finland
- y) Rwanda

589. Kenya indicated that the extradition laws (Cap. 76 and Cap. 77) apply also in the case of requests coming from countries with which Kenya has signed a bilateral treaty. In case of any conflict, the laws (Cap. 76 and Cap. 77) prevail over any treaty terms. Kenyan authorities explained that it is most unlikely for a conflict to arise because the treaties are based on the laws.

590. Kenya provided the following summary of how incoming extradition requests are executed, once received through the Ministry of Foreign Affairs and International Trade (MFAIT). The conditions summarized in paragraph 8 of the article under review, which must be fulfilled before granting any request for extradition, are acknowledged.

- When the MFAIT receives requests they are forwarded to the Attorney General who is the central authority on all matters regarding extradition.
- Once the Attorney General receives and reviews the requests he sends them to the Office of the Director of Public Prosecution (ODPP) who initiates extradition

proceedings. ODPP has a specialized International Cooperation Division that handles extradition and MLA cases.

- Once the ODPP receives the document (the request) he peruses the request and any accompanying documentation and if he is satisfied extradition should commence, he seeks authority from the Attorney General.
- The ODPP commences court proceedings.
- If the court rules in favour of the extradition, an order is issued authorizing the extradition. There are provisions for appeal in place.

591. The reviewers note that, in light of the dual criminality requirement, extradition is limited to the extent that not all offences established under the Convention have been criminalized. Moreover, not all UNCAC offences are recognized under Kenya's extradition laws. For example, the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) covers "bribery and corruption," while the Extradition (Commonwealth Countries) Act (Cap. 77) covers crimes like bribery, embezzlement and money laundering but not for example UNCAC offences such as abuse of functions or obstruction of justice. The reviewers recommend that Kenya adopt measures to ensure that offences under the Convention are recognized as extraditable under Kenya's laws and treaties, bearing in mind that not all States are designated countries to which the extradition laws apply.

592. Kenya provided the following example of an incoming extradition case:

Jersey Matter-the investigations touched on allegations of corruption, abuse of office and illicit enrichment through contracts entered into between officers of Kenya Power and Lighting Company (KPLC) between 1995 and 2008. The suspects in this matter were former employees of KPLC who had been under investigation by the Jersey Police and EACC for several years. Several requests for mutual legal assistance were written by the Jersey police to Kenya requesting information and vice versa. Jersey authorities were privy to suspicious amounts in accounts held in Jersey purportedly relating to the suspects. In addition to the mutual legal assistance requested, Jersey sought extradition orders in regard to the Kenyan suspects. The matter was pending in court at the time of the country visit. EACC has been pursuing criminal and civil proceedings on the matter given the loss of Kenyan public funds.

593. During the country visit (1-3 September 2014) Kenyan authorities indicated that Kenya had only received three extradition requests in any corruption-related matter: (i) the *Jersey matter* (referred to above), (ii) a request received on 27 October 2013 from Uganda, and (iii) a request received on 14 January 2014 from Djibouti. Kenyan authorities further confirmed that Kenya had not refused any extradition requests at the time of the country review visit.

594. Nonetheless, it was difficult for the reviewers to assess the practical implementation of the cited laws, as Kenya was unable to provide statistics on extradition requests sent or received. The authorities are encouraged to maintain comprehensive statistics on the number of extradition requests received, the nature of such requests, and status of completion, including the number of requests rejected and reasons, as well as the timeframe for responding to the requests.

Article 44 Extradition

Paragraph 2

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.

(a) Summary of information relevant to reviewing the implementation of the article

595. In Kenya, dual criminality is a *sine qua non* to granting any request for extradition.

(b) Observations on the implementation of the article

596. The reviewing experts note that Kenya has not implemented this non-mandatory provision. Dual criminality is a requirement for extradition.

Article 44 Extradition

Paragraph 3

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.

(a) Summary of information relevant to reviewing the implementation of the article

597. The applicable laws are Cap. 76 and 77 of the Laws of Kenya.

The Extradition (Commonwealth Countries) Act (Cap. 77) in Section 4 (quoted above) sets out minimum conditions relating to punishment for an offence to be extraditable (imprisonment for a term of twelve months or any greater punishment under the law of the requesting country) and the dual criminality requirement. No such period of imprisonment is established in the Extradition (Contiguous and Foreign Countries) Act (Cap. 76).

(b) Observations on the implementation of the article

598. It is noted that the minimum period of imprisonment in Section 4 of Cap. 77 applies to offences under the law of the requesting country and thus the specified period under the law of the requesting country would not seem to impede Kenya's ability to respond to requests for extradition.

599. There have been no case examples where Kenya granted extradition under the circumstances outlined in the provision under review.

Article 44 Extradition

Paragraph 4

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.

(a) Summary of information relevant to reviewing the implementation of the article

600. In Kenya, dual criminality is a *sine qua non* to granting any request for extradition. The provisions of both Cap.76 and 77 make it mandatory that there has to be an extradition treaty.

601. Kenya has concluded bilateral treaties with other countries as summarized above and under paragraph 18 of the article under review.

602. Kenya subscribes to the Commonwealth (London) Scheme on Extradition, which provides a framework for extradition between Commonwealth countries.

603. Kenya is also party to the Intergovernmental Authority on Development (IGAD) Convention on Extradition.

(b) Observations on the implementation of the article

604. The observations made under paragraph 1 above in respect of extradition in relation to UNCAC offences are referred to.

605. As noted below, Kenya does not consider the Convention as the legal basis for extradition.

Article 44 Extradition

Paragraph 5

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.

(a) Summary of information relevant to reviewing the implementation of the article

606. Kenya indicated that it makes extradition conditional on the existence of a treaty. The provisions of both Cap. 76 and 77 make it mandatory that there has to be an extradition treaty in place.

607. Kenya further indicated that it does not consider the Convention as the legal basis for extradition. On 14 August 2008, Kenya submitted a notification to the UN Secretary General under article 44(6)(a) of the Convention stating that:

In terms of Article 44(6)(a) of the Convention, the Republic of Kenya declares that it does not consider the Convention as a legal basis for co-operation on extradition with other States Parties since Kenya's municipal law (especially The Extradition (Contiguous) and Foreign Countries Act (Cap 76) and the Extradition (Commonwealth Countries) Act (Cap 77)) requires the existence of a bilateral treaty between Kenya and another state as a condition precedent to extradition proceedings.⁶

608. However, in view of the provisions of Article 2(6) of the Constitution on the application of treaties that Kenya has ratified, Kenya may review its position towards the application of the Convention in extradition proceedings.

609. The issue of how international conventions or treaties that Kenya has ratified can be applied domestically, and especially in court, is still under consideration. The High Court of Kenya has had an opportunity to interpret the effect of Article 2(5) and (6) of the Constitution on the place of international law in Kenya. The opinion of the Supreme Court of Kenya on the matter is yet to be determined. The following cases illustrate the emerging jurisprudence on the application of treaties in the domestic arena:

The Matter of Zipporah Wambui Mathara (Bankruptcy Cause No. 19 of 2010: High Court) [2010] eKLR (per Lady Justice Martha Koome).

This was an application made in a bankruptcy case seeking to stay the execution of orders of detention on account of an unsatisfied judgment debt. The applicant argued, inter alia, that, her detention was contrary to article 11 of the International Covenant on Civil and Political Rights (“ICCPR”) stating that “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.” It seems to have been the applicant’s suggestion that to the extent that the Civil Procedure Rules provided for committal to civil jail as a method of execution then it condoned imprisonment “merely on the ground of inability to fulfil a contractual obligation” contrary to the provisions of the ICCPR. With regard to the status of article 11 of the ICCPR the court took the view that committal to civil jail on account of a judgment debt was akin to imprisoning a person merely for failing to perform a contractual obligation. It was hence contrary to the ICCPR and hence unconstitutional. Thus, the court effectively suggested that applicable international law must trump contrary local legislation. In that case, Justice Koome stated that international law was above local legislation and where there was conflict between international conventions and local legislations, the provisions of international conventions prevailed over those of local legislations.

Diamond Trust Ltd v Daniel Mwema Mulwa (High Court Civil Case 70 of 2002) (2010) eKLR (per Justice L. Njagi).

⁶<https://treaties.un.org/doc/Publication/CN/2008/CN.642.2008-Eng.pdf>

The facts of this case were similar to those of the *Zipporah Mathara case* which was determined by Justice Koome. In this present case, in determining the status of international treaties and conventions in Kenya, the court (per Justice Njagi) first set out what it considered to be the relationship between the norms of law applicable in Kenya as follows:

“We have in this country a three-tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws [are] subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile.”

The court found that the ICCPR enjoyed the rank of an Act of Parliament. This was not a status that was akin to that of the Constitution. And yet it was not above that of an Act of Parliament. In effect an applicable treaty had to be treated the same way as an Act of Parliament. In the event of a conflict a court would not have to consider which of the two was superior to the other. It is for this reason that while the court finds that there is a conflict between section 40 of the Civil Procedure Act and Article 11 of the ICCPR it holds that the latter cannot render the former unconstitutional because “for as long as Section 40 remains in the statute book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts.” This case suggests that courts should not resolve conflicts between treaties and acts of Parliament but instead such conflicts should be referred to Parliament as the appropriate forum for resolving such conflicts.

Beatrice Wanjiku & Another v Attorney General & Others (High Court: Petition No 190 of 2011) (per Justice David Majanja).

The facts of this case were also similar to the other two above. However it was filed as a constitutional reference. The petitioners were judgment debtors in other civil suits in which warrants of arrest had been issued in pursuance of execution. They argued that a process that allowed committal of an individual to civil jail on account of a civil debt was unconstitutional because it violated article 11 of the ICCPR which, on the basis of article 2 of the Constitution was not only part of the law but was also superior to the impugned domestic statute. The issue thus was whether the entire process of committal to civil jail as a means of enforcing a civil debt was contrary to article 11 of the ICCPR and hence unconstitutional. Contrary to the petitioners’ submission that international law trumped conflicting domestic legislation, the court held that international legal provisions are first of all “subordinate to and ought to be in compliance with the Constitution.” Secondly, and again, contrary to the petitioners’ submission, international law did not trump domestic law. To hold otherwise would be to suggest that Kenyans surrendered their sovereignty to the international legal order insofar as legislation was concerned; a view that would not comport with the intention of the framers of the Constitution. Thus, provisions of a treaty would not trump those of a conflicting legislation because international law did not enjoy any special status under the Constitution.

(b) Observations on the implementation of the article

610. It was confirmed during the country visit that a treaty would need to be concluded on an *ad hoc* basis if a request was received from a country with which no such treaty was in place.

611. In this context the reviewers acknowledge Kenya's indications that the domestic application, especially in court, of international conventions or treaties that Kenya has ratified is still under consideration. The Court of Appeal of Kenya and the Supreme Court of Kenya are yet to pronounce themselves on the matter. Eventually, the Supreme Court will have the final say over the question of the status of international instruments vis-à-vis municipal law in Kenya. Nonetheless, Kenya indicated its commitment to implementing its international obligations, in line with the provisions of the Convention and also as provided for under the Vienna Convention on the Law of Treaties, 1969. The reviewers welcome indications that Kenya may review its position towards the application of the Convention in extradition proceedings, in particular in light of the treaty requirement.

Article 44 Extradition

Paragraph 6

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.

(a) Summary of information relevant to reviewing the implementation of the article

612. As indicated under the previous provision, on 14 August 2008, Kenya submitted a notification under article 44(6)(a) of the Convention stating that it does not consider UNCAC as a legal basis for cooperation on extradition due to domestic law requirements, such as the Extradition (Contiguous and Foreign Countries) Act (Cap 76) and the Extradition (Commonwealth Countries) Act (Cap 77), which require the existence of a bilateral treaty between Kenya and another state as a condition precedent to extradition proceedings. Accordingly, Kenya does not use the Convention as the legal basis for extradition in respect to any offence to which this article applies.

613. Kenya has concluded bilateral treaties with other countries, as noted. Kenya also informed the reviewers that there have been no cases in which such treaties have been applied to date.

(b) Observations on the implementation of the article

614. Kenya has made the requisite notification to the United Nations and has concluded extradition treaties, as noted above. The reviewers reiterate their observation that they

welcome indications that Kenya may review its position towards the application of the Convention in extradition cases.

Article 44 Extradition

Paragraph 7

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.

(a) Summary of information relevant to reviewing the implementation of the article

615. Kenya's position is that extradition is conditional on the existence of a treaty. There has been no policy change on this matter.

(b) Observations on the implementation of the article

616. Reference is made to the observations and recommendation under paragraph 1 of the article under review that not all offences under the Convention are extraditable under Kenya's extradition laws.

Article 44 Extradition

Paragraph 8

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.

(a) Summary of information relevant to reviewing the implementation of the article

617. Kenya indicated that the conditions that must be fulfilled before granting any request for extradition under the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) include:

- 1) An agreement or treaty between Kenya and the requesting State.
- 2) An order must be published in the Kenya Gazette stating that the Act applies to a specific country.
- 3) The fugitive must be identified
- 4) The request must disclose an extraditable offence.
- 5) The request must be made to the Government
- 6) Any restrictions under Section 16 of the Act must be taken into consideration.
- 7) Dual criminality must be considered. The crime or offence for which the request is made must be criminalized in both the requesting country and in Kenya.
- 8) The warrant of arrest issued by a foreign country must be duly authenticated.

618. The procedure for extradition proceedings is provided for under Section 7 of the Extradition (Contiguous and Foreign Countries) Act (Cap. 76).

7. Hearing of case and evidence

(1) When a fugitive criminal is brought before a magistrate, the magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as in a trial before a subordinate court.

(2) The magistrate shall receive any evidence which may be tendered to show that the case is one to which the relevant provisions of section 16 apply or that the crime of which the prisoner is accused is not an extradition crime.

619. Extradition under the Extradition (Commonwealth Countries) Act (Cap. 77), in addition to the requirements in Cap. 76 above, makes it mandatory for:

1) The country to be designated by Order by the Attorney General as a “designated Commonwealth Country” within the meaning of the Act.

620. The Extradition (Commonwealth Countries) Act (Cap. 77) in Section 4 sets out minimum conditions relating to punishment for an offence to be extraditable (imprisonment for a term of twelve months or any greater punishment under the law of the requesting country) and the dual criminality requirement.

621. Grounds for refusing extradition are further described under paragraph 15 of the article under review.

622. Kenya has not refused any extradition requests to date.

(b) Observations on the implementation of the article

623. Kenya recognizes conditions on extradition and grounds for refusal in line with the Convention.

Article 44 Extradition

Paragraph 9

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.

(a) Summary of information relevant to reviewing the implementation of the article

624. Kenya indicated that under the Extradition (Commonwealth Countries) Act (Cap. 77), the relevant provisions are to be found in Section 9 which reads:

9. Proceedings for committal

(1) A person arrested in pursuance of a warrant of arrest shall (unless previously discharged under subsection (3) of section 8) be brought as soon as practicable before the court.

(2) If a person is arrested in pursuance of this Act and brought before a magistrate who has no power to exercise jurisdiction under this Act, that magistrate shall have power to order that person to be brought before some magistrate having such jurisdiction, and to remand or admit that person to bail, and effect shall be given to any such order.

(3) For the purposes of proceedings under this section, the court shall have the like jurisdiction and powers, as nearly as may be, as it has in a trial.

(4) Where a fugitive arrested in pursuance of a provisional warrant is in custody and the court has not received an authority to proceed, it may fix a reasonable period (of which it shall give notice to the Attorney-General) after which it will discharge the fugitive from custody if it has not received an authority to proceed.

(5) Where the court has received an authority to proceed in respect of a fugitive arrested, and it is satisfied, after hearing any evidence tendered in support of the request for the surrender or on behalf of the fugitive, that the offence to which the authority to proceed relates is an extradition offence, and if further satisfied-

(a) where the fugitive is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed in Kenya; or

(b) where the fugitive is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large, the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his surrender, but if the court is not so satisfied, or if the committal is so prohibited, the court shall discharge him from custody.

(6) Any property in the possession of a fugitive committed to custody under this section at the time of his apprehension that may be material as evidence in proving the offence for which his surrender is requested shall, if the court so directs, be delivered up with him on his surrender.

625. Relevant provisions are also found in the Extradition (Contiguous and Foreign Countries) Act (Cap. 76).

7. Hearing of case and evidence

(1) When a fugitive criminal is brought before a magistrate, the magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as in a trial before a subordinate court.

(2) The magistrate shall receive any evidence which may be tendered to show that the case is one to which the relevant provisions of section 16 apply or that the crime of which the prisoner is accused is not an extradition crime.

8. Committal or discharge of prisoner.

(3) If the magistrate commits such criminal to prison, he shall commit him to prison to await the warrant of the Minister for his surrender; and the magistrate shall forthwith send to the Minister a certificate of the committal and such report on the case as he may think fit.

15. Discharge of prisoner

(1) Whenever a prisoner whose return is authorized in pursuance of this Part of this Act is not conveyed out of Kenya within one month after the date of the order for his return, a magistrate may—

(a) upon application by or on behalf of the prisoner; and

(b) upon proof that reasonable notice of the intention to make the application has been given to the person holding the warrant and to the Commissioner of Police or chief officer of the police of the district, city, town or area where the prisoner is in custody; and

(c) unless sufficient cause is shown to the contrary,
order the prisoner to be discharged out of custody. ...

626. Both laws contain provisions on evidence, in Sections 17 (Cap. 76) and 16 (Cap. 77), respectively.

627. Simplified extradition arrangements are also available under the London Scheme on Extradition.

628. Kenya indicated that the effects of appeal procedures, judicial review and constitutional applications, however, tend to prolong the extradition process, as demonstrated in the case of *Torroha Mohamed Torroha vs. Republic*, [1989] eKLR (summarized below under paragraph 14 of the article under review), which laid down the principles in clarifying the roles of a Magistrate in extradition proceedings:

a) the magistrate should peruse the entire evidence and understand the case without taking the position of a trial court.

b) the magistrate should also establish a link between the offence and the person accused, High Court decision in *Republic vs. Wilfred Onyango Nganyi alias Dadi & Patrick Ayisi Ingoi* (High Court of Kenya (Nairobi) [2008] eKLR (summarized below under paragraph 14 of the article under review).

c) the magistrate should not turn himself as the trial court by making findings on the credibility of the witnesses and the contradictions in their testimony

d) the magistrate should also satisfy the dual criminality requirement.

e) Section 14 of Cap. 76 states that the magistrate should be concerned with authentication of documents and to establish a prima facie evidence exists connecting the suspects to the alleged crime.

(b) Observations on the implementation of the article

629. The reviewers are satisfied with the information provided. Kenya indicated that the average timeframe for responding to extradition requests is approximately 4 to 8 weeks, assuming that there is no objection to the extradition. If there is an objection or an appeal, the extradition process will take much longer.

Article 44 Extradition

Paragraph 10

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.

(a) Summary of information relevant to reviewing the implementation of the article

630. Kenya indicated that the Extradition (Commonwealth Countries) Act (Cap. 77 of the Laws of Kenya) provides for this under Section 8(1) which states as follows:

8. Arrest for purposes of committal

(1) A warrant for the arrest of a fugitive may be issued by a magistrate-

(a) on receipt of an authority to proceed; or

(b) without an authority to proceed, upon information that the fugitive is or is believed to be in or on his way to Kenya.

631. Furthermore, the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) provides for this under Section 13 which states:

13. Provisional warrant

(1) Notwithstanding that a warrant for the arrest of any person issued in a country to which this Part applies may not yet have been endorsed in pursuance of this Part, a magistrate may issue a provisional warrant for the arrest of such person on such information and under such circumstances as would, in his opinion, justify the issue of a warrant if the offence of which that person is accused were an offence punishable by the law of Kenya and had been committed within his jurisdiction; and such warrant may be endorsed in the manner provided in the Criminal Procedure Code, and may be executed accordingly.

(2) Where a person is arrested under such a provisional warrant-

(a) no order may be made under section 14 for his return to the country in which the original warrant was issued unless the original warrant is produced and endorsed in accordance with this Part; and

(b) he shall be discharged unless the original warrant is produced and endorse within such time as the magistrate thinks reasonable in the circumstances.

632. No examples of implementation were provided.

(b) Observations on the implementation of the article

633. Based on the information provided, Kenya has legislatively implemented the provision.

Article 44 Extradition

Paragraph 11

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.

(a) Summary of information relevant to reviewing the implementation of the article

634. Kenya indicated that it would extradite a Kenyan national if the conditions for extradition, i.e. dual criminality and the rule of specialty, are met and a treaty is in place.

(b) Observations on the implementation of the article

635. Kenyan authorities confirmed during the country visit that nationality of the person sought is not a ground for refusal under the extradition laws. Should extradition of a national be refused because the grounds for extradition are not met, Kenya indicated that it would submit the case for prosecution.

636. Kenya indicated that there have been no completed extraditions of nationals in relation to corruption offences. There is, however, the pending case of Samuel Gichuru and Chris Okemo (the *Jersey case* described above) involving extradition requests involving Kenyan suspects. In this case, as noted, EACC is also pursuing criminal and civil proceedings.

Article 44 Extradition

Paragraphs 12 and 13

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.

(a) Summary of information relevant to reviewing the implementation of the article

637. There is a pending Transfer of Prisoners Bill⁷ awaiting scrutiny and deliberation in the National Assembly and which, once enacted into law, will address the issues raised under this provision. The Transfer of Prisoners Bill, 2014 was published by the Government of Kenya on 16 May 2014 and was awaiting debate in Parliament at the time of the country visit (see article 45 of the Convention below for details). The Bill would provide as follows regarding the transfer of nationals and recognition of foreign sentences (included for information only):

⁷ Available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/TransferofPrisonersBill2014.pdf>

7. Conditions for transfer of prisoners

A prisoner may be transferred between Kenya and a transfer country under this Act if the following conditions are satisfied-

- (a) the prisoner is eligible for transfer from or to Kenya;*
- (b) Kenya and the transfer country have an agreement for the transfer of the prisoner under this Act;*
- (c) the prisoner or the prisoner's representative has consented in writing to the transfer on the agreed terms;*
- (d) the appropriate consent in writing has been given to transfer on the agreed terms;*
- (e) the relevant conditions for transfer of the prisoner are satisfied;*
- (f) the transfer of the prisoner is not likely to prevent the surrender of the prisoner to any extradition country-*
 - (i) known by the Attorney-General to have requested the extradition of the prisoner or to have expressed interest in extraditing the prisoner; or*
 - (ii) that, in the opinion of the Attorney-General, is reasonably likely to request the prisoner's extradition.*

8. Eligibility for transfer of prisoners to Kenya

(1) A prisoner shall be eligible for transfer to Kenya from a sentencing country under this Act if the prisoner-

- (a) is a Kenyan citizen; or*
 - (b) is permitted to travel to, enter and remain in Kenya indefinitely under the Kenya citizenship and Immigration Act, 2011 and has community ties with Kenya, and*
 - (c) the offence for which the sentence is imposed is punishable under Kenyan law.*
- (2) If a request is made for the transfer of a prisoner to Kenya, the Attorney-General shall consult with the Cabinet Secretary responsible for immigration about whether the prisoner-*
- (a) is eligible under subsection (1) for a transfer to Kenya; or*
 - (b) is likely to be eligible under subsection (1) for a transfer to Kenya at a future time specified by the Attorney-General.*

10. Transfer to Kenya

(1) The conditions for the transfer to Kenya of a prisoner, other than a mentally impaired prisoner, shall be as follows-

- (a) neither the sentence of imprisonment imposed by the court in sentencing country nor the conviction on which it is based is subject to appeal under the law of that country;*
- (b) subject to subsection (3), the acts or omissions constituting the offence in relation to which the prisoner is serving the sentence in the sentencing country would, if the acts or omissions had occurred in Kenya, have constituted an offence in Kenya; and*
- (c) in a case where the sentence of imprisonment is determinate, on the day of receipt of the request for transfer –*
 - (i) at least six months of the prisoner's sentence remains to be served (whether or not the prisoner has been released on parole); or*
 - (ii) a period shorter than six months remains to be served and the Attorney-General has decided that, in the circumstances, transfer for a shorter period is acceptable.*

PART V. ENFORCEMENT OF SENTENCE

...

31. Sentence enforcement in Kenya

The Attorney-General may direct a sentence of imprisonment imposed on a prisoner by a court of a sentencing country to be enforced on transfer of the prisoner to Kenya under this Act by means of-

- (a) the continued enforcement method; or*
- (b) the converted enforcement method.*

32. Duration and nature of enforced sentence.

(1) The sentence of imprisonment to be enforced under section 31 may not be more severe, in legal nature or duration, than the sentence of imprisonment imposed by the sentencing country.

(2) Without prejudice to subsection (1)-

(a) if the sentence of imprisonment imposed by the transfer country is for a determinate period, the sentence of imprisonment to be enforced under this Act may not be for a longer duration than that sentence; and

(b) if the sentence of imprisonment imposed by the sentencing country is for an indeterminate period, the sentence of imprisonment to be enforced under this Act shall, as far as practicable, be subject to similar terms affecting the duration of the sentence as those imposed in the transfer country; and

(c) the sentence of imprisonment to be enforced under this Act may not be of a kind that involved a more severe form of deprivation of liberty than the sentence of imprisonment imposed by the sentencing country.

33. Directions concerning enforcement of sentence.

(1) In ordering that a sentence of imprisonment be enforced by the continued enforcement method or the converted enforcement method, the Attorney-General may, subject to section 32, give such directions as the Attorney-General may consider appropriate as to the duration and legal nature of the sentence of imprisonment as it is to be enforced under this Act.

(2) Without prejudice to the generality of subsection (1), directions may be made-

(a) as to the entitlement of the prisoner to be released on parole following the transfer; and

(b) if the prisoner is a mentally impaired prisoner, as to any review to be undertaken of the mental condition of the prisoner and treatment to be provided to the prisoner following the transfer.

(3) For the purpose of forming an opinion or exercising a discretion under this section, the Attorney-General shall have regard to such factors as the Attorney-General may consider relevant, including-

(a) any submissions made by the sentencing country;

(b) the sentence of imprisonment that might have been imposed if the acts and omissions constituting the offence had been committed in Kenya; and

(c) any limitations or requirements that in relation to the way in which a sentence of imprisonment imposed by the sentencing country may be enforced in Kenya arising from any agreement to which Kenya and the sentencing country are parties.

34. (1) A prisoner who is transferred to Kenya under this Act shall have no right of appeal or review in Kenya against the sentence of imprisonment imposed by the court of the sentencing country.

(2) a prisoner shall have no right of appeal against a decision of the Attorney-General concerning the enforcement in Kenya under this Act of a sentence of imprisonment imposed by a court of a sentencing country.

35. No appeal or review of sentences of imprisonment imposed by the transfer country, etc.

(1) Any period of the sentence of imprisonment as originally imposed by the sentencing country served by the prisoner before the transfer shall be deemed to have been served under the sentence of imprisonment as enforced under this Act.

(2) While serving a sentence of imprisonment imposed by a sentencing country that is enforced under this Act, a prisoner who is transferred to Kenya under this Act may be detained in a prison, hospital or any other place in Kenya.

(3) Any Kenyan law, practice or procedure concerning the detention of prisoners shall apply in relation to the prisoner on and after transfer to Kenya to the extent that it is capable of applying concurrently with this Act.

(4) Without prejudice to subsection (3), Kenyan law and practice and procedure relating to the following matters shall be applicable to a prisoner who is transferred to Kenya under this Act-

(a) conditions of imprisonment and treatment of prisoners;

(b) the release on parole of prisoners;

(c) the classification and separation of prisoners;

(d) the removal of prisoners from one prison to another;

(e) the removal of prisoners between prisons and hospitals or other places or between one hospital to other place and another;

(f) the treatment of mentally impaired prisoners; and

(g) the eligibility for participation in prison programs.

(5) A prisoner shall be entitled to any remission or reduction of the sentence of imprisonment imposed by the transfer country for which the prisoner would be eligible in accordance with any applicable Kenya law if the sentence were a sentence of imprisonment for an offence against a law of Kenya.

(6) Nothing in this section shall prevent the sentencing country from pardoning or granting amnesty to or quashing or otherwise nullifying the conviction of a prisoner serving a sentence of imprisonment imposed by the sentencing country in-Kenya in accordance with this Act, or from commuting the sentence.

36. Pardon, amnesty or commutation of sentences of imprisonment of prisoners transferred to Kenya.

(1) During the period in which a sentence of imprisonment is served in Kenya by a prisoner transferred to Kenya under this Act, the prisoner may be pardoned or granted any amnesty or commutation of sentence of imprisonment that could be granted under Kenyan law if the sentence of imprisonment had been imposed for an offence against a Kenyan law.

(2) The Attorney-General may, in a form prescribed by the regulations, direct that a prisoner may not be detained in custody or otherwise be subjected to detention or supervision in Kenya under a sentence or imprisonment imposed by a sentencing country and enforced under this Act only because of that sentence of imprisonment if, during the period in which the sentence of imprisonment is served in Kenya, the sentencing country notifies the Attorney-General that the prisoner's conviction has been quashed or

otherwise nullified or that the prisoner has been pardoned or granted amnesty or commutation of sentence of imprisonment under the law of the transfer country.

(b) Observations on the implementation of the article

638. In respect of paragraph 12 of the article under review, it was confirmed during the country visit that Kenya's law does not require the conditional extradition or surrender of nationals. This is also not provided for under the Transfer of Prisoners Bill.

639. In respect of paragraph 13, the Bill does, however, provide for situations where Kenya would consider the enforcement of a foreign sentence (Part V), subject to the conditions described. The reviewers welcome the swift adoption of the Bill, while noting Kenya's general position which allows for the extradition of nationals.

Article 44 Extradition

Paragraph 14

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.

(a) Summary of information relevant to reviewing the implementation of the article

640. An extradition proceeding is a criminal proceeding and the subject thereof is entitled to all the rights of an accused person as guaranteed under Article 50(1) of the Constitution of Kenya.

Constitution of Kenya

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right-

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

- (k) to adduce and challenge evidence;
- (l) to refuse to give self-incriminating evidence;
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not-
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

641. Kenya referred to the following case examples where defendants raised fair treatment objections.

(i) *Torroha Mohamed Torroha vs. Republic*, [1989] eKLR

In *Torroha Mohamed Torroha vs. Republic*, [1989] eKLR, the Court of Appeal of Kenya (per Nyarangi, Gachuhi & Masime, JJA) (on 18 January 1989) delivered a judgement based on a second appeal from a judgment of the High Court allowing the appeal of the Republic from the decision of the Chief Magistrate whereby he had discharged and set free the appellant (Torroha Mohamed Torroha). The Appellant, a national of Tanzania, was the other person concerned in proceedings brought under Section 14 of the Extradition (Contiguous and Foreign Countries) Act, Cap. 76 of the Laws of Kenya. The Appellant was objecting to his extradition to Tanzania on, among other grounds, that he would not get a fair trial in Tanzania. The appellant was wanted in Tanzania to face trial over alleged conspiracy to commit a felony and alleged offences of stealing travellers' cheques worth US\$ 390,000. While dismissing the appeal, Court of Appeal held, *inter alia*, that, "It is fundamental that there cannot be extradition where fair trial cannot be guaranteed". The court proceeded to find that the appellant would receive a fair trial in Tanzania. The court proceeded to assess the proper task of a Magistrate before whom the return of a prisoner is sought.

The Court shall have regard to Section 14 (1) of Cap. 76. The Magistrate then peruses the documentary and oral evidence and ensures that Section 14, Sub-Section 1 (a) and (b) of Cap. 76 has been complied with. Before exercising his discretion to order the return of the prisoner, the magistrate should peruse the entire evidence and understand it, without taking the position of a trial court. So, the degree to which the Magistrate has to be 'satisfied' is not expected to be as high as if any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial. The Magistrate is under no duty to enquire into the merits of the charges to be preferred. The Magistrate does not try or attempt to try any issue because there is no hearing (*Kunga vs. Republic*, [1975] E.A 155). If there is some evidence which discloses a connecting factor between the prisoner and the alleged offences, the magistrate should order the prisoner to be returned.

(ii) Republic vs. Wilfred Onyango Nganyi alias Dadi & Patrick Ayisi Ingoi (High Court of Kenya (Nairobi), [2008] eKLR.

The High Court (per Justice JB Ojwang) allowed an appeal by the Attorney General to allow the extradition of suspects to stand trial in Tanzania. The trial magistrate had initially declined to order extradition on the grounds the suspects were not assured of fair trial in Tanzania going by the conduct of the prosecution and some of the prosecution witnesses in the course of the extradition proceedings. The High Court observed that the trial and dispensation of justice was the remit of the courts and not witnesses and, therefore, the conduct of witnesses was not a ground for declining extradition. The Court observed that Tanzanian courts were just like Kenyan courts – bound by the principles of common law and equity which adhere to the principles of fair trial.

(b) Observations on the implementation of the article

642. Kenya indicated that some challenges include the ease with which Constitutional references are used as delaying tactics in some cases, and heavy backlog in the judiciary, which hinders the speedy conclusion of extradition proceedings.

643. In light of the challenges described, as discussed during the country visit, it is recommended that Kenya continue to ensure that fair treatment guarantees are applied at all stages of the proceedings, in line with the provision under review.

644. While noting the observations made under paragraph 9 above and under article 36 with respect to addressing the backlog in the judicial system, the reviewers also recommend that Kenya take measures to address the delays in extradition proceedings.

Article 44 Extradition

Paragraph 15

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.

(a) Summary of information relevant to reviewing the implementation of the article

645. Kenya cited the provisions of Cap. 76 and 77 on restrictions for extradition, as summarized below.

Section 6(1), Extradition (Commonwealth Countries) Act (Cap. 77)

General restrictions on extradition

- Political offence
- Request for surrender made to prosecute on account of race, religion, nationality or political opinions
- If surrendered, the person may be prejudiced at trial or punished, detained or restricted by reason of race, religion, nationality or political opinions

- Previous acquittal or conviction
- Specialty rule
- Discretionary- the Director of Public Prosecutions (DPP) may refuse to issue the warrant of surrender if it would be unjust and oppressive to surrender the fugitive (Section 11(3) of Cap. 77)
- Discretionary- if the offence is punishable by death in the requesting country but not in Kenya (Section 11(4) of Cap. 77)
- Discretionary- if the DPP believes it would be dangerous to the life or prejudicial to the health of the fugitive - until the condition is over (Section 11(5) of Cap. 77).

Restrictions under Extradition (Contiguous and Foreign Countries) Act (Cap. 76)

- Offence of a political character
- If the fugitive is still undergoing sentence in Kenya for another offence until the expiry of his term of sentence
- Specialty rule
- Discretionary-trivial nature of the offence (Section 16(3) of Cap. 76)
- Discretionary-application for surrender not made in good faith or in the interests of justice (Section 16(3) of Cap. 76)
- Discretionary-It would be unjust and oppressive or too severe a punishment to return the fugitive (Section 16(3) of Cap. 76)

646. Kenya informed the reviewers that it had not refused extradition on such grounds in corruption-related matters.

(b) Observations on the implementation of the article

647. Kenya indicated that no requests have been refused by Kenya in corruption-related cases. The issue of discriminatory purpose of a request has not come up in practice in any extradition cases.

648. It is noted that Section 6(1), Extradition (Commonwealth Countries) Act (Cap. 77) recognizes discrimination on the grounds of race, religion, nationality or political opinions as a mandatory reason for refusal. However, the issue of gender is not addressed. No such specific provision is included in the Extradition (Contiguous and Foreign Countries) Act (Cap. 76). The reviewers recommend that Kenya amend its laws to more closely align them with the provision under review.

Article 44 Extradition

Paragraph 16

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

649. Kenya indicated that under Kenyan law, an extraditable offence must be one described as an extraditable offence under Cap. 76 and Cap. 77. These laws do not restrict extradition on the grounds that the offence involves fiscal matters.

650. Kenya further noted that it has not refused a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(b) Observations on the implementation of the article

651. Kenya has adequately implemented the provision under review. Kenya indicated that there have been no extradition requests where the offence involved a financial or tax matter.

Article 44 Extradition

Paragraph 17

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.

(a) Summary of information relevant to reviewing the implementation of the article

652. Kenya cited Parts IV and V of Cap. 76 and Part II of Cap. 77.

653. The information envisaged under this provision has not arisen in Kenya and, therefore, Kenya has no court decisions or illustrations of exchanges between Kenya and other countries over the matters in issue.

(b) Observations on the implementation of the article

654. The cited laws do not address a duty to consult before refusing extradition. The Kenyan authorities confirmed that there are no express provisions providing for consultations in Cap. 76 or Cap. 77, but indicated that Kenyan authorities ordinarily hold consultations with requesting States in extradition cases as a matter of practice. It is recommended that Kenya adopt measures to implement the provision under review.

Article 44 Extradition

Paragraph 18

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(a) Summary of information relevant to reviewing the implementation of the article

655. Kenya has concluded bilateral and multilateral agreements and arrangements with Commonwealth and foreign and contiguous States under Cap. 76 and 77 respectively. Kenya is also party to the Intergovernmental Authority on Development (IGAD) Convention on Extradition and the London Scheme on Extradition. Moreover, Section 3 of the two Acts provides for the conclusion of such agreements or arrangements.

656. Kenya provided the following list of 25 bilateral extradition treaties.

- a) Gibraltar
- b) Gilbert and Ellis Islands Colony
- c) Hong Kong
- d) New Hebrides
- e) Pitcairn, Ducie and Oeno Islands
- f) Falkland Islands and Dependencies
- g) Saint Helena and Dependencies
- h) Seychelles
- i) The Bahamas Islands
- j) Bermuda
- k) British Honduras
- l) The British Indian Ocean Territory
- m) The British Solomon Islands Protectorate
- n) The British Virgin Islands
- o) The Sovereign Base Areas of Akrotiri and Dhekelia
- p) The United Kingdom including Jersey
- q) Federal Republic of Germany
- r) United States of America
- s) Republic of Italy
- t) Kingdom of Greece
- u) Polish People's Republic
- v) Republic of Liberia
- w) State of Spain
- x) Republic of Finland
- y) Rwanda

(b) Observations on the implementation of the article

657. Kenya has concluded treaties in line with the provision under review. The observations made above are referred to in the context of the implementation of the provision under review.

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.

(a) Summary of information relevant to reviewing the implementation of the article

658. Kenya indicated that it has adopted one bilateral agreement with the Government of Rwanda on the Transfer of Foreign Sentenced Prisoners (dated 11 July 2008).

659. Kenya indicated that it has received many requests for transfer of sentenced persons or prisoners. Such requests are routinely made by countries whose nationals are serving prison sentences in Kenya. The requests are not necessarily based on any treaty or legal framework. However, no request for the transfer of sentenced persons has been executed and none of the requests involved a corruption-related matter.

660. Nonetheless, owing to the increasing need for Kenya to consider requests of transfer of prisoners or sentenced persons, Kenya has developed a Transfer of Prisoners Bill 2014,⁸ which would address the requirements of this UNCAC article. The Bill was published by the Government of Kenya on 16 May 2014 and was awaiting debate in Parliament at the time of the country visit.

661. The Bill would facilitate the transfer of prisoners between Kenya and countries with which Kenya has entered into agreements for the transfer of prisoners, to enable the prisoners to serve out their sentences of imprisonment in the countries of their nationality or in countries with which they have community ties (see Section 2 of the Bill).

(b) Observations on the implementation of the article

662. Kenya has reportedly entered into one agreement with the Government of Rwanda on the Transfer of Foreign Sentenced Persons dated 11 July 2008.

663. The reviewers welcome the swift adoption of the Transfer of Prisoners Bill to provide greater legal certainty in corruption-related cases.

(c) Challenges, where applicable

664. Kenya has identified the following challenges and issues in fully implementing the article under review: Legislation to govern the transfer of sentenced persons will be required.

(d) Technical assistance needs

665. Kenya indicated that model treaties and on-site assistance by a relevant expert would assist Kenya in its efforts to implement the article under review.

Kenya indicated that none of the forms of technical assistance mentioned above have been previously provided.

Article 46 Mutual legal assistance

Paragraph 1

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.

⁸ Available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/TransferofPrisonersBill2014.pdf>

(a) Summary of information relevant to reviewing the implementation of the article

666. Kenya indicated that the provision under review has been implemented through the operation of the Mutual Legal Assistance Act, 2011 (MLA Act) and the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), especially Sections 114 to 120 of the latter. Kenya has consistently rendered, and also sought, mutual legal assistance to or from other countries, within the framework of the MLA Act and the POCAMLA.
667. The MLA Act provides for mutual legal assistance to be given and received by Kenya in investigations, prosecution and judicial proceedings in relation to criminal matters. The Office of the Attorney-General serves as the Central Authority for the processing of MLA requests, in line with the provisions of Section 5 of the MLA Act. Thus, the Attorney General (AG) transmits and receives all requests for legal assistance and executes or arranges for their execution. A request for MLA may be initiated by any law enforcement agency, prosecution agency or judicial authority competent under the law. In the past, the Ethics and Anti-Corruption Commission (EACC) and its precursor institutions such as the Kenya Anti-Corruption Commission (KACC) and the Kenya Anti-Corruption Authority (KACA) sought and received MLA through the AG.
668. Sections 114 to 120 of POCAMLA provide for international assistance in investigations and proceedings relating to money laundering and other proceeds of crime between Kenya and other countries. Such assistance may include the taking of evidence, execution of warrants, enforcement of restraint orders, forfeiture orders or confiscation orders.
669. Kenya explained that an affirmative decision or designation is required (as in the case of extradition) to apply the MLA Act to a requesting country pursuant to Section 9 of the Mutual Legal Assistance Act, which provides that:
- “a request under this Part shall—
(a) have the official designation of the requesting authority”.
670. No information was available as to which countries are designated countries for purposes of the MLA Act.
671. Kenya indicated that it applies the MLA Act also to requests coming from countries with which it has signed a bilateral treaty. It was explained that in practice, a conflict between the Act and the treaty terms would not arise, because during the negotiation of treaties consideration is given to the provisions of Kenya’s domestic law (Constitution, MLA Act and other laws).
672. In addition to the Mutual Legal Assistance Act of 2011, mutual legal assistance may also be granted on a case by case basis on the basis of reciprocity and comity and subject to the Constitution and the laws of Kenya.
673. Kenya confirmed that, although a treaty is not required for Kenya to render MLA, because the Act can be applied to any country in accordance with Section 3, in practice Kenya insists on a treaty being in place.

674. Kenya subscribes to the Commonwealth (Harare) Scheme, which provides a framework for mutual legal assistance between Commonwealth countries.

675. Kenya is also party to the Intergovernmental Authority on Development (IGAD) Convention on Mutual Legal Assistance.

676. Kenya provided the following information on how incoming MLA requests are executed, once received through Foreign Affairs.

- Requests are received by the Ministry of Foreign Affairs and International Trade (MFAIT), which forwards them to the Attorney General (AG), who forwards them to the relevant competent authorities, EACC, ODPP or the Directorate of Criminal Investigations (DCI) (previously known as Criminal Investigations Department (CID)), for execution.
- The competent authority acknowledges receipt to the requesting country and copies the AG.
- The investigation process commences.
- Responses are submitted to the requesting country via the Attorney General and MFAIT.

677. Kenya indicated that it has received nine (9) incoming MLA requests in the last 3 years in relation to UNCAC offences as described below. Kenya reported that it has not refused any incoming requests, although some were pending at the time of the country visit.

- 1 from France (corruption and money laundering) in respect of procurement irregularities concerning a Kenyan telecommunications company;
- 2 from Uganda: (i) 1 (corruption related) in respect of motorcycles; and (ii) 1 involving bribery;
- 1 from Rwanda (fraud/forgery related) in respect of fraudulent credential of a public officer;
- 1 from Finland (bribery of foreign public officials);
- 1 from Switzerland (fraud) in relation to securities contracts;
- 1 from Jersey (corruption and money laundering) (case is described under article 44, as the extradition of Kenyan nationals was also sought);
- 1 from the United Kingdom (Serious Fraud Office case described below);
- 1 from Tanzania (African Development Bank case described below).

678. Examples of incoming requests include the following:

U.K. Serious Fraud Office (SFO): SFO sent an MLA request on officers in public institutions in Kenya, dated 2 August 2013. The same was forwarded to EACC through the Attorney General on 4 November 2013 and EACC embarked on tracing documents, bank statements and recording of statements. Kenya has since forwarded most of the documents to the SFO by e-mail. Kenya indicated that it is in the process of gathering more information and is in constant touch with the SFO, who are pleased with the ongoing cooperation on the investigation.

Tanzania Case: The matter involved a formal request to EACC from the Prevention and Combating of Corruption Bureau (PCCB) of Tanzania in 2011/2012. It was a procurement process funded by the African Development Bank, which involved searches, document collection and recording of statements. The Tanzanian authorities communicated with EACC by e-mail and written correspondence. Tanzanian investigators came to Kenya in October 2013 and got the necessary documents and recorded statements and this entire process was facilitated by EACC.

(b) Observations on the implementation of the article

679. Kenya indicated that Regulations on mutual legal assistance were being developed by the Office of the Attorney General and the Department of Justice (OAG & DOJ) in consultation with the Office of the Director of Public Prosecutions (ODPP). The development of the Regulations is in line with Section 52 of the MLA Act, which provides that “The Attorney-General may make regulations prescribing matters necessary or convenient for the better carrying out, or giving effect to this Act.” The reviewers welcome the proposed adoption of Regulations to provide greater certainty in MLA cases and to address the recommendations of the present review.

Kenyan authorities confirmed that, in spite of Section 40 of the MLA Act, Kenya cannot provide MLA in the absence of dual criminality (see paragraph 9 below). Section 40 states that, “Kenya shall adopt such measures as may be necessary to enable it to provide a wider scope of legal assistance to a requesting state in absence of dual criminality and reciprocity”. It was confirmed during the country visit that the dual criminality requirement is strictly applied before Kenya can provide assistance, in accordance with Section 11 of the Act, which provides grounds for refusal due to the absence of dual criminality. Kenyan authorities explained that they look at the underlying conduct rather than the strict wording of the offence, although the provision (Section 40) has not yet been judicially interpreted. An example of this is the MLA request coming from France; it was explained that the offence was not recognized under Kenyan law, but that the Kenyan authorities were nonetheless able to provide the requested assistance as the conduct was related to irregularities in procurement and money laundering, which are covered in Kenyan law. Kenya indicated that it was ready to consider adopting a more flexible approach to the issue of dual criminality as envisaged under Section 40 of the MLA Act.

680. It is noted that MLA is limited to the extent that not all offences established under the Convention have been criminalized. The reviewers encourage Kenya to take steps towards a more flexible application or interpretation of the dual criminality requirement, to ensure that the widest measure of assistance can be granted in respect of UNCAC offences, as provided in the paragraph under review.

681. Furthermore, to allow for effective assessment of the practical implementation of the cited laws, the authorities are encouraged to maintain comprehensive statistics on the number of MLA requests received, the nature of such requests, and status of completion, including the number of requests rejected and reasons, as well as the timeframe for responding to the requests.

Article 46 Mutual legal assistance

Paragraph 2

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.

(a) Summary of information relevant to reviewing the implementation of the article

682. Kenya cited the Mutual Legal Assistance Act, 2011 as implementing the provision under review. The legal regime provided by the MLA Act provides for the giving of MLA to the fullest possible extent in respect of investigations, prosecutions and judicial proceedings in all criminal matters including offences established in accordance with the Convention.

683. Kenya referred to the U.K. Serious Fraud Office (SFO) and Tanzania cases (both cited above), which concerned offences involving legal persons and procurement issues.

(b) Observations on the implementation of the article

684. It was confirmed during the country visit that Kenya has provided, and is able to provide, assistance to a requesting State for an offence involving a company or legal entity. Moreover, Kenya recognizes the criminal liability of legal persons (see article 26 of the Convention above), and thus there are no legal obstacles to providing assistance in these cases.

Article 46 Mutual legal assistance

Subparagraphs 3 (a) - (i)

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;*

(a) Summary of information relevant to reviewing the implementation of the article

685. In addition to the Mutual Legal Assistance Act of 2011, Kenya informed that mutual legal assistance may also be granted on a case by case basis on the basis of reciprocity and comity and subject to the Constitution and the laws of Kenya.

Section 6(2) of the MLA Act

(2) For the purposes of this Act, legal assistance means mutual legal assistance in criminal matters and includes, but is not limited to-

- (a) identifying and locating of persons for evidential purposes;
- (b) examining witnesses;
- (c) effecting service of judicial documents;
- (d) executing searches and seizures;
- (e) examining objects and sites;
- (f) providing, including formal production where necessary, originals or certified copies of relevant documents and records, including but not limited to government, bank, financial, corporate or business records;
- (g) providing information, evidentiary items and expert evaluations;
- (h) facilitating the voluntary attendance of witnesses or potential witnesses in a requesting state;
- (i) facilitating the taking of evidence through video conference;
- (j) effecting a temporary transfer of persons in custody to appear as a witness;
- (k) interception of items during the course of carriage by a public postal service;
- (l) identifying, freezing and tracing proceeds of crime;
- (m) the recovery and disposal of assets;
- (n) preserving communications data;
- (o) interception of telecommunications;
- (p) conducting covert electronic surveillance;
- (q) Any other type of legal assistance or evidence gathering that is not contrary to Kenyan law.

PART IV – REQUEST FOR SPECIFIC FORMS OF LEGAL ASSISTANCE

12. Service of documents

(1) A request under this Act may seek assistance in the service of documents relevant to a criminal matter.

(2) The request made under subsection (1) shall be accompanied by the necessary documents to be served.

(3) The Central Authority shall ensure that the documents to be served are served either by—

- (a) any particular method stated in the request, unless such method is contrary to Kenyan law; or
- (b) any method prescribed by Kenyan law for the service of documents in criminal proceedings.

(4) The Central Authority shall transmit to a requesting state a certificate or other proof as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

(5) Notwithstanding the provisions of section 8(1) a requesting state may send legal documents directly to the intended person who is present in Kenya unless—

- (a) the address of the person for whom the document is intended is unknown or uncertain; or
- (b) the relevant law of a requesting state requires proof of service; or

- (c) it has not been possible to serve the document by post; or
- (d) there are reasons to believe that the dispatch by post will be ineffective or is inappropriate.

13. Provision or production of Records

- (1) A request under this Act may seek the provision or production of any documents, records or other material relevant to a criminal matter arising in a requesting state.
- (2) Where documents or records requested under subsection (1) are not publicly available, the Competent Authority may provide copies of such documents, records or other material to the same extent and under the same conditions as applies to provision of such records to Kenya law enforcement agencies or prosecution or judicial authorities.

14. Examination of witnesses

- (1) A request under this Act may seek assistance in the examination of witnesses.
- (2) The request made under subsection (1) shall specify as appropriate, and so far as the circumstances of the case may permit—
 - (a) the names and addresses or the official designations of the witnesses to be examined;
 - (b) the questions to be put to the witnesses or the subject matter about which they are to be examined;
 - (c) whether it is desired that the witnesses be examined orally or in writing;
 - (d) whether it is desired that an oath be administered to the witnesses or, as Kenyan law allows, that they be required to make their solemn affirmation;
 - (e) any provisions of the law of the requesting state as to privilege or exemption from giving evidence which appear especially relevant to the request;
 - (f) any special requirements as to the manner of taking evidence relevant to its admissibility in a requesting state; and
 - (g) any other relevant information.
- (3) The request may seek permission for, so far as Kenyan law permits, the accused person or his legal representative to attend the examination of the witness and ask questions of the witness.

18. Search and seizure

- (1) A request under this Act may seek assistance in the search and seizure of property in Kenya.
- (2) The request made under subsection (1) shall specify the property to be searched and seized and shall contain, so far as is reasonably practicable, all information available to a requesting state which may be required to be adduced in an application under Kenyan law for any necessary warrant or authorization to effect the search and seizure.
- (3) Subject to the relevant law, the Competent Authority shall provide such certification as may be required by a requesting state concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

19. Lending of exhibits

- (1) A request under this Act may seek to have an exhibit that was admitted in evidence in a proceeding in respect of an offence in a court in Kenya lent to a requesting state.
- (2) An application made under subsection (1) shall—
 - (a) contain a description of the exhibit requested to be lent;
 - (b) designate a person or class of persons to whom the exhibit is sought to be given;

(c) state the reasons for the request, as well as contain a description of any tests that are sought to be performed on the exhibit and a statement of the place where the tests will be performed;

(d) state the place to which the exhibit is sought to be removed; and

(e) specify a period of time at or before the expiration of which the exhibit is to be returned.

(3) Where an exhibit is lent to a requesting state upon request made under subsection (1), the Central Authority shall notify a requesting state of—

(a) description of the exhibit;

(b) description of any tests thereby authorized to be performed on the exhibit, as well as a statement of the place where the tests will be performed; and

(c) the period of time of which the exhibit shall be returned.

23. Identification, tracing etc.

(1) Kenya shall assist in proceedings involving the identification, tracing, freezing, seizure and confiscation of the proceeds and instruments of crime under its laws or any other arrangement to which Kenya may be bound in relation to a requesting state.

(2) A request for legal assistance under this section shall include—

(a) details of the property in relation to which cooperation is sought;

(b) the connection, if any, between the property and the offences in respect of which the request is made;

(c) where known, details of any third party interests in the property; and

(d) a certified copy of the freezing or seizing decision or final decision of confiscation made by a court.

(2) Nothing in this section shall prejudice the rights of bona fide third parties.

686. Kenya referred to the U.K. Serious Fraud Office and Tanzania cases (cited above), both of which involved tracing documents, bank statements and recording of statements.

687. Kenya also referred to the following case example.

Republic vs. Livingstone Maina Ngare (Anti-Corruption Case No. 5/2002)

This case relates to corruption offences committed in 2001 partly in the United States of America and partly in Kenya, by a World Bank official (U.S) and a Kenyan. The corruption emanated from a World Bank-funded project, in which a World Bank official is alleged to have bribed the project manager in Kenya. The allegation was that the project manager of the Kenya Urban Transport Infrastructure Project (KUTIP) under the Ministry of Local Government Kenya and the World Bank Official in US overstated the cost of the contract for consultancy services, for their personal gain. The World Bank Official was charged with corruption-related offences in the U.S., whereas the Kenyan official (project manager) was charged with corruption offences in Kenya. Both the U.S. and Kenya provided each other mutual legal assistance in acquiring documents that were to be used in the respective trials. The U.S. official pleaded guilty by way of plea bargain and made a promise to testify against the Kenyan suspect. The Kenyan suspect pleaded not guilty, and the U.S. suspect and other officials were expected to testify against him. When called upon to testify, the U.S. witnesses expressed fear for their safety while in Kenya. Faced with the predicament the prosecution made an application for the witnesses to testify via video link. The Kenyan High Court granted leave for their evidence to be taken via video conference.

(b) Observations on the implementation of the article

688. Based on the information provided and the discussions during the country visit, Kenya is able to provide various types of assistance in line with the provision under review.

Article 46 Mutual legal assistance

Subparagraph 3 (j) and (k)

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(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.

(a) Summary of information relevant to reviewing the implementation of the article

689. Kenyan law makes it the responsibility of the State to identify, freeze and trace proceeds of crime as well as recover assets. The MLA Act in Section 6(2)(l-m) (quoted above) provides for such assistance.

690. Relevant provisions can also be found in the MLA Act, Part IV (Recovery, Freezing, Confiscation and Disposal of Assets)

Section 23. Identification, tracing etc.

(1) Kenya shall assist in proceedings involving the identification, tracing, freezing, seizure and confiscation of the proceeds and instruments of crime under its laws or any other arrangement to which Kenya may be bound in relation to a requesting state.

(2) A request for legal assistance under this section shall include—

(a) details of the property in relation to which co-operation is sought;

(b) the connection, if any, between the property and the offences in respect of which the request is made;

(c) where known, details of any third party interests in the property; and

(d) a certified copy of the freezing or seizing decision or final decision of confiscation made by a court.

(3) Nothing in this section shall prejudice the rights of bona fide third parties.

Section 24. Measures for asset recovery through international co-operation

When providing legal assistance under section 23 with respect to proceeds and instrumentalities of crime, Kenya shall take such measures, in accordance with the provisions of this Act or any other relevant law, as may be necessary to—

(a) permit a requesting state to give effect to an order of confiscation issued by its competent court or authority;

(b) permit competent authorities of a requesting state, 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 Kenyan law;

(c) 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.

(d) permit competent authorities of Kenya to freeze or seize property upon a freezing or seizure order issued by a court or a competent authority of such a requesting state that provides a reasonable basis for a requesting state 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 (a) of this section;

(e) permit competent authorities of Kenya to freeze or seize property upon a freezing or seizure order issued by a court or a competent authority of such a requesting state that provides a reasonable basis for a requesting state 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 (a) of this section;

(f) recognize a requesting state's claim as a legitimate owner of property acquired through the commission of a criminal offence;

(g) consider taking any additional measures as 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.

(b) Observations on the implementation of the article

691. Based on the information provided and the discussions during the country visit, Kenya has legislatively implemented the provision under review. No examples of implementation were provided.

Article 46 Mutual legal assistance

Paragraph 4

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.

(a) Summary of information relevant to reviewing the implementation of the article

692. Kenya referred to Section 48 of the Mutual Legal Assistance Act.

48. Special co-operation

Subject to any written law and without prejudice to its own investigations, prosecutions or judicial proceedings, Kenya shall take measures to permit it to forward information on proceeds of criminal offences to a requesting state without prior request, where it considers that-

(a) the disclosure of such information might assist a requesting state in initiating or carrying out investigations, prosecutions or judicial proceedings; or

(b) it might lead to a request by a requesting state under this Act.

693. Kenya provided the following case examples where its authorities have shared information without a prior request with other countries.

SOUTH AFRICA -Information was shared with the South African authorities in 2014 regarding a company that is registered there and is the subject of a criminal investigation of a Kenyan public institution.

Through its regional INTERPOL office, Kenya shares information with other jurisdictions without awaiting a request through formal MLA channels.

(b) Observations on the implementation of the article

694. Section 48 provides a legal basis for the spontaneous sharing of information and examples of implementation were provided. The provision is implemented.

Article 46 Mutual legal assistance

Paragraph 5

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.

(a) Summary of information relevant to reviewing the implementation of the article

695. Kenya quoted Section 42 (on confidentiality) and Section 39(1) (on privilege for foreign records) of the MLA Act:

42. Confidentiality

The confidentiality of a request and its contents and the information and materials supplied under this Act shall be maintained except for disclosure in the criminal matter specified in the request and where otherwise authorized by the other state.

39. Privileges for foreign records

(1) Subject to section 33(2), a foreign record sent to the Central Authority by a requesting state in accordance with a Kenyan request shall be privileged and no person shall disclose to anyone the record or its purpose or the contents of the record, in compliance with the conditions on which it was so sent, it being made public or disclosed for the purpose of giving evidence.

(2) A person in possession of a record referred to in subsection (1) shall not be required, in connection with any legal proceedings, to give evidence relating to any information that is contained in the record or to produce the record.

(b) Observations on the implementation of the article

696. The cited sections relate to formal requests. It was further clarified during the country visit that EACC ensures confidentiality/privilege of information received spontaneously from another country by requiring (or providing, as needed) confidentiality undertakings. EACC officials confirmed that they have received a number of informal requests to identify the location of suspects, and provide information spontaneously. For example, in the Tanzania case referred to above, it was explained that EACC was able to assist in obtaining court records before a formal request was received.

Article 46 Mutual legal assistance

Paragraph 8

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

697. Kenya cited Section 43 of the MLA Act.

Section 43, MLA Act

Legal assistance shall not be refused solely on the grounds that the offence amounts to an offence of a fiscal nature or on the grounds of bank or other financial institution secrecy rules.

(b) Observations on the implementation of the article

698. The provision is legislatively implemented. In respect of cases where Kenya provided bank or financial records in response to an MLA request, Kenya referred to the Tanzania case (cited above), in which investigators obtained bank records by warrant, and the following case example.

U.K. Serious Fraud Office and the Independent Electoral and Boundaries Commission (IEBC) Case

In February 2014, the U.K. Serious Fraud Office wrote formally to EACC through the Attorney General of Kenya requesting for evidence (financial) and bank statements in cases concerning two public bodies in Kenya, namely: the Independent Electoral and Boundaries Commission (IEBC) and Kenya National Examinations Council (KNEC). EACC responded by acknowledging receipt of the request. Thereafter, the Commission assigned an investigator the responsibility of getting the requested information. Eventually, EACC provided the requested information. The information assisted in the trial of Mr. Christopher John Smith, Mr. Nicholas Charles Smith, and their company (Ouzman Ltd). The two directors and the company were eventually convicted by a London court for bribing foreign officials in Kenya in return for the award of contracts to the company. (For more information on this case, visit: www.sfo.gov.uk/press).

Article 46 Mutual legal assistance

Paragraph 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.

(a) Summary of information relevant to reviewing the implementation of the article

699. Kenya cited Section 11(a) as qualified by Section 40 of the MLA Act.

11. A request for legal assistance under this Act shall be refused if, in the opinion of the Competent Authority—

(a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Kenya would not have constituted an offence under Kenyan law; ...

40. Kenya shall adopt such measures as may be necessary to enable it to provide a wider scope of legal assistance to a requesting state in absence of dual criminality and reciprocity.

700. Kenya informed that there have been no examples of implementation.

(b) Observations on the implementation of the article

701. Kenyan authorities confirmed that dual criminality is a condition precedent for MLA. In spite of Section 40 of the MLA Act, Kenya cannot provide MLA in the absence of dual criminality. As noted under paragraph 1 above, the reviewers encourage Kenya to take steps towards a more flexible application or interpretation of the dual criminality requirement, to ensure that the widest measure of assistance can be granted in respect of UNCAC offences.

702. It was further confirmed during the country visit that Kenya has not rendered non-coercive assistance (paragraph 9(b)) in the absence of dual criminality. It is recommended that Kenya adopt measures to implement the provision under review.

Article 46 Mutual legal assistance

Subparagraph 10

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.

(a) Summary of information relevant to reviewing the implementation of the article

703. Kenya cited Section 16(1-3) of the Mutual Legal Assistance Act, which provides that a transfer may be made if the subject issues a statement of consent. However, this does not apply to minors under the age of 18. A transfer may also be made on the basis of an agreement between the competent authorities of both the requesting country and Kenya.

Section 16 of the Mutual Legal Assistance Act:

Voluntary attendance of persons in custody

(1) Subject to section 17, a request under this Act may seek the temporary transfer of a person in custody in Kenya for purposes of identification, providing assistance in obtaining evidence for investigations or prosecutions or to appear as a witness before a court exercising jurisdiction in a requesting state.

(2) A request made under this section shall-

(a) state the name of the person in custody;

(b) if possible, state the place of confinement of the person in custody;

(c) state the place to which the person in custody is sought to be transferred;

(d) specify the subject matter on which it is desired to examine the witness;

(e) state the reasons for which personal appearance of the witness is required; and

(f) specify the period of time at or before the expiration of which the person in custody is to be returned.

(3) A statement of consent from the person in custody whose copy shall be made available to the Central Authority shall be a prerequisite for the transfer.

704. However, pursuant to Section 17 of the Act, Section 16 shall not apply where the person sought to be transferred is a Kenyan citizen or a child within the meaning of the Children Act (No. 8 of 2001).

705. There have been examples of prisoner transfer for purposes of providing testimony in narcotics but not in corruption related matters. An example is the case of *United States of America vs. Dorothy Maju Henry & Others* (02-376) (U.S. District Court, District of Columbia (21 October 2011)). In 2003, Ms. Dorothy Maju Nzioka who had been serving a jail term at Lang'ata Women's Prison, Nairobi, after conviction and imprisonment for drug trafficking, was removed and handed over to U.S. authorities (the U.S. Drug Enforcement Agency) to testify in the aforementioned case of *USA vs. Dorothy Maju Henry & Others*.

(b) Observations on the implementation of the article

706. The provision is legislatively implemented. It was explained that there have been no examples of prisoner transfer for providing testimony or evidence in corruption cases.

Article 46 Mutual legal assistance

Subparagraph 11

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.

(a) Summary of information relevant to reviewing the implementation of the article

707. Kenya cited Section 16(4-10) of the MLA Act which provides that:

(4) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either Kenya or a requesting state.

(5) Where a person in custody is transferred, the Central Authority shall notify a requesting state of-

(a) the date upon which the person is due under the law of Kenya to be released from custody;

(b) the date by which the Central Authority requires the return of the person;

(c) any variations in such dates in (a) and (b).

(6) A requesting state shall keep the person transferred in custody, and shall return the person to Kenya when the presence of such person as a witness in the requesting state is no longer required, and in any case by the earlier of the dates notified under subsection (5) of this section.

(7) The obligation to return the person transferred shall subsist notwithstanding the fact that the person is a national of a requesting state.

(8) A requesting state to which the person is transferred shall not require Kenya to initiate extradition proceedings for the return of the person.

(9) Where a person in custody who is serving a term of imprisonment in Kenya is transferred to a requesting state under a request made in this section, the time spent in custody shall count as part of any sentence required to be served by that person in custody for the purposes of the Prisons Act (Cap. 90).

(10) Nothing in this section shall preclude the release in a requesting state without return to Kenya of any person transferred where the two States and the person concerned have agreed to such release.

(b) Observations on the implementation of the article

708. The provision is implemented in the cited legislation.

Article 46 Mutual legal assistance

Paragraph 12

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.

(a) Summary of information relevant to reviewing the implementation of the article

709. Kenya would provide the relevant immunities where a person is in Kenya pursuant to a request made by Kenya, in accordance with Section 38 of the MLA Act.

38. (1) Subject to subsection (2), where a person is in Kenya pursuant to a request made by the Central Authority the person shall not—

(a) be detained, prosecuted or punished in Kenya for any offence that is alleged to have been committed, or that was committed, before the person's departure from a requesting state pursuant to the request;

(b) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, before the person's departure from the a requesting state pursuant to the request; or

(c) be required to give evidence in any proceeding in Kenya other than the proceeding to which the request relates, if any.

(2) Subsection (1) shall cease to apply to a person if—

(a) the person has left Kenya; or

(b) the person has had the opportunity of leaving Kenya and has remained in Kenya otherwise than for—

(i) the purpose to which the request relates;

(ii) the purpose of giving evidence in a proceeding in Kenya certified by the Central Authority, in writing, to be a proceeding in which it is desirable that the person give evidence; or

(iii) the purpose of giving assistance in relation to an investigation in Kenya certified by the Central Authority, in writing, to be an investigation in relation to which it is desirable that the person give assistance.

(b) Observations on the implementation of the article

710. The provision is legislatively implemented.

Article 46 Mutual legal assistance

Paragraph 13

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.

(a) Summary of information relevant to reviewing the implementation of the article

711. On 14 August 2008, Kenya submitted a notification to the United Nations Secretary General, under article 46(13) of the Convention, stating that:

The Republic of Kenya declares that pursuant to Article 46 (13) above, the Central Authority responsible and authorized to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution shall be:

The Attorney General
State Law Office
Harambee Avenue
P.O. Box 40112-00100, Nairobi, Kenya
Tel: +254-20-2227461
Fax: +254-20 2211082
Website: <http://www.attorney-general.go.ke>
*E-mail: info@ag.go.ke*⁹

712. Section 5 of the MLA Act designates the Office of the Attorney General (OAG) as the central authority in Kenya for purposes of processing MLA requests made by or to Kenya. Once the OAG receives the requests, they are channeled through the relevant competent authority, such as the Ethics and Anti-Corruption Commission in the case of corruption and economic crime matters.

⁹<https://treaties.un.org/doc/Publication/CN/2008/CN.642.2008-Eng.pdf>

Mutual Legal Assistance Act Section 5

- (1) There is established an authority to be known as the Central Authority to perform functions specified in this Act.
- (2) The office of the Attorney-General shall be designated as the Central Authority established under subsection (1) of this section.

Section 6

The functions of the Central Authority are:-

- (a) transmitting and receiving requests for legal assistance and executing or arranging for the execution of such requests;
- (b) ensuring that requests for legal assistance conform to the requirements of law and Kenya's international obligations;
- (c) where necessary, certifying or authenticating, or arranging for the certification and authentication of any documents or other material supplied in response to a request for legal assistance;
- (d) taking practical measures to facilitate the orderly and rapid disposition of requests for legal assistance;
- (e) negotiating and agreeing on conditions related to requests for legal assistance, as well as to ensuring compliance with those conditions;
- (f) making any arrangements deemed necessary in order to transmit the evidentiary material gathered in response to a request for legal assistance to a requesting state or to authorize any other authority to do so;
- (g) carrying out such other tasks as provided for by this Act or which may be necessary for effective legal assistance to be provided or received.

713. Kenya informed that it usually takes an average of six weeks to act on MLA requests, but could take a shorter or longer period depending on the complexity of the matter or the number of actors involved in the execution of the request. Some simple requests from neighbouring countries are sometimes acted on within two weeks. In most cases, Kenya normally acknowledges receipt of MLA requests within a reasonable time, sometimes within seven (7) days of receipt.

(b) Observations on the implementation of the article

714. Further information on how incoming MLA requests are executed, once received through the Ministry of Foreign Affairs and International Trade (MFAIT), is noted under paragraph 1 of this article and was discussed during the country visit.

715. Kenyan officials explained that Kenya would accept a request through INTERPOL rather than diplomatic channels in urgent circumstances.

716. Based on the information provided and the discussion in the country visit, the provision appears to be adequately implemented.

Article 46 Mutual legal assistance

Paragraph 14

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.

(a) Summary of information relevant to reviewing the implementation of the article

717. On 14 August 2008, Kenya submitted a notification to the UN Secretary General, under article 46(14) of the Convention, stating that:

*Pursuant to Article 46 (14) of the Convention, the language acceptable to the Republic of Kenya for purposes of mutual legal assistance requests is English.*¹⁰

718. Kenya cited Section 8 of the MLA Act, which makes it mandatory for a request for mutual legal assistance to be in writing (including electronic transmission). Kenya further complied with the requirement of notifying the Secretary General of the UN on the Language (English) when it filed a notification with the UN Secretary General in March, 2008.

Section 8 of the Mutual Legal Assistance Act

(1) A request from a requesting state shall be made in writing to the Central Authority.

...

(3) For the purpose of subsection (1), “in writing” includes e-mail, facsimile or other agreed forms of electronic transmission provided that appropriate levels of security and authentication are put in place.

719. Kenya provided the following example of implementation.

RWANDA- The anti-corruption authority of Rwanda called Kenya’s EACC informally in 2011 to find out about the genuineness of the degree papers of a Kenyan officer based in Rwanda. The information sought was verified and communicated, although it was followed with a formal MLA request.

(b) Observations on the implementation of the article

720. It was explained that in urgent circumstances, Kenya would accept an incoming request by telephone, although it cannot execute the request unless it is confirmed forthwith in writing. The provision is adequately implemented.

Article 46 Mutual legal assistance

Paragraph 15 and 16

¹⁰<https://treaties.un.org/doc/Publication/CN/2008/CN.642.2008-Eng.pdf>

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.*

(a) Summary of information relevant to reviewing the implementation of the article

721. Kenya cited Section 9 of the Mutual Legal Assistance Act as implementing the provision under review:

9. Content of request for legal assistance

Except in the case of a request for the preservation of communications data under section 31, a request under this Part shall-

- (a) have the official designation of the requesting authority;
- (b) have the legal basis of the request;
- (c) specify the nature of the criminal matter, the assistance requested and details of any particular procedure to be followed in compliance with the request;
- (d) indicate the purpose for which the evidence, information or any other material is sought;
- (e) indicate any time limit within which compliance with the request is desired, stating reasons;
- (f) whether or not criminal proceedings have been instituted;
- (g) where criminal proceedings have been instituted, contain the following information-
 - (i) the court exercising jurisdiction in the proceedings;
 - (ii) the identity of the accused person;
 - (iii) the offence for which he stands accused, and a summary of the facts;
 - (iv) the stage reached in the proceedings; and
 - (v) any date fixed for further stages in the proceedings;
- (h) where criminal proceedings have not been instituted, state the offence which the Competent Authority has reasonable grounds to suspect has been, is being or will be committed with a summary of known facts;
- (i) provide assurance of reciprocity;
- (j) contain relevant documents and exhibits;
- (k) have the signature and official stamp of the requesting authority and the date of the request;
- (l) contain any other information relevant for the proper execution of the request.

(b) Observations on the implementation of the article

722. Kenyan officials confirmed that Section 8 applies to incoming requests only, whilst Section 9 applies to both incoming and outgoing requests. Accordingly, the same procedural requirements apply to both incoming and outgoing requests.

723. The cited legal provisions adequately address the provision under review.

Article 46 Mutual legal assistance

Paragraph 17

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.

(a) Summary of information relevant to reviewing the implementation of the article

724. Kenya cited Section 46 of the MLA Act which provides that “the law of Kenya shall govern the procedure for complying with a request and the admissibility of evidence to be gathered under the Act.”

725. Section 9(c) (quoted above) addresses “details of any particular procedure to be followed” in executing the request.

(b) Observations on the implementation of the article

726. The cited legal provisions adequately address the provision under review.

Article 46 Mutual legal assistance

Paragraph 18

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.

(a) Summary of information relevant to reviewing the implementation of the article

727. Kenya cited Section 22 of the MLA Act which provides that, “A testimony, identification of a person or thing or any other form of legal assistance under this Part may be provided by use of video or audio transmission technology.”

728. Kenya referred to the case of *Republic vs. Livingstone Maina Ngare* (in a case arising from Anti-Corruption Case No. 5/2002 (Nairobi)), where the Kenyan High Court

granted leave for evidence to be taken via video conference (summarized under paragraph 3 above of the article under review). The case is cited here to illustrate that Kenya's law and judicial system allow the use of video or audio transmission technology, meaning that Kenya can provide MLA through the use of such means.

729. Following the country visit, Kenya indicated that, through the Security Laws (Amendment) Act, 2014 (No. 19 of 2014), the Evidence Act (Cap. 80) has been amended by including a new Section 63A, which allows a court of law to receive oral evidence through teleconferencing and video conferencing. However, this provision was not assessed by the reviewers.

(b) Observations on the implementation of the article

730. Section 22 of the MLA Act allows for the use of video technology for taking evidence or testimony. Kenya indicated that there have been cases where video conferencing took place in Kenya or where a foreign judicial authority came to Kenya to participate in the hearing or witness identification, though none of these have involved UNCAC offences. During the country review visit, Kenya gave the example of a Scandinavian judge who came to Kenya to interview a witness in a drug-related case.

731. The provision is adequately implemented.

Article 46 Mutual legal assistance

Paragraph 19

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.

(a) Summary of information relevant to reviewing the implementation of the article

732. Kenya noted that Section 41 of the MLA Act (Rule of specialty) is relevant.

"A requesting state shall not transmit to another party or use any information or evidence obtained in response to a request for legal assistance under this Act in connection with any matter other than the criminal matter specified in the request without the prior consent of Kenya."

733. Sections 115 and 116 of POCAMLA are also deemed relevant to evidence received by Kenya.

POCAMLA

115. (1) For the purpose of an investigation or proceedings under this act, the Attorney General may request an appropriate authority of another country to arrange for-

- (a) Evidences to be taken, or information, documents, documents or articles to be produced or obtained in that country;
- (b) A warrant or other instrument authorizing search and seizure to be obtained and executed in that country;
- (c) A person from that country to come to Kenya to assist in the investigation or proceedings;
- (d) A restraint order or forfeiture order made under this act to be enforced in that country, or a similar order to be obtained and executed in that country to preserve property that had it been located in Kenya would be subject to forfeiture or confiscation under this act;
- (e) An order or notice under this act to be served on a person in that country; or
- (f) Other assistance to be provided, whether pursuant to a treaty or other written arrangement between Kenya and that country or otherwise.

(2) request by other countries to Kenya for assistances of a kind specified in subsection (1) may be made to the Attorney-General Evidence, etc., obtained from another country.

116. Evidence, documents or articles obtained pursuant to a request made under section 115 shall-

- (a) be received in evidence in Kenya;
- (b) not be used for a purpose other than that specified in that request, except with the consent of the appropriate authority of the foreign country; and
- (c) be returned when its use is no longer required, unless that authority indicate to the contrary.

(b) Observations on the implementation of the article

734. Kenya indicated that it would not be required to disclose exculpatory evidence received through an MLA request in proceedings other than the matter specified in the request (see paragraph 20 below), because Kenya strictly adheres to the rule of specialty.

735. There have been no examples of implementation. The provision is implemented in the cited legislation.

Article 46 Mutual legal assistance

Paragraph 20

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.

(a) Summary of information relevant to reviewing the implementation of the article

736. Kenya cited Section 42 of the MLA Act on confidentiality:

"The confidentiality of a request and its contents and the information and materials supplied under this Act shall be maintained except for disclosure in the criminal matter specified in the request and where otherwise authorized by the other state."

737. Kenya indicated that in all cases that have been executed, Kenya has strictly observed the rule of confidentiality. Kenya referred to the *Tanzania case* (cited above) in which confidentiality requirements were observed.

(b) Observations on the implementation of the article

738. The provision is adequately implemented.

Article 46 Mutual legal assistance

Subparagraph 21

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, ordre 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.

(a) Summary of information relevant to reviewing the implementation of the article

739. Kenya cited Section 11 of the MLA Act, which sets out the grounds for refusal of an MLA request.

Section 11 of the MLA Act

11. Grounds for refusal

A request for legal assistance under this Act shall be refused if, in the opinion of the Competent Authority-

(a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Kenya would not have constituted an offence under Kenyan law;

(b) the request relates to the prosecution or punishment of a person in respect of an act or omission where, if it had occurred in Kenya at the same time and had constituted an offence against Kenyan law, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason;

(c) the request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority in a requesting state, or has undergone the punishment provided by the law of that country, in

respect of that offence or of another offence constituted by the same act or omission as that offence;

(d) the request relates to the prosecution or punishment of a person in respect of an act or omission that if it had occurred in Kenya would have constituted an offence under the Kenyan law but the circumstances in which it is alleged to have been committed or was committed is an offence of a political character;

(e) there are substantial grounds for believing that the request is made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions;

(f) the granting of the request would prejudice the sovereignty, security or any other national interest of Kenya;

(g) the provision of the legal assistance could prejudice an investigation or proceedings in relation to a criminal matter in Kenya;

(h) the provision of the legal assistance would or is likely to prejudice the safety of any person, whether in or outside Kenya.

740. Kenya has not refused MLA in any cases to date.

(b) Observations on the implementation of the article

741. Kenya recognizes grounds for refusal in line with the Convention. Officials confirmed that Kenya has not refused assistance in any cases to date.

Article 46 Mutual legal assistance

Paragraph 22

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.

(a) Summary of information relevant to reviewing the implementation of the article

742. Kenya cited Section 43 of the MLA Act, which provides that MLA shall not be refused on the grounds that the offence is of a fiscal nature or on the grounds of bank or other financial institution secrecy rules.

Section 43 of the MLA Act

43. Fiscal offences

Legal assistance shall not be refused solely on the grounds that the offence amounts to an offence of a fiscal nature or on the grounds of bank or other financial institution secrecy rules.

743. Officials referred to the following case example where Kenya provided assistance for a request involving financial, bank or tax matters.

KENYA/TANZANIA –Tax Evasion Case in which the Kenyan and Tanzanian authorities exchanged information on tax evasion schemes of suppliers of skins and hides in the region.

(b) Observations on the implementation of the article

744. Based on the information provided, the provision is adequately implemented.

Article 46 Mutual legal assistance

Paragraph 23

23. Reasons shall be given for any refusal of mutual legal assistance.

(a) Summary of information relevant to reviewing the implementation of the article

745. Kenya informed that it usually takes about six weeks to act on a request but this largely depends on the complexity of the matter or the number of actors involved in the execution of the MLA request. However, acknowledgment of receipt of an MLA request is usually done by Kenyan authorities within seven (7) days.

746. Kenya also referred to Section 8(6) of the MLA Act, which requires the Competent Authority to promptly inform a requesting State of the reasons for refusing MLA.

Section 8(6) of MLA Act

(6) If the Competent Authority considers that:

- (a) the request does not comply with the provisions of this Act; or
 - (b) in accordance with the provisions of this Act, the request for legal assistance is to be refused in whole or in part; or
 - (c) the request cannot be complied with, in whole or in part; or
 - (d) there are circumstances which are likely to cause a significant delay in complying with the request,
- it shall promptly inform a requesting state, giving reasons.

747. Kenya has not refused MLA to date.

(b) Observations on the implementation of the article

748. Kenya's law corresponds to the provision under review. Officials confirmed that Kenya has not refused assistance to date. The reviewers welcome the swift adoption of Regulations on MLA, which could further address the requirements of the provision under review.

Article 46 Mutual legal assistance

Paragraph 24

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.

(a) Summary of information relevant to reviewing the implementation of the article

749. Kenya cited Section 8(4) of the MLA Act, which provides:

(4) Subject to the provisions of this Act, the Competent Authority shall grant the legal assistance requested in subsection (1) as expeditiously as practicable.

750. Kenya informed that it usually takes between 2 to 4 weeks, depending on the complexity of the matter, between receiving requests for mutual legal assistance and responding to them.

751. Kenya informed that in the U.K. Serious Fraud Office case, Kenya acknowledged receipt of the request and informed the SFO that it would respond as soon as more information was available.

(b) Observations on the implementation of the article

752. Kenya referred to the *Tanzania case* (cited above) by way of example that Kenya executes requests in a timely manner and responds to requests for status updates.

753. Based on the information provided and the discussions in the country visit, the reviewers are satisfied with the information provided.

Article 46 Mutual legal assistance

Paragraph 25

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.

(a) Summary of information relevant to reviewing the implementation of the article

754. Kenya cited Section 10 of the MLA Act (on the postponement of the execution of MLA requests):

10. Postponement of the execution of request

The Competent Authority may postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution.

(b) Observations on the implementation of the article

755. Kenya's law corresponds to the provision under review. Officials confirmed during the country visit that no requests have been postponed by Kenya on the ground of an ongoing investigation or prosecution. It was explained that in the UK SFO case there

were aspects of an ongoing investigation in Kenya, but there was convergence due to mutual interest and Kenya was providing the request assistance. Similarly in the *Jersey case* referred to above, Jersey investigated and intended to prosecute the case, and Kenya proceeded with the intention to harmonize investigative efforts.

Article 46 Mutual legal assistance

Paragraph 26

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.

(a) Summary of information relevant to reviewing the implementation of the article

756. Kenya referred to Section 8 of the MLA Act.

8. Incoming requests for legal assistance

(5) The Competent Authority may seek additional information from a requesting state if it considers necessary.

(6) If the Competent Authority considers that:

- (a) the request does not comply with the provisions of this Act; or
 - (b) in accordance with the provisions of this Act, the request for legal assistance is to be refused in whole or in part; or
 - (c) the request cannot be complied with, in whole or in part; or
 - (d) there are circumstances which are likely to cause a significant delay in complying with the request,
- it shall promptly inform a requesting state, giving reasons.

(b) Observations on the implementation of the article

757. The cited measure does not address a duty to consult before refusing or postponing assistance. It is recommended that Kenya adopt relevant measures in line with the provision under review. Officials confirmed that Kenya is in the process of preparing Regulations pursuant to the MLA Act, which will deal with this issue. The reviewers welcome the swift adoption of these Regulations.

Article 46 Mutual legal assistance

Paragraph 27

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.

(a) Summary of information relevant to reviewing the implementation of the article

758. Kenya indicated that it has not implemented the provision under review.

759. Kenya informed that it does not have a legal framework for facilitating compliance with this provision. However, the Office of the Attorney-General and the Department of Justice (OAG & DOJ) undertook to initiate the necessary measures towards reviewing and amending the relevant laws for purposes of ensuring full compliance.

(b) Observations on the implementation of the article

760. The reviewers note that Kenya has not implemented this mandatory provision and recommend that Kenya adopt relevant measures to ensure its implementation. In this regard, the reviewers welcome indications by Kenya that OAG & DOJ will take appropriate action to review and amend the relevant laws for purposes of ensuring full compliance.

Article 46 Mutual legal assistance

Paragraph 28

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 fulfil 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.

(a) Summary of information relevant to reviewing the implementation of the article

761. Kenya cited Section 45 of the MLA Act, which provides that ordinary costs of executing MLA requests shall be borne by Kenya unless otherwise determined.

Section 45 of the MLA Act (on Costs)

(1) Ordinary costs of executing a request shall be borne by Kenya, unless otherwise determined by Kenya and a requesting state.

(2) If expenses of a substantial or extraordinary nature are or shall be required to execute the request, the parties shall consult in advance to determine the terms and conditions under which the request shall be executed as well as the manner in which the costs shall be borne.

762. Kenya informed that Kenya has always borne the costs of MLA and has not encountered any costs involving expenses of a substantial or extraordinary nature.

(b) Observations on the implementation of the article

763. Kenya's legislation addresses the issue of costs in line with the Convention. No examples of implementation were provided.

Article 46 Mutual legal assistance

Paragraph 29

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.

(a) Summary of information relevant to reviewing the implementation of the article

764. Kenya cited Section 13 of the MLA Act on the provision or production of records. Section 13(2) sets out the framework under which the Competent Authority may provide documents that are not publicly available.

Section 13 of the MLA Act

13. Provision or production of Records

(1) A request under this Act may seek the provision or production of any documents, records or other material relevant to a criminal matter arising in a requesting state.

(2) Where documents or records requested under subsection (1) are not publicly available, the Competent Authority may provide copies of such documents, records or other material to the same extent and under the same conditions as applies to provision of such records to Kenya law enforcement agencies or prosecution or judicial authorities.

765. Kenya referred to the Tanzania case (cited above), in which Kenya collected copies of minutes of a tender process, evaluation reports and general correspondence regarding the matter and gave them to the Tanzanian investigators.

(b) Observations on the implementation of the article

766. The cited legislation addresses the provision under review. The cited case example further evidences implementation of the paragraph under review.

Article 46 Mutual legal assistance

Paragraph 30

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.

(a) Summary of information relevant to reviewing the implementation of the article

767. Kenya indicated that it is party to treaties on mutual legal assistance. However, a full list of treaties could not be provided.

768. Moreover, Kenya is party to the Intergovernmental Authority on Development (IGAD) Convention on Mutual Legal Assistance.

769. Kenya resorts to the Harare Scheme among Commonwealth countries for arrangements with States with which it has not concluded any bilateral treaties.

(b) Observations on the implementation of the article

770. Kenyan authorities were unable to provide a full list of MLA treaties. It is recommended that Kenya adapt its information systems in order to compile relevant information on existing and future treaties on international cooperation.

(c) Challenges, where applicable

771. Kenya has identified the following challenges and issues in fully implementing the article under review:

1. Limited capacity (e.g. human/technological/institution/other);

Training for all institutions and officers who handle MLA requests is needed.

2. Limited resources for implementation (e.g. human/financial/other);

There is need for technical personnel to capture data on MLA requests and monitor their processing and transmission to the relevant bodies. Some of the experts required are statisticians, IT officers, etc.

3. Other issues.

Review of the MLA Act.

(d) Technical assistance needs

772. Kenya has indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;

Benchmarking with best practices from other countries, especially in the Commonwealth.

2. On-site assistance by an anti-corruption expert;

To assist the relevant bodies deal with the challenges faced in processing MLA requests.

3. Capacity-building programmes for authorities responsible for international cooperation in criminal matters;

Training of institutions/officers involved in the processing of MLA requests.

4. Development of an action plan for implementation.

To ensure that MLA requests are processed timely and all the concerned bodies play their respective roles timely.

Kenya indicated that none of these forms of technical assistance has been provided to Kenya to-date.

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.

(a) Summary of information relevant to reviewing the implementation of the article

773. Kenya indicated that it has not implemented the article.

774. Although Kenya has been receiving requests for the transfer of criminal proceedings, Kenya has not acceded to such requests because there is no legal basis for the transfer of such proceedings.

(b) Observations on the implementation of the article

775. It was confirmed that the transfer of proceedings is not currently addressed in Kenya's legislation. Kenyan officials explained that the Office of the Attorney General and Department of Justice (OAG & DOJ) has initiated consultations on the matter, but no legislation has been drafted. During the country visit, OAG & DOJ indicated that Kenya was considering incorporating the issue of transfer of criminal proceedings into the Transfer of Prisoners Bill, which was awaiting debate in the National Assembly.

776. In light of the requests Kenya has received, Kenya may wish to adopt relevant measures to provide for the transfer of criminal proceedings where warranted in the interest of the administration of justice, in line with the article under review.

(c) Challenges, where applicable

777. Kenya has identified the following challenges and issues in fully implementing the article under review:

Inadequacy of existing normative measures (constitution, laws, regulations etc.)

Kenya does not have transfer of criminal proceedings legislation.

(d) Technical assistance needs

778. Kenya indicated that the provision of technical assistance through the development of legislation on the transfer of criminal proceedings would assist it in implementing the article under review. Kenya notes that in some cases, it may be necessary to have

proceedings commenced and continued in one jurisdiction for proper case management, and to increase the chances of obtaining convictions or recovering assets lost through corruption. It is therefore desirable that Kenya has in place an effective legislative framework to make provision for transfer of criminal proceedings, where necessary. For that reason, Kenya will require technical assistance towards the development of a legal framework for the transfer of criminal proceedings relating to corruption and other offences. Towards that end, Kenya will need a Transfer of Criminal Proceedings Act which will address the requirements of article 47 of UNCAC among other instruments.

779. Kenya indicated that the following additional forms of technical assistance, if available, would assist it in better implementing the article under review

1. Summary of good practices/lessons learned;

For the sharing of best practices on the transfer of criminal proceedings.

2. Legal advice;

On the development of transfer of criminal proceedings legislation, including the management of a transfer of criminal proceedings scheme.

3. On-site assistance by an anti-corruption expert;

To develop transfer of criminal proceedings legislation

4. Capacity-building programmes for authorities responsible for international cooperation in criminal matters;

For the training of institutions/personnel responsible for international cooperation in criminal matters.

5. Development of an action plan for implementation;

To guide the country towards the development of transfer of criminal proceedings legislation and the development of a framework for the implementation of such legislation.

Kenya indicated that none of these forms of technical assistance has been provided to Kenya to-date.

Article 48 Law enforcement cooperation

Paragraph 1

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.

(a) Summary of information relevant to reviewing the implementation of the article

780. Kenya referred to the cooperation that exists between Kenyan law enforcement bodies, such as EACC and the Kenya police, with other countries. The framework for cooperation is made possible through legal instruments such as the Witness Summonses (Reciprocal Enforcement) Act (Cap. 78 of the Laws of Kenya), which currently only applies in Uganda and provides for the enforcement of witness summonses issued by courts of Kenya and Uganda; POCAMLA; the Mutual Legal Assistance Act, which has provisions designed to facilitate law enforcement cooperation, such as letters rogatory; and the Fugitive Offenders Pursuit Act, (Cap. 87 of the Laws of Kenya), which empowers the police authorities of Uganda and Tanzania to pursue fugitives from either country within Kenyan territory (see article 44 of the Convention above).

781. Kenya, Burundi, Djibouti, Ethiopia, Rwanda, South Sudan, Tanzania and Uganda are members of the East Africa Association of Anti-Corruption Authorities (EAAACA), which forms a platform for direct cooperation between Member States and law enforcement agencies in relation to offences established under the UNCAC. The members are bound by a constitution and have annual forums for sharing information.

782. Kenya is also party, through the Inspector General of the National Police Service, to the Eastern Africa Police Chiefs Cooperation Organisation (EAPCO), which provides a platform where police chiefs in the region exchange information on all aspects of crime and state security. The chiefs have an annual forum on a rotation basis. Kenya's law enforcement authorities also cooperate through INTERPOL.

783. Kenya is also a member of the Eastern & Southern Africa Anti-Money Laundering Group (ESAAMLG), whereby States exchange information on money laundering and combating terrorism. Notably, ESAAMLG is an associate Member of the Financial Action Task Force (FATF).

784. The Office of the Director of Public Prosecutions (ODPP) has obtained membership in key organs, namely:

- African Association of Prosecutors
- International Association of Prosecutors (as an organizational member);
- Commonwealth Regional Programme for Directors of Public Prosecution;
- Heads of Anti-Corruption and Money Laundering Agencies.

785. Kenya's Financial Reporting Centre (FRC), which was operationalized in April 2012, has entered into one (1) Memorandum of Understanding (MOU) with the Seychelles (2013). MOUs with Tanzania, Namibia, Malawi, Lesotho and South Africa are under negotiation and are at an advanced stage. FRC staff have also participated in knowledge visits with the Financial Intelligence Centre (FIC) of South Africa, the Financial Intelligence Unit (FIU) of Mauritius, the FIU of Belgium, Financial Crimes Enforcement Network (FINCEN) of USA, and the Dutch FIU.

786. Kenya provided the following statistics on incoming and outgoing requests for cooperation from/to the FRC at the domestic and international level in the last 2 years.

	Requests to FRC		Requests by FRC	
	2013	2014	2013	2014
Domestic law enforcement agencies	2 (CID-Police)	1	0	0
Domestic regulatory bodies	3	0	0	1
Foreign FIUs	3	2	0	0

787. Kenya also referred to Section 6(2) of the MLA Act. The Office of the Attorney General is vested with the responsibility of cooperating with other countries in this regard. Section 6(2) of the Mutual Legal Assistance Act sets out the requirements. Specifically:

The requirements of sub-paragraph (b) (i) of the article under review are provided for in Section 6 (2)(a), the requirements of sub-paragraph(b) (ii) are provided for in Section 6(2) (k), (l) and (m), while the requirements of sub-paragraph(b) (iii) are provided for in Section 6 (2)(b) to (r).

Regarding sub-paragraphs (c), (d) and (f) of the article under review, Section 6(2) also makes provision for a wide range of assistance that Kenya can grant and includes assistance in investigations. Section 6(2)(e) also provides for the examination of objects and sites.

Mutual Legal Assistance Act

Section 6(2)

For the purposes of this Act, legal assistance means mutual legal assistance in criminal matters and includes, but is not limited to-

- (a) identifying and locating of persons for evidential purposes;
- (b) examining witnesses;
- (c) effecting service of judicial documents;
- (d) executing searches and seizures;
- (e) examining objects and sites;
- (f) providing, including formal production where necessary, originals or certified copies of relevant documents and records, including but not limited to government, bank, financial, corporate or business records;
- (g) providing information, evidentiary items and expert evaluations;
- (h) facilitating the voluntary attendance of witnesses or potential witnesses in a requesting state;
- (i) facilitating the taking of evidence through video conference;
- (j) effecting a temporary transfer of persons in custody to appear as a witness;
- (k) interception of items during the course of carriage by a public postal service;
- (l) identifying, freezing and tracing proceeds of crime;
- (m) the recovery and disposal of assets;
- (n) preserving communications data;
- (o) interception of telecommunications;
- (p) conducting covert electronic surveillance;
- (r) any other type of legal assistance or evidence gathering that is not contrary to Kenyan law.

788. Regarding sub-paragraph (e), Kenya indicated that it has bilateral law enforcement agreements whereby the parties exchange liaison officers for purposes of conducting investigations, collecting information, technology transfer, training of local officers on crime and sharing of information. Each law enforcement authority in Kenya has a liaison officer who coordinates the law enforcement cooperation activities with other enforcement authorities. This is especially so for EACC, CID, KRA, and the Office of the Auditor General (Kenya National Audit Office). A full list of law enforcement agreements was unavailable.

789. Kenya noted that it does not have a database through which information can be shared with law enforcement in other countries.

(b) Observations on the implementation of the article

790. The reviewers noted that the cited provisions of the MLA Act focus on mutual legal assistance (UNCAC article 46) rather than direct law enforcement cooperation. However, they take note of the explanation by the Kenyan authorities that these channels can also be used for direct cooperation among law enforcement agencies, not involving formal MLA channels.

791. It was explained that Kenyan authorities cooperate with their counterparts in other countries to effect witness summons and arrest fugitives. This has been done in Uganda and Tanzania. In one case discussed during the country visit, the Attorney General

received a summons from the International Criminal Court to serve witness summons in Kenya, which Kenyan Police executed, and the Attorney General subsequently testified in the Hague. Moreover, Kenya indicated that MOUs on police-to-police cooperation exist, but no further details were provided.

792. The FRC has entered into one MOU with the Seychelles (2013). Since Kenya is not party to the Egmont Group of Financial Intelligence Units, the reviewers welcome the conclusion of further MOUs by the FRC.

793. Kenyan authorities were unable to provide a list of agreements and MOUs on law enforcement cooperation. Moreover, no data on incoming or outgoing requests made or executed by Kenyan authorities was available. As noted below, Kenya is encouraged to maintain comprehensive statistics on law enforcement cooperation, including its existing and future agreements.

794. The reviewers acknowledge the exchange of personnel and liaison officers between Kenyan law enforcement agencies, including EACC, CID and KRA, and their foreign counterparts.

Article 48 Law enforcement cooperation

Paragraph 2

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 organizations, to enhance the cooperation between their law enforcement agencies.

(a) Summary of information relevant to reviewing the implementation of the article

795. Kenya indicated that it is party to such multilateral treaties as the Inter-Governmental Authority on Development (IGAD) Convention on Mutual Legal Assistance in Criminal Matters and the IGAD Convention on Extradition; the draft East African Community (EAC) Protocol on Preventing and Combating Corruption (which is still in the negotiation stage), and the African Union (AU) Convention on Preventing and Combating Corruption. Reference is also made to the different MOUs among law enforcement agencies described above.

796. Kenya indicated that it partly considers this Convention as the basis for direct law enforcement cooperation. Although Kenya will normally require bilateral agreements to facilitate law enforcement cooperation, the UNCAC has been used in the past as the basis for cooperation between the EACC of Kenya and anti-corruption bodies of other countries, especially within the EAC (Tanzania, Uganda, Rwanda and Burundi).

797. EACC has in the past collaborated with other anti-corruption agencies within the East African region over sharing information and documents relating to corruption investigations.

(b) Observations on the implementation of the article

798. The reviewers acknowledge indications by the Kenyan authorities that the cited conventions, including IGAD, EAC and AU, provide a mechanism to facilitate direct law enforcement cooperation.

799. Kenya indicates that it partly considers this Convention as the basis for direct law enforcement cooperation. During the country visit Kenya Police confirmed that they have also used UNCAC for direct law enforcement cooperation, but no examples of requests received or made under this Convention were available. Kenya is encouraged to maintain comprehensive statistics on the implementation of the article under review.

Article 48 Law enforcement cooperation

Paragraph 3

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.

(a) Summary of information relevant to reviewing the implementation of the article

800. Kenya referred to Section 6(2) of the MLA Act, which allows for the use of technology in conducting investigations and cooperation with other countries by preserving communications data; interception of telecommunications; conducting covert electronic surveillance.

801. Furthermore, Section 32 of the MLA Act provides for the following forms of mutual legal assistance:

Section 32 of the MLA Act

32. Covert electronic surveillance

(1) A request may be made to Kenya from a requesting state for deployment of covert electronic surveillance.

(2) Covert electronic surveillance shall take place in accordance with the procedures provided for under Kenyan law.

(3) Nothing in this section shall preclude a request for assistance involving surveillance, including the use of a tracking device, other than that provided for in this section.

802. 346. Kenya informed that EACC and the Kenya Police have assisted the Ugandan Police using technology to locate of suspects and hostile witnesses.

(b) Observations on the implementation of the article

803. The reviewers noted that the cited provisions of the MLA Act focus on mutual legal assistance (UNCAC article 46) rather than direct law enforcement cooperation. However, they take note of the explanation by the Kenyan authorities that these channels can also be used for direct cooperation among law enforcement agencies, not involving formal MLA channels.

(c) Challenges, where applicable

804. Kenya has identified the following challenges and issues in fully implementing the article under review:

1. Inter-agency coordination;

The cooperation between anti-corruption bodies with counterparts in other countries is based on informal arrangements and goodwill of the management of the concerned institutions.

2. Specificities in its legal system;

The Ethics and Anti-Corruption Act, 2011 and the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) do not have express provisions authorizing EACC to receive or provide direct law enforcement cooperation to foreign bodies. Section 12 of ACECA, which used to provide for that, was repealed through amendments introduced by the Ethics and Anti-Corruption Act, 2011 (No. 22 of 2011).

3. Limited capacity (e.g. human/technological/institution/other; please specify);

Inadequate training for officers who deal with such matters. Officers require continuous training programmes.

4. Limited resources for implementation (e.g. human/financial/other; please specify);

There are few trained officers who can handle such requests.

(d) Technical assistance needs

805. Kenya has indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

- 1. Summary of good practices/lessons learned;*
- 2. Technical assistance (e.g. set-up and management of databases/ information-sharing systems);*
- 3. On-site assistance by a relevant expert;*
- 4. Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation;*
- 5. Development of an action plan for implementation;*
- 6. Model agreement(s)/ arrangement (s);*

Kenya indicated that none of these forms of technical assistance has been provided to Kenya to-date.

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.

(a) Summary of information relevant to reviewing the implementation of the article

806. Kenya referred to the establishment and operation of the East African Association of Anti-Corruption Authorities (EAAACA), whose members carry out joint investigations when necessary on corruption matters. EAAACA is composed of national anti-corruption agencies from the Partner States of the East African Community (EAC): Burundi; Kenya, Rwanda, Tanzania and Uganda. EAAACA has, in the recent past, admitted to its membership anti-corruption bodies from other Eastern African countries, namely South Sudan, Ethiopia and Djibouti.

807. EAAACA forms the basis for joint investigations in East African countries. In addition, Partner States of the EAC are currently negotiating an EAC Protocol on Preventing and Combating Corruption, which provides for, amongst other things, joint investigations and collaboration by the anti-corruption agencies of the Partner States.

808. Kenya's anti-corruption and law enforcement bodies have been cooperating with other anti-corruption and law enforcement bodies to carry out joint investigations under the auspices of, among others: EAAACA; Eastern Africa Police Chiefs Cooperation Organisation (EAPCO) and ESAAMLG mentioned before.

809. By way of example, Kenya referred to the Tanzania tax evasion case (cited under article 46(22) above), in which the Kenyan and Tanzanian authorities conducted a joint investigation into tax evasion schemes of suppliers of skins and hides in the region.

(b) Observations on the implementation of the article

810. The reviewers acknowledge the response of the Kenyan authorities that joint investigations are possible in the framework of EAAACA, EAPCO and ESAAMLG. No examples of joint investigations involving UNCAC offences were reported.

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.

(a) Summary of information relevant to reviewing the implementation of the article

811. Kenya indicated that it is yet to fully implement the measures above and is hence partially compliant with the article under review. Although the various provisions of law contemplate the adoption of special investigative techniques and provide for the admissibility of evidence thereby obtained, there is a glaring lack of a specific legislation providing for the use of covert surveillance and other special investigative techniques. Such a law could also consolidate and declare the admissibility of evidence derived from the use of such techniques.

812. There is need for a legal review of the law governing this matter, with a view to either amending existing laws or enacting new legislation on the matter. The Kenya Law Reform Commission has been tasked with the conduct of the necessary research on this legal issue.

813. The provisions of the Evidence Act (Cap. 80 of the Laws of Kenya), as amended by the Kenya Communications (Amendment) Act 2008 substantially address the issue of admissibility of electronic evidence obtained from covert operations and surveillance. The Communications (Amendment) Act 2008 regulates e-commerce, e-transactions and cybercrimes, although not comprehensively. Following the country visit, Kenya indicated that, through the Security Laws (Amendment) Act, 2014 (No. 19 of 2014), a new Section 78A was included in the Evidence Act (Cap. 80 of the Laws of Kenya) to provide for the admissibility of electronic and digital evidence. However, this provision was not assessed by the reviewers.

814. In practice, special investigative techniques are used by law enforcement agencies. EACC's use of special investigative techniques in special sting operations has been challenged in court on the grounds that it amounts to entrapment and violates the accused person's constitutional rights. Further, investigative agencies lack the capacity to utilize special investigative techniques.

815. Kenya cited the Mutual Legal Assistance Act, which provides for covert electronic surveillance (Section 32) and an opportunity for bilateral or multilateral agreements or arrangements for using such special investigative techniques (Section 30).

Section 32 of the Mutual Legal Assistance Act

32. Covert electronic surveillance

(1) A request may be made to Kenya from a requesting state for deployment of covert electronic surveillance.

(2) Covert electronic surveillance shall take place in accordance with the procedures provided for under Kenyan law.

(3) Nothing in this section shall preclude a request for assistance involving surveillance, including the use of a tracking device, other than that provided for in this section.

Section 30 of the Mutual Legal Assistance Act

30. Bilateral or multilateral arrangements

"Nothing in this Part shall preclude any bilateral or multilateral arrangements for the purpose of facilitating the exploitation of present and future technical possibilities regarding the lawful interception of telecommunications."

816. With respect to paragraph 2 of the article under review, Kenya indicated that the EAAACA agreement, EAPCO arrangement and MOUs could be used as a basis for special investigative techniques.

817. Kenya indicated that paragraph 3 under review is not applicable and hence has not been implemented.

818. Kenya indicated that it is partly compliant with paragraph 4 under review, especially through Section 29 of the MLA Act which relates to interception of items during carriage by a public postal service.

Section 29 of the Mutual Legal Assistance Act

29. Interception of items during the course of carriage by a public postal service

For the purpose of a criminal investigation, a requesting state may, in accordance with the requirements of this Act or any other relevant law, make a request to Kenya for the interception of an item during the course of its carriage by a public postal service and immediate transmission of the said item or a copy thereof.

819. No examples of the use of special investigative techniques at the international level in matters involving UNCAC offences were reported.

(b) Observations on the implementation of the article

820. The reviewers welcome indications by Kenya on the need to adopt specific legislation providing for the use of covert surveillance and other special investigative techniques, which could also clarify the admissibility of evidence derived from the use of such techniques. This is borne out by the legal challenges raised in court to the EACC's use of such techniques.

821. The reviewers welcome steps being taken by Kenya to enact a new legislation on the matter.

(c) Challenges, where applicable

822. Kenya has identified the following challenges and issues in fully implementing the article under review:

1. Specificities in its legal system;

There is need for a review of the law of evidence relating to production of evidence gathered through special investigative techniques.

2. Limited capacity (e.g. human/technological/institution/other; please specify);

There is an urgent need to train personnel on special investigative techniques.

3. Limited awareness of state-of-the-art special investigative techniques.

Anti-corruption and law enforcement investigators need training on state-of-the-art investigative techniques. In addition, anti-corruption and law enforcement agencies in Kenya require specialized equipment for carrying out special investigative techniques.

4. Limited resources for implementation (e.g. human/financial/other; please specify);

The equipment required for carrying out special investigative techniques are very expensive and training costs for the use of such equipment are also very high.

(d) Technical assistance needs

823. Kenya has indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;

2. On-site assistance by a relevant expert;

3. Capacity-building programmes for authorities responsible for designing and managing the use of special investigative techniques;

4. Development of an action plan for implementation;

5. Legal advice;

6. Model agreements/ arrangements.

Kenya indicated that none of these forms of technical assistance has been provided to Kenya to-date.

Annex

CSOS POSITION ON THE REVIEW OF KENYA'S IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

PRESENTED TO THE VISITING GOVERNMENTAL EXPERT REVIEWERS FROM THE UNODC SECRETARIAT, CAPE VERDE AND PAPUA NEW GUINEA ON 3 SEPTEMBER 2014

The signing and ratification of the United Nations Convention Against Corruption (UNCAC) on 9th December 2003, when it was opened for signing was a great milestone in the anti-corruption struggle in Kenya. This was done immediately after the National Rainbow Coalition (NARC) had taken over the reins and there was sufficient momentum for anti-corruption given that NARC rode on the anticorruption agenda. Subsequently, the Constitution of Kenya 2010 was promulgated and a number of laws enacted which gave additional momentum to the fight against corruption. These include the Anti-Corruption and Economic Crimes Act (2003); the Public Officer Ethics Act (2003), the Government Financial Management Act 2004, the Public Procurement and Disposal Act (2005), the Witness Protection Act (2006), the Fiscal Management Act (2009), the Public Finance Management Act (2012), and the Leadership and Integrity Act (2012) among others.

The acceptance by the Government to be reviewed on the implementation of the UNCAC under the current cycle is further testament on paper of its will to fight corruption. As CSOs, we welcomed the gazette notice No. 10700 and also acknowledge the approval of the review process by the Cabinet and the commitment to implement the report of the review as was reiterated by His Excellency the President.

The design of the review mechanism makes it an intergovernmental process in which public/CSO participation is discretionary to the government being reviewed. This stands at cross purposes with two things. First is an overriding principle that runs across the UNCAC which allows state parties to do things in accordance to their domestic context and second is the fact of our domestic constitutional context that makes public participation in all governance processes mandatory. Noteworthy here is that the Constitution of Kenya has literally forced a marriage between government and the public in all such governance processes and it would have been unthinkable to have a closed door exclusive government review process. In our context therefore participation is not discretionary.

We appreciate the courage and confidence shown in allowing for CSOs to be represented in the local review by two (2) people out of the seventeen (17) appointed to the steering committee. While we could have done better with more representation, this was a good step. We also note with gratitude the robust Terms of Reference (TORs) for the committee and the fact that it provides Kenya an opportunity for a thorough assessment of its anti-corruption

efforts-laws, policies, institutions and programmes- and with an open possibility of actioning steps and measures to be taken to ensure compliance.

While great effort went into the compilation and submission of the self-assessment checklist, this could not be devoid of challenges and useful lessons. First is a glaring weakness of the omnibus tool. The tool does not allow for a thorough enough assessment of the effectiveness of the legal, policy and institutional measures put in place to domesticate the UNCAC. Secondly, when you compare the UNCAC review mechanism and similar mechanism under other UN standards, the window of shadow reporting is very narrow in the UNCAC. Third and related to the first, on the surface the review manifests remarkable progress in domestication, but this stands in sharp contrast to the state of corruption in the country. In our view, there are still irreconcilable and glaring discrepancies between progress in domesticating UNCAC and the reality of corruption in the Country. This basically calls for stronger enforcement mechanisms for the country to fully realize the dividends of domesticating such mechanisms (wealth declarations).

It is important to note that data/statistics are the cornerstones for such review processes. Given the multiplicity of the agencies involved with elements of anti-corruption work in our Country, there is need for a robust central data management system on anti-corruption. Data has to be properly maintained and in a uniform format for ease of reporting not just on our international obligations but most importantly to the citizens as required by the Constitution. The same data should be made available to the public as stipulated in Article 35 of the Constitution of Kenya so that citizens are accorded a genuine opportunity to constantly appraise the efforts by Government and provide objective feedback.

The report of the steering committee could have been richer and immensely benefitted from more extensive consultations with multiple stakeholders if time and resources afforded for such an opportunity. While the TORs required publication of the draft self-assessment checklist for public feedback prior to transmission, this was not properly done.

The UNCAC review is almost coming to an end. However, the expansive TORs given the committee does not necessarily end with the UNCAC review. It is critical that the remaining bits of the TORs are fully executed as well. The time allowed for the CSO meeting with the review team is very little. It is not enough to fully appreciate the position of CSOs on the review process and content. In future, more time should be allocated to meetings for substantive feedback to be given.

While the review mechanism only provides for publication of the summary of the final country review report a number of countries that have taken the further step of publishing the full text of their country review reports. It is our desire as CSOs, a desire we know we share with all our colleagues in the larger civil society movement and indeed the general Kenyan public, that Kenya is counted among the growing list of countries that publish their full report. In this regard, we want to kindly request that the Honorable Attorney General of the Republic of Kenya considers publication and widely disseminating the full final country

review report and with a clear roadmap for the implementation of gaps/recommendations through another inclusive process.

Prepared by:

1. Transparency International Kenya
2. Centre for Law and Research International (CLARION)
3. Law Society of Kenya
4. International Commission of Jurists-Kenya
5. Constitution and Reform Education Consortium (CRECO)
6. Article 19
7. Institute for Economic Affairs (IEA)
8. African Centre for Open Governance (AFRICOG)