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## The UNCAC Compliance Review in Kenya: Process and Prospects

How can States Parties to the UN Convention against Corruption (UNCAC) bridge divides between treaty requirements and domestic laws, policies and practice? This case study analyzes the Kenyan government's efforts to identify anti-corruption reform needs for implementing UNCAC. Benefits accrued from having the very institutions in charge of implementation conducting the review instead of outsourcing it to international consultants. But – although the process was participatory in nature – key actors like the judiciary and the parliament were not included, potentially reducing valuable buy-in for reform. It was also difficult to find a balance between involvement of high-level leadership and implementation-level staff.

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## Background

In December 2002, Kenya's National Rainbow Coalition (NARC) won a landslide victory over its KANU rival, ending Daniel Arap Moi's 24 consecutive years in power as president. Eager to make good on its promise to fight the country's endemic corruption problems, the new government quickly established an Office of Governance and Ethics, and passed two important laws: the Public Officer Ethics Act and the Anti-Corruption and Economic Crimes Act (ACECA). The latter provided for the creation of the Kenyan Anti-Corruption Commission (KACC), an autonomous agency with investigative, although not prosecutorial, powers. Kenya also became the first country to sign and ratify, in late 2003, the United Nations Convention against Corruption (UNCAC).<sup>1</sup>

At first, the ratification of UNCAC had little impact on Kenya's anti-corruption efforts. Frustration with the weak legal framework for the KACC's enforcement functions inspired the agency's director to suggest a systematic assessment of Kenya's compliance with the UNCAC: what aspects were already in place, and what gaps remained? Could the UNCAC be leveraged for example, to enhance the KACC's effectiveness? This analysis would not be simple: the convention's provisions covering criminalization, law enforcement, prevention and international cooperation require not only a broad range of laws but also policies and institutional structures to implement them. Still,

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<sup>1</sup> In 2003, armed with a resounding mandate to address decades of systemic corruption, the new Kenyan government of President Mwai Kibaki became the first signatory to the UNCAC. The symbolic value was high, but in reality Kenya was far from compliant with many of the Convention's provisions. It was, some officials joke, a 'sign now, read later' scenario aimed at gaining good will from the Kenyan public and the international community (Interviews, Nairobi, October 2009).

the KACC research officer set about, in 2004, reviewing requirements from the UNCAC's seventy-one articles as an internal KACC exercise.<sup>2</sup>

The impetus for a structured analysis involving other stakeholders arose during the first Conference of State Parties to the UNCAC held in Amman, Jordan in December 2006. There, the Kenyan delegation came across a booklet presented by its Indonesian counterpart, the 'Indonesia Gap Analysis'. In a meeting with the Indonesians and the German Technical Cooperation agency GTZ, which had supported the process and publication of the Indonesian study, the idea to launch a similar process in Kenya emerged. Originally, the KACC and Ministry of Justice (MoJ) planned to commission international consultants to undertake the job for them. Persuaded to tackle the challenge themselves, they instead applied for funds through Kenya's Governance, Justice, Law and Order Sector reform programme (GJLOS), and secured bilateral support from GTZ for a multi-stakeholder process. The 2007/2008 GJLOS Medium Term Strategy integrated the UNCAC compliance review as an activity under its thematic work on 'Ethics, integrity and anti-corruption'.

## Description of the compliance review in Kenya

The Kenyan compliance review was steered by an Oversight Committee (OC) composed of the MoJ, the KACC, the GTZ Good Governance Support Project, and later the Ministry of Foreign Affairs. The roles of the OC members reflected their respective mandates. The KACC led the technical aspects, while the MoJ provided guidance on the Government of Kenya's position. At the conclusion of the process, it was agreed that the MoJ would take responsibility for implementing measures to address the gaps found.

The OC supervised work of a Technical Committee (TC), initiated communication with

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<sup>2</sup> Interview, KACC Research Officer, October 2009.

relevant agencies, and sought resources as different needs arose. The Technical Committee itself, led by KACC, conducted the actual review. It was composed of fifteen government institutions<sup>3</sup>, Transparency International-Kenya (TI), the International Commission of Jurists (Kenya Office) (ICJ), the Kenya Private Sector Alliance (KEPSA) and GTZ. Within the TC, state attorneys from KACC led smaller groups to examine individual Convention chapters, including Prevention, Criminalization, Mutual Legal Assistance and International Cooperation, Asset Recovery, and Technical Assistance. Mandatory and voluntary provisions were treated alike, following a realization that many of the non-mandatory articles, like criminalization of illicit enrichment, were critically important to Kenya in terms of its anti-corruption challenges. Significantly, the judiciary – obviously a key player for UNCAC implementation – was not included at this initial phase. At the time, the OC felt that participation in the executive-led process might be perceived to compromise judicial independence.

The initial analysis drafted internally by KACC formed the basis for the first TC workshop in October 2007. According to the terms of reference, the process would identify the laws, administrative policies, regulations and practices existing or required to achieve UNCAC compliance. Later on, enforcement and implementation lapses would emerge as separate topics of inquiry. Through the TC workshops and meetings that followed, participants gained a greater understanding of the Convention's content and how it relates to their institutions' mandates. The initial meetings were particularly important to achieve consensus regarding relevant stakeholders, their modes of participation, and the need for support from interna-

tional experts. That said, it proved difficult to secure consistent attendance from certain ministries and departments, and sometimes quite junior staff with limited knowledge were sent as representatives.

A first draft was completed in late 2007 and sent to international legal experts at the Basel Institute on Governance and the International Centre for Asset Recovery (ICAR) in Switzerland for comments. The Basel/ICAR team pushed the TC to consider gaps in light of best international practice, and they introduced those standards through long distance contact as well as participation in various meetings in Kenya. Critical inputs were also gathered through specialized stakeholder meetings with magistrates, civil society, and private sector representatives. The civil society stakeholder sessions, in particular, were useful in broadening the scope of the compliance review exercise. At first, civil society participants objected to the draft document, complaining that simply comparing Kenya's laws and policies with UNCAC standards implied that those laws and policies were actually implemented in the spirit of the convention. To mediate the discussion, GTZ Kenya suggested creating a new column in the matrix for enforcement gaps – areas where implementation of laws and policies is inadequate – to provide a more complete picture of reform requirements. This seemingly minor innovation, according to people involved, changed both the tenor of discussions (by acknowledging civil society concerns) and the tone of the final document. It also facilitated the development of an implementation plan at the end of the process.

A stakeholder conference for high-level government representatives took place in Mombasa in June 2008 to validate the draft analysis. Following the meeting, the Technical Committee regrouped together with the Chief Economist from the Prime Minister's office and other government planning staff to draft a plan for implementation. The resulting two versions (the 'micro' one for domestic use and a less detailed 'macro' one for international consumption) identify the activities that should be undertaken to address the identified gaps – in

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3 The Ministry of Justice National Cohesion and Constitutional Affairs, the Kenya Anti-Corruption Commission, the Ministry of Foreign Affairs, the Attorney General's Office, the Directorate of Public Prosecution, the Kenyan Law Reform Commission, the Kenyan Police Criminal Investigation Department, the National Anti-Corruption Campaign Steering Committee, the Parliamentary Service Commission, the Public Procurement Oversight Authority, the Kenyan Revenue Authority, the Central Bank of Kenya, the Kenyan National Audit Office, the Efficiency Monitoring Unit and the Ministry of Finance.

other words, a wish list rather than a strategic agenda for reform. It includes an extensive legislative agenda, including amendments to existing laws and proposals for new ones. In addition, controversial measures regarding asset recovery are included. Nonetheless, in November 2008, the implementation plan was validated at a second stakeholder's conference with representatives at the ministerial and vice-ministerial levels. In an effort to share experience from other regions, the KACC requested input from the Institute of Governance Studies (IGS) at BRAC University in Dhaka-Bangladesh. They contributed their perspectives from the recent Bangladeshi compliance and gap analysis and forward-looking efforts to bridge analysis and implementation.

### *Next steps*

Longstanding plans to present the analysis and implementation documents to Parliament have been postponed due to tensions between the KACC and Parliament, which resulted in the September 2009 resignation of the KACC's director, Justice Ringera. Both documents, however, were distributed in November 2009 at the UNCAC Conference of State Parties in Doha, Qatar. Neither the coordinating mechanism for implementation – with MoJ at the helm – nor the exact approach to implementation has been officially decided.

The civil society organizations (ICJ, TI, Kituo and KEPSA) most heavily involved in the process planned to develop a position paper recommending priorities for implementation. These include topics long on their advocacy agenda, including passage of the Freedom of Information Bill, which would increase government transparency and give muscle to existing anti-corruption legislation. For example, under the Public Officer Ethics Act all public officials must declare their own assets and those of close family members. However, in the absence of adequate government oversight, CSOs argue that the declarations must be publicly accessible. Also, a freedom of information law would facilitate whistle blowing by increasing availability of government records.

### *Donor engagement*

Kenya's compliance review took place in the broader context of GTZ's work supporting such exercises in a number of countries, including Indonesia, Bangladesh and Colombia. The purpose of this effort is ultimately to assist countries to implement the Convention, and to provide a basis for coordinated technical assistance. At a practical level, the multi-stakeholder and process-oriented compliance reviews can feed into formal assessment efforts such as the UNCAC self-assessment checklist administered by the UN Office on Drugs and Crime (UNODC), and the review mechanism put in place at the third Conference of the States Parties to the UN Convention against Corruption in 2009.<sup>4</sup> For the Kenya review, the GTZ UNCAC Project based at headquarters in Germany sourced experts, advised the local GTZ team and promoted the process at the international level.

As described above, GTZ's Good Governance Support Project based in Nairobi was involved in the entire review process. In addition to the Project Leader, one staff member was assigned to consistently participate in the OC and TC, provided technical support, and ensured consistency in terms of various stakeholders' involvement. The total cost of the compliance review to GTZ was 150,000 Euro – the remaining costs were split between the MoJ and KACC.

Neither the UNODC, which serves as Secretariat for the UNCAC, nor other bilateral donors active in governance support in Kenya, including USAID, DFID, the EU, Netherlands, Sweden and Canada, were involved in the compliance review process.

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<sup>4</sup> Indeed, many of the potential pitfalls surrounding the self-assessment checklist (Repucci 2009) are mitigated by the type of process conducted in Kenya. The review mechanism approved at the 2009 Conference of the States Parties (United Nations 2009) is composed of two review cycles of five years each, with a quarter of the States Parties reviewed by two other States Parties during each of the first four years of each review cycle. The first cycle will cover chapters III and IV (criminalization/law enforcement, and international cooperation), while the second will cover chapters II and V (preventive measures and asset recovery).

## Impact of the compliance review process

According to the individuals interviewed, Kenya's UNCAC gap analysis process successfully managed a diverse group of stakeholders while avoiding overly broad participation. While the longer-term impact of the analysis is impossible to assess or predict, there have been some tangible outcomes of the process so far:

First, staff of key government agencies and civil society groups are not only aware of the UNCAC, but through their active engagement with its requirements have developed a stronger competence in areas of anti-corruption. One member of a Kenyan NGO involved said the process encouraged her to integrate preventive anti-corruption measures derived from the UNCAC into her judicial reform advocacy.

Second, the analysis sensitized government employees to their responsibilities to reduce corruption – combating the problem is not, as often presumed, solely the mandate of the KACC. This observation, made by several of the individuals interviewed, further highlights the importance of including the judiciary at an early stage of the process.

Third, the UNCAC discussions created momentum for the drafting or passage of laws and policies, including the Witness Protection Act and the Mutual Legal Assistance Bill. In addition, little known reservations made by the government to the UNCAC Articles 44 (Extradition) and 66 (Settlement of Disputes) were exposed and debated. Since then, the reservation to Article 66 has been withdrawn.

Additionally, almost everyone interviewed mentioned the mutual understanding and goodwill that the process created – both among government agencies and between government and its civil society counterparts. TI, ICJ and the KACC conducted joint advocacy for passage of the Anti-Money Laundering and Proceeds of Crime Bill. Several CSO participants remarked that the workshops made them better appreciate the political dynamics among government

agencies. Even more importantly, they realized that rather than lobbying the political authorities directly, there are other entry points for engaging with government – for example through the reform-minded technical staff involved in the UNCAC gap analysis.

Finally, the compliance review paved the way for increased South-South cooperation in terms of UNCAC implementation. At the 2009 Conference of States Parties to the UNCAC, Bangladesh and Kenya presented plans to establish a South-South Caucus to share experiences in developing a gap analysis and building capacity within specific areas of implementation.

## Lessons learned

The Kenyan compliance review process exemplifies both an inclusive approach to self-assessment and the supportive role that development partners can play in such processes. The main benefits incurred so far – increasing ownership and capacity of stakeholders – would have been minimal had the KACC and MoJ followed their first instinct to outsource the exercise to international experts. Stakeholders appreciated that external consultants were explicitly instructed to comment and give advice rather than provide content. At the same time, having resource persons with a range of backgrounds was necessary to provide insight into international best practice with regard to the various fields that the UNCAC covers.<sup>5</sup>

In terms of participation, the broad representation of staff from the various ministries, departments and agencies was a mixed blessing. There were divergent views about whether more sustained engagement with high level leadership should have been sought earlier on in the process rather than simply inviting Ministers and Permanent Secretaries to validate drafts in stakeholder meetings. Certainly, the vertical communication channels in many

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<sup>5</sup> Since UNCAC covers such a wide range of topics, it is unlikely that just one individual would have the required expertise to communicate international best practice with regard to every aspect (for example money laundering, procurement, whistleblowing, etc.).

agencies are weak, and the ‘technical’ staff involved in the analysis may have limited powers of persuasion when it comes to implementing recommendations. At the same time, it was important to protect the process from excessive political positioning which would have detracted from the critical approach taken.

Despite the real accomplishments of the TC in Kenya, effectiveness was sometimes hampered by the need to accommodate both the steep learning curve of the analysts and their institutional positions. In contrast to the Bangladesh experience, where a respected academic institution (ICS) with a good relationship to government could both coordinate and contribute substantive inputs, the Kenyan process was negotiated through two lead actors (the KACC and the MoJ) whose interests did not always align. The output was also compromised by the absence of inputs from the judiciary – another result, it seems, of complex institutional positioning. Several interviewees stated that involving the judiciary at least in the TC if not in the OC not only would have achieved greater buy-in from this key actor, but would have subjected it to pressure from other stakeholders about its role in addressing corruption. As the final interpreters of legislation needed to implement the UNCAC, as well as an institution perceived to be highly corrupt itself,<sup>6</sup> commitment from the judiciary is critical to the Convention’s success. In addition, more systematic inputs from magistrates during the process could have strengthened the analysis itself, as magistrates who hear corruption cases are keenly attuned to the structural and legal factors that hamper their work.

Another actor excluded from the process was, of course, Parliament. The failure to carry out a planned workshop with Members of Parliament (MPs) makes it more difficult to secure their buy-in for the proposed legislative amendments. Identifying potential champions among MPs might have helped create political

momentum for implementing at least some aspects of UNCAC.

## Conclusion

Thanks to relationships and capacities built during the UNCAC compliance review process, the Ministry of Justice has inherited a robust foundation on which to coordinate necessary reforms. At the same time, there are a number of constraints to UNCAC compliance that are important for the implementation phase.

First, the Implementation Plan for addressing identified gaps is highly dependent on new and amended legislation. The Kenyan Parliament, however, has proven resistant to passing anti-corruption laws that threatens members’ personal interests. The Proceeds of Crime and the Anti-Money Laundering Bill, one of the most important tools to end impunity of elite actors, was passed in December 2009 amid much debate in parliament and the media. Its enactment should provide an impetus for lobbying on other legislation critical to UNCAC compliance.<sup>7</sup>

If recent history is a guide, the tenuous political situation in Kenya, which resulted in numerous delays during the gap analysis process, will likely have the same effect on reform.<sup>8</sup> The lack of a national anti-corruption policy (currently under development by the MoJ) means that reforms must take place in the absence of a coherent policy framework that enforces responsibilities and creates political pressure for follow-through. There is a risk that donor assistance targeting UNCAC implementation will be suspended if the government is perceived to deliberately impede anti-corruption efforts.

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7 Some analysts note that UNCAC’s legal standing is unclear because the treaty has not yet been formally adopted into national law, as required in dualist legal systems such as Kenya’s. The Medium Term strategy for Vision 2030 does provide for full domestication of all international treaties by 2012. In addition, many of UNCAC’s legislative requirements, at least, could be met without domestication of the entire treaty if recommended amendments to the ACECA were made.

8 For example, the violence following the 2007 election resulted in the suspension of most donor funding until a coalition government took office.

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6 The Judiciary ranks as the third most corrupt institution in Kenya, according to Transparency International’s East African Bribery Index (2009).

Moreover, since only GTZ was involved in the compliance review process, the opportunity to develop a joint understanding of reform needs among donors was not fully realized. A further concern is that the active governance partners need to coordinate their support, for example, around the UNCAC Implementation Plan, to avoid the risk of delivering technical assistance in an ad-hoc, short-term manner that could reduce the chances of effective anti-corruption reform.

Planning, data collection and monitoring capacities in government departments tend to be weak. According to the KACC, efforts were made to prioritize Implementation Plan activities based on 1) perceived impact and 2) the financial implications of compliance. However, there is no budget attached, and the timetable for most activities is unrealistic considering that the analysis itself took two years. In addition, current indicators are not sufficiently focused on measuring outputs of reform. For example, one of the indicators for the development of an anti-corruption policy is that 'corruption prevalence (will be) reduced by 50%' according to the Corruption Perception Index (CPI) and the Kenya Bribery Index. Not only does the CPI measure perception rather than prevalence, but these indicators are not tailored to assessing policy impact. Follow-through on the Implementation Plan is also compromised by the fact that, rather than identifying one ministry, agency or department responsible for the implementation of a particular provision, the Plan lists 'key actors' whose engagement at some level is required.

What is the way forward? Development partners in Kenya should first support the Government of Kenya to refine the Implementation Plan for UNCAC compliance, complete with meaningful and achievable indicators,<sup>9</sup> a

budget, and clear lines of responsibility to facilitate meaningful monitoring. Who should monitor the plan, how, and with what resources are other key questions to address, and measures should be taken to improve capacity to collect and analyze relevant data by implementing agencies as well as civil society. The plan requires both domestic and international publicity, to maintain political pressure. Lessons learned from developing and implementing national anti-corruption strategies can be of particular relevance (Hussmann 2007). Some of those include the need to budget sufficiently for internal and external communication, to provide an adequate advisory capacity to the coordinating body, and to sustain demand for reforms through political discourse and robust monitoring.

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<sup>9</sup> Because the development of appropriate indicators for UNCAC implementation seems to be a common challenge among many countries, this could be a focus of international rather than national efforts, and certainly an area where the proposed South-South Caucus could play a role. The U4 Issue Paper 'Maximising the potential of UNCAC implementation: Making use of the self-assessment checklist' includes a number of existing indicators that can be adapted to individual UNCAC articles (Repucci 2009: 13). Repucci (2009:13) notes that "Indicators that balance rule-

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based as well as outcome-based standards can help to provide the framework for more holistic data collection, and can better signal the need for policy adjustments."

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