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The Media and the Anti-corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects

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THE MEDIA AND THE ANTI-CORRUPTION CRUSADE IN KENYA: WEIGHING THE ACHIEVEMENTS, CHALLENGES, AND PROSPECTS

JAMES FOROLE JARSO*

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*“Corruption can only be examined and eradicated in an environment of pluralism,
tolerance, freedom of expression, and individual security”*

— DR. OSCAR ARIAS SÁNCHEZ¹

“I fear three newspapers more than a hundred thousand bayonets.”

— NAPOLEON BONAPARTE²

1. Oscar Arias Sánchez, *Foreword* to JEREMY POPE, *TRANSPARENCY INT’L, CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM*, at ix (2000). Dr. Sanchez is a former president of Costa Rica and a Noble Peace Prize Laureate. *Id.* at ix n.1.

2. *THE NEWSPAPER AND SOCIETY: A BOOK OF READING* 254 (George L. Bird & Frederic E. Merwin eds., 1942) [hereinafter *THE NEWSPAPER AND SOCIETY*].

INTRODUCTION

In Kenya, hardly a day passes without the media highlighting corruption in the government. The vice continues to immensely impact various aspects of the nation's life: health-care continually deteriorates as vital infrastructures fail;³ millions of innocent children are denied access to education as public funds are embezzled with reckless abandon;⁴ the transport network becomes dilapidated as well-connected contractors make "quick kills;"⁵ the public "voice" is continually ignored as government officials spend public funds as they wish;⁶ the scales of justice continually skew as the wealthy and

3. See Catherine Karong'o, *Healthcare in Kenya Ailing*, CAPITAL NEWS, <http://www.capitalfm.co.ke/news/Kenyanews/Healthcare-in-Kenya-ailing-8369.html> (last visited Nov. 1, 2010) (emphasizing that the main challenges in Kenya's health sector are "low quality services, old and dilapidated infrastructure, inadequate financial resources, inaccessible healthcare . . . , unaffordable health care and poor health systems"). See generally KENYA ANTI-CORRUPTION COMM'N, *SECTORAL PERSPECTIVES ON CORRUPTION IN KENYA: THE CASE OF THE PUBLIC HEALTH CARE DELIVERY* (2010), available at <http://www.kacc.go.ke/docs/health-report.pdf>.

4. See *How Corrupt Officials Stole Free Primary School Cash*, THE STANDARD (Kenya), Dec. 17, 2009, <http://standardmedia.co.ke/archives/sports/InsidePage.php?id=1144030579&cid=4&> (reporting that the Kenya Anti-Corruption Commission has evidence of the embezzlement of 103 million Kenyan Shillings); Jeff Otieno, *UK Withholds Kenya Grant Over Corruption*, DAILY NATION (Kenya), Dec. 11, 2009, <http://www.nation.co.ke/News/-/1056/820998/-/item/0/-/109gea5z/-/index.html> (noting that the U.K.'s Department for International Development suspended its financial support for Kenya's free primary education program following reports of massive embezzlement of funds); Michael Ranneberger, *Address Graft for Reforms to Succeed: US Envoy*, DAILY NATION (Kenya), Jan. 27, 2010, <http://www.nation.co.ke/News/politics/-/1064/850600/-/wrfunjz/-/index.html> (stating that the U.S. government suspended a capacity building program in response to widespread corruption in Kenya's Ministry of Education).

5. See KENYA ANTI-CORRUPTION COMM'N, *EXAMINATION REPORT INTO THE SYSTEMS, POLICIES, PROCEDURES AND PRACTICES OF THE ROADS SUB-SECTOR 45-49* (2007), available at <http://www.kacc.go.ke/docs/ROAD-EXAMINATION-REPORT.pdf> (recognizing problematic loopholes in the stages of approving consultants and engineers which have led to abuse of discretion and favoritism in selecting contractors); *Make a Move on Dilapidated Roads*, MARS GROUP KENYA MEDIA (Mar. 31, 2009), <http://www.marsgroupkenya.org/multimedia/?StoryID=251162&p=Kasarani&page=4> (describing the status of disrepair of Kenya's roads and lamenting the behavior of local companies who do a poor job of repairing the roads).

6. See KENYA NAT'L COMM'N ON HUMAN RIGHTS & TRANSPARENCY INT'L

influential capture the national judiciary;⁷ Kenyans continually witness the pilferage of public funds through shoddy deals between gluttonous public officials and their ilk in the private sector;⁸ and, consequently, an overwhelming proportion of Kenyans languish in abject deprivation and socioeconomic inequality.⁹

KENYA, LIVING LARGE: COUNTING THE COST OF OFFICIAL EXTRAVAGANCE IN KENYA 8-12 (2007), *available at* <http://www.knchr.org/dmdocuments/LivingLarge.pdf> (reporting on the Kenyan government's frequent purchase of luxury cars for use by senior government officials, and arguing that these purchases constitute human rights violations to the extent they limit the government's ability to fulfill certain social, economic, and cultural rights); KENYA HUMAN RIGHTS COMM'N & KENYA NAT'L COMM'N ON HUMAN RIGHTS, BEHAVING BADLY: DECEPTION, CHAUVINISM AND WASTE DURING THE REFERENDUM CAMPAIGNS (2006), *available at* <http://www.knchr.org/dmdocuments/referendumreport.pdf> (highlighting cases of plunder of public funds during the November 2005 constitutional referendum).

7. *See* REPUBLIC OF KENYA, REPORT OF THE INTEGRITY AND ANTI-CORRUPTION COMMITTEE OF THE JUDICIARY OF KENYA, VOL. I (THE RINGERA REPORT) (2003), *available at* http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf (highlighting the nature and forms, causes, magnitude and level, and impact of corruption in the Kenyan judiciary); TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007: CORRUPTION AND JUDICIAL SYSTEMS (2008) (ranking the Kenyan Judiciary as the sixth most corrupt institution in the country); *cf.* REPUBLIC OF KENYA, REPORT OF THE SUB-COMMITTEE ON ETHICS AND GOVERNANCE OF THE JUDICIARY 4 (2005), *available at* http://www.deontologie-judiciaire.umontreal.ca/fr/textes%20int/documents/KENYA_RAPPORT_COMITe_000.pdf (noting with regret "the emergence of a trend of persons critical of the Judiciary to continue to demean the institution on the grounds of the previous reports of corruption and unethical practices").

8. For insights into the pecuniary costs of corruption in Kenya in the period 1991-1998 alone, see Aitan Szlapak, Will Corruption Ever Stop Developing in Kenya 67-84 (Jan. 2002) (unpublished MSc. Dissertation, University of Bristol), *available at* <http://www.tikenya.org/documents/dissertation.doc>. *See generally* KENYA HUMAN RIGHTS COMM'N, THE 2006 HAKI INDEX: MEASURING PUBLIC PERCEPTION ON THE STATE OF HUMAN RIGHTS AND THE CASE OF THE DEVOLVED PUBLIC FUNDS (2006), *available at* <http://kitutuchache.com/images/stories/Resources/Haki.pdf> (focusing on embezzlement of the devolved public funds).

9. *See* U.N. Dev. Program, *The Impact of Corruption on the Human Rights Based Approach to Development*, at 26 (Sept. 2004) (by Thusitha Pilapitya), *available at* http://www.undp.org/oslocentre/docs05/Thusitha_final.pdf [hereinafter *Impact of Corruption*] (quoting former U.N. Secretary-General Kofi Annan's remarks on the adoption of the U.N. Convention against Corruption: "Corruption hurts the poor disproportionately—by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid"); *see also* U.N. Dev. Program, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development*, at 145 (Nov. 2010) (by Jeni

According to the Kenyan chapter of the Berlin-based Transparency International (“TI”), with a bribery index¹⁰ of about 31.9%,¹¹ Kenya currently ranks as the third most corrupt country in larger East Africa,¹² having only relinquished her long-held top spot

Klugman et al.), available at http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf (ranking Kenya’s human development 128th out of 169 countries ranked, and in Africa 15th out of 51 countries ranked); *Facts and Figures*, U.N. DEV. PROGRAM—KENYA, <http://www.ke.undp.org/resources/33> (last visited Nov. 1, 2010) (highlighting that 45.9% of Kenyans live below the international poverty line, with 41% living in food poverty (extreme hunger)); *A Brief General Profile on Inequality in Kenya*, DEVELOPMENT POLICY MANAGEMENT FORUM, <http://www.dpmf.org/dpmf/> (follow “A Brief General Profile on Inequality in Kenya” hyperlink) (last visited Nov. 1, 2010) (highlighting the disturbing reality of unfairness and inequality in the distribution of national resources in Kenya); KENYA NAT’L COMM’N ON HUMAN RIGHTS, STRATEGIC PLAN 2009-2013, at 4, available at <http://www.knchr.org/> (follow “KNCHR Strategic Plan 2009-2013” hyperlink) (profiling poverty and inequality as two of the core problems in Kenya); SAMUEL LANDO & ABDALLA BUJURA, DEV. POLICY MGMT. FORUM, CLASS FORMATION AND INEQUALITY IN KENYA (Mar. 2009), available at <http://www.dpmf.org/dpmf/downloads/class%20formation%20&%20inequality%20in%20kenya.pdf> (noting that the Kenyan government’s social policy suffers from a narrow focus that does not directly address “unemployment, inequalities, [and] poverty”); AFR. CTR. FOR ECON. GROWTH, THE LINK BETWEEN CORRUPTION AND POVERTY: LESSONS FROM KENYA CASE STUDIES (Andrew Mullei ed., 2000), available at <http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN005215.pdf> (profiling corruption as one of the contributors to continued impoverishment in Kenya); World Bank, Poverty Reduction and Econ. Mgmt. Unit Afr. Region, *Kenya Poverty and Inequality Assessment Report: Vol. I Synthesis Report*, Rep. No. 44190-KE (June 2008) (Draft), available at http://aideffectivenesskenya.org/index.php?option=com_docman&task=doc_download&gid=519&Itemid=324 (highlighting the extent and nature of poverty and inequality, as well as the drivers of these worrying statistics).

10. The “bribery index” is a global tool utilized by TI to measure the extent and magnitude of bribery in a country. In arriving at the index for a country, several factors are taken into consideration, including the likelihood of encountering bribery-demand situations, as well as the prevalence, severity, impact, and frequency of bribery. *Africa and Middle East Surveys and Indices*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/policy_research/surveys_indices/africa_middle_east (last visited Nov. 1, 2010).

11. TRANSPARENCY INT’L—KENYA, EAST AFRICAN BRIBERY INDEX 2010 14 (2010), available at <http://www.tikenya.org/documents/EABI-2010.pdf>. The Index was the product of a regional survey (conducted in January through to March 2010) targeting some 10,505 randomly selected households.

12. *Id.* With a bribery index of 33%, Uganda ranks as the second most corrupt country in the region, with Tanzania coming fourth at an index of 28.6%. The aggregate index for Rwanda, the tiny nation recuperating from the horrendous

to the war-ravaged Burundi.¹³ Globally, according to a 2009 TI report, Kenya has a Corruption Perceptions Index (“CPI”)¹⁴ of 2.1, and is the thirty-third most corrupt country (out of the 180 countries ranked),¹⁵ scoring close to the likes of the Central African Republic and Cote d’Ivoire.¹⁶ Indeed, on the TI’s corruption barometer, the

1994 genocide, could not be formulated from the limited number of reported bribery incidents in the country (78 bribery experiences out of 4,350 interactions with service delivery institutions, translating to an index of 6.6%). *See Kenya: Burundi Most Corrupt Country in East Africa as Its Revenue Authority Tops List of Corrupt Institutions*, TRANSPARENCY INT’L (July 22, 2010), http://www.transparency.org/news_room/latest_news/press_releases_nc/2010/2010_07_22_ti_kenya_eabi (noting further that the vast majority of East Africans who experience a bribery situation do not report it to the authorities).

13. TRANSPARENCY INT’L—KENYA, EAST AFRICAN BRIBERY INDEX 2009 10 (2009), *available at* <http://www.tikenya.org/documents/EABIRReport09.pdf> [hereinafter EAST AFRICAN BRIBERY INDEX 2009]. In 2010, with a bribery index of 36.7%, Burundi ranks as the most corrupt country of the five East African countries in focus, the other four being Kenya, Uganda, Tanzania and Rwanda. In 2009, with a bribery index of 45%, Kenya was the most corrupt of the three East African countries under review, the other two being Uganda and Tanzania, with bribery indices of 35% and 17%, respectively). *Id.*; *see East African Bribery Index 2009: The Kenya Police is the Most Corrupt Institution in East Africa*, TRANSPARENCY INT’L (July 2, 2009), http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_07_02_kenya_index (highlighting, *inter alia*, the fact that the police force in the three East African countries top their respective aggregate indices for corruption in public institutions).

14. TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR 395, 402 (Dieter Zinnbauer et al. eds., 2009) [hereinafter GLOBAL CORRUPTION REPORT 2009] (defining the CPI as the degree to which corruption is perceived to exist among public officials and politicians, measured by businesspeople and country analysts on a scale of 0 to 10, with the lowest numerical score indicating the highest perception that corruption exists).

15. *See id.* at 184, 401 (ranking Kenya in the countries grouped as the 147th *least* corrupt out of 180 countries surveyed). The most recent figures, published in TI’s 2010 Corruption Perceptions Index, show Kenya as having the 154th *least* perception of corruption, out of 178 countries ranked. TRANSPARENCY INT’L, GLOBAL CORRUPTION PERCEPTIONS INDEX 2010 3 (2010), *available at* <http://www.transparency.org/content/download/55725/890310>.

16. *See id.* at 401 (indicating that both the Central African Republic and Cote d’Ivoire have a CPI score of 2.0, ranking them in the group of countries listed as the twenty-ninth most corrupt). For a general discourse on the exposition of how corruption and other vices have made Africa lag behind, see generally GREG MILLS, WHY AFRICA IS POOR (2010) (arguing that the cause of Africa’s poverty is largely internal, stemming from decades of economic mismanagement by the continent’s leaders); Jesse Wachanga, *Corruption: The Curse of Africa’s Development*, KENYA ANTI-CORRUPTION COMMISSION, <http://www.kacc.go.ke/docs/Corruption-curse-Africa.pdf> (last visited Nov. 1, 2010) (lamenting corruption

“pressure” in Kenya records a high of 3.5 out of a possible 5.¹⁷ Undoubtedly, it is this state of affairs that once prompted Sir Edward Clay, the British High Commissioner to Kenya from 2001 to 2005, to fiercely remark that the “gluttony” of senior officials in the Kenyan government was causing them to “vomit all over our shoes.”¹⁸

It suffices to mention that corruption in Kenya predates the country’s independence, though successive post-independence regimes have been haunted most.¹⁹ Even today, it continues to bite ferociously in the face of concerted calls for measures to sustainably curb it.²⁰ As early as the 1980s, various individuals and organizations

as the biggest impediment to Africa’s development); ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995) (explaining that some once vibrant Third World economies collapsed as corruption and other vices set into their respective national systems).

17. See TRANSPARENCY INT’L, *GLOBAL CORRUPTION BAROMETER 29* (2009), available at <http://www.transparency.org/content/download/43788/701097/> [hereinafter *GLOBAL CORRUPTION BAROMETER 2009*] (listing Kenya’s “Public Officials/Civil Servants” as the sector which those polled considered most corrupt).

18. Edward Clay, *The Damage Corruption is Doing to Kenya*, MARS GROUP BLOG (July 19, 2010), <http://blog.marsgroupkenya.org/?p=2055> (decrying the evil of corruption in Africa generally and using Kenya as a particular point of reference). Sir Clay made this remark in a fiery speech at a private luncheon for the British Business Association of Kenya in July 2004. The remark did not sit well with senior government officials, and eventually led to his being declared *persona non grata* in Kenya. Anne Penketh, *Kenya Tells Former Envoy Clay He is ‘Persona Non Grata,’* INDEPENDENT NEWS (UK), Feb. 6, 2008, www.independent.co.uk/news/world/africa/kenya-tells-former-envoy-clay-he-is-persona-non-grata-778673.html.

19. See Robert Conley, *Joyful Kenya Gets Independence from Britain: London Frees Final Colonial Holding in East Africa—Seat in U.N. Assured*, N.Y. TIMES, Dec. 12, 1963, <http://www.nytimes.com/learning/general/onthisday/big/1212.html> (covering Kenya’s emergence as an independent nation); *About KACC: History*, KENYA ANTI-CORRUPTION COMMISSION, <http://www.kacc.go.ke/default.asp?pageid=2> (last visited Nov. 1, 2010) (referencing anti-corruption legislation in force in Kenya since 1956); Joel D. Barkan, *Kenya After Moi*, 83 FOREIGN AFF. 87, 88-90 (2004) (calling Kenya a “classic example of ‘big man’ rule” in the late 1980s, where corruption was the principal mechanism by which the Moi regime maintained its power).

20. For insights into corruption in Kenya, see generally MICHELA WRONG, *IT’S OUR TIME TO EAT: THE STORY OF A KENYAN WHISTLE-BLOWER* (2009) (narrating the experiences of the former Kenyan anti-corruption czar, Mr. John Githongo); LUDEKI CHWEYA ET AL., *CONTROL OF CORRUPTION IN KENYA: LEGAL-POLITICAL DIMENSIONS, 2001-2004* (Ben Sihanya ed., 2005); LAWRENCE MUTE & S. KICHAMU AKIVAGA, *DESTROY CORRUPTION BEFORE IT DESTROYS YOU AND YOUR*

spoke out openly to virulently criticize the rampantly thriving culture of corruption in the public sector, which was quickly plunging the country's economy into its lowest ebb.²¹ In particular, opposition politicians, supported by the then highly-gagged media, heavily criticized the government's record on economic regulation, calling for concerted reform measures.²² However, it was only in the late 1990s that the government formally acknowledged corruption as a national issue.²³ This acknowledgement, however hollow, laid the basis for a resolve to *formally* fight the vice.²⁴

Today, the resolve to fight corruption is an integral part of the nation's socioeconomic development policy, at least in theory. Over the last eight years or so, Kenyans have seen a proliferation of legislation on the subject; after seeing the country's economy nearly brought to its knees, the National Assembly has passed a series of

COUNTRY (2002); CTR. FOR LAW & RESEARCH INT'L, ANATOMY OF CORRUPTION IN KENYA: LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES (Kivutha Kibwana et al. eds., 1996).

21. See Barkan, *supra* note 19, at 89 (detailing rises in poverty percentages and declines in annual income per capita, and recognizing that demands for change in the corrupt regime came first from "disaffected elites and ordinary citizens" in the 1980s, followed by international actors and donors in the early 1990s).

22. See CTR. FOR LAW & RESEARCH INT'L, INITIATIVES AGAINST CORRUPTION IN KENYA: LEGAL AND POLICY INTERVENTIONS, 1995-2001 § 9.2 (Kivutha Kibwana et al. eds., 2001) [hereinafter LEGAL AND POLICY INTERVENTIONS] (recognizing the outcry against corruption by opposition parties, which became possible only after Kenya returned to a multiparty democracy, and highlighting the impact of public debate in the fight against corruption); KENYA HUMAN RIGHTS COMM'N, THE STATE OF HUMAN RIGHTS IN KENYA: A YEAR OF POLITICAL HARASSMENT (1993) [hereinafter A YEAR OF POLITICAL HARASSMENT] (highlighting the violent suppression of the media and political activism that characterized 1992, the year Kenya formally returned to multiparty democracy); L.O. Odhiambo, *The Media Environment in Kenya Since 1990*, 61 AFRICAN STUDIES 295 (2002) (noting the media's important and increasing role in Kenya's "political liberalization," but decrying those obstacles to media freedom such as weak constitutional protections and judicial tendencies to protect the "politically connected").

23. See LEGAL AND POLICY INTERVENTIONS, *supra* note 22, § 1.1.1 (noting that the Kenyan government took steps to display its "intentions of undertaking legal and other public policy reforms that would address corruption," including the establishment of the Anti-Corruption Squad, the Kenya Anti-Corruption Authority, and the publication of other legislative proposals).

24. See *id.* (contending that while the Kenyan government's overtures may have generated optimism, the stagnant political environment "cast[s] doubt" on the government's commitment to combating corruption).

laws to address Kenyan corruption, including the Anti-Corruption and Economic Crimes Act of 2003 (“ACECA”),²⁵ the Public Officer Ethics Act of 2003,²⁶ the Government Financial Management Act of 2004,²⁷ the Public Procurement and Disposal Act of 2005,²⁸ the Witness Protection Act of 2006,²⁹ and the recent Fiscal Management Act of 2009.³⁰ Collectively, these laws vitally laid the normative and institutional foundations for the anti-corruption crusade in the country, which continues to writhe in pains inflicted by the monstrous vice.

On the regional and international fronts, Kenya has ratified a number of legally binding normative arrangements on corruption, which equally reflect the resolve to fight the socioeconomic and political evil in all its forms. For instance, at the global level of the United Nations (“U.N.”), she is party to the Convention against Corruption (“UNCAC”),³¹ which was adopted to “promote and

25. Anti-Corruption and Economic Crimes Act, (2009) Cap. 65 (Kenya), available at <http://www.kacc.go.ke/docs/legal/aceca.pdf>. In its preambular text, the Act “provide[s] for the prevention, investigation and punishment of corruption, economic crime and related offences.” *Id.* pmbl.

26. Public Officer Ethics Act, (2009) Cap. 183 (Kenya), available at <http://www.kacc.go.ke/docs/legal/poe.pdf>. In its preamble, the Act conveys a purpose of, inter alia, “advanc[ing] the ethics of public officers by providing a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers.” *Id.* pmbl.

27. Government Financial Management Act, (2009) Cap. 412B (Kenya), available at <http://www.kenyalaw.org/Downloads/Acts/Government%20Financial%20Management.pdf>. The Act seeks to streamline the management of public financial affairs by making the Treasury responsible for “establish[ing] procedures and systems for proper and effective management of government money and property.” *Id.* § 4(a).

28. Public Procurement and Disposal Act, No. 3 (2005), KENYA GAZETTE SUPPLEMENT No. 77, available at <http://www.kacc.go.ke/docs/legal/PPDA.pdf>. The Act establishes “procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities.” *Id.* § 2.

29. Witness Protection Act, No. 16 (2006), KENYA GAZETTE SUPPLEMENT No. 61, available at <http://www.kacc.go.ke/docs/legal/WPA.pdf>. The Act was passed to provide “for the protection of witnesses in criminal cases and other proceedings.” *Id.* pmbl.

30. Fiscal Management Act, No. 5 (2009), KENYA GAZETTE SUPPLEMENT No. 83, available at <http://www.kenyalaw.org/Downloads/Acts/Fiscal%20Management%20Act.pdf>. The Act was passed to provide for the regulation and oversight of the national budget process.” *Id.* pmbl.

31. U.N. Convention Against Corruption, G.A. Res. 58/4, U.N. Doc.

strengthen measures to prevent and combat corruption more efficiently and effectively.”³² She is also a party to the Convention against Transnational Organized Crimes,³³ which was adopted “to promote cooperation to prevent and combat transnational organized crime more effectively.”³⁴ Similarly, at the African Union (“A.U.”) regional level, she is a party to the Convention on Preventing and Combating Corruption (“A.U. Convention on Corruption”).³⁵ This Convention was adopted to “[p]romote and strengthen the development in Africa . . . of mechanisms required to prevent, detect, punish and eradicate corruption and related offences,”³⁶ and to “[e]stablish the necessary conditions to foster transparency and accountability in the management of public affairs.”³⁷

This article explores the role of the media in the fight against corruption in Kenya. It does so by presenting the *achievements* registered by the media in recent years, while weighing these against the *challenges* encountered and the *prospects* on the horizon, in that

A/RES/58/422 (Oct. 31, 2003). Kenya was the first to sign this instrument on December 9, 2003, and ratified it on the same day. *See United Nations Convention Against Corruption*, U.N. OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Nov. 1, 2010) (listing all the signatories and parties to the Convention and the dates upon which each country signed and/or ratified).

32. *Id.* art. 1(a).

33. U.N. Convention against Transnational Organized Crimes, G.A. Res. 55/25, UN Doc. A/RES/55/25 (Nov. 15, 2000). Kenya acceded to the Convention on June 16, 2004. *See Status of the United Nations Convention Against Transnational Organized Crime*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Nov. 1, 2010) (listing all the signatories and parties to the Convention and the dates upon which each country signed and/or ratified).

34. *Id.* art. 1. The Convention obliges states parties to “prevent, deter, and punish” the corruption of public officials.” *Id.* art. 9.

35. African Union Convention on Preventing and Combating Corruption art. 2(1), *opened for signature* July 11, 2003, 43 I.L.M. 5 [hereinafter A.U. Convention on Corruption]. Kenya signed the Convention on December 17, 2003, ratified it on February 3, 2007, and deposited the instrument of ratification on March 7, 2007. *See List of Countries Which Have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption*, AFRICAN UNION (June 8, 2010), <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf> (listing fifty-three states parties and indicating whether each signed, ratified and/or deposited the Convention and the applicable date).

36. A.U. Convention on Corruption, *supra* note 35, art. 2(1).

37. *Id.* art. 2(5).

order. It further suggests *potential enhancements* to the role of the media in the anti-corruption crusade in the country. As such, it principally argues that the media, indeed, has a crucial role to play in the fight against corruption, a role in which the Kenyan media has already proved to be vital. The work finally concludes by unequivocally asserting that the Kenyan media has a bright and promising future ahead. Thus, reasonably, there is light at the end of the long dark tunnel of graft and corruption.

It must be noted that this article presents a concise analysis of a critical issue in contemporary international (human rights) law and order. It cannot be gainsaid that the issues in focus—*the freedom of expression, the freedom of the media, and the right to information* on one hand, with *corruption* on the other—are all issues of concern to the contemporary discourse on international human rights. In fact, corruption is one of the profound travesties of human rights, with a particularly adverse impact on the realization of socioeconomic rights.³⁸ Further, since the responsibility to fight corruption lies with all members of society, including the media, the national resolve to fight corruption ultimately lifts the freedom of expression, the freedom of the media and the corollary right of access to information, onto the center stage in the anti-corruption crusade.

Before this paper delves into any substantive discussions on the subject at hand, it is imperative to clarify some of the key terms to which this work frequently refers. Four basic questions must be answered: *What is corruption? What does the freedom of expression*

38. See *Impact of Corruption*, *supra* note 9, at 9-10 (describing the express link between corruption and human rights—“[c]orruption can directly affect rights at a macro level and a micro, local level”—and stating that corruption hinders economic development and the provision of social services); 11th Int’l Anti-Corruption Conference, Seoul, S. Kor., May 2003, *The Seoul Findings*, at 1, available at <http://www.11iacc.org/download/finish/Provisional%20Seoul%20Final.30.5.03.doc> (discussing the May 2003 international conference on anti-corruption, which declared that “large-scale corruption should be designated a crime against humanity” and unequivocally condemned it as “immoral, unjust and repugnant to the ideals of humanity enshrined in the Universal Declaration of Human Rights”). Indian writer C. Raj Kumar aptly describes the interface, arguing that “corruption dilutes human rights in a significant way” and should be viewed as a human rights violation. C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31, 35 (2003).

entail? What is meant by the right to information? What is meant by the freedom of the media? It is within the framework of these vital questions that this work draws upon the following operational definitions to generally guide the reader throughout the discourse.

First, to understand the concept of *corruption*, this work relies heavily on the definition advanced by the U.N. Development Program: “the misuse of public power, office or authority for private benefit—through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement.”³⁹ Arguably, though corruption has meant different things to different people at different times and places, this definition comprehensively covers the various contemporary facets of corruption.⁴⁰ It is worthwhile to additionally mention that the term “corruption” has its origins in the Latin adjective *corruptus*, meaning “spoiled, broken or destroyed.”⁴¹ This rightly explains the nature of the vice of corruption, which radically departs from the desired norms in both the public and private sphere and “amounts to ‘moral deterioration.’”⁴²

Turning to *the freedom of expression*, in the context of this work, the concept shall be taken to connote the freedom to “seek, receive and impart information and ideas through any media and regardless of frontiers.”⁴³ Consequently, the right to information is appreciated

39. U.N. Dev. Program, Mgmt. Dev. & Governance Div., *Fighting Corruption to Improve Governance*, at 6 (Nov. 13, 1998); cf. TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS xxi (Dana Rodriguez & Linda Ehrichs eds., 2007) (identifying corruption as “the abuse of entrusted power for private gain”); Richard North, *Corruption: Stopping the Rot*, BBC ON AIR, Aug. 2003, at 10 (“Corruption is about the giving and seeking of favours, it is about buying political influence, taking kickbacks, bribing officials.”).

40. Cf. SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 7 n.10 (1978) (comparing different definitions of corruption, which, according to Rose-Ackerman, diverge based on factors like impact, manifestations and motivation, and explaining that corruption can be likened to bribery, nepotism, and misappropriation).

41. Geoffrey M. Hodgson & Shuxia Jiang, *The Economics of Corruption and the Corruption of Economics: An Institutionalist Perspective*, 41 J. ECON. ISSUES 1043, 1044 (2007).

42. *Id.*

43. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The Declaration conjoins the freedom of expression with the freedom of opinion, thereby providing for the freedom to “hold opinions without interference” as another critical component. On the

as a corollary to the freedom of expression, and shall be understood as the right to access (seek and receive) information, including that held by the State.⁴⁴ These are the meanings promulgated by the prevailing human rights instruments.⁴⁵

Finally, within the purview of the current work, *the freedom of the media* shall be understood as the freedom of electronic, print, and other types of media to broadcast, publish, or disseminate information or ideas through any medium. This entails the freedom to independently determine the editorial content of such broadcasts, publications, or disseminations. This is the understanding embodied in, for instance, the New Constitution of Kenya (“New Constitution (2010)”).⁴⁶

I. THE FREEDOM OF EXPRESSION, THE RIGHT TO INFORMATION, AND THE FREEDOM OF THE MEDIA: A CONCEPTUAL ANALYSIS

A. A DISCOURSE ON CONTENT

1. *The Freedom of Expression*

The concept of freedom of expression is believed to have surfaced in ancient Athenian civilization⁴⁷ and to have later been imparted to

philosophy of Article 19 of the Declaration, see Article 19, *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures*, at 8-10 (1993), available at <http://www.article19.org/pdfs/publications/1993-handbook.pdf>.

44. See Article 19, *Johannesburg Principles on National Security, Freedom of Expression, and Access to Information*, pmbL., U.N. Doc. E/CN.4/1996/39 (1996), available at <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> [hereinafter *Johannesburg Principles*] (recognizing the importance of public access to government-held information in a democratic society).

45. See, e.g., G.A. Res. 217 (III) A, *supra* note 43, art. 19 (asserting that the right to information is part of the “right to freedom of opinion and expression”).

46. See CONSTITUTION, art. 34 (2010) (Kenya) (providing for the “Freedom of the media” by explicitly prohibiting State interference with broadcasting and other media).

47. See KURT A. RAAFLAUB ET AL., ORIGINS OF DEMOCRACY IN ANCIENT GREECE 65 (2007) (noting that the concept of free speech is thought to have emerged in ancient Athenian democratic ideology as early as the sixth century B.C.); see also *Retail, Wholesale & Dep’t. Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 583 (Can.) (observing that “[f]reedom of expression is not . . .

colonial-era American, British, and French societies.⁴⁸ Today it is widely recognized in a plethora of international and regional human rights instruments dealing with civil and political rights. Internationally, within the U.N. human rights system, it is embodied in at least three major treaties adopted under the auspices of the global organization: the Universal Declaration of Human Rights (“UDHR”),⁴⁹ the International Covenant on Civil and Political Rights (“ICCPR”),⁵⁰ and the U.N. Convention on the Rights of the Child (“CRC”).⁵¹ Within the African regional system, this embodiment is found in the African Charter on Human and Peoples’ Rights.⁵² This normative recognition received a major boost in 1996 when the essential character of the concept (and its corollary—the right of access to information) was reaffirmed in the *Johannesburg Principles*.⁵³ Through various provisions, these *Principles* amply clarify the content of the freedom.

a creature of the [Canadian] *Charter* [of Rights and Freedoms] . . . [but] is one of the fundamental concepts that have formed the basis for the historical development of the political, social and educational institutions of western society.”).

48. See, e.g., Declaration des Droits de l’Homme et du Citoyen [Declaration of the Rights of Man and of the Citizen] art. 11 (Fr. 1789) (establishing the French view of freedom of expression by stating that “[t]he free communication of ideas and opinions is one of the most precious of the rights of man . . . [and e]very citizen may therefore speak, write, and print freely, if he accepts his own responsibility for any abuse of this liberty in the cases set by the law”).

49. See G.A. Res. 217 (III) A, *supra* note 43, art. 19. (recognizing the universal right to freedom of opinion and expression, including the right to information).

50. See International Covenant on Civil and Political Rights, art. 19, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (proclaiming the right to freedom of expression as stated in the Universal Declaration of Human Rights, but elaborating further on the many acceptable forms of information, including oral, written, printed, and art forms).

51. See Convention on the Rights of the Child, art. 13(1), *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (utilizing the same language as the ICCPR to provide the right to freedom of expression to children).

52. See African Charter on Human and Peoples’ Rights, art. 9, *adopted* June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter] (providing for the universal right to receive information).

53. See *Johannesburg Principles*, *supra* note 44, princ. 1 (proclaiming the right to freedom of expression for everyone). The *Johannesburg Principles* were “adopted . . . by a group of experts in international law, national security, and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg,” and have been referenced annually since 1996 by the U.N. Commission on Human Rights in its resolutions on freedom of expression. *Id.* at 4, Endorsements.

Basically, the various international and regional human rights instruments define the concept as constituting the freedom to “seek, receive and impart information and ideas of all kinds, regardless of frontiers,”⁵⁴ through any medium of choice, be it oral, in writing, in print, through the internet, or through art forms.⁵⁵ Thus the freedom of information implies three things: (1) the right to *seek* information; (2) the right to *receive* information; and, (3) the right to *impart* (disseminate) information and ideas of all kinds.

In Kenya, utilizing a similar approach, the Old Kenyan Constitution (“Old Constitution (rev. 2008)”) defined the freedom of expression in terms of “[the] freedom to hold opinions without interference, [the] freedom to receive ideas and information without interference, [the] freedom to communicate ideas and information without interference . . . and [the] freedom from interference with his correspondence.”⁵⁶ This definition is more particular than those advanced in the relevant international instruments.⁵⁷

Today, the subject features conspicuously in the new constitutional dispensation in Kenya, where the New Constitution (2010) unequivocally guarantees “the right [of everyone] to freedom of expression, which includes—(a) freedom to seek, receive or impart information or ideas; (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research.”⁵⁸ This makes Kenya’s new constitutional dispensation congruent with her international human rights obligations, at least in the realm of the freedom of expression.

2. *The Right to Information*

The right to information, which implies the right to access

54. ICCPR, *supra* note 50, art. 19(2); G.A. Res. 217 (III) A, *supra* note 43, art. 19.

55. ICCPR, *supra* note 50, art. 19(2); CRC, *supra* note 51, art. 13. *But see* Banjul Charter, *supra* note 52, art. 9 (failing to delineate guidelines for the right to receive information and express and disseminate opinions).

56. CONSTITUTION, § 79(1) (2008) (Kenya).

57. *Compare id.* (specifying different ways that the freedom of expression can be exercised), *with* ICCPR, *supra* note 50, art. 19(2) (using more general terms—“freedom to seek, receive, and impart information and ideas of all kinds”).

58. CONSTITUTION, art. 33(1) (2010) (Kenya).

information, including that held by the State,⁵⁹ has two *distinct* facets: it exists both as a *corollary* of the freedom of expression and as a *self-standing* right.⁶⁰ As a corollary of the right to freedom of expression, the right to information implies the freedom to “seek, receive and impart information . . . of all kinds, regardless of frontiers.”⁶¹ This means that the right is just a component of the freedom of expression.

Be that as it may, we must remember that the right constitutes a crucial bulwark of democracy. It is essential for the general progress of a democratic society⁶²—if people are to effectively monitor their government’s affairs and democratically participate in the running of society, they must “have access to government-held information.”⁶³ Accordingly, its abrogation would imply nothing short of abrogation of the ideals of democracy and good governance.

Undoubtedly, it is against this backdrop that the right to information is generally recognized in various human rights instruments,⁶⁴ with the A.U. Convention on Corruption innovatively proclaiming the right to information as a self-standing right. The

59. See *Johannesburg Principles*, *supra* note 44, pmbl. (noting that access to government-held information is necessary for people “to monitor the conduct of their government and to participate fully in a democratic society”).

60. See ICCPR, *supra* note 50, art. 19(2) (including the right “to seek, receive, and impart information” as *part* of the right to freedom of expression); see also A.U. Convention on Corruption, *supra* note 35, art. 9 (calling for the adoption of legislation to give effect to the right to information).

61. *E.g.*, ICCPR, *supra* note 50, art. 19(2).

62. See *Johannesburg Principles*, *supra* note 44, pmbl. (adding that the freedom of expression is additionally vital for social welfare and other human rights and freedoms).

63. *Id.*

64. See G.A. Res. 217 (III) A, *supra* note 43, art. 19 (proclaiming that “[e]veryone has the right to freedom of . . . expression, [which] . . . includes freedom to . . . seek, receive and impart *information* and ideas through any media regardless of frontiers”) (emphasis added); ICCPR, *supra* note 50, art. 19(2) (incorporating the freedom to information as part of the right to the freedom of expression); CRC, *supra* note 51, art. 13(1) (ensuring the child’s right to freedom of expression, including the freedom to information); Banjul Charter, *supra* note 52, art. 9(1) (declaring that “every individual shall have the right to receive information”); *Johannesburg Principles*, *supra* note 44, princ. 11 (reaffirming the right to information and extending it to proclaim the right of every individual “to obtain information from public authorities, including information relating to national security,” unless the government can show a restriction is necessary to “protect a legitimate national security interest”).

Convention obliges states parties to “adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.”⁶⁵

Judicially, the existence of the right to information was affirmed by the Inter-American Court of Human Rights (“IACtHR”) in *Claude Reyes v. Chile*.⁶⁶ In that case, three environmental activists had filed an access to information request with the Chilean government for copies of the background and environmental checks on the US-based company Trillium Corporation, which had been granted a license to carry out logging activities in the native *Lenga* forest.⁶⁷ This information was not provided.⁶⁸ After unsuccessfully petitioning the local courts, the activists approached the IACtHR, which ruled that Chile had violated Article 13 of the American Convention on Human Rights, which guarantees the freedom of opinion and expression.⁶⁹ In this landmark ruling, the Court opined that democracy demands “maximum disclosure” of all government-held information, save in a few exceptional circumstances.⁷⁰

Recently, the right to information was the subject of discussion at two meetings convened by the London-based organization “Article 19,” which brought together a group of high-level U.N. and other officials, as well as civil society and academic experts in international human rights law.⁷¹ The meetings culminated in the production of a set of principles governing the progressive interpretation of international law and standards, acceptable state practice, and general principles of law recognized by the international community⁷²—the *Camden Principles on the Freedom*

65. A.U. Convention on Corruption, *supra* note 35, art. 9(1).

66. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

67. *Id.* ¶¶ 57(13)-(18).

68. *Id.* ¶¶ 57(16)-(22).

69. *Id.* ¶ 148 (considering the American Convention on Human Rights, art. 13, adopted Nov. 22, 1969, 1114 U.N.T.S. 123).

70. *Id.* ¶ 92.

71. The two meetings were held in London (Dec. 11, 2008 and Feb. 23-24, 2009).

72. Press Release, Article 19, Geneva—Article 19 Launches the Camden

of *Expression and Equality* (“*Camden Principles*”).⁷³ These *Principles* recognize the duty of the State to protect the right to information, including the right to access information held by public bodies, with emphasis on promotion of proactive disclosure of information.⁷⁴

In Kenya, the New Constitution (2010) expressly guarantees the right to information both as a corollary of the freedom of expression and as a self-standing right.⁷⁵ Earlier, under the Old Constitution (rev. 2008), the right could only be implied from the Constitution’s language proclaiming the freedom of expression.⁷⁶

3. *The Freedom of the Media*

Over and above proclaiming the freedom of expression and the right to information, various human rights instruments guarantee the freedom of the media. For instance, within the purview of the UDHR, the ICCPR and the CRC, the freedom of the media is implied in the general guarantee of the freedom of expression.⁷⁷ The role of the media is also recognized in the *Camden Principles*, which tasks the media to take steps to, inter alia, “address as far as possible

Principles on Freedom of Expression and Equality (Apr. 23, 2009), available at <http://www.article19.org/pdfs/press/geneva-article-19-launches-the-camden-principles-on-freedom-of-expression-an.pdf>.

73. Article 19, *The Camden Principles on Freedom of Expression and Equality* (Apr. 2009), available at <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> [hereinafter *Camden Principles*].

74. *Id.* princ. 2.3.

75. See CONSTITUTION, arts. 33(1), 35(1) (2010) (Kenya) (“Every person has the right to . . . seek [and] receive . . . information or ideas . . . [, and e]very citizen has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom.”).

76. See CONSTITUTION, § 79(1) (2008) (Kenya) (“[N]o person shall be hindered in the enjoyment of his freedom . . . to receive ideas and information without interference . . .”).

77. See G.A. Res. 217 (III) A, *supra* note 43, art. 19 (guaranteeing “[the freedom to] impart information and ideas through any media and regardless of frontiers”); ICCPR, *supra* note 50, art. 19(2) (expressly providing “[the freedom to] impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print . . . or through any other media of . . . choice” (emphasis added)); CRC, *supra* note 51, art.13(1) (establishing “[the freedom to] impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, . . . or through any other media of the child’s choice”).

issues of concern to all groups in society.”⁷⁸ Plausibly, this rightly brings the media onto the anti-corruption platform as a public watchdog.

In Kenya, the New Constitution (2010) broadly guarantees the freedom of the media:

Freedom and independence of electronic, print and all other types of media is guaranteed, . . . [and t]he State shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of any information by any medium; or penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.⁷⁹

B. DEMYSTIFYING THE REGIME ON RESTRICTIONS

From ancient times, humanity has yearned for the freedom of expression and the right to information, yet censorship of such expression and information has also been an “ancient and almost universal phenomenon.”⁸⁰ This presents a paradox; the aims of the freedom of expression, including the right to information, intrinsically conflict with those of censorship—the restriction of these rights and freedoms. The resulting scenario portends two diametrically opposed forces: *the need to ensure enjoyment of the concerned rights and freedoms* and *the need to limit the enjoyment of these rights and freedoms to meet the general common good*.

To dispel the ostensible paradox, it is crucial for us to appreciate that, notwithstanding their general value to society, the exercise of the two is not absolute. First, their exercise is closely related to the rights and freedoms of others, and may be limited when it conflicts with these rights and freedoms and, second, the two can be restricted

78. *Camden Principles*, *supra* note 73, princ. 6.1(ii) (emphasis added).

79. CONSTITUTION, art. 34 (2010) (Kenya).

80. See Soli J. Sorabjee, *Freedom of Expression and Censorship: Some Aspects of the Indian Experience*, 45 N. IR. LEGAL Q. 327, 327 (1994) (noting the paradoxical relationship between freedom of expression and the countervailing urge to suppress speech); see also *The Long History of Censorship*, BEACON FOR FREEDOM OF EXPRESSION, http://www.beaconforfreedom.org/about_project/history.html (last visited Nov. 1, 2010) (explaining that censorship was popular in ancient civilizations, such as Rome and Greece, because “the ideal of good governance included shaping the character of the people”).

by the State in the interest of the public.⁸¹

I. An International Perspective

To check the possible vagaries of the so-called “justifiable restrictions,” the various regional and international instruments provide for built-in conditions that must be met for the restrictions to be authentic. For instance, the UDHR provides that the enjoyment of rights “shall be subject only to such limitations as are determined by law [to secure] due recognition and respect for the rights and freedoms of others and [to meet] the just requirements of morality, public order and the general welfare in a democratic society.”⁸² The ICCPR imposes similar conditions for the enjoyment of the right,⁸³ and additionally prohibits “propaganda for war” and “advocacy of . . . hatred that constitutes incitement to discrimination, hostility or violence.”⁸⁴

These requirements are further elaborated upon in the *Siracusa Principles* of 1984,⁸⁵ adopted by the U.N. Commission on Human Rights, and in the *Camden Principles* of 2009.⁸⁶ Similarly, though they do not rule out restrictions on the freedom of expression

81. See Sorabjee, *supra* note 80, at 328 (discussing various public interests recognized in human rights instruments that permit restriction on the freedom of speech, such as “interests of national security; territorial integrity or public safety; prevention of disorder or crime; protection of health or morals; protection of reputation or rights of others; prevention of disclosure of information received in confidence; and maintenance of the authority and impartiality of the judiciary”).

82. G.A. Res. 217 (III) A, *supra* note 43, art. 29(2).

83. See ICCPR, *supra* note 50, art. 19(3) (“The exercise of [the freedom of expression] . . . may be subject to certain restrictions . . . as are provided by law and are necessary.”).

84. *Id.* art. 20.

85. See U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Status of the International Covenants on Human Rights: The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, Annex, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter *Siracusa Principles*] (delineating numerous principles relating to limitations that are “justifiable” because they are “[p]rescribed by law,” “[i]n a democratic society,” or related to “[p]ublic order,” “[p]ublic health,” “[p]ublic morals,” “[n]ational security,” “[p]ublic safety,” or the “[r]ights and freedoms of others”).

86. See *Camden Principles*, *supra* note 73, princ. 11 (stipulating that a restriction should be the least intrusive measure available and proportionate “in the sense that the benefit to the protected interest outweighs the harm to freedom of expression”).

altogether, the non-binding (but morally persuasive) *Johannesburg Principles* place some *specific* limitations on restrictions on the freedom, particularly on the oft-invoked ground of national security. For instance, the *Johannesburg Principles* expressly proclaim that “[n]o restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.”⁸⁷ Thus, subject to very narrow exceptions, the peaceful exercise of the right to freedom of expression “shall not be considered a threat to national security or subjected to any restrictions or penalties.”⁸⁸ It cannot be gainsaid that while the onus of “demonstrating the validity of the restriction [squarely] rests with the government,”⁸⁹ the validity of the restriction turns on whether the same has a “genuine purpose and demonstrable effect of protecting a legitimate national security interest.”⁹⁰

The limitation on restrictions is particularly explicit in relation to the right to information. The *Johannesburg Principles* state that no restriction “may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.”⁹¹ In this respect, “a state may not

87. *Johannesburg Principles*, *supra* note 44, princ. 1(d) (emphasis added). A restriction on the basis of national security is justified only if it aims at protecting the country’s existence, territorial integrity, or its capacity to respond to the use or threat of force; such a restriction is not justified if it merely aims to protect the “government from embarrassment or the exposure of wrongdoing.” *Id.* princ. 2; *see Camden Principles*, *supra* note 73, princ. 2.2 (providing for “permissible restrictions”—those provided by law, narrowly defined to serve a legitimate constitutional interest, and necessary in a democratic society to protect that interest); *Siracusa Principles*, *supra* note 85, princs. 15-21, 29-31 (interpreting and clarifying the phrases “by law,” “in a democratic society,” and “national security”).

88. *See Johannesburg Principles*, *supra* note 44, princ. 7(a) (enumerating categories of speech that “shall not constitute a threat to national security,” such as speech that “advocates non-violent change of government policy” or criticizes the government, its symbols, its agencies, or its officials).

89. *Id.* princ. 1(d); *see Siracusa Principles*, *supra* note 85, princ. 20 (placing the burden on the State to demonstrate that the restriction does “not impair democratic functioning of the society”).

90. *Johannesburg Principles*, *supra* note 44, princ. 1.2.

91. *Id.* princ. 11 (emphasis added).

categorically deny access to all information;” it can only “designate . . . specific and narrow categories of information that it is necessary to withhold *in order to protect a legitimate national security interest.*”⁹²

Furthermore, under the *Johannesburg Principles*, disclosure of information is protected if it “does not actually harm and is not likely to harm a legitimate national security interest, or [if] the public interest in knowing the information outweighs the harm from disclosure.”⁹³ In fact, at all times, “the public interest in knowing the information [is to be regarded as a] primary consideration.”⁹⁴ More importantly, however information may have been obtained, once it reaches the public domain, “any justification for trying to stop further publication will be overridden by the public’s right to know.”⁹⁵ This practically negates any obligation to disclose the source of such information.

2. A Kenyan Perspective

In Kenya, where the law is better known for restriction, rather than protection, of the freedom of expression and the corollary right to information, the Old Constitution (rev. 2008) contained a comprehensive “claw-back” clause, which rooted freedom in the public interest generally, and specifically protected “the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings.”⁹⁶ Though it strived to counter the restrictions by utilizing the test of “reasonabl[e] justif[ication] in a democratic society,”⁹⁷ the Constitution did not sufficiently protect against abuse because it failed to give any guidance on the exact meaning of this phrase. Expectedly, amidst the obscurity of the phrase, realization of the freedom of expression was largely reliant on the whims of the government of the day, with successive governments striving to subjectively define the circumstances under

92. *Id.* princ. 12 (emphasis added).

93. *Id.* princ. 15.

94. *Id.* princ. 13.

95. *Id.* princ. 17.

96. CONSTITUTION, § 79(2)(b) (2008) (Kenya).

97. *See id.* § 79(2)(c) (barring restrictions upon public officers or local government civil service if they are “shown not to be reasonably justifiable in a democratic society”).

which restrictions are to be imposed.⁹⁸

The New Constitution (2010) embodies general and specific restrictions. On a general note, it provides that all rights and freedoms guaranteed in the Bill of Rights are to not be limited

except by law, and then only to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms . . . does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve that purpose.⁹⁹

The Constitution goes on to provide for limitations specific to the freedom of expression and the freedom of the media. In the realm of the freedom of expression, it provides that the exercise of the freedom “does not extend to—(a) propaganda for war; (b) incitement to violence; (c) hate speech; or (d) advocacy of hatred”¹⁰⁰ and “[shall be subject to] respect [for] the rights and reputation of others.”¹⁰¹ The same regime governs the exercise of the freedom of the media.¹⁰² Surprisingly, the Constitution fails to provide for any express limitation on the exercise of the right to access information, thereby drawing us into uncertainties.

C. THE THREE FREEDOMS: ESTABLISHING THE INTERFACE

Quintessentially, the three freedoms—*the freedom of expression*, *the right to information*, and *the freedom of the media*—are all so crucial that they are widely referenced as constituting an indispensable dimension of governance in any democracy.¹⁰³ It is

98. Cf. Alex Ndegwa, *Kenya Scores “Very Weak” in War on Corruption*, THE STANDARD (Kenya), Feb. 24, 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000004116&cid=4&> (discussing Kenya’s shortcomings in providing access to information, and referencing the Official Secrets Act as a hindrance to public access to State information).

99. CONSTITUTION, art. 24(1) (2010) (Kenya).

100. *Id.* art. 33(2).

101. *Id.* art. 33(3).

102. *Id.* art. 34(1).

103. See, e.g., World Bank, Int’l Bank for Reconstruction and Dev., *A Decade of*

hardly surprising that at its inaugural session in 1946, the U.N. General Assembly declared that the “[f]reedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the United Nations is consecrated.”¹⁰⁴ In this respect, it can be plausibly argued that the three freedoms are crucial and indispensable to ascertaining the truth in any given society. Moreover, they interface so densely that they form an inseparable mosaic of rights crucial to democratic governance.¹⁰⁵

Judicially, the interface between the freedom of expression and the right to information was illustrated by the IACtHR, which, in its advisory opinion in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*,¹⁰⁶ declared that “when an individual’s freedom of expression is [violated], . . . it is not only the right of that individual [journalist] that is being violated, but also the right of all others to ‘receive’ information and ideas.”¹⁰⁷ This understanding is equally reflected in the sentiments of the regional special procedures.¹⁰⁸

In the Kenyan context, reading between the lines in the relevant

Measuring the Quality of Governance: Governance Matters 2007, at 2 (2007), available at http://info.worldbank.org/governance/wgi2007/pdf/booklet_decade_ofmeasuring_governance.pdf [hereinafter *Governance Matters*] (declaring freedom of expression and the right to information as part of one of six indicators of the quality of governance in a country, thereby recognizing their significant impact).

104. G.A. Res. 59 (I), ¶ 1, U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1, at 95 (Dec. 14, 1946).

105. See *Governance Matters*, supra note 103, at 2 (identifying six aggregate indicators of good governance, including “voice and accountability,” which accounts for “freedom of expression, freedom of association, and a free media”).

106. See *Compulsory Membership Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶¶ 1, 29 (Nov. 13, 1985) (interpreting Articles 13 and 29 of the American Convention on Human Rights, which address the freedom of thought and expression).

107. *Id.* ¶ 30.

108. See Org. for Sec. and Cooperation in Eur. [OSCE], *Joint Declaration by the U.N. Special Rapporteur on the Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on the Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on the Freedom of Expression*, at 3 (Dec. 20, 2006), available at http://www.osce.org/documents/html/pdf/html/22784_en.pdf.html [hereinafter *Joint Declaration*] (stating that “[i]ntimidation of journalists . . . limit[s] the freedom of expression not only of journalists but of all citizens, because [it] produce[s] a chilling effect on the free flow of information”).

provisions of the Bill of Rights, one would safely deduce that this interface is amply reflected in the New Constitution (2010).¹⁰⁹ Such reflection can, for instance, be seen in the common specific limitations regime governing the exercise of the freedom of expression and the freedom of the media.¹¹⁰

II. THE ROLE OF THE MEDIA IN THE ANTI-CORRUPTION CRUSADE

Over two centuries ago, Napoleon I opined that “[m]en are powerless to secure the future; institutions alone fix the destinies of nations.”¹¹¹ Today, these words ring loudly across the globe as non-state actors assume a vital role in shaping the destinies of the world generally, and of individual nations specifically. It is in this context that this article presents the role of media in the anti-corruption crusade.

To amply discern the role of the media in the contemporary anti-corruption crusade, this article’s point of departure will be to appreciate that the freedom of expression and the right to information play a joint role in shaping accountable and transparent governance in any democratic country. In this respect, a number of actors remain critical in ensuring this noble objective. Key among them is the media. Hence, this is why it is commonly argued that a free press is the “[*conditio*] sine qua non of a true democracy,” and that the media is the “fourth limb of government, that should not be derogated [from], curtailed, or otherwise limited except for very clear and justifiable reasons.”¹¹² This standing gives the media a crucial significance in the anti-corruption crusade.

The media’s role in the anti-corruption discourse is widely

109. See CONSTITUTION, arts. 33-35 (2010) (Kenya) (highlighting the media’s right to freedom of expression because it is, impliedly, fundamental to citizens’ access to information).

110. *Id.* arts. 33(2), 34(1).

111. Szlapak, *supra* note 8, at 2.

112. MEDIA LAW & PRACTICE: THE KENYAN JURISPRUDENCE 141 (David Makali ed., 2003) [hereinafter MEDIA LAW & PRACTICE]; see JEFFREY ARCHER, THE FOURTH ESTATE Author’s Note (1996) (discussing the concept of a “Fourth Estate,” which can be traced to the English practice of allowing the “Press Gallery” to observe the British House of Commons, and about which Edmund Burke once said: “Yonder sits the Fourth Estate, and they are more important than them all”).

recognized in existing international instruments. At the global level, the preamble to the UNCAC recognizes that, to be effective, the fight against corruption, though a primary responsibility of the State, requires the “support and involvement of individuals and groups outside the public sector,”¹¹³ which undoubtedly includes the media. More importantly, the UNCAC obliges states parties “to promote the active participation of [these] individuals and groups . . . in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.”¹¹⁴ Additionally, the UNCAC adds that this participation is to be strengthened by such measures as “[e]nsuring that the public has effective access to information”¹¹⁵ and “[r]especting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.”¹¹⁶

Perhaps the value of the media in the anti-corruption crusade is more explicitly pronounced within the African system, where the A.U. Convention on Corruption expressly provides for “the right of access to any information that is required to assist in the fight against corruption and related offences.”¹¹⁷ In this respect, the Convention obliges states parties to fulfill two interrelated undertakings: first, to “[c]reate an enabling environment that will enable civil society and *media* to hold governments to the highest levels of transparency and accountability in the management of public affairs;”¹¹⁸ and second, to “[e]nsure that *the [m]edia* is given *access to information* in cases of corruption and related offences on condition that the *dissemination* of such information does not adversely affect the investigation process and the right to a fair trial.”¹¹⁹

This spirit can also be read from the *Camden Principles*, which recognize the moral and social responsibility of the media to take steps to, inter alia, “address, as far as possible, *issues of concern* to

113. See G.A. Res. 58/4, *supra* note 31, pmbl. (providing examples of actors whose support is necessary for the anti-corruption fight, including “civil society, non-governmental organizations, and community-based organizations”).

114. *Id.* art. 13(1).

115. *Id.* art. 13(1)(b).

116. *Id.* art. 13(1)(d).

117. A.U. Convention on Corruption, *supra* note 35, art. 9.

118. *Id.* art. 12(2) (emphasis added).

119. *Id.* art. 12(4) (emphasis added).

all groups in society.”¹²⁰ Undoubtedly, today, corruption qualifies as one of the “issues of concern” to everyone in Kenya.

III. THE KENYAN MEDIA IN THE ANTI-CORRUPTION CRUSADE: TAKING STOCK OF THE ACHIEVEMENTS

By and large, the relevant Kenyan laws are silent on the role of the media in the national anti-corruption crusade. Not even the principle legislation, the ACECA, attempts to address the subject.¹²¹ In fact, existing legislation is utterly silent on the role of all persons outside the public sector and the anti-corruption crusade is apparently seen as a governmental affair. Be that as it may, the Kenyan media has generally registered remarkable achievements in the fight against corruption in Kenya, visibly in four major fronts: as a “whistle-blower;” in piling pressure on government officials to account for their corrupt acts and omissions; in public education (dissemination); and, in investigative journalism.

A. THE KENYAN MEDIA AS A “WHISTLE-BLOWER”

In recent years, the Kenyan media proved pivotal in providing relevant information to members of the public and the international community alike.¹²² Crucially supplementing other actors, it has served as an effective whistle-blower. For instance, it helped unravel numerous multimillion dollar financial scams that nearly brought the Kenyan economy to its knees.¹²³

120. See *Camden Principles*, *supra* note 73, princ. 6.1 (emphasis added).

121. See generally Anti-Corruption and Economic Crimes Act, (2009) Cap. 65 (Kenya), available at <http://www.kacc.go.ke/docs/legal/aceca.pdf> (establishing the Kenya Anti-Corruption Commission to investigate, prevent, and punish alleged economic crimes and corruption but failing to address specifically the media).

122. Cf. Ngovi Kitau, *Daily Nation—Kenyans Must Seek Ways to Eradicate Political Corruption*, ALLAFRICA.COM (Jul. 17, 2008), <http://allafrica.com/stories/200807161081.html> (providing information as to various factors contributing to political corruption in Kenya and advocating “the rule of law, transparency and accountability”).

123. See *Gov’t May Withdraw Media Bill*, DAILY NATION (Kenya), Aug. 10, 2007, at 1, available at 2007 WLNR 27284001 (indicating that laws protecting journalists’ sources from disclosure have enabled the press to uncover multiple financial scandals).

The first in line was a scandal costing the government over 60 billion Kenyan Shillings (“KES”) (approximately USD 850 million) as a result of irregular foreign exchange claims and dubious export compensation awards to Goldenberg International based on fictitious gold and diamond jewelry exports.¹²⁴ The scam, popularly known as the “Goldenberg Affair,” was the subject of a judicial commission of inquiry¹²⁵ that eventually unearthed the involvement of wealthy private citizens and high-ranking officials in the highly maligned Moi government.¹²⁶

The Goldenberg Affair was only a precursor to other cases of grand corruption in the Kenyan government.¹²⁷ For instance, early in

124. See generally BOSIRE COMM’N, REPORT OF THE JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR (2005), available at <http://www.tikenya.org/documents/Goldenberg%20Report.pdf> [hereinafter GOLDENBERG REPORT] (indicating that the scandal involved several fraudulent economic schemes and implicated numerous government officials and institutions); see also William Karanja, *Kenya: Corruption Scandal*, WORLD PRESS REV., Oct. 2003, <http://www.worldpress.org/Africa/1499.cfm> (noting that approximately 60 billion Kenyan shillings (USD 850 million) were looted from Kenya’s Central Bank during the scam).

125. The Commission members were: Justice Samuel E.O. Bosire of the Kenya Court of Appeal (Chairman); Justice Daniel K. Aganyanya of the High Court of Kenya (Vice Chairman); and Mr. Peter Le Pelley, Senior Counsel. GOLDENBERG REPORT, *supra* note 124, at 10. The appointment of Justice Aganyanya was revoked following reports implicating him with corruption in office, and Mr. Nzamba Kitonga replaced him as both Commissioner and Vice Chairman. *Id.*; see Press Release, Kibaki Appoints a Tribunal to Investigate Puisine Judges (Oct. 15, 2003), available at <http://www.statehousekenya.go.ke/news/oct03/2003151002.htm> (reporting President Kibaki’s appointment of counsel to a tribunal tasked with investigating the alleged corruption of Judge Daniel K. Aganyanya).

126. See GOLDENBERG REPORT, *supra* note 124, ¶¶ 844-47 (listing those individuals found to be players in the Goldenberg Affair and referring them to the Attorney General for potential prosecution).

127. See, e.g., *Grand Regency Saga Displays Rot in Kenya’s Elite*, THE NAIROBI CHRONICLE, June 30, 2008, <http://nairobichronicle.wordpress.com/2008/06/30/grand-regency-saga-displays-rot-in-kenyas-elite/> (explaining that participants in the Goldenberg Affair were later involved in the controversial sale of the Grand Regency Hotel to “Libyan investors” connected to Muammar Gaddafi). After the scandal, the Kibaki government commissioned a hitherto unpublicized report to investigate and trace assets obtained by Moi and his associates in the Goldenberg affair, as well as to gain a better understanding of general corruption during his presidency. KROLL ASSOCS. U.K. LTD., PROJECT KTM: CONSOLIDATED REPORT (2004), available at <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=a2925d58-c6c9-11dd-b3f1-fd61180437d9>. Investigations unearthed assets worth about USD 2 billion, located in London,

2004 Kenyans were informed of an even more monstrous scandal—the “Anglo-Leasing Scam.” The multimillion dollar scandal, which TI rightly described as “albatross around the Kibaki government’s neck,”¹²⁸ involved an array of contracts with non-existent entities for various fictitious security-related projects.¹²⁹ The damning incontrovertible evidence that surfaced revealed that the scam involved senior-most officials in the then infant Kibaki regime, the majority of whom were the President’s closest political associates.¹³⁰ The thwarted scam’s intent was to reportedly raise funds for the President’s (and his associates’) re-election in 2007.¹³¹ Once again, the media played a crucial part in disseminating the damning

New York, South Africa and Australia. *Id.* at Executive Summary.

128. See Mwalimu Mati, *It’s Time to Tell the Kenyan People the Truth About the Anglo-Leasing Corruption Scandal*, TRANSPARENCY INT’L (Jan. 22, 2006), http://www.transparency.org/news_room/latest_news/press_releases_nc/2006/2006_01_23_kenya_githongo (publicizing TI—Kenya’s call on Ministers and civil servants implicated in the scam to step aside to facilitate “impartial and uncompromised investigations” into the allegations).

129. See generally JOHN GITHONGO, FINDINGS OF GRAFT IN THE GOVERNMENT OF KENYA (2005), available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf [hereinafter GITHONGO DOSSIER] (summarizing investigation procedures and conclusions of the former Permanent Secretary in Kenya’s Office of the President in Charge of Governance and Ethics, who led an investigation into graft in the Kenyan government relating to the Anglo Leasing scandal). The scandal is alleged to have started when, sometime in 2001, the government wanted to replace its old passport printing system with a state-of-the-art tamper-proof system. *Id.* ¶ 4. Between late 2001 and late 2002, the Moi government had signed an overwhelming USD 443.36 million worth of contracts with a fictitious company, Anglo Leasing and Finance Limited. *Id.* ¶ 25. In January 2003, the Kibaki government ratified the scam; between January 2003 and May 2004, it had signed an additional USD 277.7 million worth of contracts, once again with the fictitious company. *Id.* This eventually saw Kenya grappling with massive scams to defraud public coffers of over USD 1 billion.

130. *Id.* ¶¶ 2, 5, 7, 15, 19-21, 25. These associates of the President included: Dr. Moody A. Awori (then Vice President), Mr. Kiraitu Murungi (then Minister for Justice and Constitutional Affairs), Amb. Francis Muthaura (Head of Civil Service), Mr. David Mwiraria (then Minister for Finance), Mr. Chris Murungaru (then Minister for Internal Security), Mr. Dave Mwangi (then Permanent Secretary for Internal Security) and Mr. Joseph Magari (then Permanent Secretary for Treasury). *Id.*

131. See *id.* ¶¶ 27, 29 (describing discussions with Hon. Kiraitu regarding the possibility of another “resource mobilisation” Goldberg-type scam resulting from efforts to keep together the coalition against political opposition).

revelations, including the incontrovertible documentary evidence¹³² gathered by the estranged former Permanent Secretary in the Office of the President (in charge of Ethics and Governance), Mr. John Githongo.¹³³

The year 2009 was yet another busy year, as the media revealed at least four more major scandals. In January 2009, when a food shortage was peaking in Kenya, Kenyans and the international community as a whole woke up to news of a scam relating to maize imports—the “Maize Scandal.”¹³⁴ Hot on the heels of the Maize Scandal followed the “Triton Oil Scandal,” which involved the unauthorized release of oil by the Kenya Pipeline Company (“KPC”) without the knowledge of its financiers.¹³⁵ Then, in November 2009,

132. See generally GITHONGO DOSSIER, *supra* note 129.

133. Mr. Githongo, a former head of TI—Kenya, was forced into exile (in the U.K.) amidst official frustration and threats to his life and personal security. He has since returned to Kenya after the government pledged to ensure his security.

134. See generally David Okwembah & Noah Chepleon, *Revealed: Sh150 Million Maize Scandal*, DAILY NATION (Kenya), Jan. 10, 2009, <http://www.nation.co.ke/News/-/1056/513142/-/u18wmp/-/index.html>. It was reported that some briefcase millers existing only on paper had been awarded large quantities of maize from the Strategic Grain Reserve, while others were awarded lucrative import permits by the National Cereals and Produce Board. It surfaced that some of these millers colluded with high ranking government officials to re-direct cereals outside the country to avoid price controls. The millers supposedly made huge profits on the grains, while most of the importers brought in commodities that were subsequently declared unfit for human consumption. This affair was a huge insult for Kenyans, who were then facing one of the worst food shortages in the country's history. *Id.* For additional background and details, see generally *Raila on the Spot over Contaminated Maize*, DAILY NATION (Kenya), May 13, 2009, <http://www.nation.co.ke/News/-/1056/598050/-/u69omg/-/index.html>; AFR. CTR. FOR OPEN GOVERNANCE, *THE MAIZE SCANDAL* (2009), available at <http://www.africog.org/reports/Maize%20Report.pdf>.

135. See Jaindi Kisero, *KACC Asked to Probe \$98.7 Million Triton Oil Theft at Kenya Pipeline*, THE EAST AFRICAN, Jan. 10, 2009, <http://www.theeastafican.co.ke/news/-/2558/512818/-/rliqydz/-/index.html> (detailing the initiation of an investigation by the Kenya Anti-Corruption Commission and forensic auditors into the Triton Oil Scandal). Though it surfaced in January 2009, the scam occurred in 2008, when KPC allowed Triton Oil Company to withdraw oil amounting to KES 7.6 billion (approximately USD 98.7 million). By the time it collapsed in January 2009, when the scam surfaced, the company had sold all the oil and “pocketed” the proceeds. *Id.* The proprietor, Yagnesh Devani, has since gone into exile, effectively fleeing the public coffer of billions. See *No End to Triton Saga One Year On*, DAILY NATION (Kenya), Jan. 2, 2010, <http://www.nation.co.ke/business/news/-/1006/834932/-/hejqv2z/-/index.html> (noting that although Devani is wanted in Kenya for theft, there may not be sufficient “political will” to

the Kenyan media widely publicized another scam—a hitherto “hidden” scandal on high-ranking Ministry of Education officials’ misappropriation of funds meant for the donor-funded Free Primary Education (“FPE”) program.¹³⁶

In December 2009, government proposals to exorbitantly compensate land-grabbers in the Mau Forest Complex surfaced, and implicated, among many, former President Daniel Arap Moi, who owns vast tea estates and a tea factory in the forest complex.¹³⁷ Ironically, Moi and the other supposed beneficiaries of the compensation plan had no valid title to the land in question.¹³⁸ To make matters worse, ordinary squatters had earlier been evicted from

bring him to justice). For additional background and details, see generally AFR. CTR. FOR OPEN GOVERNANCE, ANALYSIS OF THE TRITON OIL SCANDAL (2009), available at <http://www.africog.org/reports/Africog%20newsletter-triton.pdf>.

136. See Benjamin Muindi, *Fake Receipts Used to Steal Free Schooling Cash*, DAILY NATION (Kenya), Dec. 15, 2009, <http://www.nation.co.ke/News/-/1056/823252/-/vo3ojl/-/index.html> (explaining that various government officials stole funds by falsifying documents and funding fake workshops); see also Benjamin Muindi & John Ngirachu, *Back to School and to the Class Society*, DAILY NATION (Kenya), Jan. 3, 2010, <http://www.nation.co.ke/News/-/1056/835626/-/voqp5j/-/index.html> (commenting on problems undermining the quality of the educational system, including the failures that led to the FPE Program scandal); Brown Onguko, Op-Ed., *Ministry has a Case to Answer*, DAILY NATION (Kenya), Dec. 28, 2009, <http://www.nation.co.ke/oped/Opinion/-/440808/832218/-/5pnnll/-/index.html> (observing that anger over the scandal did not manifest until donors made threats to withhold funding unless legal action was taken, and suggesting particular approaches to investigate the scandal).

137. See Murithi Mutiga, *Mau: Cabinet Memo Proposes Sh8.7b for Landlords*, DAILY NATION (Kenya), Jan. 2, 2010, <http://www.nation.co.ke/News/-/1056/835012/-/voqkes/-/index.html> (detailing how, despite denials by “Finance Minister Uhuru Kenyatta and his Forestry counterpart Noah Wekesa,” a cabinet memo proposed to pay Mau landlords up to KES 8.7 billion); see also Bernard Namunane, *Raila Takes on Uhuru over Mau Payout*, DAILY NATION (Kenya), Dec. 22, 2009, <http://www.nation.co.ke/News/politics/-/1064/829448/-/wtitx3z/-/index.html> (detailing the disagreement between the Prime Minister and the Minister for Finance over compensation of the Mau “landlords,” and noting that the quarrel was inspired by a media report indicating that President Moi and others may have received payouts for Mau lands); Paul N. Ndung’u, Op-Ed., *Why All Settlers in the Forest Should Leave with Nothing*, DAILY NATION (Kenya), Jan. 7, 2010, <http://www.nation.co.ke/oped/Opinion/-/440808/838030/-/5prs09/-/index.html> (arguing that squatters should not be compensated for relocating from the Mau Forest because they do not possess legal title to such lands).

138. Mutiga, *supra* note 137.

the forest complex in a bid to reforest the reclaimed land.¹³⁹ Just how Moi and his team were to benefit from the common squatter being forced into the cold remains incomprehensible to-date.

Toward the end of January 2010, Kenyans awoke to the news that officials at the Nairobi City Council and the parent Ministry of Local Government had conspired to steal public funds by overpaying for a parcel of land on the outskirts of Nairobi.¹⁴⁰ The deal, which reportedly led to the loss of KES 260 million (approximately USD 3.5 million), is already haunting, among others, the Mayor of Nairobi (Mr. Geoffrey Majiwa),¹⁴¹ the Ministry's Permanent Secretary (Mr. Sammy Kirui),¹⁴² and 12 other senior public officials¹⁴³—all of whom are now either facing investigation or standing trial for corruption.

In October 2010, Kenyans saw yet another mega-scam, the “Tokyo Embassy Scandal,” this time involving the country's Ministry of Foreign Affairs.¹⁴⁴ On-going investigations have revealed that this scam cost the Kenyan public in the region of KES 1.1 billion (approximately USD 15 million).¹⁴⁵ So far, a number of high-profile officials have “stepped aside” and are currently facing investigations,

139. See Ndung'u, *supra* note 137 (surveying the laws controlling whether the squatters can claim title to the land).

140. *Kenya Mayor in Corruption Charge Over Cemetery Scandal*, BBC NEWS AFR. (Oct. 26, 2010), <http://www.bbc.co.uk/news/world-africa-11628433> [hereinafter *Charge Over Cemetery Scandal*].

141. *Nairobi Mayor Grilled Over Cemetery Scandal*, THE KENYA WEEKLY POST (Oct. 25, 2010), <http://www.kenyaweeklypost.com/modules.php?name=News&file=article&sid=2151> [hereinafter *Nairobi Mayor Grilled*]; *Charge Over Cemetery Scandal*, *supra* note 140.

142. David Ochami, *Kibaki Suspends PS, 12 Others Over Sh260m Cemetery Scandal*, THE STANDARD (Kenya), March 8, 2010 <http://www.standardmedia.co.ke/InsidePage.php?id=2000005184&cid=4&ttitle=Kibaki%20suspends%20PS,%2012%20others%20over%20Sh260m%20cemetery%20scandal>.

143. *Id.*; *Nairobi Mayor Grilled*, *supra* note 141.

144. See Michael Onyango, *Kenyan Minister Steps Aside in Embassy Scandal*, VOANEWS.COM (Oct. 27, 2010), <http://www.voanews.com/english/news/Kenya-Foreign-Minister-Resigns-in-Corruption-Scandal-105862903.html> [hereinafter *Kenyan Minister Steps Aside*] (stating that the “most serious case” involved an overpayment for embassy property in Japan, despite “repeated assessments given to Kenyan officials deeming the land unsuitable for the embassy's purposes”).

145. Samuel Siringi, *Findings that Forced Minister and PS to Leave Under a Cloud*, DAILY NATION (Kenya), Oct. 27, 2010, <http://www.nation.co.ke/News/politics/Findings%20that%20forced%20minister%20and%20PS%20to%20leave%20under%20a%20cloud/-/1064/1041786/-/415t0lz/-/index.html>.

including the Minister (Mr. Moses Wetang'ula),¹⁴⁶ the Permanent Secretary (Mr. Thuita Mwangi),¹⁴⁷ and the former envoy to Japan (Mr. Dennis Awori).¹⁴⁸ The Kenya Anti-Corruption Commission is also investigating deals at the Kenyan missions in Islamabad, Brussels, Lagos, and Cairo.¹⁴⁹ At the military level, since March 2010, the Department of Defense is “writhing in pain” following damning revelations of corruption in procurement deals with some Jordanian and South African firms,¹⁵⁰ not forgetting the embarrassing allegations of bribery during the recently-concluded armed forces

146. *Kenyan Minister Steps Aside*, *supra* note 144; Dave Opiyo & John Ngirachu, *Wetang'ula, Permanent Secretary Resign in Graft Fallout*, ALLAFRICA.COM (Oct. 27, 2010), <http://allafrica.com/stories/201010280157.html> [hereinafter *Minister and PS Resign*]; Emeke-Mayaka Gekara & Samuel Siringi, *Kibaki Loses His Chief Envoy and Trusted Pointman*, DAILY NATION (Kenya), Oct. 27, 2010), <http://www.nation.co.ke/News/politics/Kibaki%20loses%20his%20chief%20envoy%20and%20trusted%20pointman/-/1064/1041782/-/6t0a4lz/-/index.html>; James Macharia, *Top Kenyan Officials Step Aside Over Embassy Scam*, REUTERS ALERTNET (Oct. 27, 2010), <http://www.alertnet.org/thenews/newsdesk/LDE69Q14X.htm> [hereinafter *Top Officials Step Aside*].

147. *Minister and PS Resign*, *supra* note 146; *Top Officials Step Aside*, *supra* note 146; Anthony Kariuki, *Foreign PS Thuita Steps Aside Over Embassy Saga*, DAILY NATION (Kenya), Oct. 27, 2010, <http://www.nation.co.ke/News/PS%20Thuita%20steps%20aside%20over%20embassy%20saga/-/1056/1041282/-/15p0mlw/-/index.html> [hereinafter *PS Thuita Steps Aside*].

148. Daily Nation, *Former Tokyo Envoy Questioned by Graft Team Over Dubious Land Deal*, ALLAFRICA.COM (Nov. 4, 2010), <http://allafrica.com/stories/201011050098.html>.

149. *PS Thuita Steps Aside*, *supra* note 147.

150. See David Okwembah, *Queries Raised Over Military Choppers that Have Yet to Fly*, Daily Nation (Kenya), Mar. 27, 2010, <http://www.nation.co.ke/News/Queries%20raised%20over%20military%20choppers%20that%20have%20yet%20to%20fly%20/-/1056/888378/-/view/printVersion/-/r6bi5sz/-/index.html> (suggesting that recently acquired helicopters must be defective because they had been grounded for three months since arriving from China); *Military Procurement Bosses Resign*, DAILY NATION (Kenya), Nov. 17, 2010, <http://www.nation.co.ke/News/Military%20procurement%20bosses%20resign%20/-/1056/1055762/-/15a0egv/-/index.html> (reporting that several military officials resigned the day before they were set to face questioning over the purchase of F-5 jets from Jordan and personnel carriers from South Africa); Daily Nation, *MPs Likely to Questions Jets Deal*, ALLAFRICA.COM (Nov. 17, 2010), <http://allafrica.com/stories/201011180370.html> (noting that the officials' scheduled appearance before the Parliamentary Select Committee on Defense and Foreign Relations was a “product of the new Constitution's demands that all public officials . . . be accountable to citizens”).

recruitment.¹⁵¹ Sadly, in Kenya—“the land of corruption”—similar tales continue to unfold without any certainty as to when a cog in the wheel of corruption will break.

The above cases amply illustrate the Kenyan media’s role as a public watchdog. Undoubtedly, the Kenyan public and the international community would not have known of any of these cases of grand corruption if the media, the indispensable public watchdog, had not uncovered them. The public only knew of these scams through newspapers, tabloids, and newscasts over nationwide radio and television. This reality carves a unique niche for the media in the country’s anti-corruption crusade.

B. THE KENYAN MEDIA AND ENGAGEMENT WITH CORRUPT PUBLIC OFFICIALS

In addition to helping unravel the massive scandals, the Kenyan media also generated sufficient pressure to force high-profile government officials to resign.¹⁵² So far, the axe has fallen on prominent allies of President Kibaki, including Mr. Chris Murungaru (Internal Security Minister, 2003-2004; Transport Minister, 2004-2005),¹⁵³ Mr. David Mwiraria (Finance Minister, 2003-2005),¹⁵⁴ Mr.

151. See Harry Misiko, *Fresh Corruption Claims in Armed Forces Recruitment*, DAILY NATION (Kenya), Nov. 10, 2010, <http://www.nation.co.ke/News/-/1056/1051058/-/11hwsb4z/-/index.html> (suggesting that corruption must have played a part in the recent “unprocedural dismissal[s]” of fourteen soldiers); Gerald Andae & Wycliff Kipsang, *How Corruption is Denying Youth From Poor Families Jobs in the Army*, ALLAFRICA.COM (Nov. 2, 2010), <http://allafrica.com/stories/201011030038.html> (reporting on claims that prospective military recruits from poor backgrounds lost their slots to children of rich parents, who used their cash to secure military jobs).

152. E.g., Luke Mulunda & Macharia Gaitho, *Shedding Image of a Moi Project*, DAILY NATION (Kenya), June 10, 2010, <http://www.nation.co.ke/News/Shedding%20image%20of%20a%20Moi%20project%20/-/1056/936174/-/30s4m1z/-/index.html>.

153. Dr. Murungaru had been implicated in a number of cases of corruption and economic crimes, the last in the series being the Anglo-Leasing Scam. See The Standard Team, *Kibaki Okays Fresh Graft Probe on Murungaru*, ALLAFRICA.COM (Jan. 16, 2006), <http://allafrica.com/stories/200601160279.html> (explaining the sacking of Murungaru and the opening of a probe into allegations of his involvement in Anglo-Leasing).

154. Mr. Mwiraria, who featured prominently in damning audio recordings released on the internet (in January 2006) by the then-exiled former graft tsar Mr. John Githongo, resigned on February 1, 2006. He was the first senior government

Kiraitu Murungi (Minister for Justice and Constitutional Affairs, 2003-2006),¹⁵⁵ and Mr. Amos Kimunya (Finance Minister, 2005-2006),¹⁵⁶ all of whom were adversely mentioned (at various stages) in the Anglo-Leasing Scam. More recently, the Maize Scandal saw the temporal suspension of key officials in the Office of the Prime Minister (“OPM”) and the Ministry of Agriculture, including: Dr. Mohammed Isahakhia (Permanent Secretary in the OPM), Mr. Caroli Omondi (the Prime Minister’s Administrative Secretary), Mr. Ali

official to resign over adverse implication in the Anglo-Leasing Scam. Ironically, he made a comeback when President Kibaki “cleared” him, despite there being no investigation into his alleged involvement in the saga, and appointed him Minister for Environment and Natural Resources on July 24, 2007. See *Kenyan Finance Minister Resigns Following Corruption Allegations*, VOANEWS.COM (Feb. 1, 2006), <http://www.voanews.com/english/news/a-13-2006-02-01-voa53.html> (explaining the circumstances surrounding Mwiraria’s resignation); *Kenyan Graft Ministers Resign*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/4670120.stm> (last updated Feb. 1, 2006) [hereinafter *Kenyan Graft Ministers Resign*] (reporting that Mr. Mwiraria was alleged to have “blocked investigations into the Anglo-Leasing scandal,” but that he vehemently denied his involvement); The Standard Team, *Mwiraria—It is an Honour to be Back*, ALLAFRICA.COM (July 26, 2007), <http://allafrica.com/stories/200707250772.html> (noting that opposition members dismissed President Kibaki’s move as a “demonstration of lack of commitment in the fight against corruption” and reiterated their calls for those individuals implicated in the scandal to be “cleared in the ‘most proper way’”).

155. *Kenyan Graft Ministers Resign*, *supra* note 154. Ironically, on November 15, 2006, Kibaki “cleared” and reinstated Kiraitu as Energy Minister. See David Mageria, *Kibaki Reinstates Ministers After Scandal*, INDEP. ONLINE NEWS (Nov. 16, 2006, 1:20 AM), <http://www.iol.co.za/news/africa/kibaki-reinstates-ministers-after-scandal-1.303407> (suggesting that this reappointment would anger “both Kenyans and donor nations”).

156. See Daily Nation, *MPs Pass Vote of No-Confidence Against Kimunya*, ALLAFRICA.COM (July 3, 2008), <http://allafrica.com/stories/200807030007.html> (explaining that the vote was a result of his role in the “controversial sale of the Grand Regency Hotel”); *Minister Quits Over Kenya Hotel Sum*, AL JAZEERA (July 8, 2008), <http://english.aljazeera.net/news/africa/2008/07/2008781563453941.html> (reporting that Kimunya was accused of undervaluing the Grand Regency Hotel in a sale to Laico, a Libyan agency); KenyanObserver, *Amos Kimunya Resigns*, THE NAIROBI CHRON. (July 8, 2008), <http://nairobichronicle.wordpress.com/2008/07/08/amos-kimunya-resigns/> (explaining that Kimunya denied wrongdoing but still resigned after consultations with President Kibaki); KenyanObserver, *Grand Regency Hotel—Pressure Mounts for Kimunya to Resign*, BREAKING NEWS KENYA (June 29, 2008), <http://www.breakingnewskenya.com/2008/06/29/grand-regency-hotel-pressure-mounts-for-kimunya-to-resign/> (commenting on the pressure building “across the political divide” and that “[t]he history of the Grand Regency hotel reads like a chapter in the history of corruption in Kenya”).

Mohammed (Permanent Secretary, Special Programs), Dr. Romano Kiome (Permanent Secretary, Ministry of Agriculture) and Mr. Gideon Misoi (Managing Director, National Cereals and Produce Board).¹⁵⁷

Similarly, following the revelation of the FPE scam, pressure mounted on high-ranking officials in the Ministry of Education, forcing, among others, the Ministry's Permanent Secretary (Professor Karega Mutahi) to eventually throw in the towel.¹⁵⁸ Unfortunately, despite the pressure, the Minister (Professor Sam Ongeru) managed to carry on, capitalizing on the government's *modus operandi* of burying its head deep into the sand, even amidst incessant calls for the sacking of all public officials implicated in the scam.¹⁵⁹ Indeed, the Minister's "endurance" ironically came despite the media's incontrovertible documentation (and publication) of the Minister's formal admission of culpability on his part.¹⁶⁰

C. THE KENYAN MEDIA AND PUBLIC DISSEMINATION ON ANTI-CORRUPTION LAWS AND POLICIES

The Kenyan media has equally been pivotal in the dissemination

157. See Ben Agina, *Top Government Officials Sent Home*, THE STANDARD (Kenya), Feb. 13, 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000003243&cid=4&ttl=Top%20Government%20officials%20sent%20home> (indicating that the officials were shown the door as the government succumbed to pressure to act).

158. *Id.*

159. See Kwendo Oponga, Op.-Ed., *Why War On Corruption is Political Gimmickry*, DAILY NATION (Kenya), Feb. 13, 2010, <http://www.nation.co.ke/oped/Opinion/-/440808/861622/-/5rho4w/-/index.html> ("[I]t is the same people who campaigned on an anti-graft platform in 2002 who campaigned on an anti-graft platform in 2007 who condoned graft in 2003 through 2007 and who are implicated in graft in 2010.").

160. See George Kebaso, *Corruption in Kenya as Top Ministers Implicated*, NEWSTIME AFR. (Feb. 14, 2010), <http://www.newstimeafrica.com/archives/10858> (detailing how the Education Minister, at a funeral service in South Mugirango in Western Kenya, publicly admitted diverting FPE funds to benefit his Gusii community); *Education Minister Sam Ongeru Admits Diverting Funds*, YOUTUBE, Feb. 13, 2010, <http://www.youtube.com/watch?v=Kx3RQLAbYOA> (excerpting portions of a speech by the Minister, given in his local Gusii language, where he allegedly admitted to diverting the FPE funds). But see *Minister Defends Use of Cash*, DAILY NATION (Kenya), Feb. 14, 2010, <http://www.nation.co.ke/News/-/1056/862054/-/vqj48t/-/index.html> (reporting how the Minister attempted to clear his name over the remarks made in South Mugirango, stating in particular that his remarks did not refer to the FPE funds).

of anti-corruption laws. This has been accomplished largely through frequent radio and TV talk shows on anti-corruption legislation and policies in the country and the region as a whole, where highly-qualified guest speakers from the public and private sectors are invited to drive the agenda.¹⁶¹ Such shows include: *Moving the Masses* by the Kenya Broadcasting Corporation (“KBC”);¹⁶² *Agenda 5* by the Kenya Television Network (“KTN”);¹⁶³ and *Hatua* by Nation Television.¹⁶⁴ Undoubtedly, the venture has been particularly fruitful in ensuring that the Kenyan public is enlightened on the existing normative and institutional frameworks for the fight against corruption, while also assessing the achievements and challenges for the anti-corruption crusade in Kenya.¹⁶⁵

161. See Tom Odhiambo, *Daily Nation—Corruption is Eating, But It Eats People Who Practice It*, ALLAFRICA.COM (Feb. 26, 2010), <http://allafrica.com/stories/201002260850.html> (noting that Kenyans “thrive on endless analyses of corruption on FM radio and TV stations . . .”); see also *Radio Talk Show Hosts Arrested in Kenya*, NOW PUBLIC (Dec. 12, 2008), <http://www.nowpublic.com/world/breaking-news-radio-talk-show-hosts-arrested-kenya> (reporting that radio talk show debates have “been hammering” the government’s plans to stifle the media through legislation).

162. The one-hour interactive show, sponsored by the National Anti-Corruption Steering Committee, is hosted every Sunday evening by Mr. Omar Hassan, a commissioner at the Kenya National Commission on Human Rights. Mr. Hassan succeeded Dr. Patrick Loch Otieno Lumumba, a prominent don at the University of Nairobi’s Law School and the current Director of the Kenya Anti-Corruption Commission. See Alphonse Shiundu, *Will Action Speak Louder Than Words for PLO?*, DAILY NATION (Kenya), July 28, 2010, <http://www.nation.co.ke/News/Will%20action%20speak%20louder%20than%20words%20for%20PLO/-/1056/966512/-/49v2h0z/-/index.html> (summarizing Mr. Lumumba’s work, both on and off the air).

163. The program aims at breathing life into Kenya’s New Constitution, drawing on the popular concept of “we the people.” Hassan Omar Hassan, *Agenda 5 is About “We the People,”* THE STANDARD (Kenya), June 22, 2010, <http://www.standardmedia.co.ke/commentaries/InsidePage.php?id=2000012237&cid=15&>.

164. *Hatua* is Kenya’s premier human rights television talk show produced by the Mohamed Amin Foundation, with the financial support of the Open Society for East Africa. *Hatua: TV Talk Show*, THE MOHAMED AMIN FOUND., <http://moforce.com/hatua.html> (last visited Nov. 1, 2010).

165. See Tim Kamuzu Banda & Robert Kalumba, *Nation Stamps Its Authority as Media for Africa*, DAILY NATION (Kenya), May 31, 2010, <http://www.nation.co.ke/News/Nation%20stamps%20its%20authority%20as%20media%20for%20Africa%20/-/1056/929466/-/item/1/-/xuiifyqz/-/index.html> (asserting that the media is crucial in informing the public about important political

D. INVESTIGATIVE JOURNALISM AND THE FIGHT AGAINST CORRUPTION IN KENYA

Kenyan journalists have invariably engaged in investigative journalism to uncover the truth by carrying out constant independent “on-site” investigations.¹⁶⁶ These ventures have ultimately cast a spotlight on graft in various public institutions, including the judiciary, various government ministries, public health facilities, public schools and colleges/universities, local government, the Kenya Police, the Kenya Ports Authority, and the Kenya Revenue Authority.¹⁶⁷

IV. THE KENYAN MEDIA IN THE ANTI- CORRUPTION CRUSADE: PRACTICAL CHALLENGES

A. EXTERNAL CHALLENGES

In its continued efforts to expose various forms of corruption in Kenya, the media has faced a number of stiff challenges from the external environment. The challenges highlighted in this article stem from the experiences of the media during the subsistence of the old constitutional dispensation. Where applicable, developments heralded by the nascent dispensation in the New Constitution (2010) are highlighted, with a view to putting issues in perspective. Indeed, at the moment, we can only rely on time to tell how well this new dispensation practically addresses these challenges.

1. Repressive Laws

In Kenya, at least before August 2010, the right to freedom of

and economic issues).

166. See, e.g., Gichinga Ndirangu, *Daily Nation—Locals Deserve Less Economy on Truth*, ALLAFRICA.COM (Feb. 13, 2010), <http://allafrica.com/stories/201002151447.html> (“Various arms of the public service remain fairly opaque and information on many issues of public interest has been the result of investigative journalism rather than an enabling policy on public communication.”).

167. See, e.g., Dave Opiyo, *Kenya Police Most Corrupt Institution: Index*, DAILY NATION (Kenya), July 22, 2010, <http://www.nation.co.ke/News/Kenya%20Police%20most%20corrupt%20institution/-/1056/962512/-/view/printVersion/-/15rr1t6/-/index.html> (summarizing the results of the 2010 Transparency International Bribery Index survey on Kenya).

expression was not adequately protected. Though it recognized the right to this vital freedom, the Old Constitution (rev. 2008) provided for strongly-worded “claw-back” clauses which allowed derogation from what was guaranteed. For instance, the Constitution subjected the exercise of the freedom of expression to vague limitations in the name of public interest, including national security, “public safety, public order, public morality, or public health.”¹⁶⁸ Notwithstanding the good intentions with which the limitations may have been devised, in the absence of any constitutional definition and guidance, these derogation provisions practically rendered the Constitution, the country’s supreme law, repressive.

Buttressing the suppressive regime of the Old Constitution (rev. 2008), existing laws equally portend serious challenges for the media’s engagement in the anti-corruption crusade. For instance, the Penal Code empowers the minister responsible for matters relating to national security to prohibit the importation of any publication *if it appears to him* that the prohibition is “necessary in the interests of public order, health or morals,” and is “reasonably justifiable in a democratic society.”¹⁶⁹ Unfortunately, the Penal Code does not attempt to define any parameters of public interest. This vague reference has, over the years, operated in favor of State-sanctioned abuses.

Mention must also be made of the Defamation Act, which, in 1992, was amended by the largely pro-Moi National Assembly to introduce what was called “minimum damages” for certain kinds of libel.¹⁷⁰ Expectedly, this development did not augur well with progressive journalists, judicial pundits, and legal activists, who interpreted the same as a move to restrict the freedom of expression in the countdown to the country’s first multiparty elections in twenty-five years.¹⁷¹

Similarly, building on the spirits of the Old Constitution (rev. 2008) and the Penal Code, the Communications (Amendment) Act of

168. CONSTITUTION, § 79(2)(a) (2008) (Kenya).

169. The Penal Code, (2008) Cap. 63 § 52(1) (Kenya).

170. The Defamation Act, (2005) Cap. 36 § 16A (Kenya).

171. See Mbugua Mureithi, *Daily Nation—The Long Crusade to Silence Press*, ALLAFRICA.COM (Apr. 28, 2002), <http://allafrica.com/stories/200204280038.html> (criticizing the 1992 Amendment for undermining the freedom of the press).

2009 (the “Amendment Act”) introduced new concepts into the Communications Act of 1998. The amendments have largely suppressed the freedom of expression and the right to information; they give the minister responsible for matters relating to information and communications wide-ranging powers, including the authority “to unilaterally, without recourse to parliament or the courts, enter and search broadcasting stations, and seize, dismantle and dispose of equipment” and “to intercept and disclose communications between persons, and to intercept, disclose and dispose of postal articles.”¹⁷² Meanwhile, his counterpart in the Internal Security docket is empowered to “suspend electronic media services in case of public emergency.”¹⁷³ Undoubtedly, these unrestricted “powers are likely to be abused,” bearing in mind the “heavy government composition of the regulatory authority”—the Communications Commission of Kenya.¹⁷⁴

The New Constitution (2010) ostensibly remedies this anomaly; it guarantees not only the right to freedom of expression but also the right to receive information, including that held by the State. Be that as it may, the continued existence of the above and other related legislation in Kenya’s statute books portends a serious challenge for the media in the anti-corruption crusade, unless the much-yearned-for “reformed judiciary” adopts a progressive approach to interpretation of the rights enshrined in the New Constitution (2010). However progressive the Constitution may sound, all largely depends on how the judiciary will respond in litigations seeking to enforce the rights. With the on-going purge of the judiciary, one can only be optimistic that the judiciary shall be the fountain of hope and justice for all aggrieved individuals and groups. Indeed, now and into the future, as they await full legislative implementation of the New Constitution, Kenyans shall rely on the ingenuity of the judiciary in applying the existing legislation in conformity with the new constitutional dispensation.

172. The Communications (Amendment) Act, No. 1 (2009), KENYA GAZETTE SUPPLEMENT No. 11 § 88.

173. *Id.*

174. REBECCA WANJIKU, ASS’N FOR PROGRESSIVE COMM’NS, KENYA COMMUNICATIONS AMENDMENT ACT (2009): PROGRESSIVE OR RETROGRESSIVE? 8-10 (Sept. 2009), *available at* http://www.apc.org/en/system/file/CICEWA_Kenya20090908_EN.pdf.

2. Forcible Suppression

More often than not, the State has utilized unjustified force to silence media houses critical of its performance.¹⁷⁵ The infamous “Standard Group Raid” vividly illustrates the lengths to which the State will go to suppress speech critical of the government. On March 2, 2006, hooded State agents, reportedly from the notorious *Kwekwe* squad,¹⁷⁶ conducted two simultaneous commando-style “midnight raids” on the Standard Group, a Nairobi-based media house owning an independent local daily, *The Standard*, and Kenya’s oldest private television station, the KTN.¹⁷⁷

In the violent raids at the group’s printing press (in Nairobi’s Industrial Area) and the KTN station, the raiding agents seized several computers and tapes, vandalized television broadcast equipment and a printing press, and set ablaze over 20,000 copies of the day’s issue of *The Standard*. The raid was a response to an article published in *The Standard* that alleged, inter alia, damning revelations regarding huge financial scandals and official development of mercenaries within the Kibaki government.¹⁷⁸

175. See generally A YEAR OF POLITICAL HARASSMENT, *supra* note 22.

176. See Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Promotion and Protection of all Human Rights, Civil, Political, Social and Cultural Rights, Including the Right to Development*, ¶ 10, U.N. Hum. Rts. Council, U.N. Doc. A/HRC/11/2/Add.6 (May 26, 2009) (by Philip Alston) (offering clear insight into institutionalized execution squads within the Kenyan Police). The *Kwekwe* (“weed”) squad is an “informal” unit of elite police officers, which is widely thought to be responsible for the commission of rampant State-sanctioned human rights atrocities, including systemic extrajudicial killings and torture of political dissidents. *Id.*

177. Andrew England, *Police Raid Targets Kenya’s Second Largest Media Group*, FIN. TIMES, Mar. 2, 2006, <http://www.ft.com/cms/s/0/d182f9cc-a9ff-11da-96ea-0000779e2340.html>; see Marc Lacey, *Masked Officers Raid TV Station and Newspaper Plant in Kenya*, N.Y. TIMES, Mar. 2, 2006, <http://www.nytimes.com/2006/03/02/international/africa/02cnd-kenya.html> (reporting on the response to the raid from various Kenyan political figures); Maria Lora, *Police Raid Kenya Media Offices*, CNN, Mar. 2, 2006, <http://www.cnn.com/2006/WORLD/africa/03/02/kenya.press/index.html> (noting that the men were heavily armed with AK-47 assault rifles, though not suggesting that anyone was injured); The Standard Team, “*Standard Under Attack*,” ALLAFRICA.COM (Mar. 2, 2006), <http://allafrica.com/stories/200603020148.html> (quoting an eye witness who “knew they were policemen”).

178. See England, *supra* note 177 (reporting that raids came after journalists from *The Standard* were arrested for writing an article alleging that President

Subsequently, the Standard Group consistently pointed an accusing finger at the government and called for inquiries into the horrifying assault.¹⁷⁹

Several attempts were made to unravel the “mysterious” raid, but to no avail, as the government vehemently denies any wrongdoing.¹⁸⁰ To date, the confiscated equipment has yet to be returned and the reasons and people behind the raid remain unanswered. But, Kenyans have a somewhat clear idea on the instigators and

Kibaki held a secret meeting with an opposition leader); Lora, *supra* note 177 (commenting that the Kenyan government had recently come under fire from the news media over allegations of corruption); *Africa in Focus: Kibaki Asked to State Stand on Attacks*, SUDAN VISION DAILY (Mar. 6, 2006, 8:51 UTC), <http://www.sudanvisiondaily.com/modules.php?name=News&file=article&sid=11252> [hereinafter *Kibaki Asked to State Stand on Attacks*] (citing a group of thirty NGOs as hinting that “the raid was meant to destroy corruption-related information touching on powerful government ministers”).

179. See Tom Rhodes, *Mission Journal: Mysterious Raid Draws New Concerns*, COMMITTEE TO PROTECT JOURNALISTS BLOG (Apr. 22, 2009, 11:43 AM), <http://cpj.org/blog/2009/04/mission-journal-mysterious-raid-draws-new-concerns.php> (indicating that in an interview by Tom Rhodes of the Committee to Protect Journalists, KTN researcher Patrick Mugo stated: “We at KTN believed it was individuals within the government and security services that ordered the raid”); see also The Standard Team, *Assault an Attack on Media Freedom, Says CEO*, ALLAFRICA.COM (Mar. 2, 2006), <http://allafrica.com/stories/200603020147.html> [hereinafter *Attack on Media Freedom*] (noting that the Chief Executive Officer of the Standard Group publicly denounced the invasion as unjustified and demanded an explanation from the government).

180. See Rhodes, *supra* note 179 (quoting a government official denying the government’s involvement). Almost immediately after the raid, the National Assembly, largely inspired by an overwhelming public outcry, took action; the Parliamentary Select Committee on Justice and Legal Affairs, chaired by the then Member of Parliament for Kabete, Mr. Paul Muite, put the government to task to explain the circumstances surrounding the raid. Unfortunately, the Executive remained defiant. Similarly, in June 2006, under intense public and political pressures, President Kibaki created a Commission of Inquiry, chaired by the former Commissioner of Police, Shadrack Kiruki, to look into the activities of two Armenian brothers, Artur Margaryan and Artur Sargasyan, who were widely believed to have implemented the raid on behalf of the government. Unfortunately, like many other reports of inconsequential commissions of inquiry, the Commission’s reports, which were presented to the President later in 2006, are yet to be released for public consumption. Accordingly, the entire issue remains as enigmatic as the Artur brothers themselves. *Id.*; see Alex Ndegwa, *Kibakis Now Turn Their Fury on Standard Group*, THE STANDARD (Kenya), Mar. 3, 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=1144009166&cid=4> (stating that the report is “believed to have revealed damning details of the [g]overnment’s involvement in the Artur saga”).

implementers behind the raid;¹⁸¹ the day after the raid, the then Internal Security Minister, John Michuki, who many believe was the major force behind the raid, told the press that the raid was *a police operation to protect state security*.¹⁸² Michuki vehemently retorted, “[i]f you rattle a snake, you must be prepared to be bitten by it.”¹⁸³

It can be plausibly deduced that the incident, notwithstanding the purported motive for the raid, sent a strong message that Kenya’s press “could be censored at any time without warning.”¹⁸⁴ It must be noted that, in its aftermath, the raid generated a plethora of questions, many of which still remain unanswered. For instance, many still ask: *What national security interests would have been jeopardized (as claimed by the Minister) by the unraveling of a gross corruption scandal in the government? What public interest would have been advanced by the forcible raid (to avert disclosure of the information)?* Kenyans have generally come to the conclusion that the raid could not be justified on the ground of national security.¹⁸⁵ In fact, many have cleared their conscience that the raid violated the public’s inherent right of access to information and outright denied the public’s right to information regarding the conduct of public affairs. Furthermore, it can be safely argued that the raid was unjustified as it merely sought to conceal crucial information on the

181. See Rhodes, *supra* note 179 (indicating that even though the Commissioner of Police, Major-General Hussein M. Ali, emphatically disputed police involvement, subsequent investigations revealed that the raid was carried out by State security agents, led by two government-hired Armenian mercenaries—the Artur Brothers).

182. See *Kenyan TV and Newspaper Raided by Masked Police*, WIKINEWS, http://en.wikinews.org/wiki/Kenyan_TV_and_newspaper_raided_by_masked_police (giving an account of the horrid events of the night).

183. *Kenya Admits Armed Raid on Paper*, BBC NEWS (Mar. 2, 2006), <http://news.bbc.co.uk/2/hi/4765250.stm> [hereinafter *Kenya Admits Armed Raid*]; The Standard Team, *State Owns Up To Raid*, ALLAFRICA.COM (Mar. 2, 2006), <http://allafrica.com/stories/200603020145.html>.

184. Rhodes, *supra* note 179; see Chris Wamalwa, *The East African Standard—Kibaki May Have Known About “Standard Raid”—Former Corruption Tsar*, PROPERTYKENYA (Apr. 17, 2006), <http://www.propertykenya.com/news/001013-kibaki-may-have-known-about-standard-raid---former-corruption-tsar> (suggesting that, in light of his silence, President Kibaki may have personally known of the raid).

185. See England, *supra* note 177 (noting that human rights workers, politicians and diplomats condemned the raid); see also *Attack on Media Freedom*, *supra* note 179 (suggesting that a broad goal of the raid was to intimidate the media).

functioning of public institutions, in particular to protect the Kibaki government from the sort of embarrassment attendant to the exposure of wrongdoing.

In a nutshell, in light of the circumstances surrounding it, the raid, which thwarted the Standard Group's planned release of damning reports,¹⁸⁶ violated Kenya's relevant obligations under the UNCAC, the A.U. Convention on Corruption, the ACECA, and reasonable moral and ethical standards.¹⁸⁷ To be sure, the raid vividly illustrates the government's uneasiness with the media.¹⁸⁸

3. Intimidation by the "Mighty"

For their part in the anti-corruption crusade, journalists have tirelessly engaged in independent investigations into cases of graft and corruption in the country. Unfortunately, this particular discourse has not been a smooth one. As their endeavors frequently "ruffled feathers," various journalists have constantly reported receiving threats to their lives and security.

For instance, on December 24, 2009, the *Daily Nation* carried a story on a threat to a KTN journalist by the Commissioner-General of the Kenya Revenue Authority following the TV station's "investigative story on alleged corruption at the port of Mombasa."¹⁸⁹ Though the chief tax collector denied these allegations, the affected news reporter vehemently maintained that he, on several occasions, received "veiled threats."¹⁹⁰

This case is only one of many reported every other day by Kenyan journalists engaged in the anti-corruption crusade in the country. It cannot be gainsaid that such intimidation of journalists limits not

186. See *Kibaki Asked to State Stand on Attacks*, *supra* note 178 ("The move was an act of intimidation intended to derail efforts by the media on the fight against corruption . . .").

187. See generally G.A. Res. 58/4, *supra* note 31; Anti-Corruption and Economic Crimes Act, (2009) Cap. 65 pmbl. (Kenya), available at <http://www.kacc.go.ke/docs/legal/aceca.pdf>.

188. Cf. *Kenya Admits Armed Raid*, *supra* note 183 (criticizing the government for using resources to intimidate the media and suggesting that such resources be devoted to battling corruption).

189. See *TV's Graft Story Ruffles Feathers*, DAILY NATION (Kenya), Dec. 23, 2009, <http://www.nation.co.ke/News/-/1056/830288/-/von5k8/-/index.html>.

190. *Id.* (noting that the alleged threats were characterized as "reckless, wanting and unprofessional").

only the freedom of expression of the individual journalists, but also of all citizens.¹⁹¹ This is because intimidation produces a chilling effect on the free flow of information within the society, thereby impeding accountability and transparency,¹⁹² two critical aspects of democratic governance.

4. “Defamation” Litigation

The old constitutional dispensation limited the freedom of expression by subjecting it to respect for the “reputations, rights and freedoms” of others.¹⁹³ This crucially laid the foundation for defamation law, which strives to protect the reputations of individuals and redress injuries occasioned by any offensive publication.¹⁹⁴

The current Kenyan defamation regime has its foundations in the Defamation Act of 1969, which was amended in 1992 to introduce minimum damages for certain kinds of libel.¹⁹⁵ To date, this particular amendment has firmly stood in the media’s path to effective engagement in the anti-corruption crusade. Politicians named and shamed for allegations of corruption have continually crowded the corridors of the courts to claim hefty damages for libel.¹⁹⁶ The frequent success enjoyed by these plaintiffs has led the

191. See *Joint Declaration*, *supra* note 108.

192. *Id.*

193. CONSTITUTION, § 79 (2008) (Kenya).

194. On the definition of defamation, see Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (July 2000), available at <http://www.article19.org/pdfs/standards/definingdefamation.pdf> [hereinafter *Defining Defamation: Principles*]. The Principles were produced at a Article 19 workshop held in London on February 29 through March 1, 2000, which was attended by a number of individual experts in international human rights law. *Id.* at intro.

195. See The Defamation Act, (2005) Cap. 36 § 16A (Kenya) (establishing minimum damages of one million shillings when the libel relates to “an offence punishable by death,” and minimum damages of four hundred thousand shillings for a libel relating to an offence punishable by a prison term no less than three years). It is hardly surprising that this move came at a time when several prominent politicians in the Moi regime were facing serious accusations of corruption.

196. See Harold Ayodo, *The Standard Team—Nyachae Sh20 Million Suit is Dismissed*, ALLAFRICA.COM (Jan. 23, 2007), <http://allafrica.com/stories/200701240442.html> (explaining that politicians have bombarded courts with defamation suits to “protect what they perceive to be their good character”).

public to suspect a high-level judicial conspiracy.

A number of concluded cases illustrate the extent to which the judiciary was utilized (by the State) to muzzle the press,¹⁹⁷ with the defamation litigation (brought by powerful politicians) effectively marring the media's efforts to meaningfully engage in the anti-corruption crusade in Kenya.¹⁹⁸ One such case is *Biwott v. Clays Limited*,¹⁹⁹ where the plaintiff, then a very powerful Minister in the Moi government, alleged that his reputation was severely and wantonly attacked and injured by the defendants in a U.K.-published book entitled *Dr. Iain West's Casebook*.²⁰⁰ This case opened the floodgates for prohibitive awards. In what was later termed a repressive judgment, the High Court awarded Mr. Biwott a total of KES 30 million (approx. USD 375,000) in damages, the highest award for an unliquidated claim in Kenya's history.²⁰¹

Another case in point, coincidentally involving the same plaintiff, is *Biwott v. Mbugguss*.²⁰² Here, the plaintiff sued the defendants for defamatory words published on the front page of *The People* newspaper on March 10, 1999.²⁰³ The allegedly libelous words were

197. See Odhiambo, *supra* note 22, at 298-301 (summarizing the outcome of several cases, including one where the High Court issued an injunction barring the publication of an allegedly "seditious" portrait of President Kibaki).

198. On the ideal application of defamation laws, see *Defining Defamation: Principles*, *supra* note 194. Principle 2 defines the legitimate purpose of defamation laws as protection of individuals against injury by exposure to ridicule, hatred, shunning, and avoidance by right-thinking members of the society; Principle 8 prohibits protection of public officials, regardless of their ranks or status; Principle 13 provides that the role of remedies is to redress the harm to the plaintiff's reputation, not to punish the defendant; Principle 14 calls on courts to prioritize non-pecuniary remedies as a means to redress harm; and Principle 15 provides that pecuniary compensation is to be awarded only where non-pecuniary remedies are insufficient. *Id.* princs. 2, 8, 13-15.

199. See MEDIA LAW & PRACTICE, *supra* note 112, at 564 (reproducing the court's judgment in the *Biwott* case).

200. See CHESTER STERN, DR. IAIN WEST'S CASEBOOK 88-93 (1996) (alleging that the minister was widely suspected of being the most corrupt of Moi's ministers and had participated in the murder of his cabinet colleague, Dr. Robert Ouko).

201. See MEDIA LAW & PRACTICE, *supra* note 112, at 578 (reporting that the court awarded KES 15 million for compensatory damages and KES 15 million for exemplary damages).

202. (2002) K.L.R. (H.C.K.) (Kenya), available at http://www.kenyalaw.org/CaseSearch/view_preview.php?link=3698601102984961443425&words.

203. *Id.*

part of the paper's report on corruption amidst the government's plan to build a mega hydro-power plant by damming the Turkwel River (in Kenya's North Rift region).²⁰⁴ Once again, the court awarded the plaintiff a lucrative sum of KES 20 million (approx. USD 250,000) in damages for the libel.²⁰⁵

Going by the precedents set in these and other cases, the high defamation awards and fines chill the effectiveness of the media generally and its engagement in the anti-corruption crusade specifically.²⁰⁶ It hardly goes without saying that, though the advent of the New Constitution (2010) normatively heralds a big sigh of relief, all will depend on the approach and attitude of the judiciary. Thus the new constitutional dispensation will only bear meaning (for the media) if the judiciary manifests sustained readiness and willingness to discourage suppressive defamation litigation.

5. *General Non-Enforceability of International Human Rights Law (under the Old Constitutional Dispensation)*

Though Kenya has been quick in showing its support for virtually every human rights instrument that finds its way before international and regional bodies, the position of international human rights law in the Kenyan legal system has, until August 27, 2010, remained vague. The Old Constitution (rev. 2008) was silent on the local position and/or application of international human rights law in the country.

Going by the precedent set in the landmark decision of *Okunda v. Republic*,²⁰⁷ which has for long been regarded as the *locus classicus* on the subject, the High Court of Kenya has severally ruled that mere ratification does not make an international instrument binding on the

204. *See id.* (describing the facts giving rise to Biwott's claim against Mbugguss in the section entitled "The untold story on Moi-Nyachae").

205. *See* MEDIA LAW & PRACTICE, *supra* note 112, at 562 (reporting the award of KES 10 million for compensatory and another KES 10 million for exemplary damages).

206. *See* World Bank, Access to Information, Media and Accountability in Kenya Workshop, Lake Naivasha Lodge, Kenya, Nov. 1-3, 2007, *Summary Report and Action Plan*, at 5, available at <http://siteresources.worldbank.org/PSGLP/Resources/NaivashaWshopReportandActionPlanwithAddendum.pdf> (explaining that Kenya's legal environment is one of the major challenges affecting the media in enhancing access to information).

207. (1970) E.A.L.R. 453 (Kenya).

Kenyan government. As such, instruments have no force of law unless and until they are domesticated by the National Assembly through legislation.²⁰⁸

Sadly, Kenya has done very little in this respect; without domesticating legislation, her signature on human rights instruments has remained inconsequential for the national cause of human rights.²⁰⁹ Indeed, until the promulgation of the New Constitution (2010), this remained a major challenge in the enforcement of the freedom of expression and the corollary right to information, like many other rights and freedoms. Fortunately, the advent of the new dispensation heralds a number of gains, including clarification of the position of international [human rights] law in Kenya.²¹⁰

6. Inadequate Redress Framework (under the Old Constitutional Dispensation)

Under the old constitutional dispensation, the level of redress offered for violations of human rights and freedoms was barely adequate; the prevailing legal regime failed to provide for adequate redress for aggrieved journalists, media houses, and members of the public, yet it handsomely rewarded those allegedly offended by these entities.²¹¹ It was similarly unfortunate that *definitions* of rights and

208. See *id.* at 459 (“[T]he provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya, save insofar as they are made such by the law of Kenya.”); see also *International Law Does Not Compromise Sovereignty?*, DAILY NATION (Kenya), June 10, 2010, at 1, available at 2010 WLNR 12012945 [hereinafter *Compromise Sovereignty?*] (explaining that treaties do not officially become Kenyan law unless they are “formally converted into an Act of Parliament”).

209. See *Compromise Sovereignty?*, *supra* note 208 (giving the example that it took nearly ten years for Kenya to implement the Convention on the Rights of the Child after signing it because of complicated ratification procedures).

210. See CONSTITUTION, arts. 2(5)-(6), 21(4) (2010) (Kenya) (providing that “general rules of international law shall form part of the law of Kenya,” that “any treaty or convention ratified by Kenya shall form part of the law of Kenya,” and that “[t]he State shall enact and implement legislation to fulfil [her] international obligations in respect of human rights and fundamental freedoms”).

211. Cf. Ndung’u Wainaina, *Contrary to Claims, MPs Are Not Speaking for Their Constituents*, DAILY NATION (Kenya), Mar. 20, 2010, available at 2010 WLNR 5973840 (remarking that Kenya’s legal system lacks the proper rule of law, which leads to an inequitable administration of the laws and threatens basic civil liberties).

freedoms were largely “determined” by a partisan judicial system,²¹² a reality that further skewed the scales of justice. Consequently, the quest for redress against the government and high-ranking public officials *was* largely futile over the years. This has compounded and perpetuated frustrations with the Kenyan justice system.

To make matters worse, as noted above, aggrieved individuals and media houses could not seek redress under existing regional and/or international instruments to which Kenya is a party.²¹³ Furthermore, reliance on regional and international redress mechanisms is practically hampered because Kenya has not formally acknowledged the competence of such mechanisms, particularly in the realm of the individualized complaint procedures available through the ICCPR and other international instruments.²¹⁴

The New Constitution (2010) establishes a comprehensive web of redress mechanisms, both judicial²¹⁵ and quasi-judicial.²¹⁶ Strikingly, the *locus standi* is generally open as to allow any party, including that acting on behalf of another, to petition the competent body to enforce the rights guaranteed.²¹⁷ It must be noted that the right extends to actual denial, violation or infringement, or threats to the

212. See Ahmednasir Abdullahi, Op-Ed., *Daily Nation—Time for Pro-Reform Judges to Speak Out*, ALLAFRICA.COM (May 29, 2010), <http://allafrica.com/stories/201005310228.html> (criticizing a High Court decision for pandering to the Executive by issuing a “perplexingly small-minded and bigoted judgment”).

213. See *supra* Part IV(A)(5).

214. See Optional Protocol to the International Covenant on Civil and Political Rights arts. 1-2, 4-5, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (establishing a committee to receive and consider communications from victims of violations of the ICCPR); *Status of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (last visited Nov. 1, 2010) (showing that Kenya has not ratified this protocol). Because Kenya has yet to become a party to the Protocol, aggrieved Kenyans have little recourse for ICCPR violations.

215. See CONSTITUTION, arts. 22(1), 165(3)(b) (2010) (Kenya) (granting the right to “institute court proceedings claiming that a right or fundamental freedom . . . has been denied,” and instilling in the High Court subject matter jurisdiction over these claims).

216. See *id.* arts. 59(1), (2)(e) (establishing the Kenya National Human Rights and Equality Commission, whose tasks include “monitor[ing], investigat[ing], and report[ing] on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs”).

217. *Id.* arts. 22(1)-(2), 59(3).

protected rights.²¹⁸

7. *Lack of Sustained Political Goodwill*

Generally, since corruption is a political offense, the fight against it requires sustainable political goodwill. Unfortunately, the Kenyan leadership fails to offer this goodwill, and, notwithstanding the rhetoric in official speeches, corruption continues to reign with reckless abandon.²¹⁹ Consequently, over the years the spoils of corruption have lined the pockets of many government leaders so that any authentic move to stop the rot and expose the villains has become a Herculean task.²²⁰

Indeed, today, and possibly into the foreseeable future, governance and anti-corruption reforms remain key challenges facing Kenya's efforts to resuscitate and sustain economic growth in the path toward greater national development.²²¹

B. INTERNAL CHALLENGES

Over and above the external challenges imposed upon it, the Kenyan media faces a number of internal hurdles that equally adversely impact its engagement in the anti-corruption crusade in the

218. *Id.* arts. 22(1), 59(3), 165(3)(b).

219. *See* GITHONGO DOSSIER, *supra* note 129, ¶¶ 19, 23 (illustrating the government's lack of commitment through the in-house frustrations faced by the former anti-graft tsar, John Githongo, whose professional approach to combating corruption was hindered by corrupt officials' intimidation tactics and the President's inaction).

220. *See* Wainaina, *supra* note 211 (arguing for major constitutional reforms that will combat institutionalized corruption and re-establish democratic principles); Mutuma Mathiu, *Kenyan Politics as a Process of Laundering Thieves and Murderers*, AFRO ARTICLES (Dec. 9, 2007), <http://www.afroarticles.com/article-dashboard/Article/Politics-as-the-process-of-laundering-thieves-and-murderers/62753> (explaining the vicious cycle of corruption in Kenyan politics); *see also* AFR. CTR. FOR OPEN GOVERNANCE, SHATTERED DREAMS: AN AUDIT OF THE KIBAKI GOVERNMENT'S ANTI-CORRUPTION DRIVE 2003-2007 (2008), *available at* <http://www.africog.org/reports/Narc%20Audit.pdf> (detailing how Kibaki's government generally failed to deliver on its promise to fight corruption).

221. *The Kenya Vision 2030 Program*, NAT'L ECON. & SOC. COUNCIL OF KENYA, <http://www.nesc.go.ke/News&Events/KenyaVision2030Intro.htm> (last updated Oct. 4, 2007) (explaining that "Vision 2030," launched on June 10, 2008, is an ambitious economic development plan that aims at producing an annual economic growth rate of over 10%, targeting six key economic sectors—tourism, agriculture, manufacturing, trade, information technology and financial services).

country.

1. Overemphasis on the Public Sector

Over the years, in its quest to highlight corruption in the country, the Kenyan media has, unfortunately, disproportionately emphasized corruption in the public sector; most, if not all, headline-grabbing news relates to high-level corruption within the government. A cursory review of the available information reveals that, more often than not, little attention is given to corruption in the private sector, yet that sector is equally marred.²²² Without prejudice to the media's tireless efforts, it must nonetheless be stated that, undoubtedly, information on corruption in the private sector needs equal emphasis and public attention if the anti-corruption crusade is to assume a holistic face or is to achieve comprehensive success.²²³

2. "Elitism" and "Urban Bias"

The Kenyan media suffers from "elitism," a situation that has made it rather difficult for ordinary Kenyans to be reached. For instance, in their quest for information on corruption in the country, media outlets almost exclusively interact with elites in urban-based civil society organizations; hardly ever do they interact with ordinary Kenyans in villages or grassroots-based organizations.²²⁴

222. See EAST AFRICAN BRIBERY INDEX 2009, *supra* note 13, at 19 (indicating that the Kenyan private sector currently ranks as the eighteenth most corrupt entity in the country). See generally GLOBAL CORRUPTION REPORT 2009, *supra* note 14, at 3-4 (commenting on the importance of the private sector at the individual and national levels to enhance the standard of living and catalyze progress, and noting that private sector corruption damages vital State and individual interests).

223. See GLOBAL CORRUPTION REPORT 2009, *supra* note 14, at 3 (describing the private sector as pivotal to improving the community but also noting that it is able to "disenfranchise [and] destabilize society and foster corruption").

224. See Dele Ogunade, *The Mass Media Systems of Kenya and Tanzania: A Comparative Analysis*, 1 AFR. MEDIA. REV. 99, 106 (1986), available at <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/africa%20media%20review/vol1no1/jamr001001009.pdf> (suggesting that the media "lack[s] . . . a well-defined concept of what is African about it"); *Do You Know Kenya's New Agenda?*, BUNGE LA MWANANCHI (June 21, 2010), http://www.bungela.mwananchi.org/index.php?option=com_content&view=article&id=1272:do-you-know-kenyas-new-agenda-&catid=125:special-articles&Itemid=63 (proclaiming the establishment of a new newspaper for grassroots Kenyans in response to the elitist mainstream Kenyan media).

Consequently, the media's presentation of information has been inevitably skewed in favor of the needs of elites and urban dwellers; it has significantly impacted on the quality of reporting as the journalists hardly venture into the rural settings, where the bulk of unreported corruption cases occur every other day. Furthermore, the media has been practically aloof from rural life, with no meaningful grassroots contacts to gather and report on cases of corruption in the hardship-prone rural areas.

3. *Corruption in the Media*

Unfortunately, the creeping of corruption has not spared the media itself. Though perception of corruption is generally low, as compared to that in the public sector and other private sector entities, media houses have been regularly cited as corrupt,²²⁵ scoring about 1.8 on TI's global corruption barometer,²²⁶ with the vice being reportedly rife during electioneering periods.²²⁷

4. *Lack of Follow-up*

Like the general Kenyan population, the media suffers "memory

225. See Fredrick Mudhai, *Time to Harvest? Media, Corruption and Elections in Kenya*, 4 INT'L J. COMM. ETHICS 30, 34 (2007) (chronicling several instances of media corruption and suggesting that "perhaps [media codes of conduct] can work best if they can be seen to help expose cases of media corruption").

226. See GLOBAL CORRUPTION BAROMETER 2009, *supra* note 17, at 29 (indicating that corruption perception in Kenya for political parties, parliament, the private sector, media, civil servants, and the judiciary has a cumulative average of 3.5 on a scale of 1 to 5).

227. See J. S. Kadhi, *Raila is the Media Darling in Elections*, MEDIAWATCHMAN (April 4, 2007), <http://mediawatchman.blogspot.com> (reporting that during the campaigns for the 2007 General Elections, the mainstream press in Kenya particularly favored presidential candidate Raila Odinga of the Orange Democratic Movement to the extent that journalists could be "guilty of manipulation of news, either actively or passively"); Jeff Otieno, *Daily Nation—PNU and ODM Get Most Coverage*, ALLAFRICA.COM (Nov. 1, 2007), <http://allafrica.com/stories/200710311023.html> (summarizing the findings of a study by Strategic Research for the Media Council, together with UNDP, which concluded that certain political parties received disproportionate amounts of media attention in election reporting); Morton Saulo, *The Standard—Media Coverage Favours Kibaki*, ALLAFRICA.COM (Oct. 13, 2007), <http://allafrica.com/stories/200710121148.html> (reporting that a recent survey, which analyzed re-election campaign coverage, found "a general bias in favour of the President in both State-owned and private media").

volatility;” after highlighting a corruption case, the media sooner than later forgets about the same. In the absence of consistent follow-up, the highlights themselves are the only achievement. It hardly goes without emphasis that the anti-corruption crusade demands consistent follow-up, where issues have to be revisited to assess the progress made, if any, and to forge the way forward in the hallowed anti-corruption battle.

V. INTO THE FUTURE: PROSPECTS AND THE WAY FORWARD

A. PROSPECTS FOR THE KENYAN MEDIA

Though the battle for freedom of expression and the right to information in Kenya is yet to be fully won, prospects are reasonably bright. A number of developments lend credence to this optimism. For instance, the government is gradually gaining some degree of sanity as it cedes to constant demands for the release of its grip on the fundamental rights and freedoms of individuals, in particular the freedom of expression and the right to information.²²⁸

Reportedly, the government is currently working on legislation aimed at creating an environment generally conducive for the freedom of information, with consultative discussions focusing on how to improve the Freedom of Information Bill, 2005.²²⁹ The

228. See, e.g., Walter Menya, *Gov't Willing to Review Media Law, Says Ndemo*, DAILY NATION (Kenya), Jan. 28, 2010, <http://www.nation.co.ke/News/-/1056/851062/-/vpvv26/-/index.html> (indicating that on Jan. 28, 2010 the Permanent Secretary in the Ministry of Information (Mr. Bitange Ndemo) acknowledged that repression under current media laws may have resulted from poor drafting, and promised that the government is ready to look into it). This statement of Mr. Ndemo likely heralded a big sigh of relief from the media, which had been very suspicious of the government's motives as it continually tightened its grip on media houses and other related entities.

229. Freedom of Information Bill (2005) (Kenya), available at http://www.marsgroupkenya.org/Reports/LawsandConventions/Kenya_Draft_Freedom_of_Information_Bill.pdf; see Bitange Ndemo, Op.-Ed., *Daily Nation—Your Editorial Was Meant to Besmirch the Government*, ALLAFRICA.COM (May 10, 2010), <http://allafrica.com/stories/201005101804.html> (rebuking criticisms of the government's record on the freedom of the press and describing the new Freedom of Information Bill as a progressive piece of legislation that “will place Kenya among an enviably small number of countries embracing the principle of the right to information”).

legislation, if passed, seeks to provide a right of access to information held by public bodies, subject to certain exceptions.²³⁰ More importantly, the country has just adopted a new Constitution. The New Constitution, which entered into force on August 27, 2010, contains a number of innovative in-roads to generally recognize and protect universally-recognized human rights, specifically including the freedom of expression,²³¹ the freedom of the media,²³² and the right to information.²³³

Be that as it may, the gains must be monitored; otherwise they may be erased quickly. This sentiment is echoed by the President of the United States of America, Barack Obama, who, during his visit to the offices of *The Standard* in Nairobi months after the infamous raid, remarked: “Press freedom is like tending a garden, it’s never done. It continually has to be nurtured and cultivated and the citizenry has to value it. It’s one of those things that can slip away if we don’t tend to it.”²³⁴

B. THE WAY FORWARD: RECOMMENDATIONS

In light of the achievements, challenges, and prospects for the engagement of the media in the anti-corruption crusade in Kenya, this paper offers two major recommendations to enhance the media’s role as society strives to take the anti-corruption crusade in Kenya to a higher level:

1. NORMATIVELY, Kenya has to establish a comprehensive and enduring normative framework for the protection of the freedom of expression, the freedom of the media, and the right to information.²³⁵ It would be desirable if—

230. See generally Freedom of Information Bill (Proposed Draft 2007) (Kenya), available at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/kenya_govt_foi_bill_apr07.pdf (providing the public with the right to access information held by the government, public authorities, and certain private bodies). Once passed, the Bill will have an *ex post facto* justification for the government’s Freedom of Information Policy. *Id.*

231. CONSTITUTION, art. 33 (2010) (Kenya).

232. *Id.* art. 34.

233. *Id.* art. 35.

234. Rhodes, *supra* note 179.

235. The country has to adumbrate the gains made in the New Constitution, which recognizes these freedoms and rights. CONSTITUTION, arts. 33-35 (2010) (Kenya).

(a) the protective regime enshrined in the New Bill of Rights²³⁶ is adequately supplemented by a comprehensive legislation to govern realization of the concerned rights and freedoms, with adequate checks against erosion and withering;²³⁷ *and*

(b) the legislation unlinks the right to freedom of information from the freedom of expression so that it is not viewed as a media issue. This spirit can already be discerned from the New Constitution (2010), which guarantees the right to information as a self-standing right.²³⁸

2. INSTITUTIONALLY, Kenya needs to move beyond mere aspirations. To realize this, the government must:

(a) put in place a credible institutional framework to monitor implementation of the above norms, while availing adequate redress for violations thereof;²³⁹

(b) put in place a credible institutional framework for dealing with corruption in the country, as envisaged in the New Constitution (2010);²⁴⁰ *and*

(c) accede to the prevailing international redress mechanisms, in particular the individual complaints procedures within the international and regional human rights systems.

236. *Id.*

237. This proposal is intended to guide, for instance, deliberations on the Freedom of Information Bill (Proposed Draft 2007) (Kenya), *available at* http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/kenya_govt_foi_bill_apr07.pdf.

238. CONSTITUTION, art. 35(1) (2010) (Kenya).

239. In this respect, the government has to hasten the on-going reform of the judicial and quasi-judicial redress mechanisms to ensure that, ultimately, justice is not only done but shall always seem to be done. This would, for instance, require the government to reform the judiciary (where the High Court wields the jurisdiction to hear human rights cases) and revamp the proposed Kenya National Human Rights and Equality Commission, established under article 59(1) of the New Constitution.

240. This shall require the government to put in place a new-look independent ethics and anti-corruption commission to ensure compliance with the provisions of Chapter 6 of the New Constitution (arts. 73-80), which embodies a comprehensive regime on leadership and integrity in the public service.

CONCLUSION

In a nutshell, this article modestly posits that the fight against corruption can only be authentic if the media freely engages in the public discourse, without any undue suppression of its activities. Proceeding on the argument that the freedom of expression is one of the integral bulwarks of the anti-corruption crusade, it demonstrates that the freedom is indispensable to unearthing and publicizing the hitherto unknown vices in the public and private sectors.²⁴¹ Additionally, this article notes that the exercise of the freedom of expression, hence the right to access information, is unfortunately not without challenges.²⁴²

Like every other human right or freedom, the two concepts are largely honored more in violation than in respect for their letters and spirits. In this respect, the article amply references the successive Kenyan governments' frequent efforts to gag the media, especially with regard to the anti-corruption crusade. Sadly, this has been the case throughout mankind's history, and it is no surprise that the influential French Emperor, Napoleon Bonaparte, remarked over two centuries ago: "I fear three newspapers more than a hundred thousand bayonets."²⁴³

241. *See supra* Part II.

242. *See supra* Parts III-IV.

243. *See* THE NEWSPAPER AND SOCIETY, *supra* note 2, at 254.