Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania

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> I cannot understand how the radar can be a priority for Tanzania … When I think about the poverty experienced by the schoolchildren whom I visited in Lunga Lunga, the concept of spending such an amount [US$40 million] on military radar is shocking.
>
> Daniel Kawczynski (MP)[1]

Introduction: Understanding corruption

Corruption, like all vices the world over, has many names under which it hides in all languages.[2] It also takes many forms. These include bribery, fraud, nepotism, embezzlement, graft, money laundering, extortion, influence peddling, abuse of public office or property, gifts, insider trading, and under- or over-invoicing.[3] But notwithstanding gaining such prominence – or, rather, notoriety – the question remains whether we all understand what *corruption* actually means.

Corruption has been defined as follows:[4]

> An act done with intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.

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1 The Conservative Member of Parliament for Shrewsbury & Atcham Constituency in the United Kingdom. See the United Kingdom's House of Commons debate reproduced verbatim in "Tanzania's Radar Deal: System Cost of £28m an Extraordinary Amount," *The Guardian* (Tanzania), 7 April 2007, p. 9.

2 The term corruption is associated with terms such as putrefaction, putrescence, rottenness, adulteration, contamination, debasement, defilement, infection, perversion, pollution, vitiation, demoralisation, depravation, depravity, immorality, laxity, sinfulness, wickedness, bribery, dishonesty etc.

3 Some people have referred to corruption as a cancer. See Wolfensohn, James D. 2005. *Voice for the world's poor: Selected speeches and writings of the World Bank President.* Washington, DC: The International Bank for Reconstruction and Development & World Bank, p 45.

4 See the Centennial Edition of *Black's Law Dictionary* (1991).

Simply explained, *corruption* is an act or conduct of dishonesty which is intended to implicitly influence, deviate from and alter the just behaviour and accepted societal propriety in order to satisfy one's selfish and parochial interests.[5] It should be noted that, in all cases, corruption is a reciprocal process involving two sides: the corruptor and the corrupted. Both have interest in the success of their specific unethical and illegal aims, and stand to benefit from the corrupt act. This makes the detection of corruption extremely difficult.

Corruption is not monopolised by civil servants: it is found in the public sector as well as in the private sector and within civil society.[6] In most societies, and particularly in the developing world, corruption has developed into a culture: not accepted, not loved – but taken for granted and ignored, and left to exist and entrench itself.[7]

The adverse consequences of corruption are immense. Through corruption, right becomes wrong and vice versa; the victim becomes the accused and the accused a witness; white becomes black and day becomes night because the right price has been paid. In short, corruption is an enemy of the people. What makes it even worse is that the impact of corruption disproportionately falls on the poor and most vulnerable sections of society.

James D Wolfensohn, former President of the World Bank, puts it better:[8]

> In country after country, it is the people who are demanding action on this issue. They know that corruption diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors. They also know that it erodes the constituency for aid programmes and humanitarian relief. And we all know that it is a major barrier to sound and equitable development.

Thus, the poor are in a double jeopardy situation. In the case of grand corruption, where powerful government bureaucrats take large kickbacks and major service projects are not properly implemented, it is the poor who miss the services. In the case of petty corruption, it is again the poor and vulnerable who will miss services in hospitals and courts of law because they are unable to influence nurses, clerks and others who deal with administration.

Corruption is not a new phenomenon: it is as old as history itself. There are adequate references and condemnation of this vice in most of the holy books. For instance, the Holy Koran describes the evil of bribery as immorally and

5 See Nyantakyi, Kofi. 2002. "Corruption: What is it?". In Friedrich-Ebert-Stiftung (Eds). *Corruption and development in Africa*. Accra: FES, pp 1–10.

6 (ibid.:8).

7 See Campos, J Edgardo & Sanjay Pradhan (Eds). 2007. *The many faces of corruption: Tracking vulnerabilities at the sector level*. Washington, DC: International Bank for Reconstruction and Development & World Bank, pp 1–25.

8 See Wolfensohn (2005:50).

unlawfully taking advantage of the efforts of others. It is falsehood that drags a person away from honesty and probity and takes him/her towards a life of dishonesty. The Holy Koran further says:[9]

> A man who resorts to corruption is a faithless person to his family, friends, society and government. Such a person is the most unmanly, avoid his friendship and brotherhood.

Equally, the Holy Bible has many references to corruption. It attributes corruption to a deceitful lust for corrupting things on this earth, like gold and silver. According to the Bible, corruption blinds the eyes of the wise and twists the words of the righteous.[10] The Bible says that the corrupt are like whitewashed tombs that are full of dead men's bones and all uncleanness. The corrupt are full of hypocrisy and iniquity.[11] They are wicked for accepting bribes to pervert the ways of justice.[12] Therefore, the Holy Bible sees a corrupt person as the one who would call God "Lord", but will never do anything that God says. Being slaves of corruption such people will not even regard their corrupt ideas, habits and actions as evil, and will finally perish in their own corruption, depravity and bondage.[13]

Over the years, corruption has continued unabated – although it has increased in volume, changed form, and become more refined as society developed. However, age notwithstanding, it does not mean that corruption is a permanent and non-ending phenomenon. People should not lose hope; rather, the struggle against corruption should be intensified.[14]

Corruption and constitutionalism

Corruption is very relevant to constitutionalism. This is because it undermines all the major tenets of constitutionalism, namely good governance, the rule of law, and the independence of the judiciary.

9 According to the Holy Koran, corruption spreads like wildfire. It spreads from a father to his offspring, from teachers to pupils, from false prophets to their followers, from buyer to seller and vice versa, and so on, until society as a whole is corrupted. See *Holy Qur'an.* 1983. Text, translation and commentary by A Yusuf Ali. Brentwood, MD: Amana Corporation.

10 See Exodus 23:8 and Deuteronomy 16:19.

11 See 2 Chronicles 19:7.

12 See Proverbs 17:23.

13 On what the Holy Bible says on bribery and corruption, see Lang, J Stephen. 1999. *Biblical quotations for all occasions*. New York: Gramercy Books, pp 77–78. See also The New Rainbow Study Bible. 1996. *Holy Bible: New international version*. El Reno, OK: Rainbow Studies, Inc.

14 It has been correctly noted that, in recent years, corruption has become an issue of major political and economic significance – hence the necessity to curb it. See Ruhangisa, John Eudes. 2007. "Anti-corruption and governance in East Africa". In Ojienda, Tom O (Ed.). *Anti-corruption and good governance in East Africa: Laying foundations for reform*. Nairobi: LawAfrica, p 215.

Good governance

The main victim of corruption is good governance. In a society where corruption reigns, one can hardly talk of good governance. This is because good governance is the centre of constitutionalism. It involves the fair exercise of political, economic and administrative authority in the management of a country's affairs at all levels. Good governance affirms a form of governance which is democratic, and comprises mechanisms, processes and institutions through which citizens and groups articulate their interests, mediate their differences, and exercise their legal rights and obligations. Good governance is, therefore, about efficient and effective management in the public sector, which is underpinned by high standards of integrity. The most important pillars of good governance include transparency in all affairs of the state, accountability to the public, responsiveness to people's needs, effectiveness in meeting people's expectations, and efficiency in all spheres. When corruption sets in it demolishes this well-conceived structure.

The rule of law

In any democratic society that believes in constitutionalism, the rule of law must prevail. The rule of law demands that all subjects be treated equally before the law. That means that all classes of people in a civil society should be treated alike by the law itself and before all the law enforcement bodies and agencies created by the law. The law should neither be made to benefit a particular section of society nor disadvantage another.

Equality before the law, which is central to the rule of law, requires all functions of the state that are likely to affect the basic rights of the people to be subjected before the law.[15] This means that the state and its organs should act according to and within the authority conferred by the law. This is in terms of administrative law, rather than a spin-off of equality. In the same vein, the law should not give unnecessary privileges, advantage and cushions to the state and its organs. This rule is strict in the sense that, apart from the state being 'a subject' of law as a juridical person, if the state is accorded such privileges, it will abandon its duty to act within the law and the rights of the individual will be at stake – and without a remedy in cases of excesses. The ideal situation created by the rule of law crumbles when corruption sets in. Sections of society demand and are granted, through corrupt means, rights which they do not deserve, and undermine the rights of others without just cause. In such a situation, one cannot talk of the rule of law: *it is the rule of the corrupt*.

15 See Hatchard, John, Muna Ndulo & Peter Slinn. 2004. *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern African perspective.* Cambridge: Cambridge University Press, pp 5–11.

Independence of the judiciary

The independence of the judiciary is another important element of constitutionalism which can easily be eroded in a corruption-ridden society. In a society which believes in constitutionalism, the judiciary occupies a very special position. This is because it is entrusted with the duty of deciding who is right and who is wrong. This task is given to judges, magistrates and other judicial officers. Within the doctrine of the separation of powers, the legislature is supposed to make the laws, the judiciary to interpret and administer them, and the executive to enforce them. To be able to undertake its functions fairly and impartially, the judiciary is required to be independent of the other two organs of state and independent from political pressure.

However, it is not sufficient for the judiciary to be independent of the legislative and executive arms of the state and the influence of politicians. The judiciary should also be *free from corruption*. In a society in which judicial decisions are not dependent on the evidence adduced before courts of law, but rather on the social status of the parties involved and how much they have bribed the prosecutors and judges, one can hardly talk of judicial independence. *This is because the judiciary is not independent, but firmly in the hands of the corrupt*.

Grand corruption: Its main elements

In most societies, the type of corruption which affects and troubles the common person is petty corruption. This type of corruption involves the small change that has to be given to the clerk for a court file that 'could not be found' to miraculously appear; to the nurse so that your sick relative can get a bed and other services in a hospital ward; to the traffic police officer to close his eyes to an obvious traffic violation such as illegal parking, going through a red light, and driving an unroadworthy vehicle on a public road.

While not trying to justify the actions or omissions of these public officials, these are usually actions by low-ranking officers who have been squeezed by the system and are trying to make ends meet. A society that is serious about fighting corruption needs to address the real conditions under which this category of corrupt public official lives. It is naïve to protest vociferously about the actions of these officials without scientifically studying their situation. If we pay a monthly salary that can only last a week, how do we expect the person to survive for the three weeks until payday?

However, the real problem of corruption which undermines the society and unfortunately goes unnoticed by the majority of the population relates to *grand corruption*. This form of corruption has three main elements which are worth comprehending. One, grand corruption has serious and *devastating effects*

on the economy of the country. A single dirty transaction by a public official affects citizens in their millions across generations for many years to come. Two, grand corruption does not come out of *need*, but out of *greed*. It is done by people who are already well-off and who are already being taken care of by the society. More often than not, they have all the basic needs of life and beyond. They are therefore getting into destruction of the society and its resources for leisure and luxurious needs. It is "primitive" accumulation for the sake of it and at best in order to force recognition in the society. Three, grand corruption does not involve rank and file. It is done by the *highly educated* and the *elite* in the society.

What constitutes *grand corruption* is contextual. It depends on the country and the level of its economy. This is because the actions of the corrupt officials affect the different economies differently depending on the size of corruption involved and the economy of the state. In the Tanzanian context, grand corruption has been given four elements which identify it well. These are as follows:

- It should involve a huge amount of money (about US$1 million);
- The person(s) involved must have highly ranked government posts (e.g. a Director in a Ministry or Department, or a higher placement);
- The transaction(s) involved must affect or dent the economy of the country, and
- The transaction(s) must affect the public interest.

In other jurisdictions, the conditions and the levels making a corrupt transaction *grand* may be different. However, *grand corruption* entails large-scale transactions mainly involving the state, such as major road constructions, construction of dams, and the procurement of military equipment. These types of activities involve large sums of state money. If a small percentage of this money disappears into private pockets it could mean a lot to the lives of individuals in positions of power and influence in government. On the other hand, it seriously affects the country and its economy because once corrupted, the public official is incapable of effectively exercising oversight over the projects or transactions involved. Therefore, the country ends up being the loser. It gets sub-standard products or services and, in some cases, nothing at all. For instance, it is not surprising for expired medicine worth millions of US Dollars to be delivered with no questions asked; for roads which do not meet required standards and do not last long to be constructed while people are watching; and for the state to start paying for hydroelectric dams which are never built.

Tanzania and grand corruption

For years, there have been many dubious transactions in Tanzania that have – and continue to – cost the country dearly, but with which any right-

thinking member of the community can easily detect that there is something fundamentally wrong. However, the avenues towards challenging a dubious transaction like that are almost closed. The law has not been facilitative, the media is by and large controlled by self-serving parties, and freedom of expression is simply non-existent. Over and above that, all large government transactions are stamped "confidential" and are kept well beyond public scrutiny. This was the case in Tanzania, particularly during the many years of one-party rule.

More recently, particularly after the introduction of a multiparty political system and democratisation in general, people are becoming brave and questioning old taboos. However, although no positive results have been registered so far because of the presence of a single strong party which monopolises the political space, the very fact that these issues are being raised is important. Two examples in most recent past in Tanzania which stink of grand corruption are worth closer examination.

Radar system purchase from Britain

In 1995, the Government of Tanzania raised the idea in the National Assembly that it wanted to purchase a radar system in order to make the country's airspace safer and, in so doing, attract more airlines to the country. The majority of the Members of Parliament (MPs) objected to the idea. According to the legislators, Tanzanians had more serious and pressing problems which the government should treat as priority, namely those relating to poverty, and areas such as health and education.

Despite the MPs' objections, the government went ahead with the project. In 2001 it decided to order a civilian/military radar system from BAE Systems in the United Kingdom, at a cost of £28 million. Strong objections were raised to the deal by the then UK International Development Secretary, Clare Short, and the former Chancellor of the Exchequer and now Prime Minister, Gordon Brown. The radar system was alleged to be four times more expensive than a normal civil air traffic control system, which Tanzania actually needed.

This matter divided the Labour Cabinet in UK. The opposing argument held that Tanzania, which already had eight military jets, did not need such a sophisticated aviation system. British MPs urged their government to assist Tanzania in addressing poverty instead. However, then Prime Minister Tony Blair supported the purchase – allegedly to salvage 250 jobs at BAE Systems at Cowes. Thus, he sided with Isle of Wight MP Andrew Turner, who argued that Tanzania was a grown-up government which should be allowed to make its own decisions without interference by the British. The project was also condemned by the World Bank, however, which called it a waste of money for a country with a per capita income of just £170 per year. Nonetheless, without any public debate in Tanzania, the controversial radar system was

delivered and installed. Tanzania's foreign debt was automatically increased by £28 million.[16] This was not to be paid by current politicians, but by future generations. A lengthy investigation by the Serious Fraud Office (SFO) in the UK subsequently discovered that 31% of the deal's contract price had been diverted via Switzerland. BAE had transferred the money to a subsidiary, Red Diamond Trading, registered anonymously in the British Virgin Islands. The latter moved the cash to a Swiss account in the name of a company that was secretly controlled by a Tanzanian middleman, Shailesh Vithlani. Vithlani allegedly passed the money on to Tanzanian politicians and officials. He also maintained close ties with top politicians and military leaders, and has acted as an agent not only on the radar deal, but also in the 2002 purchase from the United States of a top-of-the-range Gulfstream official jet for the then Tanzanian president, Benjamin Mkapa, at a cost of more than US$40 million.

It is embarrassing that new information is now emerging, questioning the propriety of these two transactions. Information which has not yet been openly refuted by the Tanzanian Government indicates that, in the radar system deal, a Tanzanian middleman involved was paid US$12 million (a 30% kickback) by BAE Systems to distribute to government functionaries who 'facilitated' the deal. This amount was paid directly into a Swiss bank account in the name of the middleman.[17]

Purchase of a Presidential Jet

In 2002, the Tanzanian Government decided to buy its President a brand new US$40 million Gulfstream G550 Jet. This aeroplane could only land at three airports in the country: Dar es Salaam, Kilimanjaro and Mwanza. This was not, therefore, a facility by means of which the President would be visiting any villages where the majority of his electorate live. Indeed, it was capable of flying non-stop to London, Washington, DC and Beijing! Therefore, its use against its value was questioned. Hon. Samuel Malecela (MP), a senior politician who had held various top government positions in the country, including that of Prime Minister, observed as follows in Parliament:[18]

16 See "British MPs discuss corruption allegations in Tanzania's radar deal", *ThisDay* (Tanzania), 19 July 2007, p 16; "How Tanzania wasted money that could have educated 3.5 million children", *ThisDay*, 2 August 2007, p 16; and Filiku, Philip H. "Poor Tanzania: Used radar, cars, military aircrafts, even used underwear?". *ThisDay*, 7 August 2007, p 19. On a closely related dirty deal, see "New revelations on military helicopters deal: Deliberately overpriced by close to $20 million", *ThisDay*, 5 July 2007, p 1; and "Before military choppers deal landed in court … Ikulu was warned, asked to intervene", *ThisDay*, 7 July 2007, p 1.

17 See "Tanzania's radar deal: System cost of £28m an extraordinary amount", *The Guardian* (Tanzania), 7 April 2007.

18 For this statement by the MP for the Mtera Constituency, see Kisembo, Patrick. 2007. "Sell Presidential Jet, MPs say". Available at <http://ippmedia.com>; last accessed 12 July 2007.

> It is amazing to see that even the Presidential Jet cannot land in Dodoma [the official capital of the country]. The government has to do something.

A request by the World Bank for the government to explain its purchase fell on deaf ears. Questioning the logic and propriety of flying to Europe in a brand new jet to beg for aid for Tanzania, the Chair of the opposition Civil United Front (CUF), Prof. Ibrahim Lipumba, said that the money for the expensive jet could have been better spent on education and health.

Interestingly, the UK's International Development Secretary at the time, Clare Short, defended Tanzania's purchase of the jet, even while the UK government was giving the Tanzanian government £270 million in aid.[19] The World Bank noted that this was embarrassing for Ms Short, who had spiritedly fought against the Tanzanian purchase of a military radar system a year before.[20]

The government defended the purchase. The then Minister for Transport, Prof. Mark Mwandosya, said that the jet would make the President more independent by making it possible to stop hitching lifts from other presidents. As he rhetorically asked, –[21]

> [w]hat is the cost of the pride of the nation? The number does not mean anything as long as we buy the plane, maintain it and look after the welfare of our people.

The former Finance Minister, Basil Mramba, was not that civil. As far as he was concerned, the Tanzanian Government was going to buy the radar system and the Presidential jet, whether the people liked it or not. He declared that "Tanzanians can just as well eat grass" – but that the purchases would go ahead.[22] His main arguments were that Tanzanian airspace should be safe for foreign airlines to land, and this would attract attract foreign investors. That, in his opinion, was the basis of the radar purchase. As to the presidential jet, the Minister said that the Tanzanian President was just too important to fly in the same planes – namely commercial airlines – that could be used by Al Qaeda as well. Since the President has now retired, however, it is not clear which planes he now uses. Are they not the same, in the words of the Hon. Minister, as those used by Al Qaeda?

At the end of the day it is Tanzanians who will have to pay for this and other similar dirty transactions. The question that troubles most Tanzanians is why

19 See Hencke, David. 2002. "Short defends personal jet for Tanzania's President". *Guardian* (London), 27 July 2002.

20 See Hencke, David. 2002. "£15m Jet sparks new Tanzania row", *Guardian* (London), 22 July 2002.

21 Prof. Mwandosya was quoted by the British Broadcasting Corporation (BBC) on 6 October 2004; see <http://news.bbc.co.uk/2/hi/africa/3719712.stm>.

22 See BBC News. 2002. "Tanzania defends Presidential Jet plans", London: BBC, 23 July 2002.

a departing President should insist on buying a plane as he is about to leave office – a plane he would not be able to use himself. Why not rather allow the incoming leader to sort out his or her own transport problems?

Addressing grand corruption through the law

Though not conceded by many, corruption – especially grand corruption – was introduced in Tanzania in particular and in Africa in general from the developed economies. In the latter economies, even today, corruption is condoned and euphemistically referred to as 'grease' or 'lubrication money' in foreign private investment circles, and a business person can get tax relief on such 'expenditure' because it is not regarded as taxable income.[23] Therefore, as we wholeheartedly embrace the market economy as part of globalisation, we take both the wheat and the chaff of the system, i.e. investments and corruption together.[24]

Tanzania began addressing corruption during the colonial period. Already during that era, elements of corruption, particularly in official circles and in the provision of services, the practice was becoming apparent. The colonial regime therefore introduced provisions against corruption in the Penal Code in 1932. This was followed by specific legislation on the subject, by way of the Corruption Ordinance (Chapter 400 of the Laws of Tanganyika). The first post-colonial legislation came in 1971[25] – ten years after independence – and was an indication that the 'independence honeymoon' was over and, after the Africanisation of the civil service, the new elite were developing evil fangs.

This law has been amended several times in response to changes in the political and economic situation in the country. However, apart from defining *corruption* and providing institutions to fight it, by and large, this law has remained narrow in its approach to corruption by mainly concentrating on petty corruption – perhaps because it was and still is prevalent in most spheres of public life in the country, and irritates members of the public on a daily basis.

On the international level, the Tanzanian Government has also been active in issues relating to corruption. It signed the Southern African Development

23 On this see Kaufmann, D & SJ Wei. 1999. "Does 'grease money' speed up the wheels of commerce?". *International Monetary Fund Working Paper No. 00/64.* Washington, DC: National Bureau of Economic Research, IMF; Svensson, J. 2003 ."Who must pay bribes and how much? Evidence from a cross-section of firms". *Quarterly Journal of Economics*, 118(1):207; and Soreide, Tina. 2006. *Business corruption: Incidence, mechanisms, and consequences*. Unpublished doctoral thesis submitted to the Norwegian School of Economics and Business Administration, Oslo.

24 See Stiglitz, J. 2002. *Globalization and its discontents.* Allen Lane: The Penguin Press.

25 See Prevention of Corruption Act, 1971 (No. 16 of 1971), and Chapter 329 of the Revised Laws of Tanzania of 2002.

Community (SADC) Protocol against Corruption of 2001,[26] the 2003 African Union Convention on Preventing and Combating Corruption,[27] the 2003 United Nations Convention Against Corruption,[28] which were ratified in 2005 and 2006, respectively, by the Parliament of the United Republic of Tanzania. The next logical step was to domesticate these global and regional legal obligations through a legislative process.

To this end, in January 2007, the Tanzanian Government published a Bill introducing a new law on corruption: the Prevention and Combating of Corruption Act, 2007.[29] This Bill went through the country's usual process of approving legislation. It was discussed, inter alia, by the public (stakeholders) and, having gone through the Parliamentary Committees stage, came back to the National Assembly, was debated at length and passed, subject to a few insignificant changes, before it was signed into law by the President on 11 June 2007.[30]

According to the Director-General of the Prevention of Corruption Bureau, Edward G Hoseah, the new law is intended to take into account technological advances, best practices and evolving international and regional instruments against corruption.[31] This will make the task of combating corruption manageable and create a corruption-free Tanzania. More importantly, it shifts from the traditional and now outdated ways of addressing corruption and moves into new areas discussed in public but never legislated. For the first time, it also addresses grand corruption, which was only haphazardly addressed in the Penal Code and other laws but never treated as corruption per se. In the sections that follow, we carefully examine how this new law treats the issue of grand corruption in the country. By a rough estimation, this form of corruption accounts for more than 70% of corrupt practices on in Tanzania.

The new law incorporates some new types of corruption as well, which directly relate to grand corruption. These are mandatory provisions in any national law on corruption under the United Nations Convention Against Corruption (UNCAC) best-practice considerations and were emphasised by stakeholders. These offences include corrupt transactions in contracts;[32] corruption offences

26 See United Nations Office on Drugs and Crime. 2005. *Compendium of international legal instruments on corruption* (Second Edition). New York: United Nations, p 259.
27 (ibid.:116).
28 (ibid.:21).
29 See Prevention and Combating of Corruption Act, 2007 (No.11 of 2007).
30 See "MPs call for limit to DPP powers over PCB [the Prevention of Corruption Bureau]," *ThisDay* (Tanzania), 14 April 2007.
31 Hoseah, Edward G. 2007. "An overview of the Bill on Prevention and Combating of Corruption Act, (PCCA) 2007". Mimeograph.
32 See Prevention and Combating of Corruption Act, Section 16 (1).

in procurement;[33] corrupt transactions in auctions;[34] bribery of foreign public officials;[35] and embezzlement and misappropriation.[36]

It is important to note that engagement in any of these offences has the potential of costing the nation very dearly because it involves huge sums of money. Again, inclusion of these offences comes at a time when top government officials have been trying to create a false picture that public contracts are confidential and should not be accessed by the public. The net result has been shielding grand corruption in the name of confidentiality, and creating a climate that is 'conducive' to investment by not exposing what the government and its officials actually agree with their investors. Once in office, bureaucrats quickly forget that they are representatives of the public and that it is members of the public who, in their collectivity, own the natural and other resources of the country. Therefore, by introducing provisions which target grand corruption, the law is demystifying the confidentiality theory upheld by the bureaucrats for the first time. It is good to see government bureaucrats being called upon to account for what they are doing on behalf of the public.

Corrupt transactions in contracts

Almost daily, government officials enter into various types of contracts on behalf of the country. The majority of these involve millions of shillings. By their corrupt actions, they impose liability on the nation. It is therefore important that transactions of this nature are done in good faith and with integrity, as well as with total transparency. However, experience indicates that this is not the norm. More often than not – in both developed and developing countries – public officials take advantage of public trust for their own benefit. There are stories galore of the 'Mr 10%'. That is to say, before the country got 90% of the transaction, the public official pocketed 10% of the deal. Things are worse today. In some countries, with total impunity, public officials have turned the whole transaction upside down: the country gets 10% and the official takes 90%. This explains the many imaginary bridges, dams, and factories that only exist on paper, but not on the ground – and yet the country is deeply in debt.[37]

Section 16 of the Act addresses corruption in contracts. It makes it an offence to offer any advantage to a public official as an inducement to facilitate any award of any contract or sub-contract with a public body. The contract may relate to performance of any work or supply of services.[38] It is also an

33 (ibid.:section 17(1)).
34 (ibid.:section 18(1)).
35 (ibid.:section 21).
36 (ibid.:section 28).
37 On stories of this nature in sectors such as forestry, electricity, education systems, transport, petroleum, water and sanitation, and financial administration, see Campos & Pradhan (2007).
38 Section 16(1).

offence for a public official to solicit or accept any advantage or reward as an inducement to facilitate procurement of a contract.[39] The problem here is the type of punishment provided for the commission of the offence. Originally, it was proposed that a person convicted under this section would be liable to a fine of not less than one million shillings but not more than three million shillings, or to imprisonment for a term of not less than three years but not more than five years, or both.[40] Both stakeholders and MPs called for a stiffer punishment. This has now been accepted. The new punishment is a fine not exceeding fifteen million shillings or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment. These changes do not appear in the Bill or in the Act, however: the sentence has remained as originally proposed!

What is puzzling is why legislators would want to maintain this most lenient punishment for corruption in contracts, and yet treat corruption in procurement, and auction differently. The latter is subject to a fine not exceeding fifteen million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

Corrupt transactions in procurement

Governments make huge procurements. Because the government represents the public and there are millions of citizens involved, anything procured is usually in bulk – be it medicine, vehicles, military equipment, or services. Officials in decision-making positions as regards procurement are highly sought after by the business world. They will be offered all forms of inducements because a single purchase by the government is likely to keep the business afloat for months – if not years. Here again, kickback offers of 10% or more are common. The kickback is willingly paid due to the gains anticipated by the business.

Section 17 of the Act makes it an offence to offer any advantage or reward to any person for purposes of withdrawing of a tender or refraining from inviting a tender for any contract with a public or private body for the performance of any work or supply of services.[41] Again, it is also an offence to solicit or accept such advantages or inducement to such a withdrawal of tender or refraining from inviting tender.[42] A person convicted for this offence is liable for a fine not exceeding fifteen million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.[43] The advantage or amount of value received in this transaction is liable for confiscation.[44]

39 Section 16(2).
40 Section 16(3). In addition, any advantage or value received is obliged to be confiscated by the government, as per section 16(4).
41 Section 17(1)(a).
42 Section 17(1)(b).
43 Section 17(2).
44 Section 17(3).

Corrupt transactions in auctions

Auctions of public property are a controversial area. This is because officers of the government involved try to bend all the rules to ensure that they, their children and/or their relatives and friends benefit from the auction. In other words, they ensure that they directly benefit from the 'privatisation' of the public property being auctioned. It is not strange, therefore, to find government buildings – particularly living quarters, farms, vehicles, furniture being 'auctioned' under suspicious circumstances and taken at giveaway prices by people with connections to the powers that be. Thus the whole process of auction is stage-managed to fool the public.

This endemic social problem is addressed in section 18 of the Act. It is an offence to offer any advantage as an inducement or reward on account of that other person's refraining or having refrained from bidding at an auction conducted by or on behalf of any public or private body.[45] It is also an offence to solicit or accept any advantage as an inducement or reward for refraining from bidding.[46] The punishment for this offence is a fine not exceeding fifteen million shillings or an imprisonment term not exceeding seven years, or both such fine and imprisonment.[47]

It should be noted that this provision does not go far enough to block persons with inside information – that may give them the advantage over others – from taking part in the auction. It is recommended that persons with an interest in or with the potential of gaining inside information relating to an auction should be barred from taking part in such auction. Moreover, once an auction has taken place and it is discovered that a person's success was due to having gained such information prior to the auction, the whole exercise should be declared null and void and a prosecution should follow. This should not be limited to auctions only, but should be extended to tenders as well.[48]

Bribery of foreign public officials

Many developing countries depend on donor funds for their economic and social development. These may entail funds from bilateral or multilateral

45 Section 18(1)(a).

46 Section 18(1)(b).

47 Section 18(2).

48 The decision last year by the US Government to award a staggering US$35 billion contract to the European Aeronautic Defence and Space Company – the owner of Airbus – to build an aerial refuelling aircraft and refuse the bid by the American aircraft builders Boeing, on top of imposing a fine on the company for having access to inside information prior to preparing its bid, speaks volumes. It is a movement in the right direction and sends the right signals in business circles. On this important push for cleanness in business, see "Boeing outflanked for Air Force tanker deal by Bold Ideas", *International Herald Tribune*, 10 March 2008; and "In tanker bid, it was Boeing vs. Bold Ideas", *New York Times*, 10 March 2008.

donors, international non-governmental organisations, or international inter-governmental organisations. These institutions usually provide huge amounts of money. It has been argued that officials in these institutions are not angels. Notwithstanding the rhetoric about good governance, transparency, integrity, and so on, they are not beyond suspicion. They may be involved in corrupt transactions in their relationship with their local counterparts, i.e. the individuals and institutions to whom they are making grants.

It is this possibility which is targeted by section 21 of the Act. The provision makes it an offence for any person to intentionally promise, offer or give any foreign public official or an official of a public international organisation, or any other person or entity an undue advantage in order that such foreign public official acts or refrains from acting in the exercise of his official duties to obtain or retain business or other undue advantage in relation to a local or international economic undertaking or business transaction. Equally, it is an offence for such foreign public official to solicit or accept such undue advantage. The punishment for this offence is a fine not exceeding ten million shillings or a prison term not exceeding seven years, or both such fine and imprisonment.

This is also an interesting new area of corruption. However, apart from the punishment being too lenient, the net needs to be cast further out in order to capture local staff working in offices of this nature as well, and not only the foreign officials who do. Indeed, section 21 makes reference to foreign public officials or officials of public international organisations. The latter, in my opinion, includes local officials working in these organisations.

Embezzlement and misappropriation

Interestingly, in the area of embezzlement and misappropriation, the Act stretches itself to cover both the public and private sectors. According to section 28 of the Act, any person who dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him/her or under his/her control or allows any other person to do so commits an offence. The penalty for this offence is heavy: it constitutes a fine not exceeding ten million shillings or imprisonment for a term not exceeding seven years, or both such fine and imprisonment, depending on the gravity of the offence.

Supporting provisions to curb grand corruption

Corruption is a worrying offence because taming it not as easy as is the case with other crimes. This is because law enforcement agents face *two willing parties* to the crime; both both are equally guilty, and stand to gain if not detected. Logically, both have an interest in hiding the transaction because, as indicated above, in one way or the other they stand to gain tremendously from it at the public's expense – financially or morally. In such a situation,

one requires provisions to facilitate the detection of corruption. The Act provides such avenues. They include the requirement that public officials give an account of their property; the requirement that such officials explain the source of such property; the presumption of corruption; the freezing of assets; and forfeiture of the proceeds of corruption.

(a) *Requirement to give account of one's property*: Since the introduction of the market economy and its liberalisation, public officials have become very evasive about property ownership. Some even argue that asking them what they own is an interference with their right to privacy. The Act now gives officers of the Prevention of Corruption Bureau the power, upon due authorisation by the Director-General, to require any public official in writing to provide within a specified period of time a full and true account of all or any class of property which such an official or agent possesses or possessed when s/he held public office.[49] This is an important provision because the requirements under the Leadership Code are too loose.[50] In complying with the latter, public officials fill in forms as a mere formality: nobody checks the truth of their declarations. The forms are simply filed, but there are stringent requirements when it comes to public access to such information, particularly by the media. Therefore, where the Bureau suspects that a public official has acquired property corruptly, this provision empowers it to require the person concerned to fully account for his/her wealth.[51]

(b) *Requirement to explain sources of property and maintenance of high lifestyle*: Over and above providing a detailed account of property owned, section 29 of the Act requires a public official to explain how such property was acquired. This is particularly important if the property owned is disproportionate to his/her present and past lawful income, or where the official is seen to be maintaining a standard of living above that which is commensurate with his/her present and past lawful income.

(c) *Presumption of corruption*: Section 35 of the Act provides that, where it is proved that an advantage was offered, promised or given; or solicited, accepted or obtained or agreed to be obtained by a public official by or from a person or an agent or person holding or seeking to obtain a contract from a public office, the advantage is deemed to have been offered, promised or given, solicited, accepted or

49 Section 26(1).

50 On the highly watered-down ethical conditions for leadership, see the Public Leadership Code of Ethics Act, 1995 (No. 13 of 1995), as amended by Act No. 5 of 2001.

51 The information provided can be used in the prosecution of the official (section 26(2)). Refusal to provide the information required or providing false information is an offence attracting a fine not exceeding five million shillings or a prison term not exceeding three years, or both such fine and imprisonment.

obtained or agreed to be accepted or obtained as an inducement or reward unless the contrary is proved. This provision has the effect of *shifting the burden of proof to the accused* to prove otherwise. This is important in corruption cases, where it might not be easy to meet the normal standards in criminal law of proving a case beyond reasonable doubt. Thus, it is only fair to pressurise the accused to deliver reasons once one side has proved its case.

(d) *Freezing of assets*: When a public official is under scrutiny for any corrupt or corruption-related transaction, it is quite easy for him/her to deal with the property related to the investigation in such a way as to frustrate or defeat the investigators' efforts. This may include selling, transferring or destroying the property. In order to avoid such eventualities, section 38 of the Act allows the court, upon application by the Director of Public Prosecutions, to order the freezing of the suspect's property. Once this order has been made, any payment, transfer, pledge or other disposition of such property is null and void.[52]

(e) *Forfeiture of proceeds of corruption*: Any property that is derived or obtained by a person from the commission of corrupt offences is permitted to be confiscated and forfeited to the government.[53] This includes situations where the accused is convicted. It is the duty of the Bureau, in collaboration with the Office of the Attorney-General, to ensure that such proceeds are indeed confiscated and forfeited. This forfeiture serves to preclude situations where the convicted official comes back to enjoy the proceeds of his/her corrupt actions after serving a prison term. This is meant to send a warning to all those involved in corruption that society will not allow them to enjoy the fruits of their illegal transactions in future, and thus, discourages them from indulging in corrupt practices.

There is no doubt that the net is closing in on the authors of and participants in grand corruption in Tanzania. However, its final degree of success will depend on the implementation of the new law which has just come into effect.[54]

Critique of the spirited attempt to address grand corruption

By and large, the new law seems to carry a new and spirited attempt to deal with corruption in the country, namely by moving from the old tradition of

52 Section 38 (7).
53 Section 40.
54 See Islam, Mbaraka. 2007. "New anti-graft law comes into effect", *ThisDay* (Tanzania), 3 July 2007, p 1.

restricting the war on corruption to petty corruption only. This development is partially due to the contribution of the Warioba Commission's Report in educating the public on the widespread nature of the problem of corruption in the country.[55]

However, if one critically examines the anti-corruption efforts to date, one does not see the political will on the part of the government to wage a full-fledged war on corruption. This is clearly discernible from the government's general attitude towards corruption. Firstly, the government is not keen to have all avenues of corruption – and grand corruption, in particular – closed. For instance, it is very nervous about legislation on *politically related corruption* and for wrongdoers to be prosecuted and punished.[56] The fears of consequences of legislation in this field, albeit understandable, are not accepted as genuine and legitimate. What exactly are the fears, and how have they been expressed? Secondly, the punishment being recommended in corruption offences is trivial. It is not commensurate with or reflective of the seriousness of the offences being dealt with. It is as the punishments are being suggested by persons who are potentially going to be affected by them, i.e. potentially corrupt elements likely to be prosecuted at any point, and thus preparing a smooth landing for themselves.

To start with, the fines provided in the law for those convicted in grand corruption cases are paltry. They do not take into account the gravity of the offences involved. Experience from cases involving narcotic drugs has indicated that, where convicts are fined small amounts, they pay up promptly and rush back to their old habits without any feelings of remorse. The same should be expected

55 Warioba, Joseph S. 1996. *Report of the Presidential Commission of Inquiry Against Corruption*, Dar es Salaam: Government of Tanzania.

56 Political corruption, of which the political class in Tanzania is so weary, is grand corruption. It is engaged in by persons in influential or decision-making government positions. On this form of corruption, see e.g. Amundsen, Inge. 2006. *Political corruption.* Bergen: Anti-Corruption Resource Centre, Chr. Michelsen Institute; Blake, Charles & Christopher G Martin. 2006. "The dynamics of political corruption: Re-examining the influence of democracy". *Democratization*, 13(1):1; Brinkerhoff, Derick W. 2000. "Assessing political will for anti-corruption efforts: An analytical framework". *Public Administration and Development*, 20(3):239; Harris, Robert. 2003. *Political corruption: Beyond the nation state.* London: Routledge; Heidenheimer, Arnold J & Michael Johnston (Eds). 2002. *Political corruption: Concepts and contexts.* New Brunswick/London: Transaction Publishers; Heywood, Paul. 1997. "Political corruption: Problems and perspectives". *Political Studies*, 45(3):417; Jain, Arvind K (Ed.). 2001. *The political economy of corruption.* London: Routledge; Johnston, Michael. 2005. *Syndromes of corruption: Wealth, power and democracy.* New York: Cambridge University Press; Kotkin, Stephen & Andreas Sajo. 2002. *Political corruption in transition: A sceptic's handbook.* Budapest: Central European University Press; Lederman, Daniel, Norman V Loayza & Rodrigo R Soares. 2005. "Accountability and corruption: Political institutions matter". *Economics and Politics*, 17(1):1; and Rose-Ackerman, Susan. 1999. *Corruption and government: Causes, consequences and reform.* Cambridge/New York: Cambridge University Press.

in corruption cases. Public officials – having been arrested, charged, convicted and fined – will rush back to 'business' as if nothing has happened.

One may in fact argue that, by imposing fines, the government actually wishes to participate in corrupt practices by sharing the spoils of the crime with the criminals. By imposing a fine, the government actually takes from the criminal something that was collected in a corrupt transaction. It is as if the government had sent the criminal to engage in corruption with the intention of sharing in the spoils. In other words, the government treats corruption and corrupt practices as a source of revenue for its treasury. This is absurd to say the least – not least because the fines are levied in addition to forfeiture.

It is being recommended here that, as a general rule, fines should not be allowed in corruption cases. The only option available for the convict should be a term in prison. In very exceptional circumstances where fines are to be imposed, they should be over and above prison terms and should be high, i.e. about ten times the value of the alleged value of the corrupt transaction. This may sound unreasonable, but corrupt transactions have never been reasonable. The aim should be to make those involved realise that the government and Tanzanian society at large are serious about fighting corruption. Therefore, there must be a sense of proportionality, and grounds for imposing any sentence.

As argued before, the very idea of having fines in corruption cases is unacceptable. They simply fuel corrupt practices by raising the stakes. The corrupt official will peg his/her demands on the amount of the fine for a corrupt act and ensure it is financially worthwhile to commit it. Thus, we are not dealing with the root of the disease here, but with the symptoms. As with offences related to theft in the Penal Code, corruption offences should only attract terms of imprisonment on a criminal's conviction. This will send the right signals to those involved.

Another disheartening situation is the restriction of the powers of the Prevention of Corruption Bureau to prosecute the cases they have investigated. The government still insists on retaining the massive powers of the Director of Public Prosecutions (DPP) to sanction all corruption-related prosecutions. The problem with this is that the DPP is not an independent office in Tanzania: it is directly under the supervision of the Attorney-General, and can receive instructions from either the Attorney-General or his/her Deputy. Interestingly, the Attorney-General is a member of Cabinet, the chief legal adviser to the government of the day, and an ex officio MP. Giving such an office power over an institution which can potentially prosecute top government officials misses the point entirely and reveals a lack of understanding of the seriousness of the issues involved.

This conflict of interest situation is not solved by the government's compromise to opt for giving the DPP a specific period in which to decide the fate of

corruption cases. According to the Act, the DPP is given 60 days in which to decide whether or not to prosecute cases relating to corruption referred to his/her office by the Prevention of Corruption Bureau.[57] This is yet another indication of a lack of seriousness on the part of the current government to deal with corruption up front. The question is this: why not allow the Prevention of Corruption Bureau to proceed when it finds it proper to prosecute? Why create a monopoly of the duty to prosecute criminals in a situation where the office of the DPP is incapable of handling all criminal matters in the country, particularly specialised crimes such as corruption? Reading section 57, it seems that Bureau has the mandate (without the DPP's consent) to prosecute only petty corruption listed under section 15.

Conclusion

The struggle against corruption in general and grand corruption in particular is a serious matter. It is an all-out war which should be fought on all fronts with all the means available and without compromise. As it has been correctly observed and recommended:[58]

> The opportunity cost of corruption is so high, and because corruption undermines human development, **the war against corruption must be fought on all fronts and we must do so with vigour**. Success requires steadfastness and cooperation from all arms of Government, Parliament and civil society, including the media and the private sector. [Emphasis added]

This is because corruption – whether grand or petty – distorts and disrupts development in any society.

As the Law Reform Commission of Tanzania rightly observed, the battle against corruption cannot be won simply by legislating against the scourge. It needs to be fought on different fronts, including putting in place a sound strategy to deal with the problem and empowering the justice system to deal with the offence.[59]

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57 See section 57(2). Also see the statement by the former Minister of Justice and Constitutional Affairs, Hon. Dr Mary Nagu, to Parliament. This was the coercion of the ruling party Chama Cha Mapinduzi (CCM) legislators by the then Prime Minister Edward Lowassa in "DPP given 60 days to decide on prosecution", *The Citizen* (Tanzania), 17 April 2007, p 1. See also "Bunge passes new Anti-Graft Law, but …", *ThisDay* (Tanzania), 17 April 2007, p 1; and "Corruption Bill debate roars on", *Daily News* (Tanzania), 17 April 2007, p 2.

58 See the opening remarks by John Hendra, former United Nations Development Programme Resident Representative and United Nations Resident Co-ordinator to the United Republic of Tanzania at a Parliamentarians' Seminar on Corruption held at Golden Tulip, Dar es Salaam, on 19 February 2003.

59 See United Republic of Tanzania. 2004. *Report on the review of legislation relating to corruption.* Dar es Salaam: Law Review Commission of Tanzania, p 109.

But there is more than that. Over and above perfect legislation (and the current one is far from this state),[60] there are a few issues worth considering. At the general level, those in business who are beaten in an otherwise even playing field by elements who have bribed their way to victory should not sulk and give up. They should be brave enough to blow the whistle and expose corruption. There is nothing evil about reporting corruption.[61]

At national level, the issues to take into account include taking *ethics, integrity* and *societal values* seriously, as well as *political will* on the part of the political elite. Globalisation and, in particular, the introduction of a market economy has greatly eroded *patriotism* and *national values*, which go hand in hand with the struggle for the well-being of a society. It would seem that it is now "Every man for himself, God for us all, and Devil take the hindmost"! Public officials are plundering national treasuries at will and with impunity! *Thieves and robbers* are slowly becoming *national heroes* and *role models – the clever lot* who are moving with time! On the other hand, *honest and hard-working civil servants* are regarded as *fools!* They 'slept' and never took advantage of the vast opportunities offered to them while they were in public service! This attitude fuels corruption – and grand corruption in particular – in developing countries. It is time to change this attitude if the war against corruption is to be won.

At the same time, there is a need for *political will* among politicians and the government in general to fight corruption. This is currently lacking. Tanzanian politicians have been dragging their feet on concretely addressing corruption for years. They even had the audacity to sanction corruption in elections, calling it "African hospitality".[62] Such politicians cannot be taken seriously.

60 On some of the earliest criticism to the new law, see Kija, Anil. 2007. "New Law on Graft and the 'Dead on Arrival' Syndrome," *ThisDay* (Tanzania), 5 July 2007, p 9; "PCCB now seeks to block media coverage on graft", *ThisDay* (Tanzania), 28 July 2007, p 1; and Kija, Anil. 2007. "A new PCCB legislation threatens investigative journalism", *ThisDay* (Tanzania), 8 August 2007, p 19.

61 On this, see Soreide, Tina. 2006. *Beaten by bribery: Why not blow the whistle?.* Bergen: Chr. Michelsen Institute.

62 In 2000, the Elections Act, 1985 was amended through Act No. 4 of 2000. Through this amendment, section 98(2) was deleted and replaced, and a new subsection 3 was added. The amendments introduced provisions which legalised the offering by a candidate in election campaigns of anything done in good faith as an act of hospitality to the candidate's electorate or voters. The introduced amendments are popularly known as *takrima* ("hospitality"). However, the so-called *takrima* provisions were silent on the amount and timing of the 'hospitality' to be provided to the electorate. Candidates who contested the said elections and the survey that was carried out during the electoral process showed that the parliamentary candidates practised these acts of 'hospitality' in the 2000 general elections. The study also showed that the election campaigns were marred by loopholes in the said law, which unduly influenced the electorate to vote in favour of the ruling party. The *takrima* provisions were declared offensive and as having encouraged corruption in the electoral process because they violated the right to not be discriminated against, the right to equality before the law, and the right

Their true colours emerged during the current debate on the Prevention and Combating of Corruption Act, 2007. A former Cabinet Minister responsible for good governance cautioned a shocked house that they should not allow the Bill to prevent politicians from getting rich.[63] The way this Bill was prepared, the way it was debated in the National Assembly, and the form in which it was eventually adopted clearly indicate this lack of political will and gravity in dealing with corruption in the country.

It would seem that it is the Prevention of Corruption Bureau and the donor community which have been pressurising a reluctant government to act on corruption. Therefore, by bringing this Bill, it is obvious that the government is not acting on its own volition. The fact that some of the donors decided to freeze aid and assistance to the country last year due to the government's failure to meet its promise to prepare and table the Bill in Parliament must have shocked the government into acting. However, this half-hearted attitude towards fighting corruption does not make the future look bright. A government whose leaders may be thinking of becoming involved in corruption in future and wish to escape with impunity or paltry punishments appear to be protective of corrupt practices and be relied on in the war against corruption. Such a government is a liability to its own people, and has no business being in office in the first place.

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of Tanzanian citizens to participate in free and fair elections. These rights aim at promoting integrity, transparency, good governance and democracy. See *In the Matter of the Constitution of the United Republic of Tanzania, 1977 and In the Matter of a Petition to Enforce a Constitutional Basic Right under the Basic Rights and Duties Enforcement Act, 1994 and in the Matter of the Elections Act No. 1 of 1995 and in the Matter of a Petition to Challenge as Unconstitutional Sections 98 (2) and 98 (3) of the Electoral Law (Miscellaneous Amendment) Act 4/2000 between Legal and Human Rights Centre and Two Others v The Attorney General*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 77 of 2005. On corruption in elections in Tanzania, see Chambua, Samuel E, Vincent Kihiyo & Gaudens P Mpangala (Eds). 2002. *Multiparty elections and corruption in Tanzania: With special reference to the 2000 elections.* Dar es Salaam: Dar es Salaam University Press Ltd.

63 See the statement of Hon. Wilson Masilingi, former Minister responsible for good governance in Beda, Joe. 2007. "Graft Bill must not prevent us to get rich – Masilingi". *The African On Sunday* (Dar es Salaam), 15 April 2007, p 1.

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