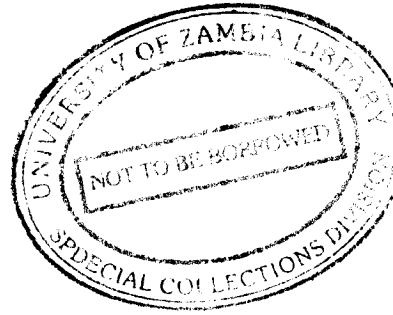


**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**



**PREVENTION AND PROSECUTION: ESSENTIAL TOOLS
IN THE FIGHT AGAINST CORRUPTION. A CRITICAL
ANALYSIS OF THE ZAMBIAN CASE**

BY

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A Directed Research

on



**PREVENTION AND PROSECUTION: ESSENTIAL TOOLS
IN THE FIGHT AGAINST CORRUPTION. A CRTICAL
ANALYSIS OF THE ZAMBIAN CASE.**

**Being a research paper submitted to the University of Zambia
in partial fulfillment of the requirements of the Bachelor of
Laws (LLB) Degree Programme.**

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DECLARATION

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that the contents of this Directed Research are entirely based on my own findings and that
I have not in any respect used any person's work without acknowledging the same.

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Dr. Patrick Matibini

Date. 6th Feb. 2008

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and willingness to help has brought me this far. I also extend my hand of gratitude to my many other friends who assisted me in one way or the other in the writing of this research.

TABLE OF LEGISLATION

Anti-Corruption Commission Act No. 42 of 1996

Corrupt Practices Act No. 14 of 1980

Electoral Act No. 12 of 2006

Parliamentary and Ministerial Code of Conduct Act, Chapter 16 of the laws of Zambia

Penal Code Chapter 146 of the laws of Zambia

Penal Code Chapter 87 of the laws of Zambia

ABBREVIATIONS

ACC	Anti-Corruption Commission
AU	African Union
DPP	Director of Public Prosecutions
DDG	Deputy Director General
DG	Director General
NGOs	Non-Governmental Organizations
UNCAC	United Nations Convention Against Corruption
UN	United Nations
SADC	Southern Africa Development Corporation
SITET	Special Investigations Team on Economy and Trade

ABSTRACT

Over the years, there has been a great deal written on the subject of corruption globally and Zambia in particular. It has been acknowledged that corruption is an enemy of development and its effects are well documented. However, prevention and prosecution *in the case of Zambia have not been analysed to determine their efficacy in the fight against corruption. For instance, since the inception of the Anti-Corruption Commission* in the 1980s, prevention and prosecution strategies have been used to fight corruption in Zambia. But the extent to which these tools have been used in fighting corruption and their success is not documented.

This paper attempts to critically analyze how prevention and prosecution strategies have been used in Zambia in fighting corruption because in every battle that is waged what matters are the weapons or tools that will be used. In the case of corruption, a crime of endemic proportions the strategies employed to fight it must be in line with international anti-corruption conventions such as the SADC Protocol Against Corruption, the African Union Convention Against Corruption and the United Nations Convention Against Corruption. These international instruments contain best practices in fighting corruption which all the State Parties are required to adopt in their respective countries. These international instruments reflect the seriousness that the international community attaches to corruption. Other laws that have a bearing on the fight against corruption help in preventing corruption but their success depends on how they are co-ordinated.

It is the author's sincere hope that this research will lead to a broadening of understanding of prevention and prosecution as essential tools that are used in fighting corruption in Zambia.

DEDICATION

To my wife Felistus Tembo Kabambe and my three wonderful kids Minetu Kabambe Kabambe, Kaoma Kabambe and Namahandi Tukuza Kabambe from whom I drew tremendous inspiration and joy to stay in the race. To my great departed uncles Donald Joseph Kumisha and Bornwell Kumisha for having nurtured the seed. Lastly, to my parents, the source of my inspiration and academic zeal.

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CHAPTER ONE

1. INTRODUCTION

Over the years, considerable debate has been carried out in both academic and international forum on the definition of corruption. The 19th Conference of European Ministers of Justice came up with the following definition;¹ “Corruption is bribery and any other behaviour in relation to persons entrusted with responsibility in the public or private sector which violates their duties that follow from their status as public officials, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantage of any kind for themselves or for others.” Under the Anti-Corruption Commission Act, corruption is defined as the soliciting, accepting, giving, promising or offering of a gratification by way of a bribe or other personal temptation of inducement, or the misuse or abuse of a public office for private advantage or benefit.² Johnston states that the search for definitions is a political as well as an analytical process. He further states, “for most analysts, judges, legislators and participants in political life, ‘corruption’ refers to specific actions by specific individuals, those holding public positions and those who seek to influence them”³ A general definition of corruption is that it is the use of public office for private gain, this includes bribery and extortion which necessarily involve at least two parties and other types of malfeasance that a public official can carry out, including fraud and embezzlement.⁴ Appropriation of

¹ Conference organized by the Council of Europe, the Multidisciplinary Group on Corruption, at Valletta, Malta, from 14 to 15 June 1994. Accessed on 5 July 2007 at <http://www.uncjin.org/Documents/Corrupt.htm>

² Section 3, Anti-Corruption Commission Act No. 42 of 1996

³ Michael Johnston, “The Search for Definitions: Vitality of Politics and the Issue of Corruption.” In International Social Science Journal, No. 149, 1996, 321-336

⁴ Cherly W. Gray and Daniel Kaufmann, “Corruption and Development,” in Finance and Development, March, 1998, p.7

public assets for private use and embezzlement of public funds by politicians and high level officials.⁵ There are as many definitions of corruption as the authors who have written on the subject, this is because of its many facets.

Whatever the definition of corruption is, one thing is certain that corruption in our country exists and is pervasive. There have been serious allegations of involvement of top Government officials and other leaders in the public and private sectors in corruption and pillage of the national economy.⁶ Raising the standards of good governance is key to a country's political development. The tenets of good governance are many and varied, but one of the most important is the absence of corruption. Both, however, are compromised by corruption which distorts the economy, diverts scarce resources from vital services and restricts investment. It also undermines programmes designed specifically to aid the poor.⁷ The former Director General of the Anti-Corruption Commission Justice Robert Kapembwa admitted that in fact, there is "too much of it, doing rounds in this country."⁸ In order to fight corruption therefore, several strategies are required to be employed in order that corruption is nibbled in the bud.

Most anti-corruption bodies employ a three-pronged approach. This approach comprises of investigation, prevention and prosecution. In Zambia since the enactment of the Anti-Corruption Commission in 1980, the three-pronged approach has been used. This paper will, however, focus on prevention and prosecution. In the Anti-Corruption Commission Act, the functions of the Commission are to prevent and take necessary and effective

⁵ Ibid

⁶ Speech by His Excellency the President of the Republic of Zambia, Delivered at Mulungushi International Conference Centre on the occasion of the formal launch of NAMAC, Thursday 14th March 2002, Lusaka, Zambia

⁷ Kwame Frimpong and Gloria Jacques, *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviours*, Lentswe La Lesedi (pvt), Gaborone, Botswana, 1999, p.vii

⁸ Anti-Corruption News, Vol.2. No.1, 1997,p.4

measures for the prevention of corruption in public and private bodies.⁹ Further, the Commission has the mandate to prosecute offences of corruption subject to the directions of the Director of Public Prosecutions under the Act and such other offences under any written law as may have come to the notice of the Commission.¹⁰ In recognition of the negative socio-economic effects of corruption on the citizenry and its effects on the Government's endeavours to efficiently provide goods and services to its people, it's clear today that preventing corruption must take a centre stage.

A cursory looks at anti-corruption strategies in Southern Africa, especially the public education programmes, reveal that the emphasis is never on eradication, but on curtailment, containment and minimization of the negative impact of corruption to society. This is regarded as a pragmatic approach considering that corruption mutates, taking different forms, keeping pace with the ever-changing technologies and economic environments. This posses numerous challenges to fighting corruption. According to Gilton Chiwaula¹¹, the Director of the Malawi Anti-Corruption Bureau, 'corruption is an invisible thief and also a moving target.' It takes place between two consenting parties. Its effects are normally difficult to see until long after the deed is done.

Prevention as a strategy is sought to be achieved through measures enhancing transparency to render attempts of corruption visible. The UN Convention rightly places particular emphasis on the prevention of corruption both in the public and private sector.¹² An effective anti-corruption strategy needs to adequately balance between

⁹ Sections 9(1)(a), Anti-Corruption Commission Act No. 42 of 1996

¹⁰ Ibid (b)(ii)

¹¹ Cited in Constance Kunaka, Noria Mashumba and Philliat Matsheza, *The SADC Protocol Against Corruption: A Regional Framework to Combat Corruption*, SAHRIT, Harare, Zimbabwe, 2002, p.19

¹² UN Convention Against Corruption

preventive and repressive means.¹³ No one strategy can combat corruption; the strategies have to be used in unison in order to fight corruption. Other than prevention, prosecution is the other very important and essential tool in fighting corruption. The implementation of these tools or strategies in fighting corruption calls for huge public resources, both financial and human. In view of this, the extent to which these strategies have worked has to be examined critically in order to determine the efficacy of the methods that have been used to fight corruption in Zambia since the 1980s.

1.1. STATEMENT OF THE PROBLEM

In the Anti-Corruption Commission Act the functions of the Commission are to prevent and take necessary and effective measures for the prevention of corruption in public and private bodies.¹⁴ Further, the Commission has the mandate to prosecute offences of corruption subject to the directions of the Director of Public Prosecutions under the Act and such other offences under any written law as may have come to the notice of the Commission.¹⁵ In recognition of the negative socio-economic effects of corruption on the citizenry and its effects on the Government's endeavours to efficiently provide goods and services to its people, it's clear today that preventing corruption must take a centre stage. A cursory look at anti-corruption strategies in Southern Africa, especially the public education programmes reveal that the emphasis is never on eradication, but on curtailment, containment and minimization of the negative impact of corruption to society. This is regarded as a pragmatic approach considering that corruption mutates, taking different forms, keeping pace with the ever-changing technologies and economic

¹³ Ibid

¹⁴ Sections 9(1)(a)

¹⁵ Ibid (b)(ii)

environments. This poses numerous challenges to fighting corruption. Prevention as a strategy is sought to be achieved through measures enhancing transparency to render attempts of corruption visible. The UN Convention rightly places particular emphasis on the prevention of corruption both in the public and private sector.¹⁶ These tools, although very essential, cannot succeed on their own without the participation of the political leadership of the country. Therefore, the existence of political will is a deciding factor in the equation of fighting corruption. It could be argued that prevention and prosecution as essential tools in the fight against corruption in Zambia have not been used effectively; this is because the efforts have not been co-ordinated. Perhaps one major internal weakness exhibited by the Anti-Corruption Commission in its many years of fighting corruption has been lack of strategy. Matenga¹⁷ an academician at the University of Zambia likens this lack of strategic planning by the Commission to launching unguided missiles that always miss the target.¹⁸

1.2. RATIONALE FOR THE STUDY

The rationale for the study is twofold; firstly it is to provide knowledge on how the fight against corruption has been spearheaded in Zambia. Further, the study will also provide knowledge on how prevention and prosecution have been used or not used as the case may be, as essential tools in fighting corruption in Zambia.

1.3. OBJECTIVES OF THE STUDY

The objectives of the study were threefold; firstly it was to outline how the fight against corruption has been conducted in Zambia since the inception of the Anti-Corruption

¹⁶ UN Convention Against Corruption

¹⁷ C.R. Matenga, "Corruption: Is it Endemic in Zambia?" Paper presented at the Citizens Forum Discussion in Lusaka, Zambia, 28 February, 1998. Sponsored by the Friedrich Ebert Stiftung. Pp15-16, Matenga is a Lecturer in the School of Development Studies.

¹⁸ Ibid

Commission. Secondly, to examine how prevention and prosecution have been used as essential tools in the fight against corruption in Zambia and lastly to analyse and determine the extent to which Zambia complies with international and regional anti-corruption conventions.

1.4. METHODOLOGY

DESK RESEARCH

I analysed statutes on corruption and other laws that have a bearing on corruption. Websites were visited in order to get information on corruption prevention and prosecution. Various publications on corruption prevention and prosecution were analysed as well.

FIELD RESEARCH

The study relied on both primary and secondary data. The data was collected from the National Archives of Zambia, the Anti-Corruption Commission Library, and Transparency International Resource Centre. Further, an endeavour was made to visit the National Assembly Library in order to look at the Parliamentary Debates prior to the formation of the Anti-Corruption Commission.

1.5. ORGANISATION OF THE STUDY

The study is divided in four chapters as follows;

CHAPTER ONE:

This chapter introduces the topic under study. It also gives background information to the formation of the Anti-Corruption Commission before 1980 and the reasons advanced for its formation. The chapter further highlights the statement of the problem, rationale for

the study and the objectives of the study. The methodology used during the execution of the study/research is explained in this chapter.

CHAPTER TWO:

Chapter two examines regional and international anti-corruption conventions and assesses their impact on the fight against corruption. The anti-corruption conventions examined are; the SADC Protocol Against Corruption, the African Union Convention Against Corruption and the United Nations Conventions Against Corruption.

CHAPTER THREE:

This chapter looks at the legal framework relating to the fight against corruption in Zambia. The statutes examined are the following; Anti-Corruption Commission Act,¹⁹ the Electoral Act²⁰ and the Parliamentary and Ministerial Code of Conduct Act.²¹

CHAPTER FOUR:

This chapter contains conclusion and recommendations

1.6. BACKGROUND: FORMATION OF THE ANTI-CORRUPTION COMMISSION

Prior to independence, the first law that applied to corruption prevention in Zambia was the Prevention of Corruption Act of 1916.²² The Prevention of Corruption Act was cited together with the Public Bodies Corrupt Practices Act of 1889. The Prevention of Corruption Act, 1916, of the United Kingdom applied to Zambia by virtue of the British

¹⁹ No. 42 of 1996
²⁰ No. 12 of 2006
²¹ Cap 16 of the laws of Zambia
²² Anti-Corruption Commission, Draft National Corruption Prevention Policy, February 10, 2006, p.4

Acts Extension Act.²³ It is very unlikely that fighting corruption in colonial Zambia was on the lips of the powers that be of that time, further it can be postulated that there was no strategy deliberately put in place to fight corruption. This was because corruption was not considered as a high risk crime or it had not yet reached a level to be considered threatening in society.

In post independence Zambia, the only legal provisions on corruption were those enacted in the Penal Code²⁴. The provisions of the Penal Code were solely concerned with corruption offences by persons working in the public service and did not provide for corruption by private bodies²⁵. Further, the offence of abuse of authority was not there in the Penal Code. Public officers who abused the authority of their offices or power in order to gain an advantage could not be penalized because there was no law in place. Further there was no legal provision that embraced prevention as an essential tool in fighting corruption. The only tool applied in fighting corruption under the Penal Code was prosecution, but corruption can not be fought using only one strategy. No criminal prosecution could be instituted under the Penal Code without the consent of the Director of Public Prosecutions (DPP).²⁶ Although, these offences were provided for in the Penal Code, most people were of the view that the law as it was could not adequately deter or crush corruption. The powers that were given to the police under the Penal Code to fight corruption were not sufficient, one can argue that it was difficult to successfully detect and prosecute offenders using the law as it existed.²⁷ Incidences of corruption however,

²³ Section 65, Corrupt Practices Act, No.14 of 1980

²⁴ Cap 146 of the Laws of Zambia

²⁵ Supra note 14

²⁶ Section 388, Penal Code Cap 146 of the Laws of Zambia

²⁷ For instance section 385(a), (b) and (c) of the Penal Code Cap 146 create the offence of corrupt practices and section 386 creates the offence of secret commissions in Government contracts. It is only these two sections which criminalize certain conduct as corruption.

continued to be recorded notwithstanding the inadequate law on corruption. In 1978 a Collector of Customs and his Assistant appeared at Lusaka Magistrate Court on a charge of official corruption. The allegation against the duo was that whilst acting together received K800 cash from a member of the public.²⁸ Wherever corruption showed its face people frowned upon it with disgust, writing in the Times of Zambia, a Times reporter wrote, “corrupt men do not deserve sympathy.”²⁹ The reporter was prompted to write this when Zambia Consumer Buying Corporation (ZCBC) management dismissed an Assistant Stores Manager who had bought cooking oil in bulk for himself and his friends without following laid down procedures. This was a time when most essential commodities were in short supply in Zambia, for one to have a good access to these commodities one needed to have ‘connections’ with officials in certain parastatal companies which provided them. People generally held the view that corrupt elements in public institutions set up to serve the interests of the masses should be pruned.³⁰ The reporter further observed that:

“One has got to have ‘connections’ in order to buy commodities like sugar, cooking oil and blankets just to mention a few. Since not all of us have ‘connections’ to enable us buy commodities we take our hats off to those in management who have worked out systems to protect the innocent public from unscrupulous people”³¹

The then Prime Minister Mainza Chona speaking in Parliament stated that the Party and Government was determined to root out corruption and abuse of office among public officers.³² The Government had to fight corruption because state power in the hands of public officers was sacred and did not belong to the holder of that power, but to the

²⁸ Times of Zambia, Tuesday, January 17, 1978

²⁹ Times of Zambia, Thursday, May 11, 1978

³⁰ Supra note 23

³¹ Ibid

³² Times of Zambia, Wednesday, February 15, 1978

people, power had to be used for the benefit of the people.³³ This statement by a high ranking Government official was an admission that corruption was slowly becoming a way of life among public officers entrusted with public responsibilities. Although, political pronouncements were being made at a high level, this alone was not enough because the law in existence was inadequate to fight corruption. In a bribery trial of a Greek national charged with official corruption in a Lusaka Magistrate Court, two top Government officials both former Ministers of the then Ministry of Lands and Natural Resources were implicated for having “helped him” in getting an export permit.³⁴ The incumbent Minister in the same ministry testified in court that this Greek national had offered him a live pig, K5,000 and a deep freezer in order for him to facilitate the issuance of an export permit. Evidence was adduced in court by the Minister that his predecessors had issued export permits to ivory traders who did not satisfy laid down procedures.³⁵ “If you help me today, I will not forget tomorrow,” said the Greek national, “you are a Minister and a Minister can do anything he wants.”³⁶

Corruption was attacking all sectors of the Zambian society and yet there was no comprehensive law to halt it. Even the judiciary which is the pillar of justice was not spared from this scourge. For instance, a local court justice in Mpatamatu was convicted and sentenced to 18 months imprisonment with hard labour for receiving a bribe of K500 as gratification in order for him to show favour in a case before him.³⁷

In 1980 a new vision motivated by public outcry emerged as corruption was slowly becoming a way of life among those entrusted with public responsibility. The challenges

³³ Ibid

³⁴ Times of Zambia, Friday, June 9, 1978

³⁵ Ibid

³⁶ Ibid

³⁷ Times of Zambia, Monday, December 18, 1978

and expectations that existed at the time may perhaps best be inferred from the debate in the National Assembly led by Hon. W.J.Phiri then Minister of Home Affairs when introducing the Corrupt Practices Bill for the second reading on 21 August, 1980:³⁸

“Sir, the main aim of the bill is to prevent Corruption in the country by comprehensively defining acts which may constitute corruption and by providing in the Bill for very severe penalties for anyone who will be found guilty of these acts....In 1979, 17 cases of corruption were reported to the Police in the first half of the year. In 1980, 85 cases were reported in the first half representing 500% increase.

Mr. Speaker Sir, effective measures are necessary if we are to attain this goal, and the law must give a clear indication to all who might be tempted to indulge in corrupt practices that by doing so they will almost certainly be detected, prosecuted and convicted and that when convicted they will face severe punishment....Another important reason for introducing this Bill is that at present, the successful detection and prosecution of offenders against the law on corruption is extremely difficult. Both parties to the act of corruption, the individual offering the bribe and the one receiving it, are, of course principal offenders and both have a vested interest in ensuring that there is no evidence left to reveal the other person’s involvement in the crime. There are invariably no independent witnesses to the act of corruption, which may not necessarily involve a physical handover of gratification. It could amount to no more than a promise to give a bribe or an agreement to accept it.

Mr. Speaker Sir, under such circumstances, the difficulties presently encountered in uncovering prima facie evidence of corruption alone, and, more importantly, evidence sufficient to support a prosecution, cannot be over-emphasized. It is indeed a usually impossible task. Time and again the powers now held by the Police and SITET have proved to be totally inadequate to permit the assembly of enough hard evidence to prove all of the elements required for a successful prosecution under existing legislation on corruption contained in the Penal Code. The Bill therefore seeks to remedy this situation by the enactment of changes to augment the powers of investigation, to codify the various offences in logical sequence, to create some new offences, to modify the existing rules of evidence and to provide realistic deterrent sentences for convicted offenders...”³⁹

The Minister further told the House that a great deal of research was conducted by officers in the Ministry of Home Affairs in liaison with officers in the Ministry of Legal

³⁸ Hon. Mr. Justice Gregory.S. Phiri, “Challenges and Expectations in Prosecuting Corruption Cases,” Paper presented to the consultative workshop for prosecutors, 28 March, 2007, Mika Lodge, Lusaka, Zambia

³⁹ Ibid, pages 3-5

Affairs within the country and overseas.⁴⁰ The existence of corruption was a threat to the whole fabric of the humanistic society of Zambia, according to the Minister of Home Affairs although rampant corruption had not yet gained root in Zambia, it was important to arrest it before it established its roots. The members of Parliament shared the same view that if corruption was allowed to gain a foothold in our society, such an eventuality could spell real disaster to the country.⁴¹ The Minister stressed thus;

“Corruption is the epitome of the exploitation of man by man. It is the exploitation of a public officer of the power entrusted to him by the people to be exercised for the common good”⁴²

The honourable members of Parliament were supportive of the measures taken by the Minister of Home Affairs to propose a law that could fight corruption. They felt that the Bill tended to look after the interests of the common man, and that it was in line with the philosophy of humanism which was against the exploitation of man by man.⁴³ The policy of the Kaunda Government behind the introduction of the Bill was to prevent corruption in the country by comprehensively defining acts which may constitute corruption and by providing in the Bill for very severe penalties for everyone who was to be found guilty of corrupt practices.⁴⁴

This debate and public outcry by the general populace in the country gave birth to the enactment of the Corrupt Practices Act in 1980.⁴⁵ The Prevention of Corruption Act, 1916 ceased to have any force or effect in Zambia and the schedule to the 1916 Act was

⁴⁰ Ibid p. 5

⁴¹ Frances Mwangala Zaloumis, “The Role of the Anti-Corruption Commission in National Development,” School of Law, University of Zambia, July 23, 1986, p. 16

⁴² Ibid

⁴³ Ibid, p. 19

⁴⁴ Zambia Parliamentary Debates No. 54, 29 July-22 August 1980 column 1079

⁴⁵ Corrupt Practices Act No. 14 of 1980

amended accordingly.⁴⁶ This was a historic piece of legislation on corruption borne out of the realization that the socio and economic fabric of the Zambian society was threatened by corruption. The salient features of this law were that for the first time in Zambia an independent institutional framework in the form of a Commission specializing in this area of criminality was created.⁴⁷ The Act also allowed deviations from the provisions of the Criminal Procedure Code or any other written law, this could be seen in the powers that were granted to the Commissioner to issue Orders, Warrants and to conduct searches without orders of the Court.⁴⁸ It also provided for the recovery and restitution of gratification,⁴⁹ forfeiture of the gratification and statutory civil judgments against convicts. The DPP was provided with additional powers to obtain information and to issue pardon or indemnity to accused persons.⁵⁰

⁴⁶ Ibid section 65

⁴⁷ Ibid, Preamble

⁴⁸ Ibid section 11

⁴⁹ Ibid section 40

⁵⁰ Ibid section 44 and 55

CHAPTER TWO

2. INTERNATIONAL ANTI-CORRUPTION CONVENTIONS AND THEIR IMPACT ON THE FIGHT AGAINST CORRUPTION

In this chapter, we consider anti-corruption conventions and why they are useful in the fight against corruption. Of interest are the Southern Africa Development Community (SADC) Protocol Against Corruption, the African Union Convention on Preventing and Combating Corruption (AU) and the United Nations Convention Against Corruption (UNCAC). The plethora of international conventions is a testimony to the global approach in combating corruption. Anti-corruption conventions are written international agreements signed by state parties which establish international frameworks of agreed rules and standards for countering corruption.¹ These conventions are intended to produce good policies and practices in and among states in the prevention, detection and sanctioning acts of corruption.

The common frameworks provided by international anti-corruption conventions serve to facilitate international co-operation in the control and sanctioning acts of corruption in order to address a cross-boarder phenomenon.² They also provide governments, citizens and donors with internationally agreed reference points for their work at the national level. These reference points serve as standards which remain constant even as administrations change.³ Further, Mwape and Lungu state that anti-corruption conventions provide civil society with leverage to hold government accountable to the

¹ Mwape Bowa and Goodwell Lungu, "Anti-Corruption Conventions, Why They Are Useful, Their Purpose And Meaning Of Signatory, Ratification And Accession," Paper presented to Parliamentarians at a workshop organized by APNAC-Zambia Chapter, 3 March 2007

² Ibid

³ Ibid

people.⁴ Their existence is evidence of how seriously the international community takes the anti-corruption problem and the need for common solutions. The standards and requirements that these conventions establish for governments carry great weight, given the convention's binding nature and the fact that they remain in place while national Governments come and go.⁵ In the context of fighting corruption, anti-corruption conventions serve as tools for citizens and civil society organizations to hold their Governments accountable on matters of anti-corruption performance.⁶

2.1. THE SADC PROTOCOL AGAINST CORRUPTION

During the mid 1990s, there were dedicated efforts by the Governments of SADC Member States to proactively address the very important issue of corruption in unison.⁷ In view of the threat that corruption posed to the regional integration of Southern Africa, there was an urgent need to develop a regional legal framework to address the issue. At the Summit of Heads of States and Government of SADC, held in Blantyre, Malawi on 14 August 2004, the Heads of States and Governments signed and adopted the SADC Protocol against Corruption.⁸ In doing so, the signatories expressed their concern about the adverse and destabilizing effects of corruption throughout the region on the culture, economic, social and political foundations of society.⁹ The Member States re-affirmed the need to eliminate the scourge of corruption through the adoption of effective

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ Draft SADC Regional Anti-Corruption Programme 2005-2010, 22 April 2004, p.2

⁸ Ibid, p.4

⁹ Ibid

preventive and deterrent measures and by strictly enforcing legislation against all types of corruption.¹⁰ The purpose of this Protocol is threefold, namely;

- (a) to promote and strengthen the development, by each of the State Parties of mechanisms needed to prevent, punish and eradicate corruption in the public and private sector;¹¹
- (b) to promote, facilitate and regulate co-operation among the State Parties to ensure the effectiveness of measures and actions to prevent, punish and eradicate corruption in the public and private sectors;
- (c) to foster the development and harmonization of policies and domestic legislation of the State Parties relating to the prevention, detection, punishment and eradication of corruption in the public and private sectors.¹²

The SADC Protocol provides for the definitions of corruption and widens the scope to include corruption in the private sector. The protocol provides a wide array of preventive measures which include the following; access to public and other information. Under Article 4,¹³ Member States are called upon to put in place mechanisms to promote access to information to facilitate eradication and elimination of opportunities for corruption.¹⁴ State Parties are called upon to adopt measures which will create, maintain and strengthen mechanisms for promoting public education and awareness in the fight against corruption.¹⁵ The Protocol requires State Parties to provide systems for protecting individuals who, in good faith, report acts of corruption. The SADC Protocol urges Member States to adopt measures or mechanisms to encourage participation by the media, civil society and non-governmental organizations in efforts to prevent corruption and mechanisms for promoting public education in the fight against corruption. Other preventive measures in the SADC Protocol include the development and adoption of

¹⁰ Preamble SADC Protocol Against Corruption

¹¹ State Parties means Member States who have ratified or acceded to the SADC Protocol Against Corruption

¹² Ibid Article 2(a), (b) and (c)

¹³ SADC Protocol

¹⁴ Ibid 4(d)

¹⁵ Ibid 4(j)

codes of conduct for public procurement of goods and services, development of systems of accountability and controls and deterrents to bribery of domestic public officials.¹⁶

Acts of corruption relating to officials of foreign agents has been provided for in the SADC Protocol. All State Parties to the Protocol are called upon to criminalize the offering or granting, directly or indirectly, by its own nationals, persons having their habitual residence in its territory, and businesses domiciled there to an official of a foreign State, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public function.¹⁷

In order to enhance co-operation in the prosecution of corruption in the SADC region Article 9 of the SADC Protocol deals with matters of extradition and provides that an extraditable offence shall be one established by the Protocol.¹⁸

It is noteworthy that under the SADC Protocol Against Corruption; the State Parties cannot make any reservations in any of the obligations set out in the Protocol.¹⁹ This entails that all the acts which constitute corruption apply to all the State Parties, this obliges them to create criminal offences for those acts under their domestic laws. It is clearly stated in the Protocol that it will supersede all other agreements and treaties which may have been entered into by the State Parties prior to its coming into operation.²⁰

¹⁶ Ibid Article 4(b) and (h)

¹⁷ Ibid Article 6(1)

¹⁸ The SADC Protocol

¹⁹ Supra note 11, p.83

²⁰ Ibid

2.2. THE AFRICAN UNION CONVENTION AGAINST CORRUPTION

The African Union Convention on Prevention and Combating Corruption is inspired by the African Charter on Human and People’s Rights and other relevant human rights instruments.²¹ The fight against corruption was not specifically introduced at the regional level until June 1998, at a session of the Assembly of Heads of States and Governments in Ouagadougou, Burkina Faso.²² The Assembly passed a resolution calling on the Secretary General to convene a high-level meeting of experts in co-operation with the African Commission on Human and People’s Rights. These experts were to consider ways of removing obstacles to the enjoyment of economic, social and cultural rights such as through the fight against corruption and impunity.²³ There was a concerted desire to put in place a legal framework to address the issue of corruption at a continental level. In July 2003, at the African Union Summit in Maputo, Mozambique a historic convention was adopted, namely the African Union Convention Against Corruption.²⁴ The African Heads of States were aware that respect for human dignity, fostering of the promotion of economic, social and political rights could not be attained in an environment of prevalent corruption.²⁵ In a consensus they acknowledged that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent. The member states were also convinced of the need to formulate and pursue, as a matter of priority, a common penal policy aimed at

²¹ Preamble, African Union Convention on Prevention and Combating Corruption

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid

protecting the society against corruption, including the adoption of appropriate legislative and adequate preventive measures.²⁶

The objectives of the AU Convention on Corruption are to;

- (a) promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors;
- (b) promote, facilitate and regulate cooperation among State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa;
- (c) co-ordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent; and
- (d) establish the necessary conditions to foster transparency and accountability in the management of public affairs.²⁷

The AU Convention focuses on four main approaches to fighting corruption namely; prevention, punishment, co-operation and education. In particular, the AU Convention strengthens laws on corruption by listing offences that should be punished or criminalized by domestic legislation of the Member States.

The AU Convention is applicable to the following acts of corruption and related offences:

- (a) the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- (b) the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- (c) any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
- (d) the diversion by a public official or any other person, for the purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its

²⁶ Ibid

²⁷ Ibid Article 2

- agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;
- (e) the offering or giving, promising, solicitation of acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
 - (f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the due advantage is for himself or herself or for anyone else, in consideration of that influence whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
 - (g) the use or concealment of proceeds derived from any of the acts referred to in the Convention; and
 - (h) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or on any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this Article.²⁸

Arising from the provisions of Article 4 of the Convention, State Parties are required to undertake legislative and other measures that are needed to establish as offences acts which constitute corruption as defined in the AU Convention.

The AU Convention also highlights preventive measures which State Parties are required to put in place in order to fight corruption. Public officials are required to declare their assets at the time of assumption of office during and after their term of office in the public service.²⁹ State Parties must also commit themselves to ensuring the right of access to any information that is required to assist in the fight against corruption and related offences³⁰ The role of the media and civil society is critical and central in the fight against corruption, the AU Convention calls upon all State Parties to create an enabling environment that will enable civil society and the media to hold Governments to the

²⁸ Ibid Article 4 (a), (b), (c), (d), (e), (f), (h) and (i)

²⁹ Ibid Article 7(1)

³⁰ Ibid Article 9

highest levels of transparency and accountability in the management of public affairs.³¹ The State Parties must ensure and provide for the participation of civil society in the monitoring process and to be consulted in the implementation of the AU Convention. State Parties must also undertake to ensure that the media 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 trial³²

2.3. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)

UNCAC is a useful guide for anti-corruption and governance reform. The UNCAC was adopted by the General Assembly in its Resolution 58/4 and opened for signature on December 2003, in Merida-Mexico.³³ The purpose of this Convention is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption and also to promote integrity, accountability and proper management of public affairs and public property.³⁴ UNCAC clearly reaches out to the greatest possible number of countries and with currently 140 signatories and 60 parties. UNCAC has succeeded within limited time to obtain adherence on a world wide level.³⁵ The relatively rapid entry into force in December 2005, only two years after its

³¹ Ibid Article 12(2)

³² Ibid (4)

³³ Komisi Pemberantasan Korupsi, Gap Analysis Study Report: Identification of Gaps Between Laws/Regulations of the Republic of Indonesia and the United Nations Convention Against Corruption, Corruption Education Commission, The Republic of Indonesia, Jakarta, November 2006. p.7

³⁴ Article 1(a) (b) and (c) United Nations Convention Against Corruption

³⁵ Status as of August 7, 2006. <http://www.unodc.org/unodc>

adoption is a clear testimony of commitment of the states around the world to the fight against corruption and an expression of the level of acceptance and awareness that the fight against corruption has achieved since it has first been put on the international agenda in the 1990s.³⁶

UNCAC calls for extensive preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sector.³⁷ Countries that are serious about their commitment under the convention have to engage in a thorough review of their legal and institutional anti-corruption structures in order to evaluate their compliance with the UNCAC and to identify potential need for reform.³⁸ Ratifying the UNCAC means for each State Party to assume the obligation of fully implementing the UNCAC at least as far as its provisions are mandatory. UNCAC rightly places particular emphasis on the prevention of corruption and in this respect goes clearly beyond the reach of most other international anti-corruption instruments that focus on criminalization. It is a requirement that each state party shall in accordance with the fundamental principles of its legal system, develop and implement effective, co-ordinated anti-corruption policies that promote the participation of society and further reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.³⁹ State Parties are further required to establish and promote effective practices aimed at the prevention of corruption,⁴⁰ periodic evaluation of relevant legal instruments and administrative measures with a view to

³⁶ Supra note 75

³⁷ Ibid p. 7

³⁸ Ibid p. 9

³⁹ Article 5(1) UNCAC

⁴⁰ Ibid 5(2)

determine their adequacy to prevent and fight corruption as a necessary undertaking that must not be neglected.⁴¹

According to Article 6,⁴² the State Parties shall establish one or several anti-corruption bodies with the task of overseeing and co-ordinating and implementing the State's anti-corruption policies.⁴³ In Zambia the body tasked with this responsibility is the Anti-Corruption Commission (ACC); this body is a creature of statute. Such a body is also required under the UNCAC to disseminate knowledge about the prevention of corruption.⁴⁴ Further, such a body in order to carry out its functions effectively, the necessary material resources and independence as well as specialized staff is required.⁴⁵ Training must also be provided so that such staff may carry out their functions.

In order to enhance corruption prevention, each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic legislation to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.⁴⁶ Public officials who violate the codes or standards established need to be punished. Since corruption cannot be fought single handed by the state alone, there is need that measures are put in place to promote the active participation of individuals and groups outside the public sector, such as civil

⁴¹ Ibid 5(3)
⁴² UNCAC
⁴³ Ibid 6(1)(a)
⁴⁴ Ibid (b)
⁴⁵ Ibid (2)
⁴⁶ Ibid 8(5)

society, non-governmental organizations and community based organizations.⁴⁷ This participation should be strengthened by such measures as:

- (a) enhancing the transparency of and promoting the contribution of the public to decision-making processes;
- (b) ensuring that the public has effective access to information;
- (c) undertaking public information activities that contribute to non-tolerance of corruption, as well public education programmes; including school and university curricula;
- (d) respecting, promoting and protecting the freedom to seek, receive, publish, and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary⁴⁸
- (e) for respect of the rights or reputations of others.⁴⁸

In most countries and Zambia in particular corruption in the private sector has not been given serious attention. This is probably due to the fact that the resources being abused or misapplied are not public funds. UNCAC however, holds that each State Party should take measures to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector.⁴⁹ Where appropriate the private sector must be provided with effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.⁵⁰ Enhanced measures to prevent corruption in the private sector that have been identified by UNCAC are the following;⁵¹

- (a) *promoting co-operation between law enforcement agencies and relevant private entities;*
- (b) *promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations with the State;*

⁴⁷ Ibid 13(1)

⁴⁸ Ibid

⁴⁹ Ibid Article 12 (1)

⁵⁰ Ibid

⁵¹ Ibid Article 12(2) (a) (b) (c) (d) and (e)