

Overcoming the corruption conundrum in Africa: A socio-legal perspective

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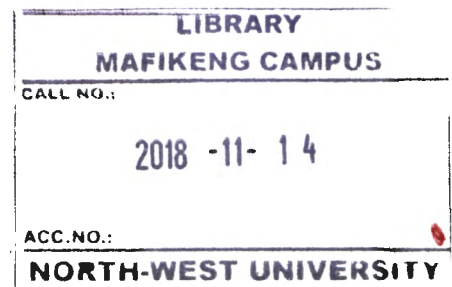


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DECLARATION BY CANDIDATE

I, Anzanilufuno Munyai, declare that the thesis entitled “Overcoming the corruption conundrum in Africa: A socio-legal perspective”, hereby submitted for the award of a degree of Doctor of Laws (LLD) in Public Law and Legal Philosophy has not previously been submitted by me for a degree at this or any other university. I further declare that this is my work in design and execution and that all materials contained herein have been duly acknowledged.

.....
ANZANILUFUNO MUNYAI

.....
DATE

DECLARATION BY PROMOTER

I, Professor Avitus A. Agbor, hereby declare that the thesis entitled “Overcoming the corruption conundrum in Africa: A socio-legal perspective” by Anzanilufuno Munyai, submitted for the degree of Doctor of Laws in Public Law and Legal Philosophy be accepted for examination.

.....

PROF. AVITUS A. AGBOR

.....

DATE

DEDICATION

To the stronghold of my life, the Guardian of my heart. To my Protector, the One greater in me than he that is in the world. To my Almighty Father. My God. Who created me for greatness on this Earth.

To my parents, Musiiwa Collen Mufamadi and Thinavhuyo Ester Munyai, the pillars of my strength. There is nothing in this universe that I can give to repay you for all the things you have sacrificed for me. Though you may not have given me everything I wanted, you gave me what I needed the most in life. I have never thanked you enough for guiding me in the right direction. The truth is: I thank God for the fact that you are my parents. You believed in me when many did not and assisted me to pave the path into the journey of life. Without your support and guidance, I would not have achieved all that I have in life, most importantly, I would not have been the woman I am today. For that, *‘daddy na mma, a huna tshine ndi nga ita fhano shangoni u lifha zwothe zwe vha nnyitela, nga nnda ha u livhuwa zwi tshi bva mbiluni yanga’*. (Daddy and ma, there is nothing in this universe that I can give to repay you for the sacrifices you have made, except to sincerely thank you).

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LIST OF ABBREVIATION AND ACRONYMS

ACA	Anti-Corruption Act
ACCU	Anti-Corruption Coalition Uganda
ACC	Anti-Corruption Commission
AMLA	Anti-Money Laundering Act
AFU	Asset Forfeiture Unit
APNAC	African Parliamentarians Network against Corruption
APRM	African Peer Review Mechanism
ARMP	Public Contract Regulatory Agency
AU	African Union
AUCPCC	African Union Convention on Preventing and Combating Corruption
BNPC	Botswana National Productivity Centre
CAG	Controller and Auditor General
CECA	Corruption and Economic Crime Act
CPA	Corrupt Practices Act
CPI	Corruption Perception Index
CPR	Corruption Prevention Reviews
CVA	Corruption Vulnerability Assessment
DCEC	Directorate on Corruption and Economic Crime
DCEO	Directorate on Corruption and Economic Offences
DoJ	Department of Justice
DPW	Department of Public Works
DWA	Department of Water Affairs
EACCA	Ethics and Anti-Corruption Commission Act
EACC	Ethics and Anti-Corruption Commission
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
EITI	Extractive Industries Transparency Initiative
EOCO	Economic and Organised Crime Office
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FDFA	Federal Department of Foreign Affairs
FIA	Financial Intelligence Authority

FIAA	Financial Intelligence Agency Act
FIAA	Foreign Illicit Assets Act
FIC	Financial Intelligence Centre
FIU	Financial Intelligence Unit
FOJ	Federal Office of Justice
FATF	Financial Action Task Force
GABAC	Groupe d'Action contre le blanchiment d'Argent en Afrique Centrale
GAC	General Auditing Commission
GAO	General Auditing Office
GDP	Gross Domestic Product
ICAC	Independent Commission against Corruption
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
IPOA	Independent Policing Oversight Authority Act
JSC	Judicial Service Commission
KCC	Kampala City Council
KIE	Kenya Institute of Education
LACC	Liberia Anti-Corruption Commission
LHDA	Lesotho Highlands Development Authority
LIPA	Liberia Institute for Public Administration
MAWG	Multi-Agency Working Group
MDA	Ministries, Departments and Agencies
MDC	Movement for Democratic Change
MENAFATF	Middle East and North Africa Financial Action Task Force
MINCSP	Ministry of the Supreme State Audit
MLA	Mutual Legal Assistance
MMDA	Metropolitan Municipalities and District Assemblies
MoU	Memorandum of Understanding
NA	National Assembly
NACC	National Anti-Corruption Commission
NAFI	National Agency for Financial Investigations
NCAF	National Anti-Corruption Forum
NCOP	National Council of Provinces

NEITI	Nigeria Extractive Industries Transparency Initiative
NEPAD	New Partnership for Africa's Development
NJC	National Judicial Council
NRM	National Resistance Movement
NSSF	National Social Security Fund
NYS	National Youth Service
OAG	Auditor-Generals Office
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
PCA	Prevention of Corruption Act
PFM	Public Finance Management
PLCE	Public Leadership Code of Ethics
PPA	Public Procurement Act
PPCC	Public Procurement and Concession Commission
PPOA	Public Procurement Oversight Authority
PPRA	Public Procurement Regulatory Authority
PSA	Public Service Act
PSACF	Public Sector Anti-Corruption Framework
PSC	Public Service Commission
RPPA	Rwanda Public Procurement Authority
RRA	Rwanda Revenue Authority
RSB	Rwanda Standards Board
RURA	Rwanda Utilities Regulatory Agency
SADC	Southern African Development Community
SAFC	Southern African Development Community Forum against Corruption
SCC	Special Criminal Court
SFO	Serious Fraud Office
SIC	Special Investigation Commission
SIP	Special Investigation Panel
SIU	Special Investigating Unit
STAOP	Strengthen Transparency, Accountability, Oversight and Participation
StAR	Stolen Asset Recovery Initiative
TSC	Teachers Service Commission
UN	United Nations

UNCAC	United Nations Convention against Corruption
UDHR	Universal Declaration of Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNGA	United Nations General Assembly
ZPPA	Zambia Public Procurement Authority
ZACC	Zimbabwe Anti-Corruption Commission

ABSTRACT

Despite the avalanche of academic literature penned by scholars of different backgrounds, a watertight definition of what is corruption is still absent. However, there is sufficient consensus that corruption can be construed as the misuse of state or public resources for private gain. Beyond dispute is the fact that corruption negatively affects socio-economic development; assaults democracy and human rights; the rule of law; good governance and widens the gap between the rich and the poor. Ultimately, it erodes peoples' confidence in public institutions. Put simply, corruption is an invisible enemy amongst a people that needs to be combatted and eliminated for socio-economic development; good governance and the rule of law to exist in any society. The impact of corruption on the African continent takes different scale and dimension due to some inherent weak legal and economic structures existent therein. As such, as compared to some Western States, corruption in Africa has devastating effects. Its prevalence is attributed to many reasons, some of which include frail anti-corruption instruments and institutions; lack of a political will in fighting corruption; the absence of democracy, good governance and the rule of law; and lastly, the entrenchment of corruption in the social fabric of the people who have elevated it to the logics of negotiations as well as *modus operandi* for anything to get done.

This thesis explores the corruption conundrum on the African continent. It starts with a navigation of the different schools of thought on corruption, exploring the plethora of definitions postulated by different scholars and identifying common elements of corruption in their definitions. By taking a socio-legal perspective into the study of corruption in the African continent, it examines both the different sociological landscapes as well as legal platforms across numerous African States and argues that corruption is practiced in almost every society in all African States, to which different names in their local languages are used. In addition, the thesis studies the various national anti-corruption legislative framework and institutional mechanisms put in place in selected African States. As argued in this thesis, the existence of national anti-corruption legislation and the establishment of institutional mechanisms to fight corruption are in themselves insufficient: these efforts must be complemented by the existence of a strong political will that propels these efforts, sets the national tone for the fight against corruption and lastly, engages the broader citizenry as well as other state institutions and organs in the fight against corruption.

A snapshot of the perpetration of grand corruption on the African continent reveals that most of the resources stolen by senior state officials are surreptitiously transferred to foreign States, especially the West, which are seen as safe havens. In fact, numerous scandals have

been documented in history where billions of liquid cash have been banked in the West by senior state officials who misappropriate public funds. In other instances, these senior state officials have acquired huge properties in these Western States. The misappropriation of public funds deprives a victim state of the resources needed to pursue socio-economic development. The depletion of resources marked for any developmental project means that such a project goes unexecuted or poorly implemented. In this regard, the fight against corruption in Africa cannot be waged by Africa alone. As argued in this thesis, there is the need for foreign governments to lend assistance to African States in their fight against corruption. This assistance may take different forms, and will ultimately require a strong political will from the governments involved. Foreign governments have a critical and priceless role to play in Africa's fight against corruption.

As mentioned earlier, no society is immune to corruption: corruption occurs in every society across the world. However, as discussed in this thesis, of critical importance is the need to bring corruption to a level that is manageable and tolerable with minimal instances of perpetration by the people. This is where Africa is entrenched in a battle as corruption is practiced by senior state officials who engage in grand corruption and lower rank officials as well as the ordinary people who have to pay a bribe or give a gift in order to have a service rendered.

By taking a socio-legal perspective into the study of corruption in Africa, this thesis explores the trends in corruption as practices across Africa; the commonalities in these practices; how entrenched these practices are within African societies; and the legal mechanisms in place to combat corruption. The methodology adopted in conducting this research was purely qualitative as it was limited to describe the practices in place as well as interrogating the legislative framework and institutional mechanisms in place to fight corruption.

At the conclusion of this research, specific findings were made: first, that no African society is immune to corruption. Second, almost every African State has an anti-corruption instrument in place, as well as an anti-corruption institution that has been established. Third, corruption has adverse impacts which are more devastating on the African continent due to its level of development, scarcity of resources and prevalence of a huge number of poor and underprivileged people. Fourth, stolen resources from African States are usually channelled secretly to non-African States where they are kept, this usually a challenge for law enforcement to detect, investigate and prosecute such perpetrators. Fifth, the perpetration of corruption deprives African States of the resources they need for socio-economic development.

Based on the following, this thesis argues and recommends that Africa's fight against corruption will require a strong political will in order to complement the existing legislative frameworks and institutional mechanisms. Without the requisite political will, national anti-corruption instruments and institutions will be ineffective, under-resourced, selective in operation and subjected to political pressure wielded by senior state official who misappropriate state funds. In addition to political will, it is also argued and recommended that foreign governments should play a key role in Africa's fight against corruption. The role of foreign governments in Africa's fight against corruption requires strict laws regulating financial institutions that receive assets from non-residents without interrogating their sources; the provision of mutual legal assistance by assisting law enforcement through the provision of information that will help in investigating such crimes, assisting in repatriating stolen assets; and also prosecuting legal and natural persons who are involved in the commission of corruption (directly or indirectly).

CHAPTER ONE

INTRODUCTION

1.1 Introduction

In this chapter, the background of the study, problem statement, definitions of concepts and other key words used in the study are presented. The research questions, aim and objectives of the study, literature review, research methodology (used in finding answers to the research questions), the scope of the study, limitations and structure of the study are also discussed and described in this chapter.

1.2 Background of the study

Corruption can be described as an invisible enemy among human beings. The question that comes to mind is: whose enemy is it exactly? There is no doubt that corruption is not the enemy of its beneficiaries, instead, it is the enemy of anyone deprived of socio-economic development. Corruption is endemic: it exists everywhere.¹ Furthermore, in societies where it has been entrenched into the social fabric, it has been elevated to a culture, a daily practice, a way of life and a means to an end. In such instances, corruption often benefits both the perpetrator (the person who offers a promise, reward or gift in order to achieve something) and the beneficiary (the person who receives the gift, reward or to whom a promise is made). For example, when a bribe for the issuance of a licence or permit is given to a state official, the transaction benefits the perpetrator as s/he gets what s/he wants (not deserves at that specific moment) and the receiver of a gift is enriched by the bribe s/he receives. Unfortunately, those who do not have the means to make such a promise (offer a reward or give a bribe) are adversely impacted by such corrupt practices as the perpetrators and beneficiaries (or recipients) made giving of a bribe, reward or promise, the conventional way of doing business or getting something done.

The term corruption is usually used in society when people feel they are being deprived of what rightfully belongs to them, or when they do not get proper services that should be rendered to them simply because they have not engaged in any conduct aimed at facilitating the delivery of

¹ Gerald E Caiden, 'Accounting For Success in Combating Corruption' in Jon S T Quah (ed), *Different Paths to Curbing Corruption: Lessons from Denmark, Finland, Hong Kong, New Zealand and Singapore* (Emerald Group Publishing 2013) 196.

such a service. Within communities, there are both public and private spheres. The State, on the one hand, has obligations to render services to both natural and legal persons over which it has jurisdiction. Some of these services include the provision of water, educational facilities, medical institutions, driving licences, business permits, construction sites, building authorisations, among others. Individuals (as individuals and in groups) operate within the private sphere. However, to a greater extent, the existence and survival of the private sphere, especially with regard to social and economic activities, depend on the regulations in place that are implemented by the State (clearly, it is a prerogative that it enjoys based on sovereignty). Therefore, interaction between the private and public spheres will occur on a regular basis as follows: permits for business activities have to be applied for and obtained prior to the commencement of business; driving licences have to be issued to applicants in order to enable them to drive; associations have to be registered in conformity with laws and policies in place before they can operate. Such scenarios highlight the frequent interaction and intersection between public and private spheres in every community.

However, how these interactions are done, what processes are followed, the speed at which these processes are run and their outcomes remain matters to be determined by every public official in charge. Despite the fact that laws and policies would regulate these, powers of such nature are discretionary. In areas where administrative accountability is weak or lacking, the exercise of such discretionary powers may be unreasonable, discriminatory, biased and unfair. Even in cases where there are sufficient guards against such mal-administrative practices, individuals still exude a tendency to influence the outcomes of applications, especially when they know they do not qualify. This paves the way for the giving of gifts (referred to as 'bribes' in criminal law). Similar situations occur when businesses influence individuals in positions of authority to obtain contracts by making promises to them. In the public sphere, a state official appoints a relative who lacks the requisite qualification for a position. Additionally, assets entrusted in the hands of a public official are misappropriated or embezzled as follows: making use of a state-funded car for a private trip; and siphoning of funds allocated for a project to other personal projects. In politics, the outcome of elections is influenced through voter fraud and dubious counting mechanisms put in place in order to gain access to, or retain political power. Examples of such illicit, dishonest and fraudulent practices abound. Seen from both a pedestrian and legal perspective, these are all acts of corruption. The question that comes to mind is: what then is corruption? The different ways in which corrupt acts are committed help explain the elusiveness in finding a universally acceptable

definition of what corruption is. As explained later in this study, the difficulty in defining corruption partly explains why overcoming it has been challenging to numerous legal systems, especially in Africa.

Studies by legal and social scientists (who have written on the subject) are considered in deconstructing the term corruption in this study. Prior to examining these studies, the definition of corruption as suggested by two dictionaries of English is provided. According to the Oxford Dictionary of English, corruption is a 'dishonest or fraudulent conduct by those in power, typically involving bribery'.² This is quite a very restrictive definition as it defines corruption within the context of those in power. The Merriam Webster dictionary provides a much broader definition of corruption. The term is seen or understood as a 'dishonest or illegal behaviour, especially by powerful people (such as government or police officials)'.³ This definition is situated within the broader term but with great emphasis on those in power.

These two definitions provide a starting point for the delineation of what corruption is (at least, from the perspectives of these definitions). As defined, corruption involves an act. The act could take different forms: promises, gestures, gifts, rewards, prizes, misappropriation, influence, or fraud. However, the act itself does not suffice to make it corruption (when seen from a legal perspective). It is the intent that underlies the act that would make it corruption. In this regard, such an act must be dishonest, fraudulent, illegal or even unethical for it to qualify as corruption. This analysis assumes that corruption, as defined above, is not limited to the public sphere: it may take place within the private sphere, even though prosecution of such cases depends on a variety of factors.

Beyond these definitions, scholars and practitioners have propounded numerous definitions on what they perceive to be corruption. Farrales is of the view that there is no universal definition of what corruption is. According to the author, a universal definition of corruption is probably impossible.⁴ However, Chugh provides a much general and broader definition of what corruption is by pointing out that corruption is a deeply-rooted phenomenon of manifold that consists of a

² Sharon Hayes, *Criminal Justice Ethics: Cultivating the Moral Imagination* (Routledge 2015) 136; <<http://www.oxforddictionaries.com/definition/english/corruption>> accessed 12 May 2016.

³ <<http://www.merriam-webster.com/dictionary/corruption>> accessed 12 May 2016.

⁴ Mark Jorgensen Farrales, 'What is Corruption? A History of Corruption Studies and the Great Definitions Debate' 2005 UCSD.

wide variety of actions and/or behaviours that refer to a dynamic process and its outcome.⁵ Banerjee *et al*; Shleifer and Vishny; Gokcekus and Bengyak; Hodgson; and Tulchin and Espach define corruption as the sale of government sources by government officials for private gains.⁶ However, this definition is quite restrictive as it focuses only public sphere corruption: that is, corruption perpetrated by individuals linked to government.

By inserting the involvement of government officials into the definition of corruption, there is a likelihood of corruption becoming associated with the culture and practice of politics. Therefore, corruption becomes traditionally accepted and perceived as a practice by government officials who occupy public offices. This approach is not only limited but complicated as it eliminates other instances of corruption occurring in the private sphere. For this reason, Farrales discusses corruption from diverse perspectives: the Moralists and Revisionists' Schools. Philosophers in the Moralism School such as Plato and Aristotle condemn corruption. According to them, any and every kind of corruption is toxic to society, politics and development. Moreover, they believe that corruption is one of the unpalatable consequences of lack of moral behaviour, which in turn, holds back society from further development.⁷ On the other hand, philosophers in the Revisionist School, as pointed out by Farrales, are hesitant in condemning corruption quickly. In order to understand their point of view, Farrales sheds light on this by giving an example of what could be considered a Revisionist 'value-free' definition of corruption:

Corruption is an extra-legal institution used by individuals or groups to gain influence over the actions of the bureaucracy. As such the existence of corruption *per se*, indicates only that these groups participate in the decision-making process to a greater extent than would otherwise be the case.⁸

⁵ Divyanshi Chugh, 'Psychology of Corruption: The Motivation behind and Conditioning of Corruption in India' (2012) *The Learning Curve*.

⁶ Abhijit Banerjee *et al*, 'Corruption' in Robert Gibbons and John Roberts (eds), *The Handbook of Organisational Economics* (Princeton University Press 2012) 1112; Andrei Shleifer and Robert W Vishny, *The Grabbing Hand: Government Pathologies and their Cures* (Harvard University Press 2002) 91; Omer Gokcekus and Kevin Bengyak, *Peculiar Dynamics of Corruption: Religion, Gender, EU Membership, and Others* (World Scientific 2014) 11; Geoffrey M Hodgson, *From Pleasure Machines to Moral Communities: An Evolutionary Economics without Homo economics* (University of Chicago Press 2012) 154; Alberto Ades and Rafael Di Tella, 'The New Economics of Corruption: A Survey and Some New Results' in Joseph S Tulchin and Ralph H Espach (eds), *Combating Corruption in Latin America* (Woodrow Wilson Centre Press 2000) 38.

⁷ Farrales (n 4).

⁸ *ibid*.

Philosophers in the Revisionist School believe that corruption emanated from the ‘disequilibria between different systems’, and that corruption is a result of modernisation and development. Put simply and categorically, Revisionists do not see corruption as being ‘inherently harmful’.⁹

Vargas-Hernández endorses the view that there is no universally acceptable definition of corruption. However, he proposes different categories of corruption as follows: political corruption, economic corruption and public administration corruption. Vargas-Hernández further asserts that, depending on the power an individual has to make decisions or to whom is requested, corruption can either be active or passive.¹⁰ Deming describes active corruption as a deliberate act by anyone who promises or gives, directly or through a third party, an advantage of any kind to an official either for himself or any other person, to enable the official to act or refrain from acting in accordance with his/her duties or functions.¹¹ On the other hand, passive corruption occurs when an official accepts or receives payment.¹²

The involvement of state officials, some of whom are political actors, in the definition of what corruption is, partly helps to explain political corruption. Political corruption exists when a person has gained political power which subsequently leads to the deviation of the individual behaviour from the guidebook of state politics and policies. Such deviation from the guidebook affects decisions made by government officials: they abuse their political power by serving their private interests and replace public and common interests with private gains.¹³ DeLeon opines that actors of political corruption act with ‘a certain amount of deliberate, coordinated action...in order to share the benefits and subsequently hide the activity from regulators, the press, or the parties being disenfranchised’.¹⁴ Examples of political corruption include nepotism, tribalism or favouritism which occur when a public official facilitates, influences, or recommends the employment of a close relative despite the fact that such a relative lacks the relevant qualifications for the job.

⁹ *ibid.*

¹⁰ José G Vargas-Hernández, ‘The Multiple Faces of Corruption: Typology, Forms and Levels’ in Agata Stachowicz-Stanusch (ed), *Organization Immunity to Corruption: Building Theoretical and Research Foundation* (Information Age Publishing 2009) 132.

¹¹ Stuart H Deming, *The Foreign Corrupt Practices Act and the New International Norms* (2nd edn, American Bar Association 2010) 423.

¹² Sharon Eicher, ‘What Corruption is and Why it Matters’ in Sharon Eicher (ed), *Corruption in International Business: The Challenge of Cultural and Legal Diversity* (Gower Publishing, Ltd 2012) 5.

¹³ Vargas-Hernández (n 10) 132.

¹⁴ Peter DeLeon, *Thinking about Political Corruption* (Routledge 2015) 25.

Economic corruption occurs when the principal's interests are sacrificed for the agent's interests resulting in the making of profits. According to Vargas-Hernández, this type of corruption 'has implications of determining the loss of income, how and how much for the principal, the agent, the state, the consumer, and the economy'.¹⁵

Lastly, public administration corruption exists when state officials abandon the principles of public service responsibility and accountability such as efficiency, truthfulness and openness. This often results in the transfer of public benefits to private benefits.¹⁶ For example, X pays 'kickbacks' to Y, a public official, to influence Y in the performance of his duties and ensure that X's company is granted a procurement contract. Another example is where a person offers a gift or bribe in order to influence an official to do or refrain from doing something that he or she is legally obliged to do.

Another kind of corruption is 'grand corruption' which involves a lot of money. An example is the offering of kickbacks to political leaders who, in turn, award lucrative government contracts to friends.¹⁷ Grand corruption is frequently defined as the considerable spending of funds and has a major impact on a government budget and the development of a state.¹⁸ The general concern with grand corruption is that it affects the level of trust society has on its leaders: it makes people to trust less, and most importantly, widens different levels of inequality.¹⁹

Heywood considers petty corruption (another kind of corruption) as 'bribes and other direct and illegal perks offered to street-level bureaucrats'.²⁰ There is some degree of consensus between Heywood and Bussell on what petty corruption is. Bussell considers petty corruption as street-level form of corruption involving an individual interacting with the state. In other words, petty corruption takes place when X, an individual, pays an additional fee to Y, a bureaucrat or state official, in order to attempt to obtain or access services, speed up the service delivery process, or to acquire certain services which he or she is not entitled to.²¹ Technically speaking, petty

¹⁵ Vargas-Hernández (n 10) 132.

¹⁶ *ibid* 133.

¹⁷ Paul M Heywood, *Routledge Handbook of Political Corruption* (Routledge 2014) 200.

¹⁸ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 1999) 27; Vinay Kumar Bhargava and Emil P Bolongaita, *Challenging Corruption in Asia: Case Studies and a Framework for Action* (World Bank Publication 2004) 90; Dante B Canlas *et al* (eds), *Diagnosing the Philippine Economy: Toward Inclusive Growth* (Anthem Press 2011) 314.

¹⁹ Heywood (n 17) 200.

²⁰ *ibid* 111.

²¹ Jennifer Bussell, *Corruption and Reform in India: Public Services in the Digital Age* (Cambridge University Press 2012) 272.

corruption involves middle or low-level public officials who are often grossly underpaid and interact directly with the public.²² Petty corruption 'systematically favours political allies' and involves small amounts of money.²³ The obvious effect of this form of corruption is that it generally harms poor members of the society when they interact with public officials to request for public services.²⁴ Petty corruption involves private individuals, business owners, or firm managers, who, on a regular basis, engage with junior or subordinate public officials (who people depend on) for the approval of licences or something similar.²⁵

Bribery is a form of petty corruption. Carlan *et al* and Malan provide similar definitions of bribery. Carlan *et al* define bribery as an agreement between parties to do or refrain from doing something required of a state official in exchange of money, property, a gift or some reward.²⁶ According to Malan, bribery could be understood as a process where a person is persuaded by either a gift or money to act improperly or not to act at all in order to favour the person who offered the bribe.²⁷ These two definitions bear plenty of similarities, the only difference being that the former defines it as an agreement while the latter considers it as a process.

Theft (of state resources) is also classified as a form of corruption. According to the general definition as provided by criminal law, theft is the unlawful removal of property that belongs to another, with the intention of causing loss, or depriving the owner of such property. Property here is construed in the broadest term to include cash, tangible assets, information, and any property that is capable of being removed.²⁸ It may also be construed to include unauthorised use of public property that results in a loss to the owner, such as making use of public office telephones for private purposes.²⁹

Another form of corruption that exists at petty level but perpetrated within a state is fraud. Fraud could be defined as 'any cunning, deception, or artifice used to circumvent, cheat, or deceive another'.³⁰ Albrecht *et al* propose three elements for the detection of fraud as follows: First, fraud

²² Thomas Theisohn and Carlos Lopes, *Ownership Leadership and Transformation: Can We Do Better for Capacity Development* (Routledge 2003) 115.

²³ Heywood (n 17) 111.

²⁴ Amitava Mukharjee, *Food Security in Asia* (SAGE Publications India 2012) 79.

²⁵ Heywood (n 17) 111.

²⁶ Philip Carlan *et al*, *An Introduction to Criminal Law* (Jones and Bartlett Publishers 2011) 126.

²⁷ Faan Malan and Ben Smit, *Ethics and Leadership in Business and Politics* (Juta and Company Ltd 2001) 232.

²⁸ John Milton, *South African Criminal Law and Procedure: Common-Law crimes* (3rd edn, Juta and Company Ltd, 1996) 585.

²⁹ Steve W Albrecht *et al*, *Fraud Examination* (Cengage Learning 2015) 155.

³⁰ Joseph Story, *Commentaries on Equity Jurisprudence* (The LawBook Exchange Ltd 2006) 113.

could be detected in an act of theft. For example, X, a financial consultant witnesses his co-worker, Y, taking money. In this example, X is considered to have committed fraud; Second, in act(s) of concealment, the alteration of records or miscounts of money or inventory which could be recognized. For example, Y, who is responsible for keeping proper financial records, alters financial documents in order to cover up stolen money; and Third, the visible, yet, inevitable change in the lifestyle of the perpetrator as a result of the embezzled funds.³¹ For example, Y buys expensive cars, technological equipment for his daily lifestyle and lavish clothing shortly after money was stolen. Another illustration of fraud could occur when one dishonestly and intentionally lies about his/her academic qualification. Unfortunately, this is common in many African States.³²

Lastly, there is institutional corruption. According to Hindess, any gains made through this form of corruption is political rather than personal. Hindess argues that 'this kind of corruption is hardly something that could be compensated for by a crackdown on corruption in other areas'.³³ On the other hand, Miller opines that 'acts of institutional corruption necessarily involve a corruptor who performs corrupt actions qua occupant of an institutional role and/or someone who is corrupt qua occupant of an institutional role'.³⁴

On the impact of corruption, scholars as well as practitioners take different positions. While some have condemned corruption, arguing that it has negative effects on government, economies and service delivery, there are others who contend that corruption has positive effects. Those belonging to this school of thought argue that corruption may aid entrepreneurs and investors, both foreign and domestic, and could be helpful in gaining some sort of control over policy progress and government activities in the economy which, in turn, will significantly reduce the negative effects of existing political uncertainties on investments and productive activities.³⁵ Using China

³¹ Mary-Jo Kranacher *et al*, *Forensic Accounting and Fraud Examination* (John Wiley and Sons 2010) 220.

³² An example of this could be seen in the case of *The People v Asseneh Christine Lambou*, wherein the accused was charged for misappropriation of funds to the sum of 18.775.732 CFA. Mrs. Christine Lambour Asseneh was employed by CAMPOST (Cameroon Postal Services) for a period of six years. Devoted to revamp CAMPOST, an internal audit was conducted to verify qualifications and certificates amongst other things. It was later established that the Bachelor of Arts (Economics) degree certificate of Mrs. Lambou Christine which was supposedly issued by the University of Benin in Nigeria was reportedly declared to be fake after the request was sent to the University by CAMPOST.

³³ Barry Hindess, 'International anti-corruption as a programme of normalization' in Luis de Sousa *et al* (eds), *Government, NGOs and Anti-Corruption: The New Integrity Warriors* (Routledge 2012) 24.

³⁴ Seumas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (Cambridge University Press 2009) 169 (emphasis added).

³⁵ John Mukum Mbaku, *Corruption in Africa: Causes, Consequences, and Cleanups* (Lexington Books 2010) 95.

as an example, Shieh points out that China has an unparalleled growth. According to Shieh, combining this with its high levels of corruption, it could be argued that 'China's corruption may be more developmental than destructive'.³⁶ Disciples of this school of thought consider corruption as a lubricant to the wheels of development, an ideology that is argued and debunked in this study.

Other schools of thought hold a different view. These scholars believe that corruption has a negative impact on both direct domestic and foreign investment.³⁷ Chamola argues that one of the significant effects of corruption is its ability to affect investment levels and income from taxes, which in due course, reduces the income of the economy, thus raising costs of transactions. These affect economic growth as the choice of projects to undertake are manipulated by government. Chamola further points out that the most important effect of corruption is 'on the pattern of allocation of resources...' and 'distribution of income within the society'.³⁸ Chamola contends that the reason why allocation of resources within the society is distorted is 'because contracts are given not based on rates but on corrupt income generation'.³⁹ As to the distribution of income, Chamola argues that this is so because corruption favours the rich.⁴⁰

The adverse impact of corruption is felt across almost every sector of public life: service delivery, conduct of political elections at all levels, good governance, the promotion, protection and respect for human rights, and infrastructural development.⁴¹ It erodes the confidence the people have in their public institutions, and gradually replaces efficiency with mediocrity. An example of corruption of state institutions is typical of legal systems as in where a party to a lawsuit or someone with interest therein corrupts the judge in order to win a case.⁴² Corruption also widens the gap between the poor and the rich, destabilises legitimate governments and polarises a community between the haves (those in economically and politically viable and stronger positions)

³⁶ Shawn Shieh, 'Corruption, Economic Growth and Regime Stability in China's Peaceful Rise', in Sujian Guo (ed), *China's "peaceful Rise" in the 21st Century* (Ashgate Publishing Ltd 2006) 65.

³⁷ Aminur Rahman *et al*, *Estimating the effects of Corruption: Implications for Bangladesh* (World Bank Publication 2000) 9.

³⁸ S D Chamola, *Kautilya Arthshastra and the Science of Management: Relevance for the Contemporary Society* (Hope India Publications 2007) 109.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Kim SOO-Am *et al*, *Relations between Corruption and Human Rights in North Korea* (Korea Institute for National Unification (South Korea) 2013) 14.

⁴² Edgardo Buscaglia, *Judicial corruption in developing countries: Its Causes and Economic Consequences* (Hoover Press 1999) 3.

and the have-nots (victims of corrupt practices).⁴³ Corruption may also challenge the legitimacy on democratic institutions. Furthermore, corruption can cause ‘political instability in a country (through its effects on income polarisation) and the violence that can flow from it’.⁴⁴ Those who belong to this school of thought perceive corruption as sand in the wheels that affect their smooth running.

Corruption is endemic, practised in both developed and developing States, urban and rural areas, democratic and autocratic governments alike. However, the issue here is not about completely eradicating corruption. The challenge is to bring corruption to a level that is tolerable and manageable. As such, different States have developed different legislative and institutional mechanisms aimed at managing the incidence of corruption and bring it to a tolerable level.

According to the data revealed by the global anti-corruption watchdog, Transparency International (TI), many African States are plagued with corruption. This, however, does not mean that the levels of corruption in African States are the same. As indicated by TI’s data, the least corrupt African States are Botswana and Rwanda.⁴⁵ Strategies taken by these States are commendable.

Corruption in Rwanda is relatively low compared to other African States. Various measures and institutions have been put in place in an effort to combat corruption.⁴⁶ The aim of the Rwanda Utilities Regulatory Agency (also known as RURA) is to regulate utilities such as telecommunications, electricity, water, gas, sanitation and transportation by ensuring that agencies that provide such services do so transparently.⁴⁷ Another anti-corruption institution in Rwanda is the Auditor-General’s Office (OAG), established to audit governance in order to facilitate its adherence to fiscal controls and ensuring that government finances are more transparent.⁴⁸ The establishment of an Anti-Corruption Unit in the Rwanda Revenue Authority (RRA) in accordance with the laws of taxation, was to create obligations for the Unit to participate in fixing, collecting, controlling and managing taxes according to the law, granting tax waivers, educating and

⁴³ Lorenzo Pellegrini, *Corruption, Development and the Environment* (Springer Science and Business Media 2011) 63.

⁴⁴ *ibid.*

⁴⁵ Elie Virgile Chrysostome and Rick Molz (eds), *Building Businesses in Emerging and Development Countries: Challenges and Opportunities* (Routledge 2014) 53; Transparency International, ‘Corruption Perception Index 2016’.

⁴⁶ Aimable Twagilimana, *Historical Dictionary of Rwanda* (Rowman and Littlefield 2015) 62.

⁴⁷ Felicia O Akinyemi, ‘Towards a Rwandan NSDI: An Update’ in Management Association and Information Resources, *Geographic Information System: Concepts, Methodologies, Tools, and Applications: Concepts, Methodologies, Tools and Applications* (IGI Global 2012) 2047.

⁴⁸ Law No.05/98 of 04/6/1998 Establishing the Office of the Auditor-General of the State Finance, Article 3.

informing the public on tax payments, and advising Central and Local Government authorities on matters relating to tax policies.⁴⁹

The Rwanda Standards Board (RSB) is a public institution. The aim of the Board is to establish national standards, disseminate such information and raise awareness as well as promote the standards, together with regulations relating to the standards and conformity with assessment.⁵⁰ The obligations of another board (the Rwanda Public Procurement Authority, RPPA) are to: organise, analyse and supervise public procurement matters; advise government or public procurement organs on policy matters and strategies relating to public procurement; control the awarding and execution of public contracts; and develop human resource professionalism in public procurement.⁵¹ Lastly, the Office of the Ombudsman of Rwanda was created: “[P]revent and fight corruption in public administration and to investigate any complaints from both individuals and associations against acts of public servants or officials”.⁵²

Apart from Rwanda, another African State that has made efforts and successfully implemented its anti-corruption mechanisms is Botswana, a small State located at the North-West of South Africa. Numerous reforms have been undertaken by this State to combat corruption, which, in effect, have brought about huge economic fortunes. The first step initiated by this State is the reform of the public sector, which over the years, proved to be critical in the fight against corruption.⁵³ The Botswana National Productivity Centre (BNPC) introduced the performance management system in an effort to reform the public service in Botswana. The Centre developed a Performance Management Manual aimed at developing professional management system by way of improving planning and changing management frameworks linked to budgeting and funding processes.⁵⁴

⁴⁹ Law No.08/2009 of 27/04/2009 Determining the Organisation, Functioning and Responsibilities of Rwanda Revenue Authority (RRA), Article 3.

⁵⁰ Law No.30 of 29/07/2013 Establishing Rwanda Standard Board (RSB) and Determining its Mission, Organisation and Functioning, Article 4.

⁵¹ Law No.63/2007 of 30/12/2007/ Establishing and Determining the Organisation, Functioning and Responsibilities of Rwanda Public Procurement Authority, Article 3.

⁵² Law No.17/2005 of 18/08/2005. See also Ian Lienert, *Choosing a Budget Management System: The Case of Rwanda* (International Monetary Fund 2004) 16.

⁵³ Mohammed Adaya Salisu, ‘Foreign Direct Investment in Sub-Saharan Africa’, in Yingqi Wei and V N Balasubramanyam (eds) *Foreign Direct Investment: Six Country Case Studies* (Edward Elgar Publishing 2004) 194.

⁵⁴ Bernadette Nambi Karuhanga and Amanda Werner, ‘Factors for Successful Performance Management Implementation in a University in Uganda’ in Jotham Momba (ed), *Zambia Social Science Journal Vol. 3, No.1 (April 2012)* (Cambridge Scholars Publishing 2014) 77.

It is crucial for States to take measures to transform their governmental functionalities in an effort to combat corruption. Often considered as one of the most corrupt States in Africa, Cameroon has battled with institutional reforms, thus leading to the creation of a National Anti-Corruption Observatory and a Special Criminal Court (SCC) (in 2011) with jurisdiction to try persons who misappropriate public funds over 50.000.000 CFA Francs (approximately US\$ 100.000). Even though these institutions have gone operational, the arrest, indictment, prosecution and conviction of numerous top-notch politicians, ministers, and directors of parastatal comes as cogent evidence of political will to combat corruption. However, the impact of these actions would only be appreciated after the release of TI's latest score sheet.

Decades of development of international instruments on Anti-Corruption has led to the establishment of various pieces of instruments⁵⁵ as follows: the Inter-American Convention against Corruption;⁵⁶ the 1997 European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union⁵⁷ and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵⁸ Other international instruments include the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption;⁵⁹ the African Union Convention on

⁵⁵ Nick Wolanin, *Corruption and Anti-corruption* (ANU E Press 2013) 36.

⁵⁶ Inter-American Convention against Corruption 29 March 1996, S. Treaty Doc. No.105-39, 35 I.L.M 724. Adopted at the third plenary session, held on 29 March 1996. The Convention urged the promotion and strengthening State Party development mechanisms that are aimed at preventing, detecting, punishing and eradicating corruption. Furthermore, the Convention urged the promotion, facilitation and regulation of States Parties cooperation in order to ensure that anti-corruption measures and actions are effective.

⁵⁷ The Convention ensures that the European Union members' have criminal provisions against corruption covering issues on bribery matters that involve public officials other EU countries or public officials of the European Communities. See also Stefania Giavazzi *et al*, 'The ABC Model: The General Framework for and Anti-Bribery Compliance Program', in Stefano Manacorda *et al* (eds), *Prevention Corporate Corruption: The Anti-Bribery Compliance Model* (Springer Science and Business 2014) 118.

⁵⁸ The Convention was adopted in 1997 and it is centred on 'active corruption', that is, it focuses on any acts of bribing officials. The idea of the Convention is to give contracting parties an obligation to criminalize acts of bribery involving foreign public officials. See also Andress Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012) 310.

⁵⁹ These are instruments aimed at providing civil remedies for citizens of States parties who suffered damages as a result of corruption and where appropriate, it allows the citizens to claim compensation. See also OECD, *Corruption: A Glossary of International Standards in Criminal Law* (OECD Publishing 2008) 13; Sope Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualified or Debarment Measures* (Bloomsbury Publishing 2012) 22.

Preventing and Combating Corruption (AUCPCC);⁶⁰ and the United Nations Convention against Corruption.⁶¹

There are other international instruments which were not specifically adopted to solely combat corruption, but nonetheless stipulate the need to eradicate corruption and to have any corrupt act punishable. These instruments include: the International Covenant on Economic, Social and Cultural Rights which sheds light on how corruption may affect the realisation of economic, social and cultural rights of the general public; the United Nations Convention against Transnational Organised Crime⁶² provides for individual criminal responsibility on those who attempted or completed criminal activity within the scope of the Convention including acts of corruption,⁶³ and laundering proceeds of a crime; and the AUCPCC criminalises the following acts: passive bribery of foreign and international public officials; active and passive bribery in the private sector; trade influence; embezzlement; misappropriation or any other diversion of property in the private sector and illicit enrichment.⁶⁴

In summary, corruption is a global crisis that causes economic, political and social damage. There is a need for the international community and governments to take a stand in order to fight this pandemic (corruption). This study examines the corruption conundrum from a socio-legal perspective. This is done by identifying the different ways in which corruption is committed in various African societies, and how this has shaped the definitions of what constitutes corruption. In addition, it helps in finding ways of overcoming corruption. While acknowledging the existence of national and international anti-corruption strategies, it is argued in this study that these are few

⁶⁰ The principal purpose of the Convention is to aimed at promoting and strengthening development mechanisms in the prevention, detection, punishment and the eradication of corruption and other related offences in both the public and private sector in African states, together with facilitating and regulating co-operation in order to ensure effective measures and actions are being used in the fight against corruption, this also includes coordinating and harmonising state policies and legislation aimed at combating corruption. See also Adefolake O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspective on Anti-Corruption* (Cambridge University Press 2012) 113.

⁶¹ The Convention serves as a tool to promote and strengthen measure aimed at preventing and combating corruption, to ensure that these measures are effective and efficient, and to facilitate international cooperation and provide technical assistance in order to ensure the prevention of and fight against corruption. See also United Nations, *Multilateral Treaty Framework: An Invitation to Universal Participation Focus 2007: Towards Universal Participation and Implementation: A Comprehensive Legal Framework for Peace, Development and Human Rights* (United Nations Publications 2007) 82.

⁶² United Nations Convention against Transnational Organised Crime, United Nations General Assembly Resolution 25, U. N. GAOR, 55th Session, 62nd meeting, U.N. Doc. A/55/25 (2000), Article 1.

⁶³ *ibid* Article 8.

⁶⁴ *ibid* Articles 4(1)(a)-(h), 5, 6 and 8.

strategies, or limited political will aimed at fighting corruption, especially when it involves state officials and top political actors.

1.3 Problem statement

As stated earlier, corruption is present in every society. Corruption could easily infiltrate weak governmental administrations and cloaks itself and thrive in frail legislation. In an attempt to bring corruption to a level that is both manageable and tolerable, States, individually and collectively, have deliberated, established and implemented anti-corruption instruments. The core objectives of these instruments are not limited to ensuring that corruption is manageable and tolerable, instead, the instruments seek to make certain for its (corruption) detection, prevention and eradication in an attempt to create a corruption-free society. Unfortunately, over the decades, achieving these tasks has proved to be an extremely strenuous endeavour. Numerous reasons account for this, some of which include the clandestine nature of transactions, privacy concerns, the syndicated character of high-profile corruption in which numerous individuals play different roles and lack of political will in translating this vision into reality. Corrupt transactions often require a multiplicity of persons offering social structural support in their participation in corrupt activities. As such, when inequality increases, people tend to justify their corrupt activities.⁶⁵ Within the African context, these factors are not only portent; they elucidate the urgent necessity of a strong political will to give effect to national instruments and resources to national institutions towards the achievement of these objectives.

This researcher believes a major challenge to the eradication of corruption in Africa is tied to the difficulty in defining corruption. In this context, defining corruption would mean developing and postulating a watertight definition that captures or embraces all the various acts of corruption. If this could be done, then, probably, penalising it could be easier. However, as mentioned above and illustrated in the literature review, it is easier to explain corruption than to define it. This observation recognises the fact that different African States have differing perspectives on what corruption is.⁶⁶ In addition, they give it different labels within their formal and informal communications. The allocation of labels to different acts of corruption within various

⁶⁵ You Jong-sung and Sanjeev Khagram, 'A Comparative Study of Inequality and Corruption' (2005) 70 *American Sociological Review* 136,139 and 140.

⁶⁶ Matthew Burrows, *The Future. Declassified: Megatrends That Will Undo the World Unless We Take Action* (Palgrave Macmillan 2014) 22.

communities in Africa speak of how deeply entrenched it is within the social fabric; its crucial place in formal and informal transactions; but more importantly, how challenging it could be when it comes to combatting it at all levels. As argued later in this thesis, the difficulty in developing a watertight definition of what corruption is, with an encapsulation of all its essential ingredients, poses a major challenge.

The second challenge illustrates the detection of corrupt practices committed by high-level civil servants and bringing such individuals to justice. So many individuals have been engaged in acts of corruption, whether willingly, knowingly, ignorantly or innocently. However, with regard to corruption perpetrated by senior state officials, it hardly goes unnoticed. This is so because of the extent to which it is perpetrated; the nature of the loss caused; and the repetitiveness of the acts; results in its manifestations through invitations to; granting or acceptance of; bribes; misappropriation of funds; and conclusion of electronic transactions wherein huge sums of money are deposited into the accounts of foreign banks. Due to the unwillingness of law enforcement officials to identify, investigate and bring such individuals to justice, it becomes a 'political culture' exclusive to specific politicians or state actors. National legislation that is poorly written helps compound the situation as immunity is granted to such individuals. They are immersed in impunity as they bleed their national economies, thus depriving their States of the resources they need for development. As argued in this study, when such individuals permeate through the legal system untouched, then, it becomes necessary to solicit the assistance of foreign governments and financial institutions to assist in curbing corruption. This argument finds plenty of credence in the fact that misappropriated funds are deposited into the accounts of foreign banks. At times, assets are acquired on foreign territories, making it out of the reach of domestic law.

The third and last challenge addresses the acquiescence of state leadership. Bearing in mind how many African legal systems are faced with frail laws and institutions, often, public officials go unpunished and the stolen valuables untraceable, resulting in retrogression of a state and gross human rights violations. Weighed down by speculations that Africans are corrupt by their very nature, the presumption is that, Africa is clouded with bad governance as a result of poor and irresponsible leadership. A number of African States have been, or are, under dictatorship.⁶⁷ Even though some States characterise their systems as democratic, they usually find themselves relapsing into autocracy for the simple reason that their democracies are not founded on the right

⁶⁷ Stan Chu Ilo, 'The Face of Africa: Looking Beyond the Shadows' (Wipf and Stock Publishers 2012) 363.

normative and institutional framework. Such States often experience high levels of corruption, particularly because of the disinterest by those in power to take action in the fight against corruption. Instead, they are motivated by the realisation that existence of legit anti-corruption laws and institutions would limit and/or eventually eliminate their illegal opportunities. Apart from dictatorship, States that were once colonised and subsequently gained independence from colonial rulers, tend to have high corruption levels as well. The new leadership which vowed to transform the nation, often finds itself realising the immense power and the influence it has, and subsequently, refuses to abdicate political leadership by engaging in fraudulent acts all geared towards obtaining, retaining and consolidating political leadership. Some African leaders have gone on record for engineering constitutional amendments aimed at extending their mandate and terms of office.⁶⁸ It is argued in this study that when such individuals perpetuate such kinds of corrupt practices, they dilute a State's efforts towards combatting corruption. They become the point of reference to low-level corrupt officials who argue like the legendary Poor Parson in Chaucer's General Prologue to the *Canterbury Tales* that 'if gold can rust, what should iron do?'.⁶⁹

The mere existence of corruption has an immense impact on society, particularly the development of a State. Corruption easily flourishes in States that are developing. A developing State has numerous resources (monetary, property or natural in nature) at its disposal aimed at enhancing the growth of the economy or development in an effort to advance people's way of life. A sound, wise and rational use of these resources depends on the efficient and honest fulfilment of official obligation(s) by state officials. These officials, however, fail to diligently perform their duties because they often gravitate towards engaging in practices aimed at enriching themselves at the expense of the general public. This results in the deprivation of public entitlements and a snail-pace development of the State. Qualifying corruption as an 'invisible enemy among us', is not an overstatement. Corruption fuels and intensifies pre-existing predicaments such as the realisation of economic and social rights, widens the gap between the rich and the poor, escalates the level of poverty, alienates communities, fuels discrimination and fans the flames of political resentment.⁷⁰ It is believed that tackling corruption is a moral and legal imperative given the

⁶⁸ Francis Wiafe-Amoako, *Africa 2016-2017* (Rowman & Littlefield 2016) xi.

⁶⁹ Geoffrey Chaucer, Christopher Cannon, *The Canterbury Tales* (Oxford University Press 2011) 15.

⁷⁰ See generally: Jacques P Nguemegne, *Corruption and Human Development in Africa* (Xlibris Corporation 2011) 99.

diverse ramifications it has on democracy, accountability, the rule of law, human rights and the development of a State.

Acknowledging all concerns associated with corruption, existing anti-corruption instruments and institutions were established to improve the detection of corrupt practices with the pious hope of managing it, if not, completely eradicated within State borders. However, despite the existence of an avalanche of instruments condemning and criminalising corruption, its perpetration has changed forms as it has soared over the decades. It is argued that national institutions, including domestic and international instruments, are not in themselves sufficient to tackle corruption. Political leadership should exude an unquenchable and undiminishing desire that complements national institutions and instruments. In societies where corruption is so deeply rooted, and a way of doing business, it is inconceivable of any solution that is not accompanied and backed by a strong political will.

Worthy of note is the fact that the effectiveness of national anti-corruption institutions does not solely depend on their independence and their aims – their effectiveness significantly depends on the support given to them by the political elite. The existence of a plethora of laws and institutions does not in itself fight corruption. Political leadership, it is believed, should demonstrate that unequivocal desire to set the tone necessary for everyone to be engaged in the anti-corruption fight. In this regard, the identification of suspects, scrutiny of state accounts, investigation of transactions and conduct of prosecution can and only be done if political leadership is ready and willing to see its own ilk through these. It is argued in this study that political will is priceless in the fight against corruption; and that the high prevalence of corrupt practices in Africa is attributable to the absence of political will in this direction.

This study examines the challenges outlined above. The different anti-corruption instruments and institutions within African States are examined in this study and their strengths and weaknesses identified. By so doing, workable approaches adopted by different legal systems in Africa are discussed and how these could be replicated in different systems in order combat or reduced corruption to its lowest level.

1.4 Definition of concepts and other key terms

The concepts or terms below are used in this study to mean the following:

(a) Corruption: As discussed above, a search for a watertight definition of what corruption is remains elusive. Even though there is no universally agreed definition of what corruption is, there is at least some consensus on the presence of some elements. In this study, corruption is construed to mean the misuse of public resources by public officials for private gains. This misuse may take diverse forms.⁷¹

(b) Petty corruption is a form of corruption that has been in existence for centuries, and seen as a way of life in many developing States.⁷² This form of corruption affects 'the daily lives of a large number of people especially the poor and should be abandoned because it is a dangerous inaccurate rhetorical device'.⁷³

(c) Grand corruption refers to corruption perpetrated by senior public officials and political leaders, frequently involving 'large, international bribes and hidden overseas bank accounts'.⁷⁴

(d) Bribery may be understood to be a practice where one offers something in order to gain a dishonest advantage. Bribery can either be active or passive. For instance, the former occurs when A promises to give a bribe (usually money) to B. The latter, occurs when B, a public official accepts the bribe from A.⁷⁵ A typical example would be, A has a municipal fine which is due and on the day it is due, A bribes B, a municipal clerk with a sum of money to clear his fine, and subsequently, B accepts the bribe.

(e) Fraud may be defined as 'a false statement of fact which is made by one party to a transaction to the other knowingly, or without belief in its truth or recklessness without caring whether it be true or false, with the intent that it should be acted upon by the other party and which was in fact acted upon'.⁷⁶ Fraud may also be understood as being any significant or deliberate acts of misrepresentation of financial affairs for the benefit of the perpetrator, or third party for whom the perpetrator is acting, possibly without their knowledge.⁷⁷

⁷¹ Daniel Jordan Smith, *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria* (Princeton University Press 2007) 16.

⁷² Paul Heywood, 'Corruption' in Todd Landman and Neil Robinson, *The SAGE Handbook of Comparative Politics* (SAGE 2009) 364.

⁷³ Jon S T Quah, *Curbing Corruption in Asian Countries: An Impossible Dream?* (Emerald Group Publishing 2011) 11.

⁷⁴ *ibid.*

⁷⁵ John Fraedrich *et al.*, *Business Ethics: Ethical Decision Making & Cases* (9th edn, Cengage Learning 2012) 70.

⁷⁶ Sally Ramage, *Fraud and the Serious Fraud Office* (iUniverse 2005) 1.

⁷⁷ Peter Jones, *Fraud and Corruption in Public Services: A Guide to Risk and Prevention* (Gower Publishing Ltd 2004) 6.

- (f) Embezzlement may be defined as fraudulent acts of appropriating property 'by a person to whom it has been entrusted, or to whose possession it has lawfully come...the essence of embezzlement...lies in the breach of a fiduciary relationship deriving from the entrustment of money'.⁷⁸ Numerous jurisdictions label it 'misappropriation of public funds or property'.
- (g) Nepotism may be generally understood as being any act of favouritism showed to specific persons and occurring in wide parts of public administration. These persons could be relatives, people of the same ethnicity, same sex, gender, belief, political party or association.⁷⁹
- (h) Good governance principles: Good governance may be understood as 'the exercise of political, economic and administrative authority to manage a nation's affairs and covering relationships between governments and citizens. Good governance may also be defined as 'a way in which power is exercised in the management of the economic and social resources of a State, notably with a view to development'.⁸⁰
- (i) Political will may be defined as 'the demonstrated credible intent of political actors'. It could also be defined as 'the commitment of political leaders and bureaucrats to undertake actions to achieve a set of objectives and to sustain the costs of those actions over time'.⁸¹

1.5 Aims and objectives of the study

Considering the nature of corruption, this study seeks to determine the endemic nature of corruption in Africa by identifying and understanding its root causes.

1.5.1 Aims of the study

The overall aims of this study were to:

- (i) Undertake a socio-legal inquiry into the perpetration of corruption in Africa: the diverse ways through which it is committed, and how different communities (legal systems) respond to these through criminalisation of corruption;
- (ii) Identify different efforts (legislative and institutional) that have been made by various African States towards combatting corruption within their legal systems;

⁷⁸ Paul D Shaw and Jack Bologna, *Preventing Corporate Embezzlement* (Butterworth-Heinemann 2000) 17.

⁷⁹ Malan (n 27) 17.

⁸⁰ Sam Agere, *Promoting Good Governance: Principles, Practice and Perspective* (Commonwealth Secretariat 2000) 2-3. See also Sudarno Sumarto *et al.*, 'Governance and Poverty Reduction: Evidence from Newly Decentralization Indonesia' in Yasutami Shimomura (ed), *The Role of Governance in Asia* (Institute of Southeast Asian Studies 2003) 30.

⁸¹ Carmen Malena, 'Building Political Will for Participatory Governance: An Introduction' in Carmen Malena (ed), *From Political Won't to Political Will: Building Support for Participatory Governance* (Kumarian Press 2009) 18.

(iii) Argue that irrespective of the efforts made, the absence of a strong political will by the leaders will eventually benumb every mechanism in place. There is need for a strong political will in combatting corruption.

(iv) Argue that the existence of a political will enables state authorities to pursue and reclaim misappropriated funds transferred to foreign banks. In this regard, diplomatic channels, tools of law enforcement and intelligence require national networking so that foreign governments and institutions are not seen as complicit in the perpetration of corruption, but rather actively involved in the fight against corruption by African leaders.

1.5.2 Objectives of the study

The objectives of the study were to:

- (i) Understand the different ways through which corruption is committed in African States, and delineate its scale within African communities;
- (ii) Identifying the different kinds of corrupt practices committed by public officials;
- (iii) Explore the adverse impact of corruption on socio-economic development, direct domestic and foreign investment, democracy, human rights and rule of law;
- (iv) Identify relevant international instruments on corruption and explore the embedded weaknesses contained therein;
- (v) Through a comparative analysis, examine different national efforts (legislation and institutions) put in place by legal systems to fight corruption within their systems;
- (vi) Discuss the importance of political will in the fight against corruption; and
- (vii) Discuss the role of foreign governments and institutions in the fight against corruption.

1.6 Research questions

In conducting a socio-legal analysis of the corruption conundrum in Africa, this study seeks to find answers to the following (research) questions:

- (i) What is the scale of corruption in Africa and how is it perpetrated?
- (ii) Considering that corruption occurs in different scales, what methods of corruption are committed by public officials?
- (iii) What are the effects of corruption in Africa?

- (iv) What are the different mechanisms put in place by various States in order to combat corruption perpetrated by public officials?
- (v) Despite the efforts made by national legal systems through national instruments criminalising corruption and institutional mechanisms, why does combatting corruption remain a herculean task?
- (vi) What is the role political will in the fight against corruption? and
- (vii) How can foreign institutions and governments contribute to Africa's efforts to fight corruption?

1.7 Literature review

Corruption is a phenomenon as old as the hills (ancient) and is best described as a betrayal of trust by its benefactors at the expense of others.⁸² Throughout the years it has become one of the central issues in the national and international sphere. There is so much interest and motivation to combat corruption and promote good governance. This study seeks to address issues at hand that need devotion such as the nature and impact of corruption in Africa, as well as politics and bad governance (which have plagued the African continent for the most part).⁸³ There is need to engage with scholastic views, insights and understanding on the existence of corruption on the above-mentioned spheres and their anti-corruption mechanisms, together with other corruption-related challenges.

Due to the various segments to corruption, the likelihood of an exhaustive definition is simply nothing but erratic. Nonetheless, there are numerous thoughts and submissions surrounding its meaning, nature and implications, particularly because it is easy to identify an act as being corrupt in any given situation.⁸⁴

⁸² Laurence Cockcroft, *Global Corruption* (Best Red 2014) 80. See also John Thomas Noonan, *Bribes* (University of California Press 1987) XX.

⁸³ Ganahl Joseph Patrick, *Corruption, Good Governance, and the African State: A Critical Analysis of the Political-Economic Foundations of Corruption in Sub-Saharan Africa* (Universitätsverlag Potsdam 2014) 53.

⁸⁴ Benon C Basheka, 'Public Administration and Corruption in Uganda' in Shikha Vyas-Dooegapersad *et al* (eds), *Public Administration in Africa: Performance and challenges* (CRC Press 2013) 59.

As a starting point and in the simplest of terms, corruption may be understood as the abuse of delegated power for private gains,⁸⁵ classified as either being grand or petty depending on the money lost and the sector where it occurred.⁸⁶

Several researchers have acknowledged the classical definition of corruption by Joseph S. Nye. According to Nye, corruption is a 'behaviour that deviates from the formal duties of a public role (elective or appointive) because of private -regarding (personal, close family, private clique) wealth or status gains'.⁸⁷ Despite the fact that Nye's definition of corruption is the most acceptable, Harsch argues that such a definition is limited in nature because of its assumed differentiated society where public office is considered separate from private interest.⁸⁸

Scholars have different views on corruption. For instance, Olivier de Sardan suggests that corruption is a cumulative and expansionist process which is not only hardly reversible, but that spreads from the top to bottom.⁸⁹ Given Olivier de Sardan's assertion, it could be submitted that corruption in public administration is mostly as a result of senior officials engaging in corrupt practices. Their conducts influence the attitude and taint the integrity and morality of junior public officials in the performance of their duties. If one compares the extent of the perpetration of corruption, it could be concluded that corruption within the lower ranks is frequently perpetrated, and its consequences are not necessarily drastic as it is petty in nature. On the other hand, the perpetration of corruption by top-notch officials is not frequently perpetrated, nevertheless, its consequences are drastic because it is grand in nature. When senior public officials engage in acts of corruption and are not reprimanded for such acts, it (negatively) affects and influences the character of junior officials in the fulfilment of their duties. In view of this, the change of attitude

⁸⁵ Christopher J Anderson and Yuliya V Tverdova, 'Corruption, Political Allegiance, and Attitude Toward Government in Contemporary Africa' (2003) 47 *American Journal of Political Science* 91, 92; and Jong-sung and Khagram (n 65), 136.

⁸⁶ Per Ljung *et al*, 'The Nature of Corruption in the Water Sector' in María González de Asís *et al* (eds), *Improving Transparency, Integrity, and Accountability in Water Supply and Sanitation* (World Bank Publications 2009) 12; <<http://www.transparency.org/what-is-corruption/#define>> accessed 04 April 2016.

⁸⁷ As quoted by Jens Andvig, 'Corruption in China and Russia compared: different legacies of central planning' in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar Ltd 2006) 281; Arnold J Heidenheimer and Michael Johnston, *Political Corruption: Concepts and Contexts* (Transaction Publishers 2011) 156; Teresa S Encarnacion Tadem (ed), *Localizing and Transnationalizing Contentious Politics: Global Civil Society Movement in the Philippines* (Lexington Books 2009) 182; Ernest Harsch, 'Accumulators and Democrats: Challenging State Corruption in Africa' (1993) 31 *The Journal of Modern African Studies* 31, 33; Alan Dowty (ed), *Critical Issues in Israeli Society* (Greenwood Publishing Group 2004) 33.

⁸⁸ Harsch (n 87) 34.

⁸⁹ Jean-Pierre Olivier De Sardan, 'A moral economy of corruption in Africa' [1999] *The Journal of Modern African Studies* 22, 32-33.

and the honest fulfilment of office obligations should be launched at the top in order to serve as guidance or point of reference for lower ranking officials. Nevertheless, Amundsen's view on corruption complements Olivier de Sardan's perception of corruption. According to Amundsen, corruption is a disease that feeds on the cultural, political and economic fabric of society, destroying its vital organs. Amundsen emphasises on the significant role of a State when dealing with corruption. According to Amundsen, corruption is a societal way of living or association wherein the State (that is, civil servants, functionaries, bureaucrats and politicians) misuse the public power bestowed on them for private benefits, it is for this reason that States are often involved in corruption issues.⁹⁰

Rose-Ackerman provides a straightforward understanding of corruption which she expresses as being a symptom in state management that something has gone wrong.⁹¹ Conversely, Olaniyan provides a slightly broader understanding of the phenomenon and how one may come to comprehend its meaning. Acknowledging that corruption is a universal term, Olaniyan asserts that this term is often used to outline a range of forms that are not only different, but often overlap and are capable of being classified in numerous ways. The classification is founded by looking at the type of power being abused (whether in the public or private sector),⁹² its nature, scale, effects, and also its frequency and spread (that is, corruption can either be systematic or isolated, regularly embedded in the systems of governance).

Vargas-Hernández's perception of corruption is slightly different from Amundsen's view of corruption. Vargas-Hernández's perception does not focus on the abuse of office power; instead, it reflects ethical responsibilities of employees in the fulfilment of their obligations. Vargas-Hernández perceives corruption as a multifaceted concept, a social disease which causes social injustice affecting many developing States. He considers corruption as not only the misuse of public office for private gain as seen in various studies, but also the abuse of delegated power, and a behaviour deviating from the formal duties of a public official. While frequently associated with bribery, corruption, as explained by Vargas-Hernández, could be understood as a general term

⁹⁰ Inge Amundsen, *Political Corruption: An Introduction to the issues* (Chr. Michelsen Institute 1999) 1 and 2.

⁹¹ Susan Rose-Ackerman and Bonnie J Palifka, *Corruption and Government: Causes and Consequences, and Reform* (Cambridge University Press 2016) 51.

⁹² Basheka (n 84) 61 and Ljung *et al* (n 86) 12.

that covers the misuse of authority as a result of considerations of personal gains, which do not necessarily have to be monetary in nature.⁹³

Warren shares similar views as the above-mentioned scholars, however, his approach to corruption is different. Warren's understanding of corruption sheds light on the incitement to engage in corrupt practices. According to Warren, corruption should not be perceived as a behaviour which deviates from a prevalent norm or a norm believed to be prevalent in a given context such as politics. Rather, it should be seen as a deviant behaviour which is accompanied with a particular motivation, which may be a private gain at public expense.⁹⁴ Furthermore, Warren points out how the modern idea of corruption has failed to include a specific kind of integrity as the centre of democratic processes. This 'modern conception' defines integrity as the behaviour of an official reflecting the norms of his or her office which is most likely to make sense in the bureaucratic arena and less meaningful in the political arena where behavioural expectations are less settled.⁹⁵

An act of corruption must encompass three elements as follows: first, the act must violate laws, rules, regulations, or ethical standards; second, the act must require a public official to misuse his office or position; and third, one or more of the parties involved in the perpetration of a corrupt practice must, at least, accept some actual or expected material reward or gain. The occurrence of these acts is as a form of behaviour which violates the official ethics in the public service.⁹⁶

Another perception of corruption worth considering is that of Harsch. Harsch considers corruption as a mirror image of market activity,⁹⁷ involving a wide range of practices that vary in form and significance, often including acts of theft, embezzlement of funds, or other appropriation of state property, nepotism and the granting of favours to personal acquaintances, the abuse of public authority and position to exact payments and privileges.⁹⁸ Contrary to Harsch's examples of corrupt practices, Olivier de Sardan argues that in its legal and strict sense, corruption is the example of neither embezzlement nor abuse of public property.⁹⁹

⁹³ Vargas-Hernández (n 10) 132.

⁹⁴ Mark E Warren, 'What Does Corruption Mean in a Democracy' (2004) 48 *American Journal of Political Science* 328,330.

⁹⁵ *ibid* 331.

⁹⁶ Basheka (n 84) 60.

⁹⁷ Harsch (n 87) 34.

⁹⁸ *ibid* 33.

⁹⁹ De Sardan (n 89) 27.

In essence, irrespective of numerous contentions and perceptions of what corruption could be, it is evident that in the administration of a State, corruption is perpetrated by both senior and junior officials. Additionally, the power vested in these officials allows them to decide which form or type of corruption to commit in order to realise their private gains.

Corruption could be understood as an act or series of acts, misconduct or behaviour leading to the deviation of one's obligation to diligently fulfil his/her duty to the public. The attempted classification of these series of acts by various scholars and social scientists has led to corruption being understood as either being grand or petty, active or passive, bribery, embezzlement, theft, fraud, abuse of function, favouritism, nepotism, and improper political contributions, among others.¹⁰⁰

Grand and petty corruption are two common forms of corruption. Grand corruption is known to occur when a high-ranking state official abuses his or her entrusted position to convert public resources to his or her private gain. For example, when X, president of state Y, makes use of state funds to sustain his personal needs.¹⁰¹ Contrary to this, petty corruption occurs regularly, often involving small amounts of money or favours and is perpetrated by mid-level state officials such as policemen, clerks, nurses or customs officers. These officials are often influenced by low salaries, poor service conditions or lack of opportunities for professional growth.¹⁰² For example, when traffic officers demand, solicit, request, accept or receive a bribe from motorists.

There are different conflicting views with respect to the types or forms of corruption. Vargas-Hernández suggests that there are three basic types of corruption as follows: political; economic; and public administration corruption. Contrary to this classification, Gray, Hellman and Ryterman are of the view that there are two basic types of corruption, which they term state capture and administrative corruption. The scholars consider state capture as the actions by an individual, groups or firms, performed in the public or private sector in order to influence law formations, decrees, and other governmental policies to their own advantage as a result of illicit and non-transparent provisions aimed at providing private benefits for public officials.¹⁰³ Considering the

¹⁰⁰ United Nations Office on Drug and Crimes (UNODC), *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, Annex: The Lesotho Corruption Trials: A Case Study* (Vienna 2004) 23-29. See also Cockcroft (n 82) 62; and Ljung *et al* (n 86) 12.

¹⁰¹ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Bloomsbury Publishing 2014) 18-19.

¹⁰² *ibid* 19 -20; De Sardan (n 89) 28-29.

¹⁰³ Cheryl Williamson Gray, Joel S Hellman, and Randi Ryterman, *Anticorruption in Transition 2: Corruption in Enterprise-state Interactions in Europe and Central Asia, 1999-2002* (World Bank Publications 2004) 10.

definition of state capture, administrative corruption could be understood as the influence which private benefits of state officials may have in the implementation of rules. Administrative corruption could further be understood as the institutionalised personal use and abuse of public resources by those in public office and in governments with weaker bureaucratic capacity and accountability.¹⁰⁴

On the other hand, Mbaku asserts that in economies heavily regulated by government, there are only two types of corruption: restrictive and expansive corruption. The latter encompasses activities aimed at facilitating, improving and enhancing competitive exchange. Activities under this category are aimed at moving the economy towards its more competitive ideal state, which will, therefore, be beneficial to wealth creation and economic growth. Restrictive corruption, on the other hand, is aimed at limiting opportunities for mutually beneficial free exchange and is perceived as a constraint to wealth creation¹⁰⁵

Time and again, corruption is often said to occur in the public sector. The basis for the occurrence of large-scale corruption in the public sector could be due to the fact that high-ranking state officials exploit resources allocated for the general public. Additionally, they exploit dysfunctional institutions of the rule of law to massively steal public funds, and instead of liability being imposed against them, they are exempted from punishment.¹⁰⁶ Corruption also exists in the private sector. Although not as popular as public sector corruption, it creates an opportunity for private sector actors to possibly gain access in the civil service in order to fully and effectively participate in public policy planning and its execution.¹⁰⁷ That is to say, private-sector corruption takes place when those in power and in business, abuse their power to promote their own interests. Moreover, this form of corruption is capable of causing harm in the economy and in other areas in the public sector.¹⁰⁸

People engage in corrupt acts for various reasons. Nonetheless, they all share a common outcome: wrongfully acquiring benefits by depriving those who rightfully deserve it. Benefactors of the procurement of private gains can either be directed to the corrupt perpetrator or to two or

¹⁰⁴ ibid 10; Brian Levy, *Governance Reform: Bridging Monitoring and Action* (World Bank Publications 2007) 19; Gervase S Maipose, 'Aid Abuse and Mismanagement in Africa: Problems of Accountability, Transparency and Ethical Leadership' in Kempe Ronald Hope and Bornwell C Chikulo (eds), *Corruption and Development in Africa: Lessons from Country Case Studies* (Springer 1999) 92.

¹⁰⁵ Mbaku (n 35) 23.

¹⁰⁶ Olaniyan (n 101) 19.

¹⁰⁷ Mbaku (n 35) 88.

¹⁰⁸ Olaniyan (n 101) 20.

more other persons. From the foregoing, Amundsen thus points out that corruption can either be private or collective. Private corruption is where the corrupt actor seeks and collects private benefits for himself together with his family or close friends. On the other hand, corruption may also be collective, and occurs where resources are for the benefit of a larger group.¹⁰⁹ Considering the fact that corruption is a state-society relationship which is rarely balanced, corruption can also be redistributive (resources flowing from the state to the society) or extractive (resources flowing from the society to the State) in nature.¹¹⁰

In a study conducted by Anderson and Tverdova, it was revealed that corruption is a consequence of dissatisfaction of actions performed or conducted within the political system, affecting the minority in society, and induced by the decrease in the level of trust among civil servants.¹¹¹

It is evident that through its unrestricted manifestations, corruption influences the daily activities of a society, ranging from business, education to the delivery of services in government, thus affecting society enormously. In any task where one has to examine the effects of a harmful matter that needs to be dealt with, the matter in question should be thoroughly investigated. Corruption is no exception. The only difficulty with investigating corruption is the fact that its mere existence is more difficult to conceptualise and measure and its consequence is not always obvious.¹¹²

The intensity of corruption is so great that when it manifests a State, its consequence is felt continentally.¹¹³ Corruption is said to ‘undermine democracy and the rule of law’, infringe human rights, mislead markets and undermine the greatest attribute of a human being: life.¹¹⁴ Corruption stimulates the perpetration of ‘organised crimes and terrorism’, and threatens human security; it frustrates the poor within society through the diversion of public funds meant for development and is one of many causes of poverty; it weakens a State’s capacity and public satisfaction in the delivery of basic services; it aggravates already existing inequality and injustices; and in the

¹⁰⁹ Amundsen (n 90) 4.

¹¹⁰ *ibid* 5.

¹¹¹ Anderson and Tverdova (n 85) 99 and 102.

¹¹² *ibid* 92 and 93.

¹¹³ Olaniyan (n 101) 2.

¹¹⁴ *ibid* 64.

economy, it deters 'foreign investments and aid'; it drains the public treasury; and threatens the foundation of a law in which a State is based.¹¹⁵

Corruption worsens existing predicaments within society by reinforcing already existing inequalities and aiding unequal appropriation of wealth and retention of privileges by inhibiting institutional change that may possibly threaten existing advantages. Additionally, corruption authorises the continuous unequal allocation of assets and ownership of assets, together with unequal access to education, lessening 'the progressiveness of the tax system', decreasing the level and effectiveness of social spending in conjunction with the decrease in economic growth.¹¹⁶

Corruption distresses society in various ways, and so, one cannot rank or prioritise its effects on a State and its people. What is important, however, is the unbiased recognition of these effects in order to explore possible frameworks or mechanisms aimed at eradicating corruption. Contrary to this, Basheka is of the view that there are few effects of corruption accepted as being significant as follows: the diversion of funds from international aid organisations designated for development projects; diversion of revenue funds from publicly-owned natural resources meant for the nation's population; and attraction of worst professionals that a profession has to offer characterised by greed and self-serving corruption rent.¹¹⁷

More often than not, underprivileged members of society tend to suffer more in States with high levels of corruption. As a result, this group of people are often placed in fragile positions because corruption infringes their fundamental rights, thus leading to the deprivation of basic services. An ideal example to illustrate this would be the case of Zimbabwe. Supposedly acknowledging the impact of corruption towards its people, Chapter 13 of the Zimbabwean Constitution provides for institutions to combat corruption.¹¹⁸ Corruption in Zimbabwe seems to have been accepted as a way of life and is mostly be seen in the mining industry, which over the years, has been tainted with numerous incidents of bribery and other acts of corruption.¹¹⁹ In spite of the constitutional provisions, meant to safeguard the needs of the people, the Zimbabwean society has gravely suffered over the years and regrettably, are still suffering. In essence, when

¹¹⁵ibid 1 and 5; <www.unodc.org.unodc/en/treaties/CAC/background/secretary-general-speech.html> accessed 08 April 2016. See also Basheka (n 84) 59.

¹¹⁶ Jong-sung and Khagram (n 65) 140.

¹¹⁷ Basheka (n 84) 61.

¹¹⁸ Constitution of Zimbabwe, 2013.

¹¹⁹ Wellington Garikai Bonga *et al*, 'An Explanatory Analysis of the Economic and Social Impact of Corruption in Zimbabwe', (2015) 6 IOSR Journal of Economics and Finance 11, 11.

constitutional provisions are disregarded, corruption becomes a core destruction to society, capable of affecting societal and governmental structures. It distresses society and government, and frustrates the human rights provisions recognised by a State. Additionally, corruption threatens the justice system, economy, democracy and politics.

Corruption has an impact on the economy as well as holding back State development.¹²⁰ According to Amundsen, there is an ambiguous relationship between corruption and economic development.¹²¹ In explaining the extent of corruption in the economy, Amundsen points out that the levels of corruption vary, and as such, are dependent on the levels of economic prosperity of a State. This could imply that as a State grows richer, the levels of corruption are more likely to decline.¹²²

Corruption influences the political arena. Porta and Pizzorno suggest that little thought has been given on the consequence of corruption in the political class. They argue that, corruption targets conditions of political activity, which democracy cannot exist without (the principles of transparency, together with the equality of political rights). That is to say, corruption erodes these conditions and as a result, the quality of democracy is affected.¹²³ These scholars submit that perpetrators of corruption possess what they refer to as skills of illegality. This notion is based on the fact that actors of corrupt activities are mindful that corruption is punishable by law, hence corrupt transactions are often performed in secret. The rationale is that corrupt actors perform corrupt practices under sanction threats, and time and again, find ways that are least open to scrutiny. When executing illegal acts or misconducts, perpetrators take necessary measures to cover and protect themselves. Most importantly, individuals who engage in corrupt practices have extensive and direct information of individuals who are willing to participate in illegal transactions and those who, even though have no desire to be involved, occupy authoritative positions where corrupt opportunities are most frequent. In the simplest of terms, politicians involved in corrupt activities have little fear as to the risks involved because they have little to lose.¹²⁴

Considering the relationship between democracy and corruption, Warren shares his opinion on the meaning of corruption in a democracy. Corruption is usually a result of a deficit

¹²⁰ José M Magone (ed), *Routledge Handbook of European Politics* (Routledge 2014) 679.

¹²¹ Amundsen (n 90) 19.

¹²² *ibid* 15.

¹²³ Donatella Della Porta and Alessandro Pizzorno, 'The Business Politicians: Reflections from a Study of Political Corruption' (1996) 23 *Journal of Law and Society* 73, 74.

¹²⁴ *ibid* 75 and 76.

and duplicitous violations of the democratic norm of inclusion. The conceptual link between the two concepts can be found when individuals, who have a claim of inclusion in collective decisions and actions, are subject to deceitful and harmful segregation. Warren opines that the inexistence of a conceptual guide as to what corruption entails in a democracy is due to corruption damages not being related to the systematic norms of democracy.¹²⁵ Democracy is defined by a link between collective decision-making and the power people have to influence this decision through acts of speech and voting.¹²⁶ In a democratic society, corruption breaks this link by minimising effective public action, thus creating ineffective public service deliveries; shrinking the perception of collective actions; undermining democratic capacity among individuals in the civil society by generalising suspicions, eroding trust and reciprocity; moving public activities to sectors that may make it possible for individuals to engage in corruption; and finally, transforming the rights which people are entitled to, thus turning them to favours that can be repaid in kind.¹²⁷

An ideal democratic political system is characterised by principles that presume that a government is accountable to its citizens, the laws administered are equitable and fair, governmental actions are transparent and that all citizens have access to the political process. However, failure by such government to fulfill these principles could imply that the political system is veiled with low legitimacy levels. With corruption being part of modern democracy, it systematically weakens democratic principles (such as democratic accountability, equality and openness), as a result, it diminishes the faith of the people in political processes¹²⁸ and significantly hinders development.¹²⁹

Anti-corruption efforts and human rights complement one another, viz. human rights obligations together with principles of vigilance and diligence are crucial in the fight against corruption. According to Olaniyan, the core objectives of anti-corruption mechanisms, that is, the promotion and adherence of the principles of good governance and the rule of law, are fundamental objectives in the recognition of human rights provisions.¹³⁰

¹²⁵ *ibid* 332.

¹²⁶ Michael Mason, *Environmental Democracy* (Earthscan 1999) 21.

¹²⁷ Warren (n 94) 328 and 329.

¹²⁸ Anderson and Tverdova (n 85) 91.

¹²⁹ Lisa Rakner, 'Governance' in Peter Burnell *et al* (eds), *Politics in the Development World* (5th edn, Oxford University Press 2014) 233.

¹³⁰ Olaniyan (n 101) 8.

Viljoen shares a similar view with Olaniyan by maintaining that there are manifold links between corruption and human rights. According to Viljoen, potential human rights gains may be squandered if corruption suppresses entrepreneurship, constrains economic development, and ultimately, becomes the ‘yeast from which political dissent is brewed’. Viljoen argues that enrichment through corrupt means aggravates inequality and poverty since enrichment of the elites in the political arena depends on the appropriation of funds and resources which were intended for the public good, thus resulting in basic human rights violations.¹³¹

In theory, there are three ways in which corruption has negative implications on a State’s human rights obligations. First, corruption violates human rights by interfering with peoples’ rights to dispose of their well-deserved natural wealth and resources, thus increasing poverty and frustrating socio-economic development. Second, corruption can and may lead to a multitude of human rights violations. Lastly, corruption violates the general duty to respect, protect and promote human and peoples’ rights.¹³² Furthermore, considering the fact that there are countless examples of corrupt practices, Olaniyan argues that it is impossible to effectively combat corruption without a thorough and deeper understanding of its nature and effects on human rights.¹³³

With the daily perpetration of corruption by state officials, a small number of them are prosecuted, particularly high state officials. However, if a state official happens to be under investigation and is taken to court, the case often proceeds in a snail’s pace due to abuse of discretionary powers which the prosecution may possess. As a result, there will be huge expenses on state resources being spent on the investigative and prosecution process. In such instances, one may argue that corruption cases on high level state officials simply serve as no more than a symbolic purpose on the principle of state accountability.¹³⁴ Hence, according to Olaniyan, where the prosecution of high-level perpetrators takes place, irrespective of the outcome of the case, the corrupt state officials prosecuted often keep their ill-gotten wealth.¹³⁵

According to Porta and Pizzorno, corrupt politicians are in a position to obtain support and complicity from magistrates and other anti-corruption organs.¹³⁶ In support of this, Warren

¹³¹ Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 273.

¹³² Olaniyan (n 101) 12.

¹³³ *ibid* 15.

¹³⁴ *ibid* 8.

¹³⁵ *ibid* 9.

¹³⁶ Porta and Pizzorno (n 123) 83.

contends that in order to address the ineffectiveness of anti-corruption mechanisms, anti-corruption agencies or institutions must be designed in such a way that no state official will possess monopoly or control over institutions, and that, the only power a state official may possess is that linked to the mechanisms of accountability. With regard to the rules that guide the operations of officials, such rules should be clear and should, as much as possible, 'minimise the chances for the exercise of discretionary judgment'.¹³⁷

Even though the criminal approach has little influence in the fight against corruption, the biggest challenge for a State with high level of corruption would be finding ways to reform an institutionally corrupt political system lacking capacity.¹³⁸ According to Warren, in order to eliminate corruption in anti-corruption agencies or institutions, Klitgaard's concise definition or formula illustrating corruption, comprising of monopoly summed with discretion in the absence of accountability, must be understood.¹³⁹

Although human rights law alone cannot possibly provide a solution to the corruption problem, it can nonetheless, be seen as a strong deterrent, and motivation for one to take action. According to Olaniyan, human rights could be seen as a means for justice, fairness and basis for effective remedies to victims of corruption. Most importantly, its rich experiences, empowering nature and movement could be beneficial to anti-corruption movements and mechanisms.¹⁴⁰ On the other hand, criminal law may also aid in curbing corruption. However, as pointed out by Olaniyan, criminal law, on its own, cannot be used to fight corruption because the criminal law response to corruption tends to be technical, onerous and problematic, often due to the element of secrecy in which corruption is undertaken.¹⁴¹ What criminal law does is provide short-term enforcement benefits, while human rights law may establish substantial accountability mechanisms and normative standards which are not only long-term but over and above durable and sustainable. The basis for this is that, human rights serves as a foundation for freedom, justice and peace, reflecting the worth of divinity and embraces the idea that the violation a person's human rights suggests lack of respect they are entitled to.¹⁴²

¹³⁷ Warren (n 94) 330.

¹³⁸ Robert Harris, *Political Corruption: In and Beyond the nation state* (Routledge 2003) 213.

¹³⁹ Warren (n 94) 330.

¹⁴⁰ Olaniyan (n 101) 15.

¹⁴¹ *ibid* 11.

¹⁴² *ibid* 13.

As seen above, corruption is frequently associated with the misuse of power by public officials and, therefore, one cannot simply ignore the significant role of politics in the performance of public administration. For this reason, it could be argued that politics also plays an integral part in the existence of corruption, hence Harris submits that political corruption is multifaceted and mutable in nature. It is a concept which has no comprehensive definition of what it truly means.

Furthering Harris contention, Warren suggests that the idea of political corruption being that of abuse of one's public office for private gain, has been expanded by modern democracies¹⁴³ and as such, Warren acknowledges the broad meaning of political corruption which is the inappropriate use of common power and authority for an individual or group gain at the expense of the general public.¹⁴⁴

There are numerous anti-corruption mechanisms at the national and international spheres aimed at eliminating corruption. However, in spite of the creation and enforcement of these strategies, they solely depend on the governments' will and desire to effectively combat corruption. That is, the political will within a state administration must exist. Wayne defines political will as a social not individual process and opines that it is not synonymous with public opinion. Wayne further points out that political will depends on two key factors, momentum and reinvention.¹⁴⁵ Moreover, Wayne is of the view that political will is the sincere intention of political actors. That is to say, political will is the commitment(s) political leaders and bureaucrats have in order to carry out actions aimed at accomplishing certain objectives and to sustain costs of such actions.¹⁴⁶

Kpundeh provides a broader meaning of political will. He considers political will as the intention of political actors (such as elected or appointed leaders; civil society watchdogs; and stakeholder groups) to manage apparent causes or effects of corruption.¹⁴⁷ Furthermore, Kpundeh points out that in order to promote and implement anti-corruption reforms, political will depends on two matters: first, political and economic resources must be available to political actors or leaders; and second, the apparent power of political leaders and their ability to obtain support from domestic and international constituencies.¹⁴⁸ In other words, political will plays an important role

¹⁴³ Warren (n 94) 329.

¹⁴⁴ *ibid* 332.

¹⁴⁵ Martin I Wayne, *China's War on Terrorism: Counter-Insurgency, Political and Internal Security* (Routledge 2007) 56.

¹⁴⁶ *ibid* 56; Malena (n 81) 18.

¹⁴⁷ Quah (n 73) 453.

¹⁴⁸ Sahr John Kpundeh, 'Political Will in Fighting Corruption' in Sahr John Kpundeh and Irène Hors (eds), *Corruption and Integrity Improvement Initiative in Developing Countries* (United Nations Development Programme 1998) 92.

in safeguarding appropriate enacted anti-corruption legislation, ensures that anti-corruption measures are implemented indiscriminately and where appropriate, ensures that severe penalties are imposed on corrupt perpetrators.¹⁴⁹

In summation, corruption is a day-to-day phenomenon and there is no comprehensive definition of what it really denotes. However, despite this, the literature has shown that there are certain acts which when performed, society acknowledges as being corrupt. Corruption affects numerous aspects in the functioning of a State and society, threatens political and social stability, security, rule of law, undermines values that define a democracy, jeopardises social, economic and political development, cripples the value of openness and equity in human society and also has an impact on social organisations.¹⁵⁰ Additionally, corruption weakens the criminal justice system of a State by making justice system actors to be reluctant to prosecute such officials. It is for this reason that judicial institutions and anti-corruption agencies or institutions need to be independent and autonomous. The realisation of a corruption-free State is not dependent on the existence of numerous anti-corruption instruments or mechanisms, instead, it is solely dependent on the political will of state actors in the execution of these instruments and mechanisms.

1.8 Research methodology

This research adopts a socio-legal approach in the study of corruption on the African continent, with particular emphasis on corruption committed by public officials. Taking a comparative approach, the study examines the different mechanisms put in place by States for the purpose of combatting corruption. Given the nature of the topic, a qualitative approach was employed in conducting the study. A critical analysis of international and national instruments relating to the fight against corruption was done, and cases that have been tried and completed by the courts of different legal systems explored. Different institutional mechanisms put in place by various States, with emphasis on their mandates, scope of operation and successes in holding individuals accountable were also examined. These resources constitute the core primary sources used in this study. In addition to the primary sources, secondary sources, comprising publications by

¹⁴⁹ Quah (n 73) 454.

¹⁵⁰ Marco Arnone and Leonardo S Borlini, *Corruption Economic Analysis and International Law* (Edward Elgar 2014) 153.

distinguished scholars and practitioners as well as statesmen and policy makers on the issue of corruption were also examined.

1.9 Limitation of the study

As shown in the foregoing discussion, corruption is endemic. It is perpetrated in numerous ways, and deeply embedded in the social fabric of numerous African societies, to the point that it is almost a tool of business negotiation. However, to address every kind of corruption in an academic research of this nature would be challenging and unrealistic: given the diverse ways and the need for sufficient detail. As such, the focus of this study is on corrupt practices of state or public officials, with specific emphasis on misappropriation of public funds/property (that is, embezzlement or theft of public assets) and bribery. Specific emphasis is made on these forms of corruption for the following reasons: first, they are committed by public officials; Second, the misappropriation affects state resources in terms of availability; Third, it usually takes a syndicated nature, involving a plurality of persons who, advertently or inadvertently, participate in the commission of the crime as well as acts of fraud and dishonesty even through concealment; Fourth, these crimes are usually perpetrated by high officials in the state bureaucratic machinery, making it difficult for legal proceedings to be initiated, hence, the need for political will; and Fifth, the booty is usually transferred to another state where it is saved in financial institutions. This highlights the need for international cooperation, especially with financial institutions, in the fight against corruption.

Even though an endemic problem, this study is limited to the African continent where corruption has almost become a way of life and a source of wealth for many people. This, as it is argued, threatens the lives of the underprivileged minority who cannot afford 'incidental costs' associated with access to basic services, destabilises the economy, thus leading to the underdevelopment of African States.

1.10 Structure of the study

This study is divided into eight chapters as follows:

Chapter One is the introduction of the study.

It provides a general orientation and background of the study. The chapter also provides background and problem statement on corruption as an international concern together with its

impact. The aims and objectives, research questions, literature review on the phenomenon, research methodology and the limitations of the study are also presented in this chapter.

Chapter Two focuses on the sociological study of corrupt practices across African States.

Junior and senior public officials engaged in different acts of corruption are discussed in this chapter. The Chapter provides a layout of these acts with specific emphasis on bribery and misappropriation of funds or money. Considering the fact that corruption is embedded within society, the perspectives and responses by societies on issues relating to corruption are also discussed in this Chapter. The purpose is to show that different societal views and responses to corruption play an integral part, thus making it difficult to construct a definition of corruption.

Chapter Three presents the impact of corruption in society.

Notwithstanding, all acts of corruption are uncalled for and intolerable, they have an impact on society in one way or the other, particularly corrupt practices committed by senior state officials. Their conducts have a huge impact on all social and governmental aspects. This Chapter focuses on acts of corruption by senior state officials in African States and their impact on society, human rights, the economy, democracy, judiciary, rule of law, separation of powers and imposition of criminal or civil responsibility against senior state officials.

Chapter Four provides a discussion on the different international instruments on curbing corruption.

International instruments allow States to cooperate and assist one another in addressing matters of international concern. There are various international instruments on corruption such as those by the United Nations Organisation, the Council of the European Union, the America's and the African Union. These instruments assist States in terms of providing information on corruption, outline the nature of different acts of corruption, together with how States could implement existing international anti-corruption strategies or mechanisms within their national borders. This Chapter also examines different international instruments, with specific reference to those by the United Nations and African Union and other sub-regional instruments in Africa in order to ascertain their approach on the detection, prevention and fight against corruption.

Chapter Five focuses on national instruments and institutions used to combat corruption.

All States across Africa are faced with issues of corruption on a daily basis. With international instruments providing a framework as to how States could detect and prevent corruption, States could introduce these instruments in their systems alongside their domestic laws and enact pieces of legislation aimed at strengthening governance and combatting corruption. Considering the fact that States have at least one anti-corruption legislation, this Chapter seeks to investigate national anti-corruption instruments of African States. A comparative study is done in this Chapter in order to identify the approach which these States have used in addressing corruption. Furthermore, an examination is done in order to understand whether their laws comprehensively delineated acts of corruption, most importantly, what strategies and approaches these States could learn from each other in the fight against corruption.

The national laws on corruption not only outline prohibited acts of corruption, but could also establish anti-corruption institutions. The effectiveness of these institutions is important in the eradication of corruption. For this to be realised, the institutions need to be independent, and perform their functions and powers fairly without fear or prejudice. Taking this into consideration, the Chapter focuses on the exercise of autonomy of anti-corruption institutions in Africa, their ability to enforce law, prosecute high-level officials and their measures in preventing further acts of corruption from being committed.

Chapter Six provides a discussion of the need for political will.

States may have numerous laws on corruption accompanied by anti-corruption agencies or institutions. However, their efficiency and effectiveness exclusively rests on the intent of the political elites. The existence of political will by those in power implies that anti-corruption mechanisms will be duly implemented, and anti-corruption institutions will be afforded their independence in the performance of their functions. Most importantly, ensure that public officials, who are allegedly accused of engaging in acts of corruption, do not use their status to influence the investigative process or the judiciary on the outcome of the case. Lack of political will in African States to curb corruption has proved to be detrimental for African societies as it deprives States from establishing and enforcing good governance principles, government reformation and strengthening the effectiveness of anti-corruption institutions. This Chapter provides a discussion of the meaning and importance of political will, its importance in the fight against corruption and

how its absence could make it difficult for African States to fully address corruption-related matters and effectively implement existing anti-corruption laws.

Chapter Seven focuses on the role of foreign/western governments in combatting corruption.

In many corruption cases in Africa that involve senior state officials, monies or property stolen are often hidden in non-African States. During investigatory processes, African victim States may often encounter challenges when trying to investigate where the money or property has been hidden. It is self-evident that in comparison with Western States, African States need to boost their investigatory processes. With this in mind, African States have struggled and even failed on issues concerning corruption, particularly in law enforcement and preventing of senior officials from transferring money illegally. This Chapter seeks to point out the importance of the role played by Western States when they assist and cooperate with African States in combating corruption.

Chapter Eight is the conclusion.

This Chapter provides an analysis of issues discussed in preceding chapters and recommendations that could assist African States in the fight against corruption.

1.11 Summary

With the theoretical framework of the study outlined above, consideration needs to be given on corruption in society in order to discover what makes an act or behaviour to be classified as corrupt, who are the perpetrators of such acts, under what circumstances can such an acts or behaviour be performed and society's perception on such acts or behaviours. The next chapter provides a typology and nomenclature of corruption within Africa's legislative and sociological landscape.

CHAPTER TWO

NAVIGATING THE TYPOLOGY AND NOMENCLATURE OF CORRUPTION WITHIN AFRICA'S LEGISLATIVE AND SOCIOLOGICAL LANDSCAPE

2.1 Introduction

Drawing from the previous chapter, the following was deduced: first, there is no universally acceptable definition of corruption. Even though scholars and practitioners from different backgrounds and disciplines have tried to explain corruption, their explanation and definitions have been subjected to rigorous scrutiny and castigation. In addition, even national and international instruments do not provide any clear answer as they describe rather than define corruption; second, corruption is endemic: no human society is immune to corruption. It does not matter whether the society is poor or rich; an old or emerging democracy; third, the impact of corruption may vary from one community to another. In fact, where there are democratic values and systems of checks and balances as well as accountability of elected and appointed officials, there is a high likelihood of a lower scale of corruption compared to political systems that lack such institutions and practices; and fourth, corruption has diverse impacts, especially with regard to widening the poverty gap, assaulting democratic principles, values and norms, debilitating political institutions and finally, retarding socio-economic development.

In some communities, especially within the African continent, corruption has been elevated to the status of a fundamental component in society.¹ More specifically, within the formal sector, public service is rendered based on, in part, the giving of a gift or some 'motivation' in order to get something done. In business transactions, even in the informal sector, members of the society understand something must be given in order to get something in return (a *quid pro quo* situation). Such practices have been constant and consistent to the point that they become the logic or power of negotiation. Almost every member of the community would have given some kind of motivation for the delivery of a particular service. As this occurs, corruption becomes not only normalised but also a way of life. The intensity of the existence of corruption in most African societies is beyond dispute since it has succeeded in becoming part of society's daily routine. Moreover, it frequently lurks in places where members of society are in need of service delivery from public officials who, in turn, exploit the needs of the former. In doing so, many who need assistance from state officials

¹ William J Duiker and Jackson Spielvogel, *The Essential World History: Volume 2* (Cengage Learning 2006) 634.

seek such assistance while in possession of extra money or anything valuable to enable them get the service delivered.²

Considering the fact that written works describe and not define corruption and that this phenomenon exists in all societies and carried out in numerous ways, the purpose of this chapter is, therefore, to identify and delineate the typology of corruption by classifying the different forms of corruption as they exist in African States. The chapter also provides an illustration of how interactions between state officials and the general public are frequently accompanied by acts of corruption, and how such interactions have shaped the daily routine for those within society. The chapter also examines the sociological perspective of corruption as it is perceived and labeled by different African communities. The purpose is to highlight how embedded corruption could be in the social fabric of a community, the way it is perceived and why it is considered a herculean task to overcome in most societies.

2.2 Forms of corruption

Corruption could be considered as an inappropriate or illegal mechanism of allocating scarce resources. The allocation of resources takes place between two different systems: the market system wherein the inequalities of income are not taken into consideration; and the political system which aims at granting formal equality to each citizen's vote. The use of political decisions made on the majority basis could be undermined as a result of an illegal market facilitating the method for allocation.³

The simplest description of the forms of corruption is that it could be either little or big corruption.⁴ The latter denotes 'the decomposition, dissolution, or disorientation of the constitution', while the former denotes individual depravity.⁵ Apart from this simple classification, there are different types or forms of corruption as suggested by various authors, which are impossible to encapsulate in this study. Nonetheless, the most common types or forms of corruption mostly perpetrated by state officials are identified and delineated in this study.

² For example, the issuance of driver's licences in numerous states involves giving of bribes. A learner driver may go for testing and driving lessons but would be assured that unless extra money is paid, the driver's licence may not be issued. In other instances, the desperation of the instructors of driver's licences could be seen where they deliberately fail learners in order to delay the issuance of driver's licences until a bribe has been paid.

³ Peter DeLeon, *Thinking About Political Corruption* (Routledge 2015) 21.

⁴ *ibid* 19-20.

⁵ *ibid* 20.

Construed broadly to mean and include the misuse of power or office by public servants in a democratic society, corruption could be classified under three main categories as discussed below.

2.2.1 Grand corruption

Acts that lead to this form of corruption are usually performed by political elites who are part of the state administrative machinery. These individuals exploit their political power in making economic policies. In other words, they (high-level public officials or political elites) make corrupt decisions on large public contracts.⁶ Political elites have an obligation to ensure that resources are diligently allocated to members of the public. In doing so, they need to balance the interests of various segments of the society as well as their own desire to remain in power. Failure to do so amounts to grand corruption. In other words, when a high-level public official such as a president, minister, director or top administrative official changes national policies or implements the national policies to solely serve his/her own interest at the cost of the general public, this constitutes grand corruption. In such scenarios, little attention is given to the general public and their needs, and whether or not those elected or appointed by the state are serving the general public, tends to be irrelevant. Another feature of this form of corruption is that it is very difficult to identify unless bribes were paid. Grand corruption has huge consequences on the society. It needs to be taken into account that although it may be difficult to identify, grand corruption is also difficult to measure particularly in instances where it can be shown that some parts of society may benefit from it or where it can be established that its future gains will be beneficial to society.⁷

2.2.2 Petty, bureaucratic or survival corruption

This type of corruption is perpetrated by bureaucrats or administrators against their superiors or the general public and often involves small amounts of money, in comparison to grand corruption.⁸ Within the context of the general public, it involves a situation where members of the public pay the bureaucrat a specific amount of money either to receive a service they are entitled to, to do

⁶ Zoe Pearson, 'An International human rights approach to corruption', in Nick Wolanin and Peter Lamour (eds), *Corruption and Anti-Corruption* (ANU E Press 2013) 33; Vinay Bhargava, 'Curing the Cancer of Corruption' in Vinay Kumar Bhargava (ed), *Global Issues for Global Citizens: An Introduction to Key Development Challenges* (World Bank Publications 2006) 342; Wolfgang Amann *et al*, *Anti-Corruption: Implementing Curriculum Change in Management Education* (Greenleaf Publishing 2015) 15; Gerard McLinden, 'Integrity in Customs' in Luc De Wulf and Jose B Sokol (eds), *Customs Modernization Handbook* (World Bank Publications 2005) 70.

⁷ Arvind K Jain, 'Corruption: A Review' (2001) 15 *Journal of Economic Surveys* 71, 74.

⁸ John Mukum Mbaku, *Corruption in Africa: Causes, Consequences, and Cleanups* (Lexington Books 2010) 24.

something that is prohibited, or to speed up a public service.⁹ Petty corruption against a superior may occur when the administrator or a junior public official exaggerates the amount required to achieve an obligation in order to retain possession of the remaining funds for their own benefit.¹⁰ The perpetrators of this type of corruption tend to be underpaid, thus they seek to increase their payments by obtaining ‘small extra payments or speed money from the members of the public.’¹¹ This form of corruption is also common in the judiciary where someone pays a judicial officer a sum of money so as to reduce a penalty¹² or be acquitted of any charges against them.

2.2.3 Legislative corruption

This form of corruption involves the abuse or misuse of legislative powers by government.¹³ It could also be understood as a form of corruption in which ‘the manner and the extent to which the voting behaviour of legislators can be influenced’.¹⁴ Interested parties would bribe legislators in order to influence the content and enactment of legislation aimed at changing ‘the economic rents associated with assets’.¹⁵

The grouping or categorisation of acts of corruption differs from one individual to another depending on the perspective which the particular act is being perceived, hence several researchers strongly believe that the classification of corruption should be made in a manner that one is able to understand whether such acts of corruption are harmful or beneficial to the private exchange.¹⁶ Thus, in economies heavily regulated by government, two forms of corruption exist: expansive and restrictive corruption.¹⁷ Expansive corruption comprises corrupt activities aimed at facilitating, improving and enhancing competitive exchange. Hence, they are considered as being beneficial to the creation of wealth and economic growth.¹⁸ Furthermore, this form of corruption allows entrepreneurs to do away with ‘those regulation-induced bottlenecks or impediments that

⁹ Sarah Bracking ‘Political Development and Corruption: Why “Right Here, Right Now!”’ in Sara Bracking (ed), *Corruption and Development: The Anti-Corruption Campaigns* (Springer 2007) 5.

¹⁰ Jain (n 7) 75.

¹¹ Pearson (n 6) 33.

¹² Jain (n 7) 75.

¹³ Arvind K Jain (ed), *Economics of Corruption* (Springer Science and Business Media 1998) 22.

¹⁴ Jain (n 7) 75.

¹⁵ *ibid.*

¹⁶ Mbaku (n 8) 23.

¹⁷ Chris Rowley and Marie dela Rama (eds), *The Changing Face of Corruption in the Asia Pacific: Current Perspectives and Future Challenges* (Elsevier 2017) 185.

¹⁸ See *ibid.*

increase the costs of exchange and significantly improve production and trade'.¹⁹ Restrictive corruption, on the other hand, aims at limiting 'mutually beneficial free exchange and hence, is a constraint to wealth creation'.²⁰ The main feature of this form of corruption is that it allows for the redistribution of income and wealth, thus favouring dominant individuals and groups in the political arena. A common example of this kind of corruption is embezzlement of public funds or nepotism.²¹

Corruption comes in different forms, and exposes the society to different challenges and opportunities.²² Where corruption is prevalent in society, it becomes systematic:²³ this means that institutions whose aim is to ensure that rules are complied with are compromised as 'state custodians are not effectively constrained by the law'.²⁴ As a result, corruption tends to be influential in the public sector, which in the end, leads to economic opportunities being sold by corrupt civil servants and politicians.²⁵ Since corruption in such societies is prevalent and well-organised, for one to gain access to goods and services and the economy, one can only do so through the payment of bribes to regulators. In the judiciary, cases may be adjudicated based on the social, political and economic standing of the defendant, not on evidence.²⁶

On the contrary, in cases where corruption in a country is individualised and not organised, it is an indication that governmental institutions are not compromised.²⁷ Rather, they are determined to ensure the applicability and compliance of the rule of law.²⁸ A feature of individualised corruption is that an individual in government seeks ways in which he or she can enrich him/herself by means of bribery from either entrepreneurs or private citizens who are seeking access to government.²⁹ For example, a police officer asking for bribes from people who come to the police station for affidavits.

¹⁹ Mbaku (n 8) 23.

²⁰ *ibid.*

²¹ *ibid.*

²² Michael Johnston, *Corruption, Contention and Reform: The Power of Deep Democratization* (Cambridge University Press 2014) 1.

²³ Bhargava (n 6) 342.

²⁴ Mbaku (n 8) 23.

²⁵ *ibid* 23-24.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

It should be taken into consideration that types or forms of corruption differ depending on the situations or services rendered at hand. For instance, in police services, the types or forms of corruption differ from the general ones perpetrated in other departments or sections of government. For example, there are two primary types of corrupt police officials: first, the “grass-eaters”; and second, the “meat-eaters”.³⁰ The former involves a more passive will of the police officer to accept what is being offered to them. The latter is quite aggressive as the police officers in this instance, seek out any opportunities to exploit financial gains.³¹

Also, the types of corruption differ in the customs sector, and as such, three types commonly occur in the sector.³² The first is known as routine corruption.³³ This type involves private operators paying bribes in order to ensure a speedy process in the completion of routine customary procedures.³⁴ The second is fraudulent corruption.³⁵ This type involves a trader or an agent who asks customs officers to disregard certain illegal acts in order to minimise taxation liability or fiscal obligations.³⁶ Lastly, there is criminal corruption.³⁷ This type of corruption involves the payment of bribes by criminal operators in order to conduct a lucrative operation, for instance, drug trafficking.³⁸

Although public interest violation by private abuse of official power constitutes political corruption, corruption is not limited to official power. There is corruption in the private sector as well. Private sector corruption often takes the form of corporate corruption wherein, one engages in acts of bribery, undue influence, fraud, money laundering, or collusion.³⁹ Public sector corruption on the other hand often appears to exist mostly in public (more specifically, political) spheres, often taking the form of another classification of corruption known as political corruption, which may be defined as the violation of public interests or goods by an official who abuses his or

³⁰ Peter Johnstone and Joe Frank Jones, ‘Noble Cause Police Corruption: Suggestions for Training’ in Peter C Kratcoski and Dilip K Das (eds), *Police Education and Training in Global Society* (Lexington Books 2007) 307.

³¹ John S Dempsey and Linda S Forst, *An Introduction to Policing* (8th edn, Cengage Learning 2015) 234.

³² McLinden (n 4) 70.

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Bhargava (n6) 342;

http://www.transparency.org/whatwedo/activity/engaging_the_private_sector_in_the_fight_against_corruption accessed 28 May 2016.

her official position or power for his or her private interest.⁴⁰ For one to comprehend political corruption, it is important to understand that it is influenced by political power. As such, any definition or explanation of political corruption should capture the role or existence of a state official because such an individual represents political and governmental power. When public interests are violated through political corruption, the presumption is that there was the presence of official power.⁴¹ The counterpart of political corruption is administrative corruption. It is for this reason that this classification may be understood as being all acts of deviation, abuse of power, or the illegitimate use of one's public office that leads to commission of petty forms of bribery or illegal favours made in order to influence the implementation of law, rules and regulations 'in order to increase one's share of the benefits of such policy'.⁴²

Another form of corruption is state capture corruption. State capture corruption basically implies that private individuals or groups, with the aim of enriching themselves by means of provisions given to them by civil servants and politicians with illegal payments and other favours, capture the state in order to, and with the aim of influencing public policy outcomes.⁴³

Corruption could also be centralised or decentralised. The former may be understood as corruption that is organised wherein, for instance, a president controls key resources and dispenses patronage. This type of corruption includes organised crimes and political corruption.⁴⁴ Decentralised corruption, on the other hand, could be understood as a system where state officials at the higher level, collect a fixed bribe income from each bureaucrat who takes bribes without mandating on the size of the bribe that the particular bureaucrat charges.⁴⁵ Furthermore, decentralised corruption leads 'to lower levels of total corruption in the economy...higher levels of bribes per entrepreneur...and a smaller sector...'⁴⁶

⁴⁰ Masaya Kobayashi, 'Political Clientelism and Corruption: Neo-structuralism and Republicanism' in Junichi Kawata (ed), *Comparing Political Corruption and Clientelism* (Ashgate Publishing 2006) 9.

⁴¹ *ibid* 9-10.

⁴² Mbaku (n 8) 25; Leslie Holmes, *Corruption: A Very Short Introduction* (Oxford University Press 2015) 11; Samie'e M Darooneh *et al*, 'Administrative Corruption: Why and How' (2013) 1 *International Journal of Advanced Studies in Humanities and Social Science* 2567, 2569; Amann *et al* (n 6) 13.

⁴³ Mbaku (n 8) 25.

⁴⁴ Todd A Knoop, *Global Finance in Emerging Market Economies* (Routledge 2013) 47; Dominik Zaum, 'Corruption and statebuilding' in David Chandler and Timothy D Sisk (eds), *Routledge Handbook of International Statebuilding* (Routledge 2013) 19.

⁴⁵ Anwar Shah, 'Decentralized provision of public infrastructure and corruption' in Jonas Frank and Jorge Martinez-Vazquez (eds), *Decentralized and Infrastructure in the Global Economy: From Gaps to Solution* (Routledge 2015) 428.

⁴⁶ *ibid*.

2.3 Other forms of corruption

Corruption masks itself in different forms and could be perpetrated by a public official and/or third party or both. Common acts of corruption include bribery, collusion, embezzlement of public funds, theft, fraud, extortion, abuse of discretion, favouritism, clientelism, nepotism, the sale of government property by public officials, and patronage.

2.3.1 Bribery

Even though there is no universal definition for bribery,⁴⁷ it may be seen as a sub-category of corruption. Acts of bribery involve instances wherein an individual persuades another by using money or any valuable property to influence or enable the outcome of a decision or speed up a process which becomes a gain in return.⁴⁸ Put simply, bribery could be described as an act of payment for goods or services in order for one to obtain influence or favourable treatment.⁴⁹ Examples include instances where a person pays a customs officer in order to facilitate the entry of his goods into the country; the giving of a gift to another customs officer in order to reduce the value of goods for the determination of the correct amount of duties to be paid; and giving a small token to an administrative officer in order to obtain a licence to do business.

Considered the most widespread form of administrative corruption, bribery is often understood as a process wherein, one persuades another (public official) using a gift or money so that the latter can act improperly or omit to act, in favour of the person who offered the bribe.⁵⁰ Bribery is a universally shameful process or transaction and numerous states criminalise it.⁵¹ Bribery is often reflected in petty corruption, which is the most common form of bureaucratic corruption involving paying a bribe to a bureaucrat for one to receive services or to speed up

⁴⁷ David Lawler, *Frequently Asked Questions on Anti-Bribery and Corruption* (John Wiley and Sons 2012) 98.

⁴⁸ Michael J Corner and Timothy E Stephens, *Bribery and Corruption: How to Be an Impeccable and Profitable Corporate Citizen* (Routledge 2016) 226.

⁴⁹ Alexandra Addison Wrage, *Bribery and Extortion: Undermining Business, Governments, and Security* (Greenwood Publishing Group 2007) 9; Yahong Zhang and José G Vargas-Hernández, 'Introduction: Corruption and Government Anti-Corruption Strategies' in Yahong Zhang and Cecilia Lavena (eds), *Government Anti-Corruption Strategies: A Cross-Cultural Perspective* (CRC Press 2015) xv.

⁵⁰ Faan Malan and Ben Smit, *Ethics and Leadership in Business and Politics* (Juta and Company 2001) 232.

⁵¹ Robert Klitgaard, *Controlling Corruption* (University of California Press 1988) 11.

services, and involves small amounts of money.⁵² This form of corruption is very common in public services, especially in education, the police; and health departments.⁵³

Since bribery is mainly understood as a sub-category of corruption, the term can be further divided into two as follows: bribery with theft and bribery without theft. When an individual makes payment to a government official, and not to the government, it becomes bribery with theft. For example, when a customs official is paid to let goods enter the country without paying necessary duties, this becomes bribery with theft. On the other hand, bribery without theft occurs 'when an official demands a bribe but still passes on the regular payment to the government'.⁵⁴ For example, a customs official may request a bribe in addition to the customs duty payment and gives the duties paid to government.⁵⁵ This usually occurs where the corrupt act in question is perpetrated on the instructions, orders, approval, complicity or acquiescence of the senior administrative officer.

Ordinarily, bribery is found in the public sector.⁵⁶ However, although not common as in the public sector, it could also be found in the private sector. State officials who engage in acts of bribery, often misappropriate public resources or abuse their office for their private gains or benefit.⁵⁷ Bribery is mostly common in the public sector, perhaps, mainly because public officials are the closest people who provide the general public with their basic needs and have access to numerous state resources. Public officials engage in bribery for numerous reasons such as illicit, easy and quick enrichment. In perpetuating this kind of administrative corruption, the bribe-takers (officials) in question, usually disguise the sources of their gains or 'earnings' which do require the falsification of records in order to protect themselves.⁵⁸

The bribery trail often takes this the following form: a person pays an official a bribe and the official receives the payment. The granting of a bribe may have been as a result of the recipient

⁵² Aurora A C Teixeira, 'Corruption, economic growth and globalization' in Aurora A C Teixeira *et al* (eds), *Corruption, Economic Growth and Globalization* (Routledge 2015) 5.

⁵³ *ibid* 4; Zhang and Vargas-Hernández (n 49) xv; Konstantin V Pashev, 'Monitoring of Tax Corruption in Transition Economies: Evidence from Bulgaria' in Robert W McGee (ed), *Taxation and Public Finance in Transition and Developing Economies* (Springer Science and Business Media 2008) 325. See also Karin Hilmer Pedersen and Lars Johannes, 'The Talk of the Town: Comparing Corruption in the Baltic States and Poland' in Mai-Brith Schartau *et al* (eds), *Political Culture: values and identities in the Baltic Sea Region* (BWV Verlag 2011) 121; Bracking (n 9) 5.

⁵⁴ Zhang and Vargas-Hernández (n 49) xv.

⁵⁵ *ibid*.

⁵⁶ Elaine Chan, 'Bribery and Corruption in the Public Sector is endemic and unavoidable in all societies' <https://www.academia.edu/10658708/Bribery_and_corruption_in_the_public_sector_is> accessed 22 June 2017.

⁵⁷ Jennifer Hasty, 'Sympathetic Magic/Contagious Corruption: Sociality, Democracy, and the Press in Ghana' (2005) 17 *Public Culture* 339, 342.

⁵⁸ Wrage (n 49) 9.

initiating the act or it could have been as a result of the public official initiating the conduct.⁵⁹ In order to ensure that his position is safe and maintain his lucrative position, the official may pay a bribe from the bribe he had initially received or from a different source. In other instances, the official may pay bribes to his seniors to avoid unpalatable consequences such as being seen as selfish, or subjected to any form of administrative discipline that could lead to the termination of his or her employment. Receipt and partition of a bribe do not end only with the official involved: it is channelled to administrative superiors who, implicitly, endorse this kind of gesture as an *esprit de corps*. Definitely, the recipient is left with a very little residue from what was collected.⁶⁰

Bribery could take the form of money (for example, cash, cheques, and promissory notes) or even a valuable gift as well as a promise. The size of the gift is not as important as the intention with which the gift is given: the intention here is to influence the process or outcome of the process. This may explain why different societies give it various names such as: 'petrol money'; 'grease'; 'lubricating the wheels'; 'gombo' (*okra*); 'oil on the lips'; 'assisting with unnecessary or unforeseen weekend expenses' among others.⁶¹ This money or gift is given when an individual directs his or her hope or desire to have a public service process speeded. This form of payment is also known as petty corruption. Bribery may also be done by making large amounts of payment to a public official. This is known as grand corruption. This form of bribe is commonly done as a once-off or one-time payment made to government or a senior public official intended to influence government decisions and is made without transparency, often occurring during the awarding of tender contracts or tender processes. When this form of bribe is made, the public officials concerned will make a decision that favours the individual who gave the bribe.⁶² Another instance would be when a rich individual pays government officials huge amounts of money for political influence. For instance, the case of the wealthy South African businessman, Schabir Shaik, who paid the South African President, Jacob Zuma, before he was made president, for Zuma to secure his (Shaik) political influence during his tenure as Deputy President to former President Thabo Mbeki.⁶³

⁵⁹ Zhang and Vargas-Hernández (n 49) xv.

⁶⁰ Wragge (n 49) 9.

⁶¹ See generally: Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalisation of Kenya's Nubians* (Routledge 2016) and Peter Wuteh Vakunta, *Critical Perspectives on the Theory and Practice of Translating Camfranglais Literature* (Langaa RPCIG 2016) 109.

⁶² Zhang and Vargas-Hernández (n 49) xv.

⁶³ *Schabir Shaik and Others v The State* 2008 (2) SA 208 (CC); *Jacob Gedleyihlekisa Zuma v National Director of Public Prosecution* unreported Case No.8652/08 (18 September 2008).

Only people with the necessary means can engage in acts of bribery. Often these acts are committed by the rich as a form of dishonesty or cheating by rejecting compromises and willing to do whatever it takes to obtain what favours their circumstance(s).⁶⁴

Bribery could involve numerous people. Common bribery transactions often involve two or more individuals. For example, a person pays a public official a bribe in order to have his documents processed speedily. Another form is between government and businesses, and often occurs when a business enterprise offers a senior government official payment 'in exchange for future business'.⁶⁵

2.3.2 Misappropriation or embezzlement of public funds or property

Embezzlement or misappropriation of state/public funds or property are common acts of corruption usually perpetrated by high-level public officials. Embezzlement is a form of theft resulting in billions of dollars being embezzled, and often goes undetected. This is because embezzlement is a crime of opportunity,⁶⁶ and is generally defined as the 'unlawful conversion or misappropriation of another's money or property by one to whom such items were entrusted'.⁶⁷ In order to understand embezzlement, one must understand the physical element of embezzlement which is the act of or a series of acts converting or misappropriating the property in question, while the mental element would be that the perpetrator must have acted with the intent to deprive possession to the other person.⁶⁸ An act of conversion simply means transforming the property into a State different from its original status.⁶⁹ Misappropriation, on the other hand, simply means the 'intentional, illegal use of the property or funds of another person for one's own use or other unauthorised purpose, particularly a public official...or by any person with a responsibility to care for and protect another's assets (a fiduciary duty)'.⁷⁰ From this definition, it is evident that misappropriation cannot be limited to funds, as property could also be misappropriated.

⁶⁴ Scott Rae and Kenman L Wong, *Beyond Integrity: A Judeo-Christian Approach to Business Ethics* (3rd edn, Harper Collins 2009) 230.

⁶⁵ Wrage (n 49) 10.

⁶⁶ Frank J DiMarino and Cliff Roberson, *Introduction to Corporate and White-Collar Crime* (CRC Press 2013) 69. See also Paul D Shaw and Jack Bologna, *Preventing Corporate Embezzlement* (Butterworth-Heinemann 2000) 1.

⁶⁷ Philip Carlan *et al.*, *An Introduction to Criminal Law* (Jones and Barlett Publishers 2011) 42.

⁶⁸ *ibid.* See also Shaw and Bologna (n 66) 17.

⁶⁹ *ibid.*

⁷⁰ Gerald N Hill and Kathleen Hill, *Nolo's Plain-English Law Dictionary* (Nolo 2009) 272.

There is a bit of confusion with regard to understanding acts of embezzlement and misappropriation. Embezzlement may simply be understood as the fraudulent misappropriation of funds or property, what happens is that an official will gain lawful possession of the funds or property, but during the course of their employment, they misappropriate it.⁷¹ That is to say, embezzlement involves the outright theft of funds or property, while misappropriation involves the misuse of property or funds.⁷²

A person who embezzles funds takes necessary measures to eliminate any traces of the funds and would not return any share of the funds.⁷³ In an effort to disguise these unlawful conducts, an embezzler may make fraudulent entries in order to deceive anyone into believing that the entries are normal or, they may simply look for loopholes in accounting or financial systems and use the weakness of the system to their advantage.⁷⁴

An individual may embezzle small or huge amounts of money, what is important is that the individual must have had access to the funds or property and this is likely to be the case in government spheres wherein a public official is entrusted with government money, property or any valuable.⁷⁵

Embezzlement of public funds is common in the African continent with some of Africa's leaders being investigated. The French government is investigating African leaders and families connected to them.⁷⁶ These leaders are accused of embezzling state funds from their home states. Son of the President of Equatorial Guinea Teodoro Nguema Obiang Mangue pleaded not guilty to charges of corruption, money laundering and embezzlement.⁷⁷ Charged with plundering public funds of Equatorial Guinea to satisfy his extravagant taste, an investigation was launched in 2010 to probe the source of the money Teodoro Nguema Obiang Mangue spends or spent in France.⁷⁸

⁷¹ Shaw and Bologna (n 66) 1.

⁷² Andrew Wedeman, *Double Paradox: Rapid Growth and Rising Corruption in China* (Cornell University Press 2012) 202.

⁷³ Yan Sun, *Corruption and Market in Contemporary China* (Cornell University Press 2004) 88.

⁷⁴ See Shaw and Bologna (n 66) 7-8.

⁷⁵ Zhang and Vargas-Hernández (n 49) xvii.

⁷⁶ Ronald J Burke and Suzy Fox (eds), *Human Frailties: Wrong Choices on the Drive to Success* (Routledge 2016) 69.

⁷⁷ Lara Rebello, 'Playboy vice president of Equatorial Guinea goes on trial in Paris for embezzling US\$ 116m' (*International Business Times*, 2 January 2017) < <http://www.ibtimes.co.uk/playboy-vice-president-equatorial-guinea-goes-trial-paris-embezzling-116m-1598929> > accessed 22 June 2017.

⁷⁸ 'Son of Equatorial Guinea's leader goes on trial in France' (*Business Day*, 2 January 2017) < <https://www.businesslive.co.za/bd/world/africa/2017-01-02-son-of-equatorial-guineas-leader-goes-on-trial-in-france/> > accessed 22 June 2017.

The investigation was, however, not limited to Teodoro Nguema Obiang Mangue alone, other government officials investigated included Omar Bongo (Gabonese politician who was President of Gabon from 1967-2009) and Denis Sassou Nguesso (President of the Republic of the Congo).⁷⁹ In a settlement, Teodoro Nguema Obiang Mangue handed over property worth more than US\$ 30 million, in addition to this, a 76-metre yacht estimated at US\$ 200, a Swedish vehicle worth USD 2.8 million and a Bugatti Veyron worth USD 2 million were also seized.⁸⁰ Other examples such as the Bongo family, relatives of the late Omar Bongo, Denis Sassou Nguesso and Obiang Nguema's family from Equatorial Guinea, are all under investigation.⁸¹ Other African leaders alleged to have embezzled state funds include Mobutu Sese Seko (former President of Zaïre, now the Democratic of Republic of Congo) (considered to have embezzled about US\$ 5 billion),⁸² Sani Abacha, former president of Nigerian president (alleged to have embezzled USD 2-5 billion)⁸³ and the former president of Kenya, Daniel Arap Moi (alleged to have embezzled and stolen funds estimated at US\$ 3 to US\$ 4 billion hidden in foreign accounts).⁸⁴ In 2013, the Nigerian High Court in Abuja convicted John Yakubu Yusuf for stealing from the Police Pension Funds (NGN 32.8 billion) (US\$103,976,000.00).⁸⁵

2.3.3 Fraud

Generally, fraud could be understood as 'illegal acts characterised by deceit, concealment, or violation of trust. These acts are not dependent upon the application of threat or violence or of physical force. Frauds are perpetrated by individuals and organisations to: obtain money, property, or services; avoid payment or loss of services; or secure personal or business advantage'.⁸⁶

When committed in the public sector, fraud involves the use of fake documents often used to exploit government grants, compensation schemes or to obtain benefits for personal gains.⁸⁷

⁷⁹ *ibid.*

⁸⁰ 'French trial reveals vast wealth of Equatorial Guinean president's son' (*The Guardian*, 2 January 2017).

⁸¹ Burke and Fox (n 76) 69.

⁸² Charles Manga Fombad and Madeleine Choe-Amusimo Fombad, 'Rethinking Anti-Corruption Strategies in Africa: Constitutional Entrenchment as Basis for Credible and Effective Anti-Corruption Clean-Ups' in Charles Chernor Jalloh and Olufemi Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (Martinus Nijhoff 2015) 747.

⁸³ *ibid.*

⁸⁴ *ibid.* See also Bona Udeze, *Why Africa?: A Continent in a Dilemma of Unanswered Questions* (Xlibris Corporation 2009) 402.

⁸⁵ Olubukola Olugasa and Olubunmi Olugasa, 'Is Embezzlement of Government Funds Criminal or Breach of Trust? The Nigerian Experience' (2013) 5 UNIJOS Journal of Public Law and Constitutional Practice 208, 208.

⁸⁶ Peter Goldmann, *Financial Services Anti-Fraud Risk and Control Workbook* (John Wiley and Sons 2010) 4.

⁸⁷ Zhang and Vargas-Hernández (n 49) xvii.

Fraud by a public official may include the following instances: when an official claims reimbursement for a fictitious business for travel costs or colludes with a private business or any individual in order to get a government tender contract;⁸⁸ when an official induces a company to over supply products by way of misrepresenting the exact number of supplies needed;⁸⁹ or when, for instance, a nurse at a public hospital charges a sum of money to patients who need medical assistance.

2.3.4 Money laundering

Money laundering is defined as the ‘process by which one conceals the existence, illegal sources, or illegal application of income, and then disguises that income to make it appear legitimate’ or a ‘process of taking the proceeds of criminal activity and making these proceeds appear legal’ or ‘the act of converting funds derived from illegal activities into a spendable or consumable form’.⁹⁰ For instance, where an individual places suspicious or undisclosed sources of money in a bank account and does not disclose this income on the tax return in the country where it was earned, the bank is laundering the funds unaware and such funds become proceeds of crime.⁹¹

2.3.5 Extortion

Extortion is a term used to describe instances where one obtains another person’s property with consent. The consent, however, must have been obtained in a wrongful manner as follows: threatening force; violence or fear; or obtained ‘under the colour of official right’.⁹² Such wrongful conducts could through exposing damaging material or inducing cooperation. Extortion by public officials is also known as forced bribery.⁹³ For example, an individual who has been pulled over by a traffic officer could be threatened by the latter to pay up or else they will be given a hefty fine. Another example is when a company applies for a licence and is coerced by a public official to pay a bribe after the latter threatened to implicate the company in unlawful acts, fearful for possible loss of huge sums of money the company may pay the bribe. Public officials could extort

⁸⁸ *ibid.*

⁸⁹ Peter Langseth, ‘Measuring Corruption’ in Charles Sampford *et al*, *Measuring Corruption* (Routledge 2016) 11.

⁹⁰ James R Richards, *Transnational Criminal Organizations, Cybercrime, and Money Laundering: A Handbook for law Enforcement Officers, Auditors, and Financial Investigators* (CRC Press 1998) 44. See also Doug Hopton, *Money Laundering: A Concise Guide for All Business* (Gower Publishing 2016) 1.

⁹¹ *ibid* 2.

⁹² Charles P Nemeth, *Criminal Law* (2nd edn, CRC Press 2011) 332. See also Wragge (n 49) 12.

⁹³ Zhang and Vargas-Hernández (n 49) xvi.

from members of the public through threats of positive harm. However, it is possible for public officials to be victims of extortion.⁹⁴ Hypothetical examples of public officials would include instances wherein an individual who wants favours threatens a senior official by alleging that he or she has damaging or damning information on the official. Fearful of his or her reputation and damage, which may be caused by such information and refusing to report matters to the relevant authorities, the state official could offer the person the favour(s) requested. Another instance where a public official could be victim to extortion would be when a civilian approaches a public official to inform him or her that his relative applied for a study permit and, therefore, the officer must make the application first preference or else he or she will reveal the officials' big secret.

2.3.6 Theft

Generally, theft could be defined as 'the fraudulent taking of personal property belonging to another, from his possession or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to use or benefit of the person taking'.⁹⁵

Considering the general definition of theft, when used in the government environment, theft could be understood to mean unlawful actions committed by a public official or third party, on his/her own or in association with each other, that leads to him or her or both, stealing from the public, wherein one unlawfully takes money, property or anything valuable when he or she is not entitled to such property, by virtue of being in a position to access such funds or property. For example, a nurse in a public hospital who steals medical packaging,⁹⁶ or a mayor whose municipal district has been awarded ZAR2 Billion for service delivery, steals ZAR100 000 for his private gain during his period in office. Though this constitutes an acts of theft, such conduct could be considered as either embezzlement or misappropriation. This is because misappropriation is a form of theft wherein one intentionally usurps property or funds for their own private or personal gain;

⁹⁴ Langseth (n 89) 12; Christopher Clague, 'The International Campaign against Corruption: An Institutional Perspective' in Jac C Heckelman and Dennis Coates (eds), *Collective Choice: Essays in Honor of Mancur Olson* (Springer Science and Business Media 2013)193.

⁹⁵ Ishaku Gwangndi and Sule Musa Tagi, *The Law on Armed Robbery, Theft and House Breaking in Nigeria: A Survey of Adamawa, Borno, Taraba and Yobe States* (AuthorHouse 2012) 33.

⁹⁶ Langseth (n 89) 11; Clague (n 94) 193.

and also because embezzlement is an act of theft of entrusted funds or property.⁹⁷ Similar to misappropriation and embezzlement, theft cannot be limited to money, property could be stolen by government officials. For example, a government official in the department or ministry of land, who knows that government wants a vacant land for infrastructure, unlawfully authorises a portion of the land and ownership thereof to be registered in his or her name.

Theft by public officials is not limited to acts of unlawfully taking property: public officials who are on payrolls, but do not do their jobs, also form part of those who have committed theft. This also includes individuals who use ghost workers as a means of getting monthly payments from the government, and public officials buying assets at below-market prices when the true value of the property is different from the value which it was obtained may also be classified as theft.⁹⁸

2.3.7 Nepotism and favouritism

Considered to be synonymous to favouritism, nepotism could be understood as the act of using one's power or influence to get, for example, jobs or unfair advantage for one's own family members.⁹⁹ For example, SANANGOL is an Angolan company established in 1976 to manage the production and distribution of oil in Angola.¹⁰⁰ Following a complaint by Angolan lawyers accusing the former Angolan President, José Eduardo dos Santos of nepotism, the Angolan Supreme Court requested José Eduardo dos Santos to conduct an inquiry as to why he appointed his daughter, Isabel dos Santos as CEO of SANONGOL, after firing the board of the company.¹⁰¹ Following the complaint and other criticisms, Isabel dos Santos was fired in late 2017. In addition to the former Angolan President's daughter, his son, José Filomeno dos Santos was the chairman of Fundo Soberano de Angola, the sovereign wealth fund of Angola, prior to his removal in January 2018.¹⁰² Though dismissed from their duties, these examples serve as a clear indication of nepotism in public administration. Other examples are as follows: Zimbabwe, where former

⁹⁷ Leo Huberts, *The Integrity of Governance: What it is, What we Know, What is Done and Where to go* (Springer 2014) 115; Domènec Melé, *Business Ethics in Action: Seeking Human Excellence in Organizations* (Palgrave Macmillan 2009) 132.

⁹⁸ Clague (n 94) 193.

⁹⁹ Malan and Smit (n 50) 17.

¹⁰⁰ Katharine Murison (eds), *Africa South of the Sahara 2004* (33rd, Taylor and Francis Group) 51.

¹⁰¹ Mark Babatunde, 'Angolan President Faces Supreme Court Over Nepotism Charges' (*Face2Face Africa*, 11 November 2016) < <https://face2faceafrica.com/article/angolan-president-faces-supreme-court-nepotism-charges>> accessed 23 June 2017.

¹⁰² Candido Mendes, 'Accusing dos Santos of nepotism, Angolan party rejects president's daughter as oil company chief' (*Mail & Guardian Africa*, 7 June 2016).

President Robert Mugabe appointed his son-in-law, Simba Chikore as Chief Operating Officer at the national airline; and Equatorial Guinea's Vice-President, Teodoro Nguema Obiang Mangue, who is the son of the serving President, Teodoro Obiang Nguema Mbasogo.¹⁰³

Likewise, nepotism in government administration also exists in Western States, for example, the President of the United States of America, Donald Trump appointed his son-in-law Jared Kushner as the White House senior adviser despite the US Code on government Organisation and Employees provision which prohibits a public official (president or member of congress) from appointing, employing, promoting, advancing or advocating for 'for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual'.¹⁰⁴

Nepotism is fairly common in public administration and areas considered to be vulnerable to nepotism are recruitment, promotion and transfers.¹⁰⁵ Nepotism negatively affects human resource management and selection practices because successful candidates are selected based on relationship (affinity or consanguinity). In many instances, the individuals have little or no knowledge for the job required and as a result may not perform the job well compared to those who are qualified for the positions.¹⁰⁶ Favouritism, on the other hand, relates to an act of showing or giving further help, protection, kindness, support or advantage to a single individual or a group of people.¹⁰⁷ For instance, a manager promoting male public officials considered to be his friends. The difference between nepotism and favouritism is that the former simply favours relatives, while the latter benefits people not related to the individual.¹⁰⁸

¹⁰³ "This is how we roll in Africa: Mugabe son-in-law appointment is latest in list of controversial appointment' (News24, 7 October 2016) <<http://www.news24.com/Africa/Zimbabwe/this-is-how-we-roll-in-africa-mugabe-son-in-law-appointment-is-latest-in-list-of-controversial-appointments-20161006>> accessed 23 June 2017.

¹⁰⁴ <https://www.law.cornell.edu/uscode/text/5/3110> accessed 23 June 2017.

¹⁰⁵ Malan and Smit (n 50) 17.

¹⁰⁶ Huseyin Arasli and Mustafa Tumer, 'Nepotism, Favoritism and Cronyism: A study of their effects on job stress and job satisfaction in the Banking industry of North Cyprus' (2008) 36 Social Behavior and Personality 1231, 1239. See also Osei Owusu-Aduomi, *Hope for the youth: An indispensable Youth Development Road Map* (AuthorHouse 2014) 74.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

Cronyism is a form of favouritism where one gives ‘preference to politicians, particularly to cronies, especially as evidenced in the appointment of hangers-on office without regard to their qualification’. This conduct is often portrayed when a supervisor shows or gives special treatment or privileges to a subordinate, friends, spouse or relatives.¹⁰⁹

Nepotism, cronyism and favouritism could also be seen as triggers of corruption, affecting public officials in making decisions and performance of their practices.¹¹⁰ Nonetheless, in essence, nepotism and favouritism involve the abuse of discretion, not ruled by self-interest of an official, but that of others linked to him through membership of a family, tribe or political party.¹¹¹

2.3.8 Collusion

The World Bank, together with heads of the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, Inter-American Development Bank and the International Monetary Fund, define collusion as ‘an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly, the actions of another party’.¹¹²

In February 2017, the South African Competition Commission referred a collusion and price-fixing matter to the Competition Tribunal for Prosecution against 17 banks, including three South African banks: Investec, Standard Bank of South Africa and ABSA Bank Limited. In its two-year investigation on the matter, the South African Competition Commission found that, from at least 2007, the parties had a general agreement to collude on bid prices, offers and bid-offer spreads for spot traders in relation to currency trading involving the US Dollar/Rand currency pair.¹¹³ Furthermore, it was found that the parties had manipulated bid prices and offers through agreements to refrain from trading and creation of fictitious bids and offers at particular times.¹¹⁴ It was also established that traders of the parties primarily used Reuters currency as their trading platform to carry out their collusive activities.¹¹⁵ Other platforms included use of Bloomberg

¹⁰⁹ Fu I-Pang, ‘Favoritism: Ethical Dilemmas Viewed Through Multiple Paradigms’ (2015) 8 *The Journal of Values-Based Leadership* 1, 2.

¹¹⁰ Arasli and Tumer (n 106) 1239.

¹¹¹ Langseth (n 89) 13.

¹¹² Khi V Thai, ‘International Public Procurement: Concepts and Practices’ in Khi V Thai (ed), *International Handbook of Public Procurement* (CRC 2008) 21.

¹¹³ <http://www.compcom.co.za/wp-content/uploads/2017/01/Competition-Commission-prosecutes-banks-currency-traders-for-collusion-15-Feb-2016.pdf> accessed 22 June 2017.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

instant messaging system (chatroom);¹¹⁶ telephone conversations; and several meetings to coordinate their bilateral and multilateral collusive activities.¹¹⁷ The South African Competition Commission also found that not only did the parties assist each other in reaching the desired prices by coordinating trading times, the parties also reached agreements to refrain from trade, taking turns in transacting and pulling or holding trade activities on the Reuters currency platform trading.¹¹⁸ In particular, the South African Competition Commission is seeking the following orders: first, an order declaring that the banks (respondents) contravened the Competition Act 89 of 1998; and second, an order declaring that the banks are liable to pay an administrative penalty equal to 10 percent of their annual turnover.¹¹⁹ In 2017, Standard Bank of South Africa Limited lodged an application in the Competition Tribunal against the Competition Commission of South Africa, to compel the latter to produce its records of investigation on the collusion case (also known as the Forex case). Despite its submissions, the application was dismissed on the basis that the application took the form of an application to compel and not a review.¹²⁰

2.3.9 Abuse of discretion

In public administration, public officials have the power to make judgments or make a decision that has force of law, without strictly adhering to regulations or statutes. This occurs where the law permits them to make use of their discretion, especially in arriving at a decision. For example, in the tender procurements, a senior public official may decide to grant a tender to a specific business or to an individual. Another example is the appointment of judicial officers. According to section 174 of the South Africa Constitution, the President, after consulting with the Judicial Service Commission (JSC) and leaders of political parties represented in the National Assembly may appoint a Chief Justice and Deputy Chief Justice, together with appointing the President and Deputy President of the Supreme Court of Appeal.¹²¹ Although a public official has the power to exercise his/her own discretion when performing their office duties, the decision or judgment made must be reasonable, rational and just. For instance, it could be accepted that, a judge appointed by

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ <http://www.reuters.com/article/idUSFWN1G00LW> accessed 2 June 2017.

¹²⁰ *Standard Bank of South Africa Limited v Competition Commission of South Africa*, Case No. CR212feb17/DSC027Apr17, Competition Tribunal of South Africa (6 November 2017).

¹²¹ Constitution of the Republic of South Africa, Section 174.

a president must not be notoriously known for non-compliance with the law, improper application of the law or biasness. In another instance, a party to be granted a tender must be qualified and must have satisfied other procurement requirements; this needs to be done to prevent kickbacks and poor service delivery. The improper exercise of discretion by public officials is known as abuse of discretion (taking arbitrary decisions without regards of the facts or law).

Abuse of discretion in the context of corruption often involves public officials making irrational and/or unreasonable decisions to suit their own needs or to benefit themselves. This is supported by the conventional definition of corruption that it is the misuse of power for private gains. When officials abuse their discretion, it affects the principles of good public administration and affects service delivery, which in turn affects the rights of individuals. When this occurs, the decision or judgment made by the official could be challenged. For example, in South Africa, a person can challenge administrative decision based on the substantive content of section 33 of the Constitution of South Africa further provided for by national legislation namely the Promotion of Administrative Justice Act of 2000 which defines administrative action in section 1 as follows:

- (i) ““administrative action” means any decision taken, or any failure to take a decision, by-
 - (a) An organ of state, when-
 - (i) Exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) Exercising a public power or performing a public function in terms of any legislation; or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect....’

2.3.10 Clientelism

Clientelism is common in the election scenes where one is requested to cast a vote in exchange of favours.¹²²

¹²² Edoardo Ongaro, *Public Management Reform and Modernization: Trajectories of Administrative Change in Italy, France, Greece, Portugal and Spain* (Edward Elgar 2009) 227.

2.3.11 Patronage

Patronage occurs when a senior official, for instance, a prime minister, awards a huge sum of money to parties who contributed immensely in the elections.¹²³

2.3.12 Political corruption

Political corruption may be understood as political behaviour which is corrupt due to violation of formal standards or rules of behaviour set out by a political system to be adhered to by public officials.¹²⁴ In the simplest of explanations, as given by Nye, it is the deviation 'from formal duties of a public role (elective or appointive) because of private (personal, close family, private clique) wealth or status gains...'¹²⁵ There are four (4) types of political corruption which are common and often occur in all spheres of government. These are: bribery; embezzlement; blackmail or extortion; and preferential treatment or patronage.¹²⁶

Political corruption is one of the broadest forms of corruption since many corrupt practices emanate from it, one of them being electoral corruption, a form of corruption which is considered to shape the behaviour of politicians and heighten their need to use their office power for private gains. Political and electoral corruption, are intertwined, and though no country is immune to corruption, not all States experience electoral fraud. According to Olivier de Sardan, 'every type of regime develops its own particular form of corruption'.¹²⁷ This, therefore, implies that only democratic States experience electoral corruption and its effects since this form of corruption is linked to democracy.¹²⁸

Electoral corruption is harmful to democracy, and due to its hidden nature and its ability to take different forms, it is difficult to measure its extent and forms.¹²⁹ Electoral corruption, also known as electoral fraud, electoral malpractice, electoral misconduct, electoral malfeasance or

¹²³ Hans Nelen, 'Corruption Dutch Style' in Stefano Caneppele and Francesco Calderoni (eds), *Organized Crime, Corruption and Crime Prevention: Essays in Honor of Ernesto U. Savona* (Springer Science and Business Media 2014) 160.

¹²⁴ John G Peters and Susan Welch, 'Gradients of Corruption in Perceptions of American Public Life' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (Transaction Publishers 2002) 156.

¹²⁵ *ibid.*

¹²⁶ <http://www.houstoncrimedefense.com/4-types-of-political-corruption/> accessed 1 May 2017.

¹²⁷ Gerhard Anders and Monique Nuijten, 'Corruption and the Secret of Law: An Introduction' in Monique Nuijten and Gerhard Anders (eds), *Corruption and the Secret of Law: A Legal Anthropological Perspective* (Ashgate Publishing Ltd 2017) 7.

¹²⁸ *ibid.*

¹²⁹ Kabanda Umar *et al.*, 'Electoral Corruption in Central Africa and Entrenchment of Democratic Culture: A Study of Cameroon' (2013) 6 American Scientific Research Journal for Engineering, Technology, and Sciences 20, 21.

electoral manipulation is the ‘illegal interference with the process of election which involves the abuse of electoral institutions for personal gain’.¹³⁰ Once attained, it could be used to access and retain political power, exclude others from political leadership, discharge and appoint relatives or acquaintances as executive members of government or influence the judiciary in order to unreasonably arrest and convict those who threaten the leadership. For instance, there is a general understanding that Zimbabwean elections are not free nor fair in that, there have been instances wherein, MDC candidates and supporters were restricted from campaigning openly in some parts of the country, they would be subjected to harassments, violence and intimidation, government food stocks distributed in exchange of votes, and media-coverage would be in favour of ZANU-PF.¹³¹ Moreover, electoral corruption may be understood as the ‘abuse of the process of awareness and manipulation of conscience for some by others in the perspective to extort conduct that distorts the expression of the legitimacy of the population and, therefore, the legitimacy of the democratic game’.¹³²

It could be argued that electoral corruption is common in many African States. In an effort to prevent electoral corruption through the promotion of constitutional dispensations and democratic principles, the African Union (AU) has, over the years, taken initiatives to address this issue by prohibiting unconstitutional changes of government. The Organisation of African Unity (OAU)/(AU) is founded on many principles, including the promotion of democratic principles and practices.¹³³ The AU endorsed the principle of non-interference resulting in sovereignty being the focus of its agenda. The scale and gravity of unconstitutional changes taking place led to many African States pleading with the AU to position itself on this issue.¹³⁴ Due to the fact that the AU has a limited mandate, it did not have the required mechanisms to deal with issues relating to unconstitutional changes of government, hence relied on Article 13(1) of the African Charter on Human and Peoples’ Rights.¹³⁵

¹³⁰ Umar *et al* (n 129) 21.

¹³¹ Prince Mario, *Zimbabwe Cry for Hope* (Lulu.com 2009) 46.

¹³² Umar *et al* (n 129) 21.

¹³³ Wafula Okumu, ‘The African Union and the Challenges of Integration in Africa’ in Charles Okibgo and Festus Eribo (eds), *Development and Communication in Africa* (Rowman and Littlefield 2004) 192.

¹³⁴ Gerhard Kemp and Selemani Kinyunyu ‘The Crime of Unconstitutional Change of Government (Article 28E)’ in Gerhard Werle and Vormbaum Moritz (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Springer 2016) 61.

¹³⁵ *ibid.*

Following the 1997 Zimbabwean Summit and in an effort to show its stance against unconstitutional changes of government, the Council of Ministers of the OAU firmly declared its rejection and condemned the 1997 coup d'état that took place in Sierra Leone, thus requesting the immediate restoration of constitutional order.¹³⁶ In 2000, the Lomé Declaration was adopted in response to the unconstitutional changes of government. The Declaration defined unconstitutional changes of government as:

- i) military coup d'état against a democratically elected Government;
- ii) intervention by mercenaries to replace a democratically elected Government;
- iii) replacement of democratically elected Governments by armed dissident groups and rebel movements; and
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.¹³⁷

In 2001, a legally binding instrument, the Constitutive Act, prohibiting unconstitutional changes of government was adopted by the AU, followed by the 2003 Protocol to the Constitutive Act Relating to the Establishment of the Peace and Security Council which mandates the Council to impose sanctions when unconstitutional changes in government occur.¹³⁸ Following the adoption of the Constitutive Act, the African Charter on Democracy, Elections and Governance was adopted in 2007. Article 23 of the Charter defines unconstitutional change of government, which is slightly different from the definition provided for by the Lomé Declaration.¹³⁹

In 2014, the Malabo Protocol, which is not yet in force, extended the jurisdiction of the African Court of Justice and Human Rights which is yet to be established.¹⁴⁰ Article 28E criminalises unconstitutional change of government by defining the unconstitutional change of government similar to the above-mentioned instruments:¹⁴¹

- '1. For the purpose of this Statute, 'unconstitutional change of government' means committing or ordering to be committed the following acts, with the aim of illegally accessing to maintaining power:
- a) A putsh or coup d'état against a democratically elected government;

¹³⁶ *ibid.*

¹³⁷ African Union Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI), Thirty-Six Ordinary Session of the Heads of State and Government and the Fourth Ordinary Session of the AEC, 10-12 July 2000.

¹³⁸ Kemp and Kinyunyu (n 134) 62.

¹³⁹ *ibid.*

¹⁴⁰ Allan Ngari and Raeesah Cassim Cachalia, 'Rule of Law and the Role of Justice in Managing Conflict' in Pamela Aall and Chester A Crocker (eds), *The Fabric of Peace in Africa: Looking Beyond the State* (McGill-Queen's Press 2017) 95.

¹⁴¹ African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Article 28E.

- b) An intervention by mercenaries to replace a democratically elected government;
- c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e) Any amendments or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution; and
- f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of political actors'.¹⁴²

There are three main effects of electoral corruption as follows: first, it manipulates rules (the legal framework), that is, electoral rules are distorted to benefit a party contesting elections; second, it manipulates voters (preference-formation and expression), that is, efforts are made to distort the will of the voters by swaying their preferences and expressions through the use of various illicit forms of campaign tactics that are deceptive, conducting activities that violate campaign finance laws, usage of state resources to fund or support a particular candidate or party or bias in media coverages; and third, it manipulates voting in various ways, for example, electoral maladministration by personating, ballot-box stuffing, or misreporting.¹⁴³

In an effort to combat electoral corruption, States have enacted laws to ensure that elections are not only free, but fair and in line with the principles of democracy by laying out electoral offences and establishing electoral commissions. For example, section 1 of the Nigerian Electoral Act 6 of 2010 establishes the Independent National Electoral Commission to 'conduct voter and civic education, promote knowledge of sound democratic election processes; and conduct any referendum required to be conducted pursuant to the provision of the 1999 Constitution...' Sections 117-132 lay out electoral offences, such offences include: offences in relation to registration or nomination; improper use of voters' cards; impersonation and voting when not qualified; undue influence; threatening; offences relating to recall; bribery and conspiracy; wrongful voting; and false statements.¹⁴⁴ In another example, Part II of the Cameroonian Law

¹⁴² *ibid*

¹⁴³ Umar *et al* (n 129) 21.

¹⁴⁴ Examples of other states that have enacted electoral laws are Kenya. The Kenyan Election Offences Act 37 of 2016 lays out election offences perpetrated by any person or election officers and also provides for offences relating to the registration of voters, voting and electors' cards. It further lays out corrupt offences which may be committed in the election process personation, undue influence and bribery. Lastly, it provides for illegal practices at elections. Chapter 7 of the South African Electoral Act 73 of 1998 lays out prohibited conduct in elections, and they are undue influence,

Relating to the Electoral Code establishes an independent body with legal personality responsible for the organisation, management and supervision of all elections and referendum operations in Cameroon. Section 8 of the law provides that Elections Cameroon shall perform its duties through the Electoral Board and the General Directorate of Elections.

One of the crucial stages before elections is the period when political parties campaign to increase their chances of being elected into office. For a campaign to be successful, political parties need to be well-financed. There are various ways in which a political party may raise funds, including from the state and fundraising. For example, in South Africa, a political party may get state and private funding. The Public Funding of Represented Political Parties Act 103 of 1997 governs the allocation of funding received by political parties from the Represented Political Parties' Fund.¹⁴⁵

However, despite various ways in which political parties may get funding, there are instances wherein political corruption is used to raise funds. To prevent this, some States, through enacted legislation on electoral affairs, have provisions relating to finances of a political party in an effort to monitor state funding to political parties and, most importantly, to detect any suspicious or corrupt financial transactions transferred or given to political parties in return for government favours. For example, section 139 of the Namibian Electoral Act 5 of 2014 provides for the declaration of assets and liabilities by a political party; section 140 provides that a political party must keep proper records and audits; section 141 provides that there must be disclosure of foreign and domestic financing of political parties, organisations or other persons, and Part 3 of the Namibian Electoral Act exclusively provides for funding of political parties. In similar vein, Part XI of the Cameroonian Law Relating to the Electoral Code exclusively spells out provisions specific to the public funding of political parties and election and referendum campaigns. Among many of its provisions, section 276(3) provides that a political party or a candidate who receives public funding shall not use the latter for personal enrichment and section 277(2) provides that

impersonation, intentional false statements, infringement of secrecy, obstruction of, or non-compliance with, directions of Commission, chief electoral officer and other officers, and it also provides for prohibitions concerning voting and election materials, placards and billboards during elections. In addition to the legislation that prohibits certain conducts in elections, the country established an institution, the Electoral Commission, created by the Electoral Commission Act 51 of 1996 'to strengthen constitutional democracy and promote democratic electoral processes'. Amongst many of its functions laid out in section 5, the functions of the Commission include: managing elections and ensuring that they are free and fair, promoting conducive conditions to ensure that the elections are free and fair, promoting knowledge of sound and democratic electoral process, and promote voter education.

¹⁴⁵ Public Funding of Represented Political Parties Act 103 of 1997.

‘political parties or candidates receiving public funding, shall be bound to keep an account thereof’. In an effort to control or monitor public funding, section 278(1) prohibits a political party from receiving subsidies or funding from foreign persons, organisations, powers and/or states.

2.4 Corruption in Africa: a snapshot of the sociological landscape

Africa, compared to other continents, is perceived by many as the most corrupt in the world.¹⁴⁶ It is apparent that corruption has invaded Africa and undermined and constantly puts the development of African States in jeopardy, leading to the devastation and abuse of moral standards in African societies. As a result, perpetrators of corruption in Africa are enriched.¹⁴⁷

Most of Africa went through the tutelage of different colonial masters, especially the Belgians, British, French, Portuguese and Spanish. In the aftermath of colonialism, post-independent Africa has battled with political, social and economic policies, some of which have not only been disastrous but also account for the high prevalence of corruption on the African continent. Poor political leadership as well as weak legal systems and institutional failures partly account for this poor perception of Africa as the most corrupt continent in the world.¹⁴⁸ The survival and sustenance of corruption in African States is mostly based on weak State institutions as a result of being weakened by those in power since power was centralised in the hands of cabals of politicians, which in turn, became detrimental to the participatory democracy and economic development, and post-colonial leadership that was hardly informed by sustainable choices and a clear vision of where the States were headed to.¹⁴⁹

Pre-independent Africa adhered to the checks and balances principles: principles which allows a governmental branch to have a certain measure of influence over the other branch.¹⁵⁰ This principle was mostly eminent in the judicial system and its purpose was to curb the excessive powers of leaders.¹⁵¹ Unfortunately, after gaining independence, many African leaders needed and aspired for power and that became their ultimate objective, this later influenced them to ignore the

¹⁴⁶ < <http://infochangeindia.org/governance/news/bangladesh-most-corrupt-africa-most-dishonest-continent-ti-survey.html> > accessed 13 June 2016.

¹⁴⁷ Gbenga Lawal, ‘Corruption and Development in Africa: Challenges for Political and Economic Change’ (2007) 2 *Humanity and Social Sciences Journal*, 4.

¹⁴⁸ Oluwole Owoye and Nicole Bissessar, ‘Bad Governance and Corruption in Africa: Symptoms of Leadership and Institutional Failure’, [2012] Department of Economics, Western Connecticut State University, Danbury.

¹⁴⁹ Elizabeth Nduku and John Tenamwenye (eds), *Corruption in Africa: A Threat to Justice and Sustainable Peace* (Glonethics.net 2015) 20.

¹⁵⁰ Eric Dinalis Hirsch *et al*, *The New Dictionary of Cultural Literacy* (Houghton Mifflin Harcourt 2002) 333.

¹⁵¹ Owoye and Bissessar (n 148) 8.

checks and balances that existed during the colonial era. One of the reasons why checks and balances were disregarded was because African leaders had the desire to rule ‘by exercising a vast system of patronage’ and not to rule through constitutions or parliament.¹⁵² This partly explains why corruption problems in Africa are said to be influenced by long-term leadership mandates by dictators.¹⁵³ The effects of having long-term dictators in power is that such dictators enrich themselves because they are unable to distinguish between their property and that of the State. They often threaten or intimidate their political opponents, frustrate constitutional rule of movements, control all branches of government, regulate media freedom, block access to state information, control freedom of expression and victimise whistleblowers in the most unconventional and dehumanising ways.¹⁵⁴

Politics, for the most part in Africa, is not seen as an opportunity to compete on who best can lead and manage the State. Rather, it is perceived as an opportunity to engage in self-enrichment at the expense of the general public. This mind-set triggers the siphoning of state’s resources immediately an individual gains political power, especially as such an individual knows that s/he must do so within the prescribed constitutional mandate, which, often, is twisted and extended by flawed and corrupt political processes. Such corrupt leaders, scandalised and threatened by corrupt practices, remain immersed in paranoia, which they seek to avoid by remaining in power in the hope that they are not ousted and prosecuted like the cases of the former Presidents of Burkina Faso Blaise Compaoré from 1987 to 2014 and Ivory Coast Laurent Gbagbo from 2000-2011. One of the reasons why dictators prefer to retain presidential office is because they are terrified of being investigated for corruption or misuse of office power and/or human rights violations. However, should such a leader leave his office at his own volition, he often hand-picks his successor, allowing him to control policies in the shadows, which in turn, will not put him in harm’s way.¹⁵⁵

The integration of corruption in the socio-cultural and political spheres is mostly based on the fact that corruption is connected to both moral and dishonest acts, hence it affects all spheres.

¹⁵² *ibid* 10.

¹⁵³ *ibid* 9.

¹⁵⁴ *ibid* 9-10.

¹⁵⁵ *ibid* 11.

Although this may be the case, corruption devastates States because of its high direct cost on revenue lost or the deviation of funds from their intended purposes and economic distortions.¹⁵⁶

The existence of corruption in the spheres is profound. Seen through a political lense, corruption in Africa brings about political instability, interrupts law and order and results in the inefficiency of public services. From a socio-cultural perspective, corruption dramatically and drastically changes societal values of a progressive society in ‘pursuit of wealth, affluences, power and society recognition’ since ‘people no longer appreciate the virtues of good morals, conduct and practices’.¹⁵⁷ From the economic point of view, corruption affects development and brands Africa with a poor image in the international community which in turn affects its interpersonal and business relationships.¹⁵⁸

The costs of corruption are high, and since corruption is an pervasive issue in Africa, African States cannot endure it, and as a result, development is slowed down and governments’ intentions to eradicate poverty diminishes.¹⁵⁹

It has been said that poverty, personalisation of public office by civil servants, political culture and ‘the inability of leaders to overcome their colonial mentality in respect of their perception of public office’ could be the reasons why corruption is prevalent in Africa.¹⁶⁰ Nonetheless, apart from these, other causes of corruption may include ‘...negative colonial legacy, poor leadership, politics of the belly, omnipotent state, greed and selfishness, clientelism, patronage and nepotism, absence of popular participation of the public in government, weak institutions of governments, lack of accountability and transparency, lack of political will, weak ethical values, centralist nature of the state and concentration of state power, weak judicial system and constant insecurity and conflicts’ and the use of military coups to ‘consolidate power through de-jure or de-facto...which guarantee them security of tenure but which are also used to propagate their so-called development agenda for the nation’ as a strategy to perpetuate neo-colonialism, and in addition, exploit the needs of the general public and rescind any dissenting voice.¹⁶¹

¹⁵⁶ Lawal (n 147) 4.

¹⁵⁷ *ibid* 5.

¹⁵⁸ *ibid*.

¹⁵⁹ *ibid* 1.

¹⁶⁰ *ibid* 4.

¹⁶¹ Elizabeth Nduku and John Tenamwenye (eds), *Corruption in Africa: A Threat to Justice and Sustainable Peace* (Glonethics.net 2015) 22.

Another reason why corruption has progressed over the years is because high-level public officials in all sectors of government, use their power to accrue wealth to the detriment of the general public, the existence of insensitive donor programmes aimed at creating and supporting bad governance, which as a result, ingrains corruption, impunity and increases the levels of poverty.¹⁶²

The control or eradication of corruption in Africa will, forever, be challenging since Africa has weak institutions, many of which are controlled by dictators.¹⁶³

2.5 Challenges in defining corruption

There is an enormous amount of expectation to define corruption and throughout the years, the inability to do so points to numerous fundamental factors that hinder the construction of a watertight definition. This problem, however, is partly attributable to the varied perceptions of what corruption is. In this regard, two factors could account for this: first, since it is acknowledged that corruption exists in diverse societies, people make use of different words or phrases when referring to acts of corruption. The tendency, therefore, has been to perceive some gestures or acts as 'normal' within the social fabric of the community, making it acceptable and, therefore, not a problem; and second, when such variances occur within the society, then, even criminalising corruption becomes a challenge. As explained above, there are different forms of corruption. However, it is important to examine Africa's different societies in an effort to identify and discuss the various names assigned to different gestures that constitute corruption.

Kiswahili is a language largely spoken in several States such as Kenya and Rwanda.¹⁶⁴ There are four words in this language that are commonly used to refer to bribery as follows: 'chai'; 'hongo'; 'rushwa'; and 'zawadi'.¹⁶⁵ Chai is a term that refers to tea, but in the context of corruption, the term is used when one asks for tea. In other words, the person is asking for a bribe.¹⁶⁶ In Kenya, corruption is prevalent as public officials look for opportunities to be paid a

¹⁶² *ibid* 23.

¹⁶³ Owoye and Bissessar (n 148) 10.

¹⁶⁴ 'Swahili to become East Africa's official language' (*The Africa Report*, 25 October 2013) < <http://www.theafricareport.com/East-Horn-Africa/swahili-to-become-east-africas-official-language.html> > accessed 22 June 2017.

¹⁶⁵ Helen Dancer, *Women, Land and Justice in Tanzania* (Boydell and Brewer Ltd 2015) 97; M J F Cooper, *Swahili Medical Dictionary and Phrasebook* (2nd edn, Lulu.com 2007) 142.

¹⁶⁶ John Shaw and Sak Onkvisit, *International Marketing: Strategy and Theory* (4th edn, Routledge 2008) 150.

little 'chai'.¹⁶⁷ Rushwa is also another word that could be used when speaking of a bribe.¹⁶⁸ Other words such as 'kutoa rushwa' or 'kulisha rushwa' are also used to refer to bribes. When a person asks for a bribe, the phrase 'kula rushwa' may be used.¹⁶⁹ Another popular term used by public officials when asking for bribes is *zawadi*, which means gifts.¹⁷⁰

When public officials ask for a bribe, they are not necessarily asking for money. This shows that a bribe is not limited to money and therefore it may be anything other than money. In many instances, before or after the performance of a public service, officials would ask the person whom s/he assisted or is about to assist, to buy them lunch or anything to drink. This is where phrases such as 'Kitu kidogo' used to mean 'something small' and 'maji ya wazee' meaning 'money for beer' are commonly used, particularly in Kenya.¹⁷¹ Moreover, 'kola' (which means 'small thing' or 'a little something') is a term commonly used in West Africa (including Nigeria, Sierra Leone, Ghana and Gambia).¹⁷² The term originated from an act of offering kola nuts as a gift to a guest visiting a homestead as a sign of respect.¹⁷³ However, with corruption being rife in Africa today, the word 'kola' is frequently used among the people of sub-Saharan African particularly in West Africa, often in business transactions either when one enters into a business contract or before the contract is fulfilled.¹⁷⁴

The word 'dash' is another word often used in States such as Ghana and Nigeria and many other African States.¹⁷⁵ Anyone who uses this word is simply asking for a tip, a bribe, donation or payoff.¹⁷⁶ In Ghana, the word 'soli' is commonly used to refer to a bribe.¹⁷⁷ In Kinyarwanda, the following terms may be used: 'ibitutire' and 'igishuko' to mean a bribe, while 'guhonga' and

¹⁶⁷ Peter D Little, 'Unofficial Trade When States Are Weak: The Case of Cross-border Livestock Trade in the Horn of Africa' in Michael Bollig *et al* (eds), *Pastoralism in Africa: Past, Present and Future* (Berghahn Books 2013) 389.

¹⁶⁸ <https://swahili.english-dictionary.help/english-to-swahili-meaning-bribe> accessed 22 June 2017.

¹⁶⁹ Cooper (n 165) 142.

¹⁷⁰ Shaw and Onkvisit (n 166) 150.

¹⁷¹ Charles Mitchell, *A Short course in international business ethics: Combining Ethics and profits in Global Business* (3rd edn, World Trade Press 2009) 26.

¹⁷² Frank Polzenhagen and Hans Georg Wolf, 'Culture-specific conceptualization of corruption in African English' in Farzad Sharifian and Gary B Palmer (eds), *Applied Cultural Linguistics: Implications for Second Language Learning and Intercultural Communication* (John Benjamins Publishing 2007) 153.

¹⁷³ Michael Valdez Moses, *The Novel and the Globalization of Culture* (Oxford University Press 1995) 141.

¹⁷⁴ James G Tillen and Sonia M Delman 'Lost in Translation: The Language of Bribery' <<https://www.millerchevalier.com/publications?find=35909>> accessed 27 June 2017.

¹⁷⁵ Robert M Prince, *Society and Bureaucracy in Contemporary Ghana* (University of California Press 1975) 118.

¹⁷⁶ Lizzie Williams, *Nigeria: The Bradt Travel Guide* (2nd edn, Bradt Travel Guide 2008) 84.

¹⁷⁷ Philip Briggs, *Ghana* (7th edn, Bradt Travel Guide 2016) 479; Hans-George Wolf and Frank Polzenhagen, *World Englishes: A Cognitive Sociolinguistic Approach* (Walter de Gruyter 2009) 216; and *ibid*.

'gutuga' would mean to bribe.¹⁷⁸ In Sudan and some other Arab States, bribery is known as 'رشوة'. More specifically, in Sudanese, a bribe is referred to as 'nyogok'.¹⁷⁹

'Bonsella' is a term used commonly in South Africa.¹⁸⁰ It is derived from an isiZulu word 'bansola' which means offering a gift in gratitude.¹⁸¹ This word, including other words such as 'tjotjo' and 'isinyobo' are used by South African public officials when asking for a bribe.¹⁸² Common phrases that may also be used include 'ma lini e bribe', which means 'how much is a bribe?'; 'uya hli nza' is an idiom commonly found in the isiZulu vocabulary which means 'you have to slaughter first'; and lastly, 'OMKWOP' or 'omkoopgeld' is an Afrikaner word for bribe.¹⁸³

In Yoruba language, spoken in Nigeria, a bribe is referred to as 'abetele'.¹⁸⁴ 'Egunje' is another popular term in Nigeria which is a euphemism for bribe, inducement, or kickbacks.¹⁸⁵ Moreover, in the Hausa language, bribery is referred to as 'cin hanci' and in the Igbo language, it is referred to as 'iri ngo'.¹⁸⁶

In Chichewa language, spoken in Zimbabwe, bribery is referred to as 'ziphuphu' and in Shona, a bribe is referred to as 'pfumbamuromo'.¹⁸⁷

Public officers tend to ask for bribes in the midst of their regular income. When people approach them for services, they may ask for a bribe before or after assisting a person. In Cameroon, people may use terms such as 'whisky'; 'pepper'; 'small thing'; 'envelope'; 'carburant' (French word for 'petrol') when referring to a bribe.¹⁸⁸ In other instances, the phrase 'fanta-money' or 'Coca-Cola money' are also popular and often used when an official wants to be bribed.¹⁸⁹ Additional words such as 'makalapati'; 'mimbo' (a drink – often alcoholic); 'tchoko' (or 'choko'

¹⁷⁸ <http://www.kinyarwanda.net/index.php?q=bribe&start=0> accessed 9 August 2016.

¹⁷⁹ <http://www.sanskritdictionary.com/translate.php?q=bribe> accessed 9 August 2016.

¹⁸⁰ <http://www.cliftonfirstbeach.co.za/cape-town-holiday-apartment2.asp> accessed 22 June 2017.

¹⁸¹ Oriana Palusci (ed), *English, But Not Quite: Locating Linguistic Diversity* (Tangram Ediz 2010) 187. See also Tony Maxwell, *Searching for the Queen's Cowboys: Travels in South Africa Filming a Documentary on Strathcona's Horse and the Anglo-Boer War* (Brattonmax 2009) 169.

¹⁸² http://www.indifferentlanguages.com/words/bribery#region_4 accessed 9 August 2016 and <https://glosbe.com/xh/en/isinyobo> accessed 9 August 2016.

¹⁸³ < <http://sanskritdictionary.com/translate.php?q=bribe&lang=&iencoding=>> accessed 12 August 2016.

¹⁸⁴ https://archive.org/stream/DictionaryOfTheYorubaLanguage/A_Dictionary_of_the_Yoruba_Language_djvu.txt accessed 12 August 2016.

¹⁸⁵ <http://www.egunje.info/faq/php> accessed 8 August 2016.

¹⁸⁶ http://www.indifferentlanguages.com/words/bribery#region_4 accessed 9 August 2016.

¹⁸⁷ <http://www.sanskritdictionary.com/translate.php?q=bribe> accessed 9 August 2016 and http://www.indifferentlanguages.com/words/bribery#region_4 accessed 9 August 2016.

¹⁸⁸ Lozzi Martial Meutem Kamtchueng, 'Is that what I eat?-A linguistic study if the language of corruption in multilingual Cameroon' (2015) 9 International Journal of Languages Studies 59, 64.

¹⁸⁹ Salvatore Schiavo-Campo and Hazel M McFerson, *Public Management in Global Perspective* (Routledge 2014) 419.

– meaning something that motivates, prompts, induces or influences), ‘soya’ (a piece of braai beef); ‘gombo’ (or ‘ngombo’ used to refer to something slimy meaning it makes things move easier and unperturbed); ‘myja’; ‘petrol’; and ‘chokuchoku’ are frequently used in Cameroon.¹⁹⁰ In most French-speaking African States, especially Cameroon; Togo and Benin, bribery is referred to as ‘*dossier bien habille*’ or ‘*dossier cravatè*’.¹⁹¹ Apart from words, there are phrases or expressions that one may use when asking for a bribe. These are phrases that many public officers use in Cameroon and include the following:

- ‘there isn’t one beer?’
- ‘I drink just a bottle of beer’
- ‘You leave me/us like that?’
- ‘Can you, please, quench my thirst?’
- ‘Can you show a sign of appreciation?’
- ‘Can you give me a cup or bottle of wine?’
- ‘Can you give me a cup of *garri*?’
- ‘Even chewing-gums are good for chewing’.¹⁹²

Moreover, these are the phrases commonly used by policemen who want bribes. For example, ‘is that what we eat?’; ‘I do not eat papers/documents’; and ‘does that pay?’.¹⁹³

Other general words and phrases common in Africa when one asks for a bribe include: *pot de vin* often used in West Africa, meaning glass of wine; ‘fanta money’ or ‘Coca-Cola money’; ‘brown envelope’;¹⁹⁴ ‘long throat’;¹⁹⁵ or ‘to settle’.¹⁹⁶ *Baksheesh* is a term commonly used in the Middle East. The term means to tip or to bribe and many underprivileged people would ask for *baksheesh* as a means of survival.¹⁹⁷ ‘Cold water’ is an expression common in West Africa when someone is asking for a tip or bribe;¹⁹⁸ and palm greasing may be used commonly to mean either a direct or indirect form of bribery or corruption. An act of palm greasing occurs when a public official performs his duties after an illegal payment has been made from a service recipient. The practice is not limited to money: the public official may also receive gifts in kind. The basis behind

¹⁹⁰ <http://www.chrda.org/articles5.html> accessed 22 June 2017. See also Wolf and Polzenhagen (n 177) 214.

¹⁹¹ *ibid* 214-216; <http://www.chrda.org/articles5.html> accessed 10 August 2016.

¹⁹² Kamtchueng (n 188) 71.

¹⁹³ *ibid*.

¹⁹⁴ Hans-Georg Wolf, ‘East and West African Englishes: differences and commonalities’ in Andy Kirkpatrick (ed), *The Routledge Handbook of World Englishes* (Routledge 2010) 202.

¹⁹⁵ Wolf and Polzenhagen (n 177) 214.

¹⁹⁶ *ibid* 215; Schiavo-Campo and McFerson (n 189) 419.

¹⁹⁷ Jill Hanson Flatt, *In Love with Bangladesh* (WestBow Press 2013) 165.

¹⁹⁸ Wolf and Polzenhagen (n 177) 143.

the performance of this practice allows the public official to perform the services required immediately.¹⁹⁹

In addition to the common words and phrases used when referring to bribery, there are other words that are used to refer to other acts of corruption. In Kiswahili, fraud is referred to as '*mdanganyifu*' or '*dangonyo*'.²⁰⁰ Moreover, when referring to theft of money or funds by public officials one may say '*wizi wa fedha*'.²⁰¹ The phrase '*wizi wa fedha*' may also be used to refer to the misappropriation of funds, however one may also use the following sentence '*matumizi mabaya ya fedha*'.²⁰² When one refers to money laundering, one would say '*chafu fedha*'.²⁰³

Apart from the numerous words and phrases used by different societies to refer to corruption, a second factor that makes it difficult to define this phenomenon is the fact that different societies have different yardsticks of what is morally accepted in public life.²⁰⁴ Morality is essential for society to function. With corruption being part of many societies, it could be said that it has been accepted as a way of life. The state of accepting and the extent of corruption may vary from one society to another. In other societies, any act of corruption irrespective of whether it involves petty amounts of money, is out rightly unacceptable, whereas in other societies petty corruption may in fact be tolerated to such an extent where leaders may deem it acceptable.²⁰⁵ For instance, when addressing citizens on how to cleverly participate in corruption, the late notorious dictator of the *République du Zaïre*, Mobutu Sese Seko Kuku Ngbendu wa Za Banga once said 'if you steal, do not steal too much at a time. You may be arrested. Steal cleverly, little by little. And if you succeed in stealing, invest what you have stolen in the country itself. Those who export what they steal are the enemies of the Republic'.²⁰⁶ The statement indicates that in other societies small corruption (petty corruption) is acceptable, however, when one engages in a corrupt act that exceeds the threshold of society (grand corruption), it then becomes unacceptable and thus,

¹⁹⁹ Senyo B S K Adjibolosoo, *The Human Factor in Developing Africa* (Greenwood Publishing Group 1995) 70.

²⁰⁰ <http://www.africanlanguages.com/swahili> accessed 10 August 2016.

²⁰¹ *ibid.*

²⁰² <http://www.translate.google.co.za/#en/sw/misappropriation%20of%20funds> accessed 10 August 2016.

²⁰³ <http://www.translate.google.co.za/#en/sw/lauding%20money> accessed 10 August 2016.

²⁰⁴ Social morality 'is the normative background of social conduct. It is what many moral lapses are deviation from, the standards by which much of what we do is judge, the criterion often appealed to in establishing what requires excuses and what sort of excuse is acceptable'. See John Kekes, *Moral Tradition and Individuality* (Princeton University Press 1991) 90.

²⁰⁵ Peter Anassi, *Corruption in Africa: The Kenyan Experience: A Handbook for Civic Education on Corruption* (Trafford Publishing 2004) 267.

²⁰⁶ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Bloomsbury Publishing 2014) 28.

punishable. It is statements made by people such as the former leader of the Democratic Republic of Congo that makes the eradication of corruption difficult to achieve because while the world is trying to establish and implement anti-corruption measures, leaders are tolerating and inciting members of society to engage in corruption. Taking this into consideration, one cannot develop a definition that prohibits any corrupt practice, whereas on the other hand, society accepts certain practices: that is, one cannot have a definition that prohibits on the one hand and tolerates on the other, certain corrupt practices.

With all these obstacles, it is extremely difficult and challenging to define corruption and subsequently, difficult to prosecute alleged corrupt individuals which ultimately, makes combating corruption or even controlling it problematic.

Corruption is a global concern that has left the national and international community working together to ameliorate this horrendous concern. With a phenomenon as old as mankind, traced back to biblical eras, one may ask if corruption is dreadful to society and why is it that it still exists after so many years? In other words, what are the challenges faced by the society in order to overcome corruption? The challenges in overcoming corruption are as follows: in societies with deep-rooted levels of corruption, its undesirable effects increase greatly, inducing cynicism because the people within the society have regarded it as a norm. While still in existence, the social values are undermined because people find corruption money as easy money compared to looking for proper basic employment. Since this is still the case, it gradually destroys the legitimacy of a government by getting in the way of the delivery of public goods and services to the public. It goes further to limit economic growth by reducing the amount of resources to which the public is entitled to, discourages any sort of private investments and savings and hampers the use of governmental revenue and development assistance funds.²⁰⁷ In other words, corruption is capable of influencing investments, increase or decrease the allocation of resources (done using factors such as nepotism, ethnicity, race, or gender)²⁰⁸ and expenditure on necessary basic needs such as education and healthcare services.²⁰⁹

Moreover, the causes of corruption and challenges are not limited within specific national borders, international commercial transactions between two or more States is also one of the major

²⁰⁷ Lawal (n 147) 1

²⁰⁸ Elizabeth Nduku and John Tenamwenye (eds), *Corruption in Africa: A Threat to Justice and Sustainable Peace* (Glonethics.net 2015) 22.

²⁰⁹ *ibid* 21.

factors of corruption. This is so because, more often than not, the money obtained from corrupt practices are siphoned to foreign territories, for instance, if the parties to the transaction are Africans, the money gained is frequently ‘kept in safe havens outside Africa’²¹⁰ which may be difficult to trace.

2.6 Summary

The sociological perspective of corruption is important because it does not only expose how different societies react and respond to the commission of corruption, but shows how corruption has become integrated within society and often used as a way of life and means to an end. Moreover, it sheds light on how many people no longer consider it as an evil lurking in society. Furthermore, bearing in mind that different societies use all sorts of words and phrases to qualify and describe the phenomenon, it is clear that the construction of a definition that reflects each society’s perspective and understanding of corruption would be difficult and challenging.

Despite the fact that there is no universal definition of corruption, there are several conducts which when committed, could be classified as being corrupt. These conducts may be perpetrated by anyone who is a state official and even by an ordinary citizen. In addition, even though many of these conducts involve money, corruption is not limited to the giving or receiving of money, acts of corruption may also involve property.

Generally, those who engage in such conducts do so by making use of small amounts of money. However, as mentioned earlier, corruption may also involve the giving or receiving of large amounts of money. The use of little money has allowed societies to tacitly accept corrupt exchanges between an individual and a public official. This, therefore, suggests that certain forms of corruption, for instance, petty corruption, has become part of society’s daily routines, and so the people see and accept these conducts as either a way of life, means to an end or survival tactic.

Acts of corruption committed by senior officials mostly involve millions of dollars of state money which could have been used to further projects aimed at providing for the general public, particularly the disadvantaged. That is to say, when senior officials engage in acts of embezzlement or grand corruption, the society may be affected in more ways than one; poverty, unemployment and poor service delivery rates may rise, the country’s development or economic plans could be stalled, the underprivileged may have access to improper healthcare-services and environment,

²¹⁰ Lawal (n 147) 2.

and in other instances, criminal activities may rise as well. All this is an indication that corruption affects nearly all aspects within State borders.

In as much as members of society may engage in various acts of corruption, either voluntarily or out of desperation, whatever the circumstance may be, members of the society are gravely affected by its effects, particularly the underprivileged as a result of increase in poverty and unemployment rates, economic declines and the impediment of State developments. This chapter has presented the sociological perspective of corruption in Africa, the next chapter shall examines the impact of corruption on African States.

CHAPTER THREE

THE IMPACT OF CORRUPTION IN AFRICA

3.1 Introduction

The previous chapter delineated how corruption has integrated within society, becoming a way of life. Despite it being part of society's normality, corruption tears down the social fabric resulting in, amongst other things, unequal distribution of wealth; inequality and human rights violations; state administrators failure to uphold democratic principles; bias and prejudicial administration of justice; and lastly, distorts economic and development growth. These effects, and many others, affect the functionality of society and the realisation of its needs.

People of different psychological, emotional and intelligence levels make up a society, allowing them to interact and share a common culture. Society is essential because it brings about a social order which allows people to possess values, plans and materials which, individually, they cannot possess.¹ In order for a society to function, there has to be promises that members of the society make and are bound to keep, and when such promises are not kept, the society will eventually cease to function.² Most importantly, the ultimate functionality of a society depends on individual selflessness. This is an indication that members of the society must put their personal differences aside in order to become a unified unit.³

The idea of selflessness in an individual is a quality which every member of society desires their leader to possess. Nonetheless, in reality, African leaders fall short of this quality as they engage in acts of embezzlement, misappropriation, stealing and siphoning of public funds. These acts, and many others, have an impact on the functioning of a society. To be precise, such conducts tremendously affect the lives of the people due to the failure to realise their basic human rights such as shelter, education, clean water and environment, among others. Moreover, such conducts pave the way for junior officials to engage in corrupt practices as well, guided by the conducts of senior officials.

¹ Randall L Calvert, 'Explaining Social Order: Internalization, External Enforcement, or Equilibrium' in Karol Edward Soltan *et al* (eds), *Institutions and Social Order* (University of Michigan Press 1998) 131.

² Bao-Er, *China's Child Contracts* (BMLRC 2008) 30.

³ Dawid Botha *et al*, *Public Relations: Fresh Perspectives* (Pearson South Africa 2007) 5.

Every society has its own needs, which ought to be provided for.⁴ These needs may include existence needs,⁵ relatedness needs⁶ and growth needs.⁷ These needs may be delivered to the people through social development, a process where social changes are designed and planned in order to promote the well-being of the population in conjunction with the dynamic process of economic development.⁸ The social development process and its outcome may be hindered by numerous factors, one in particular being the perpetration of corruption.

The existence of corruption in society gives rise to challenges not only for the people, but also government administration, aggravating existing state challenges such as inequality, discrimination, unemployment, and poverty. Moreover, the existence of corruption makes it difficult for people to get proper service delivery without additional illegal payments being made, thus making it extremely strenuous for those whose earnings are below average to afford paying bribes. Corruption prevents government from providing proper basic services such as clean water and sanitation due to theft, embezzlement or misappropriation of public funds by civil servants. This adversely affects members of society, particularly the underprivileged minority who, for the most part, depend on the basic services that government ought to provide for them. With regard to government administration, corruption influences officials to demand and request bribes from the general public, influences officials to undermine their official duties thus, disregarding the adherence and importance of principles of transparency and accountability. Additionally, corruption slows down government projects aimed at providing basic services to the public, slows down sustainable development and reduces state revenues.

⁴ Fjalar J de Haan *et al*, 'The needs of society: A new understanding of transitions sustainability and livability' (2014) 85 *Technological Forecasting and Social Change* 121, 126-127.

⁵ Existence needs are basically the material and physiological desires. For example, health, which includes the need for protection of both mental and physical well-being; safety, which embraces the need for a safety physical environment for members of the society; sustenance and livelihood which includes food, drinks, water, and all other needs necessary to sustain life.

⁶ Also known as 'all the needs which involve relationships with significant others'. These needs include interaction and social cohesion which focuses on the need to opportunities in order for an individual to socially and economically interact with others; knowledge and belief, which focuses on the need of making sense of the world to enable one to understand the social and physical environment and one's role in them.

⁷ Growth needs depend on 'a person finding the opportunities to be what he is most fully and to become what he can'. This need includes culture and identity, centred on the need for one to have a sense of belonging and connection; equity and justice, centred on the need for fair treatment and the allocation of equal opportunities and; freedom and autonomy which focuses on the need to self-determination, the possibility to voice one's opinions without any constraints or penalties and opportunities for self-subsistence.

⁸ Francis J Turner (ed), *Encyclopedia of Canadian Social Work* (Wilfrid Laurier Univ. Press 2009) 368.

The impact of corruption in society, development, the economy or government administration is never ending. This is supported by numerous submissions that corruption is endemic.⁹ In *South African Association of Personal Injury Lawyers v President of the RSA and Another*, the constitutional validity of the Special Investigating Units and Special Tribunals Act, which governed the functioning of the Special Investigating Unit (SIU) aimed at investigating serious malpractices and maladministration in state institutions was at issue.¹⁰ In this case, the Court mentioned significant impacts of corruption as follows:

Corruption and malpractice are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment of human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.¹¹

In another South African case, Squires J described corruption-

as a phenomenon that can truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effects into all aspects of administrative functions.¹²

African States and beyond, are affected by corruption, however, the focal point of this chapter is to shed light on how corruption affects African societies. The discussion below focuses on the impact of corruption in society, and how it endangers the rule of law, threatens the realisation of human rights, the economy, democracy, the judiciary, separation of powers and imposition of criminal or civil responsibility against senior state officials.

3.2 Gauging the impact of corruption on Africa

Corruption exists irrespective of a legal system a State adheres to, therefore, its consequences may differ or in other instances, be similar from one State to another. Whether or not corruption is acceptable or detrimental to the society, is subjective. The basis for this may be that, in as much as others perceive corruption as having a negative consequence on the State and its people, others

⁹ Joseph M Isanga, 'Rethinking the Rule of Law as Antidote to African Development Challenges' in David K Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Routledge 2016) 75.

¹⁰ *South African Association of Personal Injury Lawyers v Willem Hendrik Heath, The Special Investigating Unit, President of the Republic of South Africa and The Minister of Justice* 2001 (1) SA 883 (CC).

¹¹ *ibid* para 4.

¹² *Schabir Shaik and Others v The State* 2007 (1) SA 240 (SCA), para 264.

may perceive it as capable of being justified. For instance, corruption could be beneficial if certain conditions are met.¹³ Although this may be the case, what is intriguing is whether or not this implies that a little bit of corruption is acceptable.¹⁴

The impacts of corruption are endless, nonetheless, there are those impacts that are significant, that shape up, mould or give rise to other impacts. Corruption is, therefore, conceived the moment an individual decides to pursue a private interest at the expense of others. This lack of selflessness and greed, fuels the desire to seek opportunities to gain more to fulfill one's private gains. In order to seek opportunities and gain more, private interest plays an incredible role in ensuring that one's private gains are fulfilled. Where a public official has private interest in transactions within the course of his duties, his interest, together with that of the public, are bound to be in conflict. A common example would be the awarding of government tender contracts. Where a tender is to be awarded, a corrupt public official is likely to ensure that it be awarded to a company he owns and which may not even be qualified to deliver the services required, or to other companies or to persons whom he knows he will benefit from financially. In this instance and in many others, it is clear that the private interest of a public official outweighs that of the public.

There are various meanings to what furthering one's private interest means. It could mean embezzling, stealing or misappropriating state resources or ensuring that one's close relatives or acquaintances are improperly employed. Nepotism and the furtherance of one's private benefits are not the only significant consequences of corruption. One other significant impact of corruption would be its ability to diminish the legitimacy of political structures, consequently, contributing to the states' instability and national disintegration. This often happens where instead of regular and predictable delivery of goods and services, the services are allocated or distributed on a selective basis and often unreliable.¹⁵

The economy is another target for corruption with consequences affecting every member of society, especially the underprivileged. Government gets its income, also known as tax revenue,

¹³ These conditions include the general public having some level of tolerance attitude toward corruption, and the ability of public officials to invest their 'capital' at home rather at the Swiss Bank. According to Nye, corruption may benefit the society in a number of ways including: (a) 'greater economic development (as capital formation, increased bureaucratic efficiency, and the creation of entrepreneurs and entrepreneurial incentive), (b) speedier national integration (by fostering inter-elite co-ordination and supportive, participatory attitudes among rural non-elites), and (c) increased governmental capacity in the development of greater effectiveness and legitimacy'.

¹⁴ Victor Le Vine, 'Corruption in Ghana' [1975] *Transition* 48, 57.

¹⁵ *ibid* 58.

from tax payments.¹⁶ Corruption threatens the economy through the misappropriation of tax revenues and other fees due to government. For governments to fulfill the needs of its people, tax revenue ought to be raised. Unfortunately, individuals and firms find ways or strategies to evade tax.¹⁷ Consequently, a state's ability to perform its functions and deliver services will be reduced or minimised due to insufficient resources or funds.¹⁸

Corruption takes various forms. As discussed in the preceding chapters, corruption exists in both junior and senior levels of government administration and in both the public and private sectors. Corruption can either be petty¹⁹ or grand.²⁰ Since grand corruption involves huge amounts of state funds or resources being embezzled, stolen or misappropriated, this form of corruption is frequently perpetrated by senior state officials. The reasons for embezzling, stealing or misappropriating on a larger scale could be traced to the mismanagement or wastage of state resources, dictatorship, social decay and inequity in state administration, which unfortunately may lead to devastating economic consequences. Common conducts by senior public officials or political elites who steal, misappropriate or embezzle state funds or resources may often include hiding these valuables, depositing or siphoning them into foreign bank accounts, or simply spending the ill-gotten wealth on luxurious lifestyles.²¹ It is unfortunate that poor states together with their underprivileged minority citizens, are mostly affected by such misconducts, as those embezzled, stolen or misappropriated funds may well have been invested by the State or used to start-up government projects or complete projects in progress.

Apart from state wealth being unlawfully taken by public officials, corruption could also influence underground economic activities (legal or illegal) to take place.²² Illegal activities include drug trades or business where things are being smuggled, while legal activities include

¹⁶ See Gregory N Mankiw, *Principles of Microeconomics* (Cengage Learning 2016) 228.

¹⁷ Sugata Marjit and André Seidel, 'Tax Evasion, Corruption and Tax Loopholes' (2016) 18 *German Economic Review* 283, 283.

¹⁸ Anthony Q Q Aboagye, 'Corruption in Ghana: Evidence, Analysis of Corporate Procedures and Suggestions to Minimize its Incidence' (2005) 11 *Review of Human Factor Studies* 33, 34.

¹⁹ Acts of corruption perpetrated by government officials on a smaller scale: see Peter Larmour, 'Corruption and the Concept of Culture: Evidence from the Pacific Islands' in Manuhia Barcham *et al* (eds), *Corruption: Expanding the Focus* (ANU E Press 2012) 170.

²⁰ High scale level corruption committed by government officials which includes the abuse of public office or government resources.

²¹ William Agbodohu and Ransford Quarmyne Churchill, 'Corruption in Ghana: Causes, Consequences and Cures' (2014) 2 *International Journal Economics, Finances and Management Sciences* 92, 97.

²² *ibid*.

undertakings that are legal but not recorded to evade tax.²³ All these activities exist in every State, however, they become prevalent where corruption is widespread.²⁴

The mere existence of corruption allows the 'well-connected' or elites to enjoy economic rent by means of irregular or monopolised profits. Moreover, corruption bestows large benefits on certain people, leading to unequal distribution of income and thus affecting a societal group in various ways.²⁵ For instance, when income is unequally distributed between members of society, coupled with demands for bribe by public officials, the people whose daily routine gravely depend on governments' service delivery may find themselves in a predicament when they are not in a position to pay bribes (from their low source of income). Failure to pay bribes demanded by public officials may prevent the general public from services they ought to receive such as sending their children to decent schools, receiving proper health care services, or receiving government services such as water supply, electricity or sanitation.²⁶

For corruption to flourish and for it to have influence or impact on indicators in the public or private sector, governance must be weak. The cause of such governance may be due to the absence of procedures required to be laid down for the carrying out of activities within the sectors, or absence of enforcement mechanisms. Another reason why governance may be weak could be traced back to its inception on how it (governance) simply was not conceived properly. The foundation of a government system is crucial for administration to be effective and efficient. If the administrative foundation of a State is frail, every other aspect of governance may possibly take that form. This may be caused by various factors, nevertheless, the most probable factor could be the fact that perhaps, public officials within that government system, intended or had the desire to use the system for their own benefit.²⁷ For instance, when a State gains independence from colonialism, there are numerous resources and power at the hands of the new leadership. Thus, when the elite in leadership seek to satisfy their private benefits, they find various ways to do so. This may include public service fees not clearly stated for the general public, weak accounting system,²⁸ poor service delivery and unequal distribution of wealth.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Aboagye (n 18) 34.

²⁸ *ibid.*

The prevalence of corruption in Africa²⁹ has led to the impoverishment of the continent,³⁰ hindering economic development of States.³¹ The pleasures of corruption reflect the pleasures of the State, ‘its powers to satisfy desires for social, cultural, and material plenitude as well as legitimacy and solidarity’.³² This flow of desire empowers a state to stimulate discipline.³³ For a state to fulfill its desires it needs to foster discipline however, in many instances, the desires of a state to provide for its people are often short-lived due to widespread corruption in government administration.

The existence of corruption in numerous legal systems affects societies in many ways, ultimately leading to destabilisation of a state, poor service delivery and regrettably, the embrace of corruption as a way of life. The discussion that follows focuses on how corruption destabilises the fundamental features of any state: democracy, human rights, rule of law, judiciary, separation of powers, and challenges in the imposition of criminal responsibility on the political elite.

3.3 The fundamental impact of corruption on African societies

Many African states are developing and thus, striving to be economically and politically stable. Because of this, corruption effortlessly finds its way in government systems resulting in the immobilisation of these states. Corruption has overwhelming effects on African societies. These effects are primarily traced to lack of political will to curb corruption, non-compliance with the principles of transparency, accountability and rule of law. The discussion below focuses on the devastating consequences of corruption on key features of African States.

²⁹ See Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Bloomsbury Publishing 2014) 115.

³⁰ African leaders who embezzled state funds may include former Zaire President Mobutu Sese Seko in the amount of US\$ 5 billion; Nigerian former Head of State Sani Abacha US\$ 2-5 billion; the arraignment of the former President of Zambia Fredrick Chiluba for charges of corruption in the amount of US\$ 40m; Malam Yusuff Issah, Minister of Sports in Ghana was convicted for theft amounting to US\$ 46,000 and for the cause of financial loss of the state; Victor Selmormey, Deputy Finance Minister was convicted for defrauding on false pretence and his willingness to cause financial loss to the State in the amount of US\$ 1,297,500; Ibrahim Adam, former Minister of Food and agriculture, Kwame Pepra, former Minister of Finance; George Sipah Yankey, Legal Director in the Finance Department were convicted for their wilfulness in causing financial loss to the state in the amount of US\$ 20 million: see Aboagye (n 18) 35.

³¹ Agbodohu and Churchill (n 21) 92.

³² Jennifer Hasty, ‘The Pleasures of Corruption: Desire and Discipline in Ghanaian Political Culture’ (2005) 20 *Cultural Anthropology* 271, 272.

³³ *ibid.*

3.3.1 Democracy

The African Union (AU), in its Constitutive Act, enacted its commitment to promote democratic principles when it provided in Article 4 that the Union shall, in performing its functions, respect democratic principles.³⁴

For one to say there is democracy, one must at least observe society being at liberty to choose its rulers.³⁵ That is, democracy allows a society to decide matters as a collective unit.³⁶ When one speaks of a democracy, two main issues need to stand out: (1) the people rule; and (2) the people are politically free.³⁷

Democracy could be direct or indirect. In a state where people play a direct role (an active and engaged citizenry) in its administration, that is, where people take direct part in making laws and taking decisions on important issues governing the state, it is said the state observes direct democracy or participatory democracy.³⁸ In this type of democracy, the people and not the elected, make important decisions that concern the state.³⁹ The opposite of direct democracy would be indirect democracy. Here, the power of the people or their ability in making decisions on important matters is limited. In such a democracy, elected politicians rule, however, their powers are likewise limited.⁴⁰ Politicians have an upper hand over the people because they have a more direct and active role in the administration of a state. The fact that the people's powers are limited or have been restricted to a certain extent, does not necessarily mean that the people do not take part in decision-making. In an indirect democracy, the people are afforded the opportunity to express their views through voting.⁴¹

Various nations that exercise direct democracy or representative democracy, do so in either two forms: presidential democracy; or parliamentary democracy. A presidential democracy is one wherein the government branches not only make and enforce law, they do so separately but equally so. Parliamentary democracy, on the other hand, could be understood 'as a system of government

³⁴ Organisation of African Unity, Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (2001).

³⁵ Alain Touraine, *What Is Democracy* (Westview Press 2008) 7.

³⁶ Alex Woolf, *Democracy* (Evans Brothers 2005) 4.

³⁷ *ibid.*

³⁸ Trevor Munroe, *An introduction to politics: lectures for first year students* (3rd edn, Canoe Press 2002) 47.

³⁹ *ibid.*

⁴⁰ Munroe (n 38) 48.

⁴¹ Kym Farrand, *Morally and Otherwise Right Lives, Education and Upbringing: A Rational Basis for Citizenship, Liberty and Peace, a Theory about Everything* (UPA 2016) 225.

characterised by three main elements: (1) duality of the executive; (2) Parliament is a central and essential component; (3) flexible separation of powers between the executive and legislature'.⁴²

Most African States post-independence have been dominantly governed by one-party regimes.⁴³ This 'one-party state' system or the African democracy, is often adopted by African leaders, claiming that it is, in fact, 'compatible with African political values' and that such a system is part of the African tradition.⁴⁴

The nature of the so-called African democracy has given rise to many challenges bred by one element in particular: power. Power manifests control and greed. It is because of this that 'power in African democracies has tended to be an intra-elite transfer (from the father to the son in the case of monarchies, or from the incumbent president to a hand-picked successor)'.⁴⁵

Though most African States have turned away from the one-party regime, it may be argued that in such a regime, corruption becomes prevalent. Power corrupts. That is an undisputed fact. Hence, many African democracies, particularly democratic dictatorships, lack transparency, accountability, and effective legislation aimed at detecting illegal activities, judiciaries are not independent, media and opposition parties, if they exist, lack freedom of expression,⁴⁶ and the peoples' freedom of choice is, in many instances, unreasonably restricted.

Even though power may be vested on a single individual, which in many cases, unfortunately, results in misappropriation of funds and/or property and other sorts of (internal) conflicts, an interesting question would be: are 'fully free' or liberal democratic African states truly free or liberal? Or does the notion of power and its mischiefs hide within? It is believed to be the case. However, power subsists irrespective of a government system a state adheres to. That is, whether dictatorship, liberal or monarchy, all these systems have an element of power vested in them. For some, it may not be absolute, but the truth of the matter is that power exists, and it is its existence that brings about issues that cripple the administration of a state, ultimately leading to widespread or systematic corruption. This argument, it is believed, is supported by the notion that

⁴² Sotirios Petrovas, *Parliamentary Democracy in the Lisbon Treaty: The Role of the Parliamentary Bodies in Achieving Institutional Balance and Prospects for a New European Political Regime* (Universal-Publishers 2011) 14.

⁴³ See Assa Okoth, *A History of Africa: African nationalism and the de-colonisation process* (East African Publishers 2006) 239.

⁴⁴ Dominique E Uwizeyimana, 'Democracy and Pretend Democracies in Africa: Myths of African Democracies' (2012) 16 *Law, Democracy and Development* 139, 140; Pal Ahluwalia, *Politics and Post-Colonial Theory: African Inflections* (Psychology Press 2001) 56.

⁴⁵ *ibid* 141.

⁴⁶ Uwizeyimana (n 44) 143.

corruption is universal,⁴⁷ meaning, it exists irrespective of a system of government, nor its economic or development status.

The significant effects of corruption in a democracy are as follows: first, corruption restricts public and political participation. In any democratic dispensation, the views of the public matters because any decision made at any level of government, affects them. Public participation is obviously not observed in an autocratic state or any state where senior officials seek to exclusively advance their own private needs. A common example of political participation would be voting.⁴⁸ Regrettably, in a state wherein corruption flourishes, coupled with power being centralised, members of the public will be deprived or even deceived on issues relating to voting; second, corruption does not promote principles of transparency, accountability and good governance; and third, where there is corruptions, laws on the detection of illegal activities are rarely enacted and if they (laws) exist, they are not implemented accordingly. Public officials who yearn to obtain illicit gains from state resources, lack the desire to enact laws or take part in the enactment of laws aimed at prohibiting their conducts or restricting their unlawful conducts. Hence, it is common for state officials to find loopholes within the law to enable them to embezzle or misappropriate funds and not be caught, or if caught, find ways to escape liability.

For corruption to be combatted effectively, it is paramount for African states to truly adhere to the underlying principles of democracy itself. Over the years, efforts to promote democracy and good governance have been made. For example, the Harare Commonwealth Declaration⁴⁹ and the adoption of the African Charter on Democracy, Elections and Governance by the African Union. These instruments, and many others, emphasise the importance of democracy and spell out fundamental precepts of democracy: transparency and accountability, together with the protection, respect and realisation of peoples' rights and their freedoms.

The emphasis on good governance (when one speaks of democracy) can never be enough. Good governance is the pillar of democracy, without it, democracy ceases to exist. Good

⁴⁷ John Girling, *Corruption, Capitalism and Democracy* (Routledge 2002) 12.

⁴⁸ See Heidi Burgess and Cate Malek, 'Public Participation: Beyond Intractability' (September 2005) <<http://www.beyondintractability.org/essay/public-participation>> accessed 5 September 2017.

⁴⁹ Said Adejumobi, 'African and the Challenges of Democracy and Good Governance in the 21st Century' <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan008483.pdf> accessed 9 November 2016; The Harare Commonwealth Declaration (1991) http://thecommonwealth.org/sites/default/files/inline/Harare%20Commonwealth%20Declaration%201991_0.pdf accessed 9 November 2016.

governance could be seen as depicting ‘participatory, consensus-oriented, accountable, transparent, responsive features which states are encouraged to adhere to.’⁵⁰

An ideal democratic state is one that takes care of its people’s needs. Unfortunately, where corruption exists in such a government system, democratic and good governance principles do not stand a chance of being adhered to, ultimately resulting in power being abused by political elites.⁵¹ Since power is concentrated in the hands of a few people, they alone benefit greatly from corruption, at the expense of the petitions of the general public being ignored, thus threatening their welfare.⁵²

The impacts of corruption on a state could be traced to several sources: one in particular that is common to various African states and which opens the doors to subsequent acts of corruption is electoral fraud. Electoral fraud is one of the popular forms of corruption in democratic societies wherein, government officials, electoral officials or citizens, intentionally engage in illegal acts with the intention to influence the final act of casting or counting votes.⁵³ Generally, the end result of a leader governing a state due to electoral fraud often leads to long office terms, abuse of human rights, supporting of dishonest and corrupt practices, and the extermination of good governance principles such as accountability and transparency.

Corruption has an enormous impact on any democratic nation, and regrettably, for the purpose of this study, revealing all the impacts is an enormous task. Nonetheless, the key effects of corruption on democracy are as follows:

- i. Corruption, particularly in a democratic state, gives rise to fraudulent and manipulation in electoral processes. What corruption does is that it holds a state’s democratic journey at ransom, spreading like a cancerous disease, being an enemy to the people and friends of the dictators;
- ii. Corruption thrives where lawlessness is sovereign thus, affecting the rule of law and creating tensions in democratic institutions and governance processes;
- iii. Corruption does not grant society equal opportunities;

⁵⁰ Jephias Mapuva, ‘The Debilitating Impact of Corruption on Democracy and Good Governance: A Critical Analysis’ (2014) 2 International Journal of Political Science and Development 164, 171-172.

⁵¹ *ibid* 170.

⁵² *ibid* 169.

⁵³ Pippa Norris, *Why Electoral Integrity Matters* (Cambridge University Press 2014) 35.

- iv. It limits representation and participation of citizens in state affairs, undermines the legitimacy of government, and creates and nurtures political, economic and social chaos;
- v. Corruption creates arrogant leaders who dissociate themselves from the people and neglect their needs, and act with impunity; and
- vi. It frustrates the foundations of democratic values and morals.⁵⁴

3.3.2 Human rights

The AU is an intergovernmental organisation whose primary purpose is to ensure that human rights are promoted and protected in conformity with the African Charter on Human and Peoples' Rights, together with other human rights instruments.⁵⁵ Article 4 of the Constitutive Act of the AU provides that the Union shall function in accordance with various principles, including the respect for human rights.⁵⁶

Human rights are rights which belong to everyone. To support and emphasise the significance of these rights, there are at least nine international instruments on human rights.⁵⁷

⁵⁴ Mapuva (n 50) 169-170.

⁵⁵ Constitutive Act of the African Union.

⁵⁶ *ibid.*

⁵⁷ International Convention on the Elimination of All Forms of Racial Discrimination, United Nations General Assembly Resolution 2106(XXA), U.N. GAOR, 21st Session, 1406th meeting, U.N. Doc. A/RES/2106(XXA) (1965); International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200(XXI), U.N. GAOR, 21st Session, 1496th meeting, U.N. Doc. A/RES/2200A (XXI) (1966); International Covenant of Economic, Social and Cultural Rights, United Nations General Assembly Resolution 2200(XXI), U.N. GAOR, 21st Session, 1496th meeting, U.N. Doc. A/RES/2200A (XXI) (1966); Convention on the Elimination of All Forms of Discrimination against Women, United Nations General Assembly Resolution 34/180, U.N. GAOR, 34th Session, 107th meeting, U.N. Doc. A/RES/34/180 (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly Resolution 39/46, U.N. GAOR, 39th Session, 93rd meeting, U.N. Doc. A/RES/39/46 (1984); Convention on the Rights of the Child, United Nations General Assembly Resolution 44/25, U.N. GAOR, 44th Session, 61st meeting, U.N. Doc. A/RES/44/25 (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations General Assembly Resolution 45/158, U.N. GAOR, 45th Session, 69th meeting, U.N. Doc. A/RES/45/158 (1990); International Convention for the Protection of All Persons from Enforced Disappearance, United Nations General Assembly Resolution 61/177, U.N. GAOR, 61st Session, 82nd meeting, U.N. Doc. A/RES/61/177 (2006); Convention on the Rights of Persons with Disabilities, United Nations General Assembly Resolution 61/106, U.N. GAOR, 61st Session, 76th meeting, U.N. Doc. A/RES/61/106 (2006); Optional Protocol to the Covenant on Economic, Social and Cultural Rights, United Nations General Assembly Resolution 63/117, U.N. GAOR, 63rd Session, 66th meeting, U.N. Doc. A/RES/63/117 (2008); Optional Protocol to the International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200(XXI), U.N. GAOR, 21st Session, 1496th meeting, U.N. Doc. A/RES/2200(XXI) A (1966); Second Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, United Nations General Assembly Resolution 44/128, U.N. GAOR, 44th Session, 82nd meeting, U.N. Doc. A/RES/44/128 (1989); Optional Protocol to the Covenant on the Elimination of Discrimination against Women, United Nations General Assembly Resolution 54/4, U.N. GAOR, 45th Session, 28th meeting, U.N. Doc. A/RES/54/4 (1999); Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, United Nations General Assembly Resolution 54/263, U.N. GAOR, 54th Session, 97th meeting, U.N. Doc.

These instruments have various provisions, however, two fundamental issues are discussed in line with the focus of this chapter. First, at first glance, the instruments provide for the prohibition of certain practices by individuals contrary to the purpose of the instrument in question, while at the same time, emphasising and reiterating the importance of the particular human right which the instrument intends to promote.⁵⁸ Second, with human rights put forward, the instruments also require states to take measures to ensure that the rights which the particular instrument purports are upheld.⁵⁹

The second issue needs emphasis. For different human rights reiterated in various international instruments to be successfully realised, states are required to take measures to ensure that people enjoy their basic human rights. The different measures which a state may take mostly depend on the use of state resources hence, it is crucial for states to use its maximum available resources in the realisation of human rights. Availability of resources means ‘both the resources existing within a state as well as those available from the international community through international cooperation and assistance’.⁶⁰ Maximum available resources are those that are available to government whether natural, human, or technical in nature.⁶¹ Additionally, available resources may also include public expenditure.⁶²

A/RES/54/263 (2000); Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, United Nations General Assembly Resolution 54/263, U.N. GAOR, 54th Session, 97th meeting, U.N. Doc. A/RES/54/263 (2000); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, United Nations General Assembly Resolution 66/138, U.N. GAOR, 66th Session, 89th meeting, U.N. Doc. A/RES/66/138 (2011); Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, United Nations General Assembly Resolution 57/199, U.N. GAOR, 57th Session, 77th meeting, U.N. Doc. A/RES/57/199 (2002); and Optional Protocol to the Convention on the Rights of Persons with Disabilities, United Nations General Assembly Resolution 61/106, U.N. GAOR, 61st Session, 76th meeting, U.N. Doc A/RES/61/106 (2006).

⁵⁸ ICCPR, Articles 1(1), 6(1), 7-19, and 22-27; ICESCR, Articles 1, 6(1), 7, 8(1)-9, 11(1), 12(1), 13(1), and 15(1); CRC, Articles 2(1), 6(1), 7, 13; ICMW, Articles 8-25, 28-30, 32, 36, 38-39(1), 40(1), 41(1), 43, 46, 47(1), 48(1), 51(1)-(2), 54(1), 55, 56(1); CPED, Articles 1, 17(1), 24(2); CRPD, Articles 1, 5(1)-(2), 6(1), 10, 15(1), 17-19, 22(1), 24(1)-(3), 25, 27(1), 28, 30(1).

⁵⁹ ICERD, Articles 2, 7 and 8; ICCPR, Article 28; ICESCR, Articles 2(1), 6 (2), 11(2), 12(2), 13(2), & 15(2); CEDAW, Articles 2-8, 11-12, 14(2) and 17(1); CAT, Articles 2(1), 5(1)-(3), 10-15; CRC, Articles 2(2), 3(2)-(3), 4, 6(2), 8(2), 11, 18(3)-19, 21-22, 24(2), 27(4), 28(2), 32(2), 33-36, 38(2), 39; ICMW, Articles 31(2), 33(2), 44, 45(1), 47(2), 48(2), 64-65, 67-71; CPED, Articles 3-4, 6(1), 9-10, 12, 18(2), 21-23, 24(2)-(4), (6), 25, 26; CRPD, Articles 4, 5(3), 6(2), 7-9, 11, 12(3)-(5), 13-14, 15(2), 16, 20-21, 22(2)-27(1), 28-31, 34.

⁶⁰ Diane Elson *et al*, *Rethinking economic policy for social justice: the Radical Potential of Human Rights* (Routledge 2016) 21

⁶¹ *ibid*. See also Sigrun Skogly, ‘The Requirement of Using the ‘Maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as well as Quantity?’ (2012) 12 Human Rights Law Review 393, 389-419.

⁶² Office of the United Nations High Commissioner for Human Rights, *Economic, social and cultural rights: Handbook for National Human Rights Institutions* (United Nations Publications 2005) 12.

The emphasis of state's prudent usage of available resources in the realisation of people's rights, could be seen in the Limburg Principles. In 1986, the Limburg Principles were adopted.⁶³ The Principles were developed by a group of international law experts who were considering the nature and scope of the obligations of States Parties to the International Covenant on Economic, Social and Cultural Right.⁶⁴ The core of these principles is that, a State has to make certain that at a minimum, the rights of everyone are kept, irrespective of its level of economic development, 'and is by no means intended as a method of a non-compliance for poor states'.⁶⁵

In addressing the extensive effects of corruption within society, it is important to note that corruption infringes the central human rights principles of transparency, accountability, non-discrimination and participation in communities. Moreover, vulnerable groups (women, children, people with disabilities or minority groups) are often the first victims of corruption as it denies them their rights to basic services such as health, education, housing or land.⁶⁶

Where corruption is widespread, states frequently encounter difficulties in complying with human rights obligations. In order to understand the effects corrupt practices have on human rights and the theoretical link between the two, it is imperative apply human rights law as a complementary legal framework, not only on academic or philosophical matters, but in factual matters as well. The basis for this is that members of the general public are often victims of human rights violations caused by corruption, and as a result, they often do not get effective remedies from existing anti-corruption legal instruments.⁶⁷

For it to be said that human rights have been violated by acts of corruption, the element of causation needs to be established. Although international law does not provide uniform rules regarding causation, the International Law Commission (ILC), in Article 3 of the ILC Draft Articles on State Responsibility⁶⁸ point outs that there must be a causal link between the breach of a legal obligation and the damages caused as a result.⁶⁹ Though the causal link between a legal

⁶³ Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers 2006) 375.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ <<http://www.ohchr.org/EN/NewsEvents/Pages/HRCCaseAgainstCorruption.aspx>> accessed 13 May 2016.

⁶⁷ Olaniyan (n 29) 12.

⁶⁸ Responsibility of States for Internationally Wrongful Acts, United Nations General Assembly Resolution 56/83, U.N. GAOR, 56th Session, 85th meeting, U.N. Doc. A/RES/56/83 (2001).

⁶⁹ Anne Peters, 'Corruption and Human Rights' (2015) Basel Institute on Governance Working Paper Series No. 20/2015, 18.

breach and damage need to be established, it is further necessary that for human rights violations to be considered as such, there must be proximity between the breach and the damage. That is, the latter must not be too remote. The element of proximity has to be determined both objectively, by looking at natural and normal consequences, and also subjectively, by making use of the foreseeability criterion.⁷⁰

Measures which states ought to take to realise human rights cannot, in any way possible, be the same. Nonetheless, what is important is for states to make use of their maximum available resources to give effect to these rights. Unfortunately, the existence of corruption suppresses the realisation of these rights. Coupled with acts of misappropriation, theft or embezzlement of state resources, the realisation of these rights becomes a far-fetched obligation a state ought to fulfill, making corruption a barrier to the realisation of human rights.

3.3.3 The rule of law

To prevent disruption and promote stability in governance, the principle of rule of law must be upheld. One of the many objectives of the AU is to promote popular participation and good governance.⁷¹ Article 4 of the Constitutive Act of the AU provides that the Union shall function in accordance with the principle of the respect for the rule of law and good governance.⁷²

The rule of law may also be understood as ‘the juridical conceptions and mechanisms that preside over the functioning of the state’.⁷³ When one dwells deeper into the jurisprudence of this principle, it could be established that similar to corruption, there is no universal definition of the phrase “rule of law”. This is because it means different things to different people, and ‘there is no agreement about how it can be reconciled with other, competing values, notably with the requirement of democratic government’.⁷⁴

Though there may not be a universal definition of what it means, the rule of law has been accepted as a principle centred in democratic societies. That is, the rule of law is, to an extent,

⁷⁰ *ibid.*

⁷¹ Constitutive Act of the African Union.

⁷² *ibid.*

⁷³ Chandra Lekha Sriram *et al.*, ‘Promoting the rule of law’ in Chandra Lekha Sriram *et al.* (eds), *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge 2010) 3.

⁷⁴ Ricardo Gosalbo-Bono, ‘The Significance of the Rule of law and its Implications For the European Union and the United States’ (2010) 72 *University of Pittsburgh Law Review* 229, 231; Francis G Jacobs, *The Sovereignty of Law: The European Way* (Cambridge University Press 2007) 7.

intertwined with democracy: 'there can be no democracy without the rule of law'.⁷⁵ Moreover, the rule of law could be understood as a principle governing governments and individuals. With this in perspective, it means that this principle governs all individuals since they (whether ordinary citizens or legislators, executive or judicial officers) are within the scope of the law and thus, bound by the law.⁷⁶

Since this principle applies to both government officials and the general public, there are two key issues that should be considered when one applies this principle to these parties. First, concerning the application of the principle of the rule of law against government officials, it is crucial to understand that while they enact and enforce laws, they (government officials) should likewise, adhere to the particular laws. Second, with respect to the general public, they must all be equal before the law.⁷⁷

The rule of law complements democratic values of any state and is intertwined with the criminal justice system. As mentioned above, the rule of law principle provides that existing laws within a state should be applicable against members of the public and against political elite. The primary purpose for this is to ensure that a state is intact and democratic values and principles are upheld. If laws are to apply equally to everyone irrespective of their status or position within the state, it can confidently be argued that the rule of law principle is a counterpart of the criminal justice system.

Criminal justice system could be understood as collective institutions made up of law enforcement, adjudication and correction, wherein an accused passes numerous stages until his accusations are disposed of or punishment has been concluded against him.⁷⁸ The functions of a criminal justice system include crime prevention, prosecuting and punishing of offenders and lastly, protecting members of the public.⁷⁹ Acknowledging the functions and purpose of a criminal justice system, it could be argued that corruption in the justice system and within law enforcement, undermines the rule of law. This is so because the acts of requesting, soliciting or demanding

⁷⁵ Ridvan Peshkopia, *Conditioning Democratization: Institutional Reforms and EU Membership Conditionality in Albania and Macedonia* (Anthem Press 2014) 116.

⁷⁶ <http://www.australiancollaboration.com.au/pdf/FactSheets/Rule-of-law-FactSheet.pdf> accessed 14 November 2016.

⁷⁷ *ibid.*

⁷⁸ <http://www.definitions.uslegal.com/c/criminal-justice-system/> accessed 14 November 2016.

⁷⁹ Julian V Roberts and Mike Hough, *Understanding Public Attitudes to Criminal Justice* (McGraw-Hill Education (UK) 2005) 9.

bribes, prevents members of the public who are unable to afford paying a bribe, the inability to access the justice system such as the courts, or police services.⁸⁰

It is important for the criminal justice system of a state to be impartial in resolving disputes and managing chaos within a state. Unfortunately, the integrity of the criminal justice system could be tarnished due to the existence of corruption in the administration of the system. It is for this reason that the police, prosecutors, and judicial officers have to exercise their functions diligently and impartially.

3.3.4 The judiciary

The African Charter on Democracy, Elections and Governance is an instrument that seeks to ensure that States Parties promote democratic, good governance, human rights and right to development principles.⁸¹ The judiciary plays an important role in the fulfilment of this purpose, and as such, Article 2 of the African Charter on Democracy, Elections and Governance provides that States Parties ought to promote and protect the independence of the judiciary.⁸²

The foremost role of the judiciary relates to the administration of justice.⁸³ Although the latter is the central role, the judiciary may also perform other roles as follows: adjudicating disputes;⁸⁴ interpreting and enacting laws,⁸⁵ judicial review,⁸⁶ advisory, miscellaneous and supervisory functions;⁸⁷ and the protection of people's fundamental rights and the Constitution.⁸⁸

⁸⁰ <http://www.richardbistrong.com/corruptions-impact/> accessed 14 November 2016.

⁸¹ African Union, African Charter on Democracy, Elections and Governance, adopted by the Eighth Ordinary Session of the Assembly, 30 January 2007.

⁸² *ibid.*

⁸³ Durga Kanta Sarmah, *Political Science (For +2 Stage) Volume 2* (2nd edn, New Age International 1997) 103.

⁸⁴ After finding out the facts concerning a case before it, examining witnesses, evidence and all other case records, the judiciary performs its most important function: adjudicating dispute where parties to such dispute involve individual (s) and/or government(s).

⁸⁵ Laws can be interpreted differently, and thus when a case is before a court, it is crucial for the court to interpret the law(s) that concerns the case before it and find meaning to the word, clauses and/or sentences used in those laws with reference to the case. In connection with the interpretation function of the judiciary, the act(s) of interpreting a law may lead to a new law. This law, also known as 'judge-made' law exist as a result of judges interpreting an existing law which perhaps may have be contradictory or ambiguous.

⁸⁶ This function involves the examination of a law and ultimately determining whether such law is in accordance with constitutional provisions. If the court establish that the provision is not in line with the constitution, the provision is thus declared unconstitutional.

⁸⁷ The advisory function allows a highest court to provide advice to (chief) executives on matters relating to the law. The miscellaneous function includes matters relating to property, minor children or lunatics or issues relating to licenses or granting or cancellation of citizenship to mention a few. The supervisory function allows the higher courts to supervise lower court.

⁸⁸ The courts are considered to be the custodians of the rights of individuals and it is also the guardian of the constitution.

When one explains judicial independence, the explanation must go beyond emphasising the independence of judges when making decisions, instead the concept needs to be understood on a broader scale. Three key issues need to be depicted when one explains or defines judicial independence: first, impartiality.⁸⁹ The explanation of judicial independence needs to shed light on the impartiality of the judiciary. That is, when a judicial officer adjudicates on disputes, such a decision must not be influenced by any interest pertaining to the outcome of the case. Second, the explanation or understanding of judicial independence must also emphasise that judgments or decisions by the judiciary need to be respected and consequently, complied with. Concerning compliance, preferably, it must be voluntary. However, relevant bodies, through powers vested in them, can compel parties to comply with decisions of the judiciary.⁹⁰ Third, the explanation of judicial independence needs to show that when adjudicating, it is important that individuals, government or any interested party must not influence a judicial officer with the intent to sway the officer in making a decision. This, therefore, means that judges need to be free, at all circumstances, that is, they must be free from interference.⁹¹

Judicial officers are capable of engaging in acts of corruption and when this happens, it affects the impartiality of justice and undermines the independence of the judiciary. These corrupt practices are often perpetrated between a judicial officer and a member of the public, or between a judicial officer and any other person in the justice system.⁹² In many instances, bribes, often petty, are paid to those in the justice system mainly to influence the outcome of a case or to merely delay it.⁹³ The impacts of corruption, particularly bribery, on the judiciary are as follows: first, it restricts members of the society, particularly the poor, from accessing the courts since in other instances, the bribe amount required is above their means; Second, it creates biasness. When judicial officers are biased or when people are of the view that they are biased, it leads to distrust in the system. When this occurs, the people no longer have the desire to turn to the courts to seek remedy for violation of their rights by the state or any other person; Third, corruption affects the

⁸⁹ Warren Freedman, *Understanding the Constitution of the Republic of South Africa* (Juta and Company Ltd 2013) 237.

⁹⁰ Matthew Stephen, 'Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs' (World Bank) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JudicialIndependence.pdf> accessed 01 September 2017.

⁹¹ *ibid.*

⁹² Siri Gloppen, 'Courts, corruption and judicial independence' in Tina Søreide and Aled Williams, *Corruption, Grabbing and Development: Real World Challenges* (Edward Elgar Publishing 2013) 69 and 72.

⁹³ *ibid.* 70.

ability of the courts to perform its duties.⁹⁴ Fourthly, corruption in the judiciary could also be seen where a state appoints judicial officers who are friends of the political elite. Such individuals may be appointed based on their political views or affiliations.⁹⁵ Moreover, corruption also diminishes the trust people had on the judiciary.⁹⁶

The following are some examples that shed light on the grave nature of bribery in the judiciary: a documentary compiled by Anas Aremeyaw, a Ghanaian investigative journalist, revealed how at least 20 judicial officers negotiated bribes in order to influence the outcome of cases before them.⁹⁷ Many of these judges have been dismissed from their judicial duties and others convicted.⁹⁸ In another incidence, a Kenyan Supreme Court Judge, Philip Tunoi, was suspended following an investigation after allegations surfaced that he received a bribe worth US\$ 2 million.⁹⁹

3.3.5 Separation of powers

In order to ensure that power is not abused, Article 3 of the African Charter on Democracy, Elections and Governance provides that States Parties shall implement the Charter in accordance with the principle of separation of powers.¹⁰⁰

The theory of separation of powers is founded on the principles of checks and balances. This principle essentially emphasises the importance of balancing the powers of governments and liberty of the people by checking the abuse of powers. With this in mind, the theory of separation of powers states that organs of government (that is, the legislature, executive and judiciary) should be separated and independent of one another.¹⁰¹

The main object of the theory of separation of powers is to ensure that power is not centralised, in order to avoid issues of corruption and tyranny.¹⁰² The observation of this theory

⁹⁴ *ibid.*

⁹⁵ See Fidelma Donlon, 'Rule of Law: From the International Criminal Tribunal for the former Yugoslavia to the War Crime Chamber of Bosnia and Herzegovina' in Dina Francesca Haynes (ed), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina* (Ashgate Publishing 2008) 264.

⁹⁶ Gloppen (n 92) 71.

⁹⁷ Monica Mark, 'Ghana's top undercover journalist masters disguise to expose corruption' (*The Guardian*, 24 September 2015).

⁹⁸ Femi Akomolafe, *Black Damage* (Lulu.com 2016) 204.

⁹⁹ Peter Leftie, 'Kenya's \$2m 'bribe' judge suspended' *African Review* (Kenya, 23 February 2016) <<http://www.africareview.com/news/Kenya-judge-suspended-over-bribe-claims/979180-3089720-hpedni/index.html>> accessed 12 November 2016.

¹⁰⁰ African Charter on Democracy, Elections and Governance, 2007.

¹⁰¹ Sarmah (n 83) 104-105.

¹⁰² *ibid* 105.

would be difficult in a dictatorship systems or in monarchies since the leader performs the functions of the judiciary, the legislature and the executive. Unfortunately, in such states,¹⁰³ this tends to lead to tyranny, greed, corruption, unequal distribution of wealth, and unreasonable limitation on rights such as freedom of expression.¹⁰⁴ As a model for governance of states, the separation of powers theory has been provided for in the constitutions of various African states, although some states maintain that the the separation is not absolute. For instance, in the South African case of *S v Dodo*, Ackermann J held that:

There is, under our Constitution, no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other...¹⁰⁵

Even though separation of powers is not absolute in South Africa (together with various African states),¹⁰⁶ its Constitution makes provision for this theory.¹⁰⁷ The principle of separation of powers is the centre of democratic nations, and it cannot be confidently argued that the principle is capable of preventing misuse of power. The abuse of power exists and remains persistent despite the existence of this principle, together with the principle of checks and balances, observed in both developing and developed democracies. Hence, the abuse of power is defined as ‘the misuse of public office for private gain’: an indication that corruption, together with other conducts that constitute misuse of power exist despite the theory of separation of powers and the principle of

¹⁰³ For example, Swaziland is an absolute monarchy with its King exercising executive, legislative, and judicial powers. Corruption in the country has led to destruction and demoralization of the state with an alarming poverty and unemployment rate. See Kempe Ronald Hope, Snr, *Corruption and Governance in Africa: Swaziland, Kenya, Nigeria* (Springer 2017) 31. Under the leadership of dictator, Sani Abacha, Nigeria is believed to have lost at least US\$ 4.3 billion amassed in foreign western territories. See David Smith, ‘Switzerland to return Sani Abacha loot money to Nigeria’ (*The Guardian*, 18 March 2015).

¹⁰⁴ Sarmah (n 83) 105.

¹⁰⁵ *S v Dodo* 2001 (3) SA 382 (CC), at para 22.

¹⁰⁶ There is no democratic state with absolute separation of powers or lack of separation of powers: see Brenda Erickson, Kae Warnock and Brian Weberg, ‘Separation of Powers: An Overview’ (National Conference of State Legislatures) accessed 31 August 2017.

¹⁰⁷ The Constitution of the Republic of South Africa (Act 108 of 1996) lays out the powers of parliament in sections 44, 55 and 57(1); the independence of the judiciary can be found in section 165 and the powers of the executive are laid out in section 85. The Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and 8 December 2005 which was adopted on 2003 and Article 60 provides for three branches of government, the legislature, executive and judiciary are separate and independent of one another. The Constitution of the People’s Democratic Republic of Algeria 1989 (amended by the constitutional revision of 1996) also provides for powers of the executive (Articles 70-97), legislature (Articles 98-137) and judiciary (Articles 138-158). Sections 53-72 of the Constitution of Sierra Leone, 1991 provides for executive powers, whilst Sections 105-109 provides for the exercise of legislative power and chapter VII of the constitution lays out provisions concerning the judiciary.

checks and balances that are, among other things, aimed at safeguarding such prohibited practices.¹⁰⁸

3.4 Corruption and state official criminal liability

As a general rule, all laws within the borders of a state are applicable to both the law makers, law enforcers and the general public. For a criminal justice system of a state to be effective and efficient, it is important that when a law has been contravened by a government official, his official status must not absolve him from criminal or civil prosecution.

In various states, senior state officials are rarely prosecuted. This is mainly because high-ranking state officials who possess executive, legislative, judicial, military and/or bureaucratic power, enjoy a special status in their state of origin leading to the objection of any civil or criminal jurisdictional claims.¹⁰⁹ For this reason, it could be said that legal immunity creates problems in their prosecutions. For example, section 308 of the Nigerian Constitution provides that:

no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office; a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued: provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office...¹¹⁰

In as much as immunities from investigation, prosecution or arrests exempt public officials from liability during their period of office to ensure independence of certain institutions/offices, the outcome of this is that the effectiveness of investigations or prosecution of corruption offenses tends to be affected negatively, especially where high-level of corruption has been alleged.¹¹¹

¹⁰⁸ James E Alt and David D Lassen, 'Political and Judicial Checks on Corruption: Evidence from American State Governments' (2008) 20 *Economics and Politics* 33, 33.

¹⁰⁹ Hin-Yan Liu, *Law's Impunity: Responsibility and the Modern Private Military Company* (Bloomsbury Publishing 2015) 12.

¹¹⁰ Constitution of the Federal Republic of Nigeria, section 308.

¹¹¹ OECD, *Fighting Corruption in Eastern Europe and Central Asia Anti-Corruption Reforms in Eastern Europe and Central Asia Progress and Challenges, 2009-2013: Progress and Challenges, 2009-2013* (OECD Publishing 2013) 75.

Another challenge faced when prosecuting state officials is that possible witnesses could be silenced, resulting in the non-trial of officials.¹¹² Consequently, such state official will use the stolen wealth to access political and economic opportunities. On the other hand, if the state official is or most likely to be prosecuted, the process tends to be problematic since the alleged accused continues to be protected or assisted by banking secrecy laws and the lack of whistle-blower protection laws that could encourage publicising financial documents.¹¹³ Moreover, the status of such officials enables them to possess a high level of influence and could even use stolen wealth to hire the best lawyers and accountants in order to distort or hide evidence of their misconduct.¹¹⁴ Additionally, these elites may also have unparalleled or exceptional access to the media in an effort to heavily invest in the industry for them to sway public opinions in particular directions.¹¹⁵ Finally, the high-level positions held by such officials encourages them to launder the proceeds of their crimes, thus taking advantage of the flaws of existing legal frameworks.¹¹⁶

3.5 Summary

The extent to how society and government reacts to corruption is crucial. Considering the fact that no state is immune to corruption, despite the level or extent of corruption in a state, each state experiences the effects of corruption, the only difference is the extent of the experiences. The underlying factor that makes these experiences different resides on how a state reacts to corruption.

As reiterated, Botswana is one of the least corrupt states in Africa.¹¹⁷ Despite the existence of corruption in this state, over the years, Botswana has managed to grow tremendously. Acknowledging the challenges faced by any developing state, Botswana has been able to successfully manage corruption by adhering to good governance principles and allowing it to, among other things, develop economically.¹¹⁸

On the other hand, there are states where corruption has successfully thrived. In such states, the impact of corruption is significant due to lack of determination of state leaders to curb corruption, coupled with the absence of transparency and accountability principles, judicial

¹¹² Olaniyan (n 29) 9.

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ Transparency International, 'Corruption Perception Index 2016'.

¹¹⁸ <http://www.worldbank.org/en/country/botswana/overview> accessed 20 October 2016.

independence and lack of political will to curb corruption. These factors intensify pre-existing predicaments of a state which later, incapacitates and greatly distresses the people, particularly the underprivileged minority in society. For example, considered among the worst corrupt states in Africa, Somalia, also known as a 'failed state', is known for its lawlessness, famine and poverty.¹¹⁹ Compared to other states, corruption in Somalia is severe, hence its effects in the country are significant.

The consequences of corruption 'may' have evolved slightly mainly because the world itself is changing, subjected to many factors. What seems to be striking, however, is the fact that the effects or consequences of corruption are all centred on one main feature, that corruption, in itself, is a core source of destruction, irrespective of its era of existence. Therefore, it is, no doubt, that this phenomenon has been and still is, fascinating to everybody in society, hence numerous studies have been conducted and completed on corruption.

Corruption could be perceived as a victimless crime because both the giver and receiver of a bribe, for example, benefit from the transaction.¹²⁰ However, despite this perception, it cannot be overlooked that corruption negatively influences the economy of states, causes many states to be classified as under-developed, influences public administration through below standard service delivery and violates and undermines numerous fundamental rights such as the right to dignity, equality and freedom.¹²¹ In addition to this, the greatest impact of corruption would be the loss of large amounts of money that could have been used to provide essential needs for the poor or underprivileged in society.

Although it may generally be detrimental to society, corruption has become part of society. This is commonly seen in acts of giving and receiving of gifts. The acts of gift giving and receiving is commonly observed. Public officials receive gifts, movable or immovable, monetary or anything valuable, as a way for giving favours to the giver of such gifts. For example, General Joseph A. Ankrah, who was Chairman of the National Liberation Council and former President of Ghana,

¹¹⁹ Leonie Murray, *Clinton, Peacekeeping and Humanitarian Interventionism: Rise and Fall of a Policy* (Routledge 2007) 39.

¹²⁰ Andrew Faull, 'Bring Them into Line: Managing Corruption in SAPS and Metro Police Department' [2008] SA Crime Quarterly 21, 21.

¹²¹ John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar Publishing 2014) 145.

resigned after it was discovered that he illicitly received sums of money amounting to USD 30,000 from foreign firms.¹²²

It goes without saying that corruption has become a way of life and a means which people resort to during desperate times. For instance, where an individual has been unsuccessfully looking for employment, such a person may rely on engaging in inappropriate and/or unlawful acts as an effort to secure employment. For example, in a developing state such as Ghana, it could be said that there are few job opportunities available in the country. The inability to find a job could encourage people to engage in prohibited conducts in order to secure employment.¹²³ Conducts which individuals commonly engage in to secure employment include acts of bribery, fraud, sexual favours and nepotism.

The circumstances in which corruption occurs is understood in the following manner: politicians put their own personal/private interest above those of the public, or officials demand money and favours from members of the public for services that were supposed to be free.¹²⁴ Corruption is commonly understood and generally ‘associated with large public spending and low quality of public infrastructure...it reduces the state’s ability to exercise control and correct market distortions, in addition to inducing political instability and violence’.¹²⁵ Therefore, it is safe to say that corruption harms the economy by reducing productivity.¹²⁶

There are presumably two main challenges in any democratic government: corruption and a judicial system that is inefficient due to its failure to be independent and adherence to the constitution.¹²⁷ In order to curb corruption, the judiciary has to be unstained.¹²⁸ Where there are allegations or suspicion against a public official, an investigation must be conducted irrespective of the status of the official. The judiciary should be able to interpret and implement laws, against anyone who violates the law in question. If individual states desire to combat corruption, and possess the necessary political will, this desire needs to be reflected in numerous aspects of a state and judicial independence should be one of them. If state officials accept and understand that

¹²² Herbert H Werlin, ‘The Roots of Corruption-The Ghanaian Enquiry’ (1972) 10 *The Journal of Modern African Studies* 247, 248.

¹²³ *ibid* 255.

¹²⁴ Chaib Bounoua and Siham Matallah, ‘Corruption and Economic Growth: Empirical Evidence from Algeria’ (2014) 8 *International Journal of Innovation and Applied Studies* 927, 928.

¹²⁵ *ibid*.

¹²⁶ *ibid*.

¹²⁷ Southeast European Legal Development Initiative, Centre for the Study of Democracy, *Anti-corruption in Southeast Europe: First Steps and Policies* (Centre for the Study of Democracy 2002) 96.

¹²⁸ *ibid*.

beyond their official duties, they are citizens first and thus, subject to the law, they will realise that indeed, they are bound by the laws they themselves enacted and as a result, for any misconduct committed, they ought to be held accountable.

Many public officials, particularly junior officials, argue that the main reasons why they ask for bribes or engage in any form of corruption is because their salaries can barely put themselves and their respective families through. Salary increments or lack thereof, plays a crucial role in the level of corruption a state may experience. It is essential for a government to have control and monitor public expenditure management through legislation and policies available. Though government may indeed control finances, in extraordinary situations, such control may be misused. For instance, where a senior public official is being investigated or where a trial is pending against such an official or where trial is underway, the state may abruptly increase salaries and benefits of judges with the sole purpose of influencing the outcome of the case.¹²⁹

In essence, corruption has major negative consequences, particularly in emerging economies. In any developing state where corruption exists, three things are apparent: first, the economy remains undeveloped; second, the majority of the people remain uneducated; and lastly, society is often unequally divided into two: we have the smaller group that make up the middle class and a weaker subordinate group.¹³⁰

There are numerous challenges faced by states in curbing corruption. Nonetheless, it is worth emphasising that in order to fight corruption, it is important that in the performance of their duties, public officials do so honestly with integrity and loyalty, they must be accountable, and dedicate themselves to the proper functioning of social, economic and political institutions.¹³¹ This is important because public officials (particularly junior public officials), their duties require constant engagements with the general public. The efforts of these officials, together with development of anti-corruption mechanisms and institutions, are essential in reducing the rate of corruption in Africa. Furthermore, African states must be guided by international instruments on corruption when enacting anti-corruption laws and, together with the establishment of anti-corruption institutions. The essence of these instruments are discussed in the next chapter.

¹²⁹ Gloppen (n 92) 72.

¹³⁰ Leah Graham and Amanda L Beal, 'Foundations for Change: Rule of Law, Development, and Democratisation' (2014) 42 *Politics and Policy* 311, 315.

¹³¹ Aboagye (n 18) 34-35.

CHAPTER FOUR

INTERNATIONAL INSTRUMENTS ON CURBING CORRUPTION

4.1 Introduction

The preceding chapters have outlined the sociological perspective of corruption and its impact on African states, primarily on how corruption threatens the development of a state's economy, the realisation of human rights, democracy, judiciary, separation of powers, imposition of criminal or civil liability and the rule of law.

At this point in time, the endemic nature of corruption is unmistakeable. Over the years, corruption has proved difficult to eliminate, and it could be argued that, at least, from a general perspective, corruption cannot or may not be completely eradicated. If this is so, it surely does not imply that nothing cannot be done about it. The impact of corruption on states and civil society organisations, has compelled and motivated the international community into addressing corruption-related issues.

The primary purpose of this chapter is to discuss international instruments on corruption, and their identifiable key provisions. Over the years, numerous international instruments on corruption have been adopted to criminalise certain practices as being corrupt, provide mechanisms on the prevention of the perpetration of corrupt practices, promotion of good governance principles and urging state cooperation, together with urging states to take preventative measures in its eradication.

International instruments play a crucial role in the fight against corruption. They serve as a global platform for states to unite in setting out anti-corruption principles. Anti-corruption instruments provide universal standards as to how public officials need to conduct themselves in the course of executing their duties and how public and private sector actors need to conduct themselves. Additionally, they lay out corrupt practices and preventative measures for states to consider and implement in the hope of curbing corruption. International instruments aimed at curbing corruption are examined and discussed in this chapter as well. The discussion begins with the United Nations' (UN) instruments on corruption, followed by those of the African Union (AU) and other sub-regional instruments in Africa such as the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS).

4.2 International instruments against corruption

Recognising the impact of corruption on governance, the economy, the society and development, among others, the international community was obligated to rise and come to the conclusion that global efforts need to be established in order to combat corruption through developing and agreeing on international instruments aimed at detecting, monitoring, preventing and eradicating corruption. Principal international instruments against corruption include those developed by the United Nations (UN), and the African Union (AU). These instruments, together with others, lay out primarily, certain conducts as being corrupt, emphasise on the promotion of good governance and state of foreign assistance, and provide preventative measures which member states or states parties to an instrument must adhere to or domesticate.

4.2.1 The United Nations System

The earliest attempt by the UN to address corruption can be traced to 1975 when the United Nations General Assembly (UNGA) adopted the first instrument to recognise corruption in international business transactions and explicitly declaring bribery as a corrupt practice.¹ The measures against corrupt practices of transnational and other corporations, their intermediaries and others involved, urged states to adopt legislation, to investigate and take legal actions or appropriate measures in an effort to prevent the commission of corrupt practices.² What the instrument does not explicitly outline is what constitutes 'corrupt practices'. Despite the usage of such terms, only one practice is outrightly outlined, and that is bribery.

Later that year (1975), the UNGA established the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices.³ However, in 1978, this body was replaced by the International Agreement in Illicit Payments Committee, established by the UN Economic and Social Council (ECOSOC).⁴ The Committee drafted a convention on illicit payments by forbidding

¹ Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery Through Corporate Liability* (Routledge 2016) 81.

² Measures against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved, United Nations General Assembly Resolution 3514 (XXX), U.N. Doc. GAOR, 30th Session, 2441st meeting, U.N. Doc. A/RES/3514 (XXX) (1975).

³ Jennifer L McCoy and Heather Heckel, 'The Emergence of a Global Anti-Corruption Norm' in Daniel N Nelson and Laura Neack (eds), *Global Society in Transition: An International Politics Reader* (Kluwer Law international 2002) 224.

⁴ *ibid.*

any act of 'offering, promising, or giving of illicit payments to public officials in international commercial transactions'.⁵

In 1996, two instruments were adopted by the UNGA. The first instrument is the UN Declaration against Corruption and Bribery in International Commercial Transactions.⁶ The Declaration serves 'to promote social responsibility and appropriate standards of ethics on the part of private and public corporations'. Article 3 of the Declaration lays out the elements of bribery. Additionally, it urges States Parties to the UN to take preventative measures 'to combat all forms of corruption, bribery and related illicit practices in international commercial transactions', and criminalise acts of bribery by public officials.⁷ The Declaration does not have the force of law, instead, it is perceived as a political commitment by states through national, regional and international institutions. The Declaration, among other things, provides for the following: first, that Member States take necessary measures to combat all forms of corruption, bribery and other related illicit practices; second, it provides for the criminalisation of bribery involving foreign officials; third, it lays out the elements of bribery; and fourth, it urges Member States to develop, inter alia, 'accounting standards and practices' to improve transparency in international commercial transactions and 'business codes, standards or best practices'.⁸ The second instrument is the International Code of Conduct for Public Officials in order to urge states to utilise such a code to combat corruption.⁹ The Code provides for six distinct issues, many which can be seen in succeeding instruments. The issues are general principles (Article I)¹⁰, conflict of interest and

⁵ Ibid. See also Obidairo (n 1) 81.

⁶ United Nations Declaration against Corruption and Bribery in International Commercial Transactions, United Nations General Assembly Resolution 51/191, U.N. GAOR, 51st Session, 86th meeting, U.N. Doc. A/RES/51/191 (1997).

⁷ Articles 1 and 2.

⁸ United Nations Declaration against Corruption and Bribery in International Commercial Transactions, United Nations General Assembly Resolution 51/59, U.N. GAOR, 51st Session, 86th meeting, U.N. Doc. A/RES/51/191 (1996); Wayne Visser *et al*, *The A to Z of Corporate Social Responsibility: A Complete Reference Guide to Concepts, Codes and Organisations* (John Wiley and Sons 2009) 468.

⁹ Action against Corruption, United Nations General Assembly Resolution 51/59, U.N. GAOR, 51st Session, 82nd meeting, U.N. Doc. A/RES/51/59 (1997).

¹⁰ The Code defined a public office as a position of trust wherein one has a duty to act in the public's interest, and thus a public official is expected to serve the public with loyalty, and perform functions efficiently, effectively and with integrity; they must be attentive, fair and impartial and they must not give preferential treatment or improperly discriminate anyone or any group, nor should they abuse their power. Moreover, public resources must be administered effectively and efficiently.

disqualification (Article II),¹¹ disclosure of assets (Article III),¹² acceptance of gifts or other favours (Article IV),¹³ confidential information (Article V),¹⁴ and political activities (Article VI).¹⁵

In 1997, ECOSOC recommended to the General Assembly to adopt the International Cooperation against Corruption and Bribery in International Commercial Transactions Resolution A/RES/52/87.¹⁶ Adopted in February 1998, this Resolution persuades states to criminalise acts of bribery by public officials ‘of other states in international commercial transactions...’ and to urge states to engage ‘...in programmatic activities’ aimed at deterring, preventing and combating bribery and corruption.¹⁷ Moreover, it appealed with the Secretary-General to ask each state to provide a report on the steps that it took in implementing ‘the provisions of the United Nations Declaration against Corruption and Bribery...’ through national anti-corruption strategies and policies.¹⁸

In 2001, the UNGA Resolution 55/61 requested the UN Secretary-General to summon ‘an intergovernmental open-ended expert group’ to ‘examine and prepare...draft terms of reference for the negotiation of future legal instrument against corruption’. Pursuant to the meetings in Vienna (from 30 July-August 3rd 2001), the group through GA Resolution 55/61, recommended the GA to adopt ‘a draft resolution on the terms of reference for the negotiation of an international legal instrument against corruption’.¹⁹ In response to the report by the group, the GA instructed

¹¹ A public official is prohibited from using his official authority for private gains, whether his own or that of his family, and where conflict of interest may arise in the performance of his duties, such an official is expected to declare such possibility. Moreover, a public official is prohibited to improperly use state resources (money, services, information or property) for activities other than their official duties. And lastly, any public official who leaves his position shall not later take advantage of such position.

¹² Subject to an official’s position, law and administrative policies, such an official is expected to disclose his assets and liabilities and that of his spouse.

¹³ A public official is prohibited from soliciting or receiving, directly or indirectly gifts or favours that may influence the performance of his duties, functions or judgment.

¹⁴ A public official has a duty to keep confidential matters confidential, even after departing from such office; unless where national legislation provides otherwise or where such disclosure will serve as a need for justice.

¹⁵ Any activity, political or otherwise, which an official engages in, must not impair the performance of his official duties and functions

¹⁶ Obidairo (n 1) 82.

¹⁷ International Cooperation Against Corruption and Bribery in International Commercial Transactions, United Nations General Assembly Resolution 52/87, U.N. GAOR, 52nd Session, 70th meeting, U.N. Doc. A/RES/52/87 (1998).

¹⁸ *ibid.* See also Guido Bertucci and Elia Yi Armstrong, ‘United Nations Involvement in Promoting Government Ethics’ in Yassin EL-Ayouty *et al* (eds), *Government Ethics and Law Enforcement: Toward Global Guidelines* (Greenwood Publishing Group 2000) 33.

¹⁹ An Effective International Legal Instrument Against Corruption, United Nations General Assembly Resolution 55/61, U.N. GAOR, 55th Session, 81st meeting, U.N. Doc. A/res/55/61 (2001); Obidairo (n 1) 83.

the 'Ad Hoc Committee for the Negotiation of a Convention against Corruption to negotiate a broad and effective convention'.²⁰

4.2.1.1 UN Convention against Transnational Organized Crime

Considering and acknowledging the increase of organised crime and its links with crimes such as corruption and terrorism, the World Ministerial Conference on Organised Transnational Crime was held from 21st-23rd November 1994, resulting in the conclusion of the Naples Political Declaration and Global Action Plan against Organised Transnational Crime, adopted in 1994.²¹ The sole purpose of the Declaration was to call for a conference on the negotiation of a convention on organised transnational crimes.²²

In 1998, UNGA Resolution 53/111 on Transnational Organised Crime established 'an open-ended intergovernmental Ad Hoc committee' to elaborate on the UN Convention against Transnational Organised Crime and its three additional protocols.²³ In 2000 and 2001, the Convention and three Additional Protocols were adopted.²⁴ Forty-Eight African States have since ratified the Convention at the time of writing.²⁵

The Convention defined what transnational crime is before laying out transnational offences.²⁶ Article 6 of the UN Convention against Transnational Organised Crime criminalises

²⁰ Terms of Reference for the Negotiation of an International Legal Instrument Against Corruption, United Nations General Assembly Resolution 56/260, U.N. GAOR, 56th Session, 93 meeting, U.N. Doc. A/RES/56/260 (2002); Obidairo (n 1) 83.

²¹ Andreas Schloenhardt, 'Transnational Organised Crime and International Criminal Law' in Cherif M Bassiouni (ed), *International Criminal Law: Sources, Subjects and Contents* (3rd edn, Brill 2008) 948.

²² Naples Political Declaration and Global Action Plan Against Organized Transnational Crime, United Nations General Assembly Resolution 49/159, U.N. GAOR, 49th Session, 94th meeting, U.N. Doc. A/RES/49/159 (1994); Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd edn, Routledge 2009) 234.

²³ Transnational Organized Crime, United Nations General Assembly Resolution 53/111, U.N. GAOR, 53rd Session, 85th meeting, U.N. Doc. A/RES/53/111 (1999); Bassiouni (n 22) 907.

²⁴ United Nations Convention against Transnational Organized Crime, United Nations General Assembly Resolution 55/25, U.N. GAOR, 55th Session, 62nd meeting, U.N. Doc. A/RES/55/25 (2000); Bantekas and Nash (n 23).

²⁵ African States that have ratified the Convention (this includes acceptance, approval, accession and succession of the Convention): Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Mali, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

²⁶ 2. For the purpose of ... article, an offence is transnational in nature if:

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or

laundering of proceeds of crime. According to this Article, the following conducts constitute a criminal offence when committed intentionally:

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (b) Subject to the basic concepts of its legal system:
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; and
 - (ii) Participation in, association with or conspiracy to commit, attempt to commit and aiding, abetting, facilitating and counselling the commission of any of the offences...

Article 7 of the UN Convention against Transnational Organised Crime provides for anti-money laundering measures which States ought to take. According to this provision, in order for States to detect all forms of money-laundering, they shall:

- (a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering...; and
- (b) Ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at national and international levels within the conditions prescribed by its domestic law and... shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.

Additionally, States Parties are urged to implement 'feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders'.²⁷ Furthermore, they shall develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.²⁸

(d) It is committed in one State but has substantial effects in another State.

²⁷ UN Convention against Transnational Organised Crime, Article 7(2).

²⁸ *ibid* Article 7(4).

Article 8 of the UN Convention against Transnational Organised Crime criminalises corruption wherein, it declares certain conducts as criminal offences when committed intentionally:

- (a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; and
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties...

Article 23 of the UN Convention against Transnational Organised Crime provides for the criminalisation of obstruction of justice. According to this Article, certain conducts are criminal offences and amount to obstruction of justice when committed intentionally, these conducts are:

- (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention; and
- (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention....

4.2.1.2 The UN Convention against Corruption (UNCAC)

An Ad Hoc Committee for the Negotiation of a Convention against Corruption negotiated and approved the UN Convention against Corruption which was adopted by the GA on 31 October 2003.²⁹ This Convention is said to be the first international instrument to respond to corruption, recognising it as a transnational phenomenon which jeopardises the stability and security of society, the rule of law and sustainable development; impairing institutions, democratic and ethical values, and with links to other forms of crimes.³⁰ Additionally, the majority of African States are

²⁹ United Nations Convention against Corruption, United Nations General Assembly Resolution 58/4, U.N. GAOR, 58th Session, 51 meeting, U.N. Doc. A/RES/58/4 (2003) and Obidairo (n 1) 83.

³⁰ United Nations, *Multilateral Treaty Framework: An Invitation to Universal Participation: Focus 2007: Towards Universal Participation and Implementation. A Comprehensive Legal Framework for Peace, Development and Human Rights* (United Nations Publications 2007) 82; UNCAC, Preamble.

States Parties to the Convention except Chad, Djibouti and Somalia.³¹ The instrument sheds light on the determination by the GA, which are to:

- (a) Promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) Promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption...;
- (c) Promote integrity, accountability and proper management of public affairs and public property.³²

The Convention lays out certain conducts as criminal offences. Article 15 criminalises acts of bribery perpetrated by national public officials and lays out conducts which may be declared as such when committed intentionally:

- (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties; and
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties...

Article 16 of UNCAC criminalises acts of bribery of foreign public officials and officials of public international organisations. The Article criminalises certain conducts when committed intentionally:

1. The promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; and
2. The solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties.

³¹ https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf accessed 2 September 2017.

³² UNCAC, Article 1.

Article 17 of UNCAC criminalises acts of embezzlement, misappropriation or other diversion of property by a public official. It criminalises these conducts when committed intentionally:

The embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

Article 18 of UNCAC provides for trade in influence and criminalises the following conducts when committed intentionally:

a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party, an undue advantage for the original instigator of the act or for any other person; and

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuses his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party, an undue advantage.

Article 19 of UNCAC provides for the abuse of function and criminalises certain conducts when committed intentionally. These conducts include:

the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

Article 20 of UNCAC criminalises illicit enrichment, defined by the Article as the ‘significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her income’. The unexplained significant increase of such assets becomes a crime when committed intentionally.

Article 21 of UNCAC criminalises bribery in the private sector. It criminalises certain conducts when committed intentionally during economic, financial or commercial activities, these conducts or practices include:

a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private

sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting; and

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, acts or refrains from acting.

Article 22 of UNCAC provides for embezzlement of property in the private sector. It criminalises certain actions that are committed intentionally ‘in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.’

Article 23 of UNCAC criminalises laundering of proceeds of crime. It criminalises the following conducts when committed intentionally:

(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

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

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; and

(ii) Participation in, association with or conspiracy to commit, attempt to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this Article.

Additionally, it is a criminal offence when one intentionally engages in action or actions that lead to the ‘concealment or continued retention of property when the person involved knows that such property is the result of an offence’.³³

Article 25 of UNCAC provides for obstruction of justice and the following conducts constitute a criminal offence when committed intentionally:

a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere

³³ *ibid* Article 22.

in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention; and

- (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.

In order to ensure that states combat corruption, chapter II of UNCAC provides for preventative measures that States Parties ought to take. Article 5 of UNCAC focuses on preventative anti-corruption policies and practices. According to this Article, States Parties are urged to:

1. Develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability;
2. Establish and promote effective practices aimed at the prevention of corruption;
3. Periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption; and
4. Collaborate with each other and with relevant international and regional organisations in promoting and developing the measures.

Furthermore, Article 6 of UNCAC provides for a preventative anti-corruption body or bodies. According to this Article, States Parties shall:

1. Ensure the existence of a body or bodies, as appropriate, that prevent corruption by:
 - (a) Implementing policies referred to in Article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of these policies; and
 - (b) Increasing and disseminating knowledge about the prevention of corruption.
2. Grant the body the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

4.2.2 African instruments against corruption

There are various instruments in Africa to address corruption. Although they vary in scope, the instruments lay out prohibited conducts, promote principles of democracy and good governance, and provide measures which states ought to implement in an effort to curb corruption in Africa. The discussion below outlines instruments adopted by the AU and its Regional Economic Communities, particularly SADC and ECOWAS.

4.2.2.1 African Union Instruments against Corruption

Corruption violates fundamental rights and human rights obligations of governments. Acknowledging this, Heads of State of the African Union (AU), in an attempt to combat corruption, adopted instruments as discussed below, to fight corruption, promote and protect human and peoples' rights. Furthermore, the AU, through these instruments, urges African states to adopt a culture that adheres to principles of good governance, the rule of law, transparency and accountability.

4.2.2.1.1 African Union Convention on Preventing and Combating Corruption

The Declaration and Decision adopted by the 34th Ordinary Session of the Assembly of Heads of States and Governments of the Organisation of African Unity,³⁴ requested the Organization of African Unity (OAU)

‘to convene...a high level meeting of Experts to consider ways and means of removing obstacles to the enjoyment of economic, social and cultural rights, including the fight against corruption and impunity and propose appropriate legislative and other measures...’³⁵

From 26th-29th November 2001 and 16th-17th September 2002, two experts' meetings were held which led to the drafting and adoption of the Anti-Corruption Convention.³⁶ In March 2003, the text was approved, completed and recommended to the AU Assembly for adoption.³⁷ The AUCPCC was adopted in 2003 at the 2nd Ordinary Session of the Assembly of the Union held in

³⁴ Resolution AHG/Dec.126 (XXXIV) 1998.

³⁵ African Union (AU) Convention on Preventing and Combating Corruption, 43 I.L.M. 5 (2004).

³⁶ Kolawole Olaniyan, 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal' (2004) 4 African Human Rights Law Journal 74, 78.

³⁷ *ibid* 78. See also Ndiva Kofele-Kale, *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* (Routledge 2016) 187.

Maputo, and entered into force on 5th August 2006.³⁸ As of 2017, thirty-seven (37) states had ratified the Convention.³⁹ The primary purpose of the AU Convention is to encourage African States to promote, facilitate, regulate and strengthen mechanisms for the prevention, detection, punishment and eradication of corruption. Additionally, it urges states to establish conditions aimed at fostering transparency and accountability in the administration of public affairs.⁴⁰

The AUCPCC applies 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 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 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 or 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

³⁸ Kameswari G, *Anti-Corruption Strategies: Global and Indian Socio-legal Perspectives* (ICFAI 1996) 15.

³⁹ Ratification or accession of the AUCPCC by the following States: Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Seychelles, Sierra Leone, Tanzania, Togo, Uganda, Zambia, and Zimbabwe, as of 2017.

⁴⁰ AUCPCC, 2004.

decision-making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, 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) Illicit enrichment;

(h) The use or concealment of proceeds derived from any of the acts referred to in this Article; and

(i) 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.

Article 6 of the AUCPCC criminalises acts of laundering of the proceeds of corruption, wherein, one engages in:

a) The conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action;

b) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences; and

c) The acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences.

The AUCPCC recognises illicit enrichment as an act of corruption or related offence, hence Article 8 establishes illicit enrichment as an offence. Illicit enrichment as defined in Article 1 may be understood to be ‘the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.’

To ensure that the purposes of the Convention are realised and in an effort to curb corruption, Article 5 sets out preventative measures which States Parties ought to undertake. The measures are as follows:

1. Adopt legislative and other measures that are required to establish the offences laid down in the Convention;

2. Strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force;
3. Establish, maintain and strengthen independent national anticorruption authorities or agencies;
4. Adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services;
5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities;
6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals;
7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences; and
8. Adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitisation of the media, and the promotion of an enabling environment for the respect of ethics.

4.2.2.1.1 **African Charter on Democracy, Elections and Governance**

With corruption thriving in the public sector, the performance of public services becomes poor overtime and service delivery below standard. To address this, the AU, developed an instrument, the African Charter on Democracy, Elections and Governance which came into force on 15th of February 2012, aimed at promoting and strengthening good governance by embedding transparency, accountability and participatory democracy on the African continent.⁴¹ Only ten (10) African States have signed and ratified the Charter.⁴²

4.2.2.1.2 **African Charter on the Values and Principles of Public Services and Administration**

The AU adopted the African Charter on Values and Principles of Public Services and Administration in 2011 in Addis Ababa, Ethiopia,⁴³ with only sixteen (16) African States having

⁴¹ African Union, African Charter on Democracy, Elections and Governance, 2007.

⁴² Burkina Faso, Ethiopia, Ghana, Guinea, Lesotho, Mauritania, Rwanda, Sierra Leone, South Africa, and Zambia.

⁴³ Francis Ng'ambi. *Malawi: Effective Delivery of Public Education Services* (African Minds 2011) 8.

ratified it.⁴⁴ The instrument was primarily established to develop professionalism in the public service in order to ensure that there is quality service delivery, public participation and improved working conditions in an effort to ensure that there is high level of equity and effectiveness in the public sector.⁴⁵

Development in any society is important because it enhances society's way of life, hence development is a right. Recognising that corruption affects development, whether social, political or economic, instruments such as the African Charter on Human and Peoples' Rights, together with the Declaration on the Right to Development, exist in an effort to promote and protect this right.⁴⁶

4.2.2.2 Sub-regional instruments against corruption

To eradicate corruption, regional integration is essential to promote cooperation between states, most importantly, to unify states in developing anti-corruption strategies.

4.2.2.2.1 SADC Protocol Against Corruption (2001)

The Declaration and Treaty establishing SADC was signed by heads of state of Southern African States in 1992 in Windhoek, Namibia.⁴⁷ In 2000 recommending a SADC anti-corruption instrument.⁴⁸ In 2001, the SADC Protocol against Corruption was signed by heads of state and government of the SADC and came into force in July 2005.⁴⁹ The instrument was developed to 'promote the development of anticorruption mechanisms at national level [...] promote cooperation in the fight against corruption by States Parties' and 'harmonise national anticorruption legislation in the region'.⁵⁰

⁴⁴ Algeria, Burkina Faso, Burundi, Cameroon, Côte d'Ivoire, Congo, Kenya, Mali, Malawi, Mozambique, Mauritius, Namibia, South Africa, Sao Tome and Principe, Tanzania, and Zambia.

⁴⁵ African Union, African Charter on Values and Principles of Public Service and Administration (2011), preamble and Article 2.

⁴⁶ Declaration on the Right to Development, United Nations General Assembly Resolution 41/128, U.N. GAOR, 41st Session, 97th meeting, U.N. Doc. A/RES/41/128 (1986); African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 22.

⁴⁷ Colin Alfred Arthur Nicholls *et al*, *Corruption and Misuse of Public Office* (Oxford University Press 2011) 528.

⁴⁹ Johanna Berning and Moses Montesh, 'Analysis of South African National Anticorruption Agencies' in Frederic Lemieux *et al* (eds), *Economic Development, Crime, and Policing: Global Perspective* (CRC Press 2015) 225. See also John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar Publishing 2014) 24.

⁵⁰ Southern African Development Community, Protocol against Corruption, 2001.

Article 3 of the SADC Protocol against Corruption lays out acts of corruption:

- a) The solicitation or acceptance, directly or indirectly, by a public official, of any article 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, by a public official, of any article 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 for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
- d) The diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official received by virtue of his or her position for purposes of administration, custody or for other reasons;
- e) The offering or giving, promising, solicitation or 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 undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
- g) The fraudulent use or concealment of property derived from any of the acts referred to in this Article; and
- h) Participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in 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.

Additionally, Article 6 of the said Protocol provides for acts of corruption relating to an official of a foreign state as follows:

1 Each State Party shall prohibit and punish 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.

Article 4 of the Protocol sets out preventative measures which States Parties are urged to undertake. According to this Article, the measures which states should adopt must create, maintain and strengthen the following:

- a) Standards of conduct for the correct, honourable and proper fulfilment of public function;
- b) Systems of government hiring and procurement of goods and services that ensure the transparency, equity and efficiency of such systems;
- c) Government revenue collection and control systems that deter corruption;
- d) Mechanisms to promote access to information to facilitate eradication and elimination of opportunities for corruption;
- e) Systems for protecting individuals who, in good faith, report acts of corruption;
- f) Institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption;
- g) Deterrents to the bribery of domestic public officials, and officials of foreign states;
- h) Mechanisms to encourage participation by the media, civil society and non-governmental organisations in efforts to prevent corruption; and
- i) Mechanisms for promoting public education and awareness in the fight against corruption.

As of 2017, the ratification of the SADC Protocol Against Corruption was said to be at 87%. As per assessment, 14 out of 15 SADC Member States signed the SADC Protocol Against Corruption (Madagascar did not sign the Protocol), and 13 out of 15 did not ratify the Protocol (Madagascar and Sychelles did not ratify).⁵¹

⁵¹ <https://actsouthernafrica.wordpress.com/2017/05/17/status-on-the-signature-and-ratification-of-anti-corruption-instruments-by-sadc-member-states/> accessed 13 February 2018.

4.2.2.2.2 **ECOWAS Protocol on the Fight against Corruption**

The ECOWAS treaty was signed in 1975 by 15 states in Lagos, Nigerian in an effort to encourage state cooperation and integration in economic activities.⁵² By 1980, States Parties observed that the objectives of the treaty were not being realised, thus prompting the need to revise the 1975 treaty.⁵³ The revision led to the drafting and adoption of the treaty in July 1993.⁵⁴ The revised Treaty laid down fundamental principles which parties to the treaty vowed to adhere to, highlighting issues of 'peace, security and stability of member states' and the introduction of an additional institution. All these are some features which the 1975 treaty did not provide for.⁵⁵

Acknowledging the need to strengthen mechanisms on the prevention, suppression and eradication of corruption, the ECOWAS Protocol on the Fight against Corruption was adopted.⁵⁶ Although not yet in force, key features are seen in its Articles 6 and 7 where it criminalises certain acts as being corrupt. Article 5 provides for preventative measures which member states need to adhere to in order to realise its objectives as stipulated in Article 2 of the Protocol. Moreover, it urges States Parties to assist each other 'so as to strengthen measures to prevent, detect and suppress acts of corruption'.⁵⁷

Article 6 of the ECOWAS Protocol on the Fight against Corruption provides for acts of corruption as follows:

- a) A public official demanding or accepting, either directly or indirectly through a third party, any object of pecuniary value such as a gift, offer, a promise or an advantage of any nature, whether for himself or for another person, in exchange for an act or an omission in the discharge of his duties;
- b) Offering or giving a public official, either directly or indirectly, any object of pecuniary value such as a gift, a favour or an advantage, whether for himself or another person, in exchange for an act or an omission in the discharge of his or her duties;
- c) Any person who promises to offer or to grant directly or indirectly any undue advantage to any person who declares or confirms that he can exercise some influence on decisions or actions of persons occupying positions in the public or private sector, whether or not this influence had

⁵² Oteng K Kufuor 'The Framework for Capital Movements within the ECOWAS' (1995) 3 African Yearbook of International Law 239, 239.

⁵³ Odihambo Morris, Chitiga Rudi and Ebobrah Solomon, *The Civil Society Guide to Regional Economic Communities in Africa* (African Minds 2016) 53.

⁵⁴ *ibid.*

⁵⁵ *ibid* 53-54.

⁵⁶ ECOWAS Protocol on the Fight against Corruption, 21 December 2001, reprinted United Nations, *Compendium of International Legal Instruments on Corruption* (2nd edn United Nations Office on Drugs and Crime 2005) 211-213.

⁵⁷ *ibid.*

been exercised or not, or whether the supposed influence had the desired result or not;

d) Any person who declares or confirms that he can exercise some influence on decisions or actions of persons occupying positions in the public or private sector, whether the influence is used or not, and whether or not the supposed influence had the desired result; and asking for or accepting directly or indirectly any undue advantage from whatever quarters;

e) a public official diverting from its initial purpose, either for his own benefit or for the benefit of another person, any asset, whether moveable or immovable, or deeds and securities belonging to the State, an independent agency or an individual, given to the public official by virtue of his position and for the needs of the State for safe-keeping and for other reasons.

3. (a) A significant increase in the assets of a public official that he cannot reasonably explain in relation to his lawful earnings shall be considered an illicit enrichment.

4.

a) Creating or using an invoice or any other accounting document or record containing false or incomplete information.

b) Unlawfully omitting to make a record of payment.

5

a) Promising to offer or giving public officials or employees of companies of the private sector, either directly or indirectly to themselves or to third parties, in order to carry out or abstain from carrying out an action in violation of their functions;

b) Public officials or employees of companies of the private sector, asking for or receiving, directly or indirectly, bribes for themselves or third parties, in order to carry out or refrain from carrying out an action in contravention of their duties.

Article 7 of the ECOWAS Protocol on the Fight against Corruption on laundering proceeds of corruption and similar criminal offences, it provides that:

(a)

(i) The conversion or transfer of assets, knowing that such assets are the proceeds of crime, for the purpose of concealing the illicit origin of the assets or of helping any person who is involved in the commission of the predicate offence, to evade the legal consequences of his or her action;

(ii) The concealment of the true nature, source, location, disposition, movement or ownership of or rights with respect to assets, knowing that such assets are the proceeds of crime; is a criminal offence.

Moreover, criminal offences are extended to include-

- (b) Subject to the basic concepts of its legal system:
 - (i) The acquisition, possession or use of assets, knowing at the time of receipt, that such assets are the proceeds of crime; and
 - (ii) Participation in, association with or conspiracy to commit, attempts to commit, aiding and abetting in facilitating and concealing the commission of any of the offences established in accordance with this article.

Article 12 of the ECOWAS Protocol on the Fight against Corruption criminalises certain acts of corruption concerning foreign public officials. According to this Article:

1. Each State Party shall prohibit and punish the act of offering or giving to a foreign public official, either directly or indirectly, any object of pecuniary value such as gifts, promises or favours, to compensate the public official for an act or an omission in the exercise of his official functions.

4.2.2.2.3 **Excerpts from the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security**

Heads of State and Governments ‘adopted the framework establishing the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-Keeping and Security’.⁵⁸ The adoption of the Framework led to the adoption of the Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-Keeping and Security in December 1999 to enable states to eradicate corruption within their territories.⁵⁹ Article 48 of the Protocol urges its Member States to promote transparency, accountability and good governance in an effort to eradicate corruption. Article 49 provides for measures against money laundering. The Article provides that:

The ECOWAS Secretariat and Member States shall adopt strategies for combating the problem of money laundering, by extending the scope of offences, enabling the confiscation of laundered proceeds and illicit funds and easing bank secrecy laws within and outside the sub-region.

4.3 **Summary**

Public officials engage in acts of corruption in various ways. The realisation and the determination to urge and support states to criminalise corrupt practices, led to the development and adoption of

⁵⁸ John-Mark Iyi, *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law: Towards an Theory of Regional Responsibility to Protect* (Springer 2016) 5.

⁵⁹ United Nations, *Compendium of International Legal Instruments on Corruption* (2nd edn United Nations Office on Drugs and Crime 2005) 13.

various anti-corruption instruments by the international community. The instruments not only criminalise certain acts as being corrupt, they also provide for preventative measures which some states have domesticated in an effort to detect and possibly minimise the perpetration of corruption.⁶⁰

There is a great deal of pressure on the international community when addressing corruption-related issues and there is much base to cover. Few key observations from these instruments could be made. First, when one generally looks at international instruments on anti-corruption, it is observed that they all describe, and not define corruption. They do this by simply laying out different conducts or practices accepted as being corrupt such as bribery, money laundering, fraud and illicit enrichment. Additionally, with corruption often perpetrated in the public sphere of government, senior public officials slowly benefit at the expense of the general public. In addressing this, international instruments urge states to criminalise acts of illicit enrichment. That is, in terms of these instruments, states need to establish a law declaring ‘...a significant increase in the assets of a government official who cannot reasonably explain, in relation to his lawful earnings during the performance of his functions’, an offence.⁶¹

The second key observation made from the international instruments on anti-corruption instruments discussed above is that, there are certain standards which public officials need to stand by, viz. in the performance of their duties, including the following: adherence to ethical employment standards; exercise principles of loyalty, honesty, efficiency and impartiality; they should be courteous; lawfully exercise their discretionary power, and where there is private interest in the performance of their duties, they should disclose such accordingly; they should be accountable; and they should not misuse their public office.⁶²

The third observation from the instruments is that they emphasise the importance of state cooperation in the fight corruption.

The fourth key observation is that although corrupt practices are often perpetrated by civil servants, their commission is not limited to natural persons. International instruments, therefore,

⁶⁰ UNCAC, Articles 6 and 9; United Nations Convention against Transnational Organized Crime, Articles 8 and 31; United Nations Declaration against Corruption and Bribery in International Commercial Transactions; AUCPCC; ECOWAS Protocol on the Fight against Corruption; the Southern African Development Community, Protocol against Corruption, Articles 4 and 7.

⁶¹ AUCPCC, 2004; ECOWAS Protocol on the Fight against Corruption.

⁶² For example, UNCAC, Article 8; the Council of Europe, Model Code of Conduct for Public Officials, Appendix to Council of Ministers Recommendation No. R (2000) 10. 2000.

urge states to hold liable, legal or juristic persons who engage in acts of corruption (for their benefit) committed by any natural person or public servant. This, therefore, means that, in the imposition of liability, criminal or civil, both natural and legal persons could be held accountable.⁶³

In summation, it is imperative for African States to domesticate UN, AU and sub-regional anti-corruption instruments in accordance with their legal systems. Additionally, African regions must convene to address corruption-related issues, develop strategies aimed at addressing these issues and establish agencies aimed at monitoring the implementation of anti-corruption strategies. The next chapter presents a discussion on national anti-corruption institutions and instruments enacted by African States.

⁶³ UNCAC, Article 26; United Nations Convention against Transnational Organised Crime, Article 10; ECOWAS Protocol on the Fight against Corruption.

CHAPTER FIVE

INTERROGATING THE FRAMEWORK OF NATIONAL ANTI-CORRUPTION INSTRUMENTS AND INSTITUTIONS IN AFRICA

5.1 Introduction

Chapter 4 focused on instruments designed and developed by the international community to address corruption and how states could detect and manage the phenomenon, or eradicate it. The effects of corruption compelled states to better understand international anti-corruption standards, their subsequent implementation by states in accordance with their legal systems and existing laws, in order to be able to educate civil society organisations and public officials on matters of corruption and empower states to investigate, prosecute and punish perpetrators of corrupt practices.

As discussed in the previous Chapter, it is important for states not to only domesticate, but implement international anti-corruption instruments. Domestication of international instruments affords states an opportunity to address a specific issue of concern. Although domestication of international instruments may vary due to a range of laws and the legal system of a state, one of the core purposes of domestication is to educate civil society organisations on the subject (corruption) and to ensure that states are determined to adhere to the general purposes and standards of the instruments concerned.

Even though different African States had national instruments in place to combat corruption within their legal systems, the ratification of the United Nations Convention against Corruption (UNCAC)¹ triggered some legislative reforms in some African States. An examination of instruments in some African States revealed that so many African States have some form of legislative framework, at least, in place, to fight against corruption. Examples abound in States in Africa: the Algerian Law No.06-01 on the Prevention and the Fight Against Corruption (2006); the Angolan Penal Code (2006), Law on Infraction Against the Economy (1999) and the Angolan High Authority Against Corruption (1996); the Botswana Corruption and Economic Crime Act (CECA) (as amended 2013), Penal Code 1964 (as amended 2005) and the Proceeds of Serious Crimes Act (1990); the Cabo Verdean Criminal Code Legislative Decree No.4/2003; Law No. 65-LF-24 of 12th November 1965 (book I) and Law No. 67-LF-1 of 12th June 1967 (book II) Relating

¹ United Nations Convention Against Corruption, United Nations General Assembly Resolution 58/4, U.N. GAOR, 58th Session, 51 meeting, U.N. Doc. A/RES/58/4 (2003).

to the Penal Code in Cameroon; the Ghanaian Anti-Money Laundering Act (AMLA) (2008), Criminal Offences (Procedure) Act of 1960 and the Public Property Protection Act of 1977; the Kenyan Anti-Corruption and Economic Crimes Act of 2003, Proceeds of Crime and Anti-Money Laundering Act of 2009, the Penal Code 1930 (as amended 2012) and the Public Officers Ethics Act of 2003; Lesotho enacted the Prevention of Corruption and Economic Offences Act of 1999 (and the 2006 amendment) and the Money Laundering and Proceeds of Crime Act of 2008; the Liberian Penal Law and Criminal Procedure Law Amendment Act of 1976 and the Prevention of Money Laundering Law 2002; the Malawian Penal Code (Chapter 7:01), Corrupt Practices Act (CPA) of 1995 and the Money Laundering and Proceeds of Serious Crime and Terrorist Financial Act of 2006; the Mauritian Criminal Code 6/1838, Prevention of Corruption Act (PCA) of 2002, Financial Intelligence and the Anti-Money Laundering Act of 2002; and in Namibia, the Namibian Anti-Corruption Act (hereinafter ACA) of 2003, Local Authorities Act of 1992, Prevention of Organised Crime Act of 2004, and the Financial Intelligence Act of 2007.²

National and international institutions, agencies or bodies have been established to develop strategies to prevent and combat corruption.³ For anti-corruption instruments to be successfully and effectively implemented, corresponding institutions, bodies or agencies must be created. This is necessary because such an anti-corruption institution will be mandated to address corruption and other related practices, institute investigations and bring to book corrupt officials. In addition, they may refer such individuals to competent legal authorities.

The success, performance and functioning of national anti-corruption institutions or bodies in Africa may vary. For example, the Angolan High Authority against Corruption was created by

² Also, Rwandan laws include the Prevention, Suppression and Punishment of Corruption and Related Offences Act of 2003 and Law No. 47/2008 on Prevention and Suppression of Money Laundering and Financing of Terrorism; in Sierra Leone the Anti-Corruption Act (ACA) of 2008 and Anti-Money Laundering Act of 2012; in South Africa the Prevention and Combating of Corrupt Activities Act of 2004 and the Prevention of Organized Crime Act of 1998; in Zimbabwe, the Criminal Law (Codification and Reform) Act and the Prevention of Corruption Act (the PCA).

³ National frameworks show how States' desire to address corruption. In the international sphere, international instruments show how intergovernmental organisations including the United Nations; the Organization for Economic Cooperation and Development; the African Union; the Organization of American States; the Council of Europe; the European Union; the Arab League; and the FATF; the World Bank and the International Monetary Fund provide numerous recommendations, orders and codes or mechanisms aimed at combating corruption. Additionally, these instruments and bodies encourage and create international cooperation and assistance between states: see Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Bloomsbury Publishing 2014) 1; OECD Development Assistance Committee and Transparency International, 'Development Partnership Forum on Improving Donor Effectiveness in Combating Corruption', 9-10 December 2004; Ganahl Joseph Patrick, *Corruption, Good Governance, and the African State: A Critical Analysis of the Political-Economic Foundations of Corruption in Sub-Saharan Africa* (Universitätsverlag Potsdam 2014) 53.

law. However, it is still to be established.⁴ In other parts of Africa, national anti-corruption bodies are in place. For example, in Nigeria, there is the Nigerian Economic and Financial Crimes Commission;⁵ in South Africa, the Public Protector;⁶ and in Cameroon, the National Anti-Corruption Observatory⁷ and the Special Criminal Court (SCC)⁸ which, to date, have prosecuted numerous top state officials for the misappropriation of public funds.⁹

States that have anti-corruption institutions or agencies, have encountered challenges in the performance of their assigned functions. One cannot simply suggest that least corrupt states in Africa such as Botswana, Mauritius and Rwanda have strong impenetrable anti-corruption institutions or agencies. These States have encountered challenges; however, they have been able to detect and manage corruption more effectively.

For anti-corruption institutions to be functional, effective and efficient, efforts must be made to strengthen such institutions. This could be done through policies, regulations or simply establishing another independent institution or authority that will investigate a certain class or classes of corrupt practices. For example, in strengthening its anti-corruption institutions, Cameroon established a SCC. Although the Law establishing the SCC did not introduce a new offence into Cameroon's legal system, it gave it jurisdiction over any act of misappropriation of public funds amounting to at least 50,000,000 CFA Francs (that is, approximately US\$ 100000).¹⁰

In 2016, Mauritius, Rwanda, Cape Verde and Botswana were among the least corrupt states in Africa.¹¹ Considering the systemic nature of corruption,¹² one may ask what are these States doing or have done differently from other African States in the detection and prevention of corruption.

In the 2016 Corruption Perception Index (CPI) conducted by Transparency International (TI), Mauritius ranked 50th out of 176 states with a score of 54 out of 100 (the perceived level of

⁴ <https://www.export.gov/article?id=Angola-Corruption> accessed 3 August 2017.

⁵ Established by the EFCCA of 2004.

⁶ Established by the South African Constitution Act 108 of 1996, sections 181-183.

⁷ International Monetary Fund, *Cameroon: Enhanced Heavily Indebted Poor Countries: Completion Point Document and Multilateral Debt Initiative (MDRI)* (International Monetary Fund 2006) 24.

⁸ Law No 2011/028 of 14 December 2011, as amended by Law No 2012/011 of 16 July 2012.

⁹ See Avitus A Agbor, 'Prosecuting the Offence of Misappropriation of Public Funds: An Insight into Cameroon's Special Criminal Court' (2017) 20 PELJ 1.

¹⁰ *ibid.*

¹¹ Transparency International, 'Corruption Perception Index 2016'.

¹² Michael A Genovese, 'The Politics of Corruption and the Corruption of Politics' in Michael A Genovese, Victoria A Farrar-Myers, *Corruption and American Politics* (Cambria Press 2010) 3.

corruption in a country's public sector).¹³ A state is said to adhere to good governance principles when it is democratically organised, efficient in its administrative system, when there are reformation policies and government organisations, and warrants the existence of organisations and policies aimed at protecting property rights and judicial independence.¹⁴ As a democratic nation, Mauritius has managed to successfully observe good governance principles not to only improve itself, but to ensure it develops and successfully implement anti-corruption strategies.

In a 2015 survey conducted by TI, one of the pressing issues Mauritians were asked was whether they thought their government was doing well or bad regarding its anti-corruption efforts. According to the results, 71 percent of Mauritians were of the view that their government was doing badly in terms of fighting corruption, while 25 percent indicated that the government was doing well.¹⁵ Similarly, Cape Verde ranked 38th out of 176 states with a CPI score of 59 out of 100.¹⁶ In a survey conducted by TI, it was revealed that 61 percent Cape Verdeans indicated that their government was doing badly in terms of fighting corruption. On the other hand, 23 percent indicated that their government was doing well.¹⁷

From the results of these surveys, two observations could be made as follows: first corruption could be perceived differently by individuals depending on how it affects them. On the one hand, those who are in the minority, those who earn an average income or the poor are most likely to perceive their government as not doing enough to combat corruption, and they may substantiate their view by arguing that basic services are not rendered to them. On the other hand, the middle class social actors and elites of society alike, together with senior government officials may not necessarily deem their government as not doing enough because they either benefit from the corrupt practices or simply because they are able to fend for themselves through their personal means or earnings; and secondly, the survey results point out that despite a state being considered the least corrupt, the reality is that it may encounter corruption-related challenges. However, the only major difference between a state such as Mauritius and worst corrupt states such as Libya, Sudan, Angola and the Republic of Congo¹⁸ is that, Mauritius has the political will or willingness to combat corruption and has managed and minimized corruption within its borders.

¹³ Transparency International, 'Corruption Perception Index 2016'.

¹⁴ Brian C Smith, *Good Governance and Development* (Palgrave Macmillan 2007) 4 and 5.

¹⁵ Caralie Pring, *People and Corruption: Africa Survey 2015* (Transparency International 2015) 9, 11.

¹⁶ Transparency International (n 11).

¹⁷ Pring (n 15).

¹⁸ Transparency International (n 11).

Other results from the survey revealed that only 1 percent of Mauritians paid a bribe in the past year. Compared to results of surveys conducted in Liberia where 69 percent of Liberians said that they paid a bribe in the past year, it becomes apparent that states have different approaches to corruption.¹⁹ The Mauritian survey further revealed that for the past 12 months, 0 percent of Mauritians paid bribes in public schools, public hospitals and for the issuing of identity cards, voters cards or permit services. However, it was discovered that 1-15 percent of Mauritians paid bribes in order to acquire utility, police and court services.²⁰

Like any other State, Mauritius is affected by corruption. However, what makes Mauritius exceptional is that it has developed and effectively implemented its anti-corruption strategies. Most importantly, it possesses the necessary political will. It is for this reason that Mauritius is a good illustration of an African State that has made credible efforts in its fight against corruption. These achievements, nonetheless, do not suggest that there are no set backs in Mauritius. The 2015 arrest of former Prime Minister, Navinchandra Ramgoolam, for allegations of conspiracy and money laundering allegations,²¹ and the resignation of Pravind Jugnauth, former Minister of Technology, after a court of law found him guilty of a conflict of interest under the PCA 5 of 2002 due to allegations that surfaced that he used his political influence 'to persuade the government to acquire the Medpoint clinic, partly owned by his brother-in-law, for Rs (Mauritian Rupees) 14 million (equivalent to at least US\$ 4.1 million) in 2010, are a few recent examples.²²

Equally noteworthy is the fact that Mauritius has ratified UNCAC and the Southern African Development Community's Protocol against Corruption.²³ In addition to these international instruments, Mauritius has, at least, ten national anti-corruption instruments: the Financial and Audit Act, 38 of 1973; the PCA, 5 of 2002; the Financial Intelligence and Anti-Money Laundering Act, 6 of 2002; the Financial Reporting Act, 45 of 2004; the Public Procurement Act (PPA), 33 of 2006; the Financial Services Act, 14 of 2007; the Competition Act, 25 of 2007; the Asset Recovery Act, 9 of 2011; the Bank of Mauritius Act, 34 of 2004; the Banking Act, 35 of 2004; the Declaration of Assets Act, 28 of 1991; and the Companies Act, 15 of 2001.

¹⁹ Pring (n 15) 14.

²⁰ *ibid* 19-20.

²¹ Arch Puddington *et al* (eds), *Freedom in the World 2016: The Annual Survey of Political Rights and Civil Liberties* (Rowman and Littlefield 2016) 447.

²² Christina Vilbrin, 'Mauritian Premier's Son Quits Cabinet after Corruption Case' (Bloomberg, 1 July 2015).

²³ Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations, United Nations General Assembly, Treaty Series, vol. 2349, 14 December 2005.

A concise examination of these instruments reveals two things: first, that corruption related matters often involve public funds. Taking into consideration the Mauritian legislative framework, it could be said that most of its laws are of a financial nature. This implies that Mauritius acknowledges that there is need to focus on tightening and strengthening its financial system to prevent public monies from being used for private gains; and second, Mauritius is one of the few African States that have an instrument specifically on the recovery of assets, a key instrument to ensure that states wherefrom funds were stolen are returned.²⁴

In addition to Mauritius, the 2016 CPI revealed that Botswana is also one of the least corrupt African States ranked 35th out of 176 states with a score of 60 out of 100.²⁵ Botswana is a liberal democracy that has successfully protected the rights of its citizens and privately-owned means of production.²⁶ It is considered the best-rated governance in Africa and the best in managing the economy and ensuring that corruption remains at a minimum.²⁷

Though it may be among the least corrupt states in Africa, Botswana has experienced corruption scandals. It is worth emphasising that despite these scandalous incidences, bribery in

²⁴ The Asset Recovery Act 9 of 2011 (as amended) amongst other things provides for the following: it grants the Director of Public Prosecution powers vested in the act; it Permits the attainment of a restraining order property in instances where a person is charged or convicted and it is reasonably believed that the property is the proceed or instrument in the offence. Moreover, an order may be obtained to 'protect any other property in which the person has an interest other than a lawful interest;' where a person has been convicted of an offence or of any other unlawful activity sufficiently related to the offence, a confiscation order may be obtained 'in respect of the benefit derived or likely to be derived by the person from that offence'; sub-Part C of the Act specifically provides for the tracing of assets. In essence, it sheds light as to which property is recoverable, property indirectly obtained or used, and property not recoverable; part VI of the Act provides for international co-operation with section 53 providing for international co-operation agreements. See also sections 4, 9, 17(1), 40, 41, 42.

²⁵ Transparency International (n 11).

²⁶ Tukumbi Lumumba-Kasongo, 'The Problematics of Liberal Democracy and Democratic Process: Lessons for Deconstructing and Building African Democracies' in Tukumbi Lumumba-Kasongo (ed), *Liberal Democracy and Its Critics in Africa: Political Dysfunction and the Struggle for Progress* (Zed Books 2005) 10; Sisay Asefa and Wei-Chaio Huang, 'The Challenge of Good Governance and Leadership in Developing Countries' in Sisay Asefa and Wei-Chaio Huang (eds), *The Political Economy of Good Governance* (W.E. Upjohn Institute 2015) 144.

²⁷ *ibid.*

government administration and nepotism,²⁸ Botswana has managed to successfully develop and implement anti-corruption measures.²⁹

Like Mauritius, a survey was conducted and the Batswanapeople were asked whether their government was doing well or bad in the fight against corruption. The results revealed as follows: 42 percent indicated that the government was doing badly, while 54 percent said the government was doing well.³⁰ In a 2015 survey by TI, only 1 percent of Batswanas had paid a bribe to officials. In answering the question ‘what services do people pay bribes for?’, the results of the survey revealed that only 1-15 percent of people in Botswana paid bribes for public schools and for police services. Moreover, it was established that 0 percent paid bribes for public hospitals, court and utility services together with identity document, voter’s cards and permit services,³¹ and the bribery rate of Botswana was said to be at 1 percent.³²

Botswana’s efforts and political will to combat corruption could be tracked back to its first president, Sir Seretse Khama, whose efforts, willingness and determination, ‘quickly earned the state a reputation for clean management of public resources’, resulting in ‘the establishment of an autonomous civil service, which has been protected from widespread politicisation, together with the development of an autonomous judiciary’.³³ The efforts of Sir Khama have become the foundation blocks for Botswana and have led to a solid legal framework aimed at combating

²⁸ Corruption scandals in Botswana date back to 1975 involving Mr Kunz who was an engineer in the Ministry of Works and Communications who was subsequently found guilty and sentenced to nine months in prison. In the 1980s, other allegations involving public officials came to light. However, no investigations were conducted and thus no one was ever held liable of corruption. However, in 1991 corruption scandal involving the acquisition of text books for primary schools surfaced. A Presidential Commission of Inquiry was established to investigate the supply of textbooks to primary schools by the International Project Managers (IPM) company after being granted a tender to supply education material on behalf of the Ministry of Local Government Lands and Housing. The Commission found that: (a) tender regulations were ignored and that senior officials responsible for checking the awarding of tenders failed to do so; (b) the company was in an ‘embryonic stage’, in addition, its owners lacked formal education and had no experience in the acquisition of school materials; (c) initially, the company was granted an open-ended contract that did not provide for any financial ceiling; and (d) the Central Tender Board did not approve the tender, which led to BWP 27 million not being accounted for. See David Sebudubudu, ‘Corruption and Its Control in Botswana’ (2003) 23 Botswana Notes and Records 125,126. Another example, former Vice- President of Botswana, Peter Mmusi and Daniel Kwelagobe, former Minister of Agriculture, were forced to resign following an investigation after allegations were made regarding their illegal transfer of land. See www.globalsecurity.org/military/world/botswana/corruption.htm accessed 28 February 2017.

²⁹ USA International Business Publication, *Botswana Mineral and Mining Sector Investment and Business Guide: Volume 1 Strategic Information and Regulation* (International Business Publication 2007) 186.

³⁰ Pring (n 15) 11.

³¹ *ibid* 19.

³² *ibid* 38.

³³ Alina Mungiu-Pippidi, *The Quest for Good Governance: How societies develop control of corruption* (Cambridge University Press 2015) 145.

corruption. Key instruments in place to combat corruption in Botswana include the following: the CECA, 13 of 1994;³⁴ the Proceeds of Serious Crime Act, 13 of 2000 (Cap 08:03) (as amended);³⁵ and the Financial Intelligence Act, 6 of 2009.³⁶

In addition to the above-mentioned states, the 2016 CPI also identified Rwanda as one of the least corrupt states in Africa ranked 50th out of 176 states with a score of 54 out of 100.³⁷ After the genocide of 1992-1993, Rwanda had to re-establish itself. The process brought numerous challenges, one of them being building good governance. It may be argued that through determination and enthusiasm, Rwanda redirected the principles of good governance, which led to the increase of public participation and policies decentralising administration and financial powers to local administrative units closer to the people.³⁸ Over the years, Rwanda has ensured that the reduction of corruption within its borders remain a priority. This determination was reflected when the World Bank governance measures indicated that over the years, Rwanda has made remarkable progress in ensuring that corruption is controlled.³⁹

Even though corruption is not as severe in Rwanda compared to other African states,⁴⁰ there is a fair amount of corruption in Rwanda reflected in gross financial mismanagement or acts of embezzlement, and in the education system especially following a report by TI that large sums of money had been unaccounted for in public or government-aided schools in Rwanda.⁴¹

Apart from numerous instruments that prohibit corrupt practices, the key anti-corruption instrument in Rwanda is Law No.23/2003 Related to the Punishment of Corruption and Related

³⁴ Created to establish and confer powers Directorate on Corruption and Economic Crime to investigate corruption an economic crime cases as provided for in Part II and III of the Act. Part IV lays down corruption related offences including bribery, acceptance or promise to a bribe, conflict of interest, cheating of public revenue and possession of unexplained property.

³⁵ Proceeds of Serious Crime Act was enacted specifically for individuals who have been convicted of serious crimes. The essence of this is to ensure that that such individuals do not benefit in any way or obtain rewards from the serious crimes they were convicted of, moreover, the act also provides for money laundering and other connected matters. Part II and III of the act provide for confiscation and restraining orders respectively, Part V provides for money laundering, Part VI provides for production matters which also includes foreign request for assistance as laid out in section 20.

³⁶ The Financial Intelligence Act 6 of 2009 was enacted to create a National Coordinating Committee on Financial Intelligence to report on suspicious transactions.

³⁷ Transparency International (n 11).

³⁸ Joseph Kamugisha, 'Rwanda has excelled in good governance' (*The New Times*, 5 June 2010).

³⁹ Margee M Ensign and William E Betrand, *Rwanda: History and Hope* (University Press of America 2009) 72.

⁴⁰ Such as Zimbabwe (ranked 154th place out of 176 states by Transparency International in the 2016 CPI); Angola (ranked 164th place out of 176 states by Transparency International in the 2016 CPI) and Somalia (ranked 176th place out of 176 states by Transparency International in the 2016 CPI).

⁴¹ Daniel S Ntwari, 'Corruption on the rise in Rwanda' (*African Reporter*, 22 April 2015).

Offences enacted to prevent, suppress and punish corruption and related offences 'in service sector organs, public and private institutions as well as in non-governmental organisations'.⁴²

With the above summary on anti-corruption efforts initiated and implemented by Rwanda, Botswana, and Mauritius, a broader discussion is provided below on selected African States. Anti-corruption instruments play a significant role in the fight against corruption. Though their effective implementation depends on the political will of a state (as discussed in the subsequent chapter), these instruments serve as a guide for government officials and civil society organisations on how to detect, prevent and combat corruption.

This chapter seeks to examine national instruments adopted by African States by outlining provisions that classify certain practices as corrupt, reveal similar legislative provisions from different states, and investigate existing unique or exceptional instruments. Additionally, this chapter examines existing anti-corruption institutions, their functions, powers and achievements.

5.2 National anti-corruption instruments in Africa: a review of selected African states

Anti-corruption instruments are tools that reflect of a state's commitment to combat corruption. As discussed below, though the content, structure and scope of anti-corruption instruments of the selected states may vary, the instruments share two common objectives: they were created in the spirit and following the guidance of international anti-corruption instruments, solidifying that there exists a global consensus to combat and eradicate corruption; and they were created to combat corruption.

A discussion on anti-corruption instruments in Africa is provided below. The discussion reveals similarities in the instruments, particularly in the categorisation and definition of various corrupt practices and the creation of anti-corruption instruments. On the other hand, the discussion shows uniquely enacted laws and their respective provisions.

5.2.1 Botswana

Botswana has two key anti-corruption instruments: the Penal Code Law No.2 of 1964⁴³ and the CECA 13 of 1994.⁴⁴ Division II of the Penal Code (sections 99-110) provides for offences against the administration of lawful authority. The offences include extortion by public officers; public

⁴² Law No. 23/2003 Related to the Punishment of Corruption and Related Offences, Article 1.

⁴³ Penal Code, 1964.

⁴⁴ Corruption and Economic Crime Act 1994.

officers receiving property to show favour; officers charged with administration of property of a special character or with special duties; false claims by officials; abuse of office; false certificates by public officers; unauthorised administration of oaths; false assumption of authority; impersonating persons employed in the public service; threat of injury to persons employed in public services and tempering with public officers. In addition to these provisions, Division VIII of the Penal Code provides for offences relating to corrupt practices.⁴⁵

Principally enacted to create the Directorate on Corruption and Economic Crime discussed below, the CECA, 13 of 1994 came into effect on 19 August 1994. Part IV of the Act (sections 24-34) lays out corrupt offences: corruption by or of public officers;⁴⁶ corruption in respect of official transactions;⁴⁷ acceptance of bribe by public officers after doing an act;⁴⁸ promise of bribe to a public officer after doing act;⁴⁹ corrupt transactions by or with agents;⁵⁰ bribery for giving assistance with regard to contracts;⁵¹ bribery for procuring withdrawal of tender;⁵² conflict of interest;⁵³ bribery in relation to auctions;⁵⁴ cheating of public revenue;⁵⁵ and possession of unexplained property.⁵⁶

Apart from the above-mentioned anti-corruption instruments, there are other pieces of legislation that prohibit certain corrupt practices.⁵⁷

5.2.2 Cameroon

Despite being one of Africa's most corrupt states as per TI 2016 CPI, anti-corruption efforts in Cameroon have strengthened the state's determination to combat corruption, many of which are centred on the administration of state funds by public officials. A state that does not have legislation regulating funding of political parties is vulnerable to corruption. Cameroon recognises the need to promote transparency in political party funding. Part II of the Law Relating to the

⁴⁵ Penal Code (n 43)

⁴⁶ Corruption and Economic Crime Act, section 24.

⁴⁷ *ibid* section 25.

⁴⁸ *ibid* section 26.

⁴⁹ *ibid* section 27.

⁵⁰ *ibid* section 28.

⁵¹ *ibid* section 29.

⁵² *ibid* section 30.

⁵³ *ibid* section 31.

⁵⁴ *ibid* section 32.

⁵⁵ *ibid* section 33.

⁵⁶ *ibid* section 34.

⁵⁷ See for example Public Service Act 13 of 1998, section 35.

Public Funding of Political Parties and Election Campaigns lays down conditions which political parties may receive public funding and prohibits the use of public funding for personal enrichment.⁵⁸

Acknowledging the endemic nature of corruption in public procurement and its effects on the delivery of quality services to Cameroonians, the Public Contracts Code regulates public procurement by setting out rules that ought to be adhered to in the awarding, execution and control of procurement.⁵⁹

The system of declaring of assets and liabilities is an important anti-corruption tool as it fosters transparency by public officials. Article 66 of the Cameroonian Constitution requires government officials⁶⁰ to ‘declare their assets and property at the beginning and at the end of their tenure of office’.⁶¹ Similar to the aforementioned constitutional provision, the Law on the Declaration of Assets mandates government officials to declare all property, ‘movable and immovable property and tangible and intangible property in and out of the country and belonging to the person liable, his spouse and their minor descendants right up to the first degree’.⁶²

In an effort to uphold its democratic principles and address the needs of Cameroonians, the Law Relating to Financial Regime of Regional and Local Authorities ‘lays down conditions for the preparation, presentation, execution and control of the execution of budgets of local authorities’ applicable to regions, councils and cities, unions and public establishment councils, and any other local authority set up by law.⁶³

Additionally, in order to ensure that fundamental values such as equality, fairness, accountability, public interest, probity, loyalty and humanity are adhered to in the performance of duties by public officials, the Cameroonian Code of Ethics sets out duties and obligations which public officials ought to uphold.⁶⁴ Among its provisions, the Code addresses conflict of interest,⁶⁵

⁵⁸ Law No.2000/015 of 19 December 2000 relating to the Public Funding of Political Parties and Election Campaigns.

⁵⁹ Decree No.2004/275 of 24 September 2004 to Institute the Public Contract Code, Article 2.

⁶⁰ The President of the Republic, the Prime Minister, Members of Government and persons ranking as such, the President and Members of the Bureau of the National Assembly, the President and Members of the Bureau of the Senate, Members of Parliament, Senators, all holders of an effective elective office, Secretaries-General of Ministries and person ranking as such, Directors of the Central Administration, General Managers of public and semi-public enterprises, Judicial and Legal Officers, administrative personnel in charge of the tax base, collection and handling of public funds, all managers of public votes and property.

⁶¹ Constitution of the Republic of Cameroon, Law No.96-06 of 18 January 1996.

⁶² Law No.2006/001 of 25 April 2006 Relating to the Declaration of Assets and Property, Articles 1-3.

⁶³ Law No.2009/011 of 10 July 2009 Relating to Financial Regime of Regional and Local Authorities.

⁶⁴ *Projet de Code d'éthique de l'administration publique camerounaise*, Articles 3 and 4.

⁶⁵ *ibid* Article 6(c) and Articles 25-27.

behaviour of public officials towards any person who uses or may use a service or public domain⁶⁶ and behaviour of public officials in the performance of their duties.⁶⁷

The Cameroonian Penal Code (Penal Code) is composed of Law No. 65-LF-24 of 12th November 1965 (book I) and Law No. 67-LF-1 of 12 June 1967 (book II). The Penal Code is generally accepted as the primary anti-corruption instrument,⁶⁸ and for this discussion, offences in book II of the Penal Code are considered.

It is impracticable to separate elections from political corruption. Politicians with ulterior motives and hidden agendas will find ways to manipulate elections by misusing election regulations. Section 122 of the Penal Code criminalises electoral fraud by providing that anyone who commits electoral offences in sections 122 (1) (a) to (k) shall be imprisoned or fined or both. Additionally, liability will be imposed on anyone who uses violence or participates in corrupt practices during elections. Section 123 provides that anyone who participates in the practices in sections 123(a)-(e), shall be imprisoned ‘for from 3 (three) months to 2 (two) years or with a fine of from 10 000 CFA Francs (ten thousand) to 100 000 CFA Francs (one hundred thousand) or with both such imprisonment and a fine’. In addition, sections 123-3 prohibit anyone from misappropriating public funds which were received in the context of public funding of a political party.

Undue advantage may often be categorised as a tangible, intangible or non-pecuniary benefit, and in many instances, public officials and/or third parties abuse their positions to gain an undue advantage. Sections 134 and 134-1 prohibit and guarantee liability to be imposed on anyone who engages in active or passive corruption.⁶⁹ Apart from requesting undue advantage, public officials may exploit members of the public by requesting demands which are not due. To prohibit this, section 142 prohibits a public servant, public employee, public notary, public auctioneer, bailiff or process server or representative, from demanding any fee, due, duty or tax which is not due, or demanding any material benefit otherwise than on payment of the proper price. Favouritism

⁶⁶ *ibid* section I

⁶⁷ *ibid* section II.

⁶⁸ Law No. 2016/007 of 12 July 2016 Relating to the Penal Code amended the Penal Code.

⁶⁹ Section 134(1) of the amended Penal Code provides that ‘any national, foreign or international civil servant or public employee who, himself or for a third party, solicits, accepts or receives any offer, promise, gift or present in order to perform, refrain from performing or postpone any act of his office shall be punished.’

Section 134-1(1) of the amended Penal Code provides that ‘whoever makes promises, offers, gifts and presents or yields to requests liable to result in corruption in order to obtain either the performance, postponement or abstention from an act or one of the favours or benefits defined in section 134 above shall be punished.’

may be regarded in the same light as receiving an undue advantage at the expense of another or a group; and as such, section 143 of the Penal Code prohibits a public servant from deciding between parties based on favour or ill will.

Section 135 of the Penal Code prohibits a public servant or government employee from taking or accepting directly or indirectly any interest.⁷⁰ Additionally, section 136 of the Penal Code provides that liability will be imposed on 'any person whose duties include the supervision of any concern, undertaking or concession, or the expression of an opinion on its operations, and who, in any manner, assists or shares in its financing or operation.'

Section 161 of the Penal Code prohibits a person from using assault, threat, gift or promise to procure any advantage from any public authority. Likewise, a public official is prohibited from soliciting, receiving or accepting any offer, promise or gift to procure any advantage from any public authority or body. Additionally, any person is prohibited from committing fraud in the examination or competition with the intent to procure his entry in the public service, or any degree certificate or qualification issued by the State or by a public service.⁷¹ Moreover, a person is prohibited from engaging in corrupt practices in order to facilitate the success or cause candidates to fail in the administrative competitive examination or other examinations.⁷²

It may be argued that to foster harmonious relationships in society, realisation of rights and enjoyment of freedoms, laws must be properly interpreted and implemented to regulate societal activities. In an attempt to ensure that society trusts and have confidence in the justice system, Parts D and E of the Penal Code, respectively, lay down provisions relating to the perversion of justice and refusal to assist justice.

The administration of public works in Africa is often dictated by corrupt officials which results in the extensive misuse of public funds for personal or private gains. To detect and prevent such instances, section 184 of the Penal Code provides for the misappropriation of public property.

⁷⁰ (1) Any public servant or government employee who takes or accepts any interest, direct or indirect:
(a) in any grant, contract or selection of tenders subject to his opinion or which he supervised, controlled, administered or drew up; or
(b) in any private concern, cooperative or corporation in which the State has shares, in any authority or concession subject to his supervision or control; or
(c) in contracts or agreement signed on behalf of the State or a local authority with a natural person or corporate body; or
(d) in any business for which it is his duty to authorize payment or liquidation;
shall be punished.'

⁷¹ Section 163 of the amended Penal Code.

⁷² Section 163-1(1) of the amended Penal Code.

This provision, as discussed below, has bearing on the Cameroonian government to establish a SCC to bring to justice, persons who misappropriate public funds for private gains. As such, the mandate of this special court could be traced or is founded under section 184(1) of the Penal Code.⁷³

5.2.3 Ghana

Ghana does not have a specific piece of instrument considered to be an anti-corruption law. Its main instrument on corruption related offences is the Criminal Code 29 of 1960 which came into force the following month, February 1961.⁷⁴ Part III of the Code provides for offences against rights of property, and several of other corruption offences, including fraud by agents; on dishonestly receiving property obtained or appropriated by offence;⁷⁵ falsely pretending to be public officer or juror; explanation as to by public officer; corruption; of and by public officer or juror; explanation as to corruption by a public officer;⁷⁶ explanation as to corruption to a public officer; special explanations as to corruption of and by public officer; corrupt agreements for unlawful acts; acceptance of briber by a public officer, after act done; promise of bribe to a public officer, after act done; explanation as to oppression; explanation as to extortion; making false declarations, for office or voting; on giving of false certificate by public officer;⁷⁷ destruction, of documents by a public officer; deceiving a public officer; accepting or giving bribe to influence public officer or juror; corrupt promise by a judicial officer or juror; corrupt selection of a juror; prevention, of election by force; corruption, intimidation and personation in respect of election; falsification of return at election; explanation as to elections;⁷⁸ and withholding of public money,

⁷³ (1) whoever, by whatever means, fraudulently takes or keeps any property, moveable or immovable belonging to, destined or entrusted to the State. Cooperative, council or public establishment under the supervision of the State or in which the State directly or indirectly holds the majority of the shares shall be punished:

- a) where the value of the property exceeds 500 000 Francs CFA (five hundred thousand) francs with imprisonment for life;
- b) where the value of the property is above 100 000 Francs CFA (one hundred thousand) but below or equal to 500 00 Francs CFA (five hundred) thousand, with imprisonment of from 15 (fifteen) to 20 (twenty) years;
- c) where the value of the property is less than or equal to 100 000 Francs CFA (one hundred thousand) with imprisonment for from 50 000 (fifty) to 500 000 Francs CFA (five hundred thousand).

⁷⁴ Other instruments on corruption offence include Representation of the People Act of 1992, section 33, Customs Excise and Preventive Service (Management) Act of 1993 (PNDCL 330), sections 271- 272; the Value Added Tax Act 546 of 1998, section 63; the Financial Administration Act 654 of 2003, section 62(1).

⁷⁵ Criminal Code 1960, sections 145-147.

⁷⁶ *ibid* sections 237, 239 and 240.

⁷⁷ *ibid* sections 241-249.

⁷⁸ *ibid* sections 250-259.

by a public officer.⁷⁹ Additionally, Chapter 5 provides for offences relating to public offices and to public elections.⁸⁰

5.2.4 Kenya

Enacted to prevent, investigate and punish corruption, economic crimes and other related offences, the Kenyan Anti-Corruption and Economic Crimes Act 3 of 2003⁸¹ criminalises the secret inducement for advice; conflict of interest; improper benefits of trustees for appointments; bid rigging; protection of public property and revenue; abuse of office; and dealing with suspected property.⁸²

5.2.5 Lesotho

With specific reference to corrupt practices, the Prevention of Corruption and Economic Offences Amendment Act 8 of 2006 did not make a great deal of changes to the Prevention of Corruption and Economic Offences Act 5 of 1999. In fact, certain provisions were either deleted or added to the existing provisions in the 1999 Act. The following constitute corrupt offences: corruption by or with public officers;⁸³ conflict of interest;⁸⁴ bribery;⁸⁵ corruption in respect of official transactions;⁸⁶ acceptance of bribe by a public officer after doing an act;⁸⁷ promise to do an act;⁸⁸ corrupt transaction by or with an agent;⁸⁹ bribery for giving assistance in contracts;⁹⁰ bribery for procuring withdrawal of tender;⁹¹ cheating of public revenue;⁹² and possession of unexplained property.⁹³ The Amendment Act inserted a provision on the declaration of assets after section 30 of Act of 1999.

⁷⁹ *ibid* section 260.

⁸⁰ Criminal Code 1960.

⁸¹ Anti-Corruption and Economic Crimes Act 3 of 2003.

⁸² *ibid* sections 39-47.

⁸³ Prevention of Corruption and Economic Offences Amendment Act, section 13 should be read with section 21 of Prevention of Corruption and Economic Offences Act.

⁸⁴ Section 14 of the Amendment Act should be read with section 28 of Prevention of Corruption and Economic Offences Act of 1999.

⁸⁵ Section 16 of the Amendment Act should be read with section 29 of Prevention of Corruption and Economic Offences Act of 1999.

⁸⁶ Prevention of Corruption and Economic Offences Act of 1999, section 22.

⁸⁷ *ibid* section 23.

⁸⁸ *ibid* section 24.

⁸⁹ *ibid* section 25.

⁹⁰ *ibid* section 26.

⁹¹ *ibid* section 27.

⁹² *ibid* section 30.

⁹³ *ibid* section 31.

5.2.6 Malawi

There are two core anti-corruption instruments in Malawi: the Penal Code (Chapter 7:01) criminalises corruption as provided for in Chapter X, which provides for corruption and the abuse of office;⁹⁴ and the Malawian Corrupt Practice Act⁹⁵ which went into effect in 1996 and criminalises numerous practices: the corrupt use of official powers and procuring through corrupt use of official powers; public officers performing functions corruptly, misuse of public office; dealing in contracts; disclosure of interest by public officers;⁹⁶ corrupt transaction by or with private bodies;⁹⁷ corrupt transaction by or with agents; corruption of members of public bodies with regard to meetings, advantage for giving assistance, with regard to meetings; advantage in regard to bidding at auction sales, and possession of unexplained property.⁹⁸

5.2.7 Namibia

Enacted to prevent and punish corruption, Chapter 4 of the Namibian ACA provides for corrupt practices and penalties.⁹⁹ The following are provisions that criminalise corrupt practices in Namibia: offence of corruptly accepting gratification, or giving gratification to agent; corrupt acquisition of private interest by a public officer; corruption in relation to tenders; bribery of a public officer; corruption of witnesses; bribery of foreign public officials; bribery in relation to auctions; bribery for giving assistance in relation to contracts; corruptly using office or position for gratification; corruption in relation to sporting events; and dealing with, using, holding, receiving or concealing gratification in relation to any offence.¹⁰⁰

5.2.8 Nigeria

As part of the anti-corruption framework, the Code of Conduct Tribunal was created by the Nigerian Constitution and forms part of the Nigerian anti-corruption legislative framework. The specific aim of the Code of Conduct Bureau and Tribunal Act 1 of 1989 is to monitor

⁹⁴ Section 90 official corruption; section 91 extortion by public officers; section 92 public officers receiving property to show favour; section 93 officers charged with administration of power of a special character or with special duties; section 94 false claims by officials; section 95 abuse of office; section 96 false certificates by public officers; section 97 unauthorized administration of oaths; section 98 false assumption of authority; section 99 personating public officers; section 100 threat of injury to persons employed in public service.

⁹⁵ CPA 18 of 1995.

⁹⁶ *ibid* sections 25-25D.

⁹⁷ *ibid* section 26.

⁹⁸ *ibid* sections 28-30.

⁹⁹ ACA 8 of 2003.

¹⁰⁰ *ibid* sections 33-45.

public officials in the performance of their administrative duties.¹⁰¹ In order to do so, the Code criminalises certain conducts such as: conflict of interest with duty; bribery; and abuse of powers.¹⁰² The standard conducts which public officials need to adhere to are also provided for in the Constitution of the Federal Republic of Nigeria as stipulated in Schedule V.¹⁰³

Chapter 12 of the Criminal Code Act Cap C38 LFN 2004 provides for Corruption and Abuse of Office.¹⁰⁴ This Chapter lays out corrupt punishable practices as follows: 1) official corruption: public official inviting bribers, on account of own actions; 2) a person giving bribes, on account of actions of public official; 3) official corruption: a person inviting bribes, on account of actions of a public official; 4) restrictions on arrest and prosecution of judicial officers for offences under sections 98 to 98B;¹⁰⁵ 5) extortion by public officers; public officers interested in contracts; 6) officers charged with administration of property of a special character or with special duties; 7) false claims by officials; abuse of office; 8) false certificates by public officers; 9) administering extra-judicial oaths; false assumption of authority; 10) impersonating public officers; 11) impersonating members of the Armed Forces or Police; 12) and unlawfully wearing of the uniform of the Armed Forces, and selling, uniform, to unauthorised persons.¹⁰⁶

The corrupt Practice and Other Related Offences Act, 5 of 2000 was created to prohibit and prescribe punishment of corrupt conducts and other related offences.¹⁰⁷ The Act lays out various punishable corrupt practices such: gratification by an official; corrupt offer to public officers; corrupt demand by persons; counselling offences relating to corruption; fraudulent acquisition of property; fraudulent receipt of property;¹⁰⁸ making false statements or return; gratification by and through agents, and definition of agent; bribery of a public officer; offences of using offices and position for gratification;¹⁰⁹ bribery in relation to auctions; bribery for giving assistance with regard to contracts; duty to report bribery transactions; dealing with,

¹⁰¹ Code of Conduct Bureau and Tribunal Act 1 of 1989.

¹⁰² Sections 5, 12 and 13 of the Code of Conduct Bureau and Tribunal Act 1 of 1989.

¹⁰³ Constitution of the Federal Republic of Nigeria 1999.

¹⁰⁴ Nigerian Criminal Code Act Cap 39 LFN 2004.

¹⁰⁵ *ibid* sections 98-98B.

¹⁰⁶ *ibid* sections 99, 101-111.

¹⁰⁷ Corrupt Practices and Other Related Offences Act 5 of 2000.

¹⁰⁸ *ibid* sections 8-13.

¹⁰⁹ *ibid* sections 16, 18 and 19.

using, holding, receiving or concealing gratification; and making statements which are false or intended to mislead.¹¹⁰

Chapter X of the Penal Code Act lays out Offences by or Relating to Public Officers.¹¹¹ The Chapter prohibits various practices and classifies them as corrupt offences. These practices include: public officers taking gratification in respect of an official act; taking gratification in order to influence a public officer; abetment by a public officer of offence mentioned in section 116; offering or giving gratification to a public officer; a public officer obtaining valuable thing without consideration from a person concerned in proceeding or business transacted by such public officer; offering or giving valuable things without consideration; third person profiting by gratification; public officer dishonestly receiving money or property not due; and public officer disobeying directions of law with intent to cause injury or to save a person from punishment or property from forfeiture.¹¹²

5.2.9 Rwanda

Law No.23/2003 Related to the Punishment of Corruption and Related Offences was to prevent, suppress and punish corruption and related offences 'committed in service sector organs, public and private institutions as well as in non-governmental organisations'.¹¹³ Chapter one of Title III provides for Punishment of Corruption and Related Offences. Section 1 provides for punishment of passive corruption;¹¹⁴ and section 2 provides for punishment of active corruption.¹¹⁵ Chapter II provides for Punishment of Offences Related to Corruption; Section 1 provides for punishment of acts of demanding, receiving in excess of the justified, exempting from tax or non-taxation, giving away for free or at a very low price, public property by public servants;¹¹⁶ Section 2 provides for punishment of trafficking of influence;¹¹⁷ Section 3 provides for punishment of favouritism;¹¹⁸

¹¹⁰ *ibid* sections 22-25.

¹¹¹ Penal Code (Northern State) Federal Provisions Act Cap 53 LFN 1960.

¹¹² *ibid* sections 115-123. Other offences include: section 124 public officer framing incorrect document with intent to cause injury; section 125 public officer in judicial proceeding acting contrary to law; section 126 wrongful committal or confinement by public officer; section 127: public officer omitting to arrest or aiding escape; section 128 public officer omitting to arrest or permitting escape. Section 129: Public officer causing danger by omitting to perform duty; section 130 abandonment of duty by public officer; section 131 public officer unlawfully purchasing property; section 132 personating a public officer; section 133 wearing dress or carrying token used by public officer.

¹¹³ Law No.23/2003 Related to the Punishment of Corruption and Related Offences, Article 1.

¹¹⁴ *ibid* Articles 10-13.

¹¹⁵ *ibid* Articles 14-16.

¹¹⁶ *ibid* Articles 17-18.

¹¹⁷ *ibid* Articles 19-20.

¹¹⁸ *ibid* Article 22.

Section 4 on punishment of seeking of benefits by employees from activities outside of their attributions;¹¹⁹ Section 5 provides for punishment of illicit enrichment;¹²⁰ and Section 6 provides punishment of laundering.¹²¹

5.2.10 Sierra Leone

The ACA 1 of 2000 was adopted to combat and prevent corrupt practices. The Act was repealed leading to the promulgation of the ACA 12 of 2008.¹²² Part IV of the Act lays out corrupt offences as follows: corrupt acquisition of wealth; possession of unexplained property; offering, soliciting or accepting advantage; using influence to contracts; influencing a public officer; peddling influence; bid rigging; corrupting a public officer; bribery if or by a public officer to influence decision of a public body; soliciting, accepting or obtaining advantage for a public officer; misappropriation of public funds or property; misappropriation of donor funds or property; impeding investment; corrupt transactions with agents; deceiving a principal; accepting advantage to protect an offender from legal proceedings; abuse of office; abuse of position; public officer using his office for advantage; conflict of interest; treating of public officer; receiving gift for corrupt purpose; protection of public property and revenue; dealing with suspect property; bribery in relation to auctions; gifts; and transfer of proceeds of corruption.¹²³

5.2.11 Somalia

The Somali Penal Code Decree No.5 of 1962 criminalises the following corrupt practices: misappropriation to the prejudice of private persons; corruption for performing an official act; corruption for performing an act contrary to the duties of office; peculation by taking advantage of the error of another person; extortion by a public officer;¹²⁴ abuse of office in cases not specifically provided for by law; private interest in official acts; omission or refusal to perform official acts, collective abandonment of public offices, employments, services or works, interruption of a public service of public necessity, failure to perform duties of office on the

¹¹⁹ *ibid* Article 23.

¹²⁰ *ibid* Article 24.

¹²¹ *ibid* Articles 25-26.

¹²² Anti-Corruption Act 12 of 2008.

¹²³ *ibid* sections 26-52.

¹²⁴ Penal Code Articles 242-246.

occasion of abandonment of a public office or of interruption of a public service, and individual abandonment of public office, service or work.¹²⁵

5.2.12 South Africa

Corruption is endemic in the public sector,¹²⁶ it takes many forms and is a barrier to the realisation of public services. The Public Service Act (PSA) 1994 as Amended by Act 30 of 2007, provides for the 'organisation and administration of the public service, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service.'

The South African Constitution acknowledges the need to safeguard procurement of contracts. Section 217 provides that 'when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.¹²⁷

The Prevention of Organised Crime Act 121 of 1998 was enacted to prevent organised crimes, money laundering and criminal gang activities from endangering public order and the economy of South Africa. Chapter two of the Act lays down offences relating to racketeering activities.¹²⁸ Chapter three lays down offences relating to proceeds of unlawful activities. Section 4 criminalises money laundering while section 5 criminalises anyone who assists another to benefit from proceeds of unlawful activities. Chapter four (sections 9-11) lays down offences relating to criminal gang activities.

The Code of Ethics is essential for state administration most importantly, the code of ethics plays a fundamental role in the fight against corruption. The Executive Members Ethics Act 82 of 1998 was enacted to provide 'a code of ethics governing the conduct of members of Cabinet, Deputy Ministers and members of provincial Executive Councils. Additionally, the Act provides that the Public Protector 'must investigate any alleged breach of the code of ethics on receipt of a complaint'.¹²⁹

¹²⁵ ibid Articles 250, 251, 255-259.

¹²⁶ Alexander Johnston, *South Africa* (A & C Black 2014) 274.

¹²⁷ Constitution of the Republic of South Africa Act 108 of 1996, section 217.

¹²⁸ Prevention of Organised Crime Act 121 of 1998, section 3.

¹²⁹ Executive Members Ethics Act 82 of 1998, section 3. See generally, *Economic Freedom Fighters v Speaker of the National Assembly and Others and Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 of 31 May 2016.

Witnesses to corruption play an essential role in the fight against corruption, unfortunately, they do not report illegal activities due to threats or intimidation by corrupt individuals. The Witness Protection Act 112 of 1998 established an Office for Witness Protection and lays down powers of the Director as the head of the office.¹³⁰ Additionally, the Act lays down grounds for application, protection of a minor and when a witness may be discharged from protection.¹³¹

Public finance management (PFM) is a key component in the fight against corruption. The PFM Act 1 of 1999 was enacted to regulate the state's financial management in the national and provincial government by establishing a National Treasury and National Revenue Funds¹³² and the Provincial Treasuries and Provincial Revenue Funds and laying down their functions and powers.¹³³

The Promotion of Administrative Justice Act 3 of 2000 (PAJA), was enacted to promote efficient administration and good governance and 'create a culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of a public function, by giving effect to the right to just administrative action'. PAJA was enacted to ensure that the right to administrative action is lawful, reasonable and procedurally fair and further lays down reasons for administrative action.

Transparency and accountability are one of the key ingredients to curb corruption. When government documents are publicised, it implies that government is responsive, accountable to its people and transparent. The Promotion of Access to Information Act 2 of 2000 was enacted to foster a culture of transparency and accountability in public and private bodies by effecting the constitutional right to access to information.¹³⁴ Though the Act was enacted to effect the aforementioned constitutional right, sections 33 to 46 lay down the grounds for refusal of access to records.¹³⁵

For corruption to be detected in the workplace, it is imperative for employees to be protected when information is disclosed. The Protected Disclosure Act of 2000 was enacted to protect a public or private employee who makes a protected disclosure.¹³⁶ The Act further provides

¹³⁰ Witness Protection Act, sections 2 and 3.

¹³¹ *ibid* sections 7, 12 and 13.

¹³² Public Finance Management Act, sections 5 and 6.

¹³³ *ibid* sections 17 and 16. See also the Municipal Financial Management Act of 2003.

¹³⁴ Promotion of Access to Information Act, Preamble.

¹³⁵ *ibid*.

¹³⁶ According to section 1, protected disclosure means a disclosure made to-
(a) a legal adviser...

for procedures an employee may employ if he or she intends to disclose information regarding improprieties by his or her employer. Additionally, the Act provides an employee with remedies if he or she was subjected to any occupational detriments.

Enacted to prevent and combat corruption and corrupt activities, the Prevention and Combating of Corrupt Activities Act 12 of 2004 lays out corrupt practices as seen in :sections 3 on general offences of corruption, section 10 on offences of receiving or offering of unauthorised gratification by or to party to an employment relationship, section 17 on offences relating to the acquisition of private interest in contract, agreement or investment of public body, section 19 on intentional interference with, hindering or obstructing of investigation of offence.¹³⁷

5.2.13 Sudan

The 1994 Penal Code was repealed and a new Penal Code was promulgated in 2003.¹³⁸ The Penal Code makes corruption a punishable offence (Chapter 13: offences by or relating to public servants) committed within Sudan. Acts of corruption include the following: public servants taking gratification in respect of official act; taking bribes or gratification in order to influence public servant; abetment by a public servant of offences mentioned in section 129; offering or giving bribes or gratification to a public servant; receiving or giving bribes or gratification by an agent or employee to show favour or disfavour; public servant obtaining valuable things without consideration from the person concerned in proceeding or business transacted by such public servant; offering or giving valuable things about consideration; third person profiting by bribery or gratification; public servant dishonestly receiving money or property not due; public servant disobeying direction of law with intent to cause injury or to save a person from punishment or property from forfeiture; public servant framing incorrect record or writing or mistranslating document with intent to cause injury or to save person from punishment or property from forfeiture; public servant in judicial proceeding making a report which he knows to be contrary to

(b) an employer...

(c) a member of Cabinet or of the Executive Council of a province...

(d) a person or body...

(e) any other person or body in accordance with section 9, but does not include a disclosure-

(i) in respect of which the employee concerned commits an offence by making that disclosure; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.

¹³⁷ Prevention and Combating of Corrupt Activities Act of 2004.

¹³⁸ Laws of the Sudan, The Penal Code 2003.

law; commitment for trial or confinement by person having authority who knows that he is acting contrary to law;¹³⁹ public servant intentionally omitting to arrest, or permitting or aiding escape from confinement or custody; public servant negligently omitting to arrest or permitting escape from confinement or custody; public servant willfully omitting to perform duty, if such omission causes danger; wrongful abandonment of duty by public servant; public servant engaging in trade; public servant engaging in trade; personating a public servant; and wearing dress or sing token used by public servant.¹⁴⁰

5.2.14 Swaziland

Adopted on 6 June 2006 in an effort to fight corruption in Swaziland, the PCA 3 of 2006 was enacted 'to investigate and punish corrupt activities'.¹⁴¹ Part III classifies corruption offences as follows: bribery; offences for giving assistance, with regard to contracts and tenders; corrupt transactions by or with public or private bodies; cheating of public revenue; offences in relation to auctions; corrupt transactions by or with an agent; conflict of interest; corrupt activities relating to law officers and public prosecutors; corrupt activities relating to witnesses during certain proceedings; offences in respect of corrupt activities relating to politicians; offences in respect of corrupt activities relating to sporting events; offences in respect of gambling games or games of chance; offences in respect of corrupt activities relating to judicial officers; possession of property without reasonable explanation; money laundering; and general offences of corruption.¹⁴²

5.2.15 Tanzania

In an effort to eradicate corruption, promote good governance, and protect the right to ownership and property, the United Republic of Tanzania enacted the Prevention and Combating of Corruption Act, 11 of 2007, which provides for the prevention of corruption, investigative processes and how corruption and corruption-related offences will be combatted.¹⁴³

Part III of the Act lays out corruption and related offences as follows: corrupt transactions; corrupt transactions in contracts; corrupt transactions in procurement; corrupt transactions in auctions; corrupt transactions in employment; bribery of foreign public official; use of documents

¹³⁹ *ibid* sections 128-139.

¹⁴⁰ *ibid* sections 140-147.

¹⁴¹ PCA 2006.

¹⁴² *ibid* sections 21-24, 34, 41-42.

¹⁴³ Prevention and Combating of Corruption Act of 2007.

intended to mislead principal; persons obtaining advantage; advantage received on behalf of accused; sexual favour or any other favours; public officials to give accounts of properties; possession of unexplained property; embezzlement and misappropriation; diversion; aiding and abetting; abuse of position; trading in influence; transfer of proceeds of corruption; presumption of corruption; false pretence to be an officer; offences of disclosure of identity, and duty to give information.¹⁴⁴

5.2.16 Uganda

The Penal Code of Uganda Cap 120 (1950) is the core of Uganda's legal framework in the fight against corruption. Division II of the Code provides for offences against the administration of lawful authority.¹⁴⁵ This Division is divided into two parts as follows Chapter IX (Corruption and the Abuse of Office); and Chapter X (Offences relating to the administration of justice). The Offences relating to corruption and abuse of office as outlined in Chapter IX are as follows: officers charged with administration of property of a special character; false claims by officials; abuse of office; false certificates by public officers; unauthorised administration of oaths; false assumption of authority; personating public officers; and threat of injury to persons employed in public service.¹⁴⁶

Another central part in Uganda's anti-corruption legislative framework is the ACA, 6 of 2009, adopted in 2009 to provide effective measures aimed at preventing corruption in the public and private sectors.¹⁴⁷ The Act repealed and replaced the PCA, of 1970, and consequently, amending the Penal Code Act of 1950 and the Leadership Code Act, of 2002.

Part II of the Act is dedicated to corruption. The Act criminalises corruption by outlining corruption as an offence in section 2. Other corruption offences as provided for in the Act are: corrupt transaction with agent; corruptly procuring tenders; bribery of a public official; diversion of public resources; payment of compensation to an aggrieved party; influence peddling; conflict of interest; loss of public property; abuse of office; sectarianism; nepotism; officers charged with administration of property of a special character; unauthorised administration of oaths; false assumption of authority; personating public officers; threat of injury to persons employed in the

¹⁴⁴ *ibid* sections 15-18, 20-31 and 33-36.

¹⁴⁵ Penal Code Act of 1950.

¹⁴⁶ *ibid* sections 85-93.

¹⁴⁷ ACA 2009.

public service; embezzlement; causing financial loss; fraudulent disposal of trusted property; false accounting by a public officer; fraudulent false accounting; false claims by officials; and false certificates by public officers.¹⁴⁸

Apart from the above-mentioned anti-corruption instruments, there are other legislative acts that prohibit certain corrupt practices.¹⁴⁹

5.2.17 **Zambia**

The ACA 3 of 2012 repealed and replaced the 2010 ACA, and is considered as the main anti-corruption law in Zambia, among many others.¹⁵⁰ It provides for the prevention of corruption, its detection, investigative methods, prosecution and punishment of corrupt practices and other corruption-related matters.

Part III of the Act provides for corrupt punishable practices as follows: corrupt practices by, or with, public officers; corrupt transactions by, or with, private bodies, abuse of authority of office; possession of unexplained property; corrupt transactions by, or with, agents; corruption of members of public or private bodies with regard to meetings; corruption of witness; corrupt practices by, or with, foreign public official; conflict of interest; gratification for giving assistance, with regard to contracts; gratification for procuring withdrawal of tender; obstruction of justice; gratification with regard to bidding at auction sale; coercion of investor; corrupt acquisition of public property and revenue; electoral corruption; concealment of property; dealing with, using and concealing gratification; concealment of offence; public officer's duty to report; and offences by body corporate or incorporate body.¹⁵¹

5.2.18 **Zimbabwe**

The PCA was adopted in 1986.¹⁵² The instrument was enacted to prevent corruption. It provides for corrupt practices in section 3, and further provides for investigating claims on matters relating to dishonesty and corruption.

¹⁴⁸ *ibid* sections 3-25.

¹⁴⁹ See also Code of Conduct and Ethics for the Uganda Public Service 2005, section 4.6.

¹⁵⁰ Other main anti-corruption laws include the Prohibition and Prevention of Money Laundering Act 14 of 2001 (as amended by Act 44 of 2010); Anti-Terrorism Act 21 of 2007; Forfeiture of Proceeds of Crime Act 1 of 2010; Public Interest Disclosure (Whistleblower Protection) Act 4 of 2010 and Financial Intelligence Act 46 of 2010.

¹⁵¹ *ibid* sections 19, 21-50.

¹⁵² PCA 34 of 1985 [Chapter 9:16].

Adopted in 2004, the Criminal Law (Codification and Reform) Act provides for criminal liability for corruption offences.¹⁵³ Chapter IX of the Act is dedicated to bribery and corruption. Section 170 criminalises bribery, together with other corrupt practices such as corruptly using a false document (section 171), corruptly concealing a transaction from a principal (section 172), corruptly concealing from a principal, a personal interest in a transaction (section 173), and criminal abuse of duty as a public officer (section 174).¹⁵⁴

5.3 Key aspects on national anti-corruption instruments in Africa

For states to establish instruments that address corruption related challenges, they first need to acknowledge its existence and impacts. In order for states to combat corruption, it is necessary for them to develop instruments centred on specific corruption related issues, that is to say, there are certain subject matters which are key in the fight against corruption and which an instrument needs to be developed specifically based on them. The discussion below outlines various instruments developed to address issues related to corruption.

5.3.1 Money laundering

Money laundering could be defined as the conversion of criminal income into assets that cannot be traced to the original crime.¹⁵⁵ This conversion often takes three phases: placement, layering and integration of funds.¹⁵⁶ The first phase involves the placements or placing of funds that have been derived from an illegal activity.¹⁵⁷ The second phase involves the layering of such funds by means of passing them through various financial institutions and jurisdiction with the intent to disguise their origin.¹⁵⁸ The third phase involves integrating the funds into the economy so that they appear legitimate.¹⁵⁹

¹⁵³ Criminal Law (Codification and Reform) Act 23 of 2004.

¹⁵⁴ *ibid* sections 171-174. Other corruption related provisions include obstruction of public official (section 178); impersonating police officer, peace officer or public official (section 179); deliberately supplying false information to public authority (section 180).

¹⁵⁵ Donato Masciandaro *et al*, *Black Finance: The Economics of Money Laundering* (Edward Elgar Publishing 2007) 109.

¹⁵⁶ Peter Reuter and Edwin M Truman, *Chasing Dirty Money: The Fight Against Money Laundering* (Peterson Institute 2004) 3.

¹⁵⁷ *ibid*.

¹⁵⁸ *ibid*.

¹⁵⁹ *ibid* 1 and 3.

Any loss or harm against the economy and social sphere is sufficient to paralyse a government, unfortunately, this is what laundering of money could do to a state. Money laundering undermines the private sector because the launderers often use front companies (a company often used to conceal illegal activities) to co-mingle their illicit activities and hide their ill-gotten gains with legitimate activities and gains.¹⁶⁰ Furthermore, money laundering ensures that a state loses control of its economic policies, it affects currencies and interest rates and diminishes a state's revenue, often resulting in high tax rates.¹⁶¹ The social effect of money laundering often involves empowering illegal activities such as drug smuggling, traffickers and other related crimes.¹⁶² As a transnational crime,¹⁶³ money laundering is capable of transferring economic power from market, government and citizens, to criminals, which in extreme cases may lead to take-over of a government.¹⁶⁴

To address money laundering-related issues, states should develop instruments that address this corrupt practice. An anti-money laundering instrument should, at least, contain provisions that: define the offence and its proceeds; outline how money laundering could be perpetrated directly or indirectly; lay out how the corrupt practice improperly enriches money launderers; how the corrupt practice could be perpetrated through concealment, disguising, removing, possessing, using or selling the illicit gain. The offence involves money, property or funds, often resulting in unexplained wealth.

At least 15 African States have developed instruments specifically on money laundering. The instruments discussed below exclude general instruments with money laundering provisions: Algerian Law No.05-01 of February, 2005 on the Prevention and Fight against Money Laundering and Financing of Terrorism; Botswana Banking (Anti-Money Laundering) Regulations; Ghanaian AMLA; Kenyan Proceeds of Crime and Anti-Money Laundering Act; the Money Laundering and Financing of Terrorism (Prevention) Act in Swaziland; Angolan Law No.34/11 of 12 December 2011 Anti-Money Laundering and Counterfeit Financing of Terrorism Law; the Money Laundering and Proceeds of Crime Act of Lesotho; Malawian Money Laundering, Proceeds of

¹⁶⁰ Masciandaro *et al* (n 153) 109.

¹⁶¹ John McDowell and Gary Novis, 'The Consequences of Money Laundering and Financial Crime' (2001) 6 *Economic Perspectives* 6, 7.

¹⁶² *ibid* 6.

¹⁶³ Jay S Albanese, *Transnational Crime: Oxford Bibliographies Online Research Guide* (Oxford University Press 2010) 17.

¹⁶⁴ McDowell and Novis (n 159) 8.

Serious Crime Terrorism Financing Act; the Mauritian Financial Intelligence and Anti-Money Laundering Act; in Nigeria, The Nigerian Money Laundering (Prohibition) as amended Act; Tanzanian AMLA and the Anti-Money Laundering and Proceeds of a Crime Act; Libyan Law No.2 of 1373 DP/2005 on Combating Money Laundering; Zambian Prohibition and Prevention of Money Laundering and the Prevention of Crime; and Ugandan AMLA.

5.3.2 Fraud

It is undeniable that the levels of fraud and corruption are high in Africa.¹⁶⁵ Often perceived as a criminal or unethical behaviour, fraud may generally be understood as-

an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage.¹⁶⁶

The effects of fraud are widespread, it may affect companies, civil society, and the economy.¹⁶⁷ Nigeria is known for fraud and scams.¹⁶⁸ Aware of this dilemma, the Nigerian government, and many other African States, have developed instruments in an effort to combat fraud and other related offences.¹⁶⁹ African States that have instruments specifically on fraud are as follows: Morocco, Moroccan Law No.13-83 on the Repression of Merchandise Fraud; Nigeria, the Nigerian Advanced Fee Fraud and Other Related Offences Act of 2006; and Kenya, the Kenyan Prevention of Fraud (Investments) Act 1 of 1977.

5.3.3 Public services, code of conduct and/or ethics

The public service is service that assists in the development of a state. It could be understood as service provided for by government to its people, directly through the public sector or indirectly through financing private provisions of services.¹⁷⁰ For a relationship between government and its people to be productive, those in the public service need to adhere to their employment standards,

¹⁶⁵ Maryam Hussain, *Corporate Fraud: The Human Factor* (Bloombury 2014) 118.

¹⁶⁶ Gregory A Pasco, *Criminal Financial Investigations: The Use of Forensic Accounting Techniques and Indirect Methods of Proof* (2nd edn, CRC Press 2012) 26.

¹⁶⁷ Simon Padgett, *Profiling the Fraudulent: Removing the Mask to Prevent and Detect Fraud* (John Wiley and Sons 2014) 38.

¹⁶⁸ Peter Jones and Peter Tickner, *Fraud and Corruption in Public Services* (Routledge 2016) 78.

¹⁶⁹ *ibid.*

¹⁷⁰ Brian Howieson and Julie Hodges, *Public and Third Sector Leadership: Experience Speaks* (Emerald Group Publishing 2014) 40.

ethics and code of conducts in the workplace in order to ensure that people are granted the services they are entitled to, together with providing their basic needs. Generally, ethics are rules and principles that aid an individual to determine a right and improper conduct.¹⁷¹ Though there is no fixed definition of code of conduct or code of ethics, it could be understood as guiding principles directed at helping professions fulfil their official duties honestly and with integrity.¹⁷² African States that have developed instruments on public services, ethics and/or code of conducts are: Botswana, the Botswana Public Service Act; Kenya, the Kenyan Public Officer Ethics Act, and the Ethics and Anti-Corruption Commission Act (EACCA); Nigeria, the Nigerian Code of Conduct Bureau and Tribunal Act, and Schedule V Code of Conduct for Public Officials of the Constitution of the Federal Republic of Nigeria, 1999; Tanzania, the Tanzanian Public Service Act; Uganda, the Ugandan Code of Conduct And Ethics for Uganda Public Service; South Africa, the South Africa Public Service Act; Ghana, the Ghanaian Public Service Commission Act; Zimbabwe, the Zimbabwean PSA (Amendment); and Rwanda, Rwandan Law No.22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service.

5.3.4 Disclosure of assets, income and liabilities

The declaration of assets, income and liabilities by public officials is important. It could be seen as a mechanism intended to deter public officials from using their office for their private gain whether financially or through any other benefit for themselves, family member or associate(s).¹⁷³ Additionally, declaration of assets is important because it:

1. Increases transparency and trust of citizens in public administration through the disclosure of information concerning assets of political leaders together with civil servants. When politicians and civil servants disclose their assets, income and liability, they are proving that they have nothing to hide;¹⁷⁴
2. Aids public institutions to detect and prevent conflict of interest among their employees, moreover, it allows institutions to resolve matters on conflict of interest, which sequentially promotes integrity within the institutions;¹⁷⁵ and

¹⁷¹ Alan Jefferis, *Residential, Design, Drafting, and Detailing* (12th edn, Cengage Learning 2013) 9.

¹⁷² Katalin Varga Kiss, 'The Interaction of Intercultural, Professional Communications and Corporate Issues at Financial Institutions' in Ilse Born-Lechleitner, Evelyne Glaser (eds), *Interkulturelle Kompetenz: vermitteln, erwerben, anwenden: Teaching, Acquiring and Applying Intercultural Competence* (LIT Verlag Münster, 2014) 299.

¹⁷³ World Bank, *Public Office, Private Interests: Accountability through Income and Asset Disclosure* (World Bank Publications 2012) 7.

¹⁷⁴ OECD, *Asset Declaration for Public Officials: A Tool to Prevent Corruption* (OECD Publishing 2011) 12.

¹⁷⁵ *ibid.*

3. Monitors wealth variations of politicians and civil servants, to deter them from misconducts and protect them from false accusations that may arise.¹⁷⁶

For these general aims on the declaration of assets, incomes and liabilities to be fulfilled, African States need to emphasise the importance of declaring one's assets. Moreover, states need to make such declaration an obligation which officials (and their spouses) need to fulfil. Declaring the disclosure of one's assets, income and liability leaves no room for corrupt officials or those who intend to engage in corrupt practices from hiding assets under names of their spouses or close relatives.¹⁷⁷ Examples of states with instruments on declaration of assets include Mauritius (Declaration of Assets Act 28 of 1991), Cameroon (Law No.2006/001 of 25 April 2006 Relating to the Declaration of assets and property) and Malawi (Public Officers (Declaration of Assets, Liabilities and Business Interests Act 22 of 2013)).

5.3.5 Public procurement

Public procurement assists government in spending public expenditure effectively.¹⁷⁸ Public procurement may be understood as an-

overall process of acquiring goods, civil works and services which includes all functions from the identification of needs, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration through the end of a service, contract or the useful life of an asset.¹⁷⁹

Corruption often manifests itself in public procurement processes.¹⁸⁰ In order to prevent such manifestation, monitor and address public procurement processes, together with deterring corrupt suppliers from bidding for or obtaining government contracts, states such as Malawi and Ghana have developed instruments that address public procurement processes and related issues.¹⁸¹ It is imperative for other African States to establish instruments that address issues of

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ See OECD, *OECD Public Governance Reviews Public Procurement Review of the Mexican Institute of Social Security Enhancing Efficiency and Integrity for Better Health Care* (OECD Publishing 2013) 15.

¹⁷⁹ Khi V Thai, 'International Public Procurement: Concept and Practice' in Khi V Thai (ed), *International Handbook of Public Procurement* (CRC Press 2008) 3.

¹⁸⁰ See OECD (n 176) 15.

¹⁸¹ In Malawi, the Malawian PPA 8 of 2003; in Ghana, the Ghanaian Public Procurement Authority Act 663 of 2003.

public procurement, its relationship with corruption and how public procurement processes could be used to combat corruption.

5.3.6 Public finance management

Public Finance Management (PFM) concerns how government manages its budgets, and how it can use accounting and auditing as tools that can be used to achieve accountability and transparency to enable civil society organisations understand how government collects money and what it does with the money collected.¹⁸² Additionally, PFM concerns a set of processes and procedures aimed at covering all aspects of expenditure management in government.¹⁸³ Key objective of PFM includes: ‘maintaining a sustainable fiscal position; the effective allocation of resources; and the efficient delivery of public goods and services.’¹⁸⁴

PFM is vulnerable to corruption because the latter diverts resources, particularly scares resources, away from the intended purpose, making it difficult or even impossible for government to achieve its agenda, affecting spending in sectors such as education and health and damaging the economic growth of a state. To prevent the realisation of these effects, states need to have a strong public financial system capable of detecting and providing remediation for corruption so that its (corruption) opportunities must be at a minimal.¹⁸⁵ The first step in establishing a public financial system would be to develop an instrument aimed at managing public finances. Examples of states that have developed such laws include South Africa (Public Financial Management Act 1 of 1999 as amended), Malawi (Public Financial Management Act 7 of 2003), Zimbabwe (Public Financial Management Act 11 of 2009) and Kenya (Public Management Act 18 of 2012).

5.3.7 Access to information or documents held by the State

It is imperative for government and civil society organisations to work together to advance a state. For civil society organisations to have confidence in their government, trust needs to be established between them and their government. The association between the two could be strengthened through adherence of the principles of good governance when government is transparent and

¹⁸² Marco Cangiano *et al*, ‘The Emerging Architecture of Public Financial Management’ in Marco Cangiano *et al* (eds), *Public Financial Management and Its Emerging Architecture* (International Monetary Fund 2013) 2.

¹⁸³ *ibid*.

¹⁸⁴ *ibid*.

¹⁸⁵ William Dorotinsky and Shilpa Pradhan, ‘Exploring Corruption in Public Financial Management’ in Edgardo J Campos and Sanjay Pradhan (ed), *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (World Bank Publications 2007) 267.

accountable in its operation. To achieve this, civil society organisations must be afforded the opportunity to access government-related information.

The relationship between corruption and access to information is most likely to exist: where the right to access to information is not realised, often resulting in public officials acting contrary to what is expected of them; subsequently leading to embezzlement, misappropriation and theft of public assets or funds.

When a state grants its people the right to access government related information and when it fulfills this right, it allows government officials to perform their duties diligently, effectively and transparently.¹⁸⁶ Moreover, it allows members of the society to monitor performance of government officials and allows them to hold government officials accountable in cases of inconsistencies or where there are discrepancies.¹⁸⁷ It is for these reasons that one might argue that the right to access of information and its realisation thereof, plays a significant role in the fight against corruption because it strengthens the principles of transparency and accountability.

The Angolan Law on Access to Documents held by Public Authorities Law 11/02 of 2002 gives emphasis to the Constitutional right or freedom of information as provided for in Article 40 of the Angolan Constitution.¹⁸⁸ As provided for by the law, information which could be accessed includes ‘non-classified documents, certificates or authenticated copies and personal documents concerning third parties, documents that originate or are held by institutions of the State that have government functions and bodies of public institutions as well as statutory and other entities that exercise public authority in terms of the law’.¹⁸⁹ The right to access to information is not absolute, it is a right subject to limitation. Article 5 of the Angolan Law on Access to Documents held by Public Authorities provides that documents which contain information ‘that may cause harm to the State’s internal or external security shall be subject to access interdiction to access under authorisation for a period of time strictly necessary.’

From the above discussion, it is obvious that the selected African States have, at least, one anti-corruption instrument. Many of these instruments have similar provisions while very few address specific corruption-related issues. With these instruments in place, it is ideal for

¹⁸⁶ See Nagy K Hanna, *Transforming Government and Building the Information Society: Challenges and Opportunities for the Developing World* (Springer Science and Business Media 2010) 34.

¹⁸⁷ *ibid.*

¹⁸⁸ Angola Constitution of 2010, Article 40.

¹⁸⁹ Law on Access to Documents held by Public Authorities Law 11/02 of 2002, Preamble and Article 3.

states to create institutions to give effect to these instruments. As demonstrated below, certain anti-corruption instruments created institutions solely to implement the instrument in question, while other institutions are created separate from an anti-corruption instrument.

5.4 National anti-corruption institutions in selected African States

In order to give effect to an existing anti-corruption instruments, an institution could be established. For instance, the Mauritian Independent Commission against Corruption (ICAC) was established to implement the PCA of 2002. In other instances, an institution could be created not to give effect to an instrument, but to address issues of concern. For example, the SCC of Cameroon was established to try individuals who misappropriate or commit any related offence, amounting to at least 50 000 000 CFA Francs (US\$ 100 00).¹⁹⁰ For these institutions to be effective, a legal system must be comprehensive, they must be independent in exercising their functions, and state resources must be made available. There are several anti-corruption institutions in Africa. The discussion below outlines the reasons for the creation of these institutions, their functions and achievements since their establishment.

5.4.1 Mauritius

As one of the least corrupt states in Africa, Mauritius has made efforts to foster anti-corruption strategies through the establishment of anti-corruption institutions.

5.4.1.1 The Independent Commission against Corruption

The Independent Commission Against Corruption (ICAC) is a corporate body established by the Mauritian PCA of 2002.¹⁹¹ It is a Commission administered and managed by a Board chaired by the Director-General of the Commission and 2 (two) other members.¹⁹² The functions of the Commission include the following: educating the public against corruption, enlisting and fostering public support in the fight against corruption; receiving and considering allegations concerning the commission of a corruption offence; detecting or investigating any act of corruption; and investigating any conduct of a public officials which, in the opinion of the Commission is

¹⁹⁰ Agbor (n 9).

¹⁹¹ PCA 5 of 2002.

¹⁹² *ibid* sections 19(1), (2) and (3).

connected with or conducive to corruption.¹⁹³ The Commission is expected to exercise ‘vigilance and superintendence over the integrity systems and practices in public bodies with a view to eliminating opportunities for corruption’.¹⁹⁴ The Commission is divided into four different divisions all under the control of the Director: the Corruption Investigation Division;¹⁹⁵ Corruption Prevention and Education Division;¹⁹⁶ Legal Division; and other Divisions as the Commission may set up.¹⁹⁷

Concerning matters of reporting acts of corruption, section 43 of the PCA provides that a person, without disclosing his identity may, in writing or orally, notify the Commission or an officer of the existence or possible existence of a corrupt conduct and the Commission shall take necessary steps to facilitate the notification. Moreover, the subsequent section of the PCA provides that any officer of a public body who suspects that a corrupt practice has been committed within or in relation to that public body, such an officer shall forthwith, write a report to the Commission for investigation.¹⁹⁸

It is important for witnesses or whistle-blowers to be protected after reporting any corrupt practice. Sections 48 and 49 of the PCA provide for the protection of informers and witnesses. Where the Commission receives information in confidence that a corruption practice has been committed, the information, together with the identity of the informer, needs to be obtained in confidence and all matters thereof shall be privileged. Additionally, when an informer discloses to the Board or any officer that a person, a public official or a corporate or public body is involved in a corrupt act, and at the time the disclosure is made, it is reasonably believed that the disclosed information could be true and thus warranting an investigation under the PCA, the person who made such a disclosure shall not incur civil or criminal liability as a result of such disclosure.¹⁹⁹

Since its establishment and as of 2010 the ICAC Mauritius ‘has conducted several in-depth studies of systems and procedures of public bodies, known as Corruption Prevention Reviews (CPR), for the purpose of recommending improvements or reforms that would prevent the

¹⁹³ *ibid* sections 20(1)(a-e).

¹⁹⁴ Independent Commission Against Corruption, ‘Open-Ended Intergovernmental Working Group on the Prevention of Corruption’.

¹⁹⁵ A body established to investigate corruption and money laundering offences.

¹⁹⁶ One of the primary purposes that led to the establishment of the Corruption Prevention and Education Division was to educate and empower community, to focus on the need of good government in the public and private sector.

¹⁹⁷ Section 28(1) of the Mauritius PCA of 2002.

¹⁹⁸ *ibid* section 44.

¹⁹⁹ *ibid* sections 48(1) and 49(1).

incidence of irregularities and corrupt acts'. Moreover, '27 CPRs have been conducted in 24 public bodies with 967 recommendations'.²⁰⁰ The recommendations include making changes in anti-corruption instruments to ensure 'corruption prevention safeguards are built in the systems.'²⁰¹

The Commission has also developed a Public Sector Anti-Corruption Framework (PSACF) 'to enable the requisite capacity to prevent and combat corruption in their sphere of operation'. The framework was created to enable public bodies to take ownership of building corruption resistance in their organisations.²⁰²

There are numerous corruption-related cases in which the Commission was either a complainant or respondent. For example, in the case against Vijay Raamsahye, the accused was prosecuted for bribing a public official, violating section 4(1)(b) and (2) of the PCA.²⁰³ During the course of the trial, the prosecutions' witness, Kim Fai, testified clearly and meticulously that the accused solicited MUR 5,000 (US\$ 151.06) from him.²⁰⁴ Kim Fai was a business director of Origin Investment Ltd at the time the offence was allegedly committed. After getting a development permit, he received a letter requesting him to call the Municipality of Curepipe where he was referred to Mr Ramsahye, the accused.²⁰⁵ On 8 May 2008, 'the accused visited his site and claimed that the building was not painted adequately; that the parking should be tarred, improvements which would have cost around MUR 40, 000 (equivalent to at least US\$ 1208.48) to MUR 50 000 (equivalent to at least US\$ 1510.61).²⁰⁶ The accused allegedly asked for MUR 5000 (equivalent to at least US\$ 151.06) from Fai to sign the clearance for his trade licence; Fai refused and the accused went away.'²⁰⁷ The accused was found guilty under the PCA. The prosecution proved the following: the accused was a public official under the PCA authorised to visit premises and give clearances; and the accused solicited a gratification amounting to MUR 5,000 (equivalent to at least US\$ 151.06) to sign the clearance for his trade licence.²⁰⁸

²⁰⁰ https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2011-August-22-24/Replies_to_CU_2011_45/20110523_Mauritius_English.pdf accessed 4 August 2017.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ *ICAC v Vijay Raamsahye*, Case No. 555/09 (2004), Intermediate Court (Criminal Division).

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

In the *ICAC v Shoshimala Jukhoop* case, the accused, Shoshimala Jukhoop was found guilty of money laundering.²⁰⁹ According to the prosecution, the accused owned a savings accounts where she declared that she was self-employed and her net monthly salary was MUR 3000/- (equivalent to at least US\$ 90.64).²¹⁰ The prosecution argued that various deposits were made in the period between 10 December 2008 and 20 March 2009 to the siblings of the accused.²¹¹ Mr S. Soogrim, an auctioneer involved in the sale of vegetables, paid one of the accused's brothers, Gaanshyman Jukhoop, approximately MUR 810 000 (equivalent to at least US\$ 24842.70) between December 2008 and January 2009.²¹² Avinash, who was among the brothers and sisters of the accused claimed that he made monthly deposits to the accused amounting to MUR 15,000 (equivalent to at least US\$ 453.18) for about a year and a half. The accused said that she waited for the money to accumulate before depositing it into a bank.²¹³ The accused was prosecuted under section 3(1)(a) and (b) of the Financial Intelligence and Anti-Money Laundering Act.²¹⁴ The Court held that for an accused to be found guilty in terms of the section, the following must be proved:

1. Transaction/possession: the fact that an accused had an account and that money was deposited/ withdrawn to/from the account constitutes a transaction under section 2 of the Act;²¹⁵
2. In part and directly: when proving this element, the prosecution explained (with reference to the case) that 'in part' referred 'to that the sum of money which can be inferred to be derived from the predicate crime, when excluding such sums obtained by Mrs Soshimala Jukhoop from her legitimate income and from the various financial aid that had allegedly been given to the said Soshimala Jukhoop's relatives'. The court held that '...although the accused received money from the sale of vegetables/as gifts from her relatives, the total amount she credited

²⁰⁹ *ICAC v Shoshimala Jukhoop*, Case No. 903/2011 (2014), Intermediate Court (Criminal Division).

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² *ibid.*

²¹³ *ibid.*

²¹⁴ 3. Money Laundering

(1) Any person who –

(a) engages in a transaction that involves property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime; or

(b) receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime,

where he suspects or has reasonable grounds for suspecting that the property is derived or realized, in whole or in part, directly or indirectly from any crime, shall commit an offence.

²¹⁵ *ICAC v Shoshimala Jukhoop*, Case No. 903/2011 (2014) Intermediate Court (Criminal Division).

to her account in the period from December 2008 to January 2009 remained unexplained’²¹⁶

3. Proceeds of crime: to prove this element, the prosecution argued that the amounts of money that the accused derived from her occupation as a planter were inconsistent with the amounts of money being deposited into her bank accounts;²¹⁷ and
4. Reasonable grounds for suspecting the property was derived in part, directly, from crime: the prosecution argued that the accused’s explanations as to the origin of the money were not plausible and not supported by evidence.²¹⁸

The accused was found guilty under the provisions of the PCA.

5.4.1.2 The Financial Intelligence Unit

The Financial Intelligence Unit (FIU) is an institution established by the Financial Intelligence and Anti-Money Laundering Act of 2002 and regulated by a Director.²¹⁹ Its functions are stipulated in section 10(1) of the Act.²²⁰ As to who may report to the Unit, the Act provides that banks, financial institutions, cash dealers and members of relevant professions or occupations, have an obligation to make a report to the FIU if they believe that a transaction is of a suspicious nature.²²¹ Additionally, when a report is to be made to the FIU, it must be in the form approved by the Unit and this form is laid out in section 15(2) of the Act.

5.4.1.3 The Office of the Ombudsman

The Office of the Ombudsman was created by Act 15 of 1969 and in accordance with Chapter IX of the Mauritian Constitution.²²² The office was created to investigate complaints made against the government and to redress any form of injustice if any, ‘sustained in consequence of any alleged maladministration that could have been committed by any public officer or authority in the exercise of administrative function’. Complaints made to the Ombudsman may include those made by members of the public, those made by anyone who was invited to do so by any Minister or any

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ *ibid.*

²¹⁹ Financial Intelligence and Anti-Money Laundering Act 6 of 2002.

²²⁰ *ibid.*

²²¹ *ibid* section 14(1).

²²² Ombudsman Act 15 of 1969.

member of the Assembly, or when he or she considers to desirably to do so on his or her own initiative.²²³

5.4.2 Malawi

The 2016 CPI ranked Malawi 120 out of 176 states. In addition to this CPI ranking, Malawi acknowledges the endemic nature of corruption within its borders and has made improvements in the establishment of key anti-corruption institutions.

5.4.2.1 The Anti-Corruption Bureau

Established by the corrupt Practices Act (CPA),²²⁴ the Anti-Corruption Bureau (Bureau) is a government department that consists of a Director, his deputy and other officers.²²⁵ The Bureau was established to exercise its functions and powers independently.²²⁶ In the exercise of its functions, the Bureau was established to perform the following functions: take necessary measures to prevent corruption in public and private bodies; receive and investigate complaints, reports or any other information on any allegation or suspected corrupt practice or offence in terms of the act; investigate any alleged or suspected offence under the CPA or under any written law; prosecute any offence under the CPA; investigate a public official's conduct if the Bureau is of the opinion that such conduct is connected with, conducive to corrupt practices and to report to the relevant authority; enquire into any matter relating to the exercise of its functions.²²⁷

A ground-breaking case by the Bureau took place in August 2006, involving four suspects linked to a Ministry of Education Science and Technology (MoEST) financial scam in which about MWK 187 million (US\$ 1.32 million) went missing through the awarding of dubious tender contracts.²²⁸ Although the case went on for a long time, the Bureau ensured the suspects were convicted and appropriately sentenced by the courts.²²⁹ The Bureau managed to save more that

²²³ *ibid* section 97.

²²⁴ CPA 18 of 1995.

²²⁵ *ibid*.

²²⁶ *ibid* section 4.

²²⁷ *ibid* section 10. In 2006, 358 cases were investigated and 232 were closed for reasons such as lack of evidence or complainants not being genuine. One of the challenges Malawi faces concerns its slow legal system and this is reflected in the number of prosecuted cases by the Bureau which were 245 but only 26 were concluded. In 2009, it was reported that the Bureau received at least 500 complaints, 100 were investigated and 20 recommended for prosecution. See United Nations, *African Governance Report II: 2009* (United Nations 2009) 75; Robert I Rotberg, *The Corruption Cure: How Citizens and Leaders Can Combat Graft* (Princeton University Press 2017) 166.

²²⁸ Francis Ng'ambi, *Malawi: Effective Delivery of Public Education Services* (African Minds 2011) 11.

²²⁹ *ibid*.

MWK 1.2 billion (US\$ 8.5 million) when it investigated corruption cases involving a British firm, ITS, that was supposed to ship notebooks to Malawi.²³⁰ The contract was cancelled and the former Minister of Education, Sam Mpasu, received a jail sentence.²³¹

5.4.2.2 The Financial Intelligence Unit

The Financial Intelligence Unit (FIU) is an autonomous central national agency established under Part II of the Money Laundering, Proceeds of Serious Crime Terrorist Financing Act of 2006.²³² Among other things, the Unit was created to ‘receive, analyse and assess reports of suspicious transactions by financial institutions’ and send the report to the ‘appropriate law enforcement authorities and, the supervisory authorities if, on the basis of its analysis and assessment, the Unit has determined that there is an element of money laundering or financing of terrorism’; it may also compile statistics and records and disseminate information, make recommendations arising out of any information received, issue guidelines to various financial institutions and even advise the Minister accordingly; to create training requirements and provide such training for any financial institutions in respect of transaction records and may even extend assistance to foreign jurisdictions.²³³

Since its establishment, the Unit has developed a Service Charter to promote openness and transparency in service delivery.²³⁴ The adoption of this Charter was part of the Public Sector Reform Programme to ensure that all government ministries, departments and agencies provide high level service delivery to the people.²³⁵

5.4.2.3 The Office of the Director of Public Procurement and Internal Procurement Committees and Specialised Procurement Units

The provisions on the establishment of the Office of the Director of Public Procurement are found in Part II of the PPA of 2003.²³⁶ The main responsibility of the office is to regulate and monitor public procurement in Malawi through, among other things, assisting in the development and enhancement of efficient and effective public procurement operations; developing standardised

²³⁰ *ibid.*

²³¹ *ibid.*

²³² Money Laundering, Proceeds of Serious Crime Terrorist Financing Act 11 of 2006.

²³³ *ibid* section 11.

²³⁴ <http://www.fiumalawi.gov.mw/FIU%20Malawi%20Service%20Charter.pdf> accessed 4 August 2017.

²³⁵ *ibid.*

²³⁶ PPA 8 of 2003.

and unified procurement regulations, instructions and bidding documents; promoting the development of professional procurement workforce; collecting data that relates to public procurement and monitoring performance by Government Ministries, departments and parastatal organisations; and periodically providing qualitative and quantitative assessment on procurement activities.²³⁷ According to section 8 of the PPA of 2003, Ministries, departments and parastatal organisations have Internal Procurement Committees created to ascertain the availability of funds to pay each procurement; open bids; examine, evaluate and compare bids and select a successful bidder; and also perform any other function prescribed by Regulations for the Committees.²³⁸

5.4.2.4 The National Audit Office and Public Accounts Committee

The National Audit Office is part of the office of the Auditor-General. The Public Audit Act of 2003²³⁹ grants the Auditor General responsibility over the office and lays out the general powers of the former to include, among other things, the examination of transactions, books and accounts and ‘other public records of every Ministry, statutory office, office, agency, board, commission and bureau of Government, and public funds received by a non-profit organisation.’²⁴⁰ Aside from the National Audit Office, the Public Accounts Committee of the National Assembly was created by Part IV of the Public Audit Act. Its main purpose is ‘to give effect to the principle of the accountability of Government to the public.’²⁴¹

5.4.2.5 The Office of the Ombudsman

Established by the Ombudsman Act 10 of 1996,²⁴² the functions and duties of the Office of the Ombudsman includes enquiring and investigating any complaints made to it on allegations of abuse of power, unfair treatment of any person by a public official in the ‘employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society’.²⁴³ Section 5 of the Act set out classes of complaints which can be made to the Office of the Ombudsman. Any person may make a complaint or request to the office in writing and in a manner determined by the Ombudsman.

²³⁷ *ibid* sections 4-5.

²³⁸ *ibid* section 8.

²³⁹ Public Audit Act 6 of 2003.

²⁴⁰ *ibid* section 6.

²⁴¹ *ibid* section 18.

²⁴² Ombudsman Act 10 of 1996.

²⁴³ *ibid* section 5.

Moreover, where the Ombudsman is of the opinion that the grounds on account to which the inquiry or investigation concerned is, vexatious or frivolous, the Ombudsman shall not require an enquiry into or investigate such instances.²⁴⁴

5.4.3 Kenya

Ranked 145th out of 176 states by TI, corruption is an undeniably huge problem in Kenya. The State has established numerous institutions in an effort to combat corruption.

5.4.3.1 The Office of the Ombudsman

Established by Article 59(4) of the Kenyan Constitution, the Office of the Ombudsman investigates any conduct related to state affairs, or any act or omission performed in public administration in any governmental sphere; and investigates complaints related to the abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair, or unresponsive official conduct.²⁴⁵ Since its establishment, several complaints have been made to and investigations conducted by the Ombudsman on corruption and corruption-related offences. For example, in November 2013, a Final Investigations Report by the Ombudsman-Kenya on alleged abuse of power by the Director of the Kenya Institute of Education, was made. The investigations centred on allegations of malpractices relating to the accommodation of the 2006 Book Evaluation Team.²⁴⁶

The Kenya Institute of Education (KIE) is a body created to organise workshops to evaluate textbooks for primary and secondary education.²⁴⁷ The complainants in this matter alleged that the Hotel Le Soleil was evaluated and subsequently granted a contract award to offer accommodation to the Institute's Book evaluation team.²⁴⁸ Unfortunately, the Director unilaterally moved the evaluation team to Sun "N" Sand Hotel and KES 1 million (equivalent to at least US\$ 9629.28) was paid.²⁴⁹ In defending her actions, she indicated that Sun N Sand Beach Hotel were also evaluated by the Tender committee and found suitable. One of the three issues that had to be addressed was whether the KIE Director, Dr Lyia Nzomo, acted contrary to procurement

²⁴⁴ *ibid* section 7.

²⁴⁵ <https://www.politicalkenyan.com/office-of-the-ombudsman-in-kenya/> accessed 29 March 2017.

²⁴⁶ Office of the Ombudsman, 'Final Investigation Report by the Ombudsman-Kenya on Alleged of Power by the Director, Kenya Institute of Education' (November 2013).

²⁴⁷ *ibid* 13.

²⁴⁸ *ibid* 15.

²⁴⁹ *ibid*.

regulations. It was found that Dr Nzomo unilaterally awarded the tender to the next bidder and thus, in breach of the Public Procurement and Disposal Act of 2005.²⁵⁰ Moreover, any changes or any decision or alterations regarding the awarding of tenders had to be made by the Tender Committee.²⁵¹ The unilateral actions of Dr Nzomo to take a decision amounted 'to usurping the role and powers of the Tender Committee', and as a result, Dr Nzomo was found guilty of misconduct.²⁵²

Another investigation was conducted following allegations of abuse of office, nepotism and favouritism by the Director of the KIE through the recruitment of relatives. In this case, it was alleged that 'Dr Lydia Nzomo, Director of KIE, used her position to employ her relatives and kinsmen without following procedure, thus abusing her office and destroying professionalism.'²⁵³ The investigation of this complaint centred on section 17 of the Public Officer Ethics Act of 2003.²⁵⁴ The office of the Ombudsman found that: Mr Charles Mwambia Anampiu, brother of Dr Lydia Nzomo, was a teacher at Maiathene Secondary School. No vacancy was advertised for the position suitable for Mr Anampiu at the time.²⁵⁵ Mr Anampiu presumed that there was a vacancy before he applied for a transfer and when asked whether he went for interviews, he indicated that he did not undergo any interview process.²⁵⁶ As to the matter of transferring staff, it was revealed that the Teachers Service Commission (TSC) does not transfer its staff to other ministries, departments or agencies.²⁵⁷ This meant that the transfer of Mr Anampiu from the secondary school to the KIE was not conducted by the TSC. In fact, it was proved that it was Dr Nzomo who wrote to the TSC for the removal of Mr Anampiu's and payroll transfer to the KIE, which led to Mr Anampiu employment as a Curriculum Developer at KIE.²⁵⁸

Another finding on this investigation concerned one Mrs Mercy Kaembe Mwangi, sister of Dr Nzomo. Kaembe indicated that she walked into KIE and was later employed as a casual worker in the Catering Section.²⁵⁹ She submitted a handwritten application letter which the Senior

²⁵⁰ *ibid* 15 and 21.

²⁵¹ *ibid* 21.

²⁵² *ibid*.

²⁵³ *ibid* 24.

²⁵⁴ *ibid* 25.

²⁵⁵ *ibid* 26.

²⁵⁶ *ibid*.

²⁵⁷ *ibid*.

²⁵⁸ *ibid* 24-27.

²⁵⁹ *ibid* 27.

Administrator Officer approving her application for employment.²⁶⁰ She was informed that her application will be approved subject to the submission of her CPE Certificate.²⁶¹ Similar to Mr Anampiu above, Mrs Mwangi's employment was not advertised yet she was employed.²⁶²

Another individual who was unlawfully employed was Patrick Muriuki Mung'ania. He was once a mechanic in Nairobi, and happened to share the same District of origin as Dr Nzomo.²⁶³ In October 2010, he applied for employment as a subordinate staff, however, he was offered a senior subordinate staff position whereas he applied for a subordinate staff position.²⁶⁴ Similar to the above-mentioned individuals, the position was not advertised and his appointment was not procedural.

After thoroughly investigating the appointment of numerous individuals and allegations of abuse of office power through employment of relatives, it was found that:

- a. Dr Nzomo 'selectively and procedurally recruited two of her siblings...without due regard to the provisions relating to conflict of interest in the recruitment process in the Public Service',²⁶⁵ and
- b. Considering the allegation by Dr Nzomo who alleged that the transfer of staff members was done by the TSC, the Commission on Administrative Justice confirmed that TSC does not transfer staff to public institutions, and that in fact she wrote letters to the TSC requesting the removal of some TSC members.²⁶⁶

5.4.3.2 The Ethics and Anti-Corruption Commission

The Ethics and Anti-Corruption Commission (EACC) was established under section 3 of the Ethics and Anti-Corruption Commission Act of 2011 (EACCA). In performing its mandate, the Commission adheres to Article 10 of the Kenyan Constitution, accommodates the diversity of

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

²⁶² *ibid.*

²⁶³ *ibid.*

²⁶⁴ *ibid* 27-28.

²⁶⁵ *ibid* 29-31.

²⁶⁶ *ibid.*

Kenyan people, observes impartiality and gender equity, together with the rules of natural justice.²⁶⁷

The functions of the Commission includes: developing and promoting standards and best practices in integrity and anti-corruption and developing a code of ethics; receiving complaints concerning public officers in breach of the code of ethics; investigating and recommending the Director of Public Prosecution to prosecute any acts of corruption or violation of the code of ethics or any act prescribed by the EACA or any law; recommending appropriate actions to be taken against state or public officials who allegedly engaged in unethical conducts; and overseeing that public officials adhere to the prescribed code of ethics.²⁶⁸

In performing its function, the powers of the Commission are stipulated in Article 253 of the Kenyan Constitution and in the EACA. Its powers include to ‘acquire, hold, charge and dispose movable and immovable property’; perform any act or do anything as provided for by the Constitution, written law or the EACA;²⁶⁹ educate and create awareness on any matters within its mandate; take preventative measures against unethical and corrupt practices; initiate investigations or conduct investigations after a complaint has been made; and conduct mediation, conciliation and negotiation.²⁷⁰

In its 2015/2016 report, the Commission received a total of 7,929 complaints and allegations on corruption, economic crimes and unethical behaviour. Moreover, there were 238 reports made on ethical breaches that involved state and public officials. From the 7,929 complaints, 3856 were investigated by the Commission, 2568 were advised on the Right Authority, 633 were referred through letters, 215 were referred through IPCRM (Integrated Public Complaints Referral Mechanism), 542 were closed and the remaining 115 were awaiting more information, or were unprocessed or consolidated. Out of the complaints reported, 33 percent were bribery related, representing the highest complaints in terms of categorisation, followed by cases of embezzlement/misappropriation of public funds representing 24 percent, abuse of office with 11 percent, while public procurement irregularities stood at 10 percent.²⁷¹

²⁶⁷ EACA of 2011, section 12.

²⁶⁸ *ibid* section 11(1)

²⁶⁹ *ibid* section 3.

²⁷⁰ *ibid* section 13.

²⁷¹ Ethics and Anti-Corruption Commission, ‘Report of Activities and Financial Statements for the Financial Year 2015/2016 for the Ethics and Anti-Corruption Commission (EACC)’.

Since its creation, the Commission has been able to recover assets in cash estimated at KES 295,582,155.00 (equivalent to at least US\$ 2846243.33) and the value of recovered immovable assets estimated at KES 700,582,155.00 (equivalent to at least US\$ 6746101.73).²⁷² Furthermore, the Commission has also taken various measures in an effort to enforce Chapter Six of the Constitution. The measures include investigating ethical breaches. Out of the 147 investigations initiated on Chapter 6 violations, 56 were concluded. Some complaints were referred to the relevant authorities after considering the nature of the complaints; and monitoring declarations of incomes, assets and liabilities of state and public officials. Moreover, the Commission developed the Leadership and Integrity Regulations which was adopted by Parliament in February 2016. The body also developed guidelines to assist in facilitating officials to comply with Chapter 6 of the Constitution and the Leadership and Integrity Act 19 of 2012.²⁷³

Furthermore, in an effort to strengthen laws aimed at combating corruption, the National Ethics and Anti-Corruption Policy was developed and is in the process of dissemination to the public.

5.4.3.3 The Public Procurement Oversight Authority, Public Procurement Administrative Review Board

The Public Procurement Oversight Authority (PPOA) is a corporate body established by section 8 of the Public Procurement and Asset Disposal Act of 2015.²⁷⁴ Its functions include the following: monitoring, assessing and reviewing the public procurement and asset disposal system; monitoring the public procurement system and reporting on its overall function; monitoring procurement information which is classified; and monitoring the implementation of the preference and reservation schemes by procuring entities and investigating complaints on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public²⁷⁵

The Public Procurement Administrative Review Board is an independent board created to review, hear and determine tendering and asset disposal disputes, and perform any function set out by the Public Procurement and Asset Disposal Act or any other written law.²⁷⁶

²⁷² *ibid.*

²⁷³ *ibid* 17-19, 53, 58, 62-67 and 69.

²⁷⁴ Public Procurement and Asset Disposal Act 33 of 2015.

²⁷⁵ *ibid* sections 8 and 9.

²⁷⁶ *ibid* sections 27(1) and 28(1).

In its 2013-2018 Strategic Plan, the PPOA laid out the achievements by the authority which include the following: conducting pilot assessment on the procurement system of the state; promoting competition and to ensure that competitors are fairly treated; developing, revising and distributing standard tender documents, procurement manuals, guidelines and standard procurement formats; ensuring that stakeholders participate in public procurement policy initiation through sectoral, regional and national stakeholders forum; and providing written directives to Procuring Entities and stakeholders concerning conduct of procurement and disposal proceedings and disseminating information through PPOA circulars.²⁷⁷

5.4.3.4 The Judicial Service Commission

The main function of the Justice Service Commission is to ‘promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.’²⁷⁸

5.4.3.5 The Anti-Corruption Advisory Board

Established by section 16 of the Anti-Corruption and Economic Crimes Act of 2003, the board is an unincorporated body which is not subject to directions or control of anyone or any authority but accountable only to Parliament.²⁷⁹ The Board was established to advise the Independent EACC on the exercise of its powers and how it should perform its functions.²⁸⁰

5.4.3.6 The Office of the Auditor-General

The Office of the Auditor-General (OAG) is a corporate body established by section 4(1) of the Public Audit Act 34 of 2015. It is not subject to direction or control by anyone or authority, and when performing its functions it is required to do so independently, ‘impartially, without fear, favour or prejudice’.²⁸¹ In addition to the functions laid down in Article 29 of the Kenyan Constitution, the functions of the Office include the following: giving ‘assurance on the effectiveness of internal controls, risk management and overall governance at national and county government; undertake audit activities in state organs and public entities to confirm whether or not

²⁷⁷ Public Procurement Oversight Authority, ‘Public Procurement Oversight Authority Strategic Plan 2013-2018’, 17.

²⁷⁸ <http://www.judiciary.go.ke/portal/page/jsc-overview> accessed 29 March 2017.

²⁷⁹ Anti-Corruption and Economic Crimes Act 3 of 2003.

²⁸⁰ *ibid* sections 16(1), 17 and 18.

²⁸¹ Public Audit Act of 2015, sections 4(1) and 10.

public money has been applied lawfully and in an effective way'; and to ensure that 'public money has been used and applied to the purposes intended and that the expenditure conforms to the authority of such expenditure'.²⁸²

5.4.3.7 The Audit Advisory Board

The Audit Advisory Board is an unincorporated body established by Part III of the Public Audit Act of 2015 to advise the Auditor-General on the exercise of his/her power and performance of constitutional duties,²⁸³ advise the Auditor-General on developing and reviewing organisational development issues, budget estimates and plans of the Office of the Auditor-General, or on any matter which the Auditor-General may refer to the Board.²⁸⁴

5.4.3.8 The Financial Reporting Centre, Anti-Money Laundering Advisory Board and Asset Recovery Agency

The Centre is a corporate body established to assist in identifying proceeds of crime and to combat money laundering.²⁸⁵ The functions of the Centre are as follows: receiving and reporting of unusual or suspicious transactions made by a reporting institution; and if the Director has reasonable grounds to suspect that the transaction is suspicious, reports received are sent to competent enforcement authorities, the intelligence agency or appropriate supervisory body to further handle the matter.²⁸⁶

The Anti-Money Laundering Advisory Board was established under section 49 of the Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 primarily to advise the Director in the performance of his functions and exercise of his powers.

The Asset Recovery Agency is a semi-autonomous body under the OAG, established by section 53 of the Proceeds of Crime and Anti-Money Laundering Act of 2009. The primary purpose of the agency is to implement provisions of Parts VII to XII inclusive and to exercise powers set out in the provisions.²⁸⁷

²⁸² *ibid* section 7(1).

²⁸³ Public Audit Act of 2015.

²⁸⁴ *ibid* sections 25(1) and 27.

²⁸⁵ <http://frc.go.ke/about-frc/background.html> accessed 4 August 2017.

²⁸⁶ Proceeds of Crime and Anti-Money Laundering Act 9 of 2009, sections 21, 23 and 2 (a) and (b).

²⁸⁷ *ibid* sections 53 and 54.

5.4.3.9 The Independent Policing Oversight Authority

The Independent Policing Oversight Authority (Authority) is a corporate body governed by the Independent Policing Oversight Authority established under the Independent Policing Oversight Authority Act of 2011 (IPOA).²⁸⁸ The Authority is not subject to any person, office or authority and was established by Part II of the IPOA.²⁸⁹ In addition to its adherence to the principles of impartiality and rules of natural justice when exercising its powers, the Authority was established to 'hold the Police accountable to the public in the performance of their functions; give effect to Article 244 of the Constitution...; and ensure independent oversight of the handling of complains by the Service'.²⁹⁰ The functions of the Authority include: investigating complaints related to disciplinary or criminal offences committed by any member of the service; receiving and investigating complaints by members of the service; monitoring and investigating policing operations that affect members of the public; conducting inspections of Police premises; and reviewing patterns of police misconduct and the functioning of the internal disciplinary process.²⁹¹

5.4.4 Swaziland

The Anti-Corruption Commission (ACC) is an independent body established by section 3 of the PCA of 2006. Its functions include: examining practices and procedures of public and private bodies in order to facilitate the discovery of corrupt practices; advising private and public bodies on ways and how to prevent corrupt practices from being perpetrated, advise on ways in which methods of work or procedures could be changed in order to effectively perform duties; 'disseminating information on evil and dangerous effects of corrupt practices on the society; enlisting and fostering public support against corrupt practices'; and receiving and investigating complaints of alleged or suspected corrupt practices.²⁹²

Since 2008, a total of 18 cases have been submitted to the Director of Public Prosecution by the ACC. Out of the 18, there were 2 convictions, 2 closed cases and 8 are in various stages within the court system,²⁹³ and the remaining 6 unknown. The ACC, in accordance with section 10(1)(iii) and (iv) of the PCA has a mandate to educate the public about corruption and its effects

²⁸⁸ IPOA 35 of 2011, section 3.

²⁸⁹ *ibid* section 4.

²⁹⁰ *ibid* section 5.

²⁹¹ *ibid* sections 6 and 8.

²⁹² PCA 3 of 2006, sections 3 and 10(1).

²⁹³ Swaziland Anti-Corruption Commission. 'Seek out and eradication through professional and effective investigation' (Swaziland Anti-Corruption Commission, 11 May 2008).

and foster support from the public to fight corruption. The ACC has taken the initiative to educate public and private institutions, communities, media and schools. Additionally, in the 2009-2013 Government Programme of Action, it was emphasised that fraud and corruption should be incorporated in the curriculum of primary schools to ensure that children learn, at the earliest possible age, about corruption and fraud. The National Curriculum Centre is a statutory body tasked with initiating, coordinating, monitoring and evaluating issues taught in schools.²⁹⁴

5.4.5 Tanzania

As one of the fastest growing economies in Africa,²⁹⁵ Tanzania suffers from corruption. The Tanzanian government has battled with corruption and anti-corruption efforts have been effected in an attempt to combat corruption as follows:

5.4.5.1 The Prevention and Combating of Corruption Bureau

The Prevention and Combating of Corruption Bureau (Bureau) was created by section 5(1) of the Prevention and Combating of Corruption Act of 2007²⁹⁶ and its functions include: examining and advising the ‘practices and procedures of public, parastatal and private organisations, in order to facilitate the detection of corruption or prevent corruption and secure the revision of methods of work or procedure which appear to add to the efficiency and transparency of the institution concerned’; enlisting and fostering public support in combating corrupt practices; cooperating and collaborating with international institutions and investigating and prosecuting offences involving corruption.²⁹⁷

In 2007, the Bureau introduced the procedure to be an Anti-Corruption Club.²⁹⁸ The purpose of this was to ensure that community members and the youth are involved in preventing and fighting corruption, create awareness on the impact of corruption in society and build resilience to deny the existence of corruption.²⁹⁹ As from 2016, the Bureau had reportedly had 125 convictions, 152 acquittals and, 17 cases withdrawn.³⁰⁰

²⁹⁴ www.acc.gov.sz/index.php/public-education accessed 22 April 2017.

²⁹⁵ World Bank, ‘The World Bank in Tanzania’ (*World Bank*, 5 October 2017).

²⁹⁶ Tanzania Prevention and Combating of Corruption Act Chapter 329 of 2007.

²⁹⁷ *ibid* section 7.

²⁹⁸ <http://www.pccb.go.tz/2017/04/19/klabu-za-wapinga-rushwa/> accessed 4 August 2017.

²⁹⁹ www.pccb.go.tz/index.php/prevention/community-education/youth-corner accessed 22 April 2017.

³⁰⁰ Faustine Kapama, ‘Tanzania: PCCB Saves 9 Billion/-From Foiled Bribery Attempts’ (*AllAfrica*, 9 August 2016).

5.4.5.2 The Ethics Secretariat

The Ethics Secretariat is an independent department established under Article 132 of the Constitution of the United Republic of Tanzania of 1977.³⁰¹ Its mandate includes implementing the Public Leadership Code of Ethics (PLCE) Act 13 of 1995 as amended by Act 5 of 2001; receiving allegations against any public officials; initiating and conducting investigations on breach of ethics under the PLCE; give authorisation to any officer of the Secretariat upon receiving a warrant issued by a Magistrate; and investigate any bank account of public leaders.³⁰²

In its 2012/2013 report, it was revealed that the Ethics Secretariat received 114 complaints on breaches of PLCE and only 28 of the complaints were investigated/analysed.³⁰³ In the 2012/13 financial year, the Ethics Secretariat established the Eastern Zone Office in an effort to enhance accessibility of its services to the Coast.³⁰⁴ Moreover, it created its website to enable public officials to access the Assets and Liability Declaration Forms.³⁰⁵ Complaints handling mechanisms were also initiated, together with numerous programmes aimed at promoting ethics.³⁰⁶ Other key achievements include: amending the PLCE; improving the process and procedure of complaints against public officials; strengthening and monitoring compliance mechanisms of the PLCE; and developing and implementing ethics promotion programmes.³⁰⁷

5.4.5.3 The Public Procurement Regulatory Authority

The Public Procurement Regulatory Authority (PPRA) is an independent body created by the PPA and primarily established to ensure that PPA provisions are adhered to.³⁰⁸ The PPRA must ensure that money procurement standards and practices are fair, competitive, transparent and non-discriminatory; it must set public procurement standards; monitor compliance of procuring entities; and 'build, in collaboration with Public Procurement Policy Division and other relevant professional bodies, procurement capacity in the United Republic'.³⁰⁹

In compliance with section 9(f) of the PPA, the PPRA intends (within a determinable period of time) to develop an ICT-based Information System which collects, stores and shares

³⁰¹ Constitution of the United Republic of Tanzania of 1977, Article 132.

³⁰² PLCE Act 13 of 1995.

³⁰³ The United Republic of Tanzania, President's Office, Ethics Secretariat 'Annual Performance Report 2012/13', 5.

³⁰⁴ *ibid.*

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

³⁰⁷ *ibid.*

³⁰⁸ PPA 21 of 2004.

³⁰⁹ *ibid* section 8.

public procurement information within stakeholders. One of the systems developed so far is the Procurement Management Information System created to facilitate the exchange of information between the PPRA and other Procuring Entities.³¹⁰

In order to check and monitor procurement activities within public entities, the PPRA also developed a system to provide a checklist so that internal auditors within public entities are able to monitor whether the PPA have been complied with.³¹¹

5.4.5.4 The Commission for Human Rights and Good Governance

The Commission for Human Rights and Good Governance (Commission) was established by the Commission for Human Rights and Governance Act 7 of 2001.³¹² Section 6 of the Act sets out the functions of the Commission which include, among others: promoting the protection and preservation of human rights and duties of the society; receiving allegations and complaints of human rights violations; conducting inquiries on human rights violations and contravention of the principles of administrative justice; and conducting research on human rights, administrative justice and good governance issues and educating people on such issues.³¹³

5.4.5.5 The Controller and Auditor-General

The National Audit Office of Tanzania is a supreme audit institution headed by the Controller and Auditor-General (CAG).³¹⁴ The primary functions of the CAG include the following: enquire into, audit and examine accounts submitted to him;³¹⁵ 'examine, inquire into, audit reports on the accounts of ministers, independent departments of government, agencies and their accounting officers, local government authorities and their accounting officers, all persons entrusted with the collection, receipt, custody, issue, sale, transfer or delivery of any stamps, securities, stores or other public properties, and all public authorities and other bodies.'³¹⁶

³¹⁰ <https://www.ppra.go.tz/index.php/2012-11-29-10-53-22/pmis> accessed 22 April 2017.

³¹¹ <https://www.ppra.go.tz/index.php/2012-11-29-10-53-22/checking-monitoring> accessed 22 April 2017.

³¹² Commission for Human Rights and Governance Act 7 of 2001.

³¹³ *ibid.*

³¹⁴ Public Audit Act 11 of 2008.

³¹⁵ *ibid* section 10.

³¹⁶ *ibid* section 9.

5.4.5.6 The Financial Intelligence Unit and the National Committee

Section 4(1) of the AMLA 12 of 2006 established the FIU in order to receive, analyse and disseminate any suspicious transaction reports and any other information regarding potential money laundering or terrorist financing.³¹⁷ In addition to the FIU, the Tanzanian government established the National Multi-Disciplinary Committee on Anti-Money Laundering, under section 8(1) of the AMLA to perform the following functions: formulate, assess and improve the effectiveness of policies and measures to combat money laundering; advise the Government on legislative, regulatory and policy reforms in respect of anti-money laundering and combating predicate offences; and advise Government in relation to such other matters relating to anti-money laundering and predicate offences'.³¹⁸

5.4.5.7 The Public Service Commission

The PSC was established by section 9(1) of the PSA of 2002.³¹⁹ Section 10(1) lays down the functions of the Commission and they include: assisting the President on matters relating to service; issuing guidance, monitoring and to conduct merit-based recruitment in the public service; receiving and acting on appeals from the decisions of other delegates and disciplinary authority; and facilitating, monitoring and evaluating the performance of public officials in the public service to secure results-oriented management.³²⁰

5.4.6 Lesotho

Ranked 83rd out of 176 states by TI,³²¹ Lesotho has anti-corruption mechanisms in place, thus making it one of few African states with active political will to combat corruption.

5.4.6.1 The Public Accounts Committee

The Public Accounts Committee was established to monitor 'financial statements and accounts of all government ministries and departments, executive organs of state, courts, authorities and commissions established by the Constitution'.³²²

³¹⁷ AMLA 12 of 2006, sections 4(2) and 6.

³¹⁸ *ibid* section 9.

³¹⁹ PSA of 2002, section 9(1).

³²⁰ *ibid* section 10(1).

³²¹ Transparency International (n 11).

³²² http://www.parliament.ls/assembly/index.php?option=com_content&view=article&id=56&Itemid=57&limitstart=4 accessed 5 April 2017.

5.4.6.2 The Ethics, Code of Conduct, Immunities and Privileges Committee

The Ethics, Code of Conduct, Immunities and Privileges Committee was created primarily to continuously 'review the Code of Ethics and Conduct for members of Parliament; ensure that members disclose and register their assets, gifts and sources of income; disclose and register their assets, gifts and source of income with the Clerk; and investigate and consider complaints of alleged failure to fully disclose assets, gifts and sources of income, alleged corrupt practices, conducts of abuse of power.'³²³

5.4.6.3 The Office of the Auditor-General

The sole purpose of the Office of the Auditor General is to audit records of the Government of Lesotho. Its powers are set out in section 117 of the Constitution of Lesotho, the Audit Act of 1973 and the Statutory Bodies Act of 1973.

5.4.6.4 The Office of the Ombudsman

The Office of the Ombudsman was created by the Ombudsman Act 9 of 1996.³²⁴ Its functions are set out in section 135 of the Constitution of Lesotho. Section 9 of the Ombudsman Act sets out the powers of the Office of the Ombudsman as follows: initiate investigations after a request or complaint was made and to hold and conduct a formal enquiry on the matter; exclude a person from the enquiry proceedings if their presence is not desirable; and adopt procedures necessary for the proceedings.

5.4.6.5 The Directorate on Corruption and Economic Offences

The Prevention of Corruption and Economic Offences Amendment Act 8 of 2006 permitted the continuation of the Directorate on Corruption and Economic Offences (DCEO) established under the Prevention of Corruption and Economic Offences Act 5 of 1999.³²⁵ The latter sets out the functions and powers of the Directorate to include: receiving and investigating complaints alleging corruption; investigating any allegation or any suspected contravention of the Act; if the Directorate is of the opinion that a person's conduct could be connected to corruption, he/she may

³²³ *ibid.*

³²⁴ Ombudsman Act 9 of 1996.

³²⁵ Prevention of Corruption and Economic Offences Act 8 of 2006.

initiate an investigation; educate members of the public against evils of corruption; and undertake measure to prevent corruption and economic offences.³²⁶

5.4.6.6 The Procurement Unit

The Public Procurement Regulations of 2007 established the Procurement Unit and its duties are founded in section 4.³²⁷ The Regulations also established the Procurement Policy and Advice Division mainly responsible for developing the public procurement system ‘by securing legality, accountability, efficiency, transparency and overall value of money in the implementation of public procurement and by stimulating a competitive environment with equality of treatment among bidders in the public procurement process, while taking due regard of the Government’s policy and aims with respect to local preference schemes.’³²⁸

5.4.7 Zambia

The 2016 CPI of TI ranked Zambia 87th out of 176 states.³²⁹ Even though one may argue that there has been no significant improvement by the Zambian government in the fight against corruption, the Zambian government has taken various steps to curb corruption as follows:

5.4.7.1 The Anti-Corruption Commission

Section 4(1) of the ACA 3 of 2012 provides for the continuation of the Anti-Corruption Commission (ACC), established under Act 38 of 2010. The function of the ACC includes the following: examining practices and procedures of public and private bodies as well as advising them on how to prevent corrupt practices, and how they should change their methods of work and procedures compatible with effective performance of their duties; disseminating information on the evil and dangerous effects of corrupt practices on society; enlisting and fostering public confidence; creating committees to monitor corruption within institutions; and initiating, receiving and investigating complaints on alleged or suspected corrupt practices.³³⁰

The ACC set up created a Corruption Vulnerability Assessment (CVA) Toolkit aimed at analysing service delivery of various institutions vulnerable to corruption and make

³²⁶ Prevention of Corruption and Economic Offences Act 5 of 1999, section 6.

³²⁷ Public Procurement Regulations 1 of 2007.

³²⁸ *ibid* section 6(1).

³²⁹ Transparency International (n 11).

³³⁰ ACA 3 of 2012, section 6(1).

recommendations aimed at addressing identified vulnerable areas.³³¹ Since its establishment, 6 (six) CVA have been conducted in the Ministry of Education, National Road Fund Agency, Lusaka City Council, Kitwe City Council, Medical Stores and Zambia Police Service.³³² In addition to the establishment of the CVA, the Commission also established a Task Force on Corruption to investigate corruption-related cases.³³³ The creation of this Task Force has led to numerous successful investigations and prosecutions.³³⁴ The Commission together with the Curriculum Development Centre, also developed a Civic Education Syllabus for schools in Zambia in order to correct civic attitudes, develop appropriate youth values and morals. The syllabus was introduced in 2006 and covers corruption-related issues, together with human rights and democracy.³³⁵

5.4.7.2 The Financial Intelligence Centre

The FIC was established by the FIC Act 46 of 2010, repealed and replaced by the FIC Amendment Act 4 of 2016.³³⁶ Under the amendment Act, the main function of the FIC is to receive, request for, analyse and disseminate suspicious transaction reports. In its 2015 Trends Report it was revealed that 767 suspicious transaction reports were received by the FIC, many from the banking sector, three requests from foreign jurisdictions and disseminated reports.³³⁷

5.4.7.3 The Public Procurement Authority

Section 5(1) of the PPA provides for the continuation of the Zambia National Tender Board, established by the repealed Zambia National Tender Board Act of 1982, and to have the board be re-named the Zambia Public Procurement Authority (ZPPA).³³⁸ The PPA grants the ZPPA powers and functions centred on providing 'policy, regulation, standard setting, compliance and performance monitoring, professional development and information management and dissemination in the field of public procurement.'³³⁹ These powers and functions include, among others: regulating procurement of goods, works and services; monitoring compliance with the PPA; issuing standard bidding and other procurement documents; advising government and

³³¹ <http://www.acc.gov.zm/portfolio/time-is-running-out/> accessed 4 August 2017.

³³² *ibid.*

³³³ <http://www.acc.gov.zm/portfolio/establishment-of-task-force-on-corruption/> accessed 4 August 2017.

³³⁴ *ibid.*

³³⁵ *ibid.*

³³⁶ FIC (Amendment) Act 4 of 2016.

³³⁷ FIC, 'Trends Report-2015' (2015).

³³⁸ PPA 12 of 2008.

³³⁹ *ibid* section 6(1).

procuring entities on procurement policy and other related matters; monitoring execution of contracts concluded by procuring entities; and coordinating and promoting capacity-building and professional development in the public procurement system.³⁴⁰

The ZPPA created a Code of Conduct for Procurement Officers, Public Officers, Bidders and Suppliers.³⁴¹ The main purpose of the Code is for it to serve as a guideline to bidders, public officers and suppliers in public procurement matters.³⁴² The Code sets out a framework in which public officials, particularly those in public procurement, bidders and suppliers must work, moreover, the Code assists public officials in making public procurement decisions and how they should carry their functions and responsibilities in such matters.

Other achievements of the ZPPA include the permanent debarment of Pyramid Works Limited and its Director, Mr Alex Chizyuka, from participating in public procurement in Zambia;³⁴³ the creation of an e-procurement system referred to as the Electronic-Government Procurement (E-GP) system allowing government to use information and communication technology to conduct its procurement relationship with suppliers for the acquisition of goods, works and consulting services required by the public sector.³⁴⁴

5.4.7.4 The Anti-Money Laundering Authority and Anti-Money Laundering Investigations Unit

The Prohibition and Prevention of Money Laundering Act 14 of 2001 created two institutions namely: the Anti-Money Laundering Authority; and the Anti-Money Laundering Investigations Unit.³⁴⁵ The Anti-Money Laundering Authority was created ‘to provide general or specific policy directives to the Commissioner and advise the Minister on measures required to prevent and detect money laundering’.³⁴⁶ The Anti-Money Laundering Investigations Unit was established to collect, evaluate, process and investigate financial information; conduct investigations and prosecutions of money laundering offences and liaise with other agencies on money laundering issues; and

³⁴⁰ *ibid* section 5(1).

³⁴¹ Zambia Public Procurement Authority, ‘Code of Conduct for Procurement Officers, Public Officers, Bidders and Suppliers’.

³⁴² *ibid*.

³⁴³ <https://www.zppa.org.zm/list-of-debarred-firms> accessed 4 August 2017.

³⁴⁴ <https://www.zppa.org.zm/e-procurement-system> accessed 4 August 2017.

³⁴⁵ Prohibition and Prevention of Money Laundering Act 14 of 2001, Parts II and III.

³⁴⁶ *ibid* section 4.

develop training programmes which institutions and supervisory authorities could use to implement the Act.³⁴⁷

5.4.8 Botswana

The establishment of the Directorate on Corruption and Economic Crimes (DCEC) marked one of the significant anti-corruption efforts by Botswana. The risk of corruption in Botswana is fairly low compared to other African states, hence it has been considered one of the least corrupt states in Africa, ranked 35th out of 176 states by the 2016 TI's CPI.³⁴⁸

5.4.8.1 The Directorate on Corruption and Economic Crimes

Section 3 of the CECA 1994³⁴⁹ established the Directorate on Corruption and Economic Crimes (DCEC) in order to perform the following functions:

- Receive and investigate complaints on corruption allegations in any public body;
- Investigate alleged or suspected offences under the CECA and also contraventions of any fiscal provisions and revenue laws;
- Investigate any conduct of any person whom the Director is of the opinion is connected with or conducive to corruption;
- Assist government agencies in investigating offences relating to dishonesty and cheating of the public revenue;
- Examine procedures and practices of public bodies so as to facilitate the discovery of corrupt practices; and
- Instruct, advise and assist, upon request, any person on how such a person could eliminate corrupt practices.³⁵⁰

The DCEC has created an Oracle-based software programme in order to manage cases of investigations and keep statistics for the analysis of trends and patterns.³⁵¹ In an effort to promote ethical standards, the Public Education Division, in association with the DCEC publicises the latter's activities in various media outlets, places anti-corruption message in various newspapers, magazines and directories and distributes anti-corruption brochures.³⁵²

³⁴⁷ *ibid* section 6.

³⁴⁸ Transparency International (n 11).

³⁴⁹ CECA 13 of 1994.

³⁵⁰ *ibid* section 6.

³⁵¹ www.icac.org.hk/news/Issues28eng/button6.htm accessed 22 April 2017.

³⁵² Boitshoko Matlhare, 'An Evaluation of the Role of the Directorate on Corruption and Economic Crime (DCEC) Botswana' (Masters of Public Administration, University of the Western Cape 2006) 50.

5.4.8.2 The Financial Intelligence Agency and the National Coordinating Committee on Financial Intelligence

The Financial Intelligence Agency is a body established by section 3 of the Financial Intelligence Agency Act of 2009 (FIAA), and its functions are spelt out in section 4(1) of the Act.³⁵³ Section 6 of the FIAA established the National Coordinating Committee on Financial Intelligence to perform the following functions: assess whether the policies and measures to combat financial offences are effective; make recommendations to the Minister for reforms in administration, policy and legislative; and promote coordination between the Agency, investigatory authorities, supervisory authorities and other institutions in order to improve the effectiveness of existing policies and measures intended to combat financial offences.

5.4.8.3 The Office of the Auditor-General

The OAG is an independent office not subjected to the direction or control of any person or authority.³⁵⁴ The Office of the Auditor General was created for the sole purpose of auditing all government or government related financial transactions.³⁵⁵ Section 7 of the Audit Act of 2012 sets out the functions of the Auditor-General and Attorney General.³⁵⁶ The duties include ensuring that: ‘reasonable precaution is taken to safeguard the collection and custody of public money and that the laws, instruction and direction relating to this are observed; disbursement of public money has taken place under proper authority; reasonable precautions have been taken to safeguard the receipt, custody, issue and proper use of public supplies, and that the instructions and directions relating thereto have been duly observed; and to ensure that there are adequate instructions or directions to serve as guidance for officers responsible for collecting, issuing or disbursing public moneys or the receipts, or custody, issue and disbursement of public supplies.’³⁵⁷

³⁵³ FIAA 2009.

³⁵⁴ Taolo B Lucas and Theophilus T Tshukudu, ‘Public Budgeting in Africa: The Case of Botswana’ in Peter Fuseini Haruna and Shikha Vyas-Doorgapersad (eds), *Public Budgeting in African Nations: Fiscal Analysis in Development Management* (Routledge 2016) 39.

³⁵⁵ *ibid.*

³⁵⁶ *ibid.*

³⁵⁷ *ibid.*

5.4.8.4 The Public Procurement and Asset Disposal Board

The Public Procurement and Asset Disposal Board is a body established by section 10 of the Public Procurement and Asset Disposal Act of 2001.³⁵⁸ The main function of the Board is to ensure that all public procurement and asset disposal entities adhere to the principles of section 26.

5.4.8.5 The Office of Ombudsman

In 1995, an Act of parliament established the Office of Ombudsman to take measures to check maladministration and to enhance accountability of the government to the public. The Ombudsman Act sets out what the ombudsman is authorised and not authorised to do. Among other things, the ombudsman is authorized to conduct investigations on any administrative action of a government organisation, however, he/she is not authorised to conduct investigations when a person has or had remedy in any court of law.³⁵⁹

5.4.9 Namibia

Despite being ranked 53rd out of 176 states by the 2016 TIIs CPI, most Namibians opine that the Namibian government is doing badly in the fight against corruption.³⁶⁰ In spite of this, Namibia has made efforts to curb corruption.

5.4.9.1 The Anti-Corruption Commission

The Anti-Corruption Commission (ACC) was established by section 2 of the ACA 8 of 2003.³⁶¹ The functions of the ACC include the following: receiving or initiating investigations of alleged corrupt practices; considering whether an investigation relating to the allegation is needed and if so, to decide whether it will be carried out by the ACC or have the matter referred to another appropriate authority; consulting, co-operating and exchanging information with appropriate bodies or authorities; investigating the conduct of persons employed by a public or private body if the commissioner is of the opinion that such persons are connected with or conducive to corrupt practices; and where necessary, take anti-corruption measures against public and private bodies.³⁶²

³⁵⁸ Public and Asset Disposal Act 10 of 2001.

³⁵⁹ Keshav C Sharma, 'Towards a more ethical and accountable public bureaucracy' in Kempe R Hope and Gloria Somolekae (eds), *Public Administration and Policy in Botswana* (Juta and Company Ltd 1998) 115.

³⁶⁰ Pring (n 15) 11.

³⁶¹ ACA 8 of 2003.

³⁶² *ibid* section 3.

The 2014/2015 annual report of the ACC revealed how the office of the Directorate of Public Education and Corruption Prevention, which forms part of the Commission, developed various public education programmes.³⁶³ For instance, the Youth Outreach Programme was developed to educate the youth on corruption and to instill values, foster integrity and assist the youth in developing skills for moral reasoning; visit primary and secondary schools in order to teach the youth about the fight against corruption; the Anti-Corruption Educational Teaching Manual was designed to enable teachers to teach anti-corruption related topics in their Life Skills classes as from grades 5-10; and community outreach programmes.³⁶⁴

5.4.9.2 The Financial Intelligence Centre

The Financial Intelligence Centre (FIC) was established by section 7(1) of the Financial Intelligence Act of 2012 to combat money laundering and financing terrorism activities.³⁶⁵ The powers and functions of the FIC include the following: collecting, requesting, receiving, processing, analysing and assessing ‘reports, requests for information and information received from persons, accountable institutions, reporting institutions, government offices, ministries, or agencies or any other competent authority’; disseminating information ‘to which it has access, to competent authorities and foreign agencies with powers and duties similar to that of the Centre’; make recommendations from the information received; and coordinating various activities with persons, bodies or institutions involved in the eradication of money laundering and the financing of terrorism.³⁶⁶

5.4.10 Angola

The Law of the High Authority against Corruption Law No.3 of 1996 established an independent body to function alongside the National Assembly.³⁶⁷ The office bearers of the High Authority against Corruption are the President and two Vice-Presidents.³⁶⁸ Its core purpose is to ‘develop actions of prevention, investigation and participation for the competent entity in order to take penal or disciplinary action against acts of corruption or fraud committed in the exercise of

³⁶³ Anti-Corruption Commission ‘Annual Report 2014-2015’.

³⁶⁴ *ibid.*

³⁶⁵ Financial Intelligence Act 13 of 2012.

³⁶⁶ *ibid* section 9.

³⁶⁷ Law of the High Authority Against Corruption Law No. 3 of 1996.

³⁶⁸ *ibid* Article 5.

administrative function'.³⁶⁹ The President is expected to independently exercise his function in respect of Constitutional Law and other instruments. The functions of the President include: promoting inquires, probes, executions of investigations to be carried out in order to find out the legality of determined acts or administrative proceedings; overseeing lawfulness and correctness of administrative acts that involve the public; and referring criminal cases to the Attorney General.³⁷⁰ Unfortunately, despite the law setting up the High Authority against Corruption, this institution is still to be established in order to investigate and prosecute corruption-related cases.³⁷¹

5.4.11 Ghana

Compared to other African states, corruption in Ghana is fairly less prevalent and the Ghanaian government has made attempts to curb the phenomenon by establishing anti-corruption agencies, many of which are centered on the management of state resources.

5.4.11.1 The Serious Fraud Office

The Serious Fraud Office (SFO) was established by section 1 of the SFO Act 466 of 1993.³⁷² Its functions are to:

- Investigate any suspected offence which appears to the Director, on reasonable grounds, to involve serious financial or economic loss to the State or state organisation or institution;
- Monitor economic activities considered to be necessary in order to deter crimes that could likely cause financial or economic loss to the State;
- Take reasonable measures to prevent the commission of crimes that may cause financial or economic loss to the State; and
- Cooperate with international agencies.³⁷³

In 2010, the SFO was replaced by the Economic and Organised Crime Office (EOCO) which was established by the Economic and Organized Crime Act of 804 of 2010.³⁷⁴ The EOCO was set up to close the gaps created by the SFO Act of 1993, which created the SFO.³⁷⁵ The mandate of the SFO did not extend to prosecuting drug-trafficking, money laundering and other

³⁶⁹ *ibid* Articles 2 and 5.

³⁷⁰ *ibid* Article 8.

³⁷¹ World Bank, *Angola: Oil, Broad-based Growth, and Equality* (World Bank Publication 2007) 118.

³⁷² SFO Act 466 of 1993.

³⁷³ *ibid* section 3.

³⁷⁴ Economic and Organized Crime Act of 2010.

³⁷⁵ <http://eoco.org.gh/about/sfo-eoco/> accessed 4 August 2017.

organised crimes. Moreover, the SFO Act of 1993 allowed convicted persons to go back to society after serving their sentences and enjoy the proceeds of the crime(s) they were convicted for.³⁷⁶

The functions of the EOCO are to investigate matters relating to financial or economic loss to the Republic or any State Entity or institution, money laundering, human trafficking, prohibited cyber activity, tax fraud, and recovering proceeds of crimes.³⁷⁷ The EOCO also has a board whose sole purpose is to formulate policies to assist the EOCO achieve its objectives.³⁷⁸

Among many of its cases, the EOCO, in collaboration with the South Korean Government, prosecuted and found guilty individuals for defrauding the State through false pretences and money laundering.³⁷⁹ The accused were Njoku Chibukor (sentenced to four years which hard labour, GHS 36,000 fine or a default 3 years hard labour), Agiba Daniel and Waru Mannam (both fined GHS 36,000 (equivalent to at least US\$ 8149.53) each.³⁸⁰ In 2015, the Attorney-General and Minister of Justice, Marietta Appiah-Opong announced that the EOCO had investigated 186 cases and that it was prosecuting 46 of the cases out of the 186. Moreover, it was revealed that GHS 2,419,443,72 (equivalent to at least US\$ 54770384.64) had been recovered to the state.³⁸¹

5.4.11.2 The Public Procurement Board

The Public Procurement Board (Board) is a body established by section 1 of the PPA of 2003.³⁸² The Board was created to ‘harmonise the processes of public procurement in the public service and to secure a judicious, economic and efficient use of state resources in public procurement as well as ensure that public procurement was carried out in a fair, transparent and non-discriminatory manner’.³⁸³

Under the PPA, the Board has twenty-one (21) functions which it must perform as follows: making proposals concerning the formulation of procurement policies; ensuring policy implementation and human resource development for public procurement; developing draft rules, instructions; and other regulatory documentation on public procurement; monitoring and

³⁷⁶ *ibid.*

³⁷⁷ Economic and Organized Crime Act of 2010, section 3.

³⁷⁸ *ibid* section 5.

³⁷⁹ <http://eoco.org.gh/news/success-stories/eoco-jails-njoku-chibuzor-ikechukwu-for-defrauding-by-false-pretences-and-money-laundering/> accessed 4 August 2017.

³⁸⁰ *ibid.*

³⁸¹ <http://www.myjoyonline.com/business/2016/march-20th/eoco-recovers-over-gh24m-for-ghana-in-2015.php> accessed 22 April 2017.

³⁸² PPA 663 of 2003.

³⁸³ *ibid* section 2.

supervising public procurement; and obtaining procurement information from contracting authorities.³⁸⁴

Since its establishment, the Board has investigated numerous complaints; one of the many cases involved the Marubeni Corporation.³⁸⁵ The Complainant, Marubeni Corporation responded to a request for proposal invitation by the Volta River Authority, the Respondent.³⁸⁶ During the earlier process, the Respondent requested the Complainant to clarify certain issues involving a previous investigation conducted by the Department of Justice (DoJ) in the USA involving the Complainant.³⁸⁷ The investigation was concluded following a plea agreement entered into by the Complainant who also agreed to pay a fine in an effort to resolve the criminal charges. As a result, the Complainant was suspended for 9 (nine) months from participating in projects.³⁸⁸

In responding to issues raised by the Respondent, the Complainant indicated that since the investigations by the DoJ, it had implemented new strict compliance programmes designed to prevent conducts violating the US Foreign CPA or any other global anti-corruption laws. Moreover, the Complainant assured the Respondent that the conduct, which the DoJ was investigating, occurred years ago.³⁸⁹

After being permitted to participate in the Respondent's new call for tenders, the Complainant successfully qualified during the preliminary examination of evaluation of technical and non-technical stages of the tender process.³⁹⁰ The allegations made by the Complainant included the fact that the Respondent had the intention to disqualify the Complainant based on the US DoJ investigations after requesting clarifications on technical and commercial proposals at the evaluation stage.³⁹¹

The Complainant's contention was that it could not be disqualified on a generic clause, clause 35 of the ITB on Fraud and Corruption which the Respondent based its intended disqualification of the Complainant. The clause states that:

The employer will sanction a firm or individual declaring them ineligible, either indefinitely or for a stated period of time, to be awarded a contract by the Employer if it, at any time, determines that they have, directly or

³⁸⁴ *ibid* section 3.

³⁸⁵ *Marubeni Corporation vs. VRA – T4 Thermal Power Plant Project*, 2015.

³⁸⁶ *ibid*.

³⁸⁷ *ibid*.

³⁸⁸ *ibid*.

³⁸⁹ *ibid*.

³⁹⁰ *ibid*.

³⁹¹ *ibid*.

through an agent, engaged in corrupt, fraudulent, collusive or coercive practice in competing for, or in executing a contract.³⁹²

The complainant sought explanation on exclusion or disqualification of a tenderer from tender proceedings due to reason of fraud or corruption. The explanation was sought from the PPA. Section 22(1)(e)(i) of the PPA allows for a tenderer to be disqualified if its directors or officers have been convicted of any criminal offences relating to professional conduct.³⁹³

5.4.11.3 **The Commission on Human Rights and Administrative Justice**

The Commission on Human Rights and Administrative Justice is a body established by section 1 of the Commission on Human Rights and Administrative Justice Act 456 of 1993.³⁹⁴ The Commission is not subject to the directions or control of any person or authority, except as provided for by the Constitution or any other law.³⁹⁵ Section 7 of the Act makes provision for the performance of its functions.³⁹⁶

5.4.11.4 **The Audit Service**

The Audit Service was first established in 1910 and was referred to as the Audit Department. In 1950, the name changed to the Auditor-General's Department. In 1966, the Ghanaian Constitution

³⁹² *ibid.*

³⁹³ *ibid.*

³⁹⁴ Commission on Human Rights and Administrative Justice Act 456 of 1993.

³⁹⁵ *ibid* section 6.

³⁹⁶

- (a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;
- (b) to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the offices of the Regional Co-ordinating Council and the District Assembly, the Armed Forces, the Police Service and the Prisons Service in so far as the complaints relate to the failure to achieve a balanced structuring of those services or fair administration in relation to those services;
- (c) to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under the Constitution;
- ...
- (d) to investigate allegations that a public officer has contravened or has not complied with a provision of Chapter Twenty-four (Code of Conduct for Public Officers) of the Constitution;
- (e) to investigate all instances of alleged or suspected corruption and the misappropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigation...

changed the Auditor-General's Department into the Audit Service in order to increase the degree of independence of the service.³⁹⁷

The Audit Service Act 584 of 2000 was enacted to provide for the continuation of the Audit Service with its governing body being the Audit Service Board (Board).³⁹⁸ The functions of the Board are set out in section 4 of the Audit Service Act and include the following: determining the structure and technical expertise required in order to efficiently perform the functions of the Audit Service; and ensuring that the auditing activities by the Audit Service are in accordance with best international practices.³⁹⁹

5.4.11.5 **The Internal Audit Agency**

The Internal Audit Agency is a body created by section 1 of the Internal Audit Agency Act, 658 of 2003 in order to coordinate, facilitate and provide assurance for internal audit activities within the Ministries, Departments and Agencies (MDA) and the Metropolitan Municipalities and District Assemblies (MMDA).⁴⁰⁰ In the performance of its functions, the Internal Audit Agency ensures that:

- Any financial, managerial and operating information that has been reported internally or externally, are accurate, reliable and timely;
- Financial activities of the MDAs and MMDAs comply with the laws, policies, plans, standards and procedures, and ensure that their plans, goals and objectives are achieved and that their risks are adequately managed; and
- National resources are adequately safeguarded and used economically, effectively and efficiently.⁴⁰¹

5.4.12 **Nigeria**

Under the leadership of President Obasanjo from 1999-2007, two important anti-corruption institutions were created: the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and Other Offenses Commission.⁴⁰²

³⁹⁷ George Winful, 'Audit Profile: Ghana Audit Service' [2007] International Journal of Government Auditing.

³⁹⁸ Audit Service Act, section 1.

³⁹⁹ *ibid* section 4.

⁴⁰⁰ Internal Audit Agency Act 658 of 2003.

⁴⁰¹ *ibid* section 3.

⁴⁰² John Cambell, *Nigeria: Dancing on the Brink* (Rowman and Littlefield Publishers 2013) 33.

5.4.12.1 **The Economic and Financial Crimes Commission**

The Economic and Financial Crimes Commission (Establishment) Act of 2004 (EFCCA) established the EFCC.⁴⁰³ Section 6 of the EFCCA sets out the functions of the EFCC and they including enforcing and administering the provisions of the EFCCA; investigating financial crimes, including fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scams; coordinating and enforcing economic and financial crimes laws together with enforcing functions conferred on any other person or authority; adopting measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crimes-related offences; adopting measures to eradicate the commission of economic and financial crimes; facilitating the rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes; examining and investigating reported cases on economic and financial crimes; and determining the extent of financial loss and other losses by government, private individuals or organizations.

The EFCC also has special powers which are to investigate whether a person or corporate body or organisation has committed an offence under the EFCCA or any other law relating to economic and financial crimes. Moreover, it may also investigate properties of persons if it appears that the person's lifestyle and extent of properties are not justified by his/her source of income.⁴⁰⁴

The EFCC has managed to successfully recover assets (cash), arrest and convict individuals for fraud and other related offences within its jurisdiction, together with prosecuting high-profile cases. The EFCC has 6 offices all of which have prosecuted and convicted individuals. The Abuja office has made 24 convictions, Lagos 44, Kano 19, Port Harcourt 22, Enugu 13 and Gombe 3.⁴⁰⁵

In one of the cases, one Abdullahi Mohammed Moaikano was convicted for petty corruption for three counts of criminal breach of trust and forgery after pleading guilty to all three counts.⁴⁰⁶ The accused collected NGN 700,00 (equivalent to at least US\$ 191.65) in order to secure a haji seat for a third party under the Jigawa State Pilgrims but later converted the money for his personal use and issued the victim a forged receipt from the Pilgrim's Board.⁴⁰⁷

⁴⁰³ EFCCA of 2004.

⁴⁰⁴ *ibid* sections 1, 6 and 7.

⁴⁰⁵ <http://efccnigeria.org/efcc> accessed 22 April 2017.

⁴⁰⁶ EFCC, 'Man bags 12 years jail term for fraud' <<https://efccnigeria.org/efcc/news/2470-man-bags-12-years-jail-term-for-fraud>> accessed 22 April 2017.

⁴⁰⁷ *ibid*.

In another case, through a tip from a whistle-blower, about NGN 250m (equivalent to at least US\$ 684465.00) was intercepted by the EFCC at the Balogun market in Lagos. The tipster alleged that the large sum of money was being moved from one territory to another for conversion into foreign currencies.⁴⁰⁸ Upon investigation, it was established that the owner of the funds was a former deputy governorship candidate in Niger State. The EFCC also uncovered huge sums of money of about NGN 448, 850, 00 (equivalent to at least US\$ 122888.85) suspected to be laundered money in a shop at LEGICO Shopping Plaza, Ahmadu Bello Way, Victoria Island, Lagos.⁴⁰⁹ High profile cases being prosecuted by the Commission include Jolly Tevoru Nyame, former Executive Governor of Taraba State and Joshua Dariye, former Executive Governor of Plateau State charged with criminal misappropriation of public funds, embezzlement and criminal breach of trust, and Saminu Turaki, former Executive Governor of Jigawa charged with corruption-related offences, including money laundering.⁴¹⁰

5.4.12.2 **The Independent Corrupt Practices and other Related Offences Commission**

The Independent Corrupt Practices and Other Related Offences Commission (Commission) was established under the Corrupt Practices and Other Related Offences Act of 2000.⁴¹¹ The duties of the Commission are to: receive and investigate reports of the conspiracy to commit, attempt to commit or the commission of corrupt offences; examine the practices, systems and procedures of public bodies, and if commission opines that such practices, systems and procedures aid or facilitate fraud or corruption, it shall direct and supervise a review for them; instruct, advise and assist any officer, agency, parastatals on how fraud or corruption could be eliminated or minimised by such officer, agency or parastatal; advise heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of public bodies duties; educate the public on and against bribery, corruption and related offences; and enlist and foster public support in combating corruption.⁴¹²

⁴⁰⁸ EFCC, 'EFCC Uncovers Another Cash Haul' < <https://efccnigeria.org/efcc/news/2464-efcc-uncovers-another-cash-haul> > accessed 4 August 2017.

⁴⁰⁹ EFCC, 'EFCC Discovers About N.5bn In Lagos Plaza' < <https://efccnigeria.org/efcc/news/2458-efcc-discovers-about-n-5bn-in-lagos-plaza-3> > accessed 4 August 2017.

⁴¹⁰ EFCC, 'High profile, oil subsidy matters being prosecuted by EFCC' <<https://efccnigeria.org/efcc/news/>>. accessed 22 April 2017.

⁴¹¹ Corrupt Practices and Other Related Offences Act of 2000.

⁴¹² Sections 3 and 6 of the Nigerian Corrupt Practices and Other Related Offences Act of 2000.

With regard to its success, the Independent Corrupt Practices and Other Related Offences Commission, as of 2015, had prosecuted 142 cases.⁴¹³

5.4.12.3 **The Code of Conduct Bureau and Code of Conduct Tribunal**

The Code of Conduct Bureau and Tribunal Act 1 of 1989 established the Code of Conduct Bureau (Bureau) and Code of Conduct Tribunal (Tribunal).⁴¹⁴ The Bureau was established to ‘maintain a high standard of morality in the conduct of government business and to ensure that the actions and behaviour of public officers conform to the highest standards of public morality and accountability’.⁴¹⁵ Its duties are to: receive and examine the declaration of assets by public officials; take and retain custody of such asset declarations; and receive complaints about non-compliance or breach of the Code of Conduct Bureau and Tribunal Act.⁴¹⁶ The Tribunal, consisting of a chairperson and two (2) other persons, can impose punishment against a public official who has been found guilty under the Code of Conduct Bureau and Tribunal Act.⁴¹⁷ The punishment may include: vacating the office, any elective or nominated office as the case may be; disqualifying the official from holding a public office for a period of not more than 10 years; and seizing and forfeiting to the State, any property that was acquired through the abuse or corruption of office.⁴¹⁸

5.4.12.4 **The Fiscal Responsibility Commission**

The Fiscal Responsibility Commission (Commission) is an independent institution established by section 1 of the Fiscal Responsibility Act, 31 of 2007.⁴¹⁹ The Commission has the power to compel a person or government institution to disclose information relating to public revenue and expenditure; and investigate whether a person has violated the provisions of the Fiscal Responsibility Act. If the Commission is satisfied that the person committed a punishable offence under the Fiscal Responsibility Act, it will transfer the investigation report to the Attorney-General.⁴²⁰ The Commission was established to perform the following functions: enforce the provisions of the Fiscal Responsibility Act and make rules that will be applied in carrying out its

⁴¹³ www.icpc.gov.ng/cases/ accessed 22 April 2017.

⁴¹⁴ Code of Conduct Bureau and Tribunal Act of 1989, sections 1 and 20.

⁴¹⁵ *ibid* section 2.

⁴¹⁶ *ibid* section 3.

⁴¹⁷ *ibid* sections 20(2) and 23.

⁴¹⁸ *ibid* section 23(2).

⁴¹⁹ Nigerian Fiscal Responsibility Act of 2007.

⁴²⁰ *ibid* section 2.

functions under the Fiscal Responsibility Act; undertake fiscal and financial studies, analyse and diagnose and disseminate the results to the public; and disseminate standard practices, including international good practice that will result in public expenditure, revenue collection, debt control and transparency in fiscal matters being efficiently allocated and managed.⁴²¹

5.4.12.5 **The Nigeria Extractive Industries Transparency Initiative**

The Nigeria Extractive Industries Transparency Initiative (NEITI) Act 36 of 2007 established an autonomous self-accounting body: the Nigeria Extractive Industries Transparency Initiative.⁴²² NEITI was established for the following primary objectives: ensure due process and transparency in payments by all extractive industry companies to the Federal Government and statutory recipients; monitor and ensure accountability in the revenue receipts of the Federal Government from extractive industry companies; eliminate corrupt practices in the determination, payments, receipts and posting of revenue accruing to the Federal Government from extractive industry companies; ensure transparency and accountability by government in the application of resources from payments received from extractive industry companies; and ensure there is conformity with the principles of the Extractive Industries Transparency Initiative.⁴²³

Section 3 of the NEITI Act sets out the functions of the initiative which are to: develop a framework for transparency and accountability in reporting and disclosing revenue due to or paid to the Federal Government by all extractive industry companies; evaluate practices of all extractive industry companies and government, respectively, regarding the acquisition of acreages, budgeting, contracting, material procurement and production cost in order to ensure due process, transparency and accountability; ensure there is transparency and accountability in management of investment of the Federal Government in all extractive industry companies; obtain accurate records of cost production and volume of sale of oil, gas or other minerals from the extractive industry company; and request, from any extractive industry company or relevant organ of the Federal, State or Local Government, an accurate account of money paid by and received from the company at any period.⁴²⁴

⁴²¹ *ibid* sections 1-3.

⁴²² Nigeria Extractive Industries Transparency Initiative Act of 2007, section 1.

⁴²³ *ibid* sections 2.

⁴²⁴ *ibid* sections 3.

5.4.13 Sierra Leone

Ten years after the end of the civil war (23 Mar 1991 – 18 Jan 2002), corruption continues to be a major problem in Sierra Leone,⁴²⁵ and in addition to TI's 2016 CPI score, Sierra Leone is, among others, one of the African states with the highest level of corruption.

5.4.13.1 The Anti-Corruption Commission

The ACA 12 of 2008 established an independent Anti-Corruption Commission (ACC), an institution not subject to the directions or control of any person or authority.⁴²⁶ The ACC was established to: take necessary steps to prevent, eradicate or suppress corruption and corrupt practices; investigate alleged or suspected corruption referred to it by any person or authority whether by complaint or otherwise; investigate any matter which to the opinion of the Commission is suspicious, that any of the following has occurred or likely to occur: 'conduct constituting corruption or economic or related offence or conduct liable to allow, encourage or cause conduct constituting corruption or an economic or related offence'; and prosecute all offences committed under the ACA.⁴²⁷

According to section 7(2) of the ACA, the ACC is responsible for receiving and investigating alleged contraventions; detecting or investigating corrupt acts; investigating conducts of any person for which the commission is of the opinion is conducive to or connected with corruption; receiving, examining and retaining all declaration of assets filed under the ACA, and making inquiries, where necessary, to verify or determine whether the filed declaration of assets is accurate; examining public bodies practices in order to facilitate the discovery of corrupt practices or acts of corruption and to secure revision of those practices and procedures which to the opinion of the ACC, could lead to or be conducive to corruption or corrupt practices; and issuing instructions to public bodies of change in practices and procedures that are necessary to reduce or eliminate the occurrence of corrupt practices.

Since its establishment, the ACC has recovered millions worth of stolen assets.⁴²⁸ Recent cases include: the 2016 conviction of Joko C R Venn, Principal of Russel Technical Secondary School, on one count of abuse of office, contrary to section 42(1) of the ACA 2008. The court

⁴²⁵ Earl Conteh-Morgan, 'Critical Examination of Food Security-Insecurity in Sierra Leone' in Joseph J Bangura, Marda Mustapha, *Democratization and Human Security in Postwar Sierra Leone* (Springer 2016) 192.

⁴²⁶ ACA 2008, section 2.

⁴²⁷ *ibid* section 7.

⁴²⁸ <https://www.acauthorities.org/success-story> accessed 21 April 2017.

ordered that a fine of SLL 30 million (equivalent to at least US\$ 3947.70) be paid within a month from the date of the verdict or serve a three-year jail term.⁴²⁹ On-going cases by the ACC include the February 2017 indictment of 9 individuals for misappropriation of Donor Property. The individuals conspired to misappropriate 361 gallons of vegetable oil, 61 bags of Yellow Split beans, 241 bags of rice, 47 bags of Corn Soya bread and bags of sugar donated by the World Food Programme for communities that were vulnerable after being affected by the Ebola virus.⁴³⁰ Additionally, on 10 February 2017, the ACC indicted three seniors, Dauda Ahmid Koroma, Jessy Jim Braima Kpagoi and Alfred Mustapha Bangura of the Needy Today (TNT), a non-Governmental Organisation for misappropriating Donor Funds amounting to SLL 346,450,000 (equivalent to at least US\$ 45589.36).⁴³¹

5.4.13.2 The District Budget Oversight Committees

The District Budget Oversight Committees (Committees) were established in every district by the Budget Bureau in terms of section 21 of the Government Budgeting and Accountability Act 3 of 2005.⁴³² The Committees were established to perform the following functions: assist in formulating and monitoring poverty-related activities within their districts; serve as a focal point at community level for discussions and consideration of the medium-term expenditure framework budget and the public expenditure tracking surveys; monitor expenditure of all central government allocations to all local councils in the District; report to the Budget Bureau, every four months, on the progress of executing budgeting programmes; and serve as an intermediary between the Government and the people concerning budgetary allocations for their District.⁴³³

5.4.13.3 The Office of the Ombudsman

Established by the Ombudsman Act 2 of 1997, section 7 sets out the functions of the Office of the Ombudsman.⁴³⁴ The functions are to: investigate complaints made by a person who claims to have suffered injustice as a result of maladministration in connection with any administrative act; investigate such information received from any person or source otherwise than by complaint; and

⁴²⁹ http://www.anticorruption.gov.sl/show_news.php?id=683 accessed 22 April 2017.

⁴³⁰ www.anticorruption.gov.sl/show_new.php?id=702 accessed 22 April 2017.

⁴³¹ http://www.anticorruption.gov.sl/show_news.php?id=697 accessed 22 April 2017.

⁴³² Government Budgeting and Accountability Act 2005, section 21.

⁴³³ *ibid.*

⁴³⁴ Ombudsman Act 1997.

take appropriate actions in order to remedy, correct or reverse the act complained of through such means as are fair, proper and effective, including-

- the facilitation of negotiation and compromise between or among the parties concerned;
- reporting or causing the finding of any investigation together with his (Ombudsman) recommendation thereon to be reported to the principal officer of the prescribed authority and, where the offending person is the principal officer, to the Minister;
- drawing the attention of Government to any defect in any law discovered in the course of any investigation together with such recommendation for the remedy of any such defect as he (Ombudsman) may find necessary; and
- drawing the attention of the Attorney-General and the Minister of Justice to any contravention of the criminal law of Sierra Leone discovered in the course of any investigation.⁴³⁵

5.4.14 Zimbabwe

In spite of existing anti-corruption agencies in place, corruption is rampant in Zimbabwe as per TI 2016 CPI. It could be argued that this is because corruption is the foundation of Zimbabwean politics hence, there are relatively low efforts by the political elite to address corruption-related issues.⁴³⁶ The high level of corruption in Zimbabwe has led to relatively low successful outcomes of its anti-corruption institutions.

5.4.14.1 The Anti-Corruption Commission

The Anti-Corruption Commission Act Chapter 9:22, established the Zimbabwe Anti-Corruption Commission (ZACC).⁴³⁷ The ZACC is a corporate body established to promote investigations of serious corruption and fraud cases; make proposals on the elimination of corruption in public and private sectors; promote awareness among the public on the causes of corruption and on society; and propose new or more effective procedures for the administration of the ZACC.⁴³⁸

The ZACC was intended to perform the following functions: monitor and examine practices, systems and procurement procedures of public and private institutions; enlist and foster public support in combating corruption in society; educate the public on the dangers of corruption

⁴³⁵ *ibid* section 7.

⁴³⁶ Hevina Smith Dashwood, *Zimbabwe: The Political Economy of Transformation* (University of Toronto Press 2000) 101.

⁴³⁷ Anti-Corruption Commission Act of 2004, section 3.

⁴³⁸ *ibid* section 12.

in society; instruct, advise and assist any officer, agency or institution in eliminating or minimising corruption; receive and investigate complaints alleging any form of corruption and investigate any conduct of a person where the ZACC reasonably believes that such conduct involves corrupt activities; provide assistance in formulating practices, systems and procurement procedures of public and private institutions with a view to eliminate corrupt practices; advise on ways to strengthen anti-corruption instruments; and recommend the government to ratify and domesticate relevant international legal instruments aimed at combating corruption.⁴³⁹

The ZACC had been subjected to negative feedback since its establishment, with many maintaining that former Mugabe's regime was not eager or did not put in enough effort to combat corruption.⁴⁴⁰ Many people are of the view that with the high level of allegations of corruption in Zimbabwe, the ZACC 'should be the busiest Commission in the history of Zimbabwe'.⁴⁴¹ The Movement for Democratic Change (MDC) shared the same sentiment by maintaining that the ZACC needs to be independent and investigate all known and reported cases of corruption irrespective of whether the case involves an elite politician or public or private officials.⁴⁴²

Despite these views, the ZACC has managed to arrest officials who have engaged in corrupt practices as follows: Godfrey Tanyanyiwa on abuse of office and fraud charges involving more than US\$700, 00, MDC's St Marys MP, Marvellous Khumalo, for misappropriating US\$ 50,000 from the Constituency Development Fund, and Moffat Makuvatsine, a prosecutor for receiving a US\$ 500 bribe to have a suspect released.⁴⁴³

5.4.14.2 The Audit Office Commission

The Audit Office Act 12 of 2009 established the Audit Office Commission to perform the following functions: appoint persons to the Audit Office and exercise its disciplinary powers; conduct examinations for candidates for entry into and promotion within the Audit Office; enquire and deal with grievances made by members of the Audit Office; administer funds of the Audit Office; and exercise other functions that could be imposed or conferred to it in terms of the Audit Office Act or any other enactment.⁴⁴⁴

⁴³⁹ *ibid* section 13.

⁴⁴⁰ Jacob Wilson Chikuhwa, *A Crisis of Governance: Zimbabwe* (Algora Publishing 2004) 190.

⁴⁴¹ Jacob Wilson Chikuhwa, *Zimbabwe: The End of the First Republic* (Author House 2013) 70.

⁴⁴² Obert Gutu, 'Zimbabwe anti-corruption commission must be independent' (*The Zimbabwean*, 13 October 2016).

⁴⁴³ Chikuhwa (n 439) 70.

⁴⁴⁴ Audit Office Act of 2009, section 14 and 15.

5.4.14.3 **The Public Service Commission**

The PSA Chapter 16:04 established the PSC.⁴⁴⁵ Section 8 of the PSA sets out the functions of the PSC and they include the following: appointing persons to the Public Services and persons from approved service to office, posts and grades in the Public Service; conducting examinations for candidates for entry and promotion within the Public Service; enquiring into and dealing with complaints made by members of the Public Service; and exercising any functions imposed or conferred upon the PSC in terms of the PCA or any other instrument.

5.4.14.4 **The Financial Intelligence Unit**

The Financial Intelligence Unit (FIU) (also known as the Bank Use Promotion and Suppression of Money Laundering, Unit) was established by section 3 of the Bank Use Promotion and Suppression of Money Laundering Act 2 of 2004 (Act).⁴⁴⁶ Section 4 of the Act sets out the functions of the Unit which are to: promote the use by the public of financial institutions for mediating, facilitating or obviating cash transaction purposes; receive reports on suspicious transactions by designated institutions or employees; compile statistics and records, and gather and disseminate information within Zimbabwe; issue guidelines or directions to financial institutions; monitor and enforce the Act; and create training facilities and provide training to designed institutions.⁴⁴⁷

5.4.15 **South Africa**

In spite of numerous legislation on the promotion of transparency and accountability demanded by the Constitution, it could be argued that corruption is getting worse in South Africa. With various anti-corruption instruments, and the 2016 CPI score, South Africans are of the view that their government is doing very badly in terms of combating corruption.⁴⁴⁸

5.4.15.1 **The Public Protector**

Sections 181-183 of the South African Constitution established the Office of the Public Protector.⁴⁴⁹ The Constitution further sets out its functions which are to: investigate conducts in

⁴⁴⁵ Public Service Act Chapter 16:04.

⁴⁴⁶ Bank Use Promotion and Suppression of Money Laundering Act 2 of 2004.

⁴⁴⁷ *ibid* section 4.

⁴⁴⁸ Pring (n 15) 11.

⁴⁴⁹ Constitution (n 125) sections 181-183.

state affairs or public administration in any sphere of government alleged or suspected to have been improper or resulting in impropriety or prejudice; and report on the conduct and taking appropriate remedial action.⁴⁵⁰ A public protector may, during investigations:

- Direct any person to appear before him/her in order to give evidence or introduce a document in his/her possession or under his control if the Public Protector is of the opinion that such evidence has bearing on the matter that is being investigated; and
- Request any person at any level of government, or any person performing a public function or otherwise, subject to his/her jurisdiction, to assist him/her in performing his/her duties with regard to the investigation.⁴⁵¹

The Office of the Public Protector has conducted numerous investigations that date back to 2006 many of which include:

- a. The report on an Investigation into Allegations of Impropriety and Unethical Conduct relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of Private Residence of President Jacob Zuma in Nkandla, Kwa-Zulu Natal Province: Report No.25 of 2013/2014.

After complaints were made against the South African President Jacob Gedleyihlekisa Zuma concerning alleged upgrades for security purposes made in his Nkandla private homestead, the Public Protector then initiated investigations.⁴⁵² In her findings, it was established that the upgrade made in Nkandla were not all for security reasons.⁴⁵³ Additionally, it was established that state funds were used to upgrade the property.⁴⁵⁴ One of the remedies made by the Public Protector was that Zuma, after the determination of reasonable cost of the features were made, pay back a reasonable portion to the state.⁴⁵⁵ The remedies by the Public Protector resulted in the matter later being taken to the Constitutional Court on the basis that they were not binding but simply

⁴⁵⁰ *ibid* section 182.

⁴⁵¹ Office of Public Protector South Africa, 'History and Background to the Office of the Public Protector', accessed 5 August 2017.

⁴⁵² Report on an Investigation into Allegations of Impropriety and Unethical Conduct relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of Private Residence of President Jacob Zuma at Nkandla in the Kwa-Zulu Natal Province: Report No.25 of 2013/2014, pages 80-86.

⁴⁵³ *ibid*.

⁴⁵⁴ *ibid*.

⁴⁵⁵ *ibid* page 442.

recommendations.⁴⁵⁶ The Constitutional Court dismissed this argument and held that the President should, in fact, pay the amount as stated in the Public Protector's Report.⁴⁵⁷

- b. The report on an investigation into allegations of abuse of power and victimisation of alleged whistle-blower Ms Fikile Hlatshwayo-Rouget by the KwaZulu Natal Provincial Treasury resulting in her alleged unfair dismissal (Report No.4 of 2016/2017)

Ms Hlatshwayo-Rouget lodged a complaint alleging that former MEC Cronje 'suspended and later dismissed her under pretext charges following her making a protected disclosure regarding suspected corruption, conflict of interest, maladministration and related procurement irregularities within Treasury'.⁴⁵⁸ Additionally, Ms Hlatshwayo-Rouget alleged that 'the real reason for her dismissal was her whistleblowing and refusal to countenance irregular and corrupt procurement transactions'. She stated that the Treasury had listed her name on the Public Service's employment Persal system stating that she was dismissed, and further argued that the listing had made it difficult for her to find employment in the Public Service.⁴⁵⁹

The major findings by the Office of the Public Protector were as follows: two weeks following her employment, the complainant made a protected disclosure. The Treasury's successive Executives authorities, 'unduly refused to acknowledge that the Complainant made a protected disclosure about alleged excessive use of consultants, corruption, tender irregularities and abuse of state funds'.⁴⁶⁰ When the Treasury finally decided to investigate the contents of the disclosure made by the complainant, it was too late to arrest some of the improprieties.⁴⁶¹ With regard to MEC Ina Cronje, it was found that his conducts were in violation of the Executive Ethics Code and inconsistent with the Constitution. On matters relating to failure to deal with protected disclosures, it was found that the Treasury acted unlawfully and thus, violated, among other, sections 3 and 4 of the PCA of 2004 and section 7 of the Prevention and Organised Crime Act.⁴⁶²

⁴⁵⁶ *ibid.*

⁴⁵⁷ <https://mg.co.za/article/2016-07-27-constitutional-court-confirms-zuma-must-pay-back-r78-million-for-nkandla> accessed 5 August 2017.

⁴⁵⁸ Report on an Investigation into allegations of abuse of power and victimization of alleged whistle-blower Ms Fikile Hlatshwayo-Rouget by the KwaZulu Natal Provincial Treasury resulting in her alleged unfair dismissal. Report No.4 of 2016/2017, para 2.1.2.

⁴⁵⁹ *ibid* para 2.1.4.

⁴⁶⁰ *ibid* para 7.1.3.

⁴⁶¹ *ibid* para 7.1.4.

⁴⁶² *ibid* paras 7.1.1, 7.1.3, 7.1.7, 7.1.8.

The suspension and subsequent dismissal of the complainant was found to be irrational, unreasonable and unfair.⁴⁶³ The decision to suspend and dismiss her ‘could justifiably be seen as a charade that sought to get the Complainant out of the way by MEC Cronje and Mr Magagula who, at the time, believed and chose to stand by Dr Coetzee, whom she had accused of corrupt activities, an accusation since confirmed by the Treasury commissioned forensic investigation and by the SIU’⁴⁶⁴ and that the conducts of Cronje and Magagula constituted maladministration and abuse of power.⁴⁶⁵

- c. State Capture Report: Report on an Investigation into Alleged Improper and Unethical Conduct by the President and other State Functionaries Relating to Alleged Improper Relationships and involvement of the Gupta family in the Removal and Appointment of Ministers and Directors of State-Owned Enterprises resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta family’s business (Report No: 6 of 2016/17).

Three separate complaints were made between 18 March 2016 and 22 April 2016, concerning alleged and unethical conducts regarding the appointment of cabinet members.⁴⁶⁶ The complaints were made following media reports which alleged that Hon. Mr Mcebisi Jonas, the then Deputy Minister of Finance, was offered the Minister of Finance post by the Gupta family before the removal of Mr Nhlanhla Nene. It is alleged that the offer was made in Saxonwold, the private homestead of the Gupta family. If Atul Gupta, among others, offered the position to Mr Jonas, he should have had an influence in the removal of Mr Nene.⁴⁶⁷

In its 355 page report, one of many material questions, which had to be answered by the Public Protector, was whether or not President Jacob Zuma, in violation of the Executive Ethics Code, allowed the Gupta family and his son to be involved in the removal and appointment of the Minister of Finance.⁴⁶⁸ The Public Protector found that the President had failed, in terms of section 34 of the Prevention and Combatting of Corrupt Activities Act of 2004, to verify or investigate

⁴⁶³ *ibid* para 7.2.4.

⁴⁶⁴ *ibid* para 7.2.4.

⁴⁶⁵ *ibid* para 7.2.6.

⁴⁶⁶ State Capture report: Report on an Investigation into Alleged Improper and Unethical Conduct by the President and other State Functionaries Relating to Alleged Improper Relationships and involvement of the Gupta family in the Removal and Appointment of Minister and Directors of State Owned Enterprise resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta family’s business. Report No: 6 of 2016/17, para 2.1 and 2.4.

⁴⁶⁷ *ibid* para 2.5.

⁴⁶⁸ *ibid* para 7.1.

allegations or claims that Mr Jonas was offered the position of Minister of Finance in exchange of favours to the Gupta family.⁴⁶⁹

Another issue investigated by the Public Protector concerned the award of procurement contracts to a Gupta-controlled company. It was found that in the past, the Eskom Board once conducted itself to the sole benefit of a Gupta-controlled company called Tegeta. As a member of the Eskom Board and having direct business interests in Oakbay Resources and Energy Ltd, a company in which Atul Gupta owns 64 percent and Shiva Uranium, a company in which Oakbay Resources and Energy Ltd has 74 percent shareholding and Tegeta 19.6 percent, Mr Pamensky's position gave him access to privileged or sensitive information regarding various Eskom contracts. This, together with personal economic interest, would give Tegeta an unfair advantage over other interested buyers.⁴⁷⁰

Regarding the awarding of coal contracts to Tegeta, the Report states that such award was irregular on the following grounds: Eskom was aware that Tegeta was receiving coal from Optimum Coal Mine and still contracted with it.⁴⁷¹ Additionally, in a statement by Eskom Chairman, following Eskom's approval of prepayment, it was revealed that the prepayment included a 3 percent discount on the coal price. The report indicates that the discount is somewhat misleading and that both Eskom and Tegeta were aware that the latter was sourcing coal from Optimum Coal Mine and, therefore, it (Tegeta) 'was not actually giving any material discount.'⁴⁷² Moreover, it was found that the conduct of the Eskom Board was to solely benefit Tegeta.⁴⁷³

5.4.15.2 **The Directorate of Priority Crime Investigation**

Section 17A of the South African Police Service Act 68 of 1995 creates an independent office of the Directorate of Priority Crime Investigation (also known as Hawks) in order to prevent, combat and investigate national priority offences such as serious organised crime, serious commercial crime and serious corruption.⁴⁷⁴ The primary function of the Hawks is to implement, where

⁴⁶⁹ *ibid* para 7.1.7.

⁴⁷⁰ *ibid* para 5.7.6.

⁴⁷¹ *ibid* para 312, para X.

⁴⁷² *ibid* para 313, para Z.

⁴⁷³ *ibid* para 315, para jj.

⁴⁷⁴ Police Service Act of 1995.

appropriate, a multi-disciplinary approach and an integrated methodology that involves the co-operation of all relevant Government departments and institutions.⁴⁷⁵

About ZAR700 million worth of drug and contraband goods have been seized including destroying 360 million illegal cigarettes by the DCPI.⁴⁷⁶ In the 2012/2013 financial year, the DCPI reportedly investigated 11 criminal organisations involved in drug-related crimes and arrested 89 suspects.⁴⁷⁷ In 2016, 19 gambling sites in the Northern Cape and North-West provinces were closed and three people arrested for operating the illegal network.⁴⁷⁸

5.4.15.3 **The Special Investigation Unit and the Special Tribunal**

The Special Investigation Unit (SIU) was established by the Special Investigating Unit and Special Tribunal Act 74 of 1996 (Act).⁴⁷⁹ The core functions of the SIU are to: investigate serious malpractices, maladministration and corruption in connection with administration of state institutions; and take appropriate and effective civil action against wrongdoers and bring them to book through misconduct proceedings or hearings and criminal prosecutions.⁴⁸⁰

Apart from the SIU, section 2(1) of the Act established an independent and impartial Special Tribunal (Tribunal) aimed at performing its functions without fear, favour or prejudice. The Tribunal has jurisdiction to adjudicate civil proceeding brought before it by a SIU and may also subpoena or cause to be subpoena any person to appear before it to submit a book, document or object.⁴⁸¹

The 2015/2016 annual report of the SIU revealed that it recovered cash and/or assets of the value of R2.2 million (equivalent to at least US\$ 166108.16) of monies owed to the Department of Water Affairs for funding of the Paterson Bulk Water project.⁴⁸² This was after an allegation was made to the SIU regarding 'procurement of, and contracting for goods, works or services by the Department of Water Affairs (DWA).'⁴⁸³ The allegation led the SIU to investigate 'any

⁴⁷⁵ *ibid* section 17B. See also section 17D.

⁴⁷⁶ Babalo Ndenze, 'Hawks have 'crippled' high-profile gangs'(IOL 26 August 2013).

⁴⁷⁷ *ibid*.

⁴⁷⁸ 'Hawks shuts down 19 gambling sites, arrest three' (2 December 2016) <http://www.enca.com/south-africa/hawks-shuts-down-19-gambling-sites-arrests-three> accessed 3 June 2017.

⁴⁷⁹ Special Investigating Unit and Special Tribunal Act 74 of 1996.

⁴⁸⁰ *ibid*.

⁴⁸¹ Section 8 of the Special Investigating Unit and Special Tribunal Act 74 of 1996.

⁴⁸² Special Investigation Unit, 'Annual Report 2015/2016' 42

⁴⁸² <https://www.npa.gov.za/node/13> accessed 5 August 2017.

⁴⁸³ *ibid*.

undisclosed or unauthorised interest which the personnel of the DWA could have had with regard to contractors, suppliers or service providers who bid for work or conducted business with the DWA'.⁴⁸⁴ In another incident, the SIU recovered cash and/or assets of the value of ZAR29.2 million (equivalent to at least US\$ 2204708.33) following an investigation on corruption, fraud and maladministration in the development and delivery of low cost housing in South Africa.⁴⁸⁵

5.4.15.4 **The Asset Forfeiture Unit**

The South African National Prosecuting Authority has six business units one of them being the Asset Forfeiture Unit (AFU), established in 1999 in order to ensure that the powers in the Prevention of Organised Crime Act of 1998 are used to their maximum effect to seize criminal assets in an effort to fight organised crimes.⁴⁸⁶

Among many of its investigations, the AFU has seized numerous assets. For example, assets worth more than ZAR23 million (equivalent to at least US\$ 1736585.33) belonging to a former Salaries Accountant of Omnia Holdings (Pty) Ltd were seized by the Johannesburg AFU.⁴⁸⁷ Danalutchmee Latchman, her husband and daughter were arrested and charged with fraud, corruption and money laundering.⁴⁸⁸ In 2012, ZAR2.1m (equivalent to at least US\$ 158557.791) of assets belonging to Dr Jurry Shunoe were seized after his conviction for defrauding the Labour Department's Compensation Fund of more than ZAR5m.⁴⁸⁹

5.4.15.5 **The Special Anti-Corruption Unit**

The Special Anti-Corruption Unit (Unit) was established in 2001 to assist departments in managing corruption cases and to operate through a multi-agency approach.⁴⁹⁰ The core objective of the Unit is to investigate public officials with undeclared business interests, public officials doing business with government without disclosing their business interests, investigate public officials who are performing remunerative work outside public services without permission; and officials who are

⁴⁸⁴ *ibid.*

⁴⁸⁵ *ibid*

⁴⁸⁶ <https://www.npa.gov.za/node/13> accessed 10 April 2017.

⁴⁸⁷ 'Joburg's forfeiture unit seizes assets worth over R23mil' < <http://www.sanews.gov.za/south-africa/joburgs-forfeiture-unit-seizes-assets-worth-over-r23mil>> accessed 5 August 2017.

⁴⁸⁸ *ibid*

⁴⁸⁹ Staff reporter, 'R2.1m assets seized from Doctor's assets' (3 February 2012).

⁴⁹⁰ <http://www.dpsa.gov.za/article.php?id=11> accessed 5 August 2017.

soliciting or receiving bribes in return for performing or not performing official duties as well as receiving grants or benefits unlawfully.⁴⁹¹

The duties of the Unit are to: conduct, facilitate and coordinate the investigation of high profile cases; provide legal advice and support to resolve high profile cases; and assist departments with managing cases.⁴⁹²

In 2009, the Minister of Finance established a Multi-Agency Working Group (MAWG) to investigate fraud and corruption allegations or cases in the public sector.⁴⁹³

5.4.15.6 **The National Anti-Corruption Forum**

Following a National Anti-Corruption Summit in 1999, a resolution was passed for the establishment of a National Anti-Corruption Forum.⁴⁹⁴ On 15 June 2001, the National Anti-Corruption Forum (NCAF) was launched in Cape Town.⁴⁹⁵ The creation of the Forum was to ensure that it contributes ‘towards the establishment of a national consensus through the co-ordination of sectoral strategies against corruption’, advise government on national initiatives that could be employed to implement anti-corruption strategies, sharing information and best practices on sectoral anti-corruption work, and ‘advise sectors on the improvement of sectoral anti-corruption strategies’.⁴⁹⁶

5.4.15.7 **The Public Service Commission**

The functions of the PSC are set out in section 196(4) of the South African Constitution.⁴⁹⁷ Its functions are to: promote constitutional values and principles governing public administration in the public service; investigate, monitor and evaluate organisation, administration and personnel practices of the public service; propose measures to ensure performance in the public service are effective and efficient; give direction aimed at ensuring that personnel procedures relating to recruitment, transfers promotion and dismissals comply with constitutional values and principles; investigate and evaluate applications of persons, public administration practices and report to the

⁴⁹¹ *ibid.*

⁴⁹² *ibid.*

⁴⁹³ Moloi J Moropa, ‘State procurement system review to ensure value for money: National Treasury update; Anti-Corruption Unit: DPSC update’ <<https://pmg.org.za/committee-meeting/14763/>> (accessed 10 November 2017).

⁴⁹⁴ <http://www.nacf.org.za/about-nacf/index.html> accessed 5 August 2017.

⁴⁹⁵ *ibid.*

⁴⁹⁶ *ibid.*

⁴⁹⁷ Constitution (n 125) section 194(4).

relevant executive authority and legislature; investigate grievances of employees in the public service concerning acts or omissions of public officials and recommend appropriate measures; and advise national and provincial organs of state regarding personnel practices in the public service.⁴⁹⁸

5.4.16 Uganda

Based on the 2015 and 2016 TI CPI, there has been an increase in the level of corruption in Uganda. In 2015, Uganda ranked 139 out of 165 States in 2016, it ranked 151st of 176 states. Nonetheless, the Ugandan government has implemented anti-corruption efforts which have led to the establishment of anti-corruption institutions such as the Inspectorate and the Anti-Corruption Coalition-Uganda.

5.4.16.1 The Inspectorate

The Inspectorate is an agency established by the Inspectorate of Government Act of 2002.⁴⁹⁹ Section 8 sets out the functions of the Inspectorate which are to: promote and foster strict adherence of the rule of law and principles of natural justice in the administration; eliminate and foster the elimination of corruption, abuse of authority and of public office; promote fair, efficient and good governance in public offices; enforce the Leadership Code of Conduct; investigate acts, omissions, advice, decisions or recommendation made by a public official or any other authority; stimulate public awareness about constitutionalism values and its office activities; and conduct an enquiry on the methods used by law enforcing and state security agencies to execute their functions.⁵⁰⁰

Cases concluded by the Inspectorate include those against Ouma Adea, convicted for corruption (soliciting for and receiving a gratification); Akankwasa Damien, Executive Director of National Forest Authority, charged and convicted for abuse of power; Nsimbe Ismail, sentenced to one year imprisonment for corruption (soliciting for and receiving a gratification); and Hadija Namutebi, convicted and sentenced for charges of abuse of power, theft, unlawful possession of Government Stores and Neglect of Duty.⁵⁰¹

⁴⁹⁸ *ibid.*

⁴⁹⁹ Inspectorate of Government Act of 2002.

⁵⁰⁰ *ibid*

⁵⁰¹ <http://www.igg.go.ug/cases/concluded.criminal> accessed 22 April 2017.

The Anti-Corruption Coalition Uganda (ACCU) is an NGO formed in 1999.⁵⁰² The central purpose of ACCU is to ensure that political leaders, public servants, private sector and religious authorities do not misuse their entrusted powers.⁵⁰³ In order to achieve this overall objective, ACCU's strategic plan is to: equip the civil society with the necessary skills, knowledge, conviction, confidence and methods aimed at effectively combating corruption; provide a platform which civil society organisations can use to pressure the government to be responsible and committed to improve transparency and accountability in service delivery and in the fight against corruption in the public sector; and increase information sharing and accessibility among coalition members, strategic allied and the general public in an effort to expose corruption.⁵⁰⁴

5.4.16.2 **The Financial Intelligence Authority**

Section 18 of the AMLA 2013 established the Financial Intelligence Authority (FIA), a corporate body with perpetual succession, capable of suing and being sued and which may perform lawful functions as any corporate body.⁵⁰⁵ As provided for by section 19, , FIA was created to: enhance the identification of proceeds of crime and combat money laundering; enhance public awareness and understanding of matters related to money laundering; make information collected by it available to competent authorities and facilitate the administration and enforcement of the laws of Uganda; and exchange information with similar bodies whose states have treaties, agreements or arrangements with the Government of Uganda regarding money laundering and similar offences.⁵⁰⁶

5.4.16.3 **The Auditor-General**

Article 163(1) of the Constitution of the Republic of Uganda establishes the office of the Auditor-General.⁵⁰⁷ According to Article 163(3) an Auditor-General: audit and report public accounts of Uganda and other public offices, central and local government administrations, universities and public institutions and any public corporation, bodies or organisations established by an Act of

⁵⁰² <http://accu.or.ug/about-us/> accessed 5 August 2017.

⁵⁰³ *ibid.*

⁵⁰⁴ *ibid.*

⁵⁰⁵ AMLA 2013, section 18.

⁵⁰⁶ *ibid* sections 19 and 20.

⁵⁰⁷ Constitution of the Republic of Uganda.

parliament. Moreover, the Auditor-General shall ‘conduct financial and value for money audits in respect of any project involving public funds’.⁵⁰⁸

Section 87 of the Local Government Act of 1997 (Cap 243) as amended also provides additional functions for the Auditor-General.⁵⁰⁹ As set out in the aforementioned section, an ‘Auditor-General may carry out surprise audit, investigations or any other audit.’⁵¹⁰ Section 33 of the Public Finance and Accountability Act 6 of 2003⁵¹¹ also sets out the duties of the Auditor-General. According to this section, an Auditor-General examine, enquire into and audit accounts of the Accountant General and all accounting officers, classified expenditure centres, together with anyone who is ‘entrusted with the collection, receipt, custody, issue or payment of public moneys, or with the receipt, custody, issue, sale, transfer or delivery of any stamps, securities, stores or other Government property.’⁵¹²

5.4.16.4 **The Directorate for Ethics and Integrity, Office of the President**

In an effort to ensure that the President of Uganda performs his or her duties, Article 99 (4) of the Ugandan Constitution of the Republic of Uganda provides that ‘the functions conferred on the President...may be exercised by the President either directly or indirectly or through officers subordinate to the President’. This provision led to the establishment of an Anti-Corruption Coordination Unit, which in 1998, was redesigned to the Directorate for Ethics and Integrity. The Office of the Directorate is seen as a policy arm aimed at fighting corruption, rebuilding ethics and integrity in the society.⁵¹³

5.4.17 **Rwanda**

Despite the aftermath of the 1994 genocide, it may be argued that Rwanda has improved in the implementation of anti-corruption efforts and implementation thereof. This has led Rwanda being considered as one of the least corrupt states in Africa.

⁵⁰⁸ *ibid* Article 163(3).

⁵⁰⁹ Local Government Act of 1997 (Cap 243).

⁵¹⁰ *ibid* section 87.

⁵¹¹ Public Finance and Accountability Act 6 of 2003.

⁵¹² *ibid* section 33.

⁵¹³ Constitution of the Republic of Uganda, Article 99 (4).

5.4.17.1 **The Office of the Ombudsman**

Law No.76/2013 Determining the Mission, Powers, Organisation and Functioning of the Office of the Ombudsman established the Rwandan Ombudsman Office (Office). The Office is independent and has administrative and financial autonomy, and is not expected to take injunction from other institutions. The Office was, among other things, established for the following reasons: function as a link between the citizens and public and private institutions; prevent and fight injustice, corruption and related offences in public and private entities; receive and examine complaints from individuals and associations relating to acts of civil servants, State organs and private institutions; and receive annual declarations of assets.⁵¹⁴

5.4.17.2 **The Rwanda Revenue Authority**

The Rwanda Revenue Authority (RRA) was established by Law No.08/2009 on Determining the Organisation, Functioning and Responsibilities of Rwanda Revenue Authority.⁵¹⁵ RRA has legal personality and financial and administrative autonomy.⁵¹⁶ RRA was established to perform the following functions: participate in fixing, collecting, controlling and managing taxes; grant tax waivers; educate and sensitise the public on tax payment; advise Central and Local Government authorities on matters relating to tax policy; exercise judicial police powers to investigate taxation offences; facilitate commercial activities; and carry out any other activity relating to the collection of public revenue upon request by the Cabinet.⁵¹⁷ In the 2015/2016 financial year, the achievements of RRA included the following: it upgraded its IT infrastructure, developed a revenue investigation and enforcement management system, and the establishment of the IT governance.⁵¹⁸

5.4.17.3 **The Auditor-General**

The Office of the Auditor-General (OAG) was established by Law No.79/2013 Determining the Mission, organization and Functioning of the Office of the Auditor General of State Finances

⁵¹⁴ Law No.76/2013 Determining the Mission, Powers, Organization and Functioning of the Office of the Ombudsman, Article 4.

⁵¹⁵ Law No.08/2009 on Determining the Organization, Functioning and Responsibilities of Rwanda Revenue Authority.

⁵¹⁶ *ibid* Article 1.

⁵¹⁷ *ibid* Article 3.

⁵¹⁸ *ibid*.

which grants the OAG, legal personality and administration autonomy.⁵¹⁹ The OAG was established to: audit government revenue and expenditure in the Central and Local government, public and parastatal institutions and Government projects, or any other organ or institution that receives State budget allocation; carry out financial and property management audit; carry out the audit of accounts, efficient management of property and finances; conduct forensic audit or special audit of all organs of state; submit consolidated financial statements to relevant Chambers of Parliament; and collaborate with other individuals and corporate bodies that have similar responsibilities at both national or international levels.⁵²⁰

Article 14 sets out the responsibilities of the Auditor-General as follows: audit financial statements of the State for each fiscal year; provide advice relating to audit of public entities and institutions; ascertain whether financial and property management within public entities and institutions contain no gap that could lead to mismanagement; audit State revenue accounts and property accounts, together with all other accounts of public entities and institutions; serve as the legal representative of the Office and carry out placement of staff members; and collaborate with other institutions and staff to coordinate audit programmes and to perform any other duty that falls within his/her responsibilities.⁵²¹

5.4.17.4 **The Public Procurement Authority**

The Rwanda Public Procurement Authority (RPPA) was established by Law No.63/2007 Establishing and Determining the Organisation, Functioning and Responsibilities of RPPA.⁵²² The establishment of the RPPA resulted in the replacement of the National Tender Board.⁵²³

RPPA is a body that has legal personality, together with administrative and financial autonomy.⁵²⁴ The authority has the following functions or responsibilities: organise, analyse and supervise public procurement matters; advise Government and other public procurement organs on policies and strategies on organisations of public procurement matters; develop human

⁵¹⁹ Law No.79/2013 Determining the Mission, Organisation and Functioning of the Office of the Auditor General of State Finances, Article 3.

⁵²⁰ *ibid* Article 6.

⁵²¹ *ibid* Article 14.

⁵²² Law No. 79/2013 Determining the Missions, Organisation and Functioning of the Office of the Auditor-General of State Finances.

⁵²³ Ivan Rugema, 'The regulatory framework for public procurement in Rwanda' in Geo Quinot, Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 165.

⁵²⁴ Law No. 63/2007 Law Establishing and Determining the Organization, Functioning and Responsibilities of RPPA, Article 1.

resources professionalism in public procurement; develop teaching material, organise training and set requirements that need to be fulfilled by staff members in public procurement; collect and disseminate procurement information on public procurement; prepare standard tender documents, bid evaluation reports and other standard documents that may be used by procuring entities; suspend or approve suspensions and debarment of bidders in public procurement; provide, where possible, public entities with technical support; sensitise the public on public procurement matters; and establish relations and cooperation with other regional and international agencies that carry out similar responsibilities.⁵²⁵

In addition to its responsibilities or functions, RRPA has the power to suspend the conduct of procurement proceedings or awarding of a tender in order to investigate the matter either upon a complaint or on its own initiative in accordance with the public procurement law; carry out investigations in any procuring entity governed by the procurement law and where need be, request documents related to public procurement; and seek expert assistance in order to fulfill its mission.⁵²⁶

5.4.18 Cameroon

Based on the 2016 CPI, it may be argued that Corruption is rampant in Cameroon's public sector hence, it ranked 145th out of 176 states in the TI's 2016 CPI. In spite of the high corruption level, Cameroon's anti-corruption efforts have increased over the years marked by, for instance, the establishment of the National Anti-Corruption Commission (NACC) and the SCC.

5.4.18.1 The National Anti-Corruption Commission

The National Anti-Corruption Commission (NACC) was established by Decree No.2006/088.⁵²⁷

The NACC is an independent body created to contribute in the fight against corruption. In order to do so, it must: monitor and evaluate the effective implementation of the governmental anti-corruption plan; gather, centralise and analyse denunciations and information that has been forwarded to it concerning corrupt practices, deeds and facts and similar offences; conduct studies and investigations and oppose any measures aimed at forestalling or curbing corruption; carry out on-the-spot control of execution programmes and evaluate conditions for awarding of public

⁵²⁵ *ibid* Article 3.

⁵²⁶ *ibid* Article 4.

⁵²⁷ Decree No.2006/088 on the Setting up, Organisation and Functioning of the NACC, Article 1.

contracts; disseminate and popularise anti-corruption instruments, identify the causes of corruption and propose to the relevant authorities, measures that are likely to lead to its eradication from all public and semi-public services; and perform any other duties assigned to it by the President of the Republic.⁵²⁸

Any natural person or corporate body may lodge a complaint with NACC in respect of corrupt deeds and facts. Moreover, the Commission may also initiate proceedings for any corrupt act.

5.4.18.2 The National Commission on Human Rights and Freedoms

The National Commission on Human Rights and Freedoms is an independent institution with legal personality and financial autonomy, created by Law No.2004/016 of 22 July 2004 to promote and protect human rights in Cameroon.⁵²⁹ For the National Commission for Human Rights and Freedoms to fulfill its principal purpose or mission it: receives denunciations on cases concerning the violations of human rights and freedoms violations; carry out investigations into the violations and report to the President of the Republic; visit penal institutions, police stations and gendarmerie brigades in the presence of the Prosecutor of the Republic or his representative; make a proposal to public authorities on measures to be taken in the field of human rights and freedoms; consider all matters that relate to the promotion and protection of human rights and freedoms; popularise human rights instruments and freedoms and ensure the development of a human rights culture in the public through teaching, information and organising conferences and seminars; collect and disseminate international documents relating to human rights and freedoms; and liaise with international organisations, committees of foreign associations pursuing similar aims.⁵³⁰

5.4.18.3 The Special Criminal Court

Over the years, there have been numerous occasions where the Head of State, His Excellency Paul Biya, has expressed his displeasure with public officials who siphon state resources for their private gains. His displeasure eventually led to the establishment of the SCC by Law No.2011/28 of 14 December 2011, amended by Law No.2012/011 of July 2012.⁵³¹

⁵²⁸ *ibid* Article 2.

⁵²⁹ Law No.2004/016 of 22 July 2004, Article 1.

⁵³⁰ *ibid* Article 2.

⁵³¹ Law No.2011/28 of 14 December 2011, amended by Law No.2012/011 of July 2012. See generally Agbor (n 9) 12 and 25. See also Dibussi Tande, 'Justice for Sale or Legal Realpolitik? The Special Criminal Court Sets Legal

The SCC has jurisdiction over specific offences committed in Cameroon.⁵³² Section 2 of Law No.2011/028 of 14 December 2011 and section 2 (New) of Law No.2012/011 to amend certain provisions on Law No.2011/28 provides that:

The Court shall be competent to hear and determine matters, where the loss amounts to at least 50 000 000 CFA Francs [approximately US\$ 100 000] relating to misappropriation of public funds and other related offences provided for in the Penal Code and International Conventions ratified by Cameroon.

From this provision, it is evident that the SCC was created for a specific mandate: to investigate, prosecute and convict persons who misappropriate funds to the value of at least 50.000.000 CFA Francs.⁵³³ Moreover, the loss caused must be related or as a result of the misappropriation of public funds.⁵³⁴ Additionally, it is imperative to acknowledge that the SCC did not establish nor introduce a new offence, nor does it address the creation and definition of any crime.⁵³⁵

The creation of the SCC and its subsequent arrests, prosecutions and convictions of top political figures is a clear indication that everyone, irrespective of their position, is subject to the law.⁵³⁶ By virtue of the SCC having jurisdiction on matters wherein funds misappropriated to the value of at least 50.000.000 CFA Francs (at least US\$ 100 000), indicates that individuals who are most likely to commit such an offence on a higher scale, are those who oversee daily financial operations of State Funds.⁵³⁷ In numerous instances, the political elites or senior government officials who misappropriate funds within the score of the jurisdiction of SCC, often get assistance from other persons within or outside the banking sector. Furthermore, they establish fictitious businesses entities 'that would be awarded deals by perpetrators, and the authorisation of electronic transfers and bank withdrawals that would be overseen by those within the joint criminal enterprise'.⁵³⁸

Precedent in the Yves-Michel Fotso Embezzlement Case' (*Scribbles from the Den*, 28 January 2013) <<http://www.dibussi.com/2013/01/fotso-justice-for-sale-or-legal-realpolitik.html>> accessed 7 August 2017.

⁵³² Agbor (n 9) 13.

⁵³³ *ibid* 3. See also Dibussi Tande, 'Justice for Sale or Legal Realpolitik? The Special Criminal Court Sets Legal Precedent in the Yves-Michel Fotso Embezzlement Case' (*Scribbles from the Den*, 28 January 2013) <<http://www.dibussi.com/2013/01/fotso-justice-for-sale-or-legal-realpolitik.html>> accessed 7 August 2017.

⁵³⁴ Agbor (n 9)13.

⁵³⁵ *ibid* 4 and 13.

⁵³⁶ *ibid* 4 and 26.

⁵³⁷ *ibid* 25.

⁵³⁸ *ibid* 26.

Since its establishment top-notch political figures have been arrested, prosecuted and convicted ranging from the former Minister of Finance, former Prime Minister, tax inspectors, civil administrators and accountants.⁵³⁹

5.4.18.4 **The National Agency for Financial Investigations**

The National Agency for Financial Investigations (NAFI) was established by Decree No.2005/187 as an independent body with financial autonomy created to oversee financial intelligence through, among other things-

- receiving, processing and forwarding to competent judicial authorities, all information that will be helpful in establishing the origin of sums of money or nature of transactions mentioned in the suspicion report relating to anti-money laundering and counter terrorism financing drive; and
- to obtain information relevant to its duties from judicial authorities and authorities that manage liable persons.⁵⁴⁰

5.4.18.5 **The Ministry of Public Contracts and Public Procurement Regulation Agency**

Decree N° 2001/048 of 23 February 2001 established an independent agency with financial autonomy, the Regulation of Public Procurement (ARMP).⁵⁴¹ ARMP was established to regulate, monitor and evaluate the market system.⁵⁴² The functions or responsibilities of ARMP include: regulating public procurement activities; providing periodic evaluations of performance of those who participate in the public procurement system; giving technical opinions at the request of the ministry responsible for public procurement; making reform proposals in the public procurement context and delegation of public service; developing quality assurance framework for public procurement bodies; contributing in the training of public procurement players at the request of the administration; and designing and disseminating standard documents to players in the public procurement system.⁵⁴³

⁵³⁹ *ibid* 3.

⁵⁴⁰ Decree No.2005/187 on Organisation and Functioning of the National Agency for Financial Investigation, Article 3.

⁵⁴¹ Decree No. 2001/048 of 23 February 2001 on the Organisation and Operation of the Regulatory Public Markets.

⁵⁴² *ibid*.

⁵⁴³ *ibid* Article 3.

5.4.18.6 **The Audit Chambers of the Supreme Court**

The Constitution of the Republic of Cameroon vests judicial powers on the Supreme Court, Courts of Appeal and Tribunals. The Supreme Court is the highest court in legal and administrative matters as well as in the appraisal of accounts, and consists of three benches: judicial, administrative and audit benches.⁵⁴⁴ The Audit Bench could be considered as one of many anti-corruption institutions in Cameroon.

According to Article 41, the bench shall be-

Competent to control and rule on public accounts, as well as on those of public and semi-public enterprises. It shall give final rulings on final judgments passed by lower audit courts; examine any other matter expressly devolving upon it by law.⁵⁴⁵

5.4.18.7 **The Ministry of the Supreme State Audit**

The Ministry Supreme State Audit (MINCSP) is an office established by the President of the Republic.⁵⁴⁶ It is attached to the executive branch of government under direct jurisdiction of the President and is said to have no relation with the legislature.⁵⁴⁷ The functions or duties of the MINCSP are spelt out in Decree N° 97-47 of 5 March 1997 as mandating:

- Auditing public services, regional and local authorities, public and semi-public enterprises, religious and lay private bodies, establishments and associations that ‘receive State subsidies or are guaranteed by the State, or other public corporate bodies, at the administrative, financial and accounting levels’;
- ‘Controlling and auditing accounts of the State budget’;
- Conformity and regularity control, financial, environmental and performance control, together with specific control, and programme evaluation;
- Carrying out specific audit of public and private enterprises and bodies which are strategic to the nation or to national defence interests’;
- Giving opinion on drafting legal and statutory instruments of a financial nature submitted to them; and
- Having access to the national financial and economic card index.⁵⁴⁸

⁵⁴⁴ Constitution of the Republic of Cameroon, Law No.96-06, Article 38

⁵⁴⁵ *ibid.*

⁵⁴⁶ Decree No. 97-47 of 5 March 1997 to Organize the Supreme State Audit Services.

⁵⁴⁷ *ibid.*

⁵⁴⁸ Order No. 00012/MPT/CAB of 09 August 2001 Establishing a Cell of Fight against Corruption in the Ministry of Posts and Telecommunications, Articles 2-6.

5.4.18.8

The Anti-Corruption Ministerial Cells

The Cell for the Fight against Corruption was created by Order N° 00012/MPT/CAB of 09 August 2001 Establishing a Cell of Fight against Corruption in the Ministry of Posts and Telecommunications. The functions of the Cell of Fight against Corruption are to: to ensure that anti-corruption measures prescribed by the Ministry of Posts and Telecommunications are effectively implemented; and carry out missions relating to the prevention and suppression of corruption within departments and agencies of the Ministry and propose measures to curb the phenomenon.⁵⁴⁹

5.5 Summary

For states to combat corruption, they must develop strong anti-corruption strategies, and if these states have the willingness to implement these strategies, the willingness will be reflected in the legislative framework of the state in question.

Corruption in Africa is not prevalent because there are no anti-corruption laws or mechanisms in place, it is prevalent simply because existing laws in many African states are not effectively implemented. To correct their position in the fight against corruption, African states need to re-evaluate their legislative frameworks and convene with their legislators to find and tighten loopholes contained in their legislative provisions. This can be achieved if states consider adopt certain legislative provisions from other states into their own legislative frameworks in an effort to strengthen their existing anti-corruption provisions. This can equally be said with institutions. It is not about the number of anti-corruption institutions a state may have, rather it is about whether or not the institutions are independent in the performance of their functions. If institutions are independent, there are high chances that they will be effective and efficient because their functioning will not be influenced by anything or anyone, and if this is the case, their investigative roles will be done without prejudice or fear.

One of the crucial elements when dealing with anti-corruption instruments is understanding to whom the instruments apply to. One must not regard anti-corruption laws as being exclusively directed to public officials. Instead, these laws must also be seen as intended to address conducts by civil society organisations individually on the one hand, and their interaction with public officials, on the other, particularly because certain corrupt practices require participation of both

⁵⁴⁹ *ibid* Article 2.

parties. It is important for public officials and civil society organisations to understand that instruments play a key role in guiding those in governance, administration of justice and civil society organisations as to how they are expected to conduct themselves when government services are being rendered.

Another key proposition for African states is that, they need to consider the importance of designing anti-corruption instruments in a language that is clear and unambiguous, that is, enacted in such a way that a layman could understand. This is very crucial particularly for civil society organisations. The Sudanese and Nigerian Penal Code are perfect examples to support this argument. These instruments set out provisions and provide illustrations intended to provide further explanation, understanding and guidance in accordance with the provisions in question. The use of illustrations as a mechanism to explain legislative provisions is vital because it allows the general public to have a better understanding of the provisions of the law, and perhaps other African states could consider adopting this.

From the above discussion, it could be suggested that, for corruption to be at a minimized in Africa, African States must develop instruments on the recovery of assets, as seen in states such as Cameroon and Mauritius. This initiative becomes very important for this reason: senior officials often siphon large amounts of money to foreign territories, thus resulting in the impediment of economy growth, snail-pace development of the state, and distrust of the leadership by members of the society. The creation of an asset recovery instrument will allow African victim states to seek foreign assistance but, most importantly, to have the assets, funds and/or proceeds thereof, returned. Even though the return of assets or funds is the intended goal, victim states need to take the responsibility to regulate the conducts of public officials to prevent the recurrence of corrupt conducts and transfer of ill-gotten wealth in the future.

On the other hand, if states have existing instruments on assets recovery, they must, where necessary, amend their policies and laws on the recovery of assets, and most importantly, ensure that the recovered funds are used to benefit the greater good. All these could be achieved if African states have strong anti-corruption legislative frameworks guided by international instruments on corruption and other related matters.

The last key factor in ensuring that anti-corruption instruments are effective and efficient relates to the connection with the principles of good governance.⁵⁵⁰ Within the context of corruption, good governance principles are heightened and reflected through the development of instruments that address issues that jeopardise governance. In order to imprint the importance of these principles as a mechanism to address and combat corruption, states could make special efforts by developing an instrument centred on good governance similar to the Mauritian Good Governance and Integrity Act 31 of 2015 which came into effect on 1st January 2016.⁵⁵¹

The TI's 2016 CPI revealed that Africa has both the worst and the least corrupt states. Two opportunities could be pursued from this revelation: first, the worst corrupt states should consider examining and/or possibly adopting anti-corrupt strategies or mechanisms employed by the least corrupt states in an effort to determine what the least corrupt states have done to succeed in combatting corruption within their borders; second, the least corrupt States, among themselves, together with states with average CPI scores, could exchange anti-corruption strategies in order to improve existing and future strategies. The interchange of anti-corruption mechanisms or strategies becomes a clear indication that no state has a watertight or perfect anti-corruption strategy or plan. Nonetheless, States such as Botswana, Rwanda, Cape Verde and Mauritius, for the most part, have successfully managed to develop and implement anti-corruption strategies. These states, together with all others could identify and exchange their legislative strengths in an effort to address legislative weaknesses in the fight against corruption.

For existing anti-corruption instruments to be implemented, anti-corruption institutions agencies or bodies must be established. For these institutions to fulfil the purpose of their creation, they must function independently, without fear, favour or prejudice. From the above discussion, there are three characteristics observed in anti-corruption institutions in Cameroon, South Africa and Nigeria, which other African states could consider.

First, like Cameroon, states must have an institution such as the SCC primarily aimed at holding accountable public officials, particularly senior public officials who misappropriate large amounts of state funds. Though the criminal court was created solely to focus on misappropriation

⁵⁵⁰ Good governance principles may be understood as governmental pillars aimed at ensuring that those in power perform their functions in the interest of the public, to ensure that the rights of the general public are implemented and not violated, and to ensure that resources are allocated fairly.

⁵⁵¹ The Act established an Integrity Reporting Service Agency in an effort to promote good governance and integrity reporting in public and private sector; encourage positive reports on acts of good governance and integrity; to encourage people to make known malpractices; and recover unexplained wealth.

of public funds, future similar institutions should integrate this corrupt practice with other similar practices such as embezzlement, theft and fraud.

Second, like South Africa, anti-corruption institutions must be independent in the performance of their duties. If an institution is not independent, it becomes prone to external forces and its lack of independence defeats the purpose of its creation. The South African Office of the Public Protector is a perfect model example because it has certain qualities or characteristics which many anti-corruption institutions in Africa lack: over the years, this institution thoroughly investigated various individuals from well-known businessmen, politicians, influential people and senior government officials, without prejudice, favour or influence from anyone, political party or institution.

Third, states must have the willingness to investigate and hold accountable senior government officials; and no better state can depict this like Nigeria. Nigeria has convicted numerous senior government officials who have either stolen, misappropriated or embezzled public funds. This quality is lacking in many African States. If a government administration could impose liability against its own corrupt officials, it will gain confidence and the trust of its people. Moreover, its willingness and determination to hold its own officials liable, will serve as a deterrent to other government officials not to engage in corrupt practices.

The implementation of anti-corruption instruments, strategies, policies and/or regulations is important in the fight against corruption, so is the promotion of anti-corruption efforts. For society to be aware of corruption, a state must make efforts to increase awareness of corruption. Like Zambia one of the efforts would be to teach corruption to the rising generation. This could be done by introducing corruption as part of the school curriculum/syllabus. This strategy is crucial for two reasons: first, it targets a specific group in society, the youth, whose thoughts are not clouded by greed; second, if this rising generation is taught about corruption and its effects in schools, they could become more vigilant of its impact in society and as they mature to become active members of society, they will have a better understanding of corruption and its effects, and this should allow them to refrain from any acts of corrupt or related practices.

No state has impermeable anti-corruption mechanisms. Ideally, an almost perfect anti-corruption institution may well be one such as the SCC of Cameroon, which functions like South Africa's Office of the Public Protector; one that has the willingness to investigate and hold accountable, senior government officials like in Nigeria; and one with the will to raise

awareness to civil society organisations like Zambia and Swaziland. If such institutions could exist, the level of corruption in Africa would surely decline.

With national anti-corruption instruments in place, their implementation becomes a critical point and often a challenge for African states. Likewise, with anti-corruption institutions in place, their functioning may not be seen as reflecting the purpose of their creation. To address these challenges, one must examine the willingness of a state in the fight against corruption. The next chapter outlines and emphasises on political will as an anti-corruption mechanism.

CHAPTER SIX

THE NEED FOR POLITICAL WILL IN COMBATING CORRUPTION IN AFRICA

6.1 Introduction

The previous chapters have, among other things, delineated the crime of corruption as well as the effects and typology of the phenomenon. In addition, national and international instruments, especially legislation and institutional mechanisms established by both national governments and the international community in order to combat corruption were examined.

The question that arises is: despite these legislative instruments and institutional mechanisms, why is corruption still very high in many African states? The classification by Transparency International, the global anti-corruption watch, puts numerous African states on a very high corruption index. This is not only worrying but also disappointing given the fact that most African states have designed and enacted anti-corruption laws, institutions and policies. As argued in this chapter, these efforts are, in themselves, insufficient and ineffective in the fight against corruption. These efforts, both legislative and institutional, must be accompanied by the requisite political will. This chapter explores the notion of political will, provides an explanation of political will, highlights how political will ought to be manifested and discusses the different kinds of political will.

Against this background, this chapter seeks to examine the prime features of political will and how it could be used to combat corruption. The purpose is to illustrate that irrespective of countless instruments and institutions, whether national or international, key to a successful fight against corruption is the presence of political will to do so. In other words, despite the countless existing anti-corruption laws, policies and institutions, their effectiveness or ineffectiveness entirely depends on the leadership of a state, accompanied by its commitment and willingness to combat corruption.

Political will plays a crucial role in the fight against corruption since it is the driving force in the enforcement of laws and functioning of state institutions. The presence of political will is evident when efforts to combat corruption go beyond political rhetoric echoed on public podiums. It manifests when a state initiates development and enactment of legislation, establishes mechanisms with the mandate to combat corruption, and allows these laws and institutions to operate without any influence from any political or state actor.

For a state to combat corruption effectively, an intertwined relationship between corruption and willingness to combat corruption must be established. The facets of this relationship depend on the level or type of political will a state possesses. In other words, if a state has an active political will, then, the existence of the counterpart of this relationship, which is corruption, could be reduced. On the other hand, should a state have no political will, corruption will prevail and flourish at the expense of the society.

As argued in this chapter, political will is needed in order to complement every other effort taken by a state to fight corruption. Three basic but relevant questions warrant answers: first, what is political will? Second, can political will be measured, and if so, how? Third, what role does it play in the fight against corruption? In order to easily and better comprehend political will and how it could play a role in the fight against corruption, its definition must fully capture the different three dimensions of anti-corruption efforts: promotion; prevention; and protection. As one constructs the idea of political will in relation to these three dimensions, two issues emerge: first, it will be evident that the state and its populace must possess the willingness to combat corruption, that is to say, the state must exude political willingness to combat corruption through for example, development and implementation of preventative measures; while on the other hand, society must also possess the willingness to eradicate corruption through adherence to these measures; Second, although the political willingness of a state to combat corruption cannot be measured, a state can confirm the possession of political will through various indicators.

As discussed in this chapter, a strong political will is a *conditio sine qua non* for the successful and effective fight against corruption in every African state as it strengthens existing anti-corruption strategies and sets the national tone and mood for such fight.¹

6.2 Defining of political will

Political will could be defined as 'the demonstrated credible intent of political actors (such as elected or appointed leaders, civil society, watchdogs and, stakeholder groups) to attack perceived causes or effects of corruption at a systematic level'.² One core element that gives life to this

¹ Jon S T Quah, *Curbing Corruption in Asian Countries: An Impossible Dream* (Emerald Group Publishing 2011) 454.

² Abdul-Gafaru Abdulai, 'Political Will in Combating Corruption in Developing and Transition Economies: A Comparative Study of Singapore, Hong Kong and Ghana' (2009) 16 *Journal of Financial Crime* 387, 390. Political will may also be understood as 'the commitment of political leaders and bureaucrats to undertake actions to achieve a set of objectives and to sustain the cost of those actions over time': see Carmen Malena, 'Building Political Will for

definition is the element of 'intent'. Politicians or political elite could demonstrate intent in various ways such as the enactment and implementation of anti-corruption laws. Unless these demonstrations are accompanied by the intent to combat corruption, they reside in the annals of history as nothing but mere rhetoric like many African States that have anti-corruption laws and institutions but fail to practically implement them. A major step in the fight against corruption in Africa is the enactment, within States, of national legislative instruments aimed at combatting corruption, which should be followed by the establishment of institutional mechanisms. Beyond enactment, the enforcement of these laws and functioning of these institutions depend on the presence of political will which must be exuded by the key political leaders of that State.

Given the above definition, it could be argued that political will is not limited to politicians but extends beyond to include members of the society and the private sector.³ The existence of political will is important in the functioning of both government and society. The willingness of politicians and the general public cannot be measured using any mathematical formulae. Neither can political will be compared by some conventional yardstick. Rather, in a society that is committed to combating corruption, both the State and its people work harmoniously, ensuring that they fit within all three dimensions in the fight against corruption. In other words, both the State and the people complement each other's efforts in preventing and combating corruption.

Corruption usually spreads from senior officials and cascades down the ranks by actions or inactivity in some cases. Therefore, senior politicians must exemplify acceptable conducts for subordinates to follow.⁴ The chain of corruption could be broken if senior officials take the initiative of reprimanding other senior officials and junior officials who are expected to refrain from corrupt activities. Corruption is perpetrated by both senior and junior officials. The difference between these two classes of public officials lies in the extent to which corruption is perpetrated. Grand corruption is usually perpetrated by fewer individuals who often hold senior government positions. Although perpetrated by the minority, the damage to the state is tremendous due to the nature of the office positions which affords them access to public funds or assets and, therefore, grant them the opportunity to satisfy their private gains. For example, the Democratic Republic of

Participatory Governance: An Introduction' in Carmen Malena (ed), *From Political Won't to Political Will: Building Support for Participatory Governance* (Kumarian Press 2009) 18.

³ *ibid.*

⁴ *ibid.*

Congo (DRC) is one of the poorest states in Africa, despite being rich with natural resources.⁵ For 32 years, the DRC, formerly known as the *République du Zaïre* (between 1971 and 1997), was under the leadership of Mobutu Sese Seku, who allegedly embezzled at least US\$ 4-15 billion during his presidential term,⁶ resulting in, among other things, daunting infrastructure challenges.⁷ It could be argued that the estimated amount Mobutu Sese Seku embezzled could have been used to improve infrastructure in the DRC. This could have led to job creation, which would in turn, have lowered the poverty rate in the country. All these, together with natural resources profits, would have certainly improved its economy.

On the contrary, petty corruption is perpetrated by majority of individuals who often hold junior government positions such as such as policemen, nurses, administrators and clerks. Even though its effects are not as drastic or devastating as those of grand corruption, petty corruption affects members of the society as they depend on these officials for service delivery. For example, an underprivileged person could be treated horribly by nurses in hospitals if they are unable to pay bribes. However, if people are able to give nurses a bribe, they may receive proper treatment such as careful administration of painful injections, cleaner hospital clothes, and may not even have to wait in queues.⁸

Regrettably, where there is unchecked abuse of power, corruption usually flourishes.⁹ Across the African continent, countless individuals, initially unknown to the general public, together with known senior government officials, are now infamous for disgraceful and scandalous corrupt practices. For example, in 2011, the Ugandan Local Government Ministry contracted Amman Industrial Tools and Equipment, a locally registered Ugandan company, to supply 70,000 bicycles to local councils. An advance payment of US\$ 1.7 million was made to the company but no bicycles were delivered.¹⁰ In July 2014, the Anti-corruption Court sentenced former Permanent

⁵ Gérard Roland, *Development Economics* (Routledge 2016) 4.

⁶ 'Kleptocracy and Anti-Communism: When Mobutu Ruled Zaire' <http://adst.org/2016/09/kleptocracy-and-anti-communism-when-mobutu-ruled-zaire/> accessed 30 June 2017.

⁷ '2 Democratic Republic of Congo Logistics Infrastructure' <http://dlca.logcluster.org/display/public/DLCA/2+Democratic+Republic+of+Congo+Logistics+Infrastructure;jsessionid=C32CE53257392CEBC575D7762E6EAA4C> accessed 30 June 2017.

⁸ Jonathan Werve and Global Integrity (eds), *The Corruption Notebooks 2006* (Global Integrity 2007) 267.

⁹ See Roderick T Long, 'Hellenistic Philosophers of Law' in Fred D Miller Jr and Carrie-Ann Biondi (eds), *A Treatise of Legal Philosophers and General Jurisprudence: Volume 6: A History of the Philosophers of Law from the Ancient Greeks to the Scholastics* (2nd edn, Springer 2015) 121.

¹⁰ 'Voters speak out: We want action on corruption' < <http://www.elections.co.ug/new-vision/election/1407477/voters-speak-action-corruption> > accessed 1 July 2017.

Secretary in the Ministry of Local Government, John Muhanguzi Kashaka, to 10 (ten) years imprisonment for his role in orchestrating the financial loss of USh 4.2 billion (US\$ 1166676.00) with regard to the bicycle procurement.¹¹ Aside from Kashaka's conviction, the Ugandan Anti-Corruption Court sentenced David Chandi Jamwa, former Managing Director of National Social Security Fund (NSSF), to 12 years for causing financial loss to the fund in 2011.¹² The prosecution told the court that in his official capacity, Mr Jamwa sold off several government bonds which the NSSF held before they matured to Crane Bank at low prices knowingly or having reason to know that this would cause financial loss to the Fund.¹³ In another case, a Ugandan cleaner at Moroto Referral Hospital allegedly stole 10 million worth of drugs while on duty. Angella Abidia denied any knowledge of how the drugs ended up in her house. She was arrested following a tip-off that she planned to sell the drugs.¹⁴

In Kenya, an Act of Parliament was passed in 1964 to create a National Youth Service (NYS) to train the youth on national matters including services in the armed forces, disaster response and to encourage them to take part in national re-construction programmes.¹⁵ In 2015, the NYS scandal came to light with reports that KES791 million (US\$ 7,627,771.20) had been stolen. In 2016, the Ethics and Anti-Corruption Commission (EACC) released a statement revealing that investigations proved that at least KES 1.8 billion (US\$ 17,357,760) had been stolen from the NYS.¹⁶ The investigations into the scam continues. The supposedly leading suspects-in the NYS scam are:

- (i) A Nairobi businesswoman, Josephine Kabura, who was a hairdresser in Kiangiti village of Kiharu in Marang's County. Josephine was charged with money laundering and, in August 2016, she appeared before the magistrates' court and denied the counts of money laundering;¹⁷
- (ii) Anne Waiguru is the former Devolution and Planning Cabinet Secretary who, despite consistently denying any involvement in the NYS scandal, was indicted for looting millions;¹⁸ and

¹¹ Anthony Wesaka, 'Kashaka to spend 10 years in prison over bicycle scam' (*Daily Monitor*, 18 July 2014).

¹² Ephraim Kasozi and Lydia Mukisa, 'Former NSSF boss Jamwa sentenced to 12 years' (*Daily Monitor*, 9 March 2011).

¹³ *ibid.*

¹⁴ <https://www.redpepper.co.ug/hospital-cleaner-arrested-with-drugs-worth-ugx-10m/> accessed 1 July 2017.

¹⁵ <http://nys.go.ke/public/index.php/content/item/47/Brief-History> accessed 30 June 2017.

¹⁶ John Njagi, 'Sh1.8bn lost in NYS scam, lawmakers told' (*Daily Nation*, 30 September 2016).

¹⁷ Carole Maine and Zipporah Weru, '11 NYS scandal suspects charged with money laundering' (*The Star*, 22 August 2016).

¹⁸ Jared Too, 'MPs to Vote on Report Implicating Anne Waiguru in NYS Scandal' (*Kenyans*, 22 May 2017).

(iii) In November 2016, Kennedy Nyamao and Salim Ali Molla were charged with conspiracy to commit an economic crime over an irregular payment of KES 47.6 million (US\$ 459,016.32) that was allegedly made to a company (Blues Star Enterprises) in connection with the NYS scandal.¹⁹

In Sierra Leone, the Anti-Corruption Commission (ACC) convicted employees of a humanitarian aid organisation known as World Vision.²⁰ Leslie Lahai Monson and Kerfala Janneh were convicted for misappropriating donor funds under section 37(1) of the Anti-Corruption Act (ACA) OF 2008 and for conspiracy to commit a corruption offence under section 128(1) of the ACA of 2008. In a different case, the Commission convicted a high school principal, Joko C.R. Venn, for abuse of office, contrary to section 42(1) of the ACA 2008.²¹ In 2017, the ACC indicted three senior officials of a non-government organization, The Needy Today (TNT) for misappropriating donor funds, contrary to section 37(1) and giving ddvantage contrary to section 28(1) of the ACA 2008. Dauda Ahmid Koroma, Jessy Jim Braima Kpagoi and Alfred Mustapha Bangura allegedly ‘dishonestly appropriated donor funds meant for the Protection of Vulnerable Groups during the Ebola Outbreaks Response project amounting to SLL 346,450,000’ (US\$ 46,663.35).²²

There are two key noticeable observations that could be made on individuals who occupy public offices:

The first observation could be seen from individuals who are heads of state. In many instances, when their official term is drawing to an end, they often do not desire to vacate their offices voluntarily, instead, they alter legislative provisions to extend their mandate. This could be seen with many African leaders who have dedicated themselves to retain political leadership at all

¹⁹ Richard Munguti, ‘Two more NYS scandal suspects charged’ (*Daily Nation*, 30 November 2016).

²⁰ ‘ACC secures conviction against two staff of world vision’ < http://www.anticorruption.gov.sl/show_news.php?id=761> accessed 1 July 2017.

²¹ ‘ACC secures conviction against Joko C.R Venn’ < http://www.anticorruption.gov.sl/show_news.php?id=683> accessed 1 July 2017.

²² ‘ACC indicts top officials of The Needy Today (tnt) for misappropriation of ebola funds and five others for various corruption offences’ < http://www.anticorruption.gov.sl/show_news.php?id=697> accessed 1 July 2017.

costs,²³ even if it requires that they engage in corrupt political practices such as fraudulent voter registration, election rigging and ghost voting centres.²⁴

When power is concentrated in a single authority and his/her family member's corruption is bound to exist.²⁵ Since 1968, the Presidential office of Equatorial Guinea has been a family affair. The first President was Francisco Macias Nguema, uncle of the current President, Teodoro Obiang Nguema Mbasogo, whose son, Teodoro Nguema Obiang Mangue, is the current Vice-President. For years, Mangue has been under investigation for corruption. In 2011 a civil forfeiture was filed by the United States government against Teodoro Nguema's approximately US\$ 70.8 million of real and personal property.²⁶ Moreover, the US government alleged that the property was proceeds of foreign corruption offences and thus, were laundered into the USA.²⁷ The complaint alleges that he (Teodoro) used his official position as influence to acquire criminal proceeds through corrupt practices and money laundering. On the matter, Former Assistant Attorney General, Lanny A. Breuer stated as follows:

While Nguema's people struggled, he lived the high life-purchasing a Gulfstream jet, a Malibu mansion and nearly US\$2 million in Michael Jackson memorabilia. Alleging that these extravagant items are the proceeds of foreign official corruption, the Department of Justice is seeking to seize them through coordinated forfeiture actions. Throughout Kleptocracy Initiative, we are sending the message loud and clear: the United States will not be a hiding place for the ill-gotten riches of the world's corrupt leaders.²⁸

Other examples of dictatorial leaders using their presidential offices for private gains include military dictators and president of the *République du Zaïre* (1971-1997), Mobutu Sese Seko embezzled US\$ 5 billion during his presidential term; and former Nigerian dictator and Sani

²³ For example, African leaders who have served more than 30 years and are still in office are Teodoro Obiang Nguema Mbasogo has been President of Equatorial Guinea since 1979 together with José Eduardo dos Santos former President of Angola, Paul Biya has been President of Cameroon since November 1982, Robert Gabriel Mugabe who was President of Zimbabwe since 1987-2017 and President of Uganda Yoweri Museveni whose tenure began in 1986.

²⁴ An example of this would be Zimbabwe. For years since the Zimbabwean President Robert Mugabe has held office, it has been Zimbabwe's elections are never free nor fair. For example, the opposition party are often intimidated by the ruling party and in some cases, they have been harassed and subjected to violent acts. In an effort to buy votes from the people, government food is offered to the people; and in an effort to control the people, the media coverage favour the ruling party. See Prince Mario, *Zimbabwe Cry for Hope* (Lulu.com 2009) 46.

²⁵ Minzhu Han and Sheng Hua, *Cries for Democracy: Writings and Speeches from the 1989 Chinese Democracy Movement* (Princeton University Press 1990) 160.

²⁶ Fausto Martin De Sanctis, *International Money Laundering Through Real Estate and Agribusiness: A Criminal Justice Perspective from the Panama Papers* (Springer 2017) 1.

²⁷ *ibid.*

²⁸ *ibid.*

Abacha is said to have embezzled US\$ 2-5 billion during his presidential terms²⁹ and by 2008, US\$ 1.2 billion was recovered from various foreign bank accounts in respect of Abacha.³⁰

When leaders seek to retain political power, two things are prone to happen: corruption will be rife and the people's rights will be violated. The seriousness of these issues was emphasised by the Human Rights Watch with reference to Zimbabwe. In 2017, Human Rights Watch compiled and published a report on Zimbabwe based on events that occurred in the State in 2016. The report revealed instances where Zimbabwean officials engaged in human rights violations. Moreover, it was discovered that the former Zimbabwean President, Robert Mugabe, intensified political repression against thousands of Zimbabweans who were protesting peacefully against human rights violations and deterioration of the economy. The Zimbabwean Constitution guarantees freedom of expression and the media. However, in 2016, many journalists reporting on protests were subjected to arrests, harassments and intimidation by the police.³¹

The establishment of dictatorships in some African states is, in itself, evidence of political corruption. Political corruption dilutes any anti-corruption efforts mainly because those who are loyal to the dictators, tend to commit various acts of corruption without reproach or being reprimanded by their leaders. As Chaucer once asked: if gold can rust, what should iron do?³² Therefore, if the boss is corrupt, what then of the subordinate?

The second observation is that it is not entirely impossible for newly employed individuals in public offices to genuinely intend to make a difference in government by merely performing their duties effectively and efficiently, being honest, transparent and accountable. However, with the passage of time, it is common for such individuals to be tempted by power (and the desire to gain more money) eventually pushing them to seek opportunities for private gains. This is common within police departments in various African states such as Kenya, Zimbabwe and Nigeria, where the police often seek bribes before providing assistance.³³ This is also evident in the improper awarding of contracts, oil business transactions, and the departments of finance and home affairs. For example, in Kenya, Sylvester Mwaliko, former Permanent Secretary of Home Affairs, was

²⁹ Clare Fletcher and Daniela Herrmann, *The Internationalisation of Corruption: Scale, Impact and Countermeasures* (Routledge 2016) 105.

³⁰ *ibid* 105 and 173.

³¹ <https://www.hrw.org/world-report/2017/country-chapters/zimbabwe> accessed 27 May 2017.

³² See Margaret Hallissy, *A Companion to Chaucer's Canterbury Tales* (Greenwood Publishing Group 1995) 45.

³³ Chingozha P Misheck and Mawere Munyaradzi, *Negotiating Law, Policing and Morality in Africa: A Handbook for Policing in Zimbabwe* (Langaa RPCIG 2015) 75. See also Amos Dele Dada, *To the Rescue (say no to corruption)* (AuthorHouse 2014) 168.

found guilty of abuse of office for arbitrarily awarding an Anglo Leasing contract.³⁴ The Anglo-leasing scandal involved the diversion of funds to non-existing entities. An investigation conducted by the former anti-corruption crusader John Githongo revealed that, a non-existent company (Anglo Leasing and Finance) had received a contract by the Immigration Department in the Ministry of Home Affairs. In addition to this, a 3 percent down payment estimated at about KES 90 million (US\$ 865801.80) had been paid from KES 7 billion (US\$ 67340.14) intended to be used to produce tamper-proof passports on behalf of the immigration department.³⁵ Mr Mwaliko was sentenced to 3 (three years) imprisonment and ordered to pay a Sh3 million fine).³⁶

In many African States, it has been shown that political corruption may take different forms, especially when public power is misused for private gains.³⁷ Both senior politicians and public officials, who are engaged in different forms of corruption, do so partly due to the power, or authority vested in them. This authority allows them not only to misuse their power but also to control and intimidate the vulnerable society to enable them to promote their private needs. For example, in Zambia, former Lands Minister, Gladys Nyirongo was found guilty of misusing her power intended to serve the people for her own personal gains. The former Lands Minister was charged with two counts of abuse of office, contrary to section 99(1) of the Zambian Penal Code. She was convicted and sentenced to four years in jail for corruption and abuse of office. On the first count, it was proved that between January 2006 and February 2007, she had directed Daisy Mulenga, an officer in the Ministry of Lands, to generate offer letters to 10 people, and as a result of her conducts, the court held that she had contravened land alienation procedures. On the second count, it was proved, that Niyirongo gave a direction to Christopher Chewe, who was a junior technician in the Ministry of Agriculture, to sub-divide a former Zambia Consolidated Copper Mines (ZCCM) farm and create property number 1/19634/m for herself; this was in contravention of the land alienation procedure. For her conducts, the court held that the accused abused her office powers when she gave these directions.³⁸

³⁴ Rob Jillo, 'Former PS fined over Sh7b passport deal' (*CapitalFM*, 5 September 2012).

³⁵ David Wachira and Sudha Arlikatti, 'Challenges of Effective E-governance: Problems of Transparency, Infrastructure, and Connectivity in Kenya' in Christopher G Reddick (ed), *Comparative E-Government* (Springer Science and Business Media 2010) 263.

³⁶ Jillo (n 34).

³⁷ Sung Hui Kim, 'What Governmental Insider Trading Teaches Us about Corporate Insider Trading' in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 174.

³⁸ 'Gladys Nyirongo sent to jail for corruption' (*Lusakatimes*, 14 February 2009) <<https://www.lusakatimes.com/2009/02/14/gladys-nyirongo-sent-to-jail-for-corruption/>> accessed 8 June 2017; and 'Former Lands Minister, Reverend Gladys Nyirongo Sentenced to 4 Years Imprisonment...' <

Many individuals who assume government positions perceive the latter as an opportunity to enrich themselves. The mentality that many public officials have is that ‘if my predecessors succeeded in enriching themselves, surely I can do the same’. This skewed mentality could lead one to argue that, indeed, corruption is engraved in society.³⁹ Unfortunately, this state of reasoning leads or will most likely lead to ineffective anti-corruption strategies. Furthermore, it will be difficult to develop and subsequently implement such strategies.

As expressed by the historian John Emerich Edward Dalberg-Acton in a letter to the Church of England (Bishop Mandell Creighton), ‘power tends to corrupt, and absolute power corrupts absolutely’.⁴⁰ Power vested in a public official can either serve society accordingly, or serve as an instrument to satisfy one’s private gains. It is unfortunate that the latter often prevails. For example, the former Minister of Agriculture, of Sierra Leone, Dr Harry Will, was convicted for embezzlement. Dr Will embezzled US\$ 1.5 million from the Work Bank Development funds, which were intended to buy rice seeds from Ghana for the livelihood of struggling farmers in Sierra Leone. As punishment for his conduct, he was fined SLL 500, 000 (US\$ 66.67).⁴¹ On 16 March 2001, former Permanent Secretary at the Ministry of Education in Sierra Leone, Soluku Bockarie, was convicted for misappropriating about US\$ 1 billion. The misappropriated funds were meant to pay salaries of 26,000 Sierra Leonean teachers.⁴² In Cameroon, Atangana Mebara Jean-Marie, Inoni Ephraim, Otele Essomba Hubert Patrick Marie, Kevin Joseph Walls⁴³ and Eyoum Lydienne *épse* Loyse, Abah Abah Polycarpe, Engoulou Henri, Baleng Maah Célestin and, Ngwem Honoré were convicted by the Special Criminal Court for misappropriating public funds and ordered to pay back the misappropriated funds to the State Treasury.⁴⁴

The above examples reflect how senior public officials use their office positions for private gains. From the examples above, at least US\$ 12 million of public funds have been

<https://brainsplus.wordpress.com/2009/02/15/former-lands-minister-reverend-gladys-nyirongo-sentenced-to-4-years-imprisonment/> accessed 8 June 2017.

³⁹ Chris Rowley and Marie dela Rama, *The Changing Face of Corruption in the Asia Pacific: Current Perspectives and Future Challenges* (Elsevier 2017) 181.

⁴⁰ John H Lyke, *What Would Our Founding Fathers Say?: How Today’s Leaders Have Lost Their Way* (iUniverse 2012) 130.

⁴¹ Stanley C Igwe, *How Africa Underdevelops Africa* (iUniverse 2012) 52.

⁴² David Tam-Baryoh, ‘Who Will Guard the Guards’ (*World Press*, 2002).

⁴³ *Ministère Public et Etat du Cameroun C/ Atangana Mebara Jean-Marie, Inoni Ephraim, Otele Essomba Hubert Patrick Marie, Kevin Joseph Walls Tribunal Criminel Spécial, Yaoundé, Arrêt No 28/CRIM/TCS du 02 Octobre 2013.*

⁴⁴ See also Avitus A Agbor, ‘Prosecuting the Offence of Misappropriating of Public Funds: An Insight into Cameroon’s Special Criminal Court’ (2017) PELJ.

misappropriated, funds which could have been used to improve infrastructure, and expand medical services, among other.

As reiterated earlier, political will is *sine qua non* for successful anti-corruption mechanisms. It is imperative for these mechanisms to be aligned with the three dimensions of anti-corruption efforts viz prevention, promotion and protection. The commitment of political actors to combat corruption must be reflected in these three dimensions of anti-corruption efforts.

6.3 Indicators of political will

Senior political leaders and members of the society must unite in order to fight corruption. Unfortunately, beneficiaries of corruption lack the desire to fight corruption due to their awareness or realisation that anti-corruption strategies will reduce or eliminate upcoming opportunities to engage in corrupt practices.⁴⁵

The questions that come to mind are as follows: How can one establish or identify political will? Is the identification or the existence of political will uncomplicated? If a ruling party meticulously identifies its opponents as corrupt and not their own, can it be said that they possess the necessary political will to combat corruption?

It can be argued that political will manifests itself in the desire to identify and bring to justice perpetrators of corrupt practices.⁴⁶ Although this may be correct, however, it is necessary and important to emphasise that the recognition of political will is not entirely as straightforward as it may seem. For instance, political leaders may rightfully identify corrupt individuals, by selectively prosecuting political opponents, it could be argued that they have political will, though they do, it is not genuine or sincere.⁴⁷

In some states, leaders are quick to point out that their government or leadership will be transparent in all aspect of governance and that they do not tolerate any form of corruption.⁴⁸ This approach leads them to find fault in their opponents rather than tackling corruption-related issues

⁴⁵ Sahr Kpundeh and Phyllis Dininio, 'Political Will' in Rick Statenhurst *et al*, (eds), *The Role of Parliament in Curbing Corruption* (World Bank Publications 2006) 41.

⁴⁶ During his office term as the CEO of an NGO Uganda Centre for Accountability, the former Director of Economic Affairs in the Office of the President Teddy Seezi Cheeye, embezzled 120 million from the Global Fund to Aids, Tuberculosis and Malaria causing the country to lose more billions in funding. For his conducts, he was found guilty and convicted for forgery and embezzlement in 2009. See Fletcher and Herrmann (n 29) 200; Karl Hanson, Olga Nieuwenhuys (eds), *Reconceptualization Children's Rights in International Development: Living Rights, Social Justice, Translations* (Cambridge University Press 2012) 158.

⁴⁷ Kpundeh and Dininio (n 45) 42.

⁴⁸ *ibid*.

on a neutral basis.⁴⁹ The reality is that it is difficult for a head of state, who is affiliated to a particular political party, to be neutral towards his/her opponents on any matter, particularly on corruption-related issues. In order to be seen as fighting corruption, the opposition are often used as an example of what could happen when a public official engages in corruption. It could be argued that the proper approach to tackle corruption-related issues on a neutral basis is to establish or engage existing independent anti-corruption bodies.⁵⁰

Political will is complex and, therefore, a state must prove its seriousness in the fight against corruption. As previously explained, the existence of political will is not straightforward; therefore, the question would be what should a state do as proof or confirmation to indicate that it has the necessary political will to combat corruption?

The first indicator of political will is that a state needs to recognise corruption as a critical issue that needs to be addressed.⁵¹ This recognition allows state leaders to establish and implement domestic initiatives aimed at combating corruption.⁵² The act of developing and implementing anti-corruption mechanisms serves as an indication that state leaders are fully acknowledging corruption-related issues and the challenges within the borders of the states.⁵³ Moreover, their initiatives is proof that they are keen to taking responsibility to address corruption.⁵⁴

For example, in Sierra Leone, the ACC developed a National Anti-Corruption Strategy (2014-2018) which is both political and technical in nature. The former reflects the state's priorities while the latter was developed based on various studies, public consultations, and surveys together with benchmarking anti-corruption strategies from other states.⁵⁵ To reinforce its zero tolerance to corruption, Sierra Leone intends to employ the risk-based due diligence approach when implementing this strategy.⁵⁶ Among many of its anti-corruption mechanisms, Sierra Leone has

⁴⁹ *ibid.*

⁵⁰ Examples of anti-corruption institutions created by African States include: in Mauritius, the ICAC; in Tanzania, the Public Procurement Regulatory Authority; in Lebanon, the Special Investigation Commission of the Central Bank, in Namibia, the Anti-Corruption Commission, the Directorate on Corruption and Economic Crime; in Cameroon, the Special Criminal Court; in Ghana, the SFO; in Kenya, the Ethics and Anti-Corruption Commission; in Nigeria, the Economic and Financial Crimes Commission; in Sudan, the National Commission for Redress of Public Sector Grievances; in South Africa, the Office of the Public Protector.

⁵¹ See Kpundeh and Dininio (n 45) 42.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Anti-Corruption Commission, 'National Technical Expert Team. National Anti-Corruption Strategy (Sierra Leone) (2014-2018)', 10.

⁵⁶ *ibid.*

taken initiatives aimed at reforming the economy, the public sector, legal and judiciary, together with strengthening anti-corruption institutions.⁵⁷

Public procurement is an important economic activity for a government and is used when it requires services from the private sector.⁵⁸ Moreover, it is the most vulnerable of all government activities.⁵⁹ For example, in Zambia, Maxwell Mwale, former Minister of Mines, interfered with the granting of mining licences to a Chinese mining company, Zhoughui International Mining Group, in 2009. During the trial, it was revealed that the licences were awarded within 3 (three) days to the company, a process which normally takes months. The former Minister was sentenced to one year in jail.⁶⁰ In Lesotho, Masupha Ephraim Sole, former Chief Executive of the Lesotho Highlands Development Authority (LHDA) was convicted of 11 charges of bribery, two of fraud for his role in the allocation of construction contracts and sentenced to 18 years imprisonment. The corrupt practices of the former Chief Executive were first exposed during his disciplinary enquiry at the LHDA. The enquiry was based on how Mr Sole charged the project for private expenses, abused the housing scheme of the project, nepotism and mismanagement of contracts resulting in the LHDA suffering huge financial losses. During the course of the trial, it was uncovered that there were other parties (various consortia, firms and other individuals) involved in these corrupt practices. Three of the parties were found guilty of corruption and sentenced to pay fines: the Canadian company, Acres International, was fined LSL 15 million (US\$ 1135141.67), the German company, Lahmeyer Consulting Engineers, was fined LSL 12 million (US\$ 908113.33) while the French company, Spie Batignolles, was fined LSL 10 million (US\$ 756761.11).⁶¹

In an attempt to tackle corruption in public procurement, the Mauritian Public Procurement Office, together with its Independent Commission against Corruption, (ICAC) developed a Code of Conduct for Public Officials involved in Procurement.⁶² This Code reiterates the importance of

⁵⁷ *ibid* 34-38.

⁵⁸ Daniel Plaatjies, 'Protecting Procurement: Protecting the Integrity of the State' in Daniel Plaatjies (ed), *Protecting the Inheritance: Governance & Public Accountability in Democratic South Africa* (Jacana Media 2013) 71.

⁵⁹ Teresa Medina Arnáiz, 'EU Directives as Anti-Corruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts' in Khi V Thai (ed), *International Handbook of Public Procurement* (CRC Press 2008) 107.

⁶⁰ 'Zambia's former mines minister jailed for corruption' (*Reuters Africa*, 27 February 2015) <http://af.reuters.com/article/topNews/idAFKBN0LV0RO20150227> accessed 8 June 2017.

⁶¹ Anthony Turton and Anton Earle, 'No Duck No Dinner: How Sole Sourcing Triggered Lesotho's Struggle against Corruption' (2005).

⁶² OECD, *OECD Investment Policy Reviews: Mauritius 2014* (OECD Publishing 2014) 188.

principles of accountability and transparency in decision-making processes, conflict of interest, fair and equitable treatment and confidential use of proprietary information.⁶³

Impartial implementation of anti-corruption instruments and the use of media may serve as an indication that a state has political will to fight corruption. For example, the Tanzanian anti-corruption authorities, subject to the application of anti-corruption instruments such as the Prevention of Corruption Act (PCA), and the PPA together with policy and legal frameworks, have convicted persons for their participation in the perpetration of corrupt practices.⁶⁴ Moreover, the improvement and recognition of freedom of the press and the print media in Tanzania, has contributed immensely in the fight against corruption by flushing out corrupt practices through the publication of investigatory reports.⁶⁵

The second indicator of political will is that for the initiatives to be realised, a state needs to understand the triggers of corruption and the context in which it is perpetrated.⁶⁶ This enables the state to understand the causes of corrupt behaviours, and further enables it to develop necessary measures aimed at preventing such behaviour, the promotion of integrity in public offices and in the delivery of services to the people.⁶⁷

Many argue that one of the major causes of corruption is the low income of public officials.⁶⁸ To enhance their salaries, public officials often ask for bribes from members of the public before the delivery of public service.⁶⁹ This is often seen in police departments. Police or traffic officers usually request bribes from the public, which they are most likely to receive because people want to dodge receiving hefty traffic fines or simply because they desperately need police services.⁷⁰ For states to address income-related issues, they need to find solutions on how to increase employment benefits.⁷¹ Moreover, moral principles in state departments need to be emphasised excessively. For instance, the Federal Republic of Nigeria has developed a Police

⁶³ *ibid.*

⁶⁴ See Mujwahuzi Njunwa, 'Combating Corruption in Tanzania's Public Service: Success and Challenges' (2008).

⁶⁵ *ibid.*

⁶⁶ Kpundeh and Dininio (n 45) 42.

⁶⁷ *ibid.*

⁶⁸ See Lise Rakner, 'Governance', in Peter Burnell *et al* (eds), *Politics in the Developing World* (Oxford University Press 2017) 236.

⁶⁹ See Cage Banseka, *Development for Peace* (Universal-Publishers 2005) 105.

⁷⁰ Lengwadishang Ramphéle, 'Alternative ways to pay traffic fines and avoid a jail sentence' (*702 Station*, 7 April 2015) < <http://www.702.co.za/articles/2366/alternative-ways-to-pay-traffic-fines-and-avoid-a-jail-sentence>> accessed 14 July 2017.

⁷¹ Jakob de Haan, Erik Dietzenbacher, Văn Hà Le, 'Higher government wages may reduce corruption' < <http://voxeu.org/article/higher-government-wages-may-reduce-corruption>> accessed 14 July 2017.

Code of Conduct which sets out eight principles which police officers need to adhere to.⁷² Despite the existence of the Code, police officials continue to engage in corrupt practices. For instance, several Nigerian officers solicit bribes, including the Assistant Commissioner of Police who received a NGN 2.7 million (US\$ 7468.90) bribe.⁷³

Other major triggers of corruption in public offices is the form of nepotism and favouritism. Nepotism could be understood to be favouritism towards relatives, people of the same ethnic group, same sex, belief, political party or association.⁷⁴ Favouritism occurs when one shows or gives help, protection, or advantage to a person than to another and often done within a person's sphere of influence.⁷⁵ Public administration is vulnerable to nepotism and favouritism and this is one of the reasons why corruption is rife in government. Nepotism or favouritism due to affiliation to a specific political party, is fairly common in government. This may be seen where for example, a senior government official or even a president, appoints a person for a government position without any proper minimum academic qualifications and experience for the office, but appoints such a person merely because they are affiliated to a particular political party. For example, in December 2012, the then Kenyan Ministry of Immigration and Registration of Persons re-advertised a Clerical Officer II, Drivers and Senior Support Staff vacancy following a breach by an interviewing panel in the appointment of a suitable candidate in the initial advertisement.⁷⁶ Mrs Maslynne Adhiambo Oyoo applied and was short-listed, interviewed and was informed that she was recommended for employment.⁷⁷ However, when official appointments were made, she was left out. Following the complaint she lodged, the Kenyan Office of the Ombudsman investigated the matter.⁷⁸ The major findings were as follows:

⁷² Nigerian Police Code of Conduct. See also Law N° 09/2017 of 20/03/2017 Modifying and Complementing Law N° 46/2010 of 14 December 2010 Determining the Powers, Responsibilities, Organization and Functioning of the Rwanda National Police; Amanda Dissel and Cheryl Frank (eds), *Policing and Human Rights Assessing Southern African countries' compliance with the SARPCCO Code of Conduct for Police Officials* (African Policing Civilian Oversight Forum 2012).

⁷³ Kingsley Omonobi, 'How corrupt Assistant Police Commissioner was allegedly caught with N. 2.7 m bribe' (*Vanguard*, 16 November 2016).

⁷⁴ Faan Malan and Ben Smit, *Ethics and Leadership in Business and Politics* (Juta and Company 2001) 17.

⁷⁵ Osei Owusu-Aduomi, *Hope for The Youth: An Indispensable Youth Development Road Map* (AuthorHouse 2014)

⁷⁴ See also Robert G Jones, 'Defining a Psychology of Nepotism' in Robert G Jones (ed), *Nepotism in Organizations* (Routledge 2013) 2.

⁷⁶ Investigations Report the Ombudsman-Kenya, 'The Cost of Nepotism: Unfair Treatment, Injustice and Abuse of Power in the Recruitment of Clerical Officer II in North Rachuonyo Sub-Country, Homa-Bay' (December 2014).

⁷⁷ *ibid.*

⁷⁸ *ibid.*

- i. Following the said interview, minutes of the interview panel dated 16 January 2013 were sent to the office of the Ministry with Mrs Oyoo as the successful candidate;
- ii. Upon visiting the office of the Deputy Director, Human Resource Management, it was discovered that the shortlisting minutes for a meeting that was held on 7 January 2012 contained fraudulent attachments revealing Mr Antopas Oluoch Ndebe, who came eighth in the interview, as the best candidate for employment;
- iii. The investigation further revealed that Mr Oluoch was related to Mr Peterson Keta Midida, Principal Human Resource Officer and Mr Ojuok Otieno Donald, who was the then District Registrar of Persons; and
- iv. The Office found that Mr Antopas Oluoch ‘un-procedurally secured employment’.⁷⁹

Apart from political party affiliation being a factor for nepotism or favouritism, the societal practices in Africa contributes to the existence of nepotism in government.⁸⁰ For example, if a public official was raised by an impoverished or underprivileged family and later finds decent employment, such a person has a moral duty to ensure that the rest of the family members are taken care of. This practice becomes an attracting force for nepotism. Although nepotism is not an acceptable phenomenon, particularly in western democracies, granting employment to family members and close relatives is not perceived as being wrong in African culture.⁸¹ It therefore, one might argue, becomes fairly difficult to draw a line between such honourable cultural expectancy which Africans are expected to observe and the government which relies heavily on western systems. This, however, invites the argument that strict adherence to African culture hinders the possible existence of political will to combat corruption, particularly in public offices.

The third indicator of political will is that once the cause(s) of corruption and the context in which it is perpetrated have been identified and initiatives designed, a reformation process needs to take place.⁸² For a state to prove that it possesses the necessary political will, its reformation process must be transparent, and it must involve high level of participation incorporating various

⁷⁹ *ibid.*

⁸⁰ See Wisdom Okwuoma Otaluka, ‘The Cultural Roots of Corruption: An Ethical Investigation with Particular Reference to Nepotism’ (PhD thesis, University of KwaZulu-Natal 2017).

⁸¹ David Ernest Apter, *Ghana in Transition* (2nd edn, Princeton University Press 2015) 6.

⁸² Kpundeh and Dininio (n 45) 43.

stakeholders.⁸³ Furthermore, for reform policies to be effective, public officials responsible for implementing such initiatives need to be educated on these reform policies to achieve their intended results.⁸⁴

The fourth indicator of political will is that, a state needs to acknowledge that the fight against corruption relies on three inter-connected pillars which support each other to an extent that one cannot be effective without the other.⁸⁵ These pillars are:

- i. Education: members of the society, together with public officials, must be well informed of corrupt behaviours as well as existing and upcoming anti-corruption reforms a state intends to implement.⁸⁶ For example, the official website of the Mauritian ICAC illustrates, through comics, how corrupt offence are perpetrated. The comic illustrations educate the general public and public officials to understand how corrupt offences are perpetrated. This pillar is closely linked to one of three dimensions of political will discussed earlier, known as promotion simply because education is one of many anti-corruption strategies a state may employ to combat corruption;
- ii. Prevention: As previous discussed, prevention is one of the three dimensions of political will, centred on emphasising that states must take necessary steps to develop and implement anti-corruption strategies. Effective anti-corruption strategies could be developed when states come together and the strengths and flaws of their national strategies compared. The International Anti-Corruption Conference (IACC) is a global forum which takes place every two years, bringing heads of state, civil society, private sector and many others to find ways to tackle corruption.⁸⁷ Forums such as these serve as perfect platforms to address corruption-related issues; and
- iii. Prosecution: natural and juristic persons, who ignorantly, knowingly, intentionally and willingly engage in corrupt practices, must be rightfully prosecuted. It is thus, important for the judiciary to be fair, independent and free from prejudice or fear.⁸⁸

The fifth indicator of political will is that a state must provide resources to support existing anti-corruption strategies or reforms.⁸⁹ A state must establish ways to make resources available to

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ OECD, *Specialised Anti-Corruption Institutions Review of Models: Second Edition*, (OECD Publishing 2013) 99.

⁸⁷ <https://iaccseries.org/about/> accessed 8 July 2017.

⁸⁸ Kpundeh and Dininio (n 45) 43.

⁸⁹ *ibid.*

anti-corruption institutions, agencies or bodies.⁹⁰ If a state is unable to provide these resources, it must consider requesting assistance from cooperating partners. For example, due to the nature of the committed offence, the amount of assets involved and where they were hidden, the Nigerian government did not have the necessary resources that would have enabled it to trace and seize Sani Abacha's assets. This realisation led the Nigerian government to seek assistance from Switzerland to seize, freeze and recover Abacha's assets.⁹¹

The sixth indicator of political will is that reform efforts must be monitored and evaluated objectively and reports which can either be positive or negative, must be publicised.⁹² This will enable the public to support and encourage its government.⁹³ The most effective mechanism for monitoring and evaluating anti-corruption mechanisms would be for a state to publicise its achievements in the implementation of existing anti-corruption legislation and/or policies and how they intend to improve their anti-corruption strategies. For example, as illustrated in the previous chapter, Kenya established the EACC in 2011. Since its establishment, the Commission publicises monthly, quarterly and annual reports, together with its strategic plans. These publications are available on the Commission's official website and are accessible to all. Such publications afford members of the public, an opportunity to recognise and criticise its government efforts in the fight against corruption.

Once a state's political will to combat corruption is in place, it must be strengthened. The strengthening of a state's political will guarantees the establishment and effective implementation of anti-corruption mechanisms. By so doing, a platform to address various issues will be created on how anti-corruption strategies could be developed and implemented. There are different approaches which a state could use to promote political will and subsequently, ensure that anti-corruption reforms are implemented.

The first approach in strengthening political will is referred to as the elite approach. This approach specifically focuses on legislators and their participation in parliamentary networks.⁹⁴ The approach highlights the need to allow legislators to understand issues at hand and how such issues could be addressed.

⁹⁰ *ibid.*

⁹¹ Jacinta Anyango Oduor *et al*, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (World Bank Publications 2013) 88.

⁹² Kpundeh and Dininio (n 45) 43.

⁹³ *ibid.*

⁹⁴ *ibid* 44.

The second is the societal approach, which basically focuses on members of the public.⁹⁵ Corruption is perpetrated secretly, making it very difficult for witnesses to come forward.⁹⁶ The aim of the societal approach is promote the need for public awareness and allow members of the society to come forward and to remove the veil of secrecy.⁹⁷ This approach encourages members of the public to take an active part in the fight against corruption.⁹⁸

To break the secrecy boundaries that hide corruption, witnesses need to come forward. The mere fact that corruption incidents are not reported by members of the public becomes a huge challenge for any state government determined to address corruption related issues. To address this challenge, whistleblowing laws or laws on witness protection must be enacted and efforts must be made to educate members of the society to know that they can be fully protected when they report corruption incidents. For example, for his efforts in uncovering the judicial scandal, protection for the Ghanaian investigative journalist, Anas Aremeyaw Anas was requested by the Executive Director of Ghana Integrity Initiative, Mr Vitus Azeem to ensure his safety. Moreover, Anas Aremeyaw Anas, together with his company, Tiger Eye PI, were granted immunity from prosecution under the Whistleblowers Act 720 of 2006.⁹⁹

The third approach, referred to as the institutional approach, aims at strengthening the political will of the legislature by establishing ‘effective committees, promoting access to information and research, improving bill-drafting capabilities and opening channels of communication to citizens’.¹⁰⁰ The institutional approach puts emphasis on the principle of transparency which involves publishing proceedings by legislative bodies, budgets and revenue collection.¹⁰¹ Transparency eliminates and leaves no room for corrupt practices.¹⁰² Anti-corruption mechanisms and structures such as ‘investigative bodies, prosecutors, judiciaries, law-enforcement, audit infrastructure, and ethics frameworks¹⁰³ can contribute to the successful implementation of laws and sanctions.¹⁰⁴

⁹⁵ *ibid* 45.

⁹⁶ *ibid*.

⁹⁷ *ibid*.

⁹⁸ *ibid*.

⁹⁹ Isaac Essel, ‘Anas needs police protection-Vitus Azeem alerts’ (*Joyonline*, 14 September 2015).

¹⁰⁰ Kpundeh and Dininio (n 45) 46.

¹⁰¹ *ibid*.

¹⁰² *ibid*.

¹⁰³ *ibid*.

¹⁰⁴ *ibid*.

A leader of a democratic state is expected to hear from his/her people, this expectation may be perceived as a mechanism which affords people to have an opportunity to hold their leaders accountable. This mechanism is often observed in the law-making process. In some states, before a bill becomes law, members of the public are granted an opportunity to debate on the bill.¹⁰⁵ This allows them to raise issues of concern in relation to the bill.¹⁰⁶ The importance of public participation was emphasised in the South African case of *Doctors for Life International v The Speakers of the National Assembly*.¹⁰⁷ In this case, the Constitutional Court, concerning the role of the public in the law-making process, held that:

Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.¹⁰⁸

Public participation is a right which states ought to effect and protect. The recognition of this right strengthens the element of openness and transparency, which people are out rightly entitled to. States that observe this right include South Africa, Liberia and Namibia.¹⁰⁹

The third approach may also be used to emphasise the principles of transparency and openness, observed in the appointment of judges. The Judiciary, as a branch of government, must not be influenced by any internal or external factors in the performance of its duties.¹¹⁰ The independence of the judiciary is paramount and it all starts with the appointment of judges. Judges must not be appointed because they owe favours to a state leader, or appointed because they are acquaintances of senior public officials; instead, a judge must be appointed based on merit.¹¹¹ This,

¹⁰⁵ See Frank S Jenkins, 'Decentralization and Accountability Challenges to Appointing Independent Bid Committees in the Public Sector' in Sybille Ngo Nyeck (ed), *Public Procurement Reform and Governance in Africa* (Springer 2016) 171.

¹⁰⁶ Karen Syma Czapanskiy and Rashida Manjoo, 'The Right of Public Participation in The Law-Making Process and the Role of Legislature in the Promotion of This Right' (2008) 19 *Duke Journal of Comparative and International Law* 1, 1.

¹⁰⁷ 2006 (12) BCLR 1399 (CC).

¹⁰⁸ *ibid* 111 and 115.

¹⁰⁹ See Lesley Blaauw, 'Accountability and Democracy' in Bryan M Sims and Monica Koep (eds), *Unfinished Business: Democracy in Namibia* (African Books Collective 2012) 82; Carl E Bruch, *The New "public": The Globalization of Public Participation* (Environmental Law Institute 2002) 27.

¹¹⁰ <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> accessed 14 July 2017.

¹¹¹ Duncan Watts, *British Government and Politics: A Comparative Guide* (Edinburgh University Press 2012) 160.

in particular, is important when appointing a Chief Justice of a Supreme Court of a state. In order to eliminate any elements of biasness or favouritism in ensuring that the principles of openness and transparency are observed, a body must exist solely created for the appointment of judges. In Nigeria, the Chief Justice is appointed by the President after recommendation of the National Judicial Council (NJC); a section 153(1) Federal Executive Body whose powers are set out in paragraph 21 of Part One of the Third Schedule of the Constitution. Apart from Chief Justices, judicial officers of state courts in Nigerian are appointed by state governors on the recommendation of the NJC, subject to the confirmation of the state house of assembly.¹¹²

The fourth approach, known as the international approach, is used to reinforce the political will of legislators to combat corruption when dealing with international donors.¹¹³ Efficiency and effectiveness in the use of donor resources is the responsibility of political leaders.¹¹⁴ This becomes important because many donors demand accountability and transparency with regard to the use of their resources.¹¹⁵ Anti-corruption international instruments can also serve as an effective mechanism to strengthen political will, particularly of legislators since these instruments recommend states to establish and implement anti-corruption mechanisms. This approach puts pressure on the state and its legislators as the establishment and implementation progress may be monitored, thus resulting in the strengthening of existing political will.¹¹⁶ For example, the United Nations Convention against Corruption (UNCAC) is a landmark Convention on corruption. As of 2017, at least 45 African states were States Parties to the Convention and only four (4) African states have not ratified.¹¹⁷ When a state fails to recognise and domesticate international instruments on corruption, it becomes evident that it lacks the necessary political will to combat corruption. Although domestication of these instruments could be perceived as proof that a state has the necessary will to fight corruption, domestication on its own is not sufficient to prove that a state has active or absolute political will. This may be seen for instance, when a state fails to implement the domesticated instrument. Such failure is supported by the argument that one of the major difficulties in the realisation of political will in developing states, particularly in Africa, could be

¹¹² Nicholas Aroney and John Kincaid, *Courts in Federal Countries: Federalists or Unitarists* (University of Toronto Press 2017) 300.

¹¹³ Kpundeh and Dininio (n 45) 47.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ United Nations Convention Against Corruption, United Nations General Assembly Resolution 58/4, U.N. GAOR, 58th Session, 51 meeting, U.N. Doc. A/RES/58/4 (2003).

attributed to failure in the management of corruption and poor implementation of anti-corruption laws.¹¹⁸ African States that have taken the initiative to domesticate UNCAC in their legal systems include Algeria, Botswana, Ghana, Nigeria, Sierra Leone and Zimbabwe.¹¹⁹

6.4 A synoptic analysis of the different kinds of political will

It might be argued that, African leaders, as evidenced by the numerous speeches uttered on political platforms, seem committed to fight corruption in their respective states. In every African State, there is, at least, a national legislative instrument that focuses on corruption. This is partly indicative of the will of the leaders to fight and defeat this invisible enemy among them. However, as mentioned earlier, the enactment of laws and the establishment of institutional mechanisms do not in themselves drive the fight against corruption. Probably, this is where African States got it wrong: beyond the enactment of legislation and the establishment of institutions all aimed at fighting corruption, they thought that these would be self-propelled in order to achieve the desired results. As argued earlier, these efforts need to be complemented by a strong political will. The willingness of a state to fight corruption is tested by the willingness of the state leaders to act out on what they have promised.¹²⁰ However, political will, as highlighted below, does not reside exclusively in the domain of the chief executive: political will must be exuded by the key and different state actors, across all branches of government, specifically the legislature which enacts the laws and establishes the institution; the executive should enforce these laws and the judiciary must apply them. Across the African continent, different States have shown differing degrees of political will, which range from active political will, partial political will, no political will, transnational political will, to instances where such political will shifts.¹²¹

¹¹⁸ Abdulai (n 2) 391.

¹¹⁹ For example, Algeria promulgated Law No.06-01 on the Prevention and the Fight against Corruption; in Botswana, the CECA 1994 (as amended), Proceeds of Serious Crime Act 13 of 2000 (Cap 08:03) (as amended) and the Penal Code 1964; in Ghana, the Criminal Offences Act 1960, Anti-Money Laundering Act 2008 and Public Property Protection Act 1977; in Kenya, the Anti-Corruption and Economic Crimes Act of 2003, Proceeds of Crime and Anti-Money Laundering Act of 2009, Penal Code 1970, Ethics and Anti-Corruption Commission Act 2011; in Nigeria, the Corrupt Practices and Other Related Offences Act of 2000, Money Laundering (Prohibition) Act of 2011, Code of Conduct of Bureau and Tribunal Act of 1991, and Penal Code of 1960; in Rwanda, the Prevention, Suppression and Punishment of Corruption and Related Offences Act of 2003, Prevention and Suppression of Money Laundering and Financing of Terrorism Act 2008. In Sierra Leone, the ACA of 2008 and Anti-Money Laundering Act of 2012. In South Africa, the Prevention and Combating of Corrupt Activities Act of 2004, Prevention of Organized Crime Act of 1998. In Zimbabwe, the Criminal Law (Codification and Reform) Act 2004 and the PCA of 1985.

¹²⁰ John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar Publishing 2014) 28.

¹²¹ *ibid* 28-33.

6.4.1 Active political will

Active political will reflects the ‘genuine commitment’ of the political leadership through the establishment and implementation of good governance, laws and institutions.¹²² According to the 2016 Corruption Perception Index (CPI), Cape Verde ranked 38th out of 176 states with a score of 59 out of 100 with regard to implementing an anti-corruption strategy.¹²³ Considering the anti-corruption strategies of Cape Verde, it has managed to have the lowest bribery rate.¹²⁴ Only 2 percent of its population paid a bribe in the previous 12 months (that is, between 2014 and 2015).¹²⁵ Though no state is immune to corruption, Cape Verde is a good example of how a State’s anti-corruption strategies and political will could be used combat corruption and yield good results.

In an effort to realise its mission, Botswana’s Directorate on Corruption and Economic Crime (DCEC), educates the public through *Kgotla* meetings,¹²⁶ district and agricultural fairs; radio and television shows; publishing of comic books; booklets and brochures.¹²⁷ Since its establishment, the DCEC has had some success in campaigning publicly against corruption and the conviction of corrupt persons.¹²⁸ Moreover, it actively participates in the Southern African Development Community Forum against Corruption (SAFC).¹²⁹ Botswana introduced anti-corruption clubs specifically for the youth in primary or secondary schools in order to improve their understanding on ethics and to introduce its importance, ensure that anti-corruption information is disseminated and that they participate in social and economic activities.¹³⁰

In addition to the above examples, Lesotho and Cameroon illustrate this type of political will. Lesotho was under military government between 1986 and 1993, however, in 1994, the regime was replaced by an elected civilian government.¹³¹ The civilian regime was committed to combating corruption, and initiated investigations on the Lesotho Highlands Water Project which subsequently led to successful prosecutions of several senior officials and Western construction

¹²² *ibid* 29.

¹²³ <https://www.transparency.org/country/CPV> accessed 2 February 2018.

¹²⁴ Caralie Pring, *People and Corruption: Africa Survey 2015* (Transparency International 2015).

¹²⁵ *ibid*.

¹²⁶ Tribal assemblies or public meetings were Tswana chiefs discuss policies and legislation with their people.

¹²⁷ Leon Tshipaka Mwamba, ‘An evaluation of the anti-corruption initiatives in Botswana and their relationship to Botswana’s development’ (Masters of Arts, University of South Africa 2013) 81.

¹²⁸ *ibid* 82.

¹²⁹ OSISA (Open Society Initiative for Southern Africa), *Effectiveness of Anti-Corruption Agencies in Southern Africa: Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe* (Open Society Initiative for Southern Africa and African Minds 2017) 68.

¹³⁰ Mwamba (n 127) 79.

¹³¹ Hatchard (n 120) 29.

companies.¹³² Since its establishment, the SCC of Cameroon has not only convicted several senior public officials for their role in the perpetration of corrupt practices, it has also ordered the payment of misappropriated funds and the interests accrued by such funds.¹³³

6.4.2 Partial political will

Partial political will occurs when newly elected leaders support and pursue high-profile cases of their political rivals or those who supported the previous regime.¹³⁴ This type of political will is, to a certain extent, skewed. Although it could be justified that this newly-elected leadership intends to hold perpetrators of corruption liable, the selection of these perpetrators could be questionable, especially when anti-corruption authorities are biased by only investigating opponents of the newly-elected leader, while the corrupt practices committed by supporters of the newly elected government are swept under the carpet.¹³⁵ For example, the National Resistance Movement (NRM) is the ruling party in Uganda,¹³⁶ whose regime has been plagued by numerous corruption scandals including the 2006 financial scandal involving Kampala City Council (KCC). The KCC had failed to account for at least US\$ 79 million (US\$ 21962.79) for the procurement of spare parts for KCC vehicles, repairs and vehicle service.¹³⁷ Over the years, Uganda has had a series of donor funds being stolen by public officials or not accounted for.¹³⁸ In 2012, the news that donor funds of at least US\$ 12.7 million had been embezzled from Uganda's Office of the Prime Minister sent shockwaves to the state.¹³⁹ Surprisingly, many were of the view that despite investigations being conducted, senior government officials who held office positions managing the funds were never implicated or faced any criminal sanction.¹⁴⁰ Instead, they continued their tenure of office untouched, while officials at the technical level faced prosecution. Furthermore, if the senior

¹³² *ibid.*

¹³³ Agbor (n 44).

¹³⁴ Hatchard (n 120) 30.

¹³⁵ *ibid.*

¹³⁶ Philip Briggs and Andrew Roberts, *Uganda* (8th edn, Bradt Travel Guide 2016) 25.

¹³⁷ 'corruption scandals that have rocked Uganda during NRM regime' <<http://realitycheckuganda.com/index.php/2016/06/03/corruption-scandals-that-have-rocked-uganda-during-nrm-regime/>> accessed 5 July 2017.

¹³⁸ 'Letting the Big Fish Swim' <https://www.hrw.org/report/2013/10/21/letting-big-fish-swim/failures-prosecute-high-level-corruption-uganda#page> accessed 5 July 2017.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

official happens to resign, such resignation could be temporary, resulting in their re-appointment or appointment to other government positions.¹⁴¹

Another example that illustrates partial political will is Zimbabwe. In a 2007 Country Report on Human Rights, it was revealed that the Zimbabwean Government did not effectively and impartially implement criminal penalties for official corruption against its officials. For instance, land-related matters were one of the many issues the state was unable to address impartially.¹⁴² Redistribution of expropriated white-owned commercial farms has since favoured the political elites and often done without transparency.¹⁴³ With numerous corruption allegations perpetrated by senior ZANU (PF) government officials, these elite are capable of blocking investigations against themselves or even request investigation authorities to abandon investigations.¹⁴⁴

Such lack of political will helps to buttress the perception that it is important for African States to establish independent anti-corruption institutions. The basis is to minimise partiality and promote impartial corruption cases by investigative authorities.¹⁴⁵

6.4.3 Lack of political will

In pre-independent Africa, colonial institutions provided checks and balances in order to restrict concentration of power in the hands of the few from being reached.¹⁴⁶ It is unfortunate that, post-independent African states aspire to retain power.¹⁴⁷ Such lack of political will is often seen when the period of a state leader in office is considerably lengthy¹⁴⁸ and accompanied by ineffective

¹⁴¹ *ibid.*

¹⁴² See Senate Committee on Foreign Relations and House (U S) Committee on Foreign Affairs (ed), *Country Report on Human Rights Practices for 2007* (Government Printing Office 2008) 642.

¹⁴³ *ibid.*

¹⁴⁴ Jacob Wilson Chikuhwa, *Zimbabwe at the Crossroads* (AuthorHouse 2006) 74.

¹⁴⁵ See Ebenezer Durojaye, 'Corruption as a Threat to Human Security in Africa' in Ademola Abass (ed), *Protecting Human Security in Africa* (Oxford University Press 2010) 239.

¹⁴⁶ Oluwole Owoye and Nicole Bissessar, 'Bad Governance and Corruption in Africa: Symptoms of Leadership and Institutional Failure', 8-9 < <http://www.ameppa.org/upload/Bad%20Governance.pdf> > accessed 5 July 2017.

¹⁴⁷ *ibid.*

¹⁴⁸ For example, Omar Bongo, former President of Gabon for 42 years, Mobutu Sese Sako was the President of the Democratic Republic of Congo, formerly known as Zaire for 32 years, Mohamed Suharto was Indonesia's President for 31 years and Zine Al-Abidine Ben Ali was President of Tunisia for 23 years. Not only did these individuals serve lengthy presidential terms they are amongst the worst corrupt leaders in the world. Current dictators in Africa include Angolan President José dos Santos, Equatorial Guinea President Teodoro Mbasosgo, Zimbabwean President Robert Mugabe, and Cameroon President Paul Biya. See Jeremy Sandbrook, 'The 10 Most Corrupt Leaders of Recent History' (*Integrity360*, 20 July 2016) < <http://integrity360.org/2016/07/10-most-corrupt-world-leaders/> > accessed 30 June 2017.

good governance laws and institutions. Furthermore, this type of political will may be seen when successive leaders yield to the continuation of corrupt practices as their predecessors; or where the state shows little or no support for good governance.¹⁴⁹ The former Zimbabwean President Robert Mugabe and the President of Equatorial Guinea, Teodoro Obiang Nguema Mbasogo, not only have they spent years enriching themselves, they intimidate their political rivals, have no regard for good governance principles, frustrate movements that support constitutional rule, and are unable to distinguish their private property from those of the state.¹⁵⁰ Lack of political will is the worst of all the five types of political will because its effects are not only disastrous, they affect government administration. It is for this reason that many believe corruption and institutional dysfunctions in Africa is due to the fact that ‘Africa has never known good governance and that no other continent has experienced such prolonged dictatorship’ before.¹⁵¹

This type of political will is evident in the regime of former Zimbabwean President Robert Mugabe, Equatorial Guinean and Angolan styles of governance where a leader retains power for a long period of time, resulting in ineffective anti-corruption mechanisms (if they exist) due to the numerous kinds of political corruption they perpetrate in order to retain political power and drain the resources of the State.¹⁵² Another example to illustrate this type of political will would be when a state adopts the Kenyan-style, ‘it is our turn to eat’ kind of governance wherein, new government officials continue corrupt exercises of their predecessors.¹⁵³ ‘It is our turn to eat’ is best illustrated by how Kibaki’s anti-corruption tsar,¹⁵⁴ John Githongo, who resigned in 2005 and fled to the United Kingdom after allegedly stating that his life was in danger, exposed the Anglo-Leasing corruption scandal in which the Kenyan government and its people were set to lose anything from US\$ 700 million to over US\$ 1 billion as a result.¹⁵⁵

¹⁴⁹ Hatchard (n 120) 30.

¹⁵⁰ Owoye and Bissesar (n 146) 9-10.

¹⁵¹ *ibid* 9.

¹⁵² See Opoku Agyeman, *Power, Powerlessness, and Globalization: Contemporary Politics in the Global South* (Lexington Books 2014) 104; Godfrey Mwakikagile, *The Modern African State: Quest for Transformation* (Nova Publishers 2001) 209; Stan Chu Ilo, *The Face of Africa: Looking Beyond the Shadows* (AuthorHouse 2006) 275.

¹⁵³ Hatchard (n 120) 30.

¹⁵⁴ A person appointed by government to advise on and coordinate policy in a particular area.

¹⁵⁵ Nicholas K Githuku, *Mau Mau Crucible of War: Statehood, National Identity, and Politics of Postcolonial Kenya* (Lexington Books 2015) 385.

6.4.4 Transnational political will

This type of political will is common in cases where immunity is granted to some persons: for example, a senior state official in a state that has no political will could earn protection from criminal prosecution.¹⁵⁶ For example in Nigeria, Article 308 of the 1999 Constitution of Nigeria applies to persons holding the office of President, Vice-President, Governor or Deputy-Governor who are granted immunity from prosecution.¹⁵⁷ This constitutional provision, however, does not have any effect in the United Kingdom.¹⁵⁸

When such protection does not extend abroad, it becomes possible for foreign governments to prosecute or take some kind of legal action against such corrupt senior public officials. For example, Transparency International (TI) France and Association Sherpa lodged a complaint against several African politicians, including Teodoro Nguema Obiang Mangue.¹⁵⁹ Several matters were of concern including how Teodoro Nguema Obiang Mangue could afford his luxury lifestyle when his government salary was allegedly less than US\$ 100,000.¹⁶⁰ Investigations conducted by French prosecution authorities in association with Sherpa and Transparency International France, revealed that between 2004-2011 Teodoro Nguema allegedly siphoned an estimate US\$ 115 million through phony tax imposed on wood sales.¹⁶¹

Prior to his 2017 Paris trial, the Republic of Equatorial Guinea filed proceedings before the International Court of Justice against the French Republic arguing immunity from criminal jurisdiction of Teodoro Nguema Obiang Mangue.¹⁶² Despite its diplomatic immunity petition, several assets belonging to Mangue have been seized and legal proceedings have been lodged against him. In 2012, the French government seized Mangue's Paris mansion at Avenue Foch, luxury cars, paintings and expensive wine.¹⁶³ In 2014, Mangue entered into a settlement agreement with the U.S. government following allegations that he (Mangue) looted public funds to hoard

¹⁵⁶ Hatchard (n 120) 31-32.

¹⁵⁷ See Article 308 of the Constitution of the Federal Republic of Nigeria.

¹⁵⁸ *ibid* Article 32.

¹⁵⁹ Colin Q C Nicholls *et al*, *Corruption and Misuse of Public Office* (Oxford University Press 2011) 700.

¹⁶⁰ Aislinn Lang, 'Champagne-fuelled parties, private jets, the Batmobile and James Bond submarine: Extraordinary spending of African dictator's playboy son on trial for using his impoverished people's cash to fund five star lifestyle' (*Mailonline*, 5 January 2017).

¹⁶¹ *ibid*.

¹⁶² 'Equatorial Guinea-Corruption' < <http://www.globalsecurity.org/military/world/africa/gq-corruption.htm> > accessed 5 July 2017.

¹⁶³ *ibid*.

luxury assets in the United States including a California mansion worth US\$ 30 million.¹⁶⁴ Though the settlement allowed him to keep certain assets, he was requested to sell his Ferrari and most of his Michael Jackson memorabilia.¹⁶⁵ Furthermore, in 2016, Dutch authorities seized his 76 metre yacht, *Ebony Shine*.¹⁶⁶

19 June 2017 was the opening day of the long-awaited trial of its kind. Despite arguments by Mangué's lawyers contending that he enjoyed diplomatic immunity and that France had no jurisdiction, the court proceedings commenced.¹⁶⁷ French prosecution authorities sought to prove that the amassed wealth of Mangué was illegally acquired, stolen from the people of Equatorial Guinea who are the victims of his corrupt conducts and who should be beneficiaries in case of restitution.¹⁶⁸ The trial against Mangué commenced and ended in July 2017 and French prosecution authorities sought to have Mangué imprisoned for three-years and a fine of about US\$ 34 million and confiscation order.¹⁶⁹

6.4.5 The shifting political will

The status of any political will of a state could be influenced by many factors including change in laws or policies and the change in regimes.¹⁷⁰ These are key political variables that may affect a state's commitment to fighting corruption. These factors play a major role in the state's realisation and implementation of good governance, laws and institutions, and depending on the basis of the change, the shift can be either good or bad for the state in question.¹⁷¹

Each government leadership has its own political agenda. Whether or not the agenda is genuine, can only be discovered when the leadership is in power. Generally, particularly in

¹⁶⁴ Evan Perez, 'Equatorial Guinea official reaches \$30 million corruption settlement with U.S' (CNN, 10 October 2014) < <http://edition.cnn.com/2014/10/10/world/equatorial-guinea-corruption-settlement/index.html> > accessed 5 July 2017.

¹⁶⁵ Sophie Jane Evans, 'African dictator's Malibu-based son forced to hand back \$30 million in assets to people of Equatorial Guinea (but he's allowed to keep his prized Michael Jackson's crystal glove)' (*Mailonline*, 14 October 2014).

¹⁶⁶ <http://www.dockwalk.com/Essentials/News.aspx?id=187934> accessed 13 July 2017.

¹⁶⁷ 'On Trial for Corruption: Teodoro Obiang, Son of the President of Equatorial Guinea' < https://www.transparency.org/news/feature/on_trial_for_corruption_teodoro_obiang_son_of_the_president_of_equatoria_g > accessed 10 July 2017.

¹⁶⁸ *ibid.*

¹⁶⁹

https://www.transparency.org/news/feature/on_trial_for_corruption_french_prosecutors_demand_jail_term_and_30_million accessed 26 July 2017.

¹⁷⁰ Hatchard (n 120) 31.

¹⁷¹ *ibid.*

democratic states, when a new leadership is to be elected, candidates, through their vigorous campaigns, present to the public, promises and plans they intend to effect once in office.¹⁷² It is unlikely for such candidates not to mention the fight against corruption. For example, during an event unveiling the Jubilee Party's Manifesto in June 2017, Nairobi, the Kenyan President Uhuru Kenyatta together with main opposition coalition National Super Alliance addressed Kenyans as they launched their election campaigns. The parties pledged to transform Kenya and the lives of Kenyans by improving education, health and infrastructure together with fighting corruption.¹⁷³

Prior to Muhammadu Buhari's election as President of Nigeria, like many others, he partook in presidential campaigns promising the people of Nigeria that should they elect him as president, he will address insecurity and economic-related issues, together with tackling corruption. Addressing the All Progressives Congress (APC) supporters, Buhari declared:

The fundamental issue facing this country is insecurity and the problem of the economy which was being made worse by corruption. I assure you that we are going to finally assemble a competent team of Nigerians to efficiently manage the country. The level of corruption in Nigeria is intolerable and we will make sure we succeed in fighting corruption when we get there. I am appealing to you, the damage done to this country is great. The level of unemployment, level of insecurity is intolerable. The journey has begun. It will take time, it will take patience, it will take support from you to make sure that we succeed.¹⁷⁴

It is unfortunate that, despite Buhari's promise to fight corruption, his senior government officials are involved in corruption scandals. For example, Ayodele Oke, Director General of Nigeria's National Intelligence Agency was suspended when sums of money amounting to at least US\$ 43.4 million, GBP 27,700 (US\$ 36102.38) and NGN 23.2 million (US\$ 74,000) were found in his private residence by the Economic and Financial Crimes Commission (EFCC), and Lawal Babachir former Secretary to the Government of the Federation, was suspended for his involvement in the alleged US\$ 635,000 scam.¹⁷⁵

¹⁷² See Lynnette Fourie and Neeltje du Plessis, 'The Function of electoral communication in a developing democracy: the case of South Africa' (2011) 11 *Journal of Public Affairs* 255, 255-264.

¹⁷³ Mohammed Yusuf, 'Kenyan Parties Launch Election Campaign' (*VOANEWS*, 28 June 2017).

¹⁷⁴ 'Buhari open campaign, promise to address corruption, insecurity, economy' < <http://www.premiumtimesng.com/news/headlines/174402-buhari-opens-campaign-promises-address-corruption-insecurity-economy.html> > accessed 6 July 2017.

¹⁷⁵ Fisayo Soyombo, 'Why Buhari will not rid Nigeria of Corruption' (*Aljazeera*, 4 May 2017) <http://www.aljazeera.com/indepth/opinion/2017/05/buhari-rid-nigeria-corruption-170502111331286.html> accessed 25 July 2017.

With many supporting the view that African leaders are corrupt, their intention and promises of fighting corruption can be tested as soon as they occupy government offices. If the newly elected leader has genuine intentions of combating corruption, efforts will be made to fulfil such task.¹⁷⁶ However, if the fight against corruption is not the driving force of the newly-elected leader, then corruption will continue to spread like a cancerous disease, granting government officials plenty of opportunities to engage in corrupt practices.¹⁷⁷ For example, former Nigerian President, Olusegun Mathew Okikiola Aremu Obasanjo (1999-2007), during his leadership, saw several senior public officials convicted of corruption, with Nuhu Ribadu heading the Economic and Financial Crimes Commission.¹⁷⁸ The individuals investigated include: Adolphus Wabara after being accused of receiving more than US\$ 400,000 in bribes; Alice Mobolaji, former Minister of Housing was fired after she allocated more than 200 properties to senior government officials instead of having a public sale of the properties;¹⁷⁹ and Joshua Chibi Dariye, Diepreye Solomon Peter Alamieyeseigha and Sani Abacha. However, when Olusegun Obasanjo was succeeded by President Umaru Yar'Adua in 2007, Ribadu was removed from office and in his absence, Federal Attorney-General Michael Aondoakaa allegedly used Ribadu's powers to shield senior officials such as James Ibori, the former Governor of Delta State in Nigeria from 29 May 1999 to 29 May 2007, (who was found guilty by a British Court after pleading guilty to embezzlement) from on-going international investigations on corruption-related offences.¹⁸⁰

Efforts to combat corruption should be accompanied by a credible political will that is unequivocally manifested by top political administrators across every branch of government. The judiciary cannot fight corruption if laws are not enacted by the legislature. The executive cannot enforce laws and judgments if the law-making and adjudicating organs do not play their role. As such, the manifestation of political will must not come only from key cabinet members or senior state officials. It cuts across all organs of government as well as state apparatuses, including even civil society actors. The question that comes to mind is: how do these different organs of government manifest the political will in the fight against corruption? The discussion below highlights some of the ways as they have occurred in different African States.

¹⁷⁶ See Aquiline Tarimo, *Ethnicity, Citizenship and State in Eastern Africa* (African Books Collective 2011) 42.

¹⁷⁷ John L Cook, *Afghanistan: The Perfect Failure* (Xlibris Corporation 2012) 107.

¹⁷⁸ Robert I Rotberg, *The Corruption Cure: How Citizens and Leaders Can Combat Graft* (Princeton University Press 2017) 140.

¹⁷⁹ Lauren Ploch, *Nigeria: Report on a Key Strategic Partner of the U.S. Government* (DIANA Publishing 2010) 17.

¹⁸⁰ Hatchard (n 120) 31.

6.5 Understanding political will through different anti-corruption efforts

Political will has been defined in this study as the credible intent of political actors to address the root causes or effects of corruption. Based on this definition, it can be argued that this element of intent on the part of political actors must reflect the three dimensions of anti-corruption efforts, viz: prevention; promotion; and protection. If this occurs, then, political actors will realize the following: first, that political will is an important precondition for success in combating corruption; second, a change in laws is required; third, a change in institutional governmental structures is also necessary; fourth, corrupt practices must not be tolerated; and fifth, the availability and allocation of resources is essential for investigating and prosecuting corruption.¹⁸¹

The change in law and institutional structures forms part of the prevention dimension because it affords political leaders the opportunity to address and tackle corruption-related matters through anti-corruption legislation and institutions. On the other hand, advocating no tolerance for corrupt conduct forms part of the promotion dimension as political actors will develop ways and means of raising awareness on corruption, how it is perpetrated and its effects on society and government. The availability and allocation of resources for the investigation and prosecution of corruption forms part of both the promotion and protection dimensions in that if a state has the necessary resources or requests assistance from foreign states, investigations on corrupt allegations will be conducted and the prosecution of corrupt government officials will take place. This will serve as a deterrent to other government officials that liability will be imposed on those who engage in corrupt practices, and that corruption does not pay. On the other hand, for an investigation on an allegedly corrupt public official to be initiated, a complaint must be lodged just as is the prosecution and conviction of a corrupt official. Witnesses must testify and records must be obtained from the relevant governmental agencies. For there to be full participation, protection must be accorded to individuals who have to prepare and furnish documents and also disclose confidential transactions. Put simply, witness protection programmes and legislation on protected disclosure are very vital in protecting and promoting the fight against corruption.

In the discussion that follows, the substance of the different anti-corruption dimensions (prevention, promotion and protection) are explored.

¹⁸¹ Muna Ndulo, 'A Legal Framework for Combating Corruption: Case Study from Zambia' in Muna Ndulo and Mamoudou Gazibo (eds), *Growing Democracy in Africa: Elections, Accountable Governance, and Political Economy* (Cambridge Scholars Publishing 2016) 301.

6.5.1 Prevention

One of the indicators to show that state leaders have the will and enthusiasm to combat corruption is when they decide to take necessary initiatives to establish anti-corruption mechanisms. Moreover, this 'will' supports or compliments already existing law enforcement agencies.

When a state initiates a legislative process to enact law, the process does not end when the bill becomes law; however, the process ends when the law is implemented or enforced. The implementation and enforcement of a law could be influenced by the political agenda of the government administration in power.¹⁸² Suffice to say that it is not insufficient to qualify a state as having political will to combat corruption when it merely enacts laws but does not take the necessary steps to enforce such laws. For example, the Cameroonian government, pursuant to Article 66 of its Constitution, adopted a law No. 003/2006 of 25 April 2006 relating to the Declaration of Assets and Property¹⁸³ in an effort to increase transparency and accountability among government officials. Sad to say, the law has not been enforced or implemented.¹⁸⁴ Section 2 sets out government officials who ought to declare their assets and property including the President, Prime Ministers, Cabinet Minister, Members of Parliament and other elected government officials. These officials must file their declarations to the Assets and Property Declaration Commission following their election or appointment into office and at the end of their tenure.¹⁸⁵ According to section 2 and section 3(1) of the law relating to the Declaration of Assets and Property, government officials are mandated to declare all their assets and property, movable and immovable, tangible and intangible property in or out of the country belonging to the official himself, spouse or their minor descendants. From this example, it is clear that a state cannot proclaim its will to combat corruption when it enacts a law but fails to enforce it. The purpose of such a law cannot be realised if it is not enforced. Therefore, it could be concluded that failure to enforce an anti-corruption instrument confirms a states' lack of commitment to curb corruption.

It is unfortunate that the Cameroonian government lacks the necessary political will on this issue. The lack of its commitment to adopt ways to complement the law has led it to fade in the background of the administration. The Cameroonian law relating to the Declaration of Assets and

¹⁸² http://www.lexisnexis.com/help/cu/the_legislative_process/Stage_9.htm accessed 1 July 2017.

¹⁸³ Law No. 003/2006 of 25 April 2006 Relating to the Declaration of Assets and Property. See also Agbor (n 44); Barry Turner (ed), *The Stateman's Yearbook: The Politics, Cultures and Economies of the World 2013* (Springer 2012) 262.

¹⁸⁴ Yerima Kini Nsom, 'Biya Stalling Asset Declaration Law' (*Cameroon Postline*, 11 December 2011).

¹⁸⁵ Law No. 003/2006 of 25 April 2006 Relating to the Declaration of Assets and Property, section 4.

Property, if implemented, could prevent government officials from misappropriating or embezzling public funds or property for the following reasons:

- (1) The law was created in the public interest to ensure that government officials do not steal, misappropriate, or embezzle public funds;
- (2) The law established a commission to monitor assets and property of Section 2 government officials;
- (3) The obligation to declare one's assets is not unrealistic, it is capable of being achieved; and
- (4) It sets out sanctions which may be imposed on government officials who do not comply with the provisions of the law.¹⁸⁶

National efforts of a state can be seen through its anti-corruption initiatives which are significantly centred on legislation¹⁸⁷ and institutions.¹⁸⁸ Though a state may enact anti-corruption legislation and create institutions, it is the effective enforcement of the laws and independent, impartial and unfettered functioning of the institutions that have proved to be a challenge for most African States. These challenges, obviously, could be attributed, in part, to the involvement of top senior state officials in the perpetration of corrupt acts noticed by the broader public before whose eyes they go with impunity. In addition, such state officials control the individuals who enforce the law as well as run these institutions. In short, law enforcement and leaders of anti-corruption institutions could be starved of the resources they need in order to fully and effectively implement their mandate.¹⁸⁹

Undoubtedly, national legislative instruments play a major role in the fight against corruption. As discussed earlier in this study, several African States have enacted legislative instruments that criminalise corruption: these legislative instruments, among other things, define what constitutes corrupt offences in their legal systems; stipulate the different modes of participation; and require specific state employees to declare their assets. These national legislative instruments constitute part of the efforts by African States to combat corruption within their States. They also serve a preventive function. However, there exists a specific category of instrument

¹⁸⁶ David Barnhizer, 'The Implementation Gap: What Causes Laws to Succeed or Fail?' (2013) 6-7 < https://works.bepress.com/david_barnhizer/79/ > accessed 1 July 2017.

¹⁸⁷ For example, the Angolan High Authority against Corruption (1996); Botswana CECA (as amended 2013); Kenyan Anti-Corruption and Economic Crimes Act of 2003; Namibia ACA of 2003; Lesotho's enactment of the Prevention of Corruption and Economic Offences Act of 1999 (and the 2006 amendment).

¹⁸⁸ For example, the Mauritian ICAC; the Malawian Anti-Corruption Bureau; the Cameroonian Special Criminal Court; Kenyan Office of the Ombudsman and the Ethics and Anti-Corruption Commission; Tanzanian Prevention and Combating of Corruption Bureau; Botswana Directorate on Corruption and Economic Crime.

¹⁸⁹ Sahr J Kpundeh, 'Corruption and Corruption Control' in Emmanuel Gyimah-Boadi (ed), *Democratic Reform in Africa: The Quality of Progress* (Lynne Rienner Publishers 2004) 128.

which is uniquely significant and directly related to the existence and manifestation of political will: a code of conduct instrument for government officials and civil servants.¹⁹⁰ A Code of Conduct or Code of Ethics may be understood as a set of guidelines or rules outlining norms, rules and responsibilities and proper practices.¹⁹¹ For example, though not specifically directed to senior government officials, the Ugandan Code of Conduct and Ethics for Uganda Public Service sets out guiding principles of work of ethics.¹⁹² The principles in the Code include those relating to customer care; conflict of interest; sexual harassment; removal, destruction or altering of records; accountability; and handling of gifts and bribes.¹⁹³ Ideally, it is imperative for states to have a code of conduct for senior public officials which will urge them to adhere to a leadership code of conduct which includes the declaration of assets, income and liabilities.¹⁹⁴

These Codes become a powerful tool since corruption is often perpetrated through the misappropriation or embezzlement of state or public funds. The Codes, therefore, become important because they enable relevant authorities or agencies to track the assets of government officials and track any suspicious source of income or assets. Most importantly, they are able to detect and prevent rent-seeking behaviour by senior or civil public officials.¹⁹⁵ Since corruption is a consequence of misconduct by public officials, the consistent adherence to such an instrument will, undoubtedly, result in the reduction and possibly, eradication of corruption.

Sustainable political reforms initiated through the people with a broad consensus is also key in preventive anti-corruption efforts. Unfortunately, this is problematic on the African continent as most political reforms are aimed at consolidating the status quo so that political leaders maintain their grip over political leadership. As such, even when they have lost legitimacy, they dictate to the people, an undemocratic mandate that is usually secured through unconventional

¹⁹⁰ Hatchard (n 120) 26-28.

¹⁹¹ Franz Zehetner, 'What do we Mean by Ethics in Finance' in Hermann-Josef Blanke *et al* (eds), *Common European Legal Thinking: Essays in Honor of Albrecht Weber* (Springer 2015) 407. See also the South African Office of Public Protector 'Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province' Report No: 25 of 2013/14.

¹⁹² Code of Conduct and Ethics for Uganda Public Service, 2005.

¹⁹³ *ibid*.

¹⁹⁴ Kpundeh (n 190) 129. See also the South African Executive Members' Ethics Act 82 of 1998 which was enacted to provide a code of ethics to govern the conducts of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils.

¹⁹⁵ See also South African Office of Public Protector 'Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province' Report No: 25 of 2013/14.

tactics such as the victimisation of political dissidents and seclusion of minority groups. Political reforms, in most of Africa, have been stagnated and unsupported by the populace. The downfall of numerous African leaders is partly attributed to the high-handed autocratic mannerism in which they lead their people, with bulletproof evidence of corrupt practices that drain the economies of the States. For example, the 1997 overthrow of Mobutu Sese Seko Kuku Ngbendu Wa Za Banga which led to the findings of his financial and real assets in foreign financial institutions;¹⁹⁶ the 1992 overthrow of Joseph Momoh by Captain Valentine Strasser; and in Sierra Leone, the 1997 overthrow of Ahmed Tejan Kabbah by Major General Paul Koromah.¹⁹⁷

Political reforms are vital in the fight against corruption in Africa: they close the loopholes that exist in the legal and political system, and introduce a set of norms by which everyone must play. They earn the credibility of the people and are ultimately seen as legitimate. A sound legal and political system is constructed wherein everyone trusts the institutions in the hope that everyone is subject to them (the institutions) and no one is above these institutions. Such political reforms must aim at building solid systems rather than consolidating the leadership of a few.

6.5.2 Promotion

Apart from the enactment of anti-corruption laws and the creation of anti-corruption institutions, promoting the fight against corruption plays a crucial role in its eradication. There are various ways in which anti-corruption strategies could be promoted. However, significant strategies could be through raising awareness on corruption and its related pathologies, the establishment of anti-corruption agencies and anti-corruption hotlines and education.

6.5.2.1 Establishment of anti-corruption agencies in Africa

Considering corruption being a serious problem with numerous consequences, it has negative effects on Africa's sustainable economic development. With this in mind, anti-corruption strategies need to include the establishment of anti-corruption agencies. Agencies that specialise in combating corruption are important in ensuring that corruption related problems are addressed.

¹⁹⁶ Fred M Shelley, *Nation Shapes: The Story Behind the World's Borders* (ABC-CLIO 2013) 287.

¹⁹⁷ Carlson Anyangwe, *Revolutionary Overthrow of Constitutional Orders in Africa* (African Books Collective 2012) 163.

(i) **The Pan-African Body of National Anti-Corruption Institutions**

The African Union Convention on Preventing and Combating Corruption (AUCPCC)¹⁹⁸ assisted in the establishment of the Pan-African Body of National Anti-corruption Institutions.¹⁹⁹ Its first meeting was held in November 2005 in Lusaka, Zambia, where it was recommended that AU Member States must be given assistance to enable them identify areas of convergence and divergence between multilateral anti-corruption instruments that would enable them to facilitate the implementation of these instruments at the national level.²⁰⁰ The second meeting focused on encouraging states to ratify the AUCPCC and regional and sub-regional anti-corruption Conventions such as, SADC Protocol against Corruption and Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption.²⁰¹ In addition, it urged member states to domesticate these Conventions.²⁰² Furthermore, it stressed that an Advisory Board within the AU must be established and that there is need to raise awareness on a greater scope and to improve inter-state co-ordination and capacity building.²⁰³

(ii) **New Partnership for Africa's Development (NEPAD)**

Founded by Algeria, Egypt, Nigeria, Senegal and South Africa, NEPAD is a group established to serve as a development guide on the African Continent and to acknowledge the fact that economic development is a consequence of good governance, accountability and integration.²⁰⁴ NEPAD'S Action Plan focuses on numerous issues to ensure that it achieves its goals, and one of its commitments is to combat and eradicate corruption.²⁰⁵

NEPAD, together with the African Heads of State and Government Implementation Committee, created the African Peer Review Mechanism (APRM) in 2003 to encourage the development and adoption of policies, standards and practices created to lead to political stability,

¹⁹⁸ AUCPCC, 2004.

¹⁹⁹ Governance and Public Administration of the Economic Commission for Africa in Collaboration with the AU Advisory Board on Corruption. 'Combating corruption, improving governance in Africa: Regional Anti-Corruption Programme for Africa (2011-2016)'.

²⁰⁰ Humphrey P B Moshi, 'Capital Flight and Transparency' in Ibi S Ajayi, Lèone Ndikumana (eds), *Capital Flight from Africa: Causes, Effects, and Policy Issues* (Oxford University Press 2015) 378.

²⁰¹ 'National Anti-Corruption Forum on Corruption in Private Sector' < <http://www.gov.za/national-anti-corruption-forum-corruption-private-sector> > accessed 30 June 2017.

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ George H Frederickson and Richard K Ghere (eds), *Ethics in Public Management* (2nd edn, M.E. Sharpe 2013) 319.

²⁰⁵ *ibid.*

economic growth, and sustainable development and hasten sub-regional and continental economic integration.²⁰⁶ As of 2015, only 35 states had voluntarily acceded to the APRM.²⁰⁷

To ensure the acceleration of Africa's sustainable growth and development, there must be improvement in the management of national resources. In addressing this, NEPAD's Action Plans sets out six (6) strategies aimed at addressing African problems or obstacles on economic and corporate governance-related issues;²⁰⁸ moreover, it lays down eight (8) action plans aimed at assisting States in the implementation of their strategies.²⁰⁹

NEPAD's Action Plan encourages states to adopt international standards of good practice in economic and financial areas in an effort to improve transparency and accountability. Moreover, in addressing the effects of money laundering on economic prosperity, NEPAD urges states to:

- a) Implement measures aimed at facilitating financial sector assessments;
- b) Obtain international assistance for training in money laundering measures;
- c) Place recovery of stolen assets at the top level of the global agenda;
- d) Adopt international conventions, standards and best practices;
- e) Allow international legal assistance in anti-money laundering matters;
- f) Establish or strengthen laws on regulating the duties and responsibilities of participants in financial institutions, together with laws relating to anti-corruption measures;
- g) Adopt national laws that criminalise money laundering and financing of terrorism;
- h) Improve 'co-operation within and without Africa to help recover funds illegally acquired through corruption and criminal activity that are subsequently deposited in foreign states;
- i) Develop and strengthen judiciaries in order to enhance their independence and international credibility;
- j) Strengthen access to court arrangements and investigative authorities; and
- k) Establish strong and reliable regulatory and intelligence authorities.²¹⁰

²⁰⁶ <http://aprm-au.org/pages?pageId=nmandate> accessed 25 July 2017.

²⁰⁷ South Africa, Lesotho, Mozambique, Malawi, Zambia, Angola, Tanzania, Rwanda, Uganda, Kenya, Ethiopia, Djibouti, Sudan, Egypt, Chad, Congo, Gabon, Equatorial Guinea, Cameroon, Nigeria, Benin, Togo, Ghana, Côte d'Ivoire, Liberia, Sierra Leone, Burkina Faso, Mali, Senegal, Mauritania, Niger, Tunisia, São Tomé and Príncipe, Mauritius, and Algeria.

²⁰⁸ 'A Summary of NEPAD Action Plans' <https://www.uneca.org/sites/default/files/PublicationFiles/nepadactionplanssummary.pdf> accessed 25 July 2017.

²⁰⁹ *ibid.*

²¹⁰ *ibid.*

(iii) **The AU Advisory Board on Corruption**

Created on 26 May 2009 under Article 22(1) of the AUCPCC, its mandate is to promote and encourage the adoption of measures and actions by States Parties aimed at preventing, detecting, punishing and eradicating corruption and other related offences in Africa.²¹¹

(iv) **The African Parliamentarians Network against Corruption**

The 1999 Ugandan World Bank Seminar on good governance in Africa led to the establishment of the APNAC. With 21 Member States, it was created to ‘coordinate, involve and strengthen capacities of African parliamentarians to fight corruption and promote good governance’.²¹² To achieve these goals, its objective is to ensure that African States share information on best practices, encourage or promote coordination among member states and corporate with civil society organisations. Moreover, it is also to encourage parliamentarians to promote transparency and accountability within their respective States.²¹³

(v) **Anti-Corruption Hotlines**

A hotline is a toll-free constant telephone service which is available to the public for immediate communication.²¹⁴ Hotlines can be used as a preventive and protective measure as they will afford members of society with a facility to report any suspicious corrupt conduct by public officials or any other person. This telephone line can also be used a promotion strategy. The fact that these hotlines are often toll-free, is acknowledgment of the fact that corruption is indeed a social problem with numerous effects. As such, and in an effort to address corruption-related issues, society must be given the means to contact relevant authorities or agencies to report any corrupt practices or suspicious conduct. Unfortunately, very few African States do have hotlines for the disclosure of suspected corrupt activities such as, South Africa, Zimbabwe, Sierra Leone and Kenya.²¹⁵

²¹¹ Convention on Preventing and Combating Corruption, 2004.

²¹² Frederickson and Ghere (n 204)320.

²¹³ *ibid.*

²¹⁴ <https://www.merriam-webster.com/dictionary/hotline> accessed 13 July 2017.

²¹⁵ OECD and African Development Bank, *Stocking of Business Integrity and Anti-Bribery Legislation, Policies and Practices in Twenty African Countries* (OECD Publishing 2012) 75 and 81; Katrina Manson *et al.*, *Sierra Leone* (2nd edn. Bradt Travel Guide 2012) 125.

(vi) **Awareness**

Raising awareness on corruption and its related issues is one of the many ways in which anti-corruption preventive measures and strategies could be brought to the attention of the public. African States should show some creativity in promoting such awareness. African States must develop awareness plans to ensure that the majority of their people attend and participate in such public functions. Such functions should include celebrities or top personalities from civil society. Civil society or organisations, especially religious entities, could be very valuable in the fight against corruption, especially in terms of raising awareness.

Culture and religion are important elements in the lives of many. It is generally accepted that there are five major religions in the world: Christianity, which is the world's largest religion, followed by Islam, Hinduism, Judaism and Buddhism.²¹⁶ Though unique in many ways, these religions share several sentiments regarding an individuals' way of life. For example, teachings in these religions are aimed at promoting social virtues such as truth, discipline and honesty as well as promoting the spirit of brotherhood and welfare.²¹⁷ In a similar way, culture is an important element in peoples' lives. Though several individuals affiliate to a specific religion, there are those whose lives are centred on their cultural beliefs.²¹⁸

There is no doubt that the involvement of religious entities in the fight against corruption has been and still is, a controversial issue. Religion plays an important role in the lives of many Africans; hence faith-based organisations for example, could be used as platforms to combat corruption.²¹⁹ A church may be generally understood as 'a community of moral discourse or, in the words of Hauerwas, 'a community of character' that does not have a social ethic, but is a social ethic'.²²⁰

With Christianity being a popular religion in Africa, churches play a crucial role in the fight against corruption because they teach people humility, act of sharing, kindness, and honesty.

²¹⁶ Kelly Swanson, *AP Human Geography 2017-2018* (Simon and Schuster 2017) 143.

²¹⁷ Nahid Eva, 'Importance of religion in today's world' https://www.academia.edu/3838157/Importance_of_religion_in_todays_world accessed 3 July 2017.

²¹⁸ Gabriel E Idang, 'African Culture and Values' (2015) 16 *Phronimon* 97, 99.

²¹⁹ See Sunday Bobai Agang, *When Evil Strikes: Faith and the Politics of Human Hostility* (Wipf and Stock Publishers 2016) 185.

²²⁰ JM Vorster, 'Managing Corruption in South Africa: The Ethical Responsibility of Churches' (2012) 109 *Scripture* 133, 141.

Individuals who misuse public funds for private gain, display self-interest behaviour. The latter is not immoral per se.²²¹ However, it is its negative form that breeds corrupt practices.²²² In other words, only self-interest centred on an immoral motivation or purpose influences an individual to engage in corrupt practices. Self-interest becomes immoral when it exploits others.²²³ When corrupt public officials engage in acts of corruption, they become consumed with the 'self' that they forget the interest of the people.²²⁴

Ideally, religious entities as well as traditional groups and entities should support all anti-corruption measures taken by authorities in an effort to combat corruption.²²⁵ Moreover, these religious and traditional groups or entities ought to perform the role of anti-corruption watchdogs or whistle-blowers when monitoring public administrators.²²⁶ Even though it is not their duty to perform such tasks, corruption undermines integrity, peace, social justice and equality of all in a society: these are ideals for and by which religious and traditional groups stand and serve.²²⁷

Religious groups and entities are seen as moral 'opinion makers' in communities.²²⁸ The functioning of a religious group or entity in any community knows no boundaries. Neither does it categorise its members: it is a platform where everyone stands on the same rung, whether rich or poor; young or old; educated or uneducated; employed or unemployed. With this broad spectrum of all segments of society therein, religious entities address the ills that confront their societies as they function in all spheres of life and include people from different walks of life. Such entities could be priceless venues in raising awareness in the fight against corruption if and only if there is credible political will to fight corruption.²²⁹

Though different, religion and ethics often work together in moulding the lives of civil society,²³⁰ religion provides people with the norms and values to guide them in their way of life.²³¹

²²¹ *ibid* 138.

²²² *ibid.*

²²³ *ibid.*

²²⁴ *ibid.*

²²⁵ *ibid* 140.

²²⁶ *ibid.*

²²⁷ *ibid* 141.

²²⁸ *ibid* 143.

²²⁹ *ibid* 141.

²³⁰ Marianna Fotaki, Faisal Alshehri and Saleema Kauser, 'Can Religion Help in the Fight against Corruption? Evidence from Marketing and Management in Saudi Arabia: A Behavioral Ethics Perspective' (Centre for Ethics, 28 May 2015) < <https://ethics.harvard.edu/blog/can-religion-help-fight-against-corruption> > accessed 1 July 2017.

²³¹ *ibid.*

For this reason, one might argue that these religious values could be useful in the fight against corruption as they will guide an individual on ethical decision-making in the workplace.²³²

For example, Islam dictates all Muslim behaviours. Islamic law could be understood as a set of rules which govern two dimensions of an individual's life: first, it provides worship rules governing the relationship between an individual and *Allah* (God); and second, it provides rules governing transactions between individuals and their societal norms.²³³ Since corruption often means different things to different communities, Islamic jurists have different views on corruption.²³⁴ Nonetheless, they share the same sentiment that bribery is the epitomise of corruption.²³⁵

In Islamic law, there are various conducts that could be categorised as bribery, for example *Al-Soht* (illegal earnings) are prohibited earnings or illegitimate increase of profit; and *Al-Hadiya* (gifts) means an act of giving something in real or monetary form without compensation.²³⁶ Considering the fact that the purpose of giving a bribe is to ensure that the bribee transfers benefits to the briber, *al-hadiya* or any act of gift giving could disguise bribery as the gift-giver or the briber may anticipate a private benefit from the one who accepted the gift.²³⁷ The Quran prohibits acts of corruption. For example, the *Surat Al-Baqarah* verse 188 reads as follows:

And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly, a little of other people's property.

This verse prohibits authoritative individuals (including judges, rulers and decision-makers) from facilitating unwarranted appropriation of public property or property of others by 'obtaining a favourable ruling in exchange for bribes'.²³⁸

The Quran forbids acts of corruption and bribery by emphasising that these acts are not only unjust, they cause harm to members of the community and the nation.²³⁹ For example, Quran 2, verse 188 reads as follows:

²³² *ibid.*

²³³ Aina-Obe Shamsuddin Bolatito, 'The Muslim-Ethical Norms Combat against Corruption; Are Islamic Perspective been Met in Practice' (2016) 5 International Journal of Science and Research 1, 2.

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ *ibid.*

²³⁷ *ibid.*

²³⁸ *ibid.*

²³⁹ *ibid.*

And do not consume one another's wealth unjustly or send it in bribery to rulers in order that they might aid you to consume a partition of wealth of people in sin, while you know it is unlawful'.²⁴⁰

In other religious examples, mosques could be used to raise awareness on corruption. For example, responding to its 169th standing by TIs' 2016 CPI, a Memorandum of Understanding (MoU) was signed in 2016 between the Afghan anti-corruption department and the Ministry of Hajj and Religious Affairs through mosques in an effort to create awareness among the people about corruption.²⁴¹ Ghulam Hussain Fakhri, Head of the High Office of Oversight and Anti-Corruption, maintained that the fight against corruption is 'not the job of one or two institutions', and that government departments, private sectors and Afghans should work together in the fight against corruption.²⁴² Moreover, Fakhri believes that through mosques, people would be made aware of the consequences of corruption.²⁴³

Irrespective of whether one considers Buddhism as a religion or philosophy, there is the presence of teachings of Gautama Buddha, also known as the Buddha, founder of Buddhism.²⁴⁴ The teachings of Buddha could be encapsulated in two principles: the Four Noble Truths, which focused on the doctrines of Buddha;²⁴⁵ and the Noble Eightfold path which covers discipline, that is, how people should live.²⁴⁶ The Noble Eightfold path sets out eight different ways in which one should live his/her life. One of the ways is the right of action, which focuses on how an individual must behave.²⁴⁷ This action is further divided into two: abstaining from taking of life and abstaining from taking what is not given.²⁴⁸ The latter provides that one must not appropriate the rightful belongings of another with thievish intent.²⁴⁹ It has been accepted by Buddhists that the act of 'taking what is not given' could be committed in various ways including stealing, robbery, snatching, fraudulence and deceitfulness.²⁵⁰

²⁴⁰ *ibid.*

²⁴¹ Khwaja Basir Ahmad, 'MoU signed on fighting corruption through mosques' (*Pajhwok Afghan News*, 2 February 2016).

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ David Leeming, *A Dictionary of Asian Mythology* (Oxford University Press 2001) 60.

²⁴⁵ Barbara Ann Kipfer, *Phraseology: Thousand of Bizarre Origins, Unexpected Connections, and Fascinating Facts about English's Best Expressions* (Sourcebooks Inc. 2008) 114.

²⁴⁶ Bhikkhu Bodhi, *The Noble Eightfold Path: The Way to the End of Suffering* (Buddhist Publication Society 2010) vii.

²⁴⁷ Sue Penney, *Buddhism* (Heinemann 1999) 17.

²⁴⁸ Bodhi (n 246) 58.

²⁴⁹ *ibid.* 59.

²⁵⁰ *ibid.*

Traditional leaders could be defined as

individuals occupying communal political leadership positions sanctified by cultural mores and values, and enjoying the legitimacy of particular communities to direct their affairs, their basis of legitimacy is, therefore, traditional, which includes the whole range of inherited culture and way of life; a people's history; moral and social values and traditional institutions which serve these values.²⁵¹

Traditional leadership plays an important role in bringing post-colonial political order into society, as traditional leaders have control over rural communities.²⁵² The role of traditional leaders in the fight against corruption is important because they usually command more respect in their communities than elected government officials.²⁵³ For this reason, it could be argued that the level of control traditional leaders have over their people allows them to raise awareness in their respective communities on different corrupt practices, preventive measures and penalties which could be imposed on anyone who engages in such practices.

Thus, traditional leaders could play an enormous role in the fight against corruption, not only because they have influence or control over their people, but mainly because they are in a better position to understand the concerns and dynamics of their community members on corruption-related matters.²⁵⁴ For example, in many government departments, for service to be rendered, one must be willing to pay a bribe. This practice could be problematic to individuals from rural communities as they may not be able to have the means to pay bribes. Since communities with traditional leaders often hold traditional meetings or gatherings, such settings could allow community members to raise their concerns in confidence with their traditional leaders with the expectation that their leaders would address the issues with local government administrators.

The way of life of traditional communities is in line with the Afrocentric school of thought which argues that pre-colonial Africa was not corrupt as it was 'a near perfect community' where rules focused on the moral value that everyone was his/her brother/sister's keeper.²⁵⁵ When a

²⁵¹ Christiaan Keulder, 'Traditional leaders' in Christiaan Keulder (ed), *State, Society, and Democracy: A Reader in Namibian Politics* (Gamsberg Macmillan 2000) 152.

²⁵² *ibid* 150.

²⁵³ Economic Commission for Africa, 'Harnessing Traditional Governance in Southern Africa' (November 2007) United Nations Economic Commission for Africa, 21.

²⁵⁴ See Benson O Igboin, 'Traditional Leadership and Corruption in Pre-Colonial Africa: How the Past Affects The Present' (2016) 42 *Studia Historiae Ecclesiasticae* 142-158.

²⁵⁵ *ibid* 148.

community lives on this principle, corruption will be minimized because its way of life is guided by religious rules or traditional moral values which encourage accountability and transparency.²⁵⁶

In an effort to raise awareness on corruption and corruption-related issues, African States should consider recognising and utilising the African International Anti-Corruption Day which was first recognised in 2003 under the UNCAC.²⁵⁷ Some African States such as Uganda annually sets a week dedicated to the fight against corruption. In 2016, Uganda devised the theme for the anti-corruption week entitled: Reject and Report Corruption Your Responsibility.²⁵⁸ A year before this, the South African PSC and the University of South Africa hosted an event on corruption: a roundtable was held on the relationship or link between corruption and wildlife crimes.²⁵⁹ In Nigeria, an Anti-Corruption Awareness Organisation has been established mandated to work with law enforcement agencies to detect and eradicate crimes and corruption among Nigerians and beyond.²⁶⁰

(vii) **Education**

Due to the complex nature of corruption, a holistic approach in combating corruption in Africa is more than necessary. Legislative enactments and institutional mechanisms, in themselves, are insufficient. Mostly, in societies where corruption is embedded in the social fabric, as it has become a way of life (both a *modus operandi* and *modus vivendi*), preventive measures in African States require, at least, the inclusion of educative programmes.

To change this perception and way of life, it is necessary to alter the mindsets of individuals, especially the young, into believing in the abnormality and perverseness of corruption irrespective of how it is committed and by who. In other words, the young should be taught about corruption.²⁶¹ Botswana, rated as one of the least corrupt African States, took this strategy some years back by including anti-corruption initiatives and programmes into the curricula of secondary schools.²⁶²

²⁵⁶ *ibid.*

²⁵⁷ Kingsley Uzukwu, *The Price of Freedom: From 3/25 Akron, Ohio to 2/25 Garden City, New York. A Nigerian American Account of Operation Iraq Freedom* (AuthorHouse 2009) 167.

²⁵⁸ <https://www.ppda.go.ug/launch-of-anti-corruption-week/> accessed 23 May 2017.

²⁵⁹ http://www.unodc.org/unodc/en/frontpage/2015/December/international-anti-corruption-day-2015_-campaign-highlights.html accessed 23 May 2017.

²⁶⁰ <http://acaonondostate.blogspot.co.za/> accessed 14 July 2017.

²⁶¹ Jean de Dieu Basabose, 'Anti-Corruption Education as a Way of Building positive peace in Rwanda' (DTech thesis, Durban University of Technology 2014) 215.

²⁶² OECD (n 86) 99.

However, educational strategies as an anti-corruption mechanism cannot, and should not, be limited to children: the society at large needs to be continuously involved in educational programmes. For example, the Botswana Directorate on Corruption and Economic Crime (DCEC) gathers and distributes various publications about corruption related matters to stakeholders for free.²⁶³

The involvement of civil society organisations in the fight against corruption is crucial for the oversight function to be successful. For instance, civil society could be involved when anti-corruption workshops are organised for training of officials and other persons. For example, the 12th Annual Audit, Risk and Governance (ARG) Conference held in Mauritius in October 2017.²⁶⁴

6.5.3 Protection of protected disclosures or whistleblowers

The protective dimension of anti-corruption strategies requires African States to make available assurances and security for individuals who disclose surreptitious corrupt transactions, especially those involving senior state officials. Such protection includes witness protections provided to those who share information with the authorities.

High level corruption usually occurs in secret, and very often, it is a joint criminal enterprise that involves the participation of a multiplicity of persons. Secret in nature and grave in consequence, such corrupt transactions are witnessed, noticed or discovered by junior officials who, often, are instructed to seal their lips. Such witnesses will remain unwilling to disclose what they witnessed because of the repercussions that could follow. If there is the political will, then, protection should be granted to such individuals to not only share what they witnessed but also for them to come forward without being asked as they will do this in absolute confidence that the legal system as well as its players will maintain the confidentiality of their disclosures and also preserve the integrity of their reports without being victimised in any way. To encourage witnesses to come forward and report corrupt activities, African States must develop effective witness protection and whistle-blowing programmes in order to enable anti-corruption authorities or agencies to identify corrupt individuals; commence with investigations; or to use such programmes to obtain more information that could be useful for investigations. In order to secure information from witnesses, they need to be assured of their anonymity in the process before and after information has been

²⁶³ *ibid.*

²⁶⁴ <https://auditriskgovernanceafrica.misti.com/index.php> accessed 25 July 2017.

given to relevant authorities or agencies. There are, at least, three ways in which African States could ensure that the identity of witnesses is protected:

- (i) Hotlines: As reiterated above, a hotline may be understood as a telephone line which is usually toll-free, that members of the public may use to contact an organisation or government to allow people to obtain information from the organisation or government or for the latter to receive information from the people;²⁶⁵
- (ii) Online reporting systems or services: This service or system could be useful and essential because the identity of the individual making the disclosure is completely hidden. Nigeria has a whistle-blowing programme, an initiative from the Federal Ministry of Finance which in essence, encourages people to provide information that could be useful to the Government relating to violations of financial regulations; non-compliance with procurement procedures; mismanagement or misappropriation of public funds or assets; fraud or theft of public assets.²⁶⁶ Moreover, Nigeria created a Federal Ministry of Finance Whistle-blowing Portal, an online secure portal in order to obtain information on corruption-related and financial mismanagement issues from members of the public. Furthermore, the portal allows the person making the disclosure, to perform a status check on the reported matter;²⁶⁷ and
- (iii) Legislative protection: It is imperative for African States to enact laws aimed at protecting whistle-blowers and witnesses. Such a legislative instrument will be fundamental in ensuring that the relevant agencies and authorities protect citizens. For example, the South African Protected Disclosures Act 26 of 2000 was enacted to protect any employee in the private or public sector from being subjected to occupational detriments after making a protected disclosure.²⁶⁸ It also provides remedies for an employee who was subjected to, or suffered occupational detriments after sharing a protected disclosure.²⁶⁹ Other legislative provisions on whistle-blowers include section 12 of the Ghanaian Whistle-blower Act of 2006; sections 48 and 49 of the Mauritian PCA of 2002; and Part

²⁶⁵ <https://www.collinsdictionary.com/dictionary/english/hotline>:
webster.com/dictionary/hotline accessed 24 May 2017.

<https://www.merriam->

²⁶⁶ <https://www.naij.com/1087962-6-fgs-whistleblowing-programme.html> accessed 24 May 2017.

²⁶⁷ http://whistle.finance.gov.ng/_catalogs/masterpage/MOFWhistle/assets/FMF%20WHISTLEBLOWING%20FREQUENTLY%20ASKED%20QUESTIONS.pdf accessed 24 May 2017.

²⁶⁸ Protected Disclosure Act of 2000, section 2.

²⁶⁹ *ibid* section 2(1)(a) and (b).

III of the Zambian Public Interest Disclosure (Protection of Whistle-blowers) Act of 2010.

Protection, as an anti-corruption dimension, must not be limited to the efforts of a state in the enactment of legislation or development of mechanisms aimed at guiding or assisting people in disclosing suspected cases of corruption or the development of witness protection programmes. This dimension must also be seen as a strategy that allows African States to develop mechanisms that track, investigate and prosecute perpetrators, together with seizing, freezing, confiscation or recovery of their assets where necessary.²⁷⁰

Legislative provisions on disclosure of assets, income and liabilities may be seen as one of many mechanisms which could be used to combat corruption.²⁷¹ The essence of such provisions is to allow law enforcement agencies to monitor the finances of public officials and also track suspicious sources of income or origin of any suspicious asset belonging to a public official. This allows agencies or authorities to be aware of the assets, income and liabilities of a public official before and during their tenure of office.²⁷² If a public official has assets incommensurate with his or her income; and if there is reason to believe that the assets are suspicious, law enforcement may initiate investigative proceedings; moreover, the burden of proof will be reversed: the public official will bear the onus of proof.

The crime of illicit enrichment is a new phenomenon which criminalise unexplained increase of wealth of public officials acquired during their tenure of office.²⁷³ This crime targets the significant increase in relation to the lawful income of public officials.²⁷⁴ The UN Convention against Corruption (UNCAC),²⁷⁵ the AUCPCC,²⁷⁶ and the Inter-American Convention against Corruption²⁷⁷ consider an unexplained increase of substantial wealth as a form of corruption,²⁷⁸ and the Conventions define this relatively new crime as:

²⁷⁰ See Sandra Laleta and Vanja Smokvina, 'The Protection of Whistleblowers in the Republic of Croatia' in Gregor Thüsing, Gerrit Forst (eds), *Whistleblowing-A Comparative Study* (Springer 2016) 99.

²⁷¹ See OECD, *Fighting Corruption in Eastern Europe and Central Asia Asset Declarations for Public Officials: A Tool to Prevent Corruption* (OCED Publishing 2011).

²⁷² See *ibid*.

²⁷³ Jeffrey R Boles, 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offences and Human Rights Violations' (2014) 17 *Legislation and Public Policy* 835, 836.

²⁷⁴ *ibid* 837.

²⁷⁵ United Nations Convention Against Corruption, United Nations General Assembly Resolution 58/4, U.N. GAOR, 58th Session, 51 meeting, U.N. Doc. A/RES/58/4 (2003).

²⁷⁶ African Union Convention on Preventing and Combating Corruption, 43 I.L.M.5 (2004).

²⁷⁷ Inter-American Convention Against Corruption 29 March 1996, S. Treaty Doc. No.105-39, 35 I.L.M 724.

²⁷⁸ Boles (n 273) 837.

A significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.²⁷⁹

The crime removes any monetary benefits corruption may offer a public official by depriving the latter of their ill-gotten wealth or gains.²⁸⁰ For criminal responsibility to be imposed against a public official, the following elements must be proved: the accused must have been a public official who, during his/her public tenure in office, experienced a significant increase in his/her assets, knowingly, and without justification.²⁸¹

There are conflicting views regarding the illicit enrichment crime: many applaud the crime arguing that it serves as a mechanism to fight corruption by enhancing governments' power to monitor the wealth of those in the public sector and improve transparency.²⁸² Moreover, various courts share a similar sentiment that the illicit enrichment offences sends a clear message to public officials that the penalties of engaging in corrupt practices will be loss of their office, forfeiture of wealth acquired illegally and imprisonment.²⁸³

On the other hand, many contend that the offence violates human rights,²⁸⁴ for instance, Article 11 of the Universal Declaration of Human Rights (UDHR)²⁸⁵ provides as follows::

Everyone charged with a penal offence, has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

When ratifying the IACAC, the United States made the following statement in terms of Article 2(1)(d) of the Vienna Convention on the Law of Treaties pointing out the illicit enrichment crime violated Article 11 of the UDHR:

The offence of illicit enrichment as set forth in Article IX of the Convention, however, places the burden of proof on the defendant, which is inconsistent with the United States Constitution and fundamental principles of the United States legal system. Therefore, the United States

²⁷⁹ UNCAC, Article 20; AUCPCC Articles 1 and 8.

²⁸⁰ Boles (n 273) 848.

²⁸¹ *ibid* 837.

²⁸² *ibid*.

²⁸³ *ibid* 838.

²⁸⁴ *ibid*.

²⁸⁵ Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 (III)A, 3rd Session, Supp. No. 13, U.N.Doc. A/810 (1948); Bhanoji Rao, *Human Evolution, Economic Progress and Evolutionary Failure* (Taylor and Francis 2017) 92.

understands that it is not obligated to establish a new criminal offence of illicit enrichment under Article IX of the Convention.²⁸⁶

In addition to the above UDHR provision, it could further be argued that the offence of illicit enrichment violates Article 12 of the UDHR which provides that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

It is respectfully submitted that, the acquisition and management of one's wealth is a private matter. Privacy may be understood in four different spheres, one of which includes privacy in the workplace and elsewhere, which falls within the ambit of Article 12 of the UDHR.²⁸⁷ The crime of illicit enrichment questions the legitimacy of the wealth of a public official and further assumes that such wealth was obtained illegally. This arbitrary interference shifts the burden of proof to the public official, leading him or her to make public how he/she acquired the wealth, and evidently violating the right to privacy under Article 12 UDHR. The violation of Article 12 is a result of the use of the words 'arbitrary interference' as seen in the UDHR. Arbitrary interference may be understood as making a judgment or decision in the 'absence of evidence or in the face of contrary evidence'.²⁸⁸

Taking note of the UNCAC, AUCPCC and the IACAC on the crime of illicit enrichment, when the wealth of a public official significantly increases, it is deemed that such an official has engaged in a corrupt practice or a series of corrupt practices to gain such wealth.²⁸⁹ This assumption or conclusion not only violates Article 12 of the UDHR, Article 11 is also violated because the burden of proof shifts from the prosecution to the public official to prove that the increase is legitimate.²⁹⁰

Additionally, it is respectfully submitted that the crime of illicit enrichment also violates Article 17 of the UDHR²⁹¹ for the following reasons: first, as discussed above, the crime considers

²⁸⁶ Thomas Snider, 'Combating Corruption through International Law in Africa: A Comparative Analysis' (2007) 40 Cornell International Law Journal 692, 728.

²⁸⁷ See Lars Adam Rehof, 'Article 12' in Guðmundur S Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers 1999) 252.

²⁸⁸ Jesse H Wright et al, *Learning Cognitive-Behavior Therapy: An Illustrated Guide* (2nd edn, American Psychiatric Pub 2017)11.

²⁸⁹ See Boles (n 273), 847.

²⁹⁰ *ibid* 838.

²⁹¹ UDHR, Article 17

the public official to have illegally acquired the increase in his/her wealth. It may be argued that there might be a possibility that the increase of wealth was not as a result of the perpetration of a corrupt practice, but as a result of an amalgamation of wealth owned by the public official in question and a third party as provided for in Article 17(1) of the UDHR, hence the significant increase of wealth. Second, it is to be expected that when there is suspicion of a significant increase of wealth deemed to be ill-gotten, a state may freeze the assets of a public official and the proceeds pending an official report/evidence proving otherwise. Though the state might justify its (arbitrary) decision to freeze the assets, it deprives the public official in question from freely using his/her property, and thus violating Article 17(2) of the UDHR.

6.6 Government branches in the fight against corruption

Contemporary political systems within states, whether parliamentary, presidential, federal or unitary, democratic or autocratic, seem to possess some common attributes: at least, in principle, the doctrines of separation of powers and checks and balances, where specific organs are constitutionally allocated a mandate. These branches of government have different roles and functions in ensuring that government fulfils its obligations to its people. Although the functions are different, they are inter-connected and so the system of separation of power comes into play.²⁹² No government branch has absolute power in the performance of its function, hence the division of tasks is divided into three branches: the executive, the legislature and the judiciary.²⁹³ In cases where there is a commitment to fight corruption, all these three organs of government have a crucial role to play. Such efforts require a national synergy that pushes forward the fight against corruption as a national agenda aimed at saving the integrity of public service as well as minimising the impact of corruption rather than it being perceived as some sort of political victimisation.

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

²⁹² Kenneth Janda, Jeffrey M. Berry, Jerry Goldman and Deborah Schildkraut, *The Challenges of Democracy* (12th edn, Cengage Learning 2013) 64.

²⁹³ *ibid.*

6.6.1 The legislature

Political systems have their nomenclature, and assign various names to different organs of government. Referred to as Congress in the USA,²⁹⁴ Parliament in South Africa²⁹⁵ and Cameroon,²⁹⁶ and House of Commons in the UK,²⁹⁷ these bodies are generally understood as 'a body of persons having the power to legislate'.²⁹⁸ The main function of the legislature would be to enact laws that are given legal recognition and validity over a specific territory or persons who are subject to their jurisdiction. Where democratic principles are observed, this process involves the development or drafting of a Bill which will be introduced and successively read and, sometimes, referred to relevant Committees. The Bill will thereafter be voted on, adopted where possible, and then assented to by the Head of the State as a law.²⁹⁹

As a law-making body, the legislature can contribute to the fight against corruption by performing the following tasks:

- (i) The enactment of legislation aimed at regulating the campaigning; financing of political parties, corruption and money laundering. Legislative bodies in several African States have performed this task. For example, the South African Public Funding of Represented Political Parties Act 103 of 1997;³⁰⁰ Libyan Law No.2 of 1373 DP/2005 on Combating Money Laundering;³⁰¹ Ghanaian Anti-Money Laundering Act 749 of 2008;³⁰² the Sierra Leonean Anti-Money Laundering and Combating of Financial of Terrorism Act 2 of 2012;³⁰³ the Kenyan Proceeds of Crime and Anti-Money Laundering Act of 2009;³⁰⁴ the Malawian Money Laundering, Proceeds of Serious Crime

²⁹⁴ Constitution of the United States 1787, section 1; Chris Garcia, Gabriel Sanchez, *Hispanics and the U.S. Political System: Moving into the Mainstream* (Routledge 2015) 229.

²⁹⁵ Constitution of the Republic of South Africa Act of 1996, section 42

²⁹⁶ Constitution of the Republic of Cameroon 1996, Article 4.

²⁹⁷ Parliament Acts 1911 and 1949.

²⁹⁸ Amie Kreppel, 'Legislatures' in Daniele Caramani (ed), *Comparative Politics* (2nd edn, Oxford University Press 2014) 114.

²⁹⁹ For example, in South Africa Parliament Houses (the National Assembly (NA) and the National Council of Provinces (NCOP)) play an important role in the making of laws. A minister or deputy, a parliamentary committee or a Member of Parliament introduces a Bill in the NA or the NCOP. The Bill is thereafter referred to a relevant committee and later published in the Government Gazette for public comment, suggestions or ideas. The committee will debate and where necessary amend the Bill and thereafter it is submitted to the NA for further debate and later vote on the Bill. If the Bill is passed it is then sent to the NCOP who, like the NA, debate on the Bill. For the Bill to become an Act, it is transferred to the President for assent, once this is done the Bill is referred to as an Act of Parliament. See Constitution of the Republic of South Africa, sections 73-79, 81.

³⁰⁰ Public Funding of Represented Political Parties Act 103 of 1997.

³⁰¹ Law No.2 of 1373 DP/2005 on Combating Money Laundering.

³⁰² Anti-Money Laundering Act 749 of 2008.

³⁰³ Anti-Money Laundering and Combating of Financial of Terrorism Act 2 of 2012.

³⁰⁴ Proceeds of Crime and Anti-Money Laundering Act of 2009.

and Terrorist Financing Act 11 of 2006;³⁰⁵ and the Rwandan Law No.47/2008 of 09/09/2008 on Prevention and Suppression of Money Laundering and Financing of Terrorism.³⁰⁶

- (ii) The establishment of codes of legislative conducts to serve as guidance to parliamentarians, together with codes of conduct or ethics for other services of government on how they should conduct themselves and what is expected of them when performing their official duties. For example, the South African Executive Members' Ethics Act 82 of 1998;³⁰⁷ the Mauritian Code of Ethics for Public Officers;³⁰⁸ the Ugandan Code of Judicial Conduct;³⁰⁹ the Tanzanian Code of Ethics and Conduct for The Public Service Tanzania;³¹⁰ the Kenyan Code of Conduct for the Practice of Journalism;³¹¹ and the Nigerian Police Code of Conduct.³¹² It is imperative for such codes to set out available sanctions which may be put against anyone who breaches them.

In democratic states, the legislature must perform an oversight function.³¹³ This role allows them to monitor, watch over government administrations, to hold the executive accountable for their actions, expenditure and the implementation of policies.³¹⁴ It may be argued that government officials are hardly ever held accountable for their misconducts, for this reason, it is crucial that the legislature exercises an oversight function. States whose constitutions do not provide for an oversight function, must consider the importance of having such function in place, this will strengthen accountability and transparency in the discharge of public duties. To illustrate the importance of the role of the legislature in the fight against corruption, particularly for the oversight function to be successful, Brazil is considered as an example. The Brazilian President, Michel Temer, is notoriously known for being corrupt by fellow politicians and Brazilians. In fact, few months after he won the 2014 presidential elections, six (6) of his ministers resigned after it was revealed that they were involved in various corruption scandals. In 2017, he was implicated in a corrupt scandal when a conversation between him and agribusiness mogul, Joesley Barista was

³⁰⁵ Money Laundering Proceeds of Serious Crime and Terrorist Financing Act 11 of 2006.

³⁰⁶ Law No.47/2008 of 09/09/2008 on Prevention and Suppression of Money Laundering and Financing of Terrorism.

³⁰⁷ Executive Members' Ethics Act 82 of 1998.

³⁰⁸ Code of Ethics for Public Officers.

³⁰⁹ Code of Judicial Conduct 2003.

³¹⁰ Code of Ethics and Conduct for the Public Service Tanzania, 1999.

³¹¹ Code of Conduct for the Practice of Journalism, Second Schedule of the Media Council Act 2013.

³¹² Police Code of Conduct.

³¹³ Riccardo Pelizzo and Frederick Stapenhurst, *Government Accountability and Legislative Oversight* (Routledge 2013) 16.

³¹⁴ *ibid.*

released.³¹⁵ In the recording, Barista confided with Temer on the various ways to obstruct justice.³¹⁶ This was after a plea-bargain testimony made by executives of JBS SA company was released accusing Temer of receiving millions worth of bribes.³¹⁷ The company revealed that it had made about US\$ 154 million illegal payments to various politicians and bureaucrats for winning contracts, getting easy credit from state banks and resolving tax.³¹⁸ It came as no surprise when Temer's office denied that he obstructed justice or received any bribe payments.³¹⁹ One of the reasons why corruption is rife in Brazil is due to power being consolidated in the hands of a few elites who show no regard for the democratic process and most importantly, the rule of law.³²⁰

Legislative oversight embraces oversight tools that the legislature may adopt.³²¹ Government officials are hardly ever held accountable for their misconducts. To ensure that public officials are held accountable, the answerability obligation must be imposed against them. Answerability may be understood as an obligation to answer questions based on the decision that has been taken.³²² This obligation may be realised through an oversight committees.³²³ The existence of such a committee may be necessary in Brazil following the signing into law of a Bill on labour reform.

In 2017, the Brazilian Senate passed into law the Labour Reform Bill into law.³²⁴ The law seeks to: reduce business costs; allow firms to negotiate employment contracts with their employees freely; give flexibility to collective bargaining; reduce the scope for legal action in labour disputes for companies to be flexible in the allocation of work and vacation time.³²⁵ Change is necessary but then again, in this case, Brazil's danger rests ahead. For instance, it could be argued that subject to the Bill, employers will exploit the allocation of working hours, and may even unreasonably limit the vacation time against their employees. Moreover, at first glance, this law appears to benefit employers than employees. Despite Temer's victory over the Bill, Brazilian

³¹⁵ Paulo Sergio Pinheiro, 'Brazil's Broken Political Leadership' (*The New York Times*, 4 June 2017).

³¹⁶ *ibid.*

³¹⁷ Brad Brooks and Lisandra Paraguassu, 'Brazil plea-bargain testimony says president took \$4.6 million in bribes' (*Reuters*, 18 May 2017).

³¹⁸ *ibid.*

³¹⁹ *ibid.*

³²⁰ Pinheiro (n 315).

³²¹ Pelizzo and Stapenhurst (n 313).

³²² *ibid.*

³²³ *ibid.*

³²⁴ Silvio Cascione, 'Brazil's Senate approves labor overhaul by strong margin' (*Reuters*, 12 July 2017).

³²⁵ *ibid.*

unions oppose changes brought about by the Bill, arguing that it will reduce 'job security while weakening their organising power by eliminating mandatory union dues'.³²⁶

Institutional mechanisms must be put in place with the mandate to combat corruption, especially within top governmental levels.³²⁷ As evidenced in the discussion on national instruments and institutions to combat corruption in Africa, almost every African State has at least, a single anti-corruption institution. These anti-corruption institutions were founded under legislative enactments with the mandate to fight corruption by receiving complaints and initiating investigations, prosecuting perpetrators of corruption and also monitoring the conduct of senior state officials.³²⁸ The establishment of an anti-corruption institution at state level helps complement the legislative instrument as it gives it the life and blood it needs in order to thrive. The laws do not enforce themselves: an enforcement body with a mandate to track, identify, investigate and prosecute, helps in accomplishing the letter of the law. Examples of this abound: Kenyan Ethics and Anti-Corruption Commission;³²⁹ Mauritian ICAC;³³⁰ the Nigerian Independent Corrupt Practices Commission,³³¹ the ACC of Swaziland,³³² Southern Sudan,³³³ Zambia,³³⁴ Namibia,³³⁵ Liberia,³³⁶ Sierra Leone³³⁷ and Zimbabwe;³³⁸ the Tanzanian Prevention and Combating of Corruption Bureau;³³⁹ the Botswana Directorate on Corruption and Economic Crime;³⁴⁰ the Ugandan Anti-Corruption Coalition,³⁴¹ and the Cameroonian National Anti-Corruption Commission.³⁴²

For these institutions to be effective, they must enforce anti-corruption laws against allegedly corrupt perpetrators, investigate, prosecute and when the corrupt practice is proved, hold

³²⁶ *ibid.*

³²⁷ See OECD (n 86) 23.

³²⁸ For example, the Mauritian PCA of 2002; Financial Intelligence and Anti-Money Laundering Act of 2002; Malawian CPA of 1995 and PPA of 2003; Kenya Ethics and Anti-Corruption Act of 2011.

³²⁹ Ethics and Anti-Corruption Commission Act, 2011.

³³⁰ PCA 2002 (as amended by Act 24 of 2005).

³³¹ EFCCA Act 2004.

³³² PCA, 2006.

³³³ ACA, 2009.

³³⁴ ACA 2012.

³³⁵ ACA, 2003.

³³⁶ Liberia-Anti Corruption Commission Act of 2008.

³³⁷ ACA 2008.

³³⁸ ACA 1985.

³³⁹ PCCA 11 of 2007.

³⁴⁰ Corruption and Economic Crime Act 1994.

³⁴¹ < <http://accu.or.ug/> > accessed 30 June 2017.

³⁴² Decree No. 2006/088 on the Setting up, Organisation and Functioning of the National Anti-Corruption Commission.

such perpetrators accountable. The Cameroonian legislature enacted a law creating the SCC. The Court serves as an anti-corruption institution to try persons who misappropriate public funds or similar related offences as per the Cameroonian Penal Code, of at least, 50.000.00 CFA Francs (about US\$ 100.000).³⁴³

In the Cameroonian case of *Ministère Public et Etat du Cameroun (Ministère de la Santé Publique) contre Olanguena Awono Urbain*,³⁴⁴ the party to the case, was Minister of Public Health and President of the National Committee for the Fight against AIDS (CMLS). During his tenure of office, administrative and financial management of AIDS, malaria and tuberculosis programmes were created under the Ministry. In his capacity, he violated public procurement procedures and rules relating to the management of public finances, especially signing a partnership agreement with the Cameroon Association of Social Marketing (ACMS). His act of signing the agreement authorised the release of 260.000.000 CFA Francs (US\$ 469476.80) to benefit the structure and the production of leaflets with the associations (APROSPEN, GSSP, BCH AFRICA, GIC Health, APCAS and AFLUSES). The price of the benefit was 200 million CFA Francs (US\$ 347858.00) and was financed by the HIPC funds, whose management practice are governed by national rules.

In the judgment it was held that, anyone who fails to observe provisions that govern the award, execution and control of public procurement, is in breach of public wealth and has misappropriated public funds by assimilation. Consequently, the Court held that Urbain violated the requirements on the awarding of public contracts which led to the expenditure of the sum of 200 million CFA Francs (US\$ 347858.00), and found the Urbain guilty of embezzlement.

In another Cameroonian, case of *Ministère Public et Ministère des Finances v Obouh Fegue Clément Ekegue Télesphore & Enyegue Nkolo Jacques*,³⁴⁵ Mr Obouh was charged with embezzlement coercion. Mr Enyegue was indicted for complicity in the embezzlement of public funds while Mr Télesphore was charged with coercion misappropriation of public funds. Between July 1998 and May 1999, agreements were signed: one was a settlement agreement in favour of the former National Water Company of Cameroon and the other an agreement to transfer 1.05 billion CFA Francs (US\$ 1826254.50) to the bank account of a French company *Société Électronique camerounaise* (ELCADIS). Several payments between 28 August and 4 October

³⁴³ Agbor (n 44).

³⁴⁴ *Tribunal Criminel Spécial*, Yaoundé, Arrêt no 14/CRIM/TCS du 14 Juin 2013.

³⁴⁵ *Tribunal Criminel Spécial*, Yaoundé, Arrêt No 017/CRIM/TCS du 16 Juillet 2014.

2000 were paid to the company through the Treasury Department. Mr Obough authorised, by way of signing, a fictitious claim amounting to 1.05 billion (US\$ 1826254.50) to several companies by means of false proxies and assignments of false debts. It was uncovered that the companies had no legal existence. The court held that, due to the fact that Mr Obough was the initiator and main beneficiary of the criminal manoeuvres, he was guilty of the alleged offences. Mr Teleshore was found guilty of complicity in embezzling public funds as he was the one who registered the false proxies, resulting in the companies being represented with imaginary claims. Mr Nkolo was acquitted of all charges.

In Sierra Leone, on 31 May 2017, one Leslie Lahai Monson and Kerfala were convicted and sentenced to three years for corruption by misappropriating donor funds, and conspiracy to commit a corruption offence under section 128(1) of the ACA 2008 by the ACC of Sierra Leone. It was proved that in 2015, the parties dishonestly misappropriated, for their own private use and benefit, SLL 12, 193,000 (US\$ 1625.44883). They were able to commit the act by registering 89 (eighty-nine) fake names as residents of Nengbema to be qualified to receive World Food Programme (WFP) Ebola food aid.³⁴⁶

The above examples depict how the legislature has been able to enact laws establishing anti-corruption institutions, which later implemented anti-corruption laws and hold corrupt individuals accountable for their involvement in the perpetration of corrupt practices.

6.6.2 The Executive

The executive is the branch of government whose key function is to oversee the governance of a state.³⁴⁷ The key functions of the executive are to enforce the laws as well as manage the day-to-day affairs of the State.³⁴⁸ Due to the nature of corrupt practices such as misappropriation or embezzlement of public funds or property, senior public officials make up the majority of individuals who engage in such practices. This is because their official positions make it possible for them to access these funds or property.

³⁴⁶ Anti-Corruption Commission, 'ACC Secures Conviction Against Two Staff of World Vision' <http://www.anticorruption.gov.sl/show_news.php?id=761> accessed 8 June 2017.

³⁴⁷ David F Forte and Matthew Spalding (eds), *The Heritage Guide to the Constitution: Fully Revised Second Edition* (2nd edn, Regnery Publishing 2014) 231.

³⁴⁸ Thomas H Little and David B Ogle, *The Legislative Branch of State Government: People, Process, and Politics* (ABC-CLIO 2006) 5.

For example, in the case of *Uganda v Teddy Ssezi Cheeye*,³⁴⁹ the accused, a former Internal Security Organisation Economic Monitoring Director, was charged on 26 (twenty-six) counts, categorised into (4) four groups with group 1 (one) standing for embezzlement. It was alleged that between March-December 2005, he stole US\$ 120,000,000 (US\$ 208714.80). Under this count, the prosecution had to prove that: ‘a person being a Director, Officer or Employee of a Company, steals any chattel, money or valuable security, to which he or she has access by virtue of his or her office’. During the course of the trial, the prosecution proved that indeed, there was a Company known as ‘Uganda Centre for Accountability’, and the accused was its sole Managing Director and signatory. Moreover, the accused was the sole operator of the company’s bank accounts, and that his wife was its Secretary. Lastly, the prosecution proved that US\$ 120,000,000 (US\$ 208714.80) was wired to the company’s account.³⁵⁰ Evidence was adduced proving that the company had been selected to carry out project activities in various districts. Alanganize Sel, who was District Health Inspector and Malaria Focal Officer in Ntungamo District, testified that the company did not carry out any activities in the district. Other district officers at the time, including Ariho Victor of the District of Kalabe, Twesigye Francis of the Ntungamo District and Baryahabwe Siriri, also testified that the company did not carry out any activities in their respective districts. Based on this, the Court held that the prosecution proved that no activity for which the company had been granted US\$ 120,000,000 (US\$ 208714.80) was carried out. Moreover, the Court held that:

It is not only unreasonable, but also ridiculous to suggest that the accused does not know where the money went. It went into his stomach and to use the language of section 268(b) of the Penal Code Act, he embezzled it.³⁵¹

Due to the overwhelming evidence and testimonies, Cheeye was found guilty and convicted on the first count of embezzlement and sentenced to 10 (ten) years.³⁵²

In many instances, government officials, among themselves, enforce the camaraderie of office life. In such cases, it is not uncommon for officials to look out for each other, particularly when one of their own is under investigation. In many instances, this spirit of brotherhood to protect their own may be as a result of other officials having unclean hands themselves, as an

³⁴⁹ Criminal Case No.1254 of 200) [2009] UGHC 12 (8 April 2009).

³⁵⁰ *ibid.*

³⁵¹ *Uganda v Teddy Ssezi Cheeye* (Criminal Case No.1254 of 2008) [2009] UGHC 12 (8 April 2009).

³⁵² *ibid.*

investigation against one of them may result in the others being implicated. In such instances, performing an executive function will be a daunting task, particularly if there is a possibility of a penalty being enforced against the official in question. For example, a municipal manager who, in the past, participated in the corrupt allocation of procurement contracts with a fellow official (his subordinate), may find it difficult to initiate investigative proceedings against his fellow official because he too may be implicated in the investigation. With this in perspective, it is very important for the executive to fully understand their function and to exercise their powers diligently. The unbiased functioning of the executive is important because a single instance where one senior executive member turns a blind eye on his fellow officials on corruption-related matters, will, undoubtedly, cultivate further acts of corruption. To prevent this, the executive must perform its duties without prejudice, fear or favour irrespective of when the function is performed against a civilian or a fellow public official. In the case of South Africa, the Office of the Public Protector serve as an example. Justice Nugent expressed that-

The office of the Public Protector is an important institution. It provides what will be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nations.³⁵³

The Office of the Public Protector is a constitutional mechanism, whose functions are stipulated in section 182 of the Constitution.³⁵⁴ In the course of her seven-year non-renewable office term, the former South African Public Protector, Advocate Thulisile Madonsela successfully investigated cases involving senior public officials, including the police leasing procurement saga involving former National Police Commissioner, Bheki Cele. An investigation was initiated following a complaint lodged by Advocate P Hoffman, Director of the Institute for Accountability in Southern Africa and Mr P J Groenewald. The complaint was based on a lease deal signed by

³⁵³ *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA). See also Tembeka Ngcukaitobi *et al*, *The Constitutional Law Casebook* (Juta and Company Ltd 2012) 435.

³⁵⁴ 182. (1) The Public Protector has the power, as regulated by national legislation—
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action.
(2) The Public Protector has the additional powers and functions prescribed by national legislation.
(3) The Public Protector may not investigate court decisions.
(4) The Public Protector must be accessible to all persons and communities.
(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

Cele to move the South African Police Service (SAPS) without adhering to a competitive bid process, thus violating section 217 of the Constitution. The Office of the Public Protector found that SAPS, together with the Department of Public Works (DPW), entered into a negotiated contract instead of adhering to a competitive bidding process, and for this reason, 'the constitutional requirements of fairness, equality and transparency were not complied with'.³⁵⁵ Moreover, it was found that the conclusion of the lease and the lease agreement were invalid.³⁵⁶

A complaint was lodged in the office of the Public Protector concerning the upgrades at President Zuma's homestead in Nkandla. The complainant requested an investigation to be lodged on alleged impropriety in the utilisation of state funds used to upgrade Zuma's private homestead as alleged and published by the Mail and Guardian newspaper in 2011.³⁵⁷ The major findings in the Nkandla scandal were that the measures taken to upgrade President Jacob Zuma's Nkandla homestead were in fact not security related. It was further found that the security installed were unconscionable, excessive and, as a result, caused the misappropriation of public funds, thus contravening section 195(1)(b) of the Constitution. Moreover, it was found that in addition to the fact that Zuma's family benefited improperly, he (Zuma) should pay a certain percentage of the cost incurred for non-security items.³⁵⁸

The major findings by the Public Protector, in the State of Capture Report were as follows: the South African President, Jacob Zuma, violated the Executive Ethics Code when he allowed members of the Gupta family and Duduzane Zuma (his son) to be involved in the removal and appointment process of the Minister of Finance in December 2015. Moreover, it was found that Zuma had violated the Code when he used entrusted information to enrich himself and the Gupta family, together with ensuring that his son be given preferential treatment when the state awards contracts, in business financing and preferential treatment in trading licences.³⁵⁹ It was also found that the Gupta's offered Deputy Minister Mcebisi Jonas a job in exchange for favours.³⁶⁰

³⁵⁵ Public Protector South Africa, 'Against the Rules' Report No.33 of 2010/11, para 19.3.4.2.

³⁵⁶ *ibid.*

³⁵⁷ Office of the Public Protector, 'Secure in Comfort' Report No. 25 of 2013/14, Para 2.1.

³⁵⁸ Report on an Investigation into Allegations of Impropriety and Unethical Conduct relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of Private Residence of President Jacob Zuma at Nkandla in the Kwa-Zulu Natal Province: Report No.25 of 2013/2014.

³⁵⁹ *ibid.*

³⁶⁰ State Capture report: Report on an Investigation into Alleged Improper and Unethical Conduct by the President and other State Functionaries Relating to Alleged Improper Relationships and involvement of the Gupta family in the Removal and Appointment of Minister and Directors of State Owned Enterprise resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta family's business. Report No: 6 of 2016/17.

One key lesson that could be learned by Africa States from the South African Office of the Public Protector is the fact that competent authorities or anti-corruption agencies should be independent and must exercise their functions without fear, favour or prejudice. If an anti-corruption agency could initiate and conduct investigations, against a head of state without fear, favour and prejudice, such action would deter other senior officials and remind them that they are not above reproach.

6.6.3 The Judiciary

This branch of government is made up of judges who have authority to interpret and apply the law.³⁶¹ Different constitutions of various African states provide for the functions, powers or guiding principles on the functioning of their judiciary: For instance:

- (i) Section 164 of the Zimbabwean Constitution provides that the judiciary must be independent and impartial and that ‘neither the State nor any institution or agency of government at any level, and no other person, may interfere with the functioning of the courts’;³⁶²
- (ii) Article 175 of the Angolan Constitution provides that in the exercise of their jurisdictional functions, the courts shall be independent and impartial;³⁶³
- (iii) Article 140 of the Rwandan Constitution provides that judicial power is to be exercised by the Supreme Court and any other court established by the Constitution or any other law. On the independence of the judiciary, the Constitution provides that ‘the judiciary is independent and separate from the legislative and executive branches of government. It enjoys financial and administrative autonomy’;³⁶⁴
- (iv) Article 159 of the Kenyan Constitution provides that ‘justice shall be done to all, irrespective of status’. Moreover, Article 160(1) of the Kenyan Constitution, together with Article 120 of the Constitution of Sierra Leone, provide that the judiciary shall be subject to the Constitution and the law, and ‘not subject to the control or direction of any person or authority’;³⁶⁵
- (v) Article 79 (2) and (3) of the Constitution of the Federal Democratic Republic of Ethiopia provides that ‘courts of any level shall be free from

³⁶¹ See Roger LeRoy Miller and Gaylord A. Jentz, *Cengage Advantage Books: Fundamentals of Business Law: Excerpted Cases* (2nd edn, Cengage Learning 2009) 33.

³⁶² Section 164 of the Constitution of Zimbabwe, 2013.

³⁶³ Article 175 of the Constitution of Angola, 2010.

³⁶⁴ Article 140 of the Constitution of the Republic of Rwanda, 2003.

³⁶⁵ Article 159 of the Constitution of Kenya, 2010.

any interference or influence of any governmental body, government official or from any other source. Judges shall exercise their functions in full independence and shall be directed solely by the law’;³⁶⁶

(vi) Article 102 of the Tunisian Constitution provides that ‘the judiciary is independent. It ensures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms. Judges are independent with the law being the sole authority over them in discharging their functions.’ Furthermore, Article 103 provides that ‘Judges must be competent, and should be characterised by neutrality and integrity. They shall be held accountable for any shortcomings in their performance’;³⁶⁷ and

(vii) Article 151 of the Constitution of the Democratic Republic of the Congo provides that ‘the executive power may neither give instructions to the judges in the exercise of their jurisdiction, nor rule on controversies, nor obstruct the course of justice, nor oppose the execution of a judicial decision. The legislative power may not rule on controversies of jurisdiction, nor modify a judicial decision, nor oppose its execution’.³⁶⁸

Though the phraseology of these constitutional provisions is different, the context in which they were written is the same, that: the judiciary should be independent in the interpretation and application of the law. The role of the judiciary is centred on one key guiding principle: independence.³⁶⁹ When adjudicating, it is imperative for the judiciary to do so in a manner that is fair and just and not be subject to external or internal influences.³⁷⁰ When exercising their functions, judges should mind their judicial oaths. This is important because the judiciary is a stronghold of any state, and its disablement will undoubtedly lead to the collapse of a state.³⁷¹ When judicial officers perform their functions independently, fairly, impartially and justly, it will contribute positively in the fight against corruption.

³⁶⁶ Article 79 (2) and (3) Constitution of the Federal Democratic Republic of Ethiopia, 1995.

³⁶⁷ Article 102 of the Constitution of Tunisia, 2014.

³⁶⁸ Article 151 of the Constitution of the Democratic Republic of Congo, 2005.

³⁶⁹ Benjamin William Mkapa, ‘The Legal System Should Be More Accessible and Affordable To More Tanzanians’ in Chris Maina Peter and Helen K. Bisimba (eds), *Law and Justice in Tanzania: Quarter a Century of the Court of Appeal* (African Books Collective 2007) 35.

³⁷⁰ Emperor Thembu II Votani Majola, *Effective Finance Systems for The Industrialization Program of the African Union* (Anchor Academic Publishing 2015) 9.

³⁷¹ Yekeen Olalekan, ‘The role of judiciary in fighting corruption’ (*Economic Confidential*, 7 October 2015).

Apart from interpreting the law, the judiciary ought to function as checks and balances to the legislature and executive.³⁷² Unfortunately, despite constitutional or other legislative provisions, judiciaries often lack independence and constitutional power to hold other branches accountable for any wrongdoing,³⁷³ thus making it difficult for it to call the legislature and executive to order.

Corruption in the judiciary could be triggered by various factors, one being lacking funding in the courts thus, influencing peddling among judges.³⁷⁴ When the judiciary is under-funded, it affects its ability to enforce the law properly.³⁷⁵ Moreover, if underpaid, it could find ways to supplement salaries by requesting or accepting bribes.³⁷⁶ For example, during the 2016 Christmas festive season, judges in Nigeria were owed salaries. In addition, other judges have not had an increase in their salaries for over 10-15 years, despite inflation of prices of goods and services.³⁷⁷ In Zimbabwe, a magistrate protested over the measly salaries.³⁷⁸ Batanai Tuwe resigned and joined private practice. He took his protest to social media where he ranted at the fact that ZWD 650 monthly salaries paid to magistrates were unsustainable hence, the reason why many judicial officers engage in corrupt practices.³⁷⁹ To emphasise the gravity of this issue, Tuwe maintained as follows: ‘Why should any magistrate send a person who earns ZWD 1 200 to jail when they can offer the magistrate ZWD 600 and still have more than the magistrate? A magistrate in Zimbabwe earns ZWD 650 dollars’.³⁸⁰

The judiciary on the African continent has a history of being under threat from the executive or the military.³⁸¹ Lack of independence in the judiciary often result in corruption. This could lead to mistrust of its decision by most citizens.³⁸² Dr Harry Will, a Minister of Agriculture

³⁷² Douglas Kimemia, *Africa's Social Cleavages and Democratization: Colonial, Postcolonial, and Multiparty Era* (Lexington Books 2015) 333.

³⁷³ *ibid.*

³⁷⁴ Brendalyn P Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (Greenwood Publishing Group 1995) 42.

³⁷⁵ Joseph Patrick Ganahl, *Corruption, Good Governance, and the African State: A Critical Analysis of the Political-Economic Foundations of Corruption in Sub-Saharan Africa* (Universitätsverlag Potsdam 2014) 101.

³⁷⁶ *ibid.*

³⁷⁷ Onikepo Braithwaite, ‘Of Unpaid Workers and Corruption’ (*pressreader*, 9 May 2017).

³⁷⁸ Blessed Mhlanga, ‘Magistrate quits, rants at govt over poor salaries’ (*NewsDay*, 20 December 2016).

³⁷⁹ *ibid.*

³⁸⁰ *ibid.*

³⁸¹ Gino J Naldi, ‘In Africa: The Increased Role of the OAU’ in Malcolm D Evans and Rachel Murray (eds), *The Africa Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2nd edn, Cambridge University Press 2002) 21.

³⁸² Ambrose (n 374) 42.

in Sierra Leone, was convicted for embezzlement. In spite of the fact that a senior government official was convicted, sad to say that the judge who presided on the matter, was also convicted for accepting a bribe in exchange for a gentle sentence against Dr Will.³⁸³

One of the reasons why the judiciary is not completely independent in Africa is the fact that judges and magistrates are 'dependent on currying the favour of the president'.³⁸⁴ For instance, in autocratic states such as Equatorial Guinea, Cameroon and Zimbabwe, the leaders have made it a norm to push development for constitutional changes in an effort to extend their rule.³⁸⁵ This makes it difficult for the judiciary to have power to enforce the rule of law and, as a result, it will merely follow through on the law that the president decrees.³⁸⁶

Each of these branches cannot independently combat corruption. It is thus imperative that they work side by side as their function, duties or powers are interconnected with each other. That is, the legislature must make the law, and the executive must execute these laws without fear or favour. Lastly, where there is a dispute, the judiciary must impartially and without prejudice, interpret the law.

6.7 Summary

This chapter has exposed major features of political will and how it could be used to combat corruption. The main finding of this chapter is that political will is the key in the fight against corruption. This conclusion was reached after considering the following question: why is corruption still endemic in African States despite existing anti-corruption instruments and institutions? It is argued that anti-corruption efforts by states are insufficient in the fight against corruption, instead, for them to be effective, they should be accompanied by the necessary political will. If the political elites do not possess the willingness to curb corruption, public officials and actors in the society will not be committed in the fight against corruption. For this reason, it is imperative for the political elites to possess the necessary will to combat corruption, which ideally, ought to spread to public officials at the lower rung and other stakeholders affected by corruption.

This chapter has also identified major challenges as to why curbing corruption in Africa has proved to be difficult. The first challenge is that African states seem to be reluctant in

³⁸³ Igwe (n 41) 52.

³⁸⁴ Ambrose (374) 42.

³⁸⁵ Kimemia (n 372) 333.

³⁸⁶ Ganahl (n 375) 101.

domesticating international instruments on corruption, and if these instruments are domesticated, states do not implement them. International instruments serve as a foundation for nation states to address global issues, hence their domestication is important.

The second challenge is that public officials misuse their power. Political leaders are entrusted with power intended to be used to serve the needs of the people. Unfortunately, this power is often used to acquire private gains, persuade other public officials to participate in corrupt practices and also coerce others to seal their lips when a corrupt practice has been perpetrated. This amount of power and, its misuse thereof, intimidates people, impairs the enforcement of anti-corruption laws, identification of and the imposition of liability against corrupt officials.³⁸⁷

The third challenge is that corrupt officials administer government affairs. In different Africa states, corrupt or suspected corrupt officials control the state and its resources hence, are not motivated to address corruption.³⁸⁸ It is for this reason that several African States often fail to implement and enforce anti-corruption mechanisms simply because their governments are often administered by corrupt officials.

The fourth challenge is that power is centralised in the hands of a single individual and his *protégés*. Corruption poses a challenge in the establishment and consolidation of democratic systems in Africa. In some African States, power is centralised or personalised at the top, often resulting in lack of transparency and accountability. Corruption gradually destroys the legitimacy of a regime and terrorises democratic or any other government systems through the diversion of resources intended for productive activities into rent-seeking or fostering negative incentives for investments.³⁸⁹

The fifth challenge is absence of political will within the branches of government. The unwillingness of the legislature, executive and judiciary to combat corruption is one of the major reasons why corruption thrives swiftly. When government branches do not possess the necessary political will, corruption-related issues can never be addressed. That is to say, if legislatures do not take the initiative to enact anti-corruption laws, policies and strategies, tackling corruption and its related issues becomes impossible. On the other hand, should the legislature enact laws and develop anti-corruption strategies, but the executive does not have the necessary political will, the

³⁸⁷ Donatella Della Porta and Alessandro Pizzorno, 'The Business Politicians: Reflections from a Study of Political Corruption' (1996) 23 *Journal of Law and Society* 73, 82.

³⁸⁸ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Bloomsbury Publishing 2014) 22.

³⁸⁹ Kpundeh (n 190) 121-122.

laws cannot be effectively implemented. Furthermore, if legislative provisions on corruption exist but the judiciary lacks the independence and will to fight corruption, these provisions cannot be interpreted in a fair, just and impartial manner, as judicial officers will be subject to influence by external or internal forces.

The sixth challenge focuses on the element of secrecy which witnesses to corruption are often subjected to by the political elite. More often than not, those who are involved in the perpetration of corrupt practices find themselves in a conspiracy of silence.³⁹⁰ Conspiracy of silence or secrecy may exist between perpetrators of corruption among themselves and between corrupt perpetrators and bystanders or witnesses of corruption; either way, it makes it difficult for states to effectively fight corruption.³⁹¹ The culture of silence brings to pass the culture of failure to report which, as argued in this study, tacitly incites corruption and ultimately make it difficult for anti-corruption agencies to identify corrupt individuals. Witnesses to corruption cannot be limited to members of the public, they could be found in the workplace as well. The conspiracy of silence is often observed when the life, career or family of a public official or a witness to corruption is being threatened by a corrupt official. Moreover, an individual who has been told that the disclosure of the corrupt practice would be against his best interest or if he is subjected to intimidation or if fear is or was instilled in him, the witness may opt to remain silent. In order to address such issues, whistle-blowers need to be protected. The protection of such persons must be provided for by law and/or policies.

The fight against corruption is not dependent on the number of anti-corruption legislation or institutions a state may have; rather, the fight is dependent on whether or not a state has the necessary will to combat corruption. That is to say, a state must be willing to accept that corruption is a serious issue that needs to be dealt with; the state must be willing to identify high-corruption risk areas; it must have the willingness to develop strategies and enact laws to reduce corruption in the identified areas; and it must be willing to create institutions that will bring public officials and other individuals to book if they engage in any corrupt practice. For this to be achieved, key players of government, who uphold the functioning of a state, must perform their functions efficiently and effectively.

³⁹⁰ Conspiracy of silence is a phenomenon understood to mean 'a secret agreement to keep silence about an occurrence, situation, or subject, especially to promote or protect selfish interests'.

³⁹¹ Olaniyan (n 388) 22.

In as much as the roles of public officials are important in curbing corruption, so is the role of members of the society. For society to contribute in the fight against corruption, it must refuse corruption from being part of their daily lives. For instance, instead of paying bribes to speed up public service delivery or paying bribes to escape traffic fines, they should adhere to the rules and procedures. Simply put, members of the society must not influence, in any way whatsoever, public officials by offering them bribes, gifts or any gratification for service delivery or influence public officials in the performance of their office duties.

In summation, there are several ways in which political will could be realised as follows:: first, in a democratic dispensation the principles of transparency and accountability should be complied with; second, socio-economic and political rights need to be protected; and third members of the public need to be at liberty to make decisions 'beyond the electoral arena'.³⁹² In addition, low levels of corruption could be experienced when members of the society support their political leadership.³⁹³ Therefore, it is respectfully submitted that political will does not only complement existing anti-corruption state laws and institutions, but bridges the gap between a state's level of corruption and its ability to manage and curb the phenomenon. The next chapter presents the role of foreign governments in the fight against corruption in Africa.

³⁹² Abdulai (n 2) 391.

³⁹³ Jon S T Quah, 'Controlling Corruption' in Colin H Kirkpatrick *et al* (eds), *Handbook on Development Policy and Management* (Edward Elgar Publishing 2002) 36.

CHAPTER SEVEN

THE ROLE OF FOREIGN GOVERNMENTS IN THE FIGHT AGAINST CORRUPTION IN AFRICA

7.1 Introduction

Corruption takes different forms on the African continent; it could be grand or petty corruption.¹ Corruption also cuts across a broad spectrum of African societies, as both senior state officials as well as low-level employees engage in different acts of corruption.² Most of Africa is developing, with her resources aimed at improving the social, economic and political development therein. As such, this puts at the disposal of senior government officials, plenty of resources, especially financial, which end up being looted.³ Amounts of looted funds from Africa hit a worrying and alarming amount of billions of dollars annually.⁴ Huge sums of monies as well as other assets stolen by senior state officials often get channelled to states, some of which are on the African continent, and others without its borders. Surreptitious financial transactions involving the theft of state resources are conducted between the home state of the perpetrator and the destination state which, often, is out of the home state of the perpetrator. The consignment of such huge sums of monies as well as other valuable assets, make it difficult to detect or recover,⁵ especially those in the West. In many instances, senior state officials who engage in acts of grand corruption or theft of stolen state property, often conceal them in a foreign government, especially in private commercial banks. When allegations and complaints are made and investigations lodged, it becomes difficult for the African state in question to trace such funds or obtain the necessary evidence and cooperation in order to prosecute the perpetrator and recover the siphoned funds.

Reliable sources estimate that approximately US\$ 50 billion is lost annually in Africa.⁶ Precisely, between 1970 and 2008, the amounts of funds that were transferred illicitly from African States to foreign governments reached US\$ 850 billion.⁷ It is beyond doubt that this amount is on

¹ Gabrielle Poeschl and Raquel Ribeiro, 'Everyday opinions on grand and petty corruption' in Aurora A C Teixeira *et al* (eds), *Corruption, Economic Growth and Globalization* (Routledge 2015) 59.

² Cage Banseka, *Development for Peace* (Universal-Publishers 2005) 105.

³ John P Mutonyi, 'Fighting Corruption: Kenya on the Right Track?' in Rick Sarre, Dilip K Das, Hans-Jörg Albrecht, *Policing Corruption: International Perspectives* (Lexington Books 2005) 75.

⁴ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Bloomsbury Publishing 2014) 20.

⁵ *ibid*.

⁶ Nkwazi Nkuzi Mhango, *Africa: Reunite or Perish* (Langaa RPCIG 2015) 169.

⁷ Mhango (n 5) 169.

the rise.⁸ In fact, in the past ten years, it is indisputable that these figures have surged. Such surreptitious practices, when perpetrated by senior state officials within frail legal systems, weak institutional mechanisms, and exacerbated by the absence of the rule of law, do render the corruption conundrum more complicated. Moreover, some senior state officials would find different ways of covering up their illicitly acquired wealth (or precisely, embezzled funds) by presenting their ill-gotten gains as coming from a legitimate source. They do this by inserting those gains in the economic circulation through the transfer of funds across national borders:⁹ for example, the case of the Former Head of Angola's Central Bank, Aguinaldo Jaime's attempted transfer of US\$ 50 million in oil money from a London-based bank to a private bank account in San Diego, California, USA.¹⁰ However, the transaction was intercepted after United States' law enforcement officials questioned the source(s) of the money.¹¹ This case is a good example of a failed operation aimed at draining the resources of Angola for the private benefit of an individual who chose a Western state as its destination. Had the transaction not been intercepted, questioned and frustrated, this struggling developing African State would be deprived of the sum of US\$ 50 million, monies which, if injected into the economy, would trigger some level of meaningful social and economic development like the construction of roads or schools, and the provision of equipment in hospitals and clinics in rural areas, among others. In addition, the abortive transaction involving the son of the long-serving Equatorial Guinean President, Teodoro Obiang Nguema Mbasogo, in the USA, in which the authorities questioned the source of the funds, also indicates that foreign governments as the primary destinations of these booties, have a critical role to play in the fight against corruption in Africa.¹² Like other cases discussed later in this chapter, such cases expound and validate the argument that Africa's fight against corruption requires the involvement of foreign governments if success is to be achieved. In other words, foreign governments that host stolen assets from Africa, have an invaluable role to play in the fight against corruption in Africa. As discussed below, this can be done in numerous ways. The roles here are not limited to interrogating and intercepting funds and assets obtained through corrupt practices: they include the provision of information to relevant African States wherefrom the perpetrator and

⁸ Fofack Hippolyte, 'Stolen Asset Recovery: The Need for a Global Effort' [2012] 87 Association of Concerned Africa Scholars, 29.

⁹ Riccardo Pelizzo and Frederick Staphenurst, *Corruption and Legislatures* (Routledge 2014)107.

¹⁰ <http://uk.reuters.com/article/moneylaundering-senate-idUKN0410397520100205> accessed 21 July 2017.

¹¹ *ibid.*

¹² See Jim Abrams, 'Senate report: 'Dirty money' still entering US' (*The Seattle Times*, 3 February 2010).

funds emanate; gathering and sharing of intelligence by law enforcement officials; enacting laws and developing policies that regulate the actions of financial institutions; cooperating in the repatriation of assets and funds that have a questionable legitimate origin; and facilitating the development of institutional mechanisms in order to beef up efforts in combating corruption. Even if foreign governments were to assist African States in the fight against corruption, it should be emphasised here that such efforts would have to be complemented by the requisite political will from both States (both the victim state where from the resources are stolen to the host state where the resources are kept). The efforts made by the Obasanjo administration (1999-2007) in seeking and obtaining the repatriation of funds stolen by Sani Abacha, his deceased predecessor, from Switzerland where billions of stolen US dollars were kept, buttresses this argument.¹³ The nature and scale of corruption undermine the necessity of international collaboration in this regard. In fact, a few multilateral international instruments at global, continental and regional levels do signal the need for foreign legal assistance in the fight against corruption.¹⁴

This chapter examines the different ways that foreign governments could assist the African continent in its fight against corruption. It examines the substance of these roles as spelt out in numerous international instruments, especially those that call for the establishment of Mutual Legal Assistance (MLA). Using cases that became big scandals across the globe on secret financial transactions, this chapter commences with a justification for the involvement of foreign governments in Africa's fight against corruption.

7.2 Foreign government involvement in the fight against corruption in Africa

Grand corruption, which occurs in most parts of Africa, results in colossal sums of monies being channelled illegally into the financial institutions of Western States. At times, some of these monies are used for the purchase of expensive and luxurious assets such as residential properties in uptown market areas. The perpetration of grand corruption is facilitated by lack of political will by state organs to combat corruption; weak laws; absence of the rule of law; poor institutional mechanisms; and unskilled law enforcement machinery to detect, investigate and prosecute the

¹³ See Rajarshi Banerjee, 'US Moves to Freeze and Seize Nigerian Dictator Abacha's Assets-But Who Will Get the Money' (*The Global Anticorruption Blog*, 10 March 2014).

¹⁴ See Kevin M Stephenson *et al* (eds), *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Actions* (World Bank Publications 2011) 13.

perpetrators.¹⁵ These challenges slow down the investigative processes, making it difficult to trace and recover the proceeds.¹⁶ States, wherein such acts occur, are deprived of their resources for investment and development, often resulting in African States remaining entangled in underdevelopment, deprivation and poverty.¹⁷ On the other hand, the receiving States (where the funds are sent to) utilise such funds for investment and development.¹⁸

Western-based financial institutions that knowingly facilitate the embezzlement of state funds, are complicit in their perpetration. Obviously, they become critical key players and contributors to Africa's underdevelopment, misery and poverty. Such persons (both natural and juristic) are as impeachable as the principal offenders as they offer safe havens for these stolen funds to be channelled to them without a trace.

International instruments on corruption indicate different approaches that could be used by States Parties thereto, in order to recover stolen assets.¹⁹ Such approaches, among other things, contemplate and reflect the fact that grand corruption, even when committed only within the borders of a particular state, seldom ends therein. The proceeds of corruption, especially grand corruption perpetrated by senior state officials, transcend both national and continental borders, which makes it very difficult for them to be traced and recovered.²⁰ As such, Africa's efforts to combat corruption, no matter how good-willed they may be, will encounter significant hurdles unless they are backed by the active involvement of foreign governments, especially financial institutions and law enforcement agencies. Obviously, the question that needs to be answered is as follows: why must/should foreign governments join Africa in its fight against corruption? To answer this question, it is necessary to, once again, restate the impact of corruption on social,

¹⁵ Theodore S Greenberg *et al*, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Bases Asset Forfeiture* (World Bank Publications 2009) 7.

¹⁶ *ibid* 7.

¹⁷ See OECD, *Better Policies for Development 2014 Policy Coherence and Illicit Financial Flows: Policy Coherence and Illicit Financial Flows* (OECD Publishing, 2014) 23.

¹⁸ *ibid* 23.

¹⁹ United Nations Convention against Corruption, United Nations General Assembly Resolution 58/4, U.N. GAOR, 58th Session, 51 meeting, U.N. Doc. A/RES/58/4 (2003); Organisation for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1; Transnational Organized Crime, United Nations General Assembly Resolution 53/111, U.N. GAOR, 53rd Session, 85th meeting, U.N. Doc. A/RES/53/111 (1999); Inter-American Convention against Corruption 29 March 1996, S. Treaty Doc. No. 105-39, 35 I.L.M. 724; African Union Convention on Preventing and Combating Corruption, 43 I.L.M.5 (2004).

²⁰ See Charles Monteith and Andrew Dornbierer, 'Tracking and Tracing Stolen Assets in Foreign Jurisdictions' (2013) Working Paper No. 15 International Centre for Asset Recovery, 12.

economic and political development in Africa, especially its toll on the fundamentals of good governance such as the rule of law and accountability.

7.2.1 The adverse impact of corruption on the economy

African States, wherefrom these funds and assets are stolen do encounter challenges when investigating, prosecuting, tracing and recovering assets or funds together with their proceeds therefore.²¹ The challenges are due to lack of legal, investigative, and financial resources together with limited judicial capacity.²² Act(s) of embezzling, misappropriating or stealing of funds and their illegal transfer thereof, coupled with the inability of a state to recover the funds or assets, undoubtedly, has a negative impact on the state where the funds originated or where they were stolen from. The transfer of ill-gotten funds obtained through acts of theft or misappropriation, together with laundering of money may be associated together since the object of these practices is to conceal and/or disguise the origin of the funds by transferring them to foreign territory with complicated or secretive tax systems.²³

In an effort to disguise their illicit gains or proceeds, launderers divert their funds from one economic venture to another with no motive to make profit.²⁴ One of the many ways to do this is to invest their ill-gotten funds in economic and commercial ventures.²⁵ The investments pursued by launderers are not necessarily high profit-generating investments but rather, investments that will allow their proceeds to be recycled despite the low rate return.²⁶ This kind of activity by launderers has a negative effect on the exchange and interest rate of a state because the large inflow and outflow of capital artificially accentuates the laundering process.²⁷

²¹ Greenberg *et al* (n 15) 7.

²² *ibid* 7.

²³ See Jonathan E Turner, *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud* (John Wiley and Sons 2011) 8; Lucky Yona, *International Finance for Developing Countries* (AuthorHouse 2011) 164.

²⁴ Ayodeji Aluko and Mahmood Bagheri, 'The impact of money laundering on economic and financial stability and on political development in developing countries: The case of Nigeria' (2012) 15 *Journal of Money Laundering Control* 443, 445.

²⁵ Aluko and Bagheri (n 23) 445.

²⁶ *ibid*.

²⁷ *ibid*.

7.2.2 The perpetration of corruption and its ramifications on different segments of the society

African societies serve as eloquent testimonies of the effect of corruption on a people. For numerous African societies entrenched in underdevelopment, which is made worse by limited resources, the transfer of funds from such an economy to another state devastates such economies. Such funds, ordinarily, were intended for development projects such as the construction of roads, schools and provision of equipment to medical institutions, among others.²⁸ These would, undoubtedly, improve the quality of life of the people. Moreover, depriving these economies of such funds would slow down investment and put unemployment on the surge. On the other hand, the economies of the receiving state will benefit as such funds would be used to improve the development of the state and jobs will be created in the various sectors where they are invested.²⁹ In cases where the funds are re-directed back to the state of origin, they are often invested in luxurious and prodigal lifestyles with no benefit to the broader public and national economy that was bereft of the funds.³⁰

Secret financial transactions adversely affects social welfare and widen the gap between the rich and the poor: the rich get richer and the poor get poorer. Furthermore, such transactions cause distributional consequences for the poor by deepening income inequalities and, at the same time, benefiting the political elites and a fraction of those who are part of the urban population connected to those in the political arena or political establishment.³¹

The effects of such unscrupulous transactions devastate society in various ways. When government officials, particularly senior public officials, embezzle, misappropriate or steal public funds or assets, the obligations of a state towards its people are compromised; and the poverty-stricken or underprivileged members of society often endure the consequences of such criminal conducts. The impact is even more amplified when the funds are transferred to the Western hemisphere, which cripples the economy and affects the nation at large.

To understand the chain between illicit transfer of public funds to foreign territories and its effect on society, the case of Nigeria is considered. With the largest population in Africa,³² Nigeria

²⁸ OECD (n 17) 23.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ OECD, *Illicit Financial Flows from Developing Countries Measuring OECD Responses: Measuring OECD Responses* (OECD Publishing, 2014) 20; Hippolyte (n 7) 30.

³² <http://worldpopulationreview.com/continents/africa-population/> accessed 22 July 2017.

is the second largest export economy in Africa.³³ In 2015, Nigeria exported over US\$ 45 billion with its top export being crude oil.³⁴ Despite this, Nigeria has an estimated 80 million people (or 64 percent of its population) living below the international poverty line.³⁵ Clearly, the unemployment and poverty rates in Nigeria are disturbingly very high for a State that is considered one of the largest export economies on the African continent. The question that is asked is as follows: what accounts for this situation? Wealthy in export but poorest in distribution of income? Obviously, the numerous scandalous financial transactions involving senior state officials in Nigeria are an indication of the effects of these on the society and the economy. These scandals include the following: misappropriation; theft and embezzlement of public funds; and the subsequent illicit transfer thereof. There are several senior public officials in Nigeria who have been investigated and found guilty in the past for stealing public funds and later concealing the ill-gotten funds by transferring them to Western States. To gauge the impact of such stolen funds on Nigeria's development, these figures are considered: following the 2010 arrest of James Ibori, former Governor of Delta State in Nigeria from 29 May 1999 to 29 May 2007, by the United Kingdom police on stealing charges, the accused, together with his acquaintances were convicted. The United Kingdom court gave confiscation orders against Ibori and his sister Cristine Ibori-Ibie and his associate, Udoamaka Onuigbo amounting to the following sums: GBP 5.1 million (US\$ 6,460,500.00); GBP 829,786.44 (US\$ 1,072,167.06) and GBP 2.7 million (US\$ 3,488,670.00).³⁶ The Sani Abacha case is another example worthy of illustration. After thorough investigations were conducted, a Special Investigation Panel (SIP) revealed that thirty-six transfers worth US\$ 386 million were made by the family.³⁷ Moreover, with the help of the Swiss Government, assets worth about US\$ 83 million were blocked from bank accounts in Geneva and Zurich. At least US\$ 2.3 billion have been recovered.³⁸ Considering the amounts of funds that have been stolen and

³³ Daniel Workman, 'Top African Export Countries' < <http://www.worldstopexports.com/top-african-export-countries/> > accessed 22 July 2017.

³⁴ <http://atlas.media.mit.edu/en/profile/country/nga/> accessed 5 May 2017.

³⁵ Seun Opejobi, 'Nigeria one of the poorest countries in the world, over 80m living below poverty line-UN report' (*DailyPost*, 5 September 2016).

³⁶ Melvin D Ayogu and Julius Agbor, 'Illicit Financial Flows and Stolen Assets Value Recovery' in Ibi S Ajayi, Léonce Ndikumana (eds), *Capital Flight from Africa: Causes, Effects, and Policy Issues* (Oxford University Press 2015) 351.

³⁷ See Erinco Monfrini, 'The Abacha case' in Mark Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 44.

³⁸ Isabella Massa, 'Capital Flight and the Financial System' in Ibi S Ajayi and Léonce Ndikumana, *Capital Flight from Africa: Causes, Effects, and Policy Issues* (Oxford University Press 2015) 228.

recovered from the above-mentioned individuals only, the total of the stolen funds could amount to over US\$ 10 billion, which, in essence, could have contributed to some development in Nigeria.

7.2.3 The undermining of financial institutions and policies

In 2013, the Global Financial Integrity, a non-profit Washington DC-based research and advisory organisation, estimated a significant amount to be drained out of developing states to be roughly US\$ 1 trillion in illicit financial outflows due to corruption and tax evasion.³⁹ In addition, it revealed that the money siphoned out of these states often ends up in developed states like the United States, United Kingdom, and specific 'tax havens' such as Switzerland; the British Virgin Islands, and Singapore.⁴⁰

The illicit transfer of a state's resources affects its financial systems and policies as its weak institutional, legislative, and administrative capacity are exploited by corrupt perpetrators for their own personal advantage. Ultimately, this leads to weakening governments' role towards its people, erosion of the willingness of citizens to work and pay income taxes, evasion of taxes, gradual fading of investors' confidence in the system and government's accountability to its people.⁴¹

Successful transfer of stolen assets from one state to other states is evidence of the inability or unwillingness of the legal system, including law enforcement, to detect, stop and prosecute perpetrators.⁴² The imposition and payment of all kinds of taxes in an economy are regulated by laws and policies. To evade the payment of taxes and siphon taxes that are paid to state coffers deal a devastating blow on the state's revenue.

Given the above, there are very compelling reasons why the fight against corruption is not only imperative and urgent, but also requires the involvement of foreign governments, which are seen as safe havens for the stolen assets. When financial institutions provide offshore havens where these assets are hidden, it makes it difficult for a state to detect and recover them. Senior state officials in Africa who engage in corrupt practices do so on a very high scale, involving huge sums of monies. Since their local economies are deprived of these resources, development is stagnated and hijacked, maintaining the status quo with the adverse effects suffered by the vast majority of

³⁹ <http://www.gfintegrity.org/issue/illicit-financial-flows/> accessed 4 May 2017.

⁴⁰ *ibid.*

⁴¹ Petr Janský, 'Illicit Financial Flows and the 2013 Commitment to Development Index' CGD Policy Paper (2013) Washington DC Centre for Global Development 1, 7.

⁴² Philippe Le Billon, 'Extractive Sector and Illicit Financial Flows: What Role for Revenue Governance Initiatives?' (Africa Centre For Strategic Studies, 30 November 2011) 9.

the people. If Africa's development is a concern for the western powers in particular and other States in general, then, they must play their role in combatting corruption in Africa. More importantly, corruption is an international crime that requires the collective collaborative effort of every state in order to overcome and defeat it. In fact, as an international crime that has been the subject of some multilateral international instruments, there is an obligation to assist in cases of corruption. This obligation emanates from these international instruments, whose scope needs to be delineated synoptically.

7.3 The obligation/duty to render assistance to victim states

A careful examination of international instruments on corruption highlight the existence of the obligation to render assistance to victim states, that is, the states wherefrom the assets or monies have been stolen. These instruments include the following: the United Nations Convention against Corruption (UNCAC);⁴³ the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention);⁴⁴ the African Union Convention on Preventing and Combating Corruption (AUCPCC);⁴⁵ the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption;⁴⁶ the ECOWAS Convention on Mutual Assistance in Criminal Matters;⁴⁷ and the Southern African Development Community (SADC) Protocol on MLA in Criminal Matters.⁴⁸

In addition to the aforementioned arguments for foreign legal assistance, these international instruments, at global, regional and sub-regional levels, do highlight the importance of foreign legal assistance in the fight against corruption. In the discussion that follows, an examination of how these instruments outline the nature of foreign legal assistance and the different dimensions thereof is done.

⁴³ United Nations Convention against Corruption, United Nations General Assembly Resolution 58/4, U.N. GAOR, 58th Session, 51 meeting, U.N. Doc. A/RES/58/4 (2003).

⁴⁴ Organisation for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, S. Treaty Doc. No. 105-43 37 I.L.M.

⁴⁵ AUCPCC, 2004.

⁴⁶ Protocol on the Fight Against Corruption to the Treaty on the Economic Community of West African States, 21 December 2001, reprinted United Nations Office on Drugs and Crime (UNODC), 'Compendium of International Legal Instruments on Corruption' (2nd edn, UNODC 2005).

⁴⁷ ECOWAS Convention on Mutual Assistance in Criminal Matters (adopted 29 July 1992) 2329 UNTS 301.

⁴⁸ SADC Protocol on Mutual Legal Assistance in Criminal Matters (adopted 3 October 2002).

7.3.1 The United Nations Convention Against Corruption

United Nations Convention Against Corruption (UNCAC) was adopted, among other things, ‘to prevent, detect and deter in a more effective manner, international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery’ through the promotion, facilitation and support of international cooperation and technical assistance to prevent and fight corruption (including asset recovery).⁴⁹

Chapter III of UNCAC criminalises certain conducts as being corrupt and further provides that States Parties must adopt legislative and other measures to establish the conducts as criminal offences. Chapter IV is focused on international cooperation, while Chapter V provides for the recovery of assets. For the purpose of this chapter, the following Articles are considered: Articles 31, 37, 38, 46, 51, 52, 54, 55, 57 and 59.

Article 31 of UNCAC provides for the freezing, seizure and confiscation of property, proceeds of a crime, equipment and other instrumentalities. This Article requires States Parties to confiscate proceeds of crime together with ‘property, equipment or other instrumentalities used in or destined for use in offences established in the Convention’.⁵⁰ It further provides that States Parties take necessary measures for the ‘identification, tracing, freezing or seizure of’ the aforementioned items.⁵¹ States Parties are urged to adopt legislative and other measures in accordance with their domestic law to regulate the freezing, seizing or confiscation of these items. Moreover, they shall empower their ‘courts and other competent authorities to order banks, financial or commercial records be made available or seized’.⁵²

Article 37 of UNCAC provides for cooperation among law enforcement authorities. The cooperation referred to by this Article, provides that a person involved in the perpetration of any UNCAC offences and a competent authority. The Article provides that appropriate measures be taken by States Parties to encourage participants of offences established by UNCAC to provide information to competent authorities responsible for investigating and evidentiary purposes.⁵³ States Parties shall consider mitigating punishment on an accused who provided ‘substantial cooperation in the investigation or prosecution of an offence’.⁵⁴ Moreover, States Parties shall

⁴⁹ UNCAC, Preamble and Article 1(b).

⁵⁰ *ibid* Article 31(1).

⁵¹ *ibid* Article 31(2).

⁵² *ibid* Article 31(3) and (7).

⁵³ *ibid* Article 31(1)

⁵⁴ *ibid* Article 37(2).

consider granting immunity from prosecution to a person who provided ‘substantial cooperation in the investigation or prosecution of an offence’.⁵⁵ If a person who participated in the commission of an offence established in UNCAC could provide ‘substantial corporation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law’.⁵⁶

Article 38 of UNCAC provides for cooperation between national authorities. As provided for in that Article, States Parties shall, in accordance with their domestic law, take measures to encourage cooperation between its public authorities and public officials on the one hand, and its authorities responsible for investigating and prosecuting criminal offences on the other.

Article 46 of UNCAC provides for MLA, how its request should be made, and the contents of the request. Though States Parties have an obligation to provide assistance, this obligation is not absolute, hence the Article sets out instances wherein States Parties may refuse to provide MLA to a requesting state.

Article 51 of UNCAC provides that for assets to be returned ‘States Parties shall afford one another the widest measure of cooperation and assistance’. Article 52 emphasises on how States Parties should take necessary measures to prevent and detect transfers of proceeds of a crime. As stipulated in the Article, measures shall be taken by States Parties to ensure that financial institutions within jurisdictions of States Parties-

Verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.⁵⁷

Furthermore, two additional measures on the detection of suspicious transactions shall be considered by States Parties. States Parties shall-

Implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group.

In an effort to prevent and detect transfers of proceeds of crime, States Parties shall-

⁵⁵ *ibid* Article 37(2).

⁵⁶ *ibid* Article 37(3).

⁵⁷ *ibid* Article 52(1).

Consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance.⁵⁸

Moreover, they should consider-

Taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts.⁵⁹

Article 54 of UNCAC provides for mechanisms for recovery of property through international cooperation in confiscation. Article 55 provides for international cooperation for purposes of confiscation. As stipulated in the Article, 'a State Party that has received a request from another State Party for confiscation of proceeds of crime, property, equipment or other instrumentalities shall, to the greatest extent possible within its domestic legal system:

a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party.

Moreover, 'the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities'.

Article 57 of UNCAC provides for the return and disposal of assets. States Parties must have legislative and other measures to enable their competent authorities to return assets or property that were confiscated to the jurisdiction to which they were stolen.⁶⁰

Article 59 of UNCAC provides for bilateral and multilateral agreements and arrangements:

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation.

⁵⁸ *ibid* Article 52(5).

⁵⁹ *ibid* Article 52(6).

⁶⁰ Stephenson *et al* (n 13) 77.

Apart from the UNCAC provisions on how states can recover assets, the OECD Anti-Bribery Convention also provides for asset recovery.

7.3.2 The OECD Anti-Bribery Convention

The purpose of the OECD's Anti-Bribery Convention is to reduce corrupt transactions in developing states through the encouragement of sanctions against bribery in international business transactions carried out by companies.⁶¹ Article 9 of the OECD's Anti-Bribery Convention makes provision for MLA between States Parties.⁶² The Article (together with Article 46 of UNCAC) provides for a process that allows jurisdictions to 'seek and provide assistance to other jurisdictions in the gathering of evidence, investigation and prosecution of criminal cases, and in tracing, freezing, seizing and confiscating proceeds of crime.' Once a request is made, the requested state is under an obligation to cooperate.⁶³

South Africa is the only African State that has ratified the Convention.⁶⁴ Over and above, African States must consider ratifying the Convention to ensure that foreign governments aid in curbing corruption. Considering the fact that it is the only African State that has ratified the OECD Anti-Bribery Convention, South Africa is a G20 member: a forum aimed at promoting international co-operation between states by bringing leaders, finance ministers and central banks to discuss issues related to the global financial system.⁶⁵ In order to curb corruption, it is imperative for MLA to be effective in ensuring successful investigations and prosecutions for transnational cases and for asset recovery. To ensure the effectiveness of MLA, G20 and non-G20 states have developed principles and identified mechanisms that have proved to be useful in addressing MLA barriers encountered by states. Due to the diversity of legal systems of G20 states, these principles are not only broadly framed, they are flexible to enable states to use them in line with their legal system. The principles are as follows:

⁶¹ Emmanuel T Laryea, 'Promoting Good Governance through ICT Systems: Improving Transparency and Reducing Corruption' in Ross P Buckley (ed), *Debt-for-Development Exchanges: History and New Applications* (Cambridge University Press 2011) 279.

⁶² See Article 9 of the OECD Anti-Bribery Convention.

⁶³ <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Chapter%205%20.pdf> accessed 15 February 2017.

⁶⁴ OECD, 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of May 2017' <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> accessed 20 February 2017.

⁶⁵ Nurullah Gür, *The G20 and the Governance of Global Finance* (SETA 2015) 9.

Principle 1: An effective legal basis for providing and requesting MLA in bribery and corruption cases should be adopted;⁶⁶

Principle 2: An effective institutional framework for MLA should be established, including by: i) designating a Central Authority and exchanging central authority contacts with other states; and ii) ensuring resources for the provision and requesting of MLA are adequate and efficiently used;⁶⁷

Principle 3: Mechanisms for timely responses to MLA should be put in place, including: i) providing clear, accessible information regarding the procedural requirements for MLA; ii) ensuring prompt transmission of requests by the central authority to the executing authorities; iii) maintaining open and direct lines of communication between central authorities, and encouraging, whenever possible, mechanisms for informal cooperation before the submission of an MLA request; and iv) allowing for flexibility regarding the manner and form in which MLA requests are executed in the requested State to allow for the full use of the assistance granted in the requesting State's proceedings in accordance with the state's legal systems;⁶⁸

Principle 4: Cooperation and coordination between jurisdictions should be facilitated, in accordance with the state's legal systems, including by: i) facilitating, where appropriate, direct contacts between law enforcement agencies; ii) clarifying the circumstances in which alternative forms of cooperation should be preferred to formal requests for MLA; and iii) developing mechanisms for collaborative or joint investigations;⁶⁹

Principle 5: International exchange of information through other mechanisms, should be allowed, in accordance with a state's legal systems, including by: i) facilitating exchange of financial intelligence obtained by Financial Intelligence Units (FIU); ii) facilitating exchange of tax information; iii) facilitating exchange of information with securities and other regulators; and iv) facilitating cooperation, as appropriate, with intergovernmental organisations;⁷⁰

Principle 6: States should continue their efforts to build and promote flexible and efficient schemes of cooperation targeting the proceeds of corruption and bribery by, among other things: developing or reviewing domestic legislation or practice to enable greater flexibility in providing assistance in asset recovery requests in line with chapter V of UNCAC,

⁶⁶ <https://www.oecd.org/g20/topcs/anti-corruption/High-Level-Principles-on-Mutual-Legal-Assistance.pdf> accessed 18 July 2017.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*

and consistent with other relevant international standards, including the recommendations of the Financial Action Task Force (FATF).⁷¹

Despite the existence of principles aimed at ensuring that international cooperation between states is efficient and successful in combating corruption, there are challenges that could be encountered by states from time to time, some of which include the following:

- i. Delays in the MLA system. When MLA requests are executed without delay, the MLA system will be efficient which will lead to investigators, together with prosecutors having a greater chance of finding corrupt suspects and bringing those involved in the commission of a crime to justice, together with tracing and seizing the proceeds of the crime. Though execution of MLA without delay is ideal, there are various causes for delays to execute a request. This may be due to the unique legal system of a state, lack of information, unclear communication or political factors;⁷²
- ii. When MLA request does not correspond with the response. As soon as a response is received by a requesting state, the first challenge it may encounter would be when the response is not in line with the request made or when the response does not meet its (requesting or victim state) needs. For example, in order to properly investigate an alleged corrupt transaction, a state may request access to banking information of an allegedly corrupt suspect covering several years. When such a state later receives a response containing mere bank statements without supporting banking information, the information received or provided becomes insufficient. This may be due to the fact that the requested state does not have sufficient information from the requesting state and so sorting out which material is relevant and which is not becomes a daunting task for the requested state especially when it (requested state) has limited resources;⁷³
- iii. Satisfying the dual criminality requirement. The principle of dual criminality or double criminality stems from the principle of legality and provides that: the act or omission must be criminal in both the requesting and the requested state.⁷⁴ When a state refuses to respond to a request due to the dual criminality requirement not being satisfied, the refusal may be justified.⁷⁵ This requirement may not be satisfied if, for example, a recipient state does not recognise foreign bribery as an offence. However, if the matter relates to a legal person and the

⁷¹ *ibid.*

⁷² OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (OECD 2012) 25-27.

⁷³ OECD (n 72) 36.

⁷⁴ Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 94.

⁷⁵ OECD (n 72) 42.

- recipient state does not recognise criminal liability for a legal person, it may refuse to respond to the MLA, and the refusal may be justified;
- iv. Lack of sufficient resources. This is one of the major challenges encountered by various states. One of the reasons why the recipient state may have difficulty in responding to MLA requests is due to its lack of resources. The latter includes, for example, having limited investigative, prosecution and language personnel or resources, together with access to technology necessary to deal with the request.⁷⁶ In other instances, the recipient state may have people available to deal with the matter but the challenge would be the unavailability of resources, particularly if the request received involves seizing of assets or requires voluminous documents. A requesting state may also encounter some challenges as well. For example, for a response to be successful, it must make follow-ups. However, if the state does not have the necessary resources to make such follow-ups, obtaining the MLA will be difficult;⁷⁷ and
 - v. Tipping off a suspect. It is common cause that tipping off a suspect about pending investigations against them will affect the investigative process as the suspect is most likely to flee and even conceal any evidence or assets, together with any proceeds thereof. Apart from the possibility that the recipient state may leak information, the risk is most likely to occur if the corrupt suspect is in a recipient state whose law requires its authorities to disclose certain requested information to the suspect or when the law creates an obligation against banks to inform clients when their banking information is being requested.⁷⁸

There are three steps to be adhered to when drafting a request for MLA as follows:

- a) Step 1: Preparing for MLA. In this first step, the requesting state must thoroughly look at six (6) distinct issues: ‘whether to use MLA channels or another intelligence or informal method of cooperation; timing for submitting the request for MLA; status of the authority requesting MLA; type of assistance sought, legal basis for the request; and criminal offence(s) under investigation’;⁷⁹
- b) Step 2: Drafting the MLA. The request must contain basic identification information, facts of the case, description of the assistance sought, objectives of the request, any procedures to be observed and transcription of the criminal offence;⁸⁰ and
- c) Step 3: Submitting a request for MLA. The requesting state needs to decide on the form of the transmission to communicate the request in

⁷⁶ *ibid* 39.

⁷⁷ *ibid* 39-40.

⁷⁸ OECD (n 72) 44.

⁷⁹ Phyllis Atkinson *et al*, *Tracing Illegal Assets: A Practical Guide* (International Centre for Asset Recovery 2015).

⁸⁰ *ibid*.

question: whether it will be transmission via diplomatic channels or central authorities, or direct transmission.⁸¹

7.3.3 The African Union Convention on Preventing and Combating Corruption

In an attempt to prevent or combat corruption, the AUCPCC provides for foreign government cooperation and MLA in terms of Articles 18 and 19.⁸² As stated in these Articles, States Parties are required to provide each other, technical co-operation and assistance when requests are made from national authorities on the instruction to prevent, detect, investigate or punish corrupt practices. The AUCPCC requires states to co-operate and encourage each other in taking necessary measures to prevent public officials from enjoying their ill-gotten assets through the freezing of their foreign accounts and facilitating the repatriation of stolen monies to the states of origin.⁸³ Cooperation among States Parties under the AUCPCC also includes conducting and exchange of studies, expertise and research on corruption-related issues, creating programmes and codes of ethics or organising joint training courses in an effort to address corruption related matters.⁸⁴

7.3.4 The ECOWAS Protocol on the Fight against Corruption

The ECOWAS Protocol on the Fight against Corruption was adopted to promote and strengthen effective mechanisms by States Parties to prevent, suppress and eradicate corruption. Moreover, it was adopted to promote, harmonise and coordinate national anti-corruption laws and policies. In addition to this, the Protocol seeks to intensify and revitalise cooperation between States Parties in order to make anti-corruption measures more effective. Articles 13 and 15 of the ECOWAS Protocol on the Fight against Corruption address matters relating to the recovery of assets.⁸⁵

7.3.5 ECOWAS Convention on Mutual Assistance in Criminal Matters

Member States of ECOWAS maintain that the adoption of common rules on mutual assistance in criminal matters will contribute in the development of integration. For this to be realised, states need to extend the widest MLA to combat corruption related offences, particularly serious crimes.⁸⁶

⁸¹ *ibid.*

⁸² AUCPCC, 2004.

⁸³ Kolawole Olaniyan, 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal' (2004) 4 *African Human Rights Law Journal* 74, 82.

⁸⁴ *ibid.*

⁸⁵ Protocol on the Fight against Corruption to the Treaty on the ECOWAS, 2001.

⁸⁶ ECOWAS Convention on Mutual Assistance in Criminal Matters A/P.1/7/92 (29 July 1992), preamble.

As stipulated out in the Convention, a Member State may provide assistance by:

- (a) Taking evidence or statements from persons;
- (b) Assisting in assuring the availability of detained persons or others to give evidence or assist in investigations;
- (c) Effecting service of judicial documents;
- (d) Executing searches and seizures;
- (e) Forfeitures and confiscations of proceeds of crime;
- (f) Examining objects and sites;
- (g) Providing information and evidentiary items; and
- (h) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.⁸⁷

The Convention further affords Member States the opportunity to refuse providing assistance from a requesting state subject to Article 4. As stated in the Article, assistance may be refused if:

- (a) The requesting Member State is of the opinion that the request, if granted, would prejudice its sovereignty, security and public order;
- (b) The offence is regarded by the requested Member State as being of a political nature;
- (c) there are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or that the person's position may be prejudiced for any of those reasons;
- (d) The request relates to an offence that is subject to investigation or prosecution in the requested Member State or the prosecution of which in the requesting Member State would be incompatible with the requested Member State's law on double jeopardy;
- (e) The assistance requested requires the requested Member State to carry out compulsory measures that would be contrary to its laws and practice had the offence been the subject of investigation or prosecution under its own jurisdiction; and
- (f) The request is in respect of offences related to military law which do not constitute offences under ordinary criminal law.

⁸⁷ *ibid* Article 2.

7.3.6 SADC Protocol on MLA in Criminal Matters

SADC Member States maintain the same sentiment as those ECOWAS that the adoption of common rules on mutual assistance in criminal matters will contribute in the development of integration. This led to the establishment of a Protocol on Mutual Assistance as a mechanism to adopt common rules on mutual assistance in criminal matters.⁸⁸ The Protocol sets out the scope of the assistance and further creates an obligation for States Parties to provide each other with ‘the widest possible measures of MLA in criminal matters’.⁸⁹

Despite the Protocol focusing on developing integrations, ensuring that assets are returned to a victim state and that criminal liability is imposed against perpetrators of corrupt practices in the SADC region, the Protocol sets out grounds on which a State Party may refuse to provide assistance. Accordingly, Article 6 provides that a State Party may refuse if:

- (a) The request relates to a political offence or an offence of a political character;
- (b) The request relates to an offence under military law which would not be an offence under ordinary criminal law;
- (c) The execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person; or
- (d) The requests is not made in conformity with the Protocol.

7.4 Assistance strategies

Different strategies could be used by foreign governments to combat corruption. Some of these include: the recovery of stolen assets or public funds and the stolen asset recovery initiative (as discussed below).

7.4.1 Recovery of stolen assets or public funds

The recovery of assets could be achieved if there is ‘mutual collaboration between developed and developing states or between a victim state (the requesting jurisdiction) and the foreign government where the stolen assets are located (the requested jurisdiction)’.⁹⁰ Asset recovery is an economic strategy aimed at solving government problems through the removal and bringing to justice of corrupt public officials.⁹¹ The recovery of assets is a bilateral issue and in the process of doing so, States experience different challenges, however, one of the major general challenges

⁸⁸ SADC Protocol on Mutual Legal Assistance in Criminal Matters, 2002.

⁸⁹ *ibid* Article 2.

⁹⁰ Greenberg *et al* (n 15) 8.

⁹¹ See Commonwealth Secretariat, *Commonwealth Heads of Government Meeting 2007, Book 20* (Commonwealth Secretariat 2007) 40.

include deciding whether to adopt a civil or criminal legal approach.⁹² Irrespective of the legal approach a state may choose, it is imperative for states to, at least, have an instrument that provides for the tracing, freezing, seizure and forfeiture of assets or funds as such an instrument would become a powerful tool in the curbing of corruption.⁹³

7.4.2 Stolen Asset Recovery Initiative

In addressing the importance of the recovery of assets, particularly for developing states, the United Nations Office of Drugs and Crime and the World Bank, launched the Stolen Asset Recovery Initiative (also known as 'StAR') in 2007. The Initiative was created to facilitate cooperation between states involved in the recovery of assets and to disseminate best practices on asset recovery.⁹⁴ For the initiative to achieve its purpose, the following issues, problems or challenges had to be looked at thoroughly-

- i. Developing states are likely to encounter serious obstacles in recovering stolen assets;
- ii. Even where the political will to pursue stolen assets exists, limited legal, investigative, and judicial capacity and inadequate financial resources could hamper the process; and
- iii. Jurisdictions where stolen assets are hidden, often in developing states, may not be responsive to requests for legal assistance.⁹⁵

The Initiative stands to believe that, for assets to be successfully recovered political will and legal reform need to exist in developing and developed states; moreover, such states must (if they have not done so) ratify and implement the UNCAC. States whose assets have been hidden need to promptly respond to the need to recover such assets because if the asset recovery process is prolonged, recovering such assets will not only prove to be difficult, but will also negatively affect the victim state.

7.5 Selected cases of foreign government assistance with African States

Administrative power vested on public officials allows officials to perform their duties diligently, honestly and transparently. However, the same power tempts and affords them an opportunity to

⁹² *ibid* 40.

⁹³ *ibid* 41.

⁹⁴ Stephen Kingah, 'Measures for Asset Recovery: A Multiactor Global Fund for Recovered Stolen Assets' in Jan Wouters *et al* (eds), *The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* (World Bank Publications 2015) 463.

⁹⁵ Colin Q C Nicholls *et al*, *Corruption and Misuse of Public Office* (Oxford University Press 2011) 437.

misuse power for their personal gains. In time, such power fuels and feeds the level of greed to continue to deprive a state and its people. Accompanied by lack of political will, it is no surprise that corruption paves the way for senior officials to (continue to) steal millions worth of state funds or assets. Below are selected cases to illustrate African political elites or senior government officials who have siphoned, misappropriated, stolen, laundered or embezzled state funds and how foreign governments have provided assistance to victim states to recover such funds.

7.5.1 Nigeria and the United Kingdom: the case of *James Ibori*

With convictions traced back to the 1990s for stealing and dishonest conducts, former Delta State Governor, James Ibori, was captured by the United Kingdom police on an Interpol arrest warrant in 2010. In 2012, in London's Southwark Crown Court, Ibori pleaded guilty to numerous fraud and money laundering charges.⁹⁶ He admitted to fraud amounting to GBP 79 million and was sentenced to 13 years.⁹⁷ Ibori allegedly stole over two hundred and fifty million dollars within a period of eight years. The money stolen was allegedly meant for sanitation, providing power supply and healthcare services for the people of the Delta State.⁹⁸ A confiscation order was granted and possessions that were confiscated included the following: 'a house in London valued at GBP 2.2 million, another property in the United Kingdom valued at GBP 311,000; a GBP 3.2 million mansion in Sandton, South Africa; a fleet of armoured Range Rovers valued at GBP 600,000; a GBP 120,000 Bentley Continental GT; and a Mercedes-Benz Maybach 62 bought for EUR 407,000 cash and shipped directly to his mansion in South Africa'.⁹⁹ During his tenure of office, Ibori used his wealth to acquire several luxury cars, jets, many properties in London, and real estate holding in Nigeria. It was discovered that Ibori also had real estate investments and owned Bond Technologies in the State of Florida, USA.¹⁰⁰

Ibori's case is one of many that perfectly illustrates how those who engage in a corrupt criminal enterprise could be brought to justice on the one hand and have assets recovered on the other. Other members of this enterprise included Ibori's wife, Theresa Ibori, his sister, Christine

⁹⁶ See Frederic Will, *A Southern Nigerian Community: Case Study Ughelli* (Cambridge Scholars Publishing 2013) 96.

⁹⁷ 'James Ibori pleads guilty to fraud and money-laundering charges' < <https://www.theguardian.com/global-development/2012/feb/27/james-ibori-pleads-guilty-fraud>> accessed 21 July 2017.

⁹⁸ See Oliver O Nwachukwu, *Those Challenging Cracks of Secularism: In and Beyond* (iUniverse 2014) 439.

⁹⁹ Ayogu and Agbor (n 36) 351.

¹⁰⁰ 'James Ibori's mad rush for luxurious cars, his Maybach cost N70 million and London Real Estate' <http://saharareporters.com/2007/10/24/james-iboris-mad-rush-luxurious-cars-his-maybach-cost-n70-million-and-london-real-estate> accessed 7 February 2017.

Ibori-Ibie, and his associate, Udoamaka Onuigbo, who were convicted by the juries in the United Kingdom. Moreover, confiscation orders were issued by the court amounting to GBP 5.1 million, GBP 829,786.44 and GBP 2.7 million against the three respectively.¹⁰¹

7.5.2 France and Equatorial Guinea: the case of *Teodoro Nguema Obiang Mangue*

It is important for states to work together to fight corruption, moreover, it is equally important for states to adhere to UNCAC. In doing so, France has proved to be adhering to its obligation under the Convention by ensuring that those who engage in corrupt practices, are held accountable and to restitute ill-gotten gains. This could be seen in the charges held against Teodoro Nguema Obiang Mangue, Vice President of Equatorial Guinea. Though no funds have been recovered so far, Mr Obiang is said to have appeared before the Paris Criminal Court for 'hidden investments, money-laundering, misappropriation of public funds, embezzlement, breach of trust and corruption'.¹⁰²

In 2007, an investigation against President Obiang and his acquaintances commenced following a complaint filed by Transparency International, France.¹⁰³ The complaint set out allegations of concealment and diversion of public funds. The police investigation revealed that the Obiang family owned a high-end residence in Paris, Obiang owned 8 (eight) automobiles worth over EUR 4 million.¹⁰⁴ In 2010, *la Cour de Cassation* granted judgment declaring the admissibility of the complaint, thus opening a judicial investigation.¹⁰⁵ In 2011, pursuant to these investigations, 11 luxury cars belonging to Obiang Mangue were seized by the French police; and in 2012, tens of millions worth of antiques, art works and other luxury goods were seized by the police.¹⁰⁶ The trial against Teodoro commenced and ended in 2017, Paris. At the end of the trial, the prosecution called for a US\$ 34 million fine and confiscation of assets, and a 3-year suspended jail sentence against Obiang Mangue.¹⁰⁷

¹⁰¹ Ayogu and Agbor (n 36) 351.

¹⁰² https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Obiang_Ill-Gotten%20Gains_%20The%20Public%20Prosecutor%20Requests%20the%20Opening%20of%20a%20Trial%20against%20Obiang%20-%20SHERPA_May2016.pdf accessed 8 February 2017.

¹⁰³ 'Abusing UNESCO: President Teodoro Obiang of Equatorial Guinea' (*Open Society Justice Initiative*, February 2012) 5 < <https://www.opensocietyfoundations.org/sites/default/files/obiang-unesco-20120222.pdf> > accessed 22 July 2017.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ 'On Trial for Corruption: French Prosecutors Demand Jail Term and €30 million Fine for Obiang' < https://www.transparency.org/news/feature/on_trial_for_corruption_french_prosecutors_demand_jail_term_and_30_million > accessed 22 July 2017.

7.5.3 Switzerland and Nigeria: the case of *Sani Abacha*

Soon after the death of General Sani Abacha, allegations of corruption and plundering of foreign reserve of the Central Bank of Nigeria came to light.¹⁰⁸ The public's plea to have such allegations investigated led to the establishment of a SIP.¹⁰⁹ The SIP was created to investigate the looting and corrupt practices that could have taken place during Abacha's regime. Below are three major findings by the SIP:

- i. General Abacha requested Ismail Gwarzo to present to him false funding for security operations. The funds were sent in cash amounting to US\$ 1,131 million and GBP 413 million or travellers cheques amounting to US\$ 50 million and GBP 3.5 million by the Central Bank of Nigeria to Mr Gwarzo who later took most part of the funds to General Abacha's house;¹¹⁰
- ii. At least 36 transfers estimated at US\$ 386 million were made from the Central Bank of Nigeria to bank accounts abroad held by offshore companies that belonged either to members of the Abacha's criminal organisation or to Nigerian or foreign businessmen;¹¹¹ and
- iii. The SIP found that at least US\$ 1,491 million and GBP 416 million were embezzled by the Abacha's criminal organisation.¹¹²

In the late 90s, the Nigerian government requested judicial assistance from Switzerland against General Sani Abacha and 14 others.¹¹³ In addition, it requested that all assets transferred to Switzerland be blocked and that banking documents be disclosed.¹¹⁴ Following this request, the Federal Office of Justice in Switzerland blocked assets amounting to US\$ 83 million held in bank accounts in Geneva and Zurich.¹¹⁵ In October 1999, 'Geneva's judiciary initiated various proceedings against family members and business friends of Abacha on suspicion of money laundering'. This led to the blocking of several accounts.¹¹⁶ In 2002, the Federal Office of Justice in response to the Nigerian government's request to disclose banking documents, handed over financial documents to Nigerian authorities.¹¹⁷

¹⁰⁸ Monfrini (n 37) 43.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.* 44.

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ 'Out-of-court settlement in the Abacha case - Nigeria to receive more than a billion US\$; The countries concerned cooperate in the implementation of the settlement' Star.worldbank.org/corruption-cases/sites/corruption-cases/files/Abacha_Settlement_Switzerland_Press_Rel_April_17_2002.pdf 22 July 2017.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

Switzerland is the first state to return stolen funds to Nigeria. Between 2005 and 2006, it returned an estimated US\$ 505.5 million worth of assets, together with subsequent transfers estimated to US\$ 700 million.¹¹⁸ Throughout the years of investigations, Nigeria has successfully recovered at least US\$ 2.3 billion worth of stolen funds by Sani Abacha and his family.¹¹⁹

7.5.4 Egypt: the case of *Hosni Mubarak*

In March 2011, the European Union issued a Council Regulation (EU) No 270/2011 concerning restrictive measures directed against certain persons, entities and bodies in Egypt. The regulation provides for the freezing of assets of such individuals. The persons referred to in the regulation include Hosni Mubarak (former President of Egypt from 1981 to 2011), his spouse, his sons and their spouses, and former ministers and their spouses.¹²⁰

On 21 May 2014, a Cairo Court sentenced the former President of Egypt to three years in prison after being found guilty on charges of embezzlement for private use. Moreover, he was found guilty of fraudulently billing the government for GBP 9.3 million of personal expenses.¹²¹ In January 2015, an Egyptian Court, the Court of Cassation overturned Mubarak's embezzlement conviction and a retrial was ordered after finding that legal procedure were not followed properly during Mubarak's trial.¹²² Mubarak's sons, Gamal and Alaa Mubarak, were also convicted and sentenced to four years. The Court also ordered the accused persons to pay penalties and repay the money stolen amounting to more than US\$ 20 million, in addition to the US\$ 17 million that was already paid.¹²³

7.5.5 Nigeria: the case of *Diepreye Solomon Peter Alamieyeseigha*

In 2005, the former Governor of Bayelsa State, Diepreye Solomon Peter Alamieyeseigha was arrested in the United Kingdom on suspicion of money laundering.¹²⁴ While released on bail, he

¹¹⁸ Lauren Ploch, *Nigeria: Report on a Key Strategic Partner of the U.S. Government* (DIANE Publishing 2010)17.

¹¹⁹ Massa (n 38) 228.

¹²⁰ Council Regulation (EU) 270/2011 Concerning Restrictive Measures Directed against Certain Persons, Entities and Bodies in View of the Situation in Egypt OJ L76/4.

¹²¹ 'Egypt: Hosni Mubarak fraud conviction overturned' (*BBC News*, 13 January 2015) <http://www.bbc.com/news/world-middle-east-30792001> accessed 7 June 2017.

¹²² Elizabeth LaForgia, 'Mubarak fraud conviction overturned' (*Jurist*, 13 January 2015).

¹²³ David D Kirkpatrick, 'Mubarak Gets 3 Years for Embezzlement, and His Sons Get 4' (*The New York Times*, 21 May 2014). See also Robert Morgan, *History of the Coptic Orthodox People and the Church of Egypt* (Friesen Press 2016) 484.

¹²⁴ Jean-Pierre Brun *et al*, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (World Bank Publication 2015) 16.

fled to Nigeria. US\$ 1.5 million in cash was seized and confiscated at the time of his arrest as money-laundering proceeds and returned to Nigeria.¹²⁵ Nigeria initiated civil proceedings in the United Kingdom to have assets controlled by the former Governor and his entities, Santolina Investment Corporation and Solomon and Peters Ltd, frozen and recovered.¹²⁶ Diepreye pleaded guilty in 2007 to charges of falsely declaring his assets.¹²⁷ Following his guilty plea, his assets were subsequently seized and US\$17.7 million in stolen assets were recovered and returned to Nigeria.¹²⁸ Moreover, a summary judgment was granted in the United Kingdom civil proceedings against the juristic persons and over US\$ 20 million recovered by the Nigerian government and transferred to Bayelsa State.¹²⁹ While in office, Alamiyeseigha stole public funds and received bribes for the awarding of public contracts.¹³⁰ Alamiyeseigha acquired several assets outside Nigeria and had numerous bank accounts in Cyprus, the United Kingdom and Denmark, four properties in London purchased for almost GBP 5 million and a harbour penthouse purchased for almost GBP 1 million in South Africa.¹³¹

As mentioned above, it was discovered that Alamiyeseigha had bank accounts in several foreign territories, including Seychelles and the Bahamas, this meant that any legal proceeding or process would be a difficult task for Nigerian authorities to institute against Alamiyeseigha. To ensure that he was punished for his corrupt practices, Nigerian authorities instituted civil proceedings in the United Kingdom, while simultaneously pursuing a criminal matter in Nigeria.¹³² Moreover, Nigeria applied for a court order, in an effort to secure evidence. The order requested the disclosure of evidence held by the United Kingdom Metropolitan Police.¹³³ The application was granted by the United Kingdom courts.¹³⁴ Through the evidence, Nigeria applied for a worldwide freezing order to freeze all assets owned, directly or indirectly by Alamiyeseigha.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ UNODC, *Digest of Asset Recovery Cases* (UNODC 2015)10.

¹³⁰ John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar Publishing 2014) 300

¹³¹ *ibid.*

¹³² Brun *et al* (n 124) 121.

¹³³ *ibid* 121.

¹³⁴ *ibid.*

7.5.6 The United Kingdom and Uganda

A British company, CBRN Team Ltd was investigated following allegations that a series of payments were made to Ananias Tumukunde, an advisor to Ugandan President Yoweri Museveni.¹³⁵ In 2007, a procurement contract worth GBP 210,000 was signed with CBRN Ltd to train and equip the Ugandan army to protect world leaders such as the Queen of United Kingdom and Gordon Brown, then British Prime Minister at the 2007 Commonwealth meeting held in Kampala.¹³⁶

Niels Tobiasen, who was Managing Director of the company at the time, allegedly made payments to Tumukunde and a third party Rosuke Tagaswire, of the value of GBP 80,000. This payment was made after Tumukunde approached Tobiasen, on grounds that he needed additional payments to meet local tax obligations in respect of the contract procured.¹³⁷ The Ugandan parties indicated in the financial records that they received money as agents of the Uganda government working on a contract whereas, in fact, the funds were transferred to banking accounts in London.¹³⁸ The Overseas Anti-Corruption Unit of the City of London Police was created following the G8 announcement in June 2006 by the former United Kingdom Prime Minister Tony Blair that new efforts were made to fight corruption on an international level.¹³⁹ Following thorough investigative process and efforts by the Overseas Anti-Corruption Unit, Tobiasen was arrested and later pleaded guilty to making corrupt payments.¹⁴⁰ Months later, Tumukunde was arrested and he pleaded guilty to accepting a corrupt payment and sentenced for 12 months in jail.¹⁴¹ A disclaimer was signed by Tumukunde enabling the release of GBP 52,800 from his bank account.¹⁴² The British Government, through its British High Commissioner, Martin Shearman, returned over sh116, 898,187 (US\$ 32471.97838) to the Inspector General of Government, Faith Mwendha.¹⁴³

7.5.7 The United Kingdom and Nigeria: the case of *Joshua Chibi Dariye*

An environmental contract grant was made from the Nigerian Government and deposited into the bank account of the Plateau state. The former Governor of the Plateau State of Nigeria, Joshua

¹³⁵ Nicholls *et al* (n 95) 217.

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ Nicholls *et al* (n 95) 178.

¹⁴⁰ *ibid* 217.

¹⁴¹ *ibid.*

¹⁴² *ibid*

¹⁴³ Mugisa A, 'Britain returns bribe paid to Ugandan officials' (*Saturday Vision*, 9 December 2008).

Dariye used his official position to influence the bank to issue a bank draft creditable to an account at a different Nigerian bank which he (Dariye) had created under an alias 10 months prior.¹⁴⁴ Dariye allegedly engaged in acts of misappropriation of funds amounting to more than US\$ 11.9 million during his period of office from 1999-2007, which were transferred to several bank accounts in the United Kingdom and Nigeria under his name and those of his close acquaintances.¹⁴⁵ To hide his wealth, aliases were also used and numerous properties purchased. It was believed that some of the money that was used to purchase property in London, was held under one of his aliases.¹⁴⁶ Moreover, Dariye used business fronts to launder money. His corrupt practices resulted in both states initiating civil proceedings against him for the confiscation of his ill-gotten assets.¹⁴⁷ Dariye was eventually arrested in London on suspicion of money laundering, and it was discovered that he had US\$ 210,000 on him which was later seized.¹⁴⁸

Following the employment of Kendall Freeman Solicitors to file two civil actions against Dariye by the Metropolitan Police and the Crown Prosecutorial Service, working alongside Nigeria's Economic Financial Crimes Commission (EFCC), several assets were recovered as follows: in the first civil action, property which Dariye had purchased worth GBP 395,000, was recovered;¹⁴⁹ and in the second civil action, assets worth US\$ 5.7 million were recovered stored in bank accounts at National Westminster and Banks in London.¹⁵⁰

Following through the allegations of corruption and misappropriation of assets, law enforcement officers in the United Kingdom discovered that Dariye controlled a Barclaycard account which was being paid off on a monthly basis through a bank account in the name of Joyce Oyeбанjo, Dariye's United Kingdom banker who facilitated the payment of fees on behalf of Dariye. A public order was obtained for Joyce Oyeбанjo's bank accounts, and it was discovered that Oyeбанjo had 15 different bank accounts with at least GBP 1.5 million and real property worth GBP 2 million.¹⁵¹ Consequent to examining Oyeбанjo and Dariye's bank accounts, it was

¹⁴⁴ <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Chapter%204%20.pdf> accessed 10 June 2017.

¹⁴⁵ Brun *et al* (n 124) 40.

¹⁴⁶ See <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Chapter%204%20.pdf> accessed 22 July 2017.

¹⁴⁷ Brun *et al* (n 124) 40.

¹⁴⁸ Abdullahi Y Shehu, 'Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria' (2014) 3 International Law Research 186, 193.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ Jean-Pierre Brun *et al*, *Asset Recovery Handbook: A Guide for Practitioners* (World Bank Publications 2011) 46.

discovered that there were numerous large electronic credits from various bank accounts.¹⁵² In addition, it was revealed that Dariye had obtained an ecological grant which he later diverted and concealed in his company's bank account in Nigeria and subsequently diverted to London. The Nigerian company not only purchased properties in London, but was also linked to the ecological grant theft as it allegedly received GBP 100 million worth of stolen funds.¹⁵³

Nigeria instituted a civil action against Dariye, and to do so, evidence from United Kingdom authorities was required.¹⁵⁴ Since United Kingdom authorities had obtained the evidence by using its compulsory powers, it argued that it owed duties of confidentiality to the owners of the documents; this meant that, they could not voluntarily furnish Nigerian authorities with the evidence.¹⁵⁵ Confronted by this obstacle, the Nigerian government applied for an order requesting United Kingdom authorities to disclose the evidence obtained, arguing that it was in the public's best interest. Ultimately, the United Kingdom Metropolitan Police made the disclosure, resulting in EFCC charging him with 40 counts of corruption and money laundering in November 2005.¹⁵⁶

7.5.8 The United Kingdom and Zambia

Frederick Chiluba was the second President of Zambia from 1991 until 2002.¹⁵⁷ When his presidential term ended, criminal investigations were instituted by the Zambian government, and a task force on asset recovery convened.¹⁵⁸ In 2003 he was officially charged with 168 counts of money laundering and misappropriation worth US\$ 40 million of state funds.¹⁵⁹ The Zambian government alleged that Chiluba had diverted assets from the Finance Ministry into an account held at the London branch of Zanaco (Zambian National Commercial Bank) for his personal gains.¹⁶⁰ In 2004, a civil suit in the United Kingdom, on behalf of the Zambia, was filed by Zambian authorities, who claimed that Chiluba and other Zambian officials conspired, with others, to fraudulently misappropriate public funds.¹⁶¹ The basis of the jurisdiction of this civil matter was

¹⁵² *ibid* 47.

¹⁵³ *ibid* 46-47.

¹⁵⁴ Brun *et al* (n 124) 121.

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid*.

¹⁵⁷ Emmanuel K Akyeampong and Henry Louis Gates (eds), *Dictionary of African Biography* (Oxford University Press 2012) 70.

¹⁵⁸ Brun *et al* (n 151) 16.

¹⁵⁹ Brun *et al* (n 124) 43.

¹⁶⁰ *ibid* 43.

¹⁶¹ *ibid*.

that the allegedly stolen money was transferred and held in various accounts in London, and that most of the diverted funds passed through law firms and bank accounts in the United Kingdom, that many of the defendants had close ties with London. It was also argued that the judgment would be easily and immediately enforced without any further legal action whatsoever. Zambia won the damage award when Chiluba and his co-defendants were found liable by the United Kingdom court for misappropriating US\$ 46 million.¹⁶² It is however a tragedy that the Zambian government failed to enforce this judgment, which in essence, may lead one to argue that Zambia lacks the necessary political will to combat corruption.

7.5.9 Ongoing cases against senior African officials on asset recovery

On-going investigations and judgments on the assets of senior government officials include investigations against Dennis Sassou Nguesso, Omar Bongo and Téodoro Obiang Nguema Mbasogo and their relatives. Cases against these individuals were filed by Transparency International (TI) France and SHERPA, on the grounds that luxury assets of these individuals and their entourages could not be possibly bought with their legitimate salaries. For instance, Transparency International (TI) France and SHERPA maintain President Téodoro Obiang Nguema owns cars worth more than US\$ 6 million, together with 39 homes owned by his relations. The body also maintains that Dennis Sassou Nguesso and his close relatives owned a combined 112 bank accounts.¹⁶³ A preliminary investigation conducted in late 2007 against Omar Bongo revealed that:

There are, at least, thirty-nine (39) real-estate assets, seventeen (17) of which are registered in the name of Mr Omar Bongo. Most of the properties are located in Paris' upscale 16th District. Moreover, seventy (70) bank accounts were identified, eleven (11) of which are registered in the name of Mr Omar Bongo; and an automobile fleet comprising of at least nine (9) vehicles for a total estimated value of € .493.443.¹⁶⁴

7.6 Different ways of rendering foreign assistance to African States

Despite the fact that the aim of the numerous multilateral agreements established over the years was to guide and assist states in curbing corruption and recovery of assets or funds, states continue

¹⁶² *ibid.*

¹⁶³ Olaniyan (n 4) 99. See also Hatchard (n 130) 323.

¹⁶⁴ Transparency International France, 'Biens Mal Acquis- Case: French Supreme Court Overrules Court of Appeal's Decision' (9 November 2010) http://www.transparency.org/news/pressrelease/20101109_biens_mal_acquis_case_french_supreme_court_overrule_s_court_of_appe accessed 14 February 2017.

to encounter challenges. Generally, both African and non-African States are often victims of amassed wealth being hidden by corrupt senior officials. However, Western states in particular, such as the United Kingdom, Switzerland and the United States of America, are ideal destinations to hide ill-gotten gains. When ill-gotten wealth is hidden in Western States, African states rely on Western governments to assist in the recovery of the assets or funds. Since Western States are used to hide illegally obtained wealth, foreign governments, together with their banking or financial institutions, must be mindful of their obligations to African States on matters relating to the freezing, seizure, confiscation and recovery of assets. Below is a discussion of the various ways in which foreign assistance could be rendered to African States.

7.6.1 Conclusion of bilateral and multilateral agreements on foreign assistance regarding combating corruption

There are instances wherein punishable conducts such as money laundering, financial terrorism, bribery, fraud, embezzlement or misappropriation of assets or funds are committed beyond the borders of a state. In such instances, cooperation between the affected states is required, not only to combat the practices but most importantly to ensure that individuals involved are held responsible. Generally, cooperation between states is crucial, particularly for African States where resources used to recover hidden assets or funds in foreign territories are limited or restricted.

The assumption in the eradication of corruption is that no state can combat corruption successfully without the assistance of another, hence international cooperation is necessary and crucial. The extent of expected cooperation cannot be measured because states have different experiences on the effects of corruption. It is safe to argue that first world states¹⁶⁵ are capable of controlling corruption, investigating, prosecuting and convicting corrupt individuals; together with freezing, seizing, confiscating and recovering assets hidden in foreign territories. Unfortunately, third world states¹⁶⁶ have limited or no resources to investigate corruption-related cases, to freeze, seize and recover assets or funds; hence state cooperation is critical in the tracing and subsequent recovery of assets. Having said this, foreign governments must be encouraged and not be reluctant, to enter into agreements or any means of cooperation with African states. Such cooperation agreements will not only assist African States in combating corruption; in fact, relations between the states in question will be established and strengthened.

¹⁶⁵ For example United States of America, United Kingdom, Turkey, Luxembourg and Switzerland.

¹⁶⁶ For example Equatorial Guinea, Nigeria and Angola.

To illustrate the importance of cooperating between states, Nigeria and the United Kingdom signed an agreement on the recovery and return of assets. Robert Goodwill, Immigration Minister and Abubakar Malami, Nigerian Attorney General, signed a Memorandum of Understanding (MoU) reinforcing the States commitment to continue cooperating and supporting each other in the return of seized proceeds of bribery. The two States have a mutual understanding that the money to be returned should not revert into the hands of the criminals. As a matter of fact, Nigeria vowed to ensure that the money returned will be used to improve the livelihood of the poorest members of the society and improve access to justice for all Nigerians.¹⁶⁷ These States shared the same sentiment that honesty and transparency are important factors for the sustenance of confidence and cooperation between them.¹⁶⁸

In another example, the Kenyan and Swiss Government signed a MoU. The MoU was captured under the MLA to assist in the confiscation of assets acquired illegally; fight crime in both States and re-affirm the commitments of the two governments in the fight against corruption; and to emphasise the importance of state cooperation in the strengthening of legal and judicial systems in the fight against transnational crimes. The core issues in the MoU concerned the recovery of assets in various parts of the world, and repatriating criminals and their proceeds.¹⁶⁹

7.6.2 Enactment of national laws regulating the transfer of funds

Offshore accounts are often facilitated by making use of electronic payments, and though efficient and easy to use, this type of payment system has disadvantages, thus contributing to the perpetration of corrupt practices. There are various forms of electronic banking, one of which is the electronic payment system, which is a money launderer's dream as it offers many opportunities to imitate patterns and behaviours of a legitimate transaction.¹⁷⁰ Due to the nature of the system, there is no obvious institutional and functional separation, which can be made between legitimate

¹⁶⁷ 'Immigration Minister signs agreement with Nigeria on returning stolen criminal assets' <https://www.gov.uk/government/news/immigration-minister-signs-agreement-with-nigeria-on-returning-stolen-criminal-assets> accessed 16 February 2017.

¹⁶⁸ 'Nigeria, UK Sign MoU on Return of Stolen Assets' (*Vanguard*, 30 August 2016).

¹⁶⁹ 'Kenya, Swiss government sign MOU to help recovery illegal acquired assets' (28 April 2017) <http://theinformer.co.ke/4136/kenya-swiss-government-sign-mou-to-help-recovery-illegally-acquired-assets/> accessed 6 May 2017.

¹⁷⁰ United Nations Office for Drug Control and Crime Prevention, *Financial Havens, Banking Secrecy and Money Laundering* (United Nations Office for Drug Control and Crime Prevention 1998) 34.

and illegitimate transfer of money, and so it becomes virtually impossible to differentiate between the two transactions.¹⁷¹

Another electronic banking system is on-line banking.¹⁷² One of the main reasons launders prefer on-line banking is because it enables them to avoid having to go to the bank and complete various forms. Most importantly, this banking service makes it difficult to trace the operator of on-line banking accounts, especially if they never go to the bank.¹⁷³

Another banking system preferred by launders is known as e-cash or electronic transactions services. This banking system makes it difficult to trace a transaction compared to on-line banking transactions, mainly because the transactions made are capable of flowing around the world which makes it twice as hard for authorities to detect.¹⁷⁴

Though convenient, internet banking or e-banking could be misused by money launderers and other individuals. One of its many challenges is that face-to-face contact with a customer cannot be possible.¹⁷⁵ This is problematic because when suspicious transactions are being made to a bank account, it may be difficult to determine if the transaction is being made by the nominal account holder or not.¹⁷⁶ Moreover, it may also be a challenge for other financial institutions to determine where the transaction was made.¹⁷⁷ In the place of face-to-face contact, financial institutions need to establish policies or regulations aimed at scrutinising the identity of an account holder and monitoring the transactions made in order to detect, prevent and eradicate money laundering or wrongful transfer of ill-gotten funds or assets and their proceeds thereof.¹⁷⁸

It is without a doubt that at times, there could be instances where physical recognition may be impossible to implement, thus it is important for banks to provide alternatives. For example, the Bank of France has established additional verification steps which include asking for additional documents (including copies of both sides of identity card and passport, two original pay slips, original or latest electricity or gas bill or cancelled cheque) to prove the customer's identity to open accounts in France.¹⁷⁹ If banks are not eager to develop policies aimed at identifying their

¹⁷¹ *ibid.*

¹⁷² Brigitte Unger, Elena Madalina Busuioc, *The Scale and Impacts of Money Laundering* (Edward Elgar Publishing 2007)104.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ Andrea Schaechter, *Issues in Electronic Banking: An Overview* (International Monetary Fund 2002) 20.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid* 20-21.

potential clients, they are at liberty to take firm measures. For example, Spain has strict regulations and policies as to who can make use of their on-line banking services.¹⁸⁰ In Spain, only customers who have already been in an identified traditional relationship with their bank may make use of on-line banking.¹⁸¹ This regulation eliminates major risks that could occur when a banking customer intends to create an account online.

States that are prone to being used as safe havens, must consider enacting strict laws to allow their financial institutions or banks to regulate electronic transactions made by individuals in other states. Moreover, where a bank has reason to believe that a transaction is suspicious, a report to relevant authorities must be made so that, where necessary, investigations must be initiated. Furthermore, if illicit assets or funds were transferred, they must be timeously recovered together with their proceeds and returned to the state of origin.

7.6.3 Monitoring of banking activities conducted by intra-state banks

When a foreign bank has a client from another state, particularly when the transactions involves huge sums of money, it is important for such a bank to be able to monitor the account(s) of its client. That is, the bank must know its client and whom its client is connected to directly or indirectly.¹⁸² Such scrutiny makes it possible for a bank to determine or detect if its client is a launderer, moreover, it will make it extremely difficult for future launderers to transfer their ill-gotten wealth. The problem, however, is that, in many instances, banks or financial institutions resist to know their customers and their connections, especially if it will put them at a competitive disadvantage since thorough investigations of clients, even though legitimate, could trigger clients to bank elsewhere.¹⁸³ Though this may be a fairly-minded reason in the competition arena, the reluctance by banks goes far beyond creating a competitive disadvantage for them. In fact, if their reluctance led or leads to illegal transactions being made, their conduct could easily imply that they are colluding with launderers or any other person who moves or hides their ill-gotten wealth and their proceeds.¹⁸⁴

¹⁸⁰ *ibid* 21.

¹⁸¹ *ibid*.

¹⁸² United Nations Office for Drug Control and Crime Prevention (n 170) 35.

¹⁸³ *ibid*.

¹⁸⁴ *ibid*.

7.6.4 Establishing intergovernmental networks aimed at sharing information

Money laundering is a transnational crime and one of many conducts increasing levels of corruption.¹⁸⁵ To detect it and hold its perpetrators liable, states must cooperate with each other and exchange information useful for investigative purposes, prosecution, recovery and forfeiture of assets or funds.¹⁸⁶

7.6.5 Monitoring and regulating international credit transfers

Banks or financial institutions, particularly those in the West, should monitor international credit transfers in order to detect suspicious transactions and ensure that individuals do not transfer funds or assets with which their source of origin is questionable. Acknowledging that international credit transfers involve money being transferred from one bank to another, that is, from a local bank and a bank in a foreign territory; these institutions should monitor such transactions in accordance with the United Nations Commission on International Trade Law (UNCITRAL), which developed rules for international credit transfer of funds.¹⁸⁷

UNCITRAL was adopted on 15 May 1992 as a soft law instrument, urging and recommending national legislative bodies to incorporate the UNCITRAL Model law in their legal systems.¹⁸⁸ UNCITRAL ‘applies to credit transfer where any sending bank and its receiving bank are in different States.’¹⁸⁹ UNCITRAL defines a credit transfer as:

The series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. A payment order issued for the purpose of effecting payment for such an order is considered to be part of a different credit transfer.¹⁹⁰

Chapter II of UNCITRAL sets out the obligations of the parties.¹⁹¹ Article 7 sets out instances where a payment order by a receiving bank other than the beneficiary's bank can be

¹⁸⁵ Jay S Albanese, *Transnational Crime: Oxford Bibliographies Online Research Guide* (Oxford University Press 2010) 17.

¹⁸⁶ Lester M Joseph, ‘Money Laundering Enforcement: Following the Money’ (2001) 6 *An Electronic Journal of the U.S. Department of State* 11-14.

¹⁸⁷ Chiara Giorgetti, ‘International Norms and Standards Applicable to Situations of State Fragility and Failure: An Overview’ in Hassane Cissé *et al* (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (World Bank Publications 2012) 290.

¹⁸⁸ Silvia Fazio, *The Harmonisation of International Commercial Law* (Kluwer Law International 2007) 125.

¹⁸⁹ United Nations Commission on International Trade Law, Article 1(1).

¹⁹⁰ *ibid* Article 2(a).

¹⁹¹ *ibid* Articles 5-12.

accepted or rejected, while Article 9 provides for instances wherein a beneficiary bank may accept or reject a payment order.

Generally, international credit transfers involving large amounts of funds are often done electronically.¹⁹² The scope of UNCITRAL is not restricted to electronic credit transfers even though 'it was the explosive growth of electronic credit transfer system' that led to the creation of the law in the first place.¹⁹³ The reason why the Model Law is not limited to the electronic credit transfers is because many credit transfers begin with a paper-based payment order followed by an inter-bank payment order in electronic form. Though easy to use, the electronic transfer system has its disadvantages, and one of the main reasons is that the sender of the funds may not be easily identified. In such instances, Articles 7(3)(c) and 9(2)(c) provide for solutions when a credit transfer has to be made and the sender is unidentifiable or where information of the sender is unsatisfactory or lacking.

Interstate transfer of funds are not prohibited. What makes such transfers illegal is when individuals transfer illicitly obtained funds. It is not unusual for senior public officials to embezzle or steal from public funds, transfer such funds from one foreign bank account to another in an effort to hide the origin of the funds or to simply hide the funds. To address this problem, states must be urged to enact laws aimed at monitoring credit transfers so that suspicious transactions could be detected and where there are reasonable grounds for an investigation to be conducted, it must be done timeously.

7.6.6 Encouraging inter-bank collaboration and cooperation within and beyond African

It could be argued that banks or financial institutions can find themselves explicitly or implicitly contributing to the escalating levels of corruption. They may do this by providing banking services to corrupt public officials or any other person to transfer or hide stolen or illicit funds. A bank's role in the perpetration of corruption is not limited to its involvement or relationship with its clients. Banks can also engage in acts of corruption among themselves, for example, through collusion or price-fixing. It is important for laws, regulations, or agreements to be established to ensure that transactions made by different banks in different territories, do not amount to a wrongful or illegal conduct aimed at yielding private gains for the bank or any other third party.

¹⁹² See Emmanuel Laryea, *Paperless Trade: Opportunities, Challenges and Solutions* (Kluwer Law International 2002) 141.

¹⁹³ UNCITRAL Model Law on International Credit Transfers, A/47/17 (1992).

For example, the Basel Committee on Banking Supervision established 29 Core Principles for Effective Banking Supervision.¹⁹⁴ The Basel Committee is a group of international banking supervisory authorities established by governors of central banks of the Group of Ten States (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States). The purpose of the Committee is mainly to 'enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide'.¹⁹⁵

With recent corruption cases involving three South African Banks (Investec, ABSA Bank Limited and Standard Bank), coupled with the role played by the Central Bank of Nigeria in the corruption venture by former President Abacha, and many other corruption cases involving African banks, African Central Banks should develop principles, agreements or policies aimed at managing transactions among themselves or transactions between themselves and other banks across the globe.

7.6.7 Initiation process for the recovery of assets and funds

Foreign governments should take the initiative to assist African States in recovering illicitly obtained assets or funds. For example, during the 2011 Arab uprisings, the Swiss government took an initiative (without waiting for a request for MLA) and decided to be the first state in the world to freeze assets owned by Zine El Abidine Ben Ali former President of Tunisia from 1987-2011, Muhammad Hosni El Sayed Mubarak, former President of Egypt from 1981 to 2011 and their associates held by its financial institutions.¹⁹⁶ The instantaneous measure by the Swiss government was based on two main reason: first, to avoid movement of any illicitly acquired assets from one financial centre to another in an effort to evade justice; and second, to signal the states of origin or

¹⁹⁴ Also known as the Basel 29 Core Principles, these principles serve as a framework of universally applicable minimum standards for sound supervisory practices and strengthening the global financial system. See Basel Committee on Banking Supervision, 'Core Principles for Effective Banking Supervision' <<http://www.bis.org/publ/bcbs230.pdf>> accessed 16 July 2017.

¹⁹⁵ Jakob de Haan *et al*, *Financial Markets and Institutions* (3rd edn, Cambridge University Press 2015) 100. See also *Bärbel R. Dorbeck-Jung*, 'Challenges to the Legitimacy of International Regulation: The Case of Pharmaceuticals Standardisation' in Andreas Føllesdal *et al* (eds), *Multilevel Regulation and the EU: The Interplay Between Global, European, and National Normative Processes* (Martinus Nijhoff Publishers 2008) 106.

¹⁹⁶ Rita Adam, 'Innovations in Asset Recovery: The Swiss Perspective' in Hassane Cisse *et al* (eds), *The World Bank Legal Review: Legal Innovation and Empowerment for Development* (World Bank Publications 2013) 260.

victim states that the Swiss government will accept requests for international MLA for misappropriated assets be returned.¹⁹⁷

7.6.8 Development and enactment of national laws on the freezing, seizure and confiscation of stolen funds and assets

Before assets or funds are recovered or returned to their state of origin, two processes need to take place: freezing and confiscation, seizure, or forfeiture.¹⁹⁸ These processes are important for the following reasons: on the one hand, when a foreign government freezes illicit funds or assets transferred to its territory, it prevents the perpetrator or any other person from using such funds or from further imminent transfers. On the other hand, assets or funds are seized, forfeited, or confiscated in order to frustrate the perpetrator from using them, together with their proceeds. To ensure that the amount or equivalent value of the assets or funds, together with their proceeds are returned to the state of origin, the foreign government in question must enact laws explicitly stipulating the importance of such processes, how they will be conducted, how assets and funds will be returned and international cooperation.

For example, the Federal Council of Switzerland enacted the Foreign Illicit Assets Act (FIAA)¹⁹⁹ which has been in force since 1 July 2016.²⁰⁰ The Act was enacted to govern the:

The freezing, confiscation and restitution of assets held by foreign politically exposed persons or their close associates, where there is reason to assume that these assets were acquired through acts of corruption, criminal mismanagement or by other felonies.²⁰¹

Section 3 of the Act of the FIAA sets out support measures. The section urges the Confederation, within its efforts, to provide assistance to the state of origin to obtain restitution of the frozen assets.²⁰²

The Federal Department of Foreign Affairs (FDFA) and the Federal Office of Justice (FOJ), after consulting with one another may provide technical assistance to the state of origin. The FOJ and the FDFA may:

¹⁹⁷ *ibid* 261.

¹⁹⁸ See Brun *et al* (n 151) 5-8.

¹⁹⁹ Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act (FIAA) Act of 18 December 2015).

²⁰⁰ <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/unrechtmaessig-erworbene-gelder.html> accessed 22 July 2017.

²⁰¹ FIAA, Article 1.

²⁰² *ibid* Article 11.

- a. Assist in the training of the competent authorities and provide them with legal advice;
- b. Organise bilateral or multilateral conferences or meetings; and
- c. Second experts to the country of origin.²⁰³

Furthermore, the Act also provides for the transmission of information to the state of origin.

Article 13 of section 3 of the FIAA provides that the Money Laundering Reporting Office Switzerland (MROS):

May transmit to its counterpart abroad in the country of origin any information, including bank information, that it has obtained under the provisions of this Act in order to permit that country to prepare a request for MLA from Switzerland or to complete an insufficiently substantiated request.

7.6.9 Observation and implementation of the recommendations of the Financial Action Task Force

In 1989, an intergovernmental and ‘policy-making body’ on the promotion of the necessary political will among states to bring out national legislative and regulatory reforms within their borders was established.²⁰⁴ The Financial Action Task Force (FATF) was created to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, financing terrorist activities, financing of the proliferation of weapons of mass destruction and other related threats to the integrity of the international financial system.²⁰⁵

There are currently thirty-seven (37) members of the FATF,²⁰⁶ two of which are regional organisations, the European Commission and the Gulf Co-operation Council.²⁰⁷ The FATF has nine (9) associate members, three of which are African-based:

- i. The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) was established in 1999 following the signing of a

²⁰³ *ibid* Article 12(2).

²⁰⁴ Marc Penna, ‘The ‘Pre-investigative’ Role of Financial Intelligence Units in Recovering Assets’ in Katalin Ligeti and Michele Simonato (eds), *Chasing Criminal Money: Challenges and Perspectives On Asset Recovery in the EU* (Bloomsbury Publishing 2017) 269.

²⁰⁵ *ibid*.

²⁰⁶ Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong China, Iceland, India, Italy, Ireland, Japan, Republic of Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States. Observer states are Saudi Arabia and Israel.

²⁰⁷ <http://www.fatf-gafi.org/about/membersandobservers/> accessed 22 July 2017.

Memorandum of Understanding by seven States²⁰⁸ to combat financial crimes in the region;²⁰⁹

- ii. The Middle East and North Africa Financial Action Task Force (MENAFATF) was inaugurated in November 2004 to support and ensure that its Member States adopt and implement internationally recognised anti-money laundering and counter-terrorism financing standards;²¹⁰ and
- iii. The Task Force on Money Laundering in Central Africa (Groupe d'Action contre le blanchiment d'Argent en Afrique Centrale (GABAC)) was created in December 2004 by the Heads of State of the Central African Economic and Monetary Community to combat money laundering and financial terrorism.²¹¹ The GABAC has six (6) member states and four (4) regional representatives: Cameroon, Central African Republic, Chad, Republic of the Congo, Equatorial Guinea, Gabon, the Governor of the Banks of the States of Central Africa, the President of the CEMAC Commission, the President of the Committee of Police Chiefs of Central Africa and the Secretary General of the Banking Commission of Central Africa.²¹²

Since its establishment, the FATF has developed recommendations accepted as international standards for combating money-laundering, financing terrorism and proliferation of weapons of mass destruction.²¹³ The FATF urges states to implement measures in their national systems in line with its recommendations.²¹⁴

The FATF recommendations were developed for Western, Eastern and African states. Below are key recommendations which may be respectfully submitted to be significant and crucial for foreign states to consider and implement in order to enable them to assist African states in freezing, seizing, recovering and returning of assets to the state of origin.

1 Assessing risks and applying a risk-based approach

²⁰⁸ Angola, Botswana, Comoros, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia and Zimbabwe.

²⁰⁹ Jayesh D'Souza, *Terrorist Financing, Money Laundering, and Tax Evasion: Examining the Performance of Financial Intelligence Units* (CRC Press 2011) 139.

²¹⁰ Algeria, Bahrain, Egypt, Islamic Republic of Mauritania, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestinian Authority, Qatar, Republic of Iraq, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen: see Edward V Linden (ed), *Focus on Terrorism: Volume 7* (NOVA Publishers 2007) 175.

²¹¹ <http://spgabac.org/> accessed 9 May 2017.

²¹² 'The Financial Action Task Force and FATF-Style Regional Bodies' < <https://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253361.htm> > accessed 18 July 2017.

²¹³ Dennis Cox, *Handbook of Anti-Money Laundering* (John Wile and Sons 2014) 21.

²¹⁴ *ibid.*

African states must be mindful of this recommendation: it emphasises how states are expected to identify, assess and understand money laundering and risks of financing terrorist activities within their borders, and thereafter, take action.²¹⁵ The latter should include designating an authority or a mechanism to coordinate actions to assess risks, and supply resources aimed at ensuring the risks are effectively mitigated.²¹⁶ When the assessment has been made and risks identified, states are expected to apply a risk-based approach to ensure that the measures to prevent money laundering are proportionate to the known or identified risks.²¹⁷

2 Confiscation and provisional measures

Recommendation 4 of the FATF provides that states be advised to implement legislative measures and other measures similar to those outlined in the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,²¹⁸ Palermo Convention²¹⁹ and the Terrorist Financing Convention.²²⁰ The measures must aim at ensuring that competent authorities are able to freeze or seize and confiscate the following assets or funds without prejudicing the right of a bona fide third parties: (a) property laundered; (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences; (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist organisations, or (d) property of corresponding value.²²¹

3 Financial institution secrecy laws

Recommendation 9 emphasises on the importance of states to ensure that the secrecy laws of financial institutions do not impede the implementation of the recommendation of FATF.²²²

4 Customer due diligence

²¹⁵ FATF (2012-2017), 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations' (2017).

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Article 5(2).

²¹⁹ United Nations Convention against Transnational Organized Crime, United Nations General Assembly, U.N. GAOR, 55th Session, U.N. Doc. A/RES/55/25 (2001), Articles 12 and 13.

²²⁰ International Convention for the Suppression of the Financing of Terrorism, United Nations General Assembly, U.N. GAOR, 54th Session, U.N. Doc. A/RES/54/109 (2000), Article 8.

²²¹ FATF (2012-2017), 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations' (2017).

²²² *ibid.*

Financial institutions should not keep anonymous accounts or accounts created using fictitious names.²²³ FATF's recommendation 10 provides that customer due diligence should be taken by financial institutions when:

- (i) Establishing business relations;
- (ii) Carrying out occasional transactions: (a) above the applicable designated threshold (US\$/EUR 15,000); or (b) that are wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16;
- (iii) There is a suspicion of money laundering or financing of terrorist activities; or
- (iv) The financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.²²⁴

Financial institutions should take the following customer due diligence measures:

- (a) Identify the customer and verify that customer's identity using reliable, independent source documents, data or information;
- (b) Identify the beneficial owner, and take reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements, this should include financial institutions understanding the ownership and control structure of the customer;
- (c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship; and
- (d) Conducting on-going due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted, are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.²²⁵

5 Politically exposed persons

Pursuant to FATF's recommendation 12 and in addition to executing normal customer due diligence measures, additional measures must be taken when a financial institution is in association with a foreign politically exposed person (individuals entrusted with prominent public function, for example, Heads of State, senior government, or military officials).²²⁶

²²³ *ibid.*

²²⁴ *ibid.*

²²⁵ *ibid.*

²²⁶ The measures are as follows:

- (a) The financial institutions must have appropriate risk-management systems aimed at determining whether customer or the beneficial owner is politically exposed;

6 Wire transfers

Recommendation 16 of the FATF provides that when wire transfers or related messages are to be made, financial institutions must require accurate originator and beneficiary information; and that such information must remain unchanged throughout the wire transfer or related message payment chain.²²⁷ Moreover, the institutions must monitor the transfers in an effort to detect transfers which lack such information and thereafter, take necessary measures.²²⁸

7 Reporting of suspicious transactions

Recommendation 20 creates obligations for financial institutions on matters relating to reporting suspicious transactions. A financial institution must, where it suspects or where it has reasonable grounds to suspect that funds are proceeds of a criminal activity or related to terrorist financing, report its suspicion to a FIU.²²⁹

8 Transparency and beneficial ownership of legal persons

Recommendation 24 provides that measures must be taken to prevent the misuse of legal persons for money laundering or financing of terrorist activities.²³⁰ States ought to ensure that information on the beneficial ownership and control of legal persons is adequate, accurate and that such information must, in good time, be able to be obtained or accessed.²³¹

9 MLA: freezing and confiscation

Recommendation 38 reiterates the role of states to provide legal assistance to a victim state in order to identify, freeze, seize and confiscate proceeds of crimes.²³² States must establish authorities capable of taking prompt action when responding to requests from other states to identify, freeze, seize and confiscate laundered property; money-laundering proceeds; predicate offence and

(b) Senior management approval must be obtained for establishing a business relationship, or continuing for existing customers;

(c) Taking reasonable measure to establish the source of wealth and source of funds; and

(d) Conducting enhanced ongoing monitoring of business relationship.

²²⁷ FATF (2012-2017), 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations' (2017).

²²⁸ *ibid.*

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ *ibid.*

²³² *ibid.*

financing of terrorist activities; instrumentalities used in, or intended for use in the commission of money laundering offences; or property of corresponding value.²³³

10 Extradition

Recommendation 39 provides that requests for extraditions relating to money laundering and financing of terrorist activities must be effected constructively and effectively, by taking possible measures without undue delays. The purpose of this is to prevent the states from being safe havens for individuals charged for their role in the perpetration of such crimes.²³⁴

7.6.10 Suppression of bank secrecy laws

When a bank-customer relationship has been established, one of the conditions of the relationship is that a bank is prohibited from providing any information concerning its customer.²³⁵ This may include account information by disclosing or making any enquiry on the deposits or transactions made by the client to the bank or the disclosure of personal information.

Bank secrecy laws create obligation on banks and serve as a privilege afforded to a bank customer that his information will be legally protected from being invaded by third parties.²³⁶ Balancing the obligation and the privilege on the one hand and combating corrupt practices such as money laundering on the other, could be difficult for financial institutions. It is no doubt that secrecy laws are important and necessary, however, they have been or continue to be misused by individuals who desire to profit more than they should. Several individuals, ranging from senior public officials, successful entrepreneurs and the mafia, prefer states with strict secrecy laws, or states that have weak currency, run-away inflation rates or states simply plagued with instability, in order to shield them from financial loss or protect their wealth.²³⁷

An ideal business environment for money launderers is one in which income, corporate and inheritance tax does not exist, together with the inexistence of exchange control laws and

²³³ *ibid.*

²³⁴ The recommendation provides that states are expected to:

- (a) ensure money laundering and terrorist financing are extraditable offences;
- (b) ensure that they have clear and efficient processes for the timely execution of extradition requests including prioritisation where appropriate. To monitor progress of requests a case management system should be maintained;
- (c) not place unreasonable or unduly restrictive conditions on the execution of requests; and
- (d) ensure they have an adequate legal framework for extradition.

²³⁵ <http://thelawdictionary.org/bank-secrecy/> accessed 22 July 2017.

²³⁶ He Ping, 'Banking Secrecy and Money Laundering' (2004) 7 *Journal of Money Laundering Control* 376, 376.

²³⁷ *ibid.*

where secrecy laws prohibit an enquiry into the ownership of bank accounts.²³⁸ One of the key issues launders consider before transferring funds or assets is whether the potential jurisdiction emphasises on banking secrecy and if they offer protection on their assets and anonymity. This enquiry is very crucial for those who wish to hide their money and ensure that it is beyond reach of the law enforcement.²³⁹

Offshore banking involves international banks, major investment firms and accounting firms.²⁴⁰ Due to the special private banking services they provide, they attract 'big-money' customers, who roughly, fall within the US\$ 50 million to US\$ 100 million dollar range of assets and who later take advantage of the bank's discretion and overseas laws.²⁴¹ Offshore bank accounts offer a high degree of confidentiality which is ideal for tax invaders, terrorists, arms and drug traffickers and corrupt politicians or public officials; hence such individuals are drawn to banks that offer anonymity to its customers.²⁴² Though they may be used for legal services, offshore accounts are perfect for those who yearn to profit from money laundering, fraud, corruption and tax evasion.²⁴³ With many individuals exploiting banking secrecy laws to hide their ill-gotten wealth and/or evade tax, confidential clauses must not be seen as being absolute. In fact, banking secrecy laws must be lifted so that the imposition of criminal or civil responsibility may be effective and efficiently imposed against corrupt individuals. It is, therefore, imperative for efforts on anti-money laundering and financial crimes to address issues of bank secrecy.²⁴⁴

In addressing bank secrecy provisions, Article 17 of the AUCPCC urges States Parties to take necessary measures to empower their courts and authorities when ordering confiscation or seizure of banking, financial or commercial documents.²⁴⁵ Moreover, it provides that 'States Parties shall not invoke banking secrecy to justify their refusal to cooperate with regard to acts of corruption and related offences...'²⁴⁶ Lastly, it urges States Parties to enter into bilateral agreements

²³⁸ United Nations Office for Drug Control and Crime Prevention, *Financial Havens, Banking Secrecy and Money Laundering* (United Nations Office for Drug Control and Crime Prevention 1998) 45.

²³⁹ *ibid* 36-37.

²⁴⁰ Lawrence M. Salinger (ed), *Encyclopedia of White-Collar & Corporate Crime, Volume 1* (SAGE 2005) 580.

²⁴¹ *ibid*.

²⁴² *ibid*.

²⁴³ *ibid*.

²⁴⁴ United Nations Office for Drug Control and Crime Prevention (n 238) 106.

²⁴⁵ AUCPCC, 2004.

²⁴⁶ *ibid*.

that waive banking secrecy on doubtful accounts and allow competent authorities to have the right to obtain, under judicial power or any evidence from banks and financial institutions.²⁴⁷

7.6.11 Exercise of soft-co-optive power by foreign governments

Nye defines power as ‘the ability to do things and control others, to get others to do what they would not’.²⁴⁸ Nye further defines soft power as the ‘power which occurs when one state gets other states to want what it wants’ through intangible power resources such as culture, ideology, and institutions. When a state presents this power as legitimate, and when its culture and/or ideology, is attractive, there will be less resistance by other states in that, the latter will wilfully follow.²⁴⁹ In other words, for a state to possess this kind of power, other states must admire its values, they must wish to follow it, and must aspire the level of prosperity and openness of that particular state.²⁵⁰

One cannot ignore the fact that Africa was subjected to hard power²⁵¹ by Western states, which brought about colonialism. Although one cannot erase the injustices of the past, Africa, as a united continent, can look past these injustices and uncover its potential to develop. Since many of its states have gained independence, the first step to development is acknowledgement that African states have limited or restricted anti-corruption resources; hence assistance from developed states such as the United Kingdom, Switzerland and the US is important.

When a state exercises soft power against another state, the outcome will benefit both states, for instance, the Democratic Republic of Congo and Switzerland. Congo is considered among the wealthiest states in the world in terms of untapped natural resources estimated to be worth US\$ 24 trillion dollars and is the second largest diamond producer.²⁵² Sad to say, with all its wealth, DRC is one of the poorest states in Africa with a large portion of its population living on less than US\$1.²⁵³ In addition to this, the DRC is among the worst corrupt states in Africa, ranked 156th out of 176 states by Transparency International in 2016.²⁵⁴ Between 2012 and 2016,

²⁴⁷ *ibid.*

²⁴⁸ Joseph S Nye, ‘Soft power’ (1990) 80 *Foreign Policy* 154, 166-167.

²⁴⁹ *ibid.* See also Shogo Suzuki, ‘The Myths and Reality of China’s ‘Soft Power’’ in Inderjeet Parmar and Michael Cox (eds), *Soft Power and US Foreign Policy: Theoretical, Historical and Contemporary Perspective* (Routledge 2010) 199.

²⁵⁰ Joseph S Nye Jr, ‘The Place of Soft Power in State-Based Conflict Management’ in Chester A. Crocker *et al* (eds), *Leashing the Dogs of War: Conflict Management in a Divided World* (US Institute of Peace Press 2007) 391.

²⁵¹ Nye defines hard power as the ability to use the carrots and sticks of economic and military.

²⁵² David Julius, ‘DR Congo: Richest in Resources Yet Poorest Country in the World’ (Swali Africa, 14 April 2016).

²⁵³ *ibid.*

²⁵⁴ Transparency International, ‘Corruption Perception Index 2016’.

its economy grew only 3 percent on average and in 2016, its inflation accelerated to 4.5 percent.²⁵⁵ Switzerland, on the other hand, is among the least corrupt states in the world ranked 5th out of 176 states by Transparency International in 2016.²⁵⁶ It is one of the world's most stable economies. Switzerland has a low unemployment rate, high skilled labour force, and is considered to have one of the highest Gross Domestic Products (GDP) in the world.²⁵⁷

The common factor between these two States is corruption. With that in mind, it is how the two States dealt with corruption that yielded different results. As one of the least corrupt states in the world, Switzerland could consider exercising soft power against DRC. On the one hand, though it has a stable economy and one of the highest GDP in the world, there is room for economic improvement for Switzerland and it could achieve this through the importation of natural resources, such as diamonds, from DRC. On the other hand, DRC could learn and adopt Switzerland's anti-corruption practices and could be assisted in developing and structuring anti-corruption laws and institutions. Moreover, with Switzerland being a safe haven for corrupt (senior) officials such as Mobutu Sese Seko, who stole at least US\$ 5 billion from the national treasury and hid in foreign bank accounts,²⁵⁸ DRC will receive future assistance from Switzerland for the freezing, seizure and confiscation of ill-gotten wealth. Most importantly, the recovery of funds or assets, could be used to improve its economy and infrastructure, while simultaneously creating employment and evidently decreasing the rate of poverty in DRC. Simply put, there are considerable amounts of benefits which DRC could receive if Switzerland could consider exercising soft power towards the State.

7.7 Summary

Due to their positions in government, political elites and senior public officials have access to state resources. Unfortunately, they misuse their positions to loot or misappropriate state funds or assets. In order to enjoy their ill-gotten wealth, they conceal the origin of the wealth by hiding it in foreign territories or states considered safe havens. To date, recovering stolen or misappropriated funds or assets siphoned or transferred to foreign States remains a huge challenge in Africa. The major reason for this is because Africa, considered a developing continent, lacks the necessary resources

²⁵⁵ <http://www.worldbank.org/en/country/congo/overview> accessed 17 June 2017.

²⁵⁶ Transparency International (n 254).

²⁵⁷ Adam Starchild, *Tax Havens for International Business* (Springer 1994)127.

²⁵⁸ Michael Minkov, *Cultural Differences in a Globalizing World* (Emerald Group Publishing 2011) 58.

to track, freeze, and return the assets or funds wherefrom they were stolen. Lack of resources aimed at recovering or returning assets or funds, often results in investigations stalling for unreasonably longer periods. Moreover, when the political elite transfer ill-gotten monies to foreign States, and are not investigated and brought to justice (due to lack of resources), an impression is created that they are above the law and, most importantly, beyond reproach. This causes them to not only continue stealing or misappropriating public funds or assets, but to do so on a much larger scale or magnitude.

The chain of transferring public funds or assets could be broken if states (victim states and states where the funds were transferred) work together in returning the stolen assets or funds and prevent future transfers of ill-gotten wealth. Cooperation between such states is crucial and for it to exist, victim states, particularly African victim states, need to first make thorough introspection for this reason: it (victim state) needs to acknowledge that it is failing or has failed to trace the assets or funds in question and, as such, needs assistance. Once assistance is sought, the state to which the funds were transferred must be willing to assist the victim state to investigate, trace and return the stolen or misappropriated assets or funds.

There are various strategies which foreign or private commercial banks could use to detect and prevent transfers of ill-gotten wealth. Generally, the privacy of account-holders must be protected from third parties. However, it is important for financial institutions, particularly those in 'safe haven states', to scrutinise the activities of an account holder residing in a foreign territory. Such scrutiny will enable financial institutions to detect unusual or suspicious transactions and to question the source of the assets or funds concerned; and where there is reason to believe that the transaction is suspicious and the source of the assets or funds questionable, a report or complaint must be made to competent authorities.

Financial institutions need to address matters of transparency. Transparency is an important component when one creates a bank account and subsequently making a transaction. Several accounts are in the names of fictitious persons, making it extremely difficult, if not impossible, for banks or financial institutions to trace any information concerning the account owner or its beneficiary. Financial institutions must urge account holders to be transparent when opening bank accounts and on matters relating to the source of the funds, especially when a transaction involves large amounts of money.

Financial institutions must know their customers. In fact, for these institutions to have reliable knowledge of their customers and their banking habits, internal procedures must be established. This argument is supported by the views of banking experts that when banks engage in processes of identifying and verifying the identity of its customers, it enables them to be able to identify illegal transactions such as money laundering. The procedures, also known as ‘know your customer’ standards, must be adhered to as they assist banks in terms of scrutinising their customers’ transactions and, where necessary, report any suspicious activity to relevant law enforcement agencies.²⁵⁹

Foreign territories are ideal destinations for corrupt perpetrators to hide their illicit gains; as such, foreign governments have a critical role in eradicating corruption in Africa. For assets to be recovered and returned, victim states must seek assistance from other states that are in a position to provide intelligence and other investigative resources. Suffice to say, for cooperation between governments to be complemented and strengthened, they must comply with instruments on the recovery and return of assets and mutual legal assistance; most importantly, the states must have the willingness to combat corruption.

The act of tracing, freezing, seizing or forfeiting and returning of assets or funds to a victim state achieves two things: first, it serves as a deterrent. It can be a preventative tool that may be used to deter corrupt and future perpetrators from committing acts of corruption. Moreover, it will serve as a reminder that in as much as senior government officials are not allowed to steal and siphon funds overseas, their illicit wealth and proceeds thereof, will be stripped should they be found guilty of corruption or any related offence; second, it brings victory and hope to the members of the society. People will regain confidence in their legal or investigatory system. Moreover, the stolen funds and their proceeds, if any, will be used for the greater good. The next chapter is the conclusion.

²⁵⁹ Sarah Jane Hughes, ‘Policing Money Laundering Through Fund Transfer: A Critique of Regulation Under the Bank Secrecy Act’ (1992) 67 Indiana Law Journal 283, 323.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

It is generally accepted that every society is affected by corruption. However, its effects on the African continent are undeniably tremendous. To understand its nature, the extent and impact on the continent, a socio-legal perspective had to be adopted. Adopting this approach, the researcher examined how different African societies perceive corruption and argued that their perceptions play a significant role, especially with regard to formulating a generally accepted legal definition as well as its criminalisation. National and international efforts put in place in an effort to curb corruption were identified and analysed. It is argued in this study that although it is essential for states to have national anti-corruption legislative instruments and institutional mechanisms in place, the possible eradication of corruption is not entirely dependent on such mechanisms. In fact, it is highly dependent on the existence of a strong and active political will. The latter enables proper development of anti-corruption mechanisms and further validates correct implementation of anti-corruption instruments and functioning of anti-corruption institutions. Additionally, it is argued that a strong political will is the *sine qua non* for the facilitation of state cooperation in curbing corruption.

Adopting a socio-legal approach in this study yielded important findings on corruption in Africa. Nonetheless, despite proper planning of the study, its design was not without flaws. In Chapter 1, it was asserted that the geographical focus of this study would be on the African continent. In spite of the fact that the study was carefully designed, unavoidable limitations were, however, encountered. For example, some national anti-corruption instruments and reported cases of corruption were either inaccessible or documented in a language in which the researcher is functionally illiterate (such as French, Portuguese or Arabic). Such national instruments needed expert translation, a facility which would have been so desired but unfortunately, unavailable. This limitation resulted in the study examining and analysing national anti-corruption instruments and cases of at least twenty African states, most of which are predominantly English-speaking.¹

Notwithstanding the limitations, the study revealed, among other things, that corruption is deeply entrenched both in the formal and informal sectors of African life and has become a way

¹ Algeria, Angola, Botswana, Cameroon, Democratic Republic of Congo, Ghana, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritius, Namibia, Nigeria, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

of life, the logics of negotiations and a culture of 'giving' in order to get something done. In understanding and combating this phenomenon, it is submitted in this study that its definitional elements must first be evident. Due to its nature and despite existing scholastic efforts, it became apparent that there is no universally acceptable definition of corruption. Additionally, it was revealed that existing national and international anti-corruption instruments merely describe rather than define corruption. Though it could be argued that the adoption of a watertight definition of corruption may be a herculean task, for the former to be realised, it is paramount for the typology of corruption to be delineated through the classification of existing corrupt practices and how they are perpetrated, together with the labels given to these prohibited practices and their perception by society. In light of this, two arguments were advanced in Chapter 2: first, that corruption has been unified with the daily lives of the society; and second, that a watertight definition that contains or captures all the kinds of corruption may be a staggering task as such a definition should reflect the various perspectives and understanding of corruption by societies.

Generally, the functioning of a society depends on the identification and fulfilment of societal needs. For the needs to be realised, power needs to be vested in individuals (elected or appointed) who will ensure that public resources are rightfully administered. For these individuals to perform their duties, selflessness must exist on their part. That is, collectiveness, not individuality, must be promoted. In essence, the needs of the people must be greater than the leaders' individual needs. Unfortunately, it is argued that where there is corruption, the element of selflessness in the discharge of public functions is compromised, thus resulting in the reign of individualism and the disregard or subordination of collective societal needs, together with the disablement of government administration, development and economy. This subsequently aggravates or widens the poverty gap; unemployment and inequality violates peoples' rights, threatens checks and balance and the rule of law. In Chapter 3, it is argued that despite the fact that all states are affected by corruption, countries react differently to the phenomenon. While some states make efforts to detect, monitor and prevent corruption, resulting in its minimisation, others become unsuccessful in developing anti-corruption mechanisms, leading to its continuous existence. In such states, corruption thrives as it inspires lack of transparency, unaccountability, malfunctioning of state institutions and jaundiced judiciary.

A State's anti-corruption efforts ought to be guided by international instruments. The international community has developed international instruments that serve as a framework for

States to develop anti-corruption mechanisms. Such instruments promote good governance principles, transparency and accountability; they criminalise corrupt practices; set out preventative measures which states parties should consider; and urge states to assist and cooperate with each other. In Chapter 4 of this study, it was revealed that international instruments do not define corruption. Alternatively, the instruments simply describe corruption by setting out prohibited practices. Moreover, mindful of the corrupt practices outlined in these instruments, some of them criminalise illicit enrichment. Additionally, the instruments set out standards which public officials are expected to uphold in the performance of their official duties. Furthermore, they provide that the imposition of criminal responsibility must not be limited to natural persons: in addition, it should be extended to juristic or legal persons for their role in the perpetration of corrupt practices.

As argued in this study, the fight against corruption is not dependent on existing national or international instruments or mechanisms that are in place. In fact, for corruption to be curbed, a strong political will must be evident. The existence of this will depends on the realisation and acknowledgement of corruption and its effects on society, government administration, economy and development. Additionally, the existence of political will warrants proper implementation of anti-corruption instruments and effective functioning of anti-corruption institutions. In essence, political will is what African states need to possess for proper mechanisms to be established and successfully implemented. For this reason, it is respectfully submitted in this study that where there is no political will, that state will serve as a cradle for corruption.

As argued in this study, grand corruption has significant effects on a state, particularly its economy. The last phase in the perpetration of grand corruption by senior government officials is often the transfer of ill-gotten wealth to foreign financial institutions. The unfortunate consequence of such illicit transactions is that it impedes the socio-economic development of the state wherefrom the funds or assets were stolen, while simultaneously developing the state whereto the funds are transferred. To prevent the latter from taking place, inter-state cooperation and mutual legal assistance are crucial in the detection of surreptitious financial transactions and their return thereof, together with their respective proceeds. In Chapter 7, it is argued that senior officials who occupy positions requiring them to transparently and honestly administer state funds or assets, often misappropriate, steal or embezzle state resources for their own private gains. Moreover, it is argued that such individuals create various banking accounts in states considered to be safe havens. Since Africa is a continent of emerging economies, it is unfortunate that it lacks proper resources

aimed at detecting and monitoring corruption, particularly surreptitious transactions. In this regard, assistance from foreign governments becomes crucial in the fight against corruption in Africa.

Additionally, the prohibition of providing banking investigative authorities with banking details of an account holder could be seen as a barrier to combating corruption. The protection of a customer's information by a financial authority is justifiable. Nonetheless, the protection in question hinders investigative processes where the customer in question launders money, creates bank accounts under various aliases, or makes several surreptitious transactions. For anti-corruption authorities to be able to detect corrupt transactions and monitor illegal banking activities, banking secrecy laws ought to be reconsidered, and where possible, lifted in order to enable law enforcement authorities to scrutinise suspicious banking accounts or transactions.

In this study, it is submitted that the perpetration of corruption in the public sector is disturbingly boundless compared to the private sector. In addition, the perpetration of petty corruption is high compared to grand corruption. In addressing the former, states need to consider and find ways to reform their public sectors with specific reference to an increase in remuneration. This reformation will deter public officials, particularly junior public officials, from engaging in corrupt practices with the intent to supplement their incomes. Although many African states are emerging economies, it is important for African countries to, at least, consider and be (politically and economically) willing to increase the remuneration packages of their public servants. If this could be achieved, it is hoped that many African states would be one step closer to curbing corruption.

As argued in this study, no state is immune to corruption. In light of this, it is argued that there are three issues which tend to emerge in the understanding of corruption and its impact in society as follows: first, there is division within the universal community concerning whether or not the consequences of corruption could be perceived as good or evil. Although perceptions may be subjective, the impact of corruption is profound as it invades vulnerable developing systems with unquestionably virtuous intentions to create a better place for the general public; second, anyone who convinces himself to execute an act of corruption, has the intention of reaping the intended benefits as well as putting his rights and needs above everyone else. In so doing, such an individual alters the social principles or moral standards; and third, it is apparent that corruption consists of several unethical conducts executed by individuals. Depending on the environment where these acts are perpetrated, they can never be perpetrated in the same way and extent. This

suggests that acts of corruption are designed to fit a particular environment, at a particular period, thus enabling it to infiltrate within a system and bend the law.

Generally, in most acts of corruption, there is at least a witness, who, in many cases, could be the victim. Witnesses to corruption often do not report the planning of or the actual or attempted commission of corruption. This is often due to fear of being identified as a whistleblower which may, in other instances, have grave consequences for the witness. Reporting corrupt practices assists anti-corruption institutions in the detection and subsequent investigation of such practices. As such, it is imperative for African states to develop or strengthen existing whistleblower mechanisms, especially their protection since these mechanisms are key in the fight against corruption.

Ideally, corruption in Africa should be completely eradicated. Practically, this seems impossible. The most advanced democracies as well as developed economies are not corruption-free. However, like these advanced democracies and developed economies, there are systems in place that are complemented by the necessary strong and active political will which has been priceless in bringing corruption to a very minimal and tolerable level. African states should aim at bringing corruption within their national territories to a level that is both tolerable and manageable. To do this, it is essential that African states develop different legislative and institutional measures aimed at managing incidents of corruption for it to be brought to a tolerable level. For this to be realised, African states must first acknowledge the endemic nature of corruption, how it evolves over time, what triggers it and its effects on its people, institutions, culture and psyche. This acknowledgment should be followed by measures put in place to combat corruption.

In the course of the study, it became evident that there are several tools a state could develop to curb corruption; one of them is the enactment of national instruments. National anti-corruption instruments are crucial in this regard. In this instance, it is, therefore, imperative for African states to enact national anti-corruption instruments that cover various aspects such as money laundering, surreptitious and suspicious financial transactions (both domestic and foreign), as well as unexplained wealth, among others. Additionally, the instruments in question must lay down the prohibited practices and penalties which could be imposed against perpetrators of such practice.

In light of national instruments addressing various aspects of corruption and in an effort to uncover other existing anti-corruption mechanisms on the African continent, this study revealed

that there are several anti-corruption instruments and institutions. Sad to say that many of these mechanisms seem to serve as façades and hardly deter corrupt perpetrators. The implementation of anti-corruption instruments often takes a criminal law dimension since corruption is treated as a crime. Although this approach may be effective against the perpetrators of petty corruption, the same cannot be said against the perpetrators of grand corruption. This approach becomes a minor or unimportant deterrent in the eyes of political elite or senior public officials as their role in government exempts them from punishment. In so doing, impunity impliedly permits senior public officials to be corrupt and remain corrupt. Efforts made by some African states such as Nigeria and Cameroon are acknowledged and applauded in this study. In Cameroon, the establishment of a Special Criminal Court with criminal jurisdiction over individuals who misappropriate public funds of at least 50000000 CFA Francs (equivalent to US\$ 100000) resulted in the conviction of several former senior government officials within the ranks of cabinet ministers and directors of state-run enterprises. In Nigeria, the establishment and functioning of the EFCC and other authorities has led to investigations of several senior government officials such as Sani Abacha, James Ibori, and Diepreye Solomon Peter Alamiyeseigha. In the same way, other African States should learn from this by recognising the significance of holding political elite accountable for their role in the perpetration of corrupt practices. This is evidence of credible active political will in the fight against corruption, but more importantly, the upholding of the rule of law as it ensures that no one is above the law and everyone is subject to the law.

It is also argued that the key to a corruption-free Africa is the understanding and re-engineering of what can be termed a public service consciousness that is based on responsiveness, responsibility and ethics. Although the consideration of this solution may be difficult to realise, it is not only considered possible but also a magic bullet that will alter the sociological landscape and perception of the public service: the way it is run and the manner in which the populace perceives it. The yearnings of a corrupt individual becomes greater as they advance in the perpetration of corrupt practices. This is because they are misguided and convinced themselves that they are, to a certain extent, invincible and that their need outweighs those of others. In such instances, no amount of anti-corruption initiatives can change such a perception. The re-engineering of the consciousness of the public service would require African states to develop ways and means to assist public officials into understanding the significance of how corruption affects people, particularly the poor, the vulnerable and marginalised, who are deprived of

resources and services which they are legally entitled to. This could be done through continuous community engagement in all areas so that public officials may have first-hand sight of how their corrupt practices affect the people. Additionally, public officials will appreciate their offices, respect their oaths and the fulfilment of their official duties in serving the people. In essence, African states need to promote selflessness in the conduct of public service. The mere fact that a person took an oath in a public office suggests that he or she is committed to put the needs of the people first and is determined to ensure that those needs are fulfilled. Furthermore, African states should develop ways to promote ethical principles as they are important in the performance of duties in the public sector. Considering this, the African Union, together with regional and sub-regional bodies, should consider organising regular seminars, conferences or workshops similar to those organised by the International Anti-Corruption Academy, aimed at training civil society organisations and public officials.² Public officials need to understand and be constantly reminded that the performance of their duties must be dictated by the realisation and importance of the needs of the people.

For corruption in Africa to be addressed, numerous stakeholders and movements should come together to fight the scourge. It is argued in this study that political will in the fight against corruption is very crucial: so too is the will of the people. Neither of the wills can exist without the other. It is, therefore, of paramount importance for political elites and civil society actors to be of the same mind, built on the same intention – the eradication of corruption from Africa. Corruption affects society in various ways, and is simultaneously affects the realisation of existing human rights. As such, the fight against corruption is essential for the recognition of human rights. Corruption and human rights have, on numerous occasions, been treated separately. This may be because human rights law does not openly prohibit corruption, and human rights institutions and tribunals hardly ever apply rigorous human rights analysis to the corruption problem and more often than not, human rights defenders and anti-corruption activists rarely work together in fighting corruption.³ Anti-corruption and human rights movements must work together in tandem with each other by engaging and confronting human rights problems influenced by corruption. Rather than

² <https://www.iaca.int/tailor-made-trainings/previous-trainings.html> accessed 25 October 2017.

³ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Bloomsbury Publishing 2014) 7; Saravana SKuma, 'Effects of Corruption on Human Rights' in V N Vishwanathan, *Corruption and Human Rights* (Allied Publishers 2012) 61-63.

finding solutions as individual movements, the latter must unite in finding solutions to corruption and human rights problems.

There is no precise formula to curbing corruption in Africa. Nonetheless, there are key measures which could significantly contribute in fighting corruption in Africa, which African States should consider as follows: ending the culture of impunity; protection of whistleblowers; promotion of transparency in financial transactions and accountability in government administration; promotion of selflessness and ethical standards; and state cooperation in the exchange of resource and intelligence in the detection, monitoring, investigation and prosecution of corruption.

In an effort to comprehend the corruption conundrum in Africa and possible solutions, further research adopting socio-legal perspective should be conducted on individual African States. Such approach will provide an in-depth examination and findings on how African States react and respond to corruption, navigate their challenges and successes in the curbing of corruption. Possibly, findings of such studies could shed light on the true extent and nature of corruption in Africa, its effects and perhaps, provide collective solutions for the African continent.

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