

**A CRITICAL EXAMINATION OF NAMIBIA'S INTERNATIONAL LEGAL
OBLIGATIONS IN TERMS OF THE UNITED NATIONS CONVENTION
AGAINST CORRUPTION IN COMPARISON WITH THE FRENCH LEGAL
SYSTEM**

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Abstract

Corruption is, like elsewhere in the world, a problem in Namibia. Various international, regional and sub-regional legal instruments have been ratified by Namibia which specifically deals with the problem of corruption, including the much-hailed United Nations Convention Against Corruption (UNCAC). The problem is that the incidence of corruption does not seem to decrease in the country despite several national complementary pieces of legislation. In a review of Namibia's obligations in terms of the UNCAC and its compliance thereof, a comparison was drawn with the French anti-corruption system as a methodology of answering the research question. Although France sets a good example at proactiveness in attempting to comply with the UNCAC, it might not provide the best parallel for Namibia. Better examples of good practices may be found on the African continent like in the case of South Africa. Namibia complies with the UNCAC to a certain extent but lacks harmonization of its approach. There seems to be a lack of proper implementation of anti-corruption laws passed by the country.

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DEDICATION

I dedicate this thesis to my parents, *Maria and Adam Skeffers*, without whom I would not be who I am today.

DECLARATIONS

I, Isabella Skeffers, declare hereby that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.

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Isabella Skeffers

CHAPTER 1: INTRODUCTION

‘Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish’¹

Since time immemorial, corruption has been viewed, by most nations, as a momentous hindrance to the economic and political development of any country. Namibia’s initial efforts to address corruption in the legal sphere dates back to the Prevention of Corruption Ordinance 2 of 1928 and the Prevention of Corruption Amendment Act 21 of 1985, both legislation which aimed at addressing corruption, however limited in scope and application they may have been. As the international community became more aggressive in their efforts against corruption, Namibia followed suit and doubled its efforts. This manifested in the Executive taking a more decisive stance against corruption through the initiation of an ad hoc Cabinet Committee on the promotion of ethics and the combating of corruption, which was launched by the then Prime Minister on 5 March 1997.

The aforementioned committee was tasked to do research in the area of corruption and ethics and to eventually compile recommendation for Namibia’s own action plan for combating corruption. In addition, the committee was to consider a

¹ Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption. See <<http://www.undoc.org>>. Accessed on 22/07/06.

definition for corruption². In augmentation of the work of the Executive, various institutional actors were tasked with a kaleidoscope of responsibilities in the prevention and combating of corruption, most noticeable being the Office of the Ombudsman with its Constitutional mandate to investigate corrupt practices.

After a critical examination of Namibia's current anti-corruption legal framework, various issues are presented for consideration. First and most apparent is the existence of the specific anti-corruption legislation, in the form of the Anti-Corruption Act 8 of 2003. The Act essentially deals with the definition of corruption and creates a concomitant Anti-Corruption Commission, tasked with the duty of enforcing the Act. Various miscellaneous Acts supplement the Act by also addressing the corruption problem. In sum, these comprise the national endeavours concentrated at curbing corruption.

Further, Namibia is a signatory to various international and regional conventions on corruption, in tandem with Article 144 of the Namibian Constitution. These instruments include the African Union Convention on Preventing and Combating Corruption³, the SADC Protocol Against Corruption⁴ and the United Nations Convention Against Corruption (which forms the main focus of this paper; also referred to as 'the Merida Convention' or 'UNCAC').

² M Möller *Ethics and Good Governance in Namibia – Public Service Ethics in Africa Country Report: Namibia* (2000) Namibia Institute for Democracy: Namibia 15

³ Adopted by the Assembly of the African Union on 11 July 2005.

⁴ Signed by Namibia on 14 August 2001.

1.1 Literature Review

Corruption is a problem which is experienced the world over, Namibia is no exception. Depending on who you ask, corruption was always a problem in Namibia or it only became a problem after independence. In any event, in August 1996, The Cabinet of the country ‘established an ad hoc inter-ministerial committee to develop a program to combat governmental corruption’.⁵ In 2001, former Prime Minister, Hage Geingob, mentioned the need to “focus on building our institutions and legislative instruments that promote human rights, liberal democracy, a strong civil society, transparency and anti-corruption initiatives”⁶. After several misfires to make this wish a reality, the Prime Minister had to admit in 2004, with the inception of the independent Anti-Corruption Commission that “we know that addressing the problems of corrupt practices, unethical behaviour and accountability require a great deal more than the Ombudsman, the Attorney General, the Auditor General or even the police. Nor does the enactment of codes help much if we don’t have appropriate culture and mechanisms to enforce such behaviour”⁷. Almost ten years after the ad hoc committee, with a new President entering State House, the recognition of the problem had become more apparent. In his inaugural speech, President Pohamba noted that ‘Fellow Namibians, we will continue to pursue the policy of sacrifice and hard work that was initiated by our SWAPO Party Government. As before, there will be zero tolerance for waste and corruption in public

⁵G Lister ‘Global Integrity – Namibia’ (2004) 9
<<http://www.globalintegrity.org/reports/2004/countryebad.html>>. Accessed 22/11/09.

⁶ Lister (note 5 above) 6.

⁷ Lister (note 5 above) 7.

life. I, therefore, make a solemn pledge to you my compatriots, and fellow citizens that I shall set a personal example.’⁸

When considering just one issue of the Insight Namibia Magazine, it is interesting and disheartening to note some corruption trends in its popular ‘Corruption Tracker’. For example, for July 2009⁹, 244 cases where some form of corruption was part of the charges were recorded, while only two cases were resolved in the same month while for the month of August 2009¹⁰, the Magazine reported 247 cases had been recorded, with only one resolved in the same month. According to Transparency International, Namibia is now listed as one of the most corrupt countries in the world. In its 2009 corruption perception index, the organization ranked Namibia as the 56th most corrupt country in the world out of a possible 180. This is one ranking lower ranking than South Africa which many would perceive to be certainly more corrupt than Namibia.¹¹

Much has been said about the Merida Convention in recent debates, relating mostly to its possible effectiveness in addressing corruption. A particular bone of contention in this regard is the lack of an effective review mechanism. During November 2009 the Conference of State Parties to the UNCAC met to discuss a review mechanism.

⁸ H.E. President Hifikipunye Pohamba, Inaugural Address – inauguration of President of the Republic of Namibia (21 March 2005)

⁹ ‘Corruption Tracker’ (July 2009) <<http://www.insight.com.na>>. Accessed 21/09/09.

¹⁰ Ibid, August 2009.

¹¹ See <http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table>. Accessed 27/01/10.

While acknowledging the importance of adopting a review mechanism, and the efforts of the many governments who are committed to the success of this Convention, the UNCAC Civil Society Coalition (Coalition) is disappointed that this mechanism does not adequately reflect transparency, inclusiveness and effectiveness as called for by the G-20 leaders in their September statement.¹²

In essence, the Convention has much to live up to, as it is being afforded Messiah status in the international struggle against corruption. In particular, the Convention is the first international endeavour of its kind aimed at specifically addressing corruption. As the United Nations puts it, ‘the Convention...provides the opportunity for a global response to a global problem. The level of support it has received, measured by the number of countries that have already signed (over 100), indicates both an acute awareness of the severity of the problem, as well as a remarkable political commitment to tackle it’.¹³

The ultimate success of any international instrument depends on the particular interpretation into national law by member states, i.e. proper ratification. The Convention essentially rests on four mainstays, namely: prevention and criminalization of corruption, international co-operation and asset recovery, which each state must aspire to in its enforcement of the Convention in the national legal system. Namibia’s Corruption Act makes provision for the first two pillars, namely prevention and

¹² Transparency International – Press Release. See <http://www.transparency.org/news_room/latest_news/press_releases/2009/2009_11_13_review_mechanism_flawed>. Accessed 23/02/10.

¹³ Press Release by United Nations – 10 May 2005. See <<http://www.unis.unvienna.org/unis/pressrels/2004>>. Accessed 21/02/07.

criminalization of corruption by creating an overseeing body tasked with the obligation of preventing, investigating and ensuring prosecution of corrupt practices.¹⁴ However, little or no attention has been paid to international co-operation and asset recovery, as required by the Merida Convention.

France has put anti-corruption high on the list of priorities in its national agenda. This commitment has manifested in France being the first G8 country to ratify the Merida Convention. Compounding this commitment is France's co-chairmanship in the concomitant 'friends' of the Merida Convention. In its national endeavours, France's institutional attempts at addressing corruption and organized financial crimes includes the Financial Intelligence Unit (Tracfin), established by the Anti Money Laundering Act of 12 July 1990 and the Central Service for the Prevention of Corruption (SCPC).¹⁵

In addition to the institutional mechanisms, the French legal system is particularly strong, as far as its legislative and other administrative mechanisms are concerned, which comprises of 'the central bank account database and the platform for the identification of criminal assets. France is particularly well equipped with legislation on the funding of political parties and in the field of asset seizure'.¹⁶

The sum total of these endeavours is indicative of France's stance on corruption and ultimately means that France can serve as an example of the possible successful integration of international obligations concerning corruption into national law. However, certain shortcomings of the French approach cannot be ignored, such as the

¹⁴ Chapter 3 and 4 of the Anti-Corruption Act 8 of 2003.

¹⁵ See <<http://www.diplomatie.gouv.fr/en/article>>. Accessed 22/02/07.

¹⁶ Ibid.

fact that the country only criminalized the bribery by French nationals of foreign business officials.

As a matter of parallel with Namibia, it is noteworthy to mention the efforts undertaken by South Africa (considering the countries' political history and resultant legal ties) in their approach to the corruption problem. It has been mentioned that –

South Africa, like other countries, is experimenting with a significant reorientation to administrative and preventive action as adjuncts to the limitations of law enforcement in an increasingly sophisticated public sector...corruption is as much about systems as about individual conduct. Hence, codes of conduct, administrative law mechanisms, whistle-blower protection, effective auditing, monitoring and law enforcement systems, and training in and support of ethical conduct are essential components of an ethical environment.¹⁷

South Africa's stance on corruption can best be described as a somewhat amalgam system of interlinking laws, consisting of units with specific mandates in addressing corruption. At the forefront of the cavalry is the Investigation Directorate on Corruption, which forms part of the office of the National Director of Public Prosecutions.

¹⁷ ED Williams 'Anti-Corruption Efforts in South Africa' (2001) Fall/Winter *The Journal of Public Inquiry* [Online] – Fall/Winter 21-24. Available from: <www.ignet.gov.randp>. Accessed on 22/02/07.

Also important in South Africa's institutional initiatives aimed at corruption is the Asset Forfeiture Unit (AFU), tasked with the general mandate of seizing the proceeds of crime. This is a very important component in the efforts against corruption, especially when one considers the actual nature of the crime. It is not enough to merely prosecute and sentence persons guilty of corruption when they can serve their prison terms, content with the knowledge that they can enjoy the proceeds of their crimes once they complete their prison terms. This is the main operational premise from which the AFU proceeds. Indeed, asset forfeiture is one of the four pillars, as abovementioned, on which the Merida Convention is based. Therefore, asset forfeiture has as its key objective 'taking the profit out of crime and removing property which is an instrumentality of an offence'.¹⁸

1.2 Statement of the Problem

The problem which the proposed research seeks to address is why the incidence of corruption in Namibia is not decreasing, despite the country being signatory to several international instruments (including the UNCAC) and having national legislation to that effect.

Corruption poses a phenomenal hindrance to any country's socio-economic development, especially to a developing country such as Namibia. It is therefore of utmost importance that all legal tools be concentrated in the culmination of a streamlined anti-corruption legal framework. This means that all tools must complement one

¹⁸ D William 'The Asset Forfeiture Unit: Seizing the Proceeds of Crime' *The JCPS cluster news* (March 2006), <<http://www.saps.gov.za/docs>>. Accessed 22/02/07.

another and not operate as individual pieces. In other words, proper implementation is called for.

Although being signatory to the abovementioned international conventions, it is still open for debate whether Namibia has in fact successfully translated these conventions into domestic law and whether it is in fact viable for the country to do so. Most important for consideration in the present paper is Namibia's endeavours to translate the Merida Convention, which is of vast significance, into national laws. The question to be asked is whether the successful translation of the Merida Convention would manifest in Namibia being better equipped to address corruption. The interpretation of Article 144 of the Namibian Constitution, as it relates to the application of international law in the country, contributes to the problem in this regard.

It is submitted that a critical review is necessary of whether the Namibian legal framework concerning corruption does in fact fully and effectively integrate its international obligations, as contained in the applicable international conventions and or treaties. This underscores the possibility of Namibia's attempts at curbing corruption being more concentrated, stream-lined and consequently more effective.

1.3 Research Objectives

First, the paper aims to critically assess Namibia's international obligations pertaining to corruption as specifically contained in the United Nations Convention Against Corruption (UNCAC), in an attempt at exposing those obligations and guidelines which are not presently being addressed in the operational anti-corruption laws, by drawing

parallels with the attempts in this regard of other jurisdictions in general. In particular, France shall serve as the main reference point.

Secondly, France has internationally been hailed as the forerunners in the application and compliance of the UNCAC. This paper aims to provide an overview of that country's approach to the compliance of the Convention and therefore consider whether the country provides a good example for Namibia to follow.

Ultimately, the paper aims to expose the vulnerability of the manner in which international law is incorporated into the Namibian domestic law. As a conclusion, the paper seeks to provide relevant recommendations.

1.4 Methods and Materials

The research method shall follow a qualitative approach, with a review of relevant Namibian international treaties and domestic legislation. Relevant academic offerings shall be considered in the process. Essentially, the paper will be informed by qualitative rather than quantitative research. Interviews with persons of interest, both in Namibia and France, will also serve as a means to get practical insight into the workings of the particular systems.

CHAPTER 2: THE LEGAL SETTING

The discussion on which this paper focuses is essentially one of international law. The United Nations Convention against Corruption (UNCAC) is a source of international law. Much has been said about the relationship between international law and domestic legal systems. This relationship has a history which dates back as far as the realization that states fundamentally need to interact with other states; that certain rules need to exist to govern these relationships. In Namibia, the question of international law (especially as it relates to the working of and applicability of Article 144 of the Constitution) is one which has attracted some judicial attention¹⁹ but which still needs some consideration. What follows is an attempt at setting out what the position in Namibia is regarding international law and this should set the framework within which the remainder of the paper operates. Before that, however, a brief excursion is undertaken in order to examine a definition of corruption.

2.1 A definition of corruption

Before delving into the substantial part of this paper, it is deemed necessary to attempt at a definition of the operative term, 'corruption'. It is difficult to pin-point one exacting definition of what corruption is. Although every human being *should* instinctively know what is wrong and what is right, defining the bounds of corruption may become problematic. For example, when is a Christmas gift a bribe and when can you call

¹⁹ An especially important decision taken in this regard is *The Government of the Republic of Namibia and Others v Mwilima and All other accused in the Caprivi treason Trial* 2002 NR 235.

certain employment appointment nepotism? In other words, the dilemma which presents itself is that not all acts which are morally reprehensible are legal issues. In the reverse, not all acts which are illegal or unlawful are necessarily morally repulsive to all persons. In attempting to answer such questions, there are certain yardsticks which can be used to determine when corruption is at play, for example, legal instruments.

Moreover, there are some academic offerings as to what may constitute a definition of corruption. Robert Klitgaard is one such proponent. Klitgaard proposes a formula of what may amount to corruption. The formula being:

$$C = M + D - A^{20}$$

In other words, corruption (C) is equal to monopoly (M) plus discretion (D) minus accountability (A).

Further, the nature of corruption is such that it is almost impossible to measure in practice. This is the very reason why there is such dependence on indices, many of which are based on perceptions. ‘The World Bank and the IMF estimate that over US\$ 1000 billion a year are lost to corruption, representing 5% of world GDP. The African Union reckons that corruption costs African economies over US\$ 148 billion a year or 25% of the continent’s GDP’.²¹

It is therefore interesting to note that a phenomenon that can neither be easily defined nor measured can have such a devastating effect on the world’s economy. Moreover, whenever corruption is referred to in literature, it is always portrayed as a

²⁰ R Klitgaard ‘International Cooperation Against Corruption’ (March 1998), <<http://imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaar.pdf>> Accessed 22/07/06.

²¹ French working paper on anti-corruption (5 December 2006), <<http://www.oecd.org/dataoecd/50/46/38260631.doc>> Accessed 27/01/10.

disease affecting the human race. It is evident then that this occurrence needs thorough study and a serious approach at correction.

2.2 International Law and the Namibian legal system

2.2.1 The Namibian Constitution - Article 144

International law, like in any constitutional democracy, finds its relevance and application in Namibia's supreme Constitution. Article 144 provides the legal basis for the operation and validity of international law within the workings of the Namibian legal system.

The article in question provides that 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'.

International law so referred to include 'international agreements' and 'the general rules of public international law'. International agreements are only those binding upon Namibia under the Constitution.

Before an international agreement can become binding on the Namibian legal system, firstly has to be negotiated and signed by the country's President or a delegate, in terms of Article 32(3)(e) of the Constitution. This is the only requirement which, together with Article 144, provides for the validity of international law agreements in the Namibian legal system. However, as will be demonstrated hereafter, the situation is not as clear cut. Indeed, *while the Constitution does not demand a legal framework for the*

*treaties to be implemented in Namibian domestic law, it is not always possible to obtain the results aimed at by the treaties without any domestic intervention.*²² Horn cites the United Nations Convention against Torture and other acts of Cruel, Degrading and Inhumane Treatment or Punishment as an example, where the Convention explicitly require of State Parties to specifically criminalize these acts in their domestic legal systems.

2.2.2 The Monist/Dualist debate: Where does Namibia fall?

Although the Constitutional provisions are couched as they are however, the question still remains as to how those provisions should be interpreted. A recurring question which applies to the relationship between national and international legal systems is this: to what extent does a national system require or allow itself to accommodate international law within its sphere?

Two opposing theories have developed over time, virtually at two extremes, which both aim at answering this question; namely the dualist and monist approach to international law. Each will be considered in turn at this juncture.

The dualists hold that international law and national law are two distinct entities, which operate independently of each other. This distinction drawn between the two systems by the dualists is based on the particularities of each of the systems. On the one hand, national law has as its subject the relationships between the state and an individual

²² N Horn (2008) 'International human rights norms and standards: The development of Namibian case and statutory law' in A Boesl & N Horn (eds) *Human Rights and the Rule of Law in Namibia* Macmillan Namibia: Windhoek. 142

while international law has as its subject the relationship between states.²³ According to the dualist theory ‘...international law and internal law differ in terms of their objects, sphere of operation, subjects, and sources, and are therefore independent legal systems. Bourgeois dualistic theory contains a definite rational core in that it proceeds from the sovereignty of States and views international and internal law as independent legal systems’.²⁴

The question which therefore presents itself is how this theory operates in practice. Dualist theorists hold that the theory means that a particular rule of international law can only operate in the national system if it is expressly incorporated into that system, usually by way of a legislative enactment.²⁵ It becomes clear then that according to the theory, there is no question of supremacy as each system, as has been said before, operates in its particular individual sphere.

According to the monists, who mainly argue from a natural law stance, the two systems of national and international law operate as two parts of one legal system. The theory, as proposed by theorists such as Kelsen, rejects the notion of *absolute independence*²⁶ of states, which in turn is a manifestation of the need to protect the human rights of all people. There is no necessity to specifically incorporate international law into the national system as its application is automatic.

²³ UO Umozurike *Introduction to International Law* (1999) Spectrum Law Publishers: Nigeria

²⁴ M Saifulin *A Dictionary of International Law* (1986) 92. Progress Publishers: Union of Soviet Socialist Republics.

²⁵ See R Wallace *International Law* (2005) 37. Sweet & Maxwell: London

²⁶ M Shaw *International Law* (1986) 99. Grotius Publications Limited: Cambridge.

Where does Namibia fall? After a reading of the Namibian Constitution, there are those who immediately contend that the Namibian legal system is one which adopts the monist school of thought.²⁷ This was the view taken by Strydom, C.J., in the *Mwilima*²⁸ judgment, where he gave direct effect to the International Covenant on Civil and Political Rights (ICCPR) in granting legal aid to accused persons. It is submitted, however, that a determination on the issue is not always an easy one to make. Indeed, one cannot read the Article in isolation and as such, a conclusion has to be made by having regard to the provisions providing for the procedure in which international law becomes binding on Namibian law. Furthermore, a distinction has to be drawn between customary international law and the law of treaties (which are both relevant, in terms of Article 144). Of particular interest in the present paper, is the latter. To what extent do international treaties signed and ratified by Namibia have to be incorporated into the national legal system by way of legislative enactment, in order to be applicable in the country? The answer to this question eventually becomes a very practical one: a treaty usually has self-executing provisions but then also has those which are not self-executing. Can one then use the treaty, as it is, as a legal instrument in court, if there is no national legislation giving effect to that provision and institute action only on the strength thereof? It is submitted that the answer to this question can only be in the affirmative only as far as the particular Convention does not call for specific legislative (or other) action to be taken on the part of the State Party.

²⁷ See for example F Bangamwabo (2008) 'The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework' in A Boesl & N Horn (eds) *Human Rights and the Rule of Law in Namibia* Macmillan Namibia: Windhoek. 166

²⁸ Note 18 above, page 40.

How important, therefore, is this monist/dualist distinction? According to Jennings and Watts

The doctrinal dispute is largely without practical consequences, for the main practical questions which arise – how do states, within the framework of their internal legal order, apply the rules of international law, and how is a conflict between a rule of international law and a national rule of law to be resolved? – are answered not by reference to doctrine but by looking at what the rules of various national laws and of international law prescribe.²⁹

It is submitted that this is an accurate summation of the issue at hand. It is easy to cursorily place a country's legal system within the proverbial doctrinal box but not so easy to marry this concept when practical workings of the law provide a contrasting picture. It is further submitted that each particular piece of international law should be considered on its own letter and applied accordingly, in order to give full effect to it as being part of the law of Namibia.

2.3 The Evolution of the Namibian National Anti-Corruption Framework

In order to properly delve into the nuances of the UNCAC and Namibia's compliance thereof, a proper historical picture should be painted. What follows is a brief historical outline of how Namibia has treated corruption in terms of the law.

²⁹ R Jennings and A Watts *International Law* (2006) 54. Longman: London.

2.3.1 The pre-independence position

It is quite important to as well consider the legislative position which persisted during the South African dominance of the then South West Africa. Although of limited scope and application, it is the reality that Namibia in fact possessed a legislative framework geared toward fighting corruption, prior to the coming into force of the Anti-Corruption Act. This framework essentially consisted of the Prevention of Corruption Ordinance No 2 of 1928 (hereinafter ‘the Ordinance’), as amended by the Prevention of Corruption Amendment Act No 2 of 1985 (hereinafter ‘the Amendment Act’). This part of the chapter is therefore necessary in order to consider what in fact these legislative provisions catered for in order to have a holistic picture of how the anti-corruption legal framework evolved.

It must be admitted that the Ordinance and its subsequent amendment was a marked improvement on the narrowness of the common law and therein lays its merit. The Ordinance was most probably a realization by the Legislature that the common law was just not sufficient in order to deal with the wider manifestation of the crime of bribery in that it may transcend to include more than just state officials.

The main focus of the Ordinance was to in fact extend the common law on bribery to include cases where agents corruptly accept or obtain or attempts to obtain gratification in return for doing or failing to do the business of his principal.³⁰ The

³⁰ Section 1 of the Ordinance defines an ‘agent’ as including “any person employed by or acting for another, any person employed or serving under the Administration of the Territory or the Government of the Union or any municipality, village management board or any other local authority at present existing in the Territory or which may hereafter be created, or employed by or acting for any company, society or voluntary association, and also includes the trustee of an insolvent estate, the assignee of an estate

Ordinance also makes it an offence to offer such gratification to an agent. However, the Ordinance was still a far way off from adequately addressing the issue of corruption.

The Ordinance in its original form had several noticeable shortcomings. First, the Ordinance did not cover the situation where the principal is not a public official and could therefore be punished for common law bribery. In other words, the Ordinance did not criminalize any possible transgressions by a principal. Secondly, the Ordinance did not cover the situation where a person attempted to offer gratification to an agent, only when an agent attempted to obtain such aforementioned gratification. In amplification, no definition for the term 'corruptly' was provided by the Ordinance, although corruption was evidently the main purpose and focus of the Ordinance.

Hence, the Amendment Act came into being in 1985. The Amendment had the effect of substituting the entire Ordinance, save for the definition section. Although what is surprising is that this substitution in fact contained, in all material respects, the exact same wording as the Ordinance. What changed however was where before the Ordinance created the offence of corruption and a maximum imprisonment sentence, the Amendment in fact gave no specific name to the offence and provided no particular direction to a convicting court tasked with sentencing, except that a convicted person could be sentenced as if he had committed the common law crime of bribery. It is not surprising therefore that there are no judicial decisions of note in which the Ordinance was enforced.

assigned for the benefit of or with the consent of creditors, the liquidator of a company which is being wound up, an executor of the estate of a deceased person, the administrator of a trust, and the legal representative of any person who is of unsound mind or is a minor or is otherwise under disability”.

It should be mentioned at this juncture that several other miscellaneous statutory provisions in some way or other deals with either bribery or corruption.³¹ However, the most important to note is the Public Service Act 13 of 1995. This Act generally deals with the administration of the Public Service and the question of ethics is therefore a central theme in the Act. Several provisions deal with the activities of persons who fall within the scope of the Public Service. Important in this regard is particularly section 24 of the Act, which deals with several activities considered to be misconduct in the Public Service. The section provides for seventeen variations of misconduct, pertinent however to this discussion are particularly subsection 25(f), (g) and (l) which generally create the offence of using the public service in order to promote or further private interests.

The conundrum or shortcomings with this legislative framework as it was is the fact that no holistic, comprehensive approach was taken to in fact ensure the proper criminalization of corruption. In most cases (particularly the Public Service Act), the provisions only made the particular behaviour a matter of misconduct and therefore not necessarily criminally reprehensible. As a consequence of this approach, offenders merely got the proverbial slap on the wrist as in the case of the Public Service Act which makes an offender vulnerable to suspension and possible termination of employment as the ultimate punishment.³² This approach ensures that no cases ever reach the State prosecution stage. Also, no provision is made for the return of the proceeds gained from

³¹ Section 45 of the Prisons Act 8 of 1959, as substituted by section 24 of Act 24 of 1981; Section 50(k), (l) and (m) of The Customs and Excise Act 91 of 1964; Section 141 of the Insolvency Act 24 of 1963, as substituted by section 20 of Act 14 of 1985; Section 73 of the Land Bank Act 13 of 1944; Section 10 and 11 of the Namibian Broadcasting Act 9 of 1991; Section 33 (1),(5) and (6) of the Sea Fisheries Act 29 of 1992; Section 19(1) of the State Finance Act 3 of 1991; Section 13 of the National Housing Enterprise Act 5 of 1993 and section 19(1) of the National Transport Corporation Act 21 of 1987.

³² Section 26 of the Public Service Act 13 of 1995.

the activities of corrupt officials and other persons. In fact, this species of provisions can be interpreted and perceived to essentially undermine the very existence of common law offence of 'bribery'.

2.3.2 The Common Law

It is trite that in order to ascertain Namibia's common law position, it is helpful to look to the position as it was in South Africa before Namibia gained its independence. This approach is necessary in view of the Namibian Constitution which provides that 'all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court'.³³ By such Constitutional decree, Namibia inherited a plethora of South African legislation, as well as the Roman-Dutch common law tradition.

The South African authorities are unanimous on the issue of corruption as far as that country's common law and statutory provisions are concerned. At common law, no particular and comprehensive definition existed for the crime of corruption, as we understand the crime today. However, the equivalent at common law is the crime of bribery. The authorities generally make a distinction when considering bribery, as far as it relates to the person making the bribe (the briber) and the person to whom the bribe is being offered (the bribee).

It is necessary to fully appreciate the crime of bribery in light of its historical context. It is necessary for the giving of gratifications to state officials in order for them

³³ The Namibian Constitution, Article 140.

to do their duties or not to do such duties to be punished in an open and democratic society. This is so because it is expected of state officials to do their duties without them being induced to do so by some promise of a gift or other gratification. Bribery has been considered as criminal behaviour as early as the Roman Empire where the *lex Julia repetundarum* as enacted by Julius Caesar punished state officials who accepted gifts in order for them to either do or refrain from doing something in their official capacity. What is interesting is that in the Roman-Dutch tradition it was as well bribery to in fact offer gratification to any spouse, child or relative of the public official.³⁴

In his judgment in *S v. Chorle*³⁵, Schreiner J.A., synoptically set out the common law position on bribery as it stood in South Africa at that time and pinned the historical roots of the crime of bribery down to the Placaats of the States General of the United Netherlands, which were promulgated in 1651 and 1715. As has been accepted in a number of judicial decisions, the ‘working definition’ for the crime of bribery has been the following: ‘It is a crime at common law for any person to offer or give to an official of the State, or for any such official to receive from any person, any unauthorized consideration in relation of such official doing, or abstaining from, or having done or abstained from, any act in the exercise of his functions’.³⁶

Alternatively, ‘bribery (as a briber) consists in unlawfully and intentionally offering to or agreeing with a State official to give any consideration in return for action or inaction by him in his official capacity’. On the other hand, bribery as it relates to the

³⁴ JRL Milton *South African Criminal Law and Procedure* (1982) South Africa: Juta & Co.

³⁵ *Rex v Chorle* 1945 AD 487, 492

³⁶ *Ibid* 487 and *Rex v Patel* 1944 AD 511. This definition is one advanced by Gardiner & Lansdown, *South African Criminal Law* Vol II 985.

bribee is ‘committed by a State official who unlawfully and intentionally agrees to take any consideration in return for action or inaction by him in an official capacity’.³⁷

It is an essential element for the common law crime of bribery for the bribee to be a state official. If the person who is being offered gratification as an inducement is not a state official, the crime of bribery is not committed. The question which however arises is who in fact qualifies as a State official? This question does not seem to evoke an unequivocal answer amongst the authorities, since the term ‘state authority’ has enjoyed wide application and interpretation. However, various judicial decisions act as a guideline in deciding who in fact falls within the definition of State authorities and include *inter alias* police officers, an assistant stock inspector, a price control inspector, a court interpreter and an excise officer.

It seems from the authorities that in order for a person to be considered a state official, he or she must exercise some kind of power on behalf of the state. In the decision of *Rex v Patel* it was actually held that the words used in the definition by Gardiner and Lansdown ‘in the exercise of his official functions’ should not be interpreted too narrowly and may be held to include ‘in the carrying out of the legal duties resting upon him’.³⁸ This clearly demonstrates the disparaging position at common law where each judicial officer and every academic writer has his or her own viewpoint and therefore a situation persists where one is faced with more than one definition and twice as many interpretations of those definitions.

³⁷ Milton (note 34 above) 219.

³⁸ *Rex v Patel* (note 36 above) 511.

It should however be understood that the South African Anti-Corruption Act³⁹ has in totality replaced the common law crime of bribery and as such the aforementioned issues are moot in that country. According to the section 3 (Part 1 of Chapter 2) of the Act, the general offence of corruption consists of –

3. Any person who, directly or indirectly –
 - (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
 - (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –
 - (i) that amounts to the –
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out of performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
 - (ii) that amounts to –
 - (aa) the abuse of a position of authority;

³⁹The Prevention and Combating of Corrupt Activities Act No. 12 of 2004.

- (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules;
 - (iii) designed to achieve an unjustified result; or
 - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
- is guilty of the offence of corruption.⁴⁰

⁴⁰ In addition to the General offence of corruption as created in section 3, the Act creates Offences in respect of corrupt activities relation to specific persons (Part 2); Offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification (Part 3); Offences in respect of corrupt activities relating to specific matters (Part 4); Miscellaneous offences relating to possible conflict of interest and other unacceptable conduct (Part 5) and Other offences relating to corrupt activities (Part 6).

CHAPTER 3: AN OVERVIEW OF NAMIBIA'S INTERNATIONAL ANTI-CORRUPTION OBLIGATIONS

This chapter is an overview of the most salient international obligations (both binding and non-binding) which Namibia must adhere to in the field of anti-corruption. Although the UNCAC is the main focus of this paper, it is still important to consider all relevant obligations which Namibia must comply with, in the interest of completeness. Namibia is signatory to various international anti-corruption mechanisms. The mechanisms place a myriad of both binding and non-binding obligations on the country in its fight against corruption. According to Transparency International,

the common frameworks provided by international anti-corruption conventions serve to:

- Facilitate international cooperation in the control and sanctioning of corruption in order to address a cross-border phenomenon
- Provide internationally agreed reference points, useful for reforming governments, citizens and donors
- Create peer pressure on governments, especially when bolstered by an effective review process
- Promote collective pressure on the private sector

- Provide for fora in which governments, and in some cases non-governmental actors, can meet to discuss corruption issues, align concepts and review anti-corruption efforts.⁴¹

3.1 The United Nations Convention Against Corruption

The United Nations Convention against Corruption (UNCAC or ‘the Convention’), is the first binding international attempt at curbing the incidence of corruption in such a holistic manner. The Convention was adopted by the General Assembly of the United Nations in 2003 and came into force with its thirtieth ratification on 14 December 2005. Namibia signed the Convention on 9 December 2003 and consequently ratified it on 3 August 2004.⁴²

The Convention provides for various measures which should be taken by a ratifying state. When one reads the Convention, it becomes interesting to consider and identify the lines of negotiation which probably preceded the writing of the Convention. The substantive part of the Convention is divided into six sections:

- Preventive measures
- Criminalization and law enforcement
- International cooperation
- Asset Recovery
- Technical assistance and information exchange

⁴¹ See <http://www.transparency.org/global_priorities/international_conventions>. Accessed on 11/09/09.

⁴² On signatures and ratifications, see generally <http://www.unodc.org/unodc/crime_signatures_corruption.html>. Accessed 26/09/07.

- Mechanisms for implementation

It is almost impossible and pointless to attempt at discussing each and every section of all the articles. Therefore, what follows is an overview of the most salient provisions contained in these sections.

3.1.1 Preventive Measures

This section of the Convention places both mandatory and optional obligations on States Parties. In essence, the section provides strategies which State Parties must adopt in order to prevent the incidence of corruption in their respective jurisdictions. These include preventive anti-corruption policies and practices⁴³; preventive anti-corruption body or bodies⁴⁴; public sector⁴⁵; codes of conduct for public officials⁴⁶; public procurement and management of public finances⁴⁷; public reporting⁴⁸; measures relating to the judiciary and prosecution services⁴⁹; private sector⁵⁰; participation of society⁵¹ and measures to prevent money-laundering⁵². It is evident that the provisions target both the public and private sector. The Convention calls for relevant policies and procedures aimed at the prevention of corruption, which relate to the operation of the public service, including how officials are hired, promoted, trained etc. and developing relevant codes of conduct for public officials.

⁴³ Article 5

⁴⁴ Article 6

⁴⁵ Article 7

⁴⁶ Article 8

⁴⁷ Article 9

⁴⁸ Article 10

⁴⁹ Article 11

⁵⁰ Article 12

⁵¹ Article 13

⁵² Article 14

A very critical issue which the Convention addresses in this section is the question of the judiciary and prosecutorial service. Although the need to sustain and respect the independence of the judiciary, the Convention does however encourage States Parties to adopt such measures which will limit opportunities for corruption among members of the judiciary. What is an important issue addressed by the Convention (and often overlooked by domestic legal systems), is corruption in the private sector. The Convention places obligations on States Parties to put in place appropriate regulations regarding accounting and auditing standards. Concomitant with these standards is an obligation to prescribe ‘effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures’⁵³. The participation of society in the prevention of corruption is also emphasized. Finally, States Parties are generally required to put such measures in place which would allow them to effectively regulate and supervise the transmission of money, in a bid at preventing money laundering.

3.1.2 Criminalization and law enforcement

This is probably the crux of the entire Convention: how to criminalize acts of corruption and how to enforce those laws in an effective manner. The section covers various actors, including public officials, persons in the private sector and legal entities. Some of the more interesting mandatory criminalization the Convention calls for include⁵⁴:

⁵³ Article 12 (1)

⁵⁴ The Convention however includes the caveat ‘as may be necessary’ when placing these obligations and specifically requires intention to be an element of the offence.

bribery of national public officials⁵⁵; bribery of foreign public officials and officials of public international organizations⁵⁶; embezzlement, misappropriation or other diversion of property by a public official, whether for his own benefit or that of another person or entity⁵⁷; laundering the proceeds of crime⁵⁸ and the obstruction of justice⁵⁹. Apart from these mandatory provisions, the Convention requires the State Parties to *consider (i.e. making these provisions non-mandatory)* criminalizing the following: trading in influence; abuse of functions; illicit enrichment; bribery relating to the private sector; embezzlement of property in the private sector; concealment (this is the concealment of property by a person who was not necessarily involved in the commission of the corrupt act but who knows the property is a result of corrupt acts but persists in the concealment of the property).

As it relates to law enforcement, the Convention lays down specific requirements in which manner persons guilty of the crimes aforementioned should be dealt with. As provided for by Article 30, ‘each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence’. Furthermore, State Parties are encouraged to consider measures which may be necessary to enable the confiscation of the proceeds of crime.⁶⁰ In the same article, it is made a requirement that State Parties take all necessary steps to make the identification, tracing, freezing or seizure to enable eventual confiscation.

⁵⁵ Article 15

⁵⁶ Article 16

⁵⁷ Article 17

⁵⁸ Article 23

⁵⁹ Article 25

⁶⁰ Article 31

What makes the article interesting is that the property which is eligible for confiscation is both those which are the proceeds of a crime under the Convention and ‘property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention’⁶¹. This effectively takes out profitability in the corruption equation. The provisions further target bank secrecy laws; which poses a real impediment to the investigation of crimes. Article 31(7) provides that ‘[...] each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy’.⁶²

Witnesses, experts and victims of these crimes are also protected, including their relatives.⁶³ These provisions are mandatory but do not necessarily require legislative action, only for ‘appropriate measures’ to be taken. Furthermore, whistle-blower protection is made a non-mandatory provision, with states only required to consider incorporating measures into its domestic legal system. It is submitted that in Africa especially, this might not be good enough to afford persons acting in good faith by reporting corruption protection from intimidation. As far as institutional requirements are concerned, article 36 calls for States Parties to **ensure** the existence of specialized law enforcement bodies which specifically are tasked with fighting corruption. More importantly, these bodies are required to be given their necessary independence as well

⁶¹ Article 31(1)(b)

⁶² Article 40 further reiterates the need for mechanisms to be in place which can overcome the obstacles placed by bank secrecy laws.

⁶³ Article 32

as adequate funding and training to carry out their functions.⁶⁴ Mandatory jurisdictional requirements are set out in Article 42 which provides that State Parties adopt measures which provide them with jurisdiction where offences committed under the Convention in certain specified instances.

3.1.3 International cooperation

The Convention, recognizing that corruption is a cross-border phenomenon in this age of globalization, identifies the importance of cooperation between States Parties. The Convention creates an automatic extradition system where offences where a national of a requesting State Party is present in another State Party.⁶⁵ Furthermore, Parties are required to assist one another during investigations, prosecutions and other judicial proceedings relating to offences under the Convention. Lastly, an obligation is placed on State Parties to permit the use of special investigating techniques, especially as they relate to electronic and similar technology, to be admissible as evidence in a court of law.

3.1.4 Asset Recovery

Asset recovery is arguably the most important part of the Convention. Indeed, Article 51 states that ‘the return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of

⁶⁴ Article 36

⁶⁵ Article 44

cooperation and assistance in this regard'. The provisions in this chapter are principally focused on the return of the cross-border loss of assets through corruption. This was most probably necessary, if one has regard to the many disparities that exist between different countries' legal systems and the ease with which corrupt persons are able to mobilize their ill-gotten assets across borders. Moreover, as Jorge⁶⁶ rightly points out, 'even money laundering does not mean the same thing in every place'.

Asset recovery can fulfil four essential functions, when implemented effectively:

- (a) it is a powerful deterrent measure, as it removes the incentive for people to engage in corrupt practices in the first place;
- (b) it restores justice in the domestic and international arenas by sanctioning improper, dishonest and corrupt behaviours;
- (c) it plays an incapacitative role by depriving serious offenders and powerful networks of their assets and instruments of misconduct;
- and (d) it furthers the goal of administration of justice while simultaneously repairing the damage done to (quite often, needy) victims and populations and assisting in the economic development and growth of regions, which are then viewed as more predictable, transparent, well managed, fair and competitive, and thus worthy of investment.⁶⁷

⁶⁶ G Jorge [date unknown] 'Notes on Asset Recovery in the U.N. Convention Against Corruption' <<http://www.abanet.org/intlaw/hubs/programs/Annual0316.03-16.06.pdf>> 3. Accessed 27/01/10.

⁶⁷ United Nations Office on Drugs & Crime (2006) *Legislative Guide for the implementation of the United Nations Convention against Corruption* (2006) 23. United Nations: New York

States Parties are required to implement measures which will require financial institutions within their jurisdictions to verify the identity of recipients of high-value accounts. More interestingly, it is required that persons who are known to hold public office (and their relatives and close associates) be subjected to scrutiny of their accounts.⁶⁸ These are some of the measures which have been built into the Convention, in aid of the prevention and detection of transfers of proceeds of crime. Further, various measures have been included relating to the recovery of property, which include, first, the direct recovery of property⁶⁹. This requires State Parties to implement relevant legislation or other mechanisms which would enable an aggrieved State Party to implement judicial proceedings in the court of another, with a view to recovering assets lost through corruption. Secondly, Article 54 requires international cooperation to recover assets through confiscation. State Parties are required to assist one another, to the extent of giving effect to orders (such as freezing and seizure orders) which are issued by a requesting State Party.

3.1.5 Technical Assistance and Information Exchange

State Parties are encouraged to put in place training programmes targeted at its personnel responsible for the fighting of corruption. Subjects for training are suggested for

⁶⁸ Article 52

⁶⁹ Article 53

consideration.⁷⁰ State Parties are further encouraged to study the trends in corruption in their respective countries, in consultation with experts.⁷¹

3.1.6 Mechanisms for implementation

A Conference of States Parties is created by the Convention, the purpose of which is to ‘improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation’,⁷². Although not a direct obligation on States Parties, the chapter is very important as without a review mechanism in place, the working of the Convention would be left largely to chance. In addition, it would not be possible to review the successes and failures or shortcomings of the Convention. The Convention leaves the processes and procedures of the review mechanism largely up to the States Parties to decide on but does require States Parties to provide the Conference with information on legislative and other measures taken in individual countries to implement the Convention.

To date, there has been no real review mechanism put in place, as required by the Convention. However, the Conference of States Parties was due to meet in November 2009, with the main aim of deciding on and putting in place a proper review mechanism. This is an important step to take in order to assure the implementation of the Convention by States Parties. Without such a review mechanism, States Parties will continue the

⁷⁰ Article 60(1)

⁷¹ Article 61

⁷² Article 63(1)

often seen practice of ratifying an instrument without having the necessary intention to fully comply and implement the instrument.

3.2 Regional and Sub-Regional Instruments

Although these Conventions do not form the focus of the present paper, it is however necessary to include a brief note on their obligations, in the interest of completeness. Moreover, it is interesting to identify where the various Conventions overlap and/or possibly conflict with one another. What follows is a brief discussion focusing on the African Union and SADC Conventions.

3.2.1 The African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption (hereinafter ‘the AU Convention’) is an instrument which, arguably, is very necessary and relevant in Africa. Corruption is a problem most, if not all, African countries are facing. Some alarming examples can be recalled across the continent: Mobutu Sese Seko of the Democratic Republic of Congo and General Sani Abacha of Nigeria are just two such examples.⁷³ The AU Convention was adopted by the African Union Heads of State in 2003. According to article 2 of the Convention, the objectives of the Convention are to:

⁷³ See <<http://www.transparency.org>>. Accessed 09/05/06.

1. Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.
2. Promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.
3. Coordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.
4. Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.
5. Establish the necessary conditions to foster transparency and accountability in the management of public affairs.

The Convention is very similar to the UNCAC in the topics it addresses. The AU Convention is divided into 28 articles in total, the main themes running through the Convention being criminalization, prevention of corrupt practices, international cooperation and implementation mechanisms. The Convention provides, in its ‘scope of application’,⁷⁴ a list of acts of corruption, which effectively avoids providing a definition of corruption. Further, the Convention requires specific legislative acts to be incorporated into the national systems of the State Parties, including for the

⁷⁴ Article 4

establishment of national anti-corruption agencies⁷⁵ and the setting up of control measures to ensure foreign companies respect the national legislation of a host country⁷⁶. The Convention also calls for the implementation of whistle-blower protection.⁷⁷ Another important and very Africa-relevant provision is that of article 10, which calls for transparency in political party funding. The Convention addresses corruption in both the public and private sector. Confiscation and seizure of the proceeds and instrumentalities of corruption⁷⁸ are also dealt with. Very important as well, and akin to the UNCAC, is the provisions on bank secrecy contained in Article 17 of the Convention. What is missing in the AU Convention is bribery of a foreign public official. Furthermore, the Convention does not pronounce itself on the level of sanctions a State Party should impose when a person is found guilty of an offence under the Convention, also unlike the UNCAC. Other interesting provisions of the Convention include the punishment of individuals who make false malicious allegations against others⁷⁹ and the provision that public officials declare their assets⁸⁰. As a follow-up mechanism, the Convention creates an Advisory Board on Corruption.⁸¹

⁷⁵ Article 5 (3)

⁷⁶ Article 5 (2)

⁷⁷ Article 5 (5)

⁷⁸ Article 16

⁷⁹ Article 5 (7)

⁸⁰ Article 7 (2)

⁸¹ Article 22. Article 22(5) lists the functions of the Board shall be to:

- a. promote and encourage adoption and application of anti-corruption measures on the continent;
- b. collect and document information on the nature and scope of corruption and related offences in Africa;
- c. develop methodologies for analyzing the nature and extent of corruption in Africa, and disseminate information and sensitize the public on the negative effects of corruption and related offences;
- d. advise government on how to deal with the scourge of corruption and related offences in their domestic jurisdictions;

The AU Convention is a commendable effort on the part of the African Union. It speaks of recognition by the African states of the problem of corruption on the continent. It highlights a commitment towards change which all African nations should aspire to. It should further be noted that the Convention differs from the UNCAC in some respects but only insofar as it lists augmentative provisions. In no way does the Convention conflict with the provisions of the UNCAC. The AU Convention is however not as detailed as the UNCAC.

3.2.2 The SADC Protocol Against Corruption

The SADC Protocol Against Corruption (hereinafter ‘the Protocol’) was adopted and signed by the SADC member states in August 2001. Like the two instruments discussed herein, the objective of the Protocol is informed by ‘the need for a joint and concerted effort as well as the prompt adoption of a regional instrument to promote and facilitate cooperation in fighting corruption’⁸². This ideal can be likened to that of the two other instruments discussed herein; the need for international, cross-border cooperation and assistance in the fight against corruption.

-
- e. collect information and analyze the conduct and behavior of multi-national corporations operating in Africa and disseminate such information to national authorities designated under Article 18 (1) hereof;
 - f. develop and promote the adoption of harmonized codes of conduct of public officials;
 - g. build partnerships with the African Commission on Human and Peoples’ Rights, African civil society, governmental, intergovernmental and non-governmental organizations to facilitate dialogue in the fight against corruption and related offences;
 - h. submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of this Convention;
 - i. perform any other task relating to corruption and related offences that may be assigned to it by the policy organs of the African Union.

⁸² Preamble, SADC Protocol Against Corruption, 2001.

Similar to the AU Convention, the Protocol lists what is termed ‘acts of corruption’ in its Article 3. Included are the straightforward bribery; illicit obtaining of benefits by a public official; the diversion by a public official of state property; undue advantage in the private sector; the exertion of improper influence; the fraudulent use or concealment of property obtained in the course of committing an act under the Protocol. Lastly, the Protocol lists as an act of corruption being involved in an attempt, collaboration and conspiracy as a principal, co-principal, agent, instigator, accomplice or accessory after the fact.

As preventative measures⁸³, the Protocol calls for state parties to adopt measures aimed at, inter alia, the protection of whistleblowers; public education and awareness; access to information and codes of conduct for public officials. In terms of jurisdiction, the Protocol aims to provide States Parties with the widest measure of jurisdiction whilst still recognizing and eliminating the possibility of double jeopardy.⁸⁴ The Protocol mandates States Parties to criminalize the bribing of foreign public officials.⁸⁵

As a mandatory obligation⁸⁶, a State Party is required to rework its national legislation and other measures in order to bring them in line with the objectives of the Protocol. In line with this obligation, is the call for States Parties to develop effective anti-corruption bodies and/or institutions.

⁸³ Article 4

⁸⁴ Article 5

⁸⁵ Article 6

⁸⁶ Article 7

CHAPTER 4: NAMIBIA'S COMPLIANCE WITH THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

After a review of what specifically the United Nations Convention against Corruption (hereinafter UNCAC) calls for, it is now possible to consider the way in which Namibia has internalized the Convention. This Chapter aims to investigate to what extent Namibia has complied with the provisions of the Convention, by looking at the country's institutional framework; its criminalization framework and how the country deals with the proceeds of crime. Finally, the some shortcomings in Namibia's approach to the UNCAC will be highlighted.

As has been stated in Chapter 2 herein, there are divergent views as to what the exact stance of the Namibian legal system is when it comes to international law in its legal system. However, the UNCAC makes it, to a large extent, easy to solve this problem. Indeed, it is submitted that the question of dualist or monist approaches to international law is neither here nor there when one considers the provisions of the UNCAC. The Convention, in most of its provisions, specifically calls for State Parties to take legislative measures in order to give effect to the objectives of the Convention. Alternatively, the Convention requires 'measures' to be taken. As discussed in Chapter 2 herein, the Namibian legal system has gone through various phases as far as anti-corruption measures are concerned, to the point that it is today.

Therefore, what follows is a systematic examination of Namibia's compliance with the UNCAC. For ease of reference, the discussion will start by examining the institutional framework, after which a discussion of the legislative framework will

follow, by making specific reference to which UNCAC provisions are referred to. It is submitted that looking at what Namibia has already done in the fight against corruption is an easier methodological approach, in contrast to considering each and every provision of the Convention. In the end, it should be possible to point out to what extent Namibia still has to incorporate the provisions of the UNCAC in order to reach a state of full compliance. Although full compliance is ambitious for any state party, it is still worth considering.

4.1 The Institutional Framework

As was enumerated in Chapter 3 hereof, the UNCAC, Article 6 requires each State Party to set up preventive anti-corruption bodies. In Article 36, further, State Parties are required to ensure the existence of a body (or bodies) specialized in the combating of corruption through law enforcement. Three things which are spelt out prominently in Article 36 is that the specific body should be granted the necessary independence, appropriate training of personnel and appropriate provision of resources. In addition, Article 46(13) prescribes that State Parties should designate a central body which is responsible for receiving requests for mutual legal assistance. Finally, Article 58 calls on State Parties to consider establishing financial intelligence units, responsible for tracking suspicious financial transactions. According to the UNCAC Legislative

Guide⁸⁷, it is accepted that the obligations referred to in Article 6 and 36 respectively, could be vested in one body.

4.1.1 The Office of the Ombudsman

Although the Office of the Ombudsman came into existence already in 1987 as a result of the Ombudsman for South West Africa Act⁸⁸, the office of the Ombudsman should for all intents and purposes be seen in the context of Namibia's hard won independence from the South African colonial forces. The office is a direct exemplification of the country's response to maladministration and abuse of state power. The Office seeks to act as the protector of the interests of the community by insulating, investigating and bringing prosecutions against those custodians of state power who choose to abuse that power.⁸⁹

Of course, the Constitutional mandate afforded to the Ombudsman is couched in much wider terms than these. In fact, the provisions in the Constitution which are dedicated to the Ombudsman are quite elaborate and protracted.⁹⁰ To this end, only the relevant parts of those provisions shall be considered for the purposes of this paper. Firstly, Article 89 provides the office with institutional independence, in that no member of the Executive

⁸⁷ United Nations Office on Drugs & Crime (note 67 above) 22. The Independent Commission Against Corruption of Hong Kong is listed as an example.

⁸⁸ Ombudsman for South West Africa Act, 1986.

⁸⁹ The South African counterpart, the public protector, is tasked 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 impropriety or prejudice; report such conduct and take appropriate remedial action. See Y Burns (1999) *Administrative Law under the 1996 Constitution* Durban: Butterworths. Page 234.

⁹⁰ A total of six articles are devoted to the Ombudsman (Articles 89 – 94).

or Legislature may interfere with the Ombudsman in the exercise of his or her functions.⁹¹

A very salient and as well interesting proviso relating to the Office of the Ombudsman is Article 91, which sets out the functions of that Office. The Namibian Ombudsman is provided with functions which are much wider in scope than most conventional versions of the office.⁹² Included within the functions of the Office is the duty to ‘investigate complaints concerning alleged or apparent instances of ...by an official in the employ of any organ of Government (whether central or local), manifest injustice or corruption or conduct by such official who would properly be regarded as unlawful, oppressive or unfair in a democratic society’⁹³

Evidently, the popular belief that no anti-corruption mandate had ever existed before the passing of the Anti-Corruption Act and its affiliated Commission is clearly wrong. The question which then presents itself is: what can be the reason for the office’s virtual invisibility? Arguments have been advanced on this front, including the fact that

Although no study has been done so far to assess the performance of the Office of the Ombudsman, it is correct to infer that the visibility of the office has been quite minimal during the first half of its existence. Due to its limited powers, the office of the Ombudsman can only acquire a high profile if citizens know of its

⁹¹ The Namibian Constitution, Article 89 (2).

⁹² SH Bukurura (2002) *Essays on Constitutionalism and the Administration of Justice in Namibia 1990 – 2002* Namibia: Out of Africa Publishers. Page 60.

⁹³ Namibian Constitution, Article 91 (a).

existence, if the legislature is willing to follow through and to some extent, the stature of the individual holding the office is elevated.⁹⁴

The drafters of the Namibian Constitution clearly saw corruption as a problem to be addressed both through legislative and institutional mechanisms. The question which is glaring however is why this fact remains largely unknown and why it was necessary for the Anti-Corruption Commission to be established. A further perusal of the Constitutional provisions clearly reveals that the office of the Ombudsman does in fact possess wide investigation and remedial powers.

Various persons have served in the Office of the Ombudsman and it is incumbent upon them to issue annual reports on the workings and progress of the Office.⁹⁵ Several structural or logistical problems had come to the fore as hindering the office in some measure from performing at its best. In his annual report to Parliament, the then Ombudsman Advocate Kazonguizi lamented that ‘as far as I am concerned the situation cannot be allowed to go on indefinitely and in my opinion the time has come for the office of the Ombudsman to be de-linked from the Ministry of Justice, or for that matter from the Executive...’⁹⁶ The situation which persisted at this time was the fact that the Office of the Ombudsman essentially fell under the auspices of the Ministry of Justice. The latter was in fact totally responsible for providing the former with logistical and financial support. In other words, the Ombudsman’s budget was inextricably linked to

⁹⁴ Bukurura (note 92 above) 63.

⁹⁵ The late Advocate Fanuel J. Kozonguizi, (Acting) Ephraim K.Kasuto, (Acting) Pio Teek (Acting) Justice Mutabanangwe and Biens Gawanas. Presently, Advocate John Walters holds the office.

⁹⁶ Bukurura (note 92 above) 66.

that of the Ministry of Justice and as a result the former could not fulfil its full potential due to financial, administrative and personnel constraints. As was postulated by former Ombudsman Biens Gawanas, ‘the office of the Ombudsman is for budgetary and other institutional arrangements linked to the Ministry of Justice. Mindful and highly appreciative of the assistance rendered to the office by the Ministry, the office of the Ombudsman is, however, also affected by constraints imposed upon the ministry, at times having a negative influence on the exercise of its legal obligations’.⁹⁷ This obviously flies in the face of the constitutionally provided independence of the Office of the Ombudsman.

Apart from the apparent structural problems faced by the Office of the Ombudsman, another constraint faced by the office, especially as it relates to corruption, is the scope of the powers provided to it by the Constitution. The Constitution provides the Ombudsman with powers of investigation but only as far as subpoenaing any person and questioning that person. Furthermore, the Ombudsman is only allowed to investigate complaints which come before it and therefore may not act upon its own initiative or suspicions.

Moreover, “the Ombudsman does not have law enforcement powers and normally fulfils his or her functions through making confidential recommendation to Government Ministries or agencies and seeking compliance through persuasion and negotiation”⁹⁸ It is not surprising therefore that there are no reported cases of corruption

⁹⁷ B Gawanas ‘Office of the Ombudsman, 1990-2000’ in MO Hinz et al (eds) *10 years of Namibian Nationhood* (2000) South Africa: VerLoren van Themaat Centre. P 103.

⁹⁸ Moller, M. (2000: 24).

having been investigated by the Office of the Ombudsman and ending up at the State prosecution stage. It is hardly conceivable that the public would invest its trust in the office while the latter has no clear, concrete remedial powers. The fact that Parliament serves as a veritable watchdog over the Office of the Ombudsman, through the annual reports, exacerbates the difficult position. The question should be asked of how accurate these reports are actually presented and received while the entity receiving is the very same responsible for the bank balance of the one doing the presenting. Therefore, it is possible to perceive some measure of intimidation being exercised over the Ombudsman by Parliament.

The Office of the Ombudsman has to a large extent, been inactive in terms of its mandate to combat corruption in the country. Various arguments can be advanced as to why this is the case, including the fact that the Office lacks visibility. If the citizens do not have knowledge of the existence of the Office, that Office cannot provide much of an impact on the corruption problem. Secondly, as much as the Constitution provides the Office with operational independence, it is arguable whether this manifests in practice, if one has regard to the budgetary arrangements applicable to the office. Practice has it that the Ombudsman does not have its own budget but is linked to the Ministry of Justice (i.e. the Executive). This is problematic for obvious reasons; linking the office to the budget of an already overstretched budget imposes restrictions on the Office which eventually affects its performance.

It should be considered whether this office in fact complies with the provisions of the UNCAC. In terms of Article 6 of the Convention, it is submitted that the Office of

the Ombudsman falls short. The Office of the Ombudsman is not tasked with the implementation of anti-corruption policies and practices. As has been outlined, the Office is responsible for merely the investigation of complaints of acts of corruption. Secondly, it should be considered whether Article 36 of the Convention is complied with when one considers the Office of the Ombudsman. The Article calls for an authority specialized in the fighting of corruption through law enforcement. It is not clear which meaning should be attached to the term ‘specialized’ but it does seem that the drafters of the Convention did not mean for it to mean that corruption should be the sole focus of the envisaged body.⁹⁹

4.1.2 The Anti-Corruption Commission

Although the Anti-Corruption Commission was created by The Anti-Corruption Act No. 3 of 2003, it was only officially launched by the State President in 2006. It is a peculiar situation as it took four years before the office could be opened.

Chapter 2 of the Anti-Corruption Act creates the Anti-Corruption Commission (hereinafter the ‘ACC’). The Chapter establishes the ACC, sets out its functions and powers and provides for the requirements for appointment of the Head (Director) of the body and other staff members. It is interesting to note that the Director and his/her deputy are appointed by the National Assembly, upon recommendation by the President.

As a quick reflection, it is worth reminding at this point that the UNCAC requires State Parties to establish bodies which are responsible for implementing

⁹⁹ United Nations Office on Drugs & Crime (note 67 above) 22.

preventative measures¹⁰⁰ and to be responsible for the fighting of corruption¹⁰¹ (not necessarily the same body). One thing the Convention clearly calls for is the independence and proper financial position of these bodies.

In this vein, the Act makes the Commission and its employees part of the Public Service by designating the latter as a public agency and making the Public Service Act applicable to it.¹⁰² This raises some question about the financial independence of the Commission and of course its overall operational independence.

Section 3 of the Act clearly sets out the functions of the ACC. According to the section, the powers of the ACC include receiving and initiating allegations of corruption; conduct investigations; be active in taking measures aimed at preventing corruption in public and private bodies and to disseminate information to the public about the functions of the commission.

Chapter 3 of the Act provides the commission with very wide investigative powers, which theoretically make the commission independent of any other law enforcement agency when it comes to the investigation of alleged corruption. An interesting provision in this regard is section 26 which provides the commission with the *power to obtain information concerning assets*. What this section empowers the ACC to do is issue a notice to any person under suspicion to provide detailed information on all property belonging to that person. Such a request can also be extended to a person who is suspected of having had financial dealings with the person under suspicion. In

¹⁰⁰ Article 6

¹⁰¹ Article 36

¹⁰² Section 2(3) and (4) of the Anti-Corruption Act.

addition, the Act makes failure to comply with such a request a criminal offence, punishable by a maximum prescribed fine and or a maximum prescribed prison sentence.

The question then is, after an investigation by the ACC, what happens to a case where the Commission has reasonable grounds to believe the person under investigation should be prosecuted? Section 31 provides a noteworthy procedure for the prosecution of persons believed to be guilty of a crime under the Act. In terms of the section, the Director of the ACC must, after completion of the investigation, refer the matter and all relevant information to the Prosecutor-General (PG), who then has the ultimate power to decide whether to prosecute or not, in terms of the office's constitutional powers. Also in line with the Constitutional powers of the PG (power of delegation), the section further provides that the PG may delegate authority to a staff member of the ACC to either prosecute or defend an appeal emanating from a case investigated by the commission. However, this should not be understood as to give the ACC an independent prosecutorial platform as *a person to whom authority is delegated...exercises the powers under that authority subject to the control and direction of the Prosecutor-General.*¹⁰³ The value of an independent prosecutorial platform for the ACC would lie in its ability to gain more respect and support from the public; which is an essential component in the fight against corruption. There would be visible results on the progress of corruption cases which are not muddled in with the mainstream justice system. The speed with which corruption cases are dealt with

¹⁰³ Section 31(3) of the Anti-Corruption Act.

demonstrates the seriousness with which the problem of corruption is addressed with by the state.

4.1.3 The Criminal Assets Recovery Committee

The Prevention of Organized Crime Act¹⁰⁴ (hereinafter ‘POA’) creates a Criminal Assets Recovery Committee, consisting of the Ministers of Justice, Finance, Home Affairs, the Attorney-General and one other person, if deemed necessary. The objects of the committee¹⁰⁵ are generally to act as an advisory body to Cabinet on issues relating to its enabling Act and matters relating to financial assistance of law enforcement agencies. The Act is disappointing as it does not create or provide for the capacitating of any body or bodies to specifically deal with asset recovery. The Committee is merely an advisory body and only has powers of recommendation, as set out in section 81 of the aforementioned Act.

4.1.4 A note on the Institutional Framework

The ACC is definitely a step in the right direction, at least as far as the legislative guarantees are concerned. In reality, however two things are just as important as legislative safeguards. Firstly, justice must not only be done but must also be seen to be done. As such, it is unfortunate that there exists at least a perception in Namibia that the ACC is ineffective to some extent as it only seems to have had success in addressing instances of petty corruption, in most cases amounting to not much more than theft. It is submitted that the ACC could do more in addressing this perception by educating the

¹⁰⁴ The Prevention of Organised Crime Act 29 of 2004.

¹⁰⁵ The objects of the committee are contained in Section 80 of the Act.

public more about its functions vis-à-vis that of the PG. Indeed, when one peruses a snapshot of the work being done by the ACC, the picture does not seem as bleak. The cases dealt with by the ACC range from less serious crimes such as a secretary of a school stealing funds from a Development Fund to local authority irregularities and pronouncing on the difficulties posed by the lacuna in the law relating to party political funding.¹⁰⁶ The Commission reports that in the period 2008/2009, it had received 686 reports of alleged corruption, of which:

- 85 Reports were investigated, but the cases were closed due to a lack of sufficient evidence or because the allegations contained therein appeared to be unfounded.
- 145 Reports were referred to other authorities for appropriate action. Some of these reports were partially investigated and referred whilst the nature of others was such that immediate referral was possible.
- 259 Reports were analysed and found to deserve no action by the Anti-Corruption Commission as appropriate action was already being taken by other authorities or the particular cases did not fall under the mandate of the Commission. In the last mentioned instances the persons that submitted the reports were advised of other possible action that could be considered.

¹⁰⁶ See <<http://www.accnamibia.org>> Accessed 27/01/10.

- 5 Reports received were consolidated with others containing similar information.
- 192 Reports are still being dealt with. Amongst these are six cases which are in the process of being finalised for submission to the Prosecutor-General for possible prosecution under the Anti-Corruption Act, 2003.¹⁰⁷

Moreover, the Office of the Ombudsman still has its constitutional mandate to investigate cases of alleged corruption. Therefore, the ACC should not be seen as the only avenue through which issues of alleged corruption can be addressed. It is interesting to note that there were alleged talks at Cabinet level in 2008 to amend the Constitution. Among the proposed amendments was the suggestion that the powers of the Ombudsman to investigate corruption allegations be removed. 'This appears to be a bid to separate the duties of the Anti-Corruption Commission (ACC) and the Office of the Ombudsman, as some of their functions overlap. The status of the ACC is to be strengthened through inclusion in the Constitution'.¹⁰⁸ To date, there is no record of any work done by the Criminal Assets Recovery Committee. Even so, the powers given to the Committee by its enabling Act does not provide much room for action by the Committee.

¹⁰⁷ Anti-Corruption Commission 'Annual Report 2006 – 2007'
<http://www.accnamibia.org/pnTemp/downloads_upload/anti_corruption_report_0607.pdf> Accessed 27/01/10. p14.

¹⁰⁸ 'Govt to change Constitution' *The Namibian* (17 June 2008).

4.2 The Criminalization Framework

What is just as important as the institutional framework is the criminalization framework applicable in a given State Party. Without criminalizing and (very importantly) penalizing corruption, any good institutional structures would at best be superfluous. The Convention sets out several requirements relating to criminalization of certain acts of corruption.

As was stated in Chapter 2 of this paper, the criminalization of corruption has a history which dates back to before the promulgation of the Anti-Corruption Act in 2003. Before the two Acts, there was only bribery in addition to some vague conscription on ‘corruption’ in terms of the legislation applicable at the time.

4.2.1 *The Anti-Corruption Act: A Novel Situation?*

“In a State where corruption abounds, laws must be very numerous”.¹⁰⁹ It is this line of thinking which makes it a necessary exercise to consider to what extent the Anti-Corruption Act has either amplified or change the common law position.

As a consequence of the very limited and narrow construction of both the common law and statutory implements, as discussed above, it was imperative that the Namibian Legislature introduce a new approach to the criminalization of corruption and bribery in the country. At first glance, the impression created is that the Anti-Corruption Act is an attempt at a holistic approach to the crime of corruption by providing all necessary statutory tools to deal with the crime in one single enactment. The Act

¹⁰⁹ Publius Cornelius Tacitus, 55 – 117 AD, Roman Historian. See: <http://www.anticorruption.info/law_acts.htm>.

expressly includes the common law crime of bribery as a corrupt practice.¹¹⁰ However, the common law position has been modified by the Act in that any person can be guilty of the crime of bribery, provided that person ‘corruptly’ solicits or offers to any person gratification as an inducement to do or not do something. The gratification may be accepted on behalf of the person being offered or on behalf of any other person. However, the novelty about this statutory offence lies within the requirement of ‘corruptly’. The Act defines ‘corruptly’ in very wide terms by providing that

Corruptly means in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to –

- (a) any employment relationship;
- (b) any agreement; or
- (c) the performance of any function in whatever capacity.¹¹¹

From the wording of the proviso, it seems that anybody may be ‘corrupted’¹¹². The couching of corruption in such wide terms is indeed a meaningful departure from the common law crime of bribery. The position now is that the crime is not only confined to activities which must of necessity include a public official, as required by the common law. The provision can indeed be very helpful to a court as it would no longer be

¹¹⁰ Sections 33 and 34.

¹¹¹ Section 32.

¹¹² It seems more logical to use this term instead of ‘bribed’ in light of the spirit and mischief the Act intends to address.

necessary for a presiding officer to agonize over the ambit and definition of the term ‘public official’ as had been the situation at common law. However, it should be noted that the inclusion of the proviso ‘the performance of any function in whatever capacity’ seems to be stretching the bounds infinitely far. The question has to be asked whether this provision might be capable of resulting in absurdities. Without venturing into the various canons of interpretation of statutes, it is a conceivable consequence that just about any ‘function in whatever capacity’ can then fall within the ambit of the Act. Granted, this would give the judge or magistrate much leeway and discretion to decide on matters which come before it. This does however not exclude the possibility that the courts could become overburdened with trivial and vexatious complaints. This submission however sways in view of the fact that a wide statutory provision always wins favour over its narrow and consequently more restrictive alternative.

Apart from including common law bribery, the Act creates several interesting offences, not previously included in the common law, which deserve special mention at this particular point. These offences include corruption of witnesses; bribery of foreign public officials; bribery relating 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.¹¹³ A particularly noteworthy offence created is that of a person attempting or conspiring to commit any offence created by the Act. Also included is the offence of abetting, inducing, inciting or commanding another person to commit the

¹¹³ Sections 39, 40, 41, 42, 43, 44, and 45.

mentioned offences. What is however important in this section is that persons found to be guilty of these offences are punished as if they had, strictly speaking, committed the particular corruption offence.

It is indeed conceded that the Anti-Corruption Act is a significant and progressive departure from the position preceding it, at least as far as the criminal law is concerned. However, the purpose of this section of the work is to in fact consider how significant that departure is. In other words, is there more room for improvement? It is an interesting fact to note that Namibia's Anti-Corruption Act is almost a carbon-copy of the South African Act on corruption.¹¹⁴ What is however glaringly dissimilar is the fact that the South African Act takes a more specialized, all-encompassing approach than the Namibian attempt. Specific in this regard are sections 7, 8 and 9 of the South African Act. These provisions provide respectively for offences in respect of corrupt activities relating to members of the legislative authority, offences in respect of corrupt activities relating to judicial officers and offences in respect of corrupt activities relating to members of the prosecuting authority.

These sections obviously leave no room for misinterpretation or the risk of excluding the sometimes overlooked Legislature and the judicial and prosecuting authorities. Now, the question which comes to the fore is what justification the Namibian Legislature can rely on in defence of the omission to include such specific provisions as the South African counterpart. It is conceded that Namibia is no longer part of South Africa and has full territorial sovereignty but the fact still remains that the

¹¹⁴The Prevention and Combating of Corrupt Activities Act 12 of 2004.

two countries share a special history and legal and political commonality and will. Why then are the judiciary, prosecution and legislature excluded in the Namibian Act? It is surprising that the opposition political parties in parliament did not make more of these exclusions when the Act was tabled for discussion. One has to wonder whether they at all were aware that the Act was a veritable copy of the South African statute. Surely if they were aware, they would have done a comparison and noticed the glaring omission.

Jeremy Pope postulates that the criminal law of any country must essentially comply with certain requirements or yardsticks in order for it to have a measure of success against corruption. These include:

1. Laws against corruption should comply with international human rights standards.
2. Laws should not be seen as being unduly oppressive.
3. There should be clear guidelines on sentencing.
4. Combining the various criminal laws dealing with corruption and secret commissions together in a single law has much merit.
5. Regular reviews of the criminal law framework (including laws of evidence and of the adequacy of existing penalties) are essential.
6. Special provisions may be necessary in corruption cases.
7. Special provisions will be needed to ensure that the proceeds of corruption can be recaptured by the state.

8. Provisions will also be needed to ensure that the crime of corruption is seen to include both the payment as well as the receipt of bribes.¹¹⁵

If, at least for argument's sake, one has to consider Namibia's present anti-corruption criminal law stance in the light of some of these requirements, the results are quite telling. First, it should be asked whether the laws on corruption at present are not repressive. It is difficult not noticing the penalties which are provided for in the Anti-Corruption Act. A person found guilty of an offence under the Act is liable to a fine not exceeding N\$50 000, 00 or to a term of imprisonment not exceeding 25 years, or to both.¹¹⁶ It is a trend in the Namibian judicial system to award suspended sentences and although the provision is peremptory, it still leaves the judge or magistrate with much scope to impose the particular punishment. One should also not lose sight of the possibility of corruption at this level. For these reasons, persons attempting to report persons suspected of corruption may feel that the risk is too great and the reward too small.

The fifth requirement, which relates to regular review, should also be considered. The attitude at the moment in the country is that the Anti-Corruption Act and its Commission is the ultimate in the fight against corruption. However, criminal possibility is advancing at a phenomenal rate and advancement in criminal techniques, including the use of the advancement in technology should be kept abreast with. 'For

¹¹⁵ J Pope (2001) 'Namibia's Anti-Corruption Bill: An Anti-Corruption Commission cannot fight corruption on its own' 6 – 8, <<http://www.iccpr.org.na>>. Accessed 5/05/06.
¹¹⁶ Section 49.

example, the criminal law should be able to redress corrupt corporate practices such as ‘bidding rings’ for public contracts, in which apparent competitors collude among themselves to decide who will get a particular contract and at what price’.¹¹⁷

The sixth requirement in the spectrum should also be considered. In the light of the fact that corruption is in most cases a crime which is conducted in secret, the requirement of special provisions has much merit. One such provision which should be considered, especially in the Namibian context, is that of unexplained wealth. The Anti-Corruption Act does not require of persons to explain assets which they possess which seem to be beyond their means. An introduction of such a proviso might however deem problematic in the Namibian situation in light of the various Constitutional provisions protecting privacy and liberty. However, it could be introduced at the employment level where investigations may be conducted into the asset status of employers and employees alike, especially those in the Public Service. It is quite interesting and worrying that the Anti-Corruption Act does not provide for the forfeiture from a convicted person of the proceeds of his corrupt activities.

Various merits present themselves from a perusal of the Namibian Anti-Corruption Act. These include the wide (although limited) offences created. Also, it is important to note that the Act provides the Magistrate Court with jurisdiction to try cases of corruption.¹¹⁸ This ensures that it is easier for people at all levels to approach the courts for prosecution. Also important is the extraterritorial jurisdiction provided for by

¹¹⁷ Pope (note 115 above) 7.

¹¹⁸ Section 51.

the Act.¹¹⁹ This ensures that persons domiciled or permanently resident in Namibia can be tried for activities which fall within the ambit of the Act but which they commit outside the borders of the country.

4.2.2 Offences created in terms of the Prevention of Organised Crime Act

Although not contained in the specific Anti-Corruption Act, the offences created by the Prevention of Organised Crime Act 29 of 2004 (hereinafter 'POCA') are just as important contributions to the legislative fight against corruption in Namibia. The Act is specifically aimed at addressing offences relating to money laundering, criminal gang activities and certain offences related to racketeering.¹²⁰

Article 23 of the UNCAC stipulates and calls for the criminalization of money laundering in States Parties, through legislative and other measures, as may be necessary. This challenge is taken up in sections 4 to 6 of the POCA. The offences created include disguising the unlawful origin of property¹²¹, assisting another to benefit from the proceeds of unlawful activities¹²², acquisition, possession or use of proceeds of unlawful activities¹²³. The offences created by the POCA by and large comply with the requirements of the UNCAC relating to money laundering. Section 8 of the POCA makes the Act applicable in instances where the acts of money laundering are done

¹¹⁹ Section 50.

¹²⁰ See Preamble of the POCA.

¹²¹ Section 4, Prevention of Organised Crime Act

¹²² Ibid section 5.

¹²³ Ibid section 6.

outside the borders of Namibia.¹²⁴ The remainder of offences¹²⁵ created by the Act does not necessarily relate to corruption and therefore will not form part of the present discussion.

4.3 Confiscation and Forfeiture of the proceeds of crime

A very important pillar and aspiration of the UNCAC is the recovery of assets. Indeed, the entire Chapter V of the Convention is dedicated to this topic. Upon a reading of the chapter under consideration, it becomes clear that the objective behind the said chapter is to address the evil of cross-border transfer of the proceeds of crime. The chapter is aimed at easing the cooperation between States Parties in the process of returning to the country of origin the illicit proceeds of crime. States Parties are expected to grant access to requesting States Parties to their court system and relevant authorities in order to seize, freeze and confiscate the proceeds of corruption.

In Namibia, there are two pieces of legislation (it should be noted here, at the onset, that the Anti-Corruption Act contains no provisions relating to the confiscation of the proceeds of crime) that deal with the confiscation of the proceeds of crime, namely

¹²⁴ Section 8 of the Act provides:

(1) Where an act which constitutes an offence under this Act is or was-

- (a) done by a national of Namibia within Namibia or elsewhere;
- (b) done by any person on a vehicle, ship or other seafaring vessel or aircraft travelling through Namibia, putting into port in Namibia or landing on a landing strip or airport in Namibia; or
- (c) done by any person outside Namibia and other acts forming part of the offence are done or are to be done in Namibia;
- (d) done by any person outside Namibia and the effects of the offence are felt in Namibia,

the person concerned may, regardless of anything in any law to the contrary, but subject to this Act, be tried and punished for that offence by any court which has jurisdiction over criminal offences in Namibia.

(2) For the purposes of subsection (1) an "act" includes any omission or circumstances or other course of conduct which constitutes the offence in question.

¹²⁵ Chapter 4 of the Act creates offences relating to criminal gang activities; trafficking in persons and the smuggling of migrants.

the POCA and the International Co-operation in Criminal Matters Act 9 of 2000 (hereinafter 'International Co-operation Act'). It is interesting to note that the latter Act came into operation in 2001, before the advent of the UNCAC in 2003. Further, the two systems addressing the proceeds of corruption should be distinguished. On the one hand, the POCA deals with the proceeds of crime on the national level while the International Co-operation Act does so, on the basis of cross-border cooperation. The two systems will now be considered in turn.

The POCA, in Chapter 5 deals with the confiscation of the benefits of crime relating to the offences contained in the Act. The Act provides three remedies, namely restraint orders and confiscation orders. In addition, it provides for a system of the realization of property through the forfeiture of property. Of most relevance for this discussion, are the procedures relating to the forfeiture of property and matters relating thereto. Section 51 of the Act provides for a freezing procedure, where the High Court of Namibia may issue an order which prohibits any person from dealing, in any manner, with any property. Section 59 grants the Prosecutor-General the power to apply for an order, the effect of which is to forfeit to the state property which is the subject of a preservation order. The Act further provides protection to third parties who may be aggrieved by a preservation and forfeiture orders.¹²⁶ Furthermore, when the forfeiture order takes effect, the affected property vests in the State and is administered by a *curator bonis*, appointed by the High Court. It should be reiterated at this point that the POCA does not specifically deal with corruption only but relates to various offences,

¹²⁶ Section 65

including the corrupt activity of money laundering. It should be mentioned here that although the Act was promulgated already in 2004, it was used for the first time in 2009 in the much-publicised ‘scanner’ case.¹²⁷ In the said case, the Prosecution of Namibia successfully sought an order against the directors of a company alleged to have been involved in corrupt activities.

The International Co-operation Act should be read together with the POCA, as the former comes into operation when the latter remedies prove insufficient.¹²⁸ In other words, the International Co-operation Act comes to operate in the case where a person who is under investigation holds property in a foreign state.¹²⁹ The Act therefore enables Namibia to request assistance from the foreign state with a view to recovering the property. Of course, the aim of the Act is *mutual* assistance so the same kind of cooperation could be expected from Namibia by a foreign state. However, Schedule 1 of the Act clearly sets out to which particular foreign countries the Act specifically applies. On the other hand, the Act makes it clear that the provisions of the Act do not exclude any other manner of assistance which is not covered by the ambit of the Act.

¹²⁷ PG v Tekla & Others, Case NO. POCA 1/2009, delivered on 14 August 2009.

¹²⁸ Indeed, Schedule 2 of the POCA amends section 1 of the International Co-operation Act, as far as the definitions of ‘confiscation order’ and ‘restraint order’ are concerned.

¹²⁹ Section 19 of the International Co-operation in Criminal Matters Act No. 9 of 2000

4.4 Noteworthy shortcomings of the Namibian implementation of the UNCAC

Although some noteworthy and commendable steps have been taken by the Namibian legislature and government to address the issue of corruption in Namibia, there are however still areas which need necessary attention. Some of the most pertinent areas will be discussed hereunder.

Corruption is a crime usually involving one person in a position of power and another who is in need of the services the former's position can provide. This makes corruption a silent crime where incidences more often than not go unreported. To exacerbate this, the system does not offer sufficient protection for people who step forward ('whistle blowers') and report these crimes. Section 52 of the Anti-corruption Act provides protection to informants in that their identities and/or addresses may not be revealed in any criminal proceedings. Furthermore, the section provides that no 'action or proceedings of a disciplinary, civil or criminal nature' may be brought against a person who assists the Commission in an investigation. What is missing however is the attachment of some kind of penalty which applies in the case of a contravention of the section. There is no guideline as to what happens if a whistle blower is victimized as a result of his/her identity being exposed. What is more, the protection is not absolute as the Act provides specific exceptions to the protection.¹³⁰ This state of affairs is especially discouraging to persons who are innocent and want to report wrongdoings in good faith.

¹³⁰ Section 52(2)

Another problem apparent in the Namibian anti-corruption system is that of a seemingly ineffective institutional structure. The ACC is the only institution which is specifically dealing with corruption. As has been highlighted herein, there are other institutions also tasked with addressing certain components of corruption but these institutions are largely non-operational, for whatever reasons.

Essentially, Namibia's most pressing problem does not seem to be one of bad laws. Indeed, for the most part, Namibia's laws are not the worst, especially considering the direct legislation called for by the UNCAC. The problem seems to lie elsewhere, more specifically, the question seems to be one of implementation. Does that mean that there is a tangible lack of political will?

CHAPTER 5: A COMPARISON: COMPLIANCE WITH THE UNCAC BY FRANCE

France has been chosen as an example to compare the Namibian system with, in terms of compliance with the UNCAC. According to a favourite saying of Prof. Nico Horn¹³¹, there are three ‘systems’ which apply to compliance of international law instruments. The first method is the American way of ratification whereby the country makes so many reservations to the treaty that the instrument does not have the intended effect anymore. The second method is the African method (with Namibia not being an exception), where the treaty is ratified but is not followed by any action aimed at domestication. The third method is the European system (with France not being an exception), where there is a tangible effort on the part of the ratifying state to comply with the provisions of the instrument in question. This approach has something to do with the community pressure which is exerted on member states of the European Union. This serves as the motivation why France has been chosen to serve as a comparative point of reference for the purposes of this paper. In addition, as has been mentioned in the introduction chapter herein, France has shown its commitment to the ideals of the UNCAC by, inter alia, being the first country to ratify the Convention. In addition, at the first conference of States Parties in 2006, ‘France put forward a number of draft resolutions which were subsequently adopted by the conference’.¹³² What follow is the major highlights and also shortcomings of the French domestication of the UNCAC.

¹³¹ Dean, Faculty of Law, University of Namibia.

¹³² G8 Summit *Accountability Report: Implementation Review of G8 Anti-Corruption Commitments*(2009) 21.

5.1 The Relevant Criminal provisions in the French Criminal Code

The criminalization of corruption in the French legal system can be found in its criminal code. Initially, the Code recognized two types of corruption; active and passive corruption. Passive corruption refers to the soliciting or acquiring of an undue advantage by a person in order to perform an act in the course of his/her duties. Active corruption, on the other hand, is the situation in the converse where a person offers or gives a reward to another in order for that person to do something in the course of his/her duties.

In addition, since 30 June 2000, article 435-1 of the French Criminal Code was included the

direct or indirect request or acceptance, without right, at any time, by a European civil servant, a Member State's civil servant or a member of the European Commission, Parliament, European Court of Justice, European Court of Auditors, of offers, promises, gifts...to carry out or abstain from carrying out an act of his duty, mission or mandate or facilitated by his duty¹³³

The act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, directly or indirectly, to a European civil servant, a Member State's civil servant, a member of the European Commission, the European Court of Justice, the Parliament or the

¹³³ Clifford Chance 'Anti-Corruption Legislation – An International Perspective' (November 2008), <<http://www.cliffordchance.com>> 4. Accessed 27/01/10.

European Court of Auditors that he carry out or abstain from carrying out an act of his duty, his mission, or mandate or facilitated by his mission.

(Article 435-2, Criminal Code)¹³⁴

Although it is good to include European foreign officials in the definition, it was still not sufficient, especially having regard to the requirements of the UNCAC as discussed. As such, in 2007, the French included bribery of foreign nationals in countries outside the European Union (EU) by French nationals (including international public international organizations) as a crime in its anti-corruption strategy. In terms of this law, four types of corrupt activities are created, namely:

- Passive corruption of foreign public officials and officials of international organizations,
- Active corruption of foreign public officials and officials of international organizations,
- Passive corruption of international or foreign judicial personnel,
- Active corruption of international or foreign judicial personnel.¹³⁵

It has in fact been held that ‘this broader legal definition of corruption reflects a reality and corresponds to the implementation of international legal instruments adopted

¹³⁴ Ibid 4.

¹³⁵ G8 Summit (note 132 above) 22.

notably in the European Union and the United Nations'¹³⁶. It is however curious why the reality only became relevant in 2007 while the need to include European foreign nationals in the definition was already recognized in 2000. The code further recognizes judicial persons and also corruption in the private sector. Furthermore, whistle-blowers are now protected in the labour code against disciplinary action when providing information in good faith about corrupt activities they became privy to during the course of their employment activities to a judicial officer or their employer.

What is interesting is that France has transposed the provisions of Article 18 of the UNCAC directly into its law by creating the following offences:

- passive trading in influence directed at an official of a public international organization,
- active trading in influence directed at an official of a public international organization,
- passive trading in influence directed at international judicial personnel,
- active trading in influence directed at international judicial personnel.¹³⁷

Apart from these legislative definitions of corruption, there are several prescriptive mechanisms in place which regulate high-risk endeavours. For example, 'elected officials and members of the government have to report their personal wealth at the beginning and end of their term of office. These reports are published in the *Journal Officiel*'¹³⁸.

¹³⁶ T Cassuto 'Effective Legal and Practical Measures for Combating Corruption: The French System' 24

¹³⁷ G8 Summit (note 132 above) 23.

¹³⁸ Ibid 25.

The financial sector is in turn regulated by the monetary and financial code, which requires financial institutions to report any dubious transactions or amounts of money which may have been derived from corruption. In order to make reporting more compelling, the code further makes it a criminal offence for any person to withhold any information on criminal dealings he/she might be aware of.¹³⁹

5.2 The Institutional Arrangements in the French anti-corruption system

Three bodies are mainly responsible for the fight against corruption in the French system; namely:

- *The Service Central de Prévention de la Corruption* (Central Service for the Prevention of Corruption), attached to the Ministry of Justice, performs functions which include training, assistance and promoting corruption control. It draws up an annual report covering various topics.
- *The Mission Interministérielle d'Enquête sur les Marchés* (Inter-Ministerial Unit for Procurement Investigations) and the public service delegation conventions.
- *Traitement du renseignement et action contre les circuits financiers clandestins* (TRACFIN), the unit responsible for collecting intelligence on opaque or suspicious financial transactions and, where necessary, referring its findings to the courts.

¹³⁹ Ibid 28

- FICOBA, the central record of bank accounts, under the authority of the Ministry for the Economy, Finance and Employment, is consulted to identify all bank accounts held in France by an individual or corporate entity.
- The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), part of the Ministry for the Economy, Finance and Employment, has broad auditing and investigation powers, particularly in the area of competition.
- The devolved government services (regional prefectures) have power to control the administrative acts and finances of local authorities.
- The *Commission pour la Transparence Financière de la Vie politique* verifies that elected officials do not gain personal wealth irregularly while in office.
- *The Conseil de la Concurrence*, an independent administrative authority, plays an indirect role in combating corruption by taking action against anti-competitive practices, which often underpin corruption pacts.¹⁴⁰

In addition to these institutions mentioned, is the Central Anti-Bribery Brigade (BCLC), which is attached to the Interior Ministry. What is interesting is that, irrespective of all these regulatory bodies being in place, a study showed that 50% of French companies

¹⁴⁰ Ibid 26. Websites referred to in the text have been omitted.

were faced with corruption and that only 10% were willing to expose these activities to the authorities.¹⁴¹

5.3 Anti-corruption at the Judicial Level

It is of course one thing to prevent corruption and enforce anti-corruption laws but what is also important in this process is the judicial adjudication of acts of corruption. France's substantive criminal law is divided into crimes from most to least serious. The level of the crime determines which adjudication tribunal will hear the matter. At the highest tribunal, *The Tribunal de Grande Instance de Paris*¹⁴² deals with instances of corruption. The public service is so interlinked that experts from other public offices can be acquired to assist in providing presiding officers with technical advice. With the French system being inquisitorial in nature, the presiding officers need this assistance in conducting their investigations in cases of corruption.

Another characteristic of corruption which is imperative to judicial officers is the transnational character of acts of corruption. This of course necessitates cross-border cooperation and mutual *judicial* assistance, which the UNCAC so pertinently calls for. France, being a part of the European Union (EU), is party to various instruments which facilitates this type of mutual assistance. For example, the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU of 2000; The

¹⁴¹ Ibid 27.

¹⁴² Ibid 32.

Convention on the Protection of the European Communities' Financial Interests of 1995 and the Schengen Agreement of 1995.¹⁴³

5.4 Asset Recovery

If nothing else, France is playing a particularly proactive and leading role in addressing the requirements of the UNCAC, including as it relates to asset recovery. Legislative reform has also been taken by the country in this regard. Bill no 1255 has been introduced and considered in the French parliament in 2009, which is aimed at augmenting the country's existing asset recovery system. The Bill aims at widening the scope of assets which are capable of being recovered beyond only corporeal property, so as to include 'intangible assets and rights (sums deposited in bank accounts, company shares, financial assets and other intangible rights, goodwill, loans, etc.)'¹⁴⁴. The bill in addition aims to creating an administrative body tasked with managing assets recovered in accordance with it.

5.5 International Assistance

Recognizing the fact that corruption is a phenomenon which especially plagues the developing nations of the world, France has embarked upon a campaign of assisting its partners in those countries tackling the scourge of corruption. In doing so, the country specifically aims to raising awareness by especially engaging civil society. The country is actively involved in initiatives of the World Bank and the UNODC.

¹⁴³ Ibid 36.

¹⁴⁴ Ibid 49.

CHAPTER 6: LESSONS FROM AFRICA – THE CASE OF SOUTH AFRICA

After an examination of the relevant legal requirements applicable to Namibia and considering the country's anti-corruption strategy and comparing it with the French legal system, this chapter aims to provide an African perspective as well.

Although more developed democracies across the oceans provide good examples of how to go about implementing international instruments and how a national legal system should best conform (as in the case of France), more often than not there are good examples and practices closer to home.

For this reason, it is submitted that this paper would not be complete without also considering some examples closer to home. South Africa has been selected to provide that example. It should however be noted that this section does not attempt to discuss the entire anti-corruption system of this country but to look at some noteworthy advances in the fight against corruption.

6.1 Why South Africa?

South Africa is always a popular comparative State in Namibian legal studies. Not surprisingly as the two countries share a very special history, as Namibia (then South-West Africa) was a protectorate of South Africa as from 1920 until its independence in 1990.¹⁴⁵ The result of this is that the Namibian and South African legal systems, at that time, were identical. After independence, a plethora of South African legislation and case law still remains applicable and relevant in Namibia. For this reason, the South

¹⁴⁵ SK Amoo & I Skeffers (2008) 'The rule of law in Namibia' in A Boesl & N Horn (eds) *Human Rights and the Rule of Law in Namibia* Macmillan Namibia: Windhoek.

African legal system provides a useful reference point, especially considering that country's advanced legal system compared to Namibia's still growing legal system. It is for this reason that South Africa was chosen to provide a comparative viewpoint for the present discussion. Whistle-blower protection and asset forfeiture will form the focal points for the discussion.

6.1.1 Whistle-Blower Protection

Whistle-blowing has somewhat bad connotations attached to it, especially in Africa. However, the nature of corruption is such that more often than not, corrupt practices are brought to light as a result of whistle blowing. In most cases, whistle blowers are persons who experience and witness corruption on a first-hand basis by being somehow involved in an organization, in most cases by being an employee. For this reason, whistle blowers often face intimidation and harassment after blowing the whistle. For this reason, protecting whistle blowers is imperative as their information is priceless in most cases.

As has been discussed in this paper, whistle-blower protection is conspicuously lacking in Namibia's anti-corruption legislation. The South African legislature, on the other hand, has passed very specific legislation dealing with the issue, in the form of the Protected Disclosures Act¹⁴⁶. The Act is informed generally by the South African Constitution and the recognition of the fact that before the Act, South African common

¹⁴⁶ Protected Disclosures Act 26 of 2000.

law and legislation did not protect disclosures by employees about their employers.¹⁴⁷ It is evident from the wording of the Act that the protection of employees **acting in good faith** is the ultimate aim of the Act and that it applies to both the public and private sectors. “Disclosure” enjoys a wide definition in the Act, which effectively widens the scope of the Act’s application. According to section 1(i) of the Act,

“disclosure” means any disclosure of information [sic] regarding any conduct of an *employer*, or an *employee* of that *employer*, made by any *employee* who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to incur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in the promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No, 4 of 2000); or

¹⁴⁷ See generally Preamble of the Protected Disclosures Act.

- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

The Act furthermore defines what a *protected disclosure* is, in terms of which it is a disclosure made to either a legal adviser; an employer and to offices such as the Public Protector and the Auditor-General.¹⁴⁸ In other words, a disclosure will only be protected and therefore subject to the remedies under the Act, if it falls within the definition of a 'protected disclosure'. The Act goes further than just allowing employees to make these protected disclosures, by additionally providing remedies to employees who suffer occupational detriment¹⁴⁹ as a result of making a protected disclosure. Section 4 of the Act provides a number of remedies, which include approaching a labour court and requesting a transfer from that employee's current post or station.

¹⁴⁸ For the complete definition of *protected disclosure*, see section 1(ix) of the Protected Disclosures Act.

¹⁴⁹ Occupational Detriment is defined in section 1(vi) of the Protected Disclosures Act as, in relation to the working environment of an employee, as –

- (a) *being subjected to disciplinary action;*
- (b) *being dismissed, suspended, demoted, harassed or intimidated;*
- (c) *being transferred against his or her will;*
- (d) *being refused transfer or promotion;*
- (e) *being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;*
- (f) *being refused a reference, or being provided with an adverse reference, from his or her employer;*
- (g) *being denied appointment to any employment, profession or office;*
- (h) *being threatened with any of the actions referred to paragraphs (a) to (g) above; or*
- (i) *being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.*

6.1.2 Institutional Framework

Another noteworthy component of the South African anti-corruption strategy, is its anti-corruption framework. The Special Investigating Units and Special Tribunals Act¹⁵⁰ provides

For the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units...¹⁵¹.

The Unit and Tribunal created in this Act, although noteworthy, however require the country's President to issue a Proclamation for specific cases. These cases should be based on certain pre-set alleged grounds, which include –

- (a) serious maladministration in connection with the affairs of any State institution;
- (b) improper or unlawful conduct by employees of any State institution;
- (c) unlawful appropriation or expenditure of public money or property;

¹⁵⁰ Special Investigating Units and Special Tribunals Act 74 of 1996.

¹⁵¹ Preamble, Special Investigating Units and Special Tribunals Act.

- (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- (e) intentional or negligent loss of public money or damage public property;
- (f) offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was [sic] committed in connection with the affairs of any State institution; or
- (g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

In addition to the Special Investigating Units, there is also the Investigating Directorate on Corruption (popularly referred to as ‘the Scorpions’ – now the ‘Hawks’), attached to the office of the National Prosecuting Authority of South Africa (NPA). The primary purpose of the Directorate is to investigate and prosecute instances of alleged corruption. The Directorate was established in terms of Proclamation R14/2000¹⁵². The novelty of the Directorate lay in the fact that it only had to answer to the NPA and ultimately Parliament. In a country where crime is rife and the Police overburdened, the Directorate played an important role in tackling high profile cases. Unfortunately, the office became embroiled in political crossfire. After a Polokwane meeting of the ANC elected Jacob Zuma as their leader in December 2008, cries came from within the party to disband the Scorpions, alleging political interference in their operations. The

¹⁵² Published in Government Gazette No 20997 on 24 March 2000.

Scorpions were investigating serious allegations of corruption against Mr. Zuma. Since the ANC constitutes the majority in the South African Parliament, it was not difficult for them to pass the motion for the Scorpions to be disbanded through parliament. In February 2008, the Scorpions were disbanded and integrated into the National Police Service of South Africa. Of course, this was a bad day for democracy and a terrible perception was created in the minds of the South African people; that some people are above the law.

Despite this unfortunate course of events which lead to the demise of the Scorpions, the Directorate still represents a good example of what an optimum corruption-fighting body should be. That is, specialized, well funded, independent and equipped with the necessary powers of investigation *and* prosecution.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

7.1 Summary of Findings

Certain issues were identified in this thesis, which should be outlined here. Although there is a distinction in theoretical discourse between monist and dualist methods of approach to international law, this approach is not always necessarily relevant to all international instruments. An example is the United Nations Convention (UNCAC) against Corruption, which calls for specific measures to be taken by States Parties. Therefore, Namibia cannot in all instances of international instruments (and certainly not in the case of the UNCAC) claim the operation of Article 144 of the Namibian Constitution through a monistic approach. It is necessary to consider the provisions of each international instrument in turn.

Second, it is apparent from an examination of all applicable legal instruments that Namibia possesses a capable legal structure to fight corruption in the country. However, the laws seem to be enacted on a rather ad hoc basis with some fragmentation being apparent.

Further, although it might at first glance seem that international jurisdictions such as France provide good examples of how to comply with international obligations, they might not be the most valuable and relevant solutions for a country like Namibia. Indeed, upon closer inspection, it becomes clear that jurisdictions closer to home might provide better examples of good practices, as in the case of South Africa.

7.2 Conclusion

This thesis focused on the international legal obligations applicable to Namibia in relation to corruption and focused specifically on the UNCAC. From an examination of the Namibian legal system and its implementation of international law in general and the UNCAC specifically, various vulnerabilities present themselves. However, Namibia is well on its way to a noteworthy implementation of the UNCAC.

7.3 Recommendations

It therefore becomes apparent that constant reform and review of the law is necessary in order to keep up with international law obligations. This is additionally important in the case of fighting a crime like corruption, where the modalities of the crime change as technology advances. In addition, constant reform and review allows a country to take advantage of best practices from other countries.

The Anti-Corruption Act needs to given a thorough overview in order to address some inherent weaknesses. Firstly, the Act needs to include more guidelines on how corruption may be avoided and how organizations can foster ethical behaviour. Secondly, the Anti-Corruption Commission needs to be afforded with wider powers, similar to that of the now defunct ‘Scorpions’ of South Africa.

It is trite that a law is only as good as its implementation. It is recommended, in this vein, that the implementation of anti-corruption laws be done in a consistent and transparent manner. In this regard, politicians and other high-ranking government

officials need to set a better example to the citizens, especially those in the public service.

Further, there needs to be a strengthening and harmonization of the institutions dealing with issues of corruption. As outlined in Chapter 4 herein, the Namibian legislature has created a number of legislative bodies, which all in some way or other are tasked to deal with corruption. Some of these bodies have not been operationalised since their creation. It is recommended that existing bodies be empowered, instead of creating splinter bodies.

Namibia needs to engage fully with its African neighbours in order to take maximum advantage of international co-operation in the fight against corruption. In doing so, the country could gain valuable examples from other countries on how best to address the scourge.

Finally and specifically on the UNCAC: Although this is not a Namibia-specific issue, it is recommended that the Conference of the States Parties to the UNCAC develop, as a matter of urgency, a review mechanism which will further encourage State Parties to comply with the provisions of the Convention. It is however conceded that efforts have been and are being made to this end.

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ANNEXURE 1: ANTI-CORRUPTION ACT (NAMIBIA)

ANTI-CORRUPTION ACT 8 OF 2003

[ASSENTED TO 16 JULY 2003] [DATE OF COMMENCEMENT: TO BE
PROCLAIMED]

(Signed by the President)

ACT

To establish the Anti-Corruption Commission and provide for its functions; to provide for the prevention and punishment of corruption; and to make provision for matters connected therewith.

ARRANGEMENT OF SECTIONS

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CHAPTER 3

INVESTIGATION OF CORRUPT PRACTICES

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- 33 Offence of corruptly accepting gratification
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CHAPTER 1 PRELIMINARY

1 Definitions

In this Act, unless the context indicates otherwise-

"authorised officer" means-

- (a) the Director;
- (b) the Deputy Director;
- (c) an investigating officer appointed under section 13; or

(d) a special investigator appointed under section 14;

"Commission" means the Anti-Corruption Commission established by section 2;

"corrupt practice" means any conduct contemplated in Chapter 4;

"Director" means the Director of the Commission appointed under section 4, and includes a person temporarily acting as Director under this Act;

"Deputy Director" means the Deputy Director of the Commission appointed under section 4.

CHAPTER 2 ANTI-CORRUPTION COMMISSION

2 Establishment of Anti-Corruption Commission

(1) There is established an independent and impartial body known as the Anti-Corruption Commission with such powers, functions and duties as are provided for in this Act or any other law.

(2) The Commission consists of-

- (a) a Director;
- (b) a Deputy Director; and
- (c) other staff members.

(3) The Commission is an agency in the Public Service as contemplated in the Public Service Act, 1995 (Act 13 of 1995).

(4) The Public Service Act, 1995 applies to the Commission, the Director, the Deputy Director and the other staff members of the Commission, except to the extent as provided otherwise by this Act or as is inconsistent with this Act.

3 Functions of the Commission

The functions of the Commission are-

- (a) to receive or initiate and investigate allegations of corrupt practices;
- (b) to consider whether investigation is needed in relation to an allegation and, if so, whether the investigation must be carried out by the Commission or whether the matter should be referred to any other appropriate authority for investigation or action;
- (c) to consult, co-operate and exchange information with appropriate bodies or authorities, including authorities or bodies of other countries that are authorised to conduct inquiries or investigations in relation to corrupt practices;
- (d) to assemble evidence obtained in the course of its functions and to furnish-
 - (i) to any appropriate authority contemplated in paragraph (c) ; or
 - (ii) to the prosecuting authority or any other suitable authority of another country, upon a formal request,

- evidence which may be admissible in the prosecution of a person for a criminal offence or which may otherwise be relevant to the functions of that authority;
- (e) to investigate any conduct of a person employed by a public body or private body which in the opinion of the Commission may be connected with or conducive to corrupt practices, and to report thereon to an appropriate authority within the public body or private body;
 - (f) to take measures for the prevention of corruption in public bodies and private bodies, including measures for-
 - (i) examining the practices, systems and procedures of public bodies and private bodies to facilitate the discovery of corrupt practices and securing the revision of practices, systems or procedures which may be prone or conducive to corrupt practices;
 - (ii) advising public bodies and private bodies on ways of preventing corrupt practices and on changes of practices, systems and procedures compatible with the effective performance of their duties and which are necessary to reduce the likelihood of the occurrence of corrupt practices;
 - (iii) educating the public and disseminating information on the evil and dangers of corruption, including through the publication and distribution of brochures and pamphlets or the holding of public conferences;
 - (iv) enlisting and fostering public confidence and support in combating corruption;
 - (g) to disseminate information to the public about the functions of the Commission;
 - (h) to do anything else that the Commission is required or authorised to do under this Act or any other law or which is necessary or expedient to do for achieving the purpose of this Act.

4 Appointment of Director and Deputy Director

(1) The National Assembly appoints the Director and Deputy Director upon nomination by the President.

(2) Notwithstanding the provisions of the Public Service Act, 1995 (Act 13 of 1995), the President may nominate for appointment as Director or Deputy Director any person whom the President considers suitable and who-

- (a) is of good character and of high integrity; and
- (b) possesses knowledge or experience relevant to the functions of the Commission.

5 Disqualified persons

A person is not eligible to be appointed as Director or Deputy Director who-

- (a) is not a Namibian citizen;
- (b) is a member of the National Assembly or National Council;
- (c) is a member of a regional council or a local authority council;
- (d) is an unrehabilitated insolvent; or
- (e) has been convicted of-
 - (i) theft, fraud, forgery or uttering a forged document, perjury or any other offence involving dishonesty; or

- (ii) any other offence for which a sentence of imprisonment without the option of a fine has been imposed, excluding an offence of a political nature committed before the date of Namibia's independence.

6 Authority card

(1) Upon their appointment the Director and the Deputy Director must each be issued with an authority card, signed by the President.

(2) An authority card issued under subsection (1) is *prima facie* evidence of the appointment of the person concerned.

(3) The Director and Deputy Director must display the authority card to any person in relation to whom they seek to exercise any power or perform any function or duty under this Act.

7 Term of office and conditions of service of Director and Deputy Director

(1) The Director and Deputy Director are appointed on a full-time basis for five years and may be reappointed upon expiry of their term of office.

(2) The conditions of service of the Director and Deputy Director are determined by the President with the confirmation of the National Assembly.

- (3) The Director and Deputy Director may not-
- (a) engage in the day to day management of any business or occupation;
 - (b) take part in the management of the affairs of any political party; or
 - (c) be a salaried employee of any person or organisation.

(4) The provisions of the Public Service Act, 1995 (Act 13 of 1995) in relation to requirements for appointment, tenure of office, conditions of service suspension and dismissal from office do not apply to the Director and Deputy Director in so far as they are inconsistent with the provisions of this Act.

(5) As soon as practicable after their appointment, and thereafter at such times as the Prime Minister may require, the Director and Deputy Director must each furnish to the Prime Minister a statement setting forth particulars of their assets and liabilities, including the nature and extent of any interest which they may have in any business or occupation or in any company or close corporation.

8 Vacation of office of Director or Deputy Director

The office of the Director or Deputy Director becomes vacant if-

- (a) he or she resigns from office by written notice to the President;
- (b) he or she becomes subject to a disqualification referred to in section 5; or
- (c) his or her appointment is terminated under section 9.

9 Termination of appointment of Director or Deputy Director

(1) The appointment of the Director or Deputy Director may be terminated if he or she-

- (a) has failed to comply with a condition of his or her appointment;
- (b) is unable to perform the functions of his or her office by reason of mental or physical infirmity;
- (c) fails to perform efficiently the duties of his or her office; or
- (d) has been guilty of misconduct.

(2) If the question of termination of the appointment of the Director or the Deputy Director arises, the President must notify the Chief Justice who, after consultation with the Judicial Service Commission established under Article 85 of the Namibian Constitution, must within 30 days appoint a board to inquire into the matter and submit a report and recommendations to the President.

(3) The board must consist of-

- (a) a chairperson, being a person who-
 - (i) held office as judge of the Supreme Court or the High Court of Namibia; or
 - (ii) is qualified to be appointed as judge of the Supreme Court or the High Court of Namibia; and
- (b) two other members who are of good character and integrity.

(4) If the question of termination of the appointment of the Director or Deputy Director is referred to the board, the President may suspend the Director or Deputy Director, as the case may be, from exercising the functions of his or her office pending inquiry by the board, but the suspension lapses if the board recommends to the President that the appointment should not be terminated.

(5) The board must inquire into the matter in accordance with such rules as the board may make conforming to the rules of natural justice.

(6) The board must within 30 days after conclusion of the inquiry submit its report and recommendations to the President.

(7) If the President, on receipt of the board's report and recommendations, finds that the Director or Deputy Director, as the case may be, should be removed from office, the President must communicate that finding and the reasons therefor by message to the National Assembly within 14 days after the finding if the National Assembly is then in session or, if the National Assembly is not then in session, within 14 days after its next session starts.

(8) The President must remove the Director or Deputy Director from office upon adoption by the National Assembly of a resolution calling for that person's removal from office.

10 Acting Director

(1) If the office of the Director is vacant or the Director is absent from duty or unable for any reason to perform the functions of his or her office the Deputy Director must act as Director, but the President may appoint another person to act temporarily as Director.

(2) If the offices of both the Director and Deputy Director are vacant or if both the Director and Deputy Director are absent or unable for any reason to perform the functions of their offices, the President must appoint another person with appropriate knowledge or experience to act as Director during such vacancy or temporary absence.

(3) A person acting as Director in terms of subsection (1) or (2) may not act for a period of more than six months.

(4) A person appointed as acting Director while the office of the Director is vacant is entitled to the salary attached to that office for the period that he or she so acts.

11 Duties of Director and Deputy Director

(1) The Director is the head of the Commission and is responsible for the direction, control and management of the Commission.

(2) The Deputy Director performs the functions conferred by this Act on the Deputy Director or as may be assigned to him or her by the Director.

12 Appointment of other staff members of the Commission

The other staff members of the Commission referred to in section 2(2) (c) as may be required for the proper performance of the functions of the Commission are appointed subject to the Public Service Act, 1995 (Act 13 of 1995).

13 Investigating officers

(1) Among the staff members referred to in section 12 the Director must appoint persons to be investigating officers for the purposes of this Act.

- (2) An investigating officer-
- (a) has such powers, functions and duties as may be provided for by this Act or as may be delegated or assigned to the investigating officer by the Director; and
 - (b) must exercise such powers, perform such functions and discharge such duties in compliance with the directions or instructions as may be specified orally or in writing by the Director, the Deputy Director or any other staff member of the Commission superior to him or her in rank.

(3) An authority card must be issued to every staff member appointed as investigating officer in terms of subsection (1), which-

- (a) must be signed by the Director; and

(b) is *prima facie* evidence of the appointment of the person concerned.

(4) An investigating officer must display his or her authority card to any person in relation to whom he or she may seek to exercise any power or perform any function or duty under this Act.

14 Special investigators

(1) The Director, with the concurrence of the Prime Minister, may appoint a person who has expert knowledge in a particular field to be a special investigator to investigate an allegation of corrupt practice, or any aspect thereof, specified-

- (a) in the instrument appointing the special investigator; or
- (b) in a written notice given to the special investigator by the Director.

(2) A special investigator is appointed on a temporary basis as agreed between the Director and the person and must perform his or her functions-

- (a) subject to the control and direction of the Director; and
- (b) on the terms and conditions as the Director and the special investigator may agree.

(3) An authority card must be issued to a person appointed as special investigator in terms of subsection (1), which-

- (a) must be signed by the Director; and
- (b) is *prima facie* evidence of the appointment of the person concerned.

(4) A special investigator must display his or her authority card to any person in relation to whom he or she may seek to exercise any power or perform any function or duty under this Act.

15 Administrative orders

The Director may issue administrative orders, not inconsistent with this Act or the Public Service Act, 1995 (Act 13 of 1995), on the general control, training, duties and responsibilities of staff members of the Commission, and for such other matters as may be necessary or expedient for the good administration of the Commission or the prevention of the abuse of power or neglect of duty, and generally for ensuring the efficient and effective functioning of the Commission.

16 Annual report

(1) The Director must submit to the Prime Minister, not later than 31 March of each year, a report on the activities of the Commission during the previous year.

(2) The Prime Minister must submit the report of the Director to the National Assembly within 30 days after receipt thereof or, if the National Assembly is not then in session, within 30 days after commencement of its first ensuing session.

CHAPTER 3 INVESTIGATION OF CORRUPT PRACTICES

17 Notification to Commission of corrupt practice

(1) Any person may furnish to the Commission information in connection with any matter which that person suspects on reasonable grounds concerns or may concern a corrupt practice.

(2) Information referred to in subsection (1) may be furnished to the Commission orally or in writing, and if orally the informant's statement must be reduced to writing and signed by the informant.

(3) The Director may require from an informant to furnish, in such form as the Director thinks fit, any further information as may be required for purposes of the functions of the Commission.

18 Receipt and examination of allegations

- (1) The Commission must-
- (a) receive information furnished to it by any person who alleges that another person has or is engaged, or is about to engage, in a corrupt practice; and
 - (b) examine each alleged corrupt practice and decide whether or not an investigation in relation to the allegation is warranted on reasonable grounds.

(2) When deciding whether an investigation into an alleged corrupt practice is warranted, the Commission may consider-

- (a) the seriousness of the conduct or involvement to which the allegation relates;
- (b) whether or not the allegation is frivolous or vexatious or is made in good faith;
- (c) whether or not the conduct or involvement to which the allegation relates is or has been the subject of investigation or other action by any other appropriate authority for the purposes of any other law;
- (d) whether or not, in all the circumstances, the carrying out of an investigation for the purposes of this Act in relation to the allegation is justified and in the public interest.

(3) If the Commission decides that an investigation in relation to the allegation is warranted on reasonable grounds, it must decide whether the investigation should be carried out by the Commission or whether the allegation should be referred to another appropriate authority for investigation or action.

(4) For the purposes of performing the functions under this section the Commission may-

- (a) make such preliminary inquiry as it considers necessary; and
- (b) consult any other appropriate authority.

19 Notification of decision to informant

The Commission must in writing inform a person who has made an allegation in terms of section 17 of any decision made by the Commission under section 18 that

further action in relation to the allegation for the purposes of this Act is not warranted on reasonable grounds, and if the matter is referred to another appropriate authority for further action, inform that person accordingly.

20 Initiating or assuming investigation of a complaint

(1) Investigation of a complaint or allegation of a corrupt practice may be initiated by the Commission of its own motion or on information furnished to the Commission in terms of section 17.

- (2) The Commission may-
- (a) assume the responsibility for any investigation into an alleged corrupt practice commenced or to be commenced by the police, and the police must comply with any requirement of the Commission in that regard;
 - (b) carry out an investigation into an alleged corrupt practice notwithstanding that any other authority, other than the police, is entrusted with a corresponding power or duty of investigation under, and for the purposes of, any other law.

21 Investigation by Commission

(1) For the performance of the functions of the Commission under this Act an authorised officer may conduct any investigation which the Commission is empowered to undertake in terms of this Act or any other law.

(2) Upon initiating or receiving a complaint which in the opinion of the Director warrants investigation on reasonable grounds, the Director must cause the complaint to be investigated as quickly as practicable.

(3) At any time during an investigation, the Director may designate one or more other authorised officers to assist the authorised officer conducting the investigation.

(4) A person questioned by an authorised officer conducting an investigation must answer each question truthfully and to the best of that person's ability, but a person is not obliged to answer any question if the answer is self-incriminating.

(5) At any time during an investigation the Director may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or article that has a bearing on that subject to appear before the Director, or any other authorised officer designated by the Director, at a specified time and place in order-

- (a) to be questioned; or
- (b) to deliver or produce such book, document or article.

(6) The Director or other authorised officer before whom a person appears in terms of subsection (5) may-

- (a) require that person to furnish the information under oath or on affirmation; and

- (b) administer an oath to, or accept an affirmation from, that person.

(7) No self-incriminating answer given or statement made by any person to the Director or other authorised officer in terms of this section is admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings-

- (a) for perjury; or
- (b) for an offence referred to in section 29,

and then only to the extent that the answer or statement is relevant to prove the offence charged.

22 Authority to enter and search under warrant

- (1) An authorised officer may enter any premises and there-
 - (a) make such investigation or inquiry; and
 - (b) seize anything,

which in the opinion of the authorised officer has a bearing on the investigation.

(2) Subject to section 23, premises may be entered in terms of subsection (1) only by virtue of a warrant issued by a judge of the High Court or by a magistrate in whose area of jurisdiction the building or premises are situated.

- (3) A warrant referred to in subsection (2) must be applied for by the Director, the Deputy Director or any other authorised officer and must be supported by an affidavit or a solemn declaration by the person making the application, or any other person having knowledge of the facts, stating-
 - (a) the nature of the investigation being conducted;
 - (b) the suspicion which gave rise to the investigation; and
 - (c) the need for a search and seizure in terms of this section for purposes of the investigation.

- (4) A judge or a magistrate to whom an application for a warrant is made in terms of subsection (3) may issue a warrant authorising entry and search of the premises concerned if it appears to the judge or magistrate from the information furnished that there are reasonable grounds for believing that-
 - (a) a corrupt practice has taken place, is taking place or is likely to take place; and
 - (b) that anything connected with the investigation into that corrupt practice is on or in those premises.

- (5) A warrant to enter and search premises may be issued on any day and must specifically-
 - (a) identify the premises that may be entered and searched; and

- (b) authorise an authorised officer mentioned in the warrant to conduct the entry and search of the premises.

(6) A warrant to enter and search premises is valid until one of the following events occurs-

- (a) the warrant is executed;
- (b) the warrant is cancelled by the authority who issued it or, in that person's absence, by a person with similar authority;
- (c) the purpose for issuing it has lapsed; or
- (d) the expiry of one month after the date it was issued.

(7) A warrant to enter and search may be executed only between 6:00 and 18:00, unless the judge or magistrate who issued it on good cause shown authorises that it may be executed at a different time.

(8) Before commencing with the execution of a warrant to enter and search premises, the person authorised by the warrant must-

- (a) if the person in control of the premises is present-
 - (i) identify himself or herself to that person;
 - (ii) hand a copy of the warrant to that person; and
 - (iii) supply that person, at his or her request, with particulars regarding his or her authority to execute the warrant in accordance with the powers conferred by section 24;
- (b) if no person is present, affix a copy of the warrant to a prominent and visible place on the premises.

23 Authority to enter and search without a warrant

(1) Notwithstanding section 22, an authorised officer may without a warrant of entry and search referred to in that section enter and search premises, other than a private dwelling, except if the dwelling is used also for business purposes, for the purpose of attaching and removing, if necessary, any book, document or article, if-

- (a) the occupier of the premises or any other person in control of the premises consents to the entry, search, seizure and removal of the book, document or article concerned; or
- (b) the authorised officer on reasonable grounds believes-
 - (i) that a warrant of entry and search will be issued if application therefor were made under section 22; and
 - (ii) that the delay in obtaining a warrant would defeat the object of the entry and search.

(2) Immediately before entering and searching premises in terms of this section, the person exercising the power must, if the person in control of the premises is present-

- (a) identify himself or herself to that person; and
- (b) supply that person, at his or her request, with particulars regarding-
 - (i) his or her authority to enter and search the premises without a warrant; and
 - (ii) the powers conferred by section 24.

(3) An entry and search without a warrant may be carried out between 6:00 and 18:00, unless doing it at another time is justifiable and necessary in the circumstances.

24 Powers to enter and search

(1) A person who is authorised under section 22 or 23 to enter and search premises may-

- (a) enter the premises;
- (b) search the premises;
- (c) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any book, document or article that has a bearing on the investigation;
- (d) examine any book, document or article that is on or in those premises that has a bearing on the investigation;
- (e) request information about any book, document or article from the owner or other person in control of the premises or from any person who has control of the book, document or article, or from any other person who may have the information;
- (f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
- (g) in the presence of a person in charge of, or employed at, the premises, use any computer system on the premises, or require the assistance of any such person to use that computer system, to-
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) seize any output from that computer for examination and copying; and
- (h) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

(2) Notwithstanding paragraph (g) of subsection (1), if a person contemplated in that paragraph is not present or not able to give the assistance required by the authorised officer, the authorised officer may proceed to use the computer system if in the circumstances of the case any delay may prejudice the purpose for which the search is carried out.

(3) A person conducting an entry and search of premises under this Act may be accompanied and assisted by any other authorised officer or a police officer, or by any other person authorised by the Director for that purpose.

25 Conduct of entry and search

(1) A person who enters and searches any premises under section 22 or 23 must exercise those powers with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) The search of a person under section 24(1) (c) may be conducted only by a person of the same gender as the person to be searched.

(3) A person who enters and searches premises under section 22 or 23 must, before questioning any person-

- (a) advise that person of the right to be assisted by a legal practitioner; and
- (b) allow that person to exercise that right.

(4) A person who removes anything from premises being searched must-

- (a) issue a receipt for it to the owner or other person in control of the premises; and
- (b) return it as soon as practicable after achieving the purpose for which it was removed.

(5) If the owner or person in control of any book, document or article refuses to allow the authorised officer conducting a search to inspect that book, document or article on the ground that it contains privileged information, the authorised officer may request the registrar or sheriff of the High Court, or the messenger of the magistrate's court of the area of jurisdiction where the premises are situated, to attach and remove the article or document for safe custody until a competent court determines whether or not the information is privileged.

(6) An authorised officer or a police officer who accompanies and assists an authorised officer who conducts an entry and search of premises under section 22 or 23, may overcome resistance to the entry and search by using such force as is reasonably required, including breaking out a door or a window of the premises or any container or receptacle on the premises.

(7) Before using force as contemplated in subsection (6) to gain access to any premises, the authorised officer or police officer must audibly demand admission and must announce the purpose of the entry, except if the circumstances are such that immediate entry must be gained to prevent concealment, loss or destruction of anything on or in the premises.

26 Power to obtain information concerning assets

(1) If, in the course of an investigation into an alleged corrupt practice, the Director is satisfied that it could assist or expedite the investigation, the Director may, by notice in writing, require-

- (a) any suspected person to furnish a statement in writing-
 - (i) enumerating all movable or immovable property belonging to or possessed by him or her in Namibia or elsewhere or held in trust for him or her in Namibia or elsewhere, and-
 - (aa) specifying the date on which every such property was acquired;
 - (bb) explaining whether it was acquired by way of purchase, exchange, gift, bequest, inheritance or by any other cause; and

- (cc) specifying the consideration paid or given therefor and the amount or value of the consideration;
- (ii) specifying any moneys or other property acquired in Namibia or elsewhere, or held in or sent out of Namibia, in trust for him or her or on his or her behalf during such period as may be specified in the notice;
- (b) any other person with whom the Director believes the suspected person had any financial transaction or other business dealing relating to an alleged corrupt practice to furnish a statement in writing enumerating all movable or immovable property acquired by that person in Namibia and elsewhere at the material time;
- (c) any person to furnish, notwithstanding the provisions of any other law to the contrary, any information in that person's possession relating to the affairs of any suspected person and to produce any document or certified true copy of any document relating to such suspected person which is in the possession or under the control of the person required to furnish the information;
- (d) the manager or other person in charge of any bank, building society or other financial institution, in addition to furnishing any information specified in paragraph (c) , to furnish any information or the originals, or certified true copies of the accounts or the statements of account at the bank, building society or financial institution of any suspected person notwithstanding the provisions of any other law to the contrary.

(2) Notwithstanding any oath or other obligation of secrecy imposed by law or otherwise, a person on whom a notice referred to in subsection (1) is served must, comply with the requirements of that notice within the time specified therein.

(3) A person who without reasonable excuse fails to comply with any requirement of a notice referred to in subsection (1), commits an offence and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a term not exceeding three years or to both such fine and such imprisonment.

27 Investigation of accounts at financial institutions

(1) The Director or Deputy Director, or an investigating officer or special investigator authorised in writing by the Director or Deputy Director, may require access to and investigate any bank account, share account, purchase account, expense account or any other account, or any safe box in any bank, building society or other financial institution.

(2) A person in charge of an account or safe box referred to in subsection (1) must, notwithstanding the provisions of any other law to the contrary, comply with a request made by an authorised officer referred to in subsection (1) to disclose any information or produce any book or document, including data stored in electronic form, or anything relating to an account or safe box referred to in that subsection.

(3) A person who without reasonable cause fails to comply with a request of an authorised officer in terms of subsection (2), commits an offence and is liable to a fine of

N\$50 000 or to imprisonment for three years or to both such fine and such imprisonment.

28 Powers of arrest

(1) An authorised officer may without a warrant arrest any person whom he or she reasonably suspects has committed or is about to commit an offence under this Act.

(2) If during an investigation of a suspected offence under this Act another offence is disclosed, the authorised officer may, without a warrant, arrest a person if he or she reasonably suspects that the person has committed the offence and that such other offence is connected with, or was either directly or indirectly facilitated by, the suspected offence under this Act.

(3) A person arrested must be taken forthwith to a police station to be dealt with in accordance with the Criminal Procedure Act, 1977 (Act 51 of 1977).

29 Offences in relation to functions of the Commission

- (1) A person commits an offence who-
- (a) assaults, resists or obstructs an authorised officer who is exercising a power or performing a duty conferred or imposed on, or delegated or assigned to, the authorised officer by or under this Act;
 - (b) does anything calculated to improperly influence an authorised officer concerning any matter connected with an investigation;
 - (c) defames an authorised officer in his or her official capacity;
 - (d) knowingly provides false information to an authorised officer; or
 - (e) fails to comply with a lawful direction or requirement of an authorised officer under this Act;
 - (f) having been summoned to appear before the Director or any other authorised officer in terms of section 21(5)-
 - (i) fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or
 - (ii) attends as required, but-
 - (aa) refuses to be sworn in or to make an affirmation when requested to do so;
 - (bb) fails to produce a book document or article as ordered, if it is in the possession or under the control of that person;
 - (g) falsely pretends that he or she is an authorised officer or has any of the powers of such an officer under this Act, or under any authorisation of the Commission issued under this Act;
 - (h) discloses material information concerning the affairs of any person obtained in carrying out any function in terms of this Act;
 - (i) in contravention of an order issued under section 52(3), publishes in any manner any information that may reveal the identity or address of an informer or person referred to in that section.

- (2) Paragraph (h) of subsection (1) does not apply to information disclosed-
- (a) for the purpose of the proper administration or enforcement of this Act;
 - (b) for the purpose of the administration of justice; or
 - (c) at the request of an authorised officer.

(3) A person convicted of an offence in terms of subsection (1) or (2) is liable to a fine not exceeding N\$100 000 or to imprisonment for a term not exceeding five years or to both such fine and such imprisonment.

30 Regulations

- (1) The Prime Minister may, after consultation with the Director, make regulations-
- (a) prescribing a code of conduct for office-bearers and members of the staff of institutions and bodies established by law, including bodies corporate in which the State, a regional council, a local authority council or any statutory institution or other public body is a shareholder or member or holds a similar interest;
 - (b) assigning functions to the Commission concerning the giving of advice and assistance in relation to the development and implementation of any code of conduct which any designated authority is required to formulate and implement in terms of any law;
 - (c) imposing a duty on-
 - (i) members of the National Assembly and National Council;
 - (ii) members of regional councils and local authority councils;
 - (iii) members of the management boards or committees of institutions and bodies referred to in paragraph (a) ;
 - (iv) specified categories of staff members of the Public Service, regional councils, local authority councils and institutions and bodies referred to in paragraph (a) ,
 to declare, in the manner and to the extent prescribed, their assets, including assets held in trust for them or by other persons on their behalf, and to furnish such information as may be stipulated in relation to those assets;
 - (d) prescribing the creation and keeping of a register for the recording of assets and information referred to in paragraph (c) , and the powers, functions and duties of the Commission or any other authority or person in relation to-
 - (i) the keeping of that register;
 - (ii) the receipt or collection of information to be recorded therein;
 - (iii) the preservation of secrecy in respect of that information; and
 - (iv) the circumstances when and the conditions on which any such information may be disclosed; or
 - (e) any other matter which is reasonably necessary in order to promote the efficiency of the Commission to achieve the purposes of this Act.

(2) A regulation may provide that the contravention of, or failure to comply with, any provision thereof constitutes an offence and prescribe penalties therefor not exceeding a fine of N\$100 000 or imprisonment for a period of five years or both such fine and such imprisonment.

31 Referral of matter to Prosecutor-General

(1) If, upon completion of an investigation by the Commission, it appears to the Director that a person has committed an offence of corrupt practice under Chapter 4 or any other offence discovered during the investigation, the Director must refer the matter and all relevant information and evidence assembled by the Commission in connection with the matter to the Prosecutor-General.

(2) If, upon referral of a matter in terms of subsection (1), the Prosecutor-General decides to prosecute any person for an offence under this Act, the Prosecutor-General, in consultation with the Director, may delegate authority-

- (a) to conduct criminal proceedings in court in respect of that matter; or
- (b) to defend or prosecute any appeal emanating from criminal proceedings in relation to that matter,

to any staff member of the Commission, including the Director or Deputy Director, who possesses the required legal qualifications to appear in the courts of Namibia.

(3) A person to whom authority is delegated under subsection (2), exercises the powers under that authority subject to the control and direction of the Prosecutor-General.

CHAPTER 4 CORRUPT PRACTICES AND PENALTIES

32 Definitions for this Chapter

In this Chapter, unless the context indicates otherwise-

"agent" means a person employed by or acting for another in any capacity whatsoever, and includes-

- (a) a trustee of an insolvent estate;
- (b) the assignee of an estate assigned for the benefit or with the consent of creditors;
- (c) the liquidator of a company or other corporate body that is being wound up or dissolved;
- (d) the executor of the estate of a deceased person;
- (e) the legal representative of a minor or a person who is of unsound mind or otherwise under legal disability;
- (f) a public officer or an officer serving in or under any public body;
- (g) a trustee, an administrator or a subcontractor and any person appointed as an agent in terms of any law;

"business" means any activity carried on for the purpose of gain or profit within Namibia or elsewhere, and includes all property derived from or used in or for the purpose of carrying on such activity, and all the rights and liabilities arising from such activity;

"corruptly" means in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to-

- (a) any employment relationship;
- (b) any agreement; or
- (c) the performance of any function in whatever capacity;

"gratification" includes-

- (a) money or any gift, loan, fee, reward, commission, valuable security or property or interest in property of any description, whether movable or immovable;
- (b) any office, dignity, employment, contract of employment or services and any agreement to give employment or render services in any capacity;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (d) any valuable consideration or benefit of any kind, any discount, commission, rebate, bonus, deduction or percentage;
- (e) any forbearance to demand any money or money's worth or valuable thing;
- (f) any service or favour, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty;
- (g) any right or privilege;
- (h) any aid, vote, consent or influence, or any pretended aid, vote, consent or influence;
- (i) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs;

"principal" includes any employer, any beneficiary under a trust, any trust estate, the estate of a deceased person, any person beneficially interested in the estate of a deceased person, in the case of a person serving in or under a public body, the public body and in the case of a person acting in a representative capacity, the person on whose behalf the representative acts;

"property" means money or any other movable, immovable, corporeal or incorporeal thing, whether situated in Namibia or elsewhere and includes any rights, privileges, claims, securities and any interest therein and all proceeds thereof;

"public body" means-

- (a) any ministry, office or agency of government;
- (b) any regional council or local authority council; or
- (c) any corporation, board, council, institution or other body, whether incorporate or unincorporated, or any functionary-
 - (i) exercising any power or performing any duty in terms of the Namibian Constitution; or
 - (ii) exercising a public power or performing a public function in terms of any law or the common law;

"public officer" means a person who is a member, an officer, an employee or a servant of a public body, and includes-

- (a) a staff member of the public service, including the police force, prisons service and defence force, or of a regional council or a local authority council;
- (b) a member of the National Assembly, the National Council, a regional council or a local authority council;
- (c) a judge of the Supreme Court or the High Court or any other member of the judicial authority;
- (e) any person receiving any remuneration from public funds;
- (f) if the public body is a corporation, the person who is incorporated as such.

33 Offence of corruptly accepting gratification

A person commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept for the benefit of himself or herself or any other person any gratification as-

- (a) an inducement to do or to omit doing anything;
- (b) a reward for having done or having omitted to do anything.

34 Offence of corruptly giving gratification

A person commits an offence who, directly or indirectly, corruptly offers, gives or agrees to give to any person, whether for the benefit of that person or any other person, any gratification as-

- (a) an inducement to do or to omit doing anything; or
- (b) a reward for having done or having omitted to do anything.

35 Corruptly accepting gratification by or giving gratification to agent

(1) An agent commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept from any person a gratification-

- (a) as an inducement to do or to omit doing anything;
- (b) as a reward for having done or having omitted to do anything,

in relation to the affairs or business of the agent's principal.

(2) A person commits an offence who, directly or indirectly, corruptly offers or gives or agrees to give to an agent, whether for the benefit of the agent or any other person, any gratification as-

- (a) an inducement to do or to omit doing anything; or
- (b) a reward for having done or having omitted to do anything,

in relation to the affairs or business of the agent's principal.

(3) A person commits an offence who-

- (a) knowingly gives to an agent; or

- (b) being an agent, knowingly uses,

any receipt, account or other document in respect of which the agent's principal is interested and which contains any statement which is false or erroneous or defective in any material particular and which to the knowledge of that person or the agent, as the case may be, is intended to mislead the principal or any other person.

(4) If, in any proceedings against an agent for an offence under subsection (1), it is proved that the agent corruptly accepted or obtained or agreed to accept any gratification, having reason to believe or suspect that the gratification was offered or given as an inducement or reward contemplated in that subsection, it is no defence that the agent-

- (a) did not have the power, right or opportunity to perform or not to perform any act contemplated in that subsection;
- (b) accepted the gratification without intending to perform or not to perform the act in relation to which the gratification was given; or
- (c) failed to perform or not to perform the act in relation to which the gratification was given.

(5) If, in any proceedings for an offence under subsection (2), it is proved that the accused corruptly offered or gave or agreed to give any gratification to an agent as an inducement or reward contemplated in that subsection, the accused is guilty of the offence notwithstanding that the agent had no power, right or opportunity to perform or not to perform the act in relation to which the gratification was offered given or agreed to be given.

36 Corrupt acquisition of private interest by public officer

A public officer commits an offence who knowingly and corruptly, and otherwise than as a member of a registered joint stock company consisting of more than 20 persons, acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body on or in which he or she serves as a member or as an employee or which is made on account of the public body.

37 Corruption in relation to tenders

- A person commits an offence who, directly or indirectly-
- (a) gives or offers to give to any person any gratification as an inducement or a reward for, or otherwise on account of, the withdrawal of, or the refraining from the making of, any tender for a contract invited by any public body, private organisation, corporate body or other organisation or institution to perform any work, provide any service, supply any article, material or substance or for doing anything; or
 - (b) solicits or accepts or agrees to accept for himself or herself or any other person any gratification as an inducement or a reward for or otherwise on account of the withdrawal

of, or the refraining from the making of, a tender for a contract referred to in paragraph (a).

38 Bribery of public officer

A person who offers or gives or agrees to give to a public officer, or who, being a public officer, solicits or accepts or agrees to accept, any gratification as an inducement or a reward for, or otherwise on account of-

- (a) voting or abstaining from voting at any meeting of a public body in favour of or against any measure, resolution or question relating to the functions of that public body;
- (b) performing or abstaining from performing, or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act;
- (c) aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or
- (d) showing or forbearing to show any favour or disfavour in his or her capacity as a public officer,

commits an offence, whether or not the public officer had the power, right or opportunity so to do.

39 Corruption of witnesses

(1) A person commits an offence who, directly or indirectly, corruptly offers or gives or agrees to give any gratification to any person, whether for the benefit of that person or any other person, with the intent to-

- (a) influence the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or
- (b) influence that person or another witness to absent himself or herself from such trial, hearing or other proceedings or to withhold true testimony.

(2) A person commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept any gratification, whether for the benefit of himself or herself or any other person, in return-

- (a) for testifying in a particular or untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony; or
- (b) for not testifying at any such trial, hearing or proceedings.

40 Bribery of foreign public officials

(1) A person commits an offence who, in order to obtain or retain business or an advantage in the course of business, directly or indirectly, corruptly offers or gives or agrees to give any gratification to a foreign public official-

- (a) as a reward for an act or omission by the official in connection with the performance of the official's duties or functions; or

- (b) as an inducement to use his or her position to influence any act or decision of the foreign state or public international organisation for which the official performs duties or function.

(2) For the purposes of subsection (1), "foreign public official" means-

- (a) a person holding any legislative, administrative or judicial office at any level or subdivision of government of a foreign state;
- (b) any person performing public functions for a foreign state, or any board, commission, corporation or other body or authority performing a duty or function on behalf of the foreign state; or
- (c) an official or agent of a public international organisation formed by two or more states or by two or more public international organisations.

41 Bribery in relation to auctions

A person commits an offence who, directly or indirectly, corruptly-

- (a) offers or gives or agrees to give any gratification to any other person as an inducement to refrain, or as a reward for having refrained, from bidding at any auction; or
- (b) solicits or accepts or agrees to accept any gratification as an inducement or a reward of his or her refraining or having refrained from bidding at any auction.

42 Bribery for giving assistance in relation to contracts

(1) A person commits an offence who corruptly offers or gives or agrees to give any gratification to any other person whether for the benefit of that person or any other person, as an inducement or a reward for giving assistance or using influence, or having given assistance or used influence, in-

- (a) the promotion, execution or procuring, or the amendment, suspension or cancellation, of any contract with a public body, private organisation, corporate body or other organisation or institution; or
- (b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract.

(2) A person commits an offence who corruptly solicits or accepts or agrees to accept, whether for the benefit of himself or herself or any other person, any gratification as an inducement or as a reward of his or her giving assistance or using influence, or having given assistance or used influence, in-

- (a) the promotion, execution or procuring of any contract with a public body, private organisation, corporate body or other organisation or institution; or
- (b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract.

43 Corruptly using office or position for gratification

(1) A public officer commits an offence who, directly or indirectly, corruptly uses his or her office or position in a public body to obtain any gratification, whether for the benefit of himself or herself or any other person.

(2) For the purposes of subsection (1), proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or associate of his or hers has an interest, whether directly or indirectly, is, in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her office or position in the public body in order to obtain a gratification.

- (3) For the purposes of subsection (2)-
- (a) "relative" includes-
- (i) a spouse or fiancé, including a partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits;
 - (ii) a child, including a stepchild or fosterchild;
 - (iii) a parent, including a step-parent or fosterparent;
 - (iv) a brother or sister of the public officer or of his or her spouse; or
 - (v) the spouse of any of the persons mentioned in subparagraphs (ii), (iii) or (iv); and
- (b) "associate" includes-
- (i) an employee, agent or nominee of the public officer;
 - (ii) a business partner or any company or other corporate body of which the public officer is a director or is in charge or control of its business or affairs, or in which the public officer, alone or together with any nominee of his or her, has or have a controlling interest;
 - (iii) a trust controlled and administered by the public officer.

44 Corruption in relation to sporting events

- (1) A person commits an offence who, directly or indirectly, corruptly-
- (a) solicits or accepts or agrees to accept any gratification, whether for the benefit of himself or herself or any other person, as an inducement or a reward of his or her influencing or having influenced the run of play or the outcome of any sport event; or
 - (b) offers or gives or agrees to give to any other person any gratification as an inducement to influence or as a reward for influencing or having influenced the run of play or the outcome of a sporting event.

45 Dealing with, using, holding, receiving or concealing gratification in relation to any offence

A person commits an offence who, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person-

- (a) enters into, or causes to be entered into, any dealing in relation to any property; or
- (b) uses or causes to be used, or receives, holds, controls or conceals any property or any part thereof,

which was obtained as gratification, or derived from the proceeds of any gratification obtained, in the commission of an offence under this Chapter.

- (2) For the purposes of subsection (1), "dealing" includes-
- (a) any purchase, sale, loan, charge, mortgage, lien, pledge, transfer, delivery, assignment, subrogation, transmission, gift, trust, settlement, deposit, withdrawal, transfer between accounts or extension of credit;
 - (b) any agency or grant of power of attorney; or
 - (c) any act which results in any right, interest, title or privilege, whether present or future or whether vested or contingent, in the whole or in part of any property being conferred on any person.

46 Attempts and conspiracies

A person who-

- (a) attempts to commit an offence under this Chapter;
- (b) conspires with any other person to commit an offence under this Chapter; or
- (c) abets, induces, incites or commands another person to commit an offence under this Chapter,

commits an offence and is, on conviction, liable to the punishment prescribed for that offence by this Act.

47 Fraudulent concealment of offence

A person commits an offence who, with intent to defraud or to conceal the commission of an offence under this Chapter or to obstruct an authorised officer in the investigation of any such offence-

- (a) destroys alters, mutilates or falsifies any book, document, valuable security, account, computer system, disk, computer printout or other electronic device which belongs to or is in the possession of his or her employer, or has been received by him or her on account of his or her employment, or any entry in such book, document, account or electronic device, or is privy to any such act;
- (b) makes or is privy to the making of any false entry in such book, document, account or electronic device; or
- (c) omits or is privy to the omission of any information from any such book, document, account or electronic device.

48 Duty to report corrupt transactions

(1) A public officer to whom any gratification is promised, offered, or given in contravention of any provision of this Chapter must, as soon as possible, report such fact, together with the name or any other information relating to the identity of the person or persons concerned to his or her supervisor and to the Commission.

(2) If any gratification has been demanded, solicited, accepted or obtained from any person in contravention of any provision of this Chapter, or if an attempt has been made to demand, solicit, accept or obtain any gratification from any person in contravention of any provision of this Chapter, that person must, as soon as possible, report such fact

together with the name or any other information relating to the identity of the other person or persons involved to the Commission.

(3) A person commits an offence who fails to comply with subsection (1) or (2).

49 Penalties

A person convicted of an offence under any provision of this Chapter is liable to a fine not exceeding N\$500 000 or to imprisonment for a term not exceeding 25 years, or to both such fine and such imprisonment.

CHAPTER 5 GENERAL PROVISIONS

50 Liability for offences committed outside Namibia

(1) The provisions of this Act shall, in relation to Namibian citizens and persons domiciled or permanently resident in Namibia, have effect also outside Namibia, and when an offence under this Act is committed outside Namibia by any such citizen or a person so domiciled or resident, such person may be dealt with in respect of that offence as if it had been committed at any place within Namibia.

(2) The acquittal or conviction of a person by a foreign court of law on a criminal charge for an offence similar to an offence referred to in this Act, which would be a bar to subsequent charges against that person for the same offence if committed in Namibia, is a bar to further proceedings against him or her under any law relating to the extradition of persons, in respect of the same offence, outside Namibia.

51 Jurisdiction of magistrates' courts

Any magistrates' court has jurisdiction to impose any penalty mentioned in this Act.

52 Protection of informers and information

(1) Subject to subsection (2), in any trial for an offence under this Act, a witness is not obliged to-

- (a) disclose the identity or address of any informer or person who assisted the Commission in an investigation into an alleged or suspected offence under this Act; or
- (b) state any matter which may disclose the identity or address of such informer or person.

(2) If in any proceedings before a court, the court, after full inquiry into the case, is satisfied-

- (a) that an informer wilfully made a material statement which the informer knew or believed to be false or did not believe to be true; or
- (b) that justice cannot fully be done between parties without disclosing the identity of an informer or a person who assisted the Commission in an investigation into an alleged or suspected offence under this Act or any other law,

the court may permit inquiry into, and require disclosure of, the identity of the informer or person concerned.

- (3) In a case contemplated in subsection (2) (b) the court may-
- (a) direct any person whose presence is not necessary at the proceedings to leave the court room before permitting the inquiry into the identity of an informer or person referred to in that subsection; and
 - (b) issue an order prohibiting the publication by any person of any information that may disclose the identity or address of such informer or person.

(4) No action or proceedings of a disciplinary, civil or criminal nature may be instituted or maintained by any person or authority against any informer or a person who has assisted the Commission in an investigation into an alleged or suspected offence under this Act or any other law in respect of any information, other than a material statement which he or she knew or believed to be false or did not believe to be true, disclosed by him or her to the Commission for the purpose of assisting the Commission in the performance of its functions under this Act.

(5) If any book or document, or any visual or sound recording or any other matter or material which is given in evidence or liable to inspection in any civil, criminal or other proceedings in any court, tribunal or other authority contains any entry or other matter in which any person who gave the information is named or described or shown, or which might lead to his or her identity or discovery, the court, tribunal or other authority before which the proceedings are held must cause all such parts thereof or passages therein to be concealed from view or to obliterated or otherwise removed so far as is necessary to protect such person from discovery.

53 Limitation of liability

No person, including the State, is liable in respect of anything done or omitted in good faith in the exercise of a power or the performance of a duty conferred by or under this Act.

54 Repeal and amendment of laws

(1) The Prevention of Corruption Ordinance, 1928 (Ordinance 2 of 1928), and the Prevention of Corruption Amendment Act, 1985 (Act 21 of 1985), are repealed.

(2) The Public Service Act, 1995 (Act 13 of 1995) is amended by the insertion in Schedule 3 to that Act-

- (a) in the first column, of the expression "Anti-Corruption Commission"; and
- (b) in the second column, of the expression "Director: Anti-Corruption Commission".

55 Short title and commencement

This Act is called the Anti-Corruption Act, 2003 and comes into operation on a date determined by the Prime Minister by notice in the *Gazette* .