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Review of the Anti-corruption Legal Framework in Zambia

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EXECUTIVE SUMMARY

It is widely acknowledged that corruption is a major challenge to the development of many countries and Zambia is no exception. Transparency International in its National Integrity Assessments reports describes the problem of corruption in Zambia as endemic. The Auditor General's annual reports reveal widespread corruption and misuse of Government resources by civil servants. Corruption as the UNDP Report, *Tackling Corruption, Transforming Lives*¹ (2008) underscores that corruption undermines democratic institutions, retards economic development and contributes to government instability. It attacks the foundation of democratic institutions by distorting electoral processes, perverting the rule of law and creating bureaucratic quagmires whose only reason for existence is the soliciting of bribes. Economic development is stunted because outside direct investment is discouraged and small businesses within the country often find it impossible to overcome the "startup costs" required because of corruption. In procurement and construction the people end up getting inferior quality goods as corruption advantages bribe givers at the expense of quality. Tragically, as former United Nations Secretary General Kofi Annan observed: "corruption hurts the poor disproportionately by diverting resources intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid².

Corruption has many other damaging effects; *inter alia*, weakened national institutions, inequitable social services, and blatant injustice in the courts-along with widespread economic inefficiency and unchecked environmental exploitation which again hits hardest at the poor-who often depend heavily on public services and the natural environment and are least able to pay bribes for essential services that should be theirs by right. Corruption distorts the marketplace by substituting corruption for competition in the allocation of businesses and business contracts. Instead of quality, price and service the willingness to pay bribes determines who wins and who loses contracts. Governments whose officials accept bribes are deprived of access to those who can supply the best and lowest cost of goods and services.

An essential element in any discussion on efforts to combat corruption is the legal and juridical framework within which the scourge of corruption is being fought. It is unquestionable that the legal framework though not the answer to all corruption problems is crucial in the fight against

¹ United Nations Development Program (UNDP), *Tackling Corruption, Transforming Lives: accelerating Human Development in Asia and the Pacific* (2008).

² *Ibid.*

corruption. In this study, the instruments that have been put in place to fight corruption in Zambia are discussed, reviewed, analyzed and evaluated. These include the anti-corruption Commission Act, the Money Laundering Act, the Prosecution Authority Act, the Whistle Blower Act, The Plea Negotiations and Agreements Act, the Financial Intelligence Center Act, and the Forfeiture of the Proceeds of Crime Act. These legislations are evaluated against the standards set by the various international conventions which have been elaborated at international, continental and regional level to enhance the fight against corruption. The legislations are also critically evaluated as to comprehensiveness, adequacy and effectiveness as tools in the fight against corruption. While identifying shortcomings in the legislations, the study concludes that Zambia has put in place a good frame work for the fight against corruption. The various pieces of legislation enacted are comprehensive and cover all the areas that are traditionally the subject matter typically covered by legal regimes designed to fight corruption throughout the world. The legislations though generally adequate need strengthening in areas that the study identifies. In its conclusion the study observes that for the fight against corruption to succeed government efforts have to go beyond legislation. The fight against corruption requires strong institutions, the provision of adequate resources to those institutions and above all the existence of a determined political will to end corruption in all its forms regardless of the perpetrator.

INTRODUCTION

This report analyses Zambian legislation in an attempt to critically examine its practicality and adequacy to combat corruption in the country. To this end, the report reviews the following recently adopted legislation: the Anti-Corruption Commission Act (2010), the Plea Negotiations and Agreements Act (2010), the National Prosecution Authority Act (2010), the Public Interest Disclosure (Protection of Whistleblowers) Act (2010), the Forfeiture of Proceeds of Crime Act (2010), the Financial Intelligence Center Act (2010) and the Amendment to the Prohibition and Prevention of Money Laundering Act (2010). The legislation is further evaluated in light of Zambia's international and regional commitments as per the standards set by international and regional anti-corruption instruments that Zambia has ratified or is a party to, including, the Southern African Development Community (SADC) Protocol Against Corruption³, the United Nations Convention against Corruption⁴ and the African Union (AU Convention on the Prevention and Combating of Corruption.⁵

The need to effectively curb corruption through legislation and effective institutions goes without saying because of the threat corruption poses to good governance, democracy and the rule of law and ultimately, it's potential to hinder economic, social and political development. As the South African Constitutional Court recently observed with respect to the impact of corruption on economic development: "There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfill its obligations to respect, protect, promote and fulfill all the rights enshrined in the bill of rights. When corruption and organized crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk⁶." Indeed, the demonstrated inability of many resource-rich

³ The Southern African Development Community (SADC) Protocol against Corruption was adopted on August 14, 2001. Zambia is a signatory to the protocol.

⁴ The United Nations Convention against Corruption was recognized by the General Assembly in its resolution 55/61 of 4 December 2000 as an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime.

⁵ The African Union Convention on Preventing and Combating Corruption (AU Convention) was adopted in Maputo on 11 July 2003.

⁶ In the Matter between: Hugh Glenister and President of South Africa, Minister for Safety and Security, Minister for Justice and Constitutional Development, Director of Public Prosecutions, South African Government and Helen Suzman Foundation, Constitutional Court of South Africa, Case CCT 48/10, Para. 166.

states to attain a decent level of development commensurate with their resources is attributable to the corruption plague that infects many of them. Although its prevalence may differ from one state to the other, no state can claim to be completely immune from corruption.⁷

The deleterious impact of corruption on societies and the need to combat it effectively is widely recognized in public discourse, and in the *Zambian Anti-Corruption Act* whose objective is given as to provide for the prevention, detection, investigation, prosecution and punishment of corrupt practices and related offences⁸. It is also recognized in regional⁹ and international conventions¹⁰. In a statement preceding the text of the *United Nations Convention against Corruption* former United Nations Secretary-General, Kofi Annan observed: “The evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investments and aid. Corruption is a key element in economic under performance, and a major obstacle to poverty alleviation and development¹¹.” The preamble to the *African Union Convention* acknowledges that corruption undermines accountability and transparency in the management of public affairs as well as social-economic development on the continent¹². In a similar vein, the preamble to the *Southern African Development Community Protocol against Corruption* refers to the “adverse and destabilizing effects of corruption throughout the world on the culture, economic, social and political foundations of society, and recognizes that corruption undermines good governance which includes the principles of accountability and transparency¹³. Africa has suffered particularly from corruption because the proceeds of corruption tend to be banked or spent outside of the continent. Capital flight is possibly Africa’s biggest financial problem. The African Union estimates that \$48 billion a year leaves the continent because of corruption¹⁴. This represents a quarter of the Continent’s GDP. Furthermore,

⁷ W. Paati Ofosu-Amaah, et al., *Combating Corruption: A Comparative Review of Selected Legal Aspects of State Practice and Major International Initiatives* (World Bank, 1999), vi.

⁸ *Anti-Corruption*, 2010, preamble.

⁹ *Southern African Development Community Protocol against Corruption* adopted on 14 August 2001.

¹⁰ *United Nations Convention against Corruption, 2004 and African Union Convention on Preventing and Combating Corruption, 2004.*

¹¹ <http://www.undoc.org/documents/treaties/UNCA/Publications/Convention/08-50026E.pdf>.

¹² The AU Convention was adopted on 11 July 2003.

¹³ The SADC Corruption Protocol was signed by the Heads of State of all 14 SADC member states on 14 August 2011.

¹⁴ All Africa Parliamentary Group (AAPG), *The Other Side of the Coin : The UK and Corruption in Africa*, 2006, London, p12-14.

in Africa's case the outflow of illicit money tends to be permanent¹⁵. The money that leaves the continent through corruption typically does not return and is instead invested in real estate and businesses abroad.

From a functional perspective, the different techniques and institutions adopted in order to combat corruption can be broadly categorized as either preventive or curative measures.¹⁶ Preventive instruments are upstream legal rules and norms of good behavior conducive to the establishment of a corruption free environment, while curative measures seek to provide appropriate remedies to sanction acts of corruption.¹⁷ States adopt preventive instruments to deter corruption through direct and indirect techniques which are most appropriate to their economic, cultural and sociopolitical situation.¹⁸ Indirect techniques include allusion to national commitment, leadership codes, declaration of assets, codes of conduct and the media.¹⁹ Direct preventive techniques on the other hand pertain to financial management, procurement regulations and laws, and campaign finance laws and aim at transparency and accountability of public figures.²⁰

The curative approach refers to the legal framework adopted to combat corruption. One of the most basic anti-corruption measures expected of a country which has an anti-corruption policy is to ensure that various corrupt acts are outlawed-either as part of general legislation, or as laws against specific forms of corruption. Legislation can also cover issues such as money laundering, public procurement and ethical codes. This has to be supplemented by the protection of whistle blowers-individuals who disclose information leading to the exposure of corruption. In the interest of avoiding complications and inconsistency, anti-corruption legislation needs to be easy to understand and simple to apply.

However, in as much as the instruments themselves are important, arguably the adequacy of anti-corruption legislation depends heavily on the availability of effective, transparent and capable enforcement institutions and complementary legal and institutional reforms aimed at prevention. In this regard, complementary laws such as freedom of information and reformed libel laws should be resorted to. Codes of conduct and ethical standards are aimed at ensuring the honesty and technical competence of the enforcers. It should not be forgotten that a government determined to

¹⁵ *Ibid.*

¹⁶ W. Paati Oforu-Amaah, et al., *Combating Corruption: A Comparative Review of Selected Legal Aspects of State Practice and Major International Initiatives* (World Bank, 1999), vi.

¹⁷ *Id.*

¹⁸ *Id.* P. 5

¹⁹ *Id.*

²⁰ *Id.* P. 21

eradicate corruption must not only enact legislation, promote civic values and establish institutions and agencies, but must also denote formal political commitment to implement legislation comprehensively, impartially and sustainably.

ZAMBIAN ANTI-CORRUPTION LEGISLATION: GENERAL BACKGROUND

In the context of Zambia, at independence the anti-corruption laws were the laws inherited from the United Kingdom. These included the Prevention of Corruption Act of 1916, read together with the Public Bodies Corrupt Practices Act of 1889, and the Prevention of Corruption Act of 1906. Zambia's laws governing corruption were first contained in the Penal Code, Chapter 146 of the Laws of Zambia. This legislation focused on corruption in the public sphere. To strengthen the fight against corruption, in 1973 the Zambian Government passed the Leadership Code which governed leaders and made it illegal for leaders to own business or have additional income to their paid employment. The leadership code covered all persons in the service of the then ruling party, the United National Independence Party (UNIP), the civil service, the government, local authorities, state enterprises and institutions of higher learning. The hugely unpopular Leadership Code was abolished in November, 2002²¹.

In 1971, the Special Investigations Team on Economy and Trade (SITET) was established. It was designed to investigate economic crimes in the country. This was a period during which Zambia had very strict exchange control regulations which prohibited the holding and externalization of foreign exchange out of Zambia without the written authority of the Bank of Zambia. It was hence concerned with issues of money laundering, illegal foreign currency dealings, smuggling, and hoarding of commodities, among others. The agency was tasked with arresting those who flouted exchange control regulations. SITET was fairly successful but had a reputation of using underhand methods to get evidence²². SITET was not created specifically to deal with corruption and was abolished in 1992.

In 1980, the Corrupt Practices Act, 1980 was enacted. This legislation was an attempt to put all corruption related offences in one place. The 1980 Corrupt Practices Act made corruption in both the public and private sectors an offence. Further, it provided for the establishment of the Anti-Corruption Commission to spearhead the fight against corruption. In 1996, the 1980 Corrupt Practices Act was repealed and replaced with the Anti-Corruption Act No. 42 of 1996, which transformed the Commission into an autonomous institution. The mandate of the Anti-Corruption Commission under the Act is to spearhead the prevention and combating of corrupt practices in Zambia.

²¹ The problem with the Leadership code was that it was too broad and made it illegal to engage in any business activity while one was in the employ of the Government. John Mwanakatwe, End of Kaunda Era, Lusaka, 1994, p.25.

²² John Mwanakatwe, End of Kaunda Era, Lusaka, 1994, p.137.

In 2010 as part of the National Anti-Corruption Policy implementation, Zambia embarked on an extensive legislative review in order to strengthen the legal framework to fight corruption. Pursuant to this review, the Zambian Government has passed the following legislation: the Anti-Corruption Commission Act (2010); the Forfeiture of Proceeds of Crime Act (2010); the Public Interest Disclosure (Protection of Whistleblowers) Act (2010); the Plea Bargaining Act (2010); the Amendment to the Prohibition and Prevention of Money Laundering Act (2010); The Financial Intelligence Act (2010); and National Prosecution Authority Act (2010). An additional aim of the review was to domesticate regional and international conventions on Corruption (Southern African Development Community (SADC) Protocol on Corruption; the African Union Convention on Combating and Preventing Corruption and the United Nations (UN) Convention against Corruption). The United Nations Convention against Corruption requires state parties to develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability²³. Similarly, the African Union Convention on Preventing and Combating Corruption states its objectives as among others to 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 sectors²⁴. This study examines the Zambian legislation and assess whether the resulting legal framework is consistent with international and regional conventions against corruption. It further considers whether the legislation and practices developed are effective tools in the fight against corruption.

²³ United Nations Convention against Corruption, article 5 (1).

²⁴ African Union Convention on Preventing and Combating Corruption, article 2.

INTERNATIONAL CONVENTIONS AND ANTI-CORRUPTION LEGAL FRAMEWORK

The international community has long recognized the need for a global, legally-binding instrument dealing with corruption²⁵. That goal was realized - in 2003 when the members of the United Nations adopted the UN Convention against Corruption (UNCAC). The Convention entered into force in December 2005. As of January 2007, 81 countries have ratified or acceded to the Convention. The UN Office on Drugs and Crime (UNODC) has developed a Legislative Guide for the Implementation of the United Nations Conventions against Corruption. The UNODC, with the UN Interregional Crime and Justice Research Institute (UNICRI), prepared a Technical Guide to provide practical support to State Parties in implementing the main provisions under the UN Convention. The UNCAC is the most comprehensive international anti-corruption convention to date as it covers the broadest range of corruption offences, including the active and passive bribery of domestic and foreign public officials, obstruction of justice, illicit enrichment, and embezzlement²⁶. In addition, the UNCAC addresses preventive measures, international co-operation, and technical assistance²⁷. One of the most important features of the Convention is its provisions on asset recovery, which is expressly recognized as “a fundamental principle of the Convention.”²⁸ Several provisions specify the forms of co-operation and assistance, e.g. embezzled of public funds that have been confiscated must be returned to the requesting state²⁹. The adoption of some of the provisions of the Convention are mandatory (e.g., adoption of the offences of active and passive bribery of a national public official, and the active bribery of foreign public officials and officials of public international organizations); some however, are optional and only require signatories to consider their implementation. The UNCAC contemplates a process for the periodic review of the implementation of the Convention by States Parties. The States Parties have discussed the issue in the first Conference of States Parties in December 2006 and will take further decisions in this regard³⁰.

Zambia is party to the United Nations Convention against Corruption and the African Union Convention on the Prevention and combating of Corruption and the Southern African Development Community Protocol. The United Nations Convention imposes an obligation on each member state

²⁵ W. Paatii Ofusu-Amaah, Raj Soopramanien & Kishor Uprety, *Combating Corruption: A Comparative Review of Selected Aspects of State Practice and Major International Initiatives*, 1999, p.3.

²⁶ United Nations Convention against Corruption, article 15, 16, & 17.

²⁷ Ibid, article 43, 44, 46, & 48.

²⁸ United Nations Convention against Corruption, article 51.

²⁹ Ibid, articles 51, 54, 55 & 57

³⁰ State Parties, Conference, Dead Sea, Jordan, 2006

party to establish and provide effective practices aimed at the prevention of corruption³¹. It further requires the existence of a body or bodies tasked with the prevention of corruption in all the territories of state parties to the Countries³². Moreover, Article 6(2) provides that: “ each state party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.” Under Article 8 (1) of the Southern African Development Community Protocol on Combating Illicit Drugs member states are required to institute appropriate and effective measures to curb corruption. Under Article 8 (2) these measures include the following: (a) Establishment of adequately resourced anti-corruption agencies or units that are: (i) independent from undue intervention, through appointment and recruiting mechanisms that guarantee the designation of persons of high professional quality and integrity; and (ii) free to initiate and conduct investigations. The SADC Corruption Protocol requires state parties to “adopt measures, which will create, maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption.” The AU Convention provides in Article 5(3) that states parties undertake to “establish, maintain and strengthen independent national anti-corruption authorities or agencies” Article 20 (4) reinforces the importance of independence in a more direct terms, it states that” The national authorities or agencies shall be allowed the necessary independence and autonomy, to be able to carry out their duties effectively.” The OECD³³ has identified the main criteria for effective anti-corruption agencies to be independent, specialized and have adequate training and resources.

The OECD report defined independence as follows: “independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key to the prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper resources management and internal

³¹ United Nations Convention against Corruption, article 2.

³² Ibid, article 6 (1).

³³ OECD: Specialized Anti-corruption Institutions: Review of Models (OECD Report).

controls are important elements to prevent undue interference³⁴.” The report further adds that: “one of the prominent and mandatory features of specialized institutions is not full independence but rather an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting “pre-emptive obedience”. In short, “independence” first of all entails de-politicization of anti-corruption institutions. Adequate level of independence or autonomy depends on the type and mandate of an anti-corruption institution. Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those charged with preventive functions³⁵.”

The obligations on Zambia resulting from its accession to these conventions are clear and unequivocal. Firstly they impose an obligation to: adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering, or giving to a foreign official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; and adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally³⁶: (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person; (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abused his or her real or supposed influence with a view to obtaining from an administration or public authority of the state party an undue advantage.³⁷ Further they impose a duty in international law to create an anti-corruption agency that has the necessary independence to be an effective instrument in the fight against corruption. Zambia did not enter any reservations to any of the provisions of the three conventions. It is, therefore, under international law under an obligation to implement the conventions in its domestic law. When enacting legislation Zambia must give effect to the obligations contained in the conventions. The following sections will examine and evaluate each of the six pieces of legislation on corruption in

³⁴ <http://www.oecd.org/dataoecd/7/4/39971975.pdf>

³⁵ *Id.*, p. 17

³⁶ Article 16.1 United Nations Convention against Corruption,

³⁷ Article 18, *Ibid.*

Zambia and consider their effectiveness in the fight against corruption and whether the legislation meets the standards established by the international conventions to which Zambia is a party to and further whether they are effective instruments and structures in the fight against corruption.

THE ANTI-CORRUPTION COMMISSION ACT

Scope and Overview of the Act

As observed earlier, prior to 1980, there was no specific agency dealing with corrupt practices offences in Zambia. The fight against corruption was led by the Zambia Police Force and prosecution was based on the Penal code for substantive crimes against corruption. The first Anti-Corruption Commission Act was passed in 1980³⁸. It created an Anti-Corruption Commission. Repealing sections in the Penal Code dealing with corruption, it brought them under the Corrupt Practices Act³⁹. An autonomous Anti-corruption Commission was created in 1996.⁴⁰ The Anti-Corruption Commission Act of 2010 reviews and amends the Anti-Corruption Commission Act of 1996. It states as one of its objectives bringing the law into conformity with the provisions of the regional and international conventions to which Zambia is a party⁴¹. The Act continues the existence of the Anti-Corruption Commission. The Ant-Corruption Act provides for the continuance of existence of the Anti- Corruption Commission created in 1996. The Commission is a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name and with power to do all such acts and things as a body corporate may do or perform by law. It's functions are to: Prevent and take necessary and effective measures for the prevention of corruption in public and private bodies, including, in particular, measures for: (a) Examining the practices and procedures of public and private bodies in order to facilitate the discovery of opportunities of corrupt practices and secure the revision of methods of work or procedures which, in the opinion of the Commission, may be prone or conducive to corrupt practices⁴²; (b) advising both public - and private bodies on ways and means of preventing corrupt practices, and on changes in methods of work or procedures of such public bodies and private bodies compatible with the effective performance of their duties, which the Commission considers necessary to reduce the likelihood of the occurrence of corrupt practices⁴³; (c) disseminating information of the evil and dangerous effects of corrupt practices on society; (d) creation of committees in institutions for monitoring corruption in the institution⁴⁴; and (e) enlisting and

³⁸ Anti-Corruption Act, 1980.

³⁹ Anti-Corruption Act No 14 of 1980.

⁴⁰ The Anti-Corruption Commission of 1996 was created to replace the 1980 Anti-Corruption Commission of Zambia

⁴¹ Anti-Corruption Commission Act, 2010, preamble.

⁴² Ibid, section, 6.

⁴³ Ibid, section 6 (1), (a),(ii).

⁴⁴ Ibid, section 6 (1) (a) (iii)

fostering public confidence and support against corrupt practices⁴⁵. The Commission is also authorized to: (a) initiate, receive, and investigate complaints of alleged or suspected corrupt practices, and, (b) subject to the directions of the Director of Public Prosecutions, prosecute offences under the Anti-Corruption Commission Act; and such other offences under any other written law as may have come to the notice of the commission during the investigation of an offence under the Act. It is to investigate any conduct of any public officer which, in the opinion of the Commission, may be connected with or conducive to corrupt practices; be the lead agency in matters of corruption; cooperate with other institutions authorized to investigate, prosecute, prevent, and combat corrupt practices so as to implement an integrated approach to the eradication of corruption; consult, cooperate, and exchange information with appropriate bodies of other countries that are authorized to conduct inquiries or investigations in relation to corrupt practices; and do all such things as are incidental or conducive to the attainment of its functions.

Several provisions in the Act criminalize corruption and deal with corrupt practices by or with public officers (section 19) and corrupt transactions by or with private bodies (section 20). The following are the main corruption acts defined in the Act: Corrupt use of official power(section 21); Corrupt transactions(section 22); Corruption of members of the public or private bodies with regard to meetings; (section 23); Corruption of witnesses (section 24); Corrupt practices by, or with foreign public officials (section 25); Corruption relating to sporting events (section 26); Conflict of interest (section 27); Gratification forgiving assistance, with regard to contracts (section 28); gratification for procuring withdrawal of tender (section 29); gratification with regard to bidding at auction sale (section 31); Coercion of investor (section 32) and Corrupt acquisition of public property and revenue and electoral corruption (section 34). In addition, the Act criminalizes actions that impede the prosecution of corruption offences such as dealing with property corruptly acquired (section 36); concealing the offence of corruption (section 37) and using and concealing gratification (section 36). The Act also criminalizes attempts and conspiracies. It provides that: (a) a person who aids, abets, counsels, or conspired with any person to commit an offence, commits an offence under this Act and is liable, upon conviction, to a sentence as if that person committed the offence and a person who attempts to commit an offence under this Act commits an offence and is liable, upon conviction, to a sentence as if that person committed the offence⁴⁶.

In addition, the Act provides for the following general offences: a person who: (a) knowingly makes, or causes to be made, to the Commission, false testimony or a false report in any material;(b)

⁴⁵ Ibid, section 6 (1) (a) (v)

⁴⁶ Ibid, section 39 (1) & (2).

particular on any offence or matter under investigation; (c) destroys, alters, conceals, or removes any books, document, record, or evidence that the person believes may be relevant to an investigation or proceeding; (d) destroys, alters, mutilates, or falsifies any valuable security, account, computer system, disk, computer printout, or other electronic device or any entry in any book, document, account, or electronic device; (e) knowingly misleads the Director-General, the Deputy Director-General or any other officer of the commission by giving any false information or statement or making a false allegation; (f) obstructs, insults, assaults, hinders, or delays an officer of the commission in the lawful exercise of the powers conferred on the officer under this Act; (g) refuses or fails, without reasonable cause, to give to the Director-General or an officer of the commission on request, any document or information required for purposes of this Act; (h) fails to comply with any lawful demand of the Director-General, Deputy Director-General, or an officer of the Commission under this Act; (i) fails to produce, conceals, or attempts to conceal any property, document, or book in relation to which there are reasonable grounds to believe is used to commit an offence or is a proceed of an offence under this Act; or (j) destroys anything to prevent the seizure of any property or document or securing of the property or documents⁴⁷.

Operational Structure of the Commission

The Commission is composed of a Director-General as the Chief Executive and a Board composed of Commissioners. The Anti-corruption Commission is an autonomous body set up to fight corruption and according to section 5 of the Anti-Corruption Act of 2010 it is not subject to the direction or control of any person or authority. The commissioners are appointed by the President, subject to ratification by the National Assembly. The chairperson shall be a person who has held or is qualified to hold high judicial office. The commissioners are appointed for a term not exceeding three years subject to renewal. The grounds of removal of the commissioner as spelt out in section 8 are restricted to bankruptcy; insanity or death of a commissioner.

Section 9 of the Act establishes the office of Director-General. He or she is appointed by the President subject to ratification by the National Assembly on such terms and conditions as the President may determine. According to section 9(3) a person shall not be qualified to be appointed Director-General unless the person is qualified to be appointed judge of the High Court. No fixed term limit appears to be stated for the office of Director-General except that the retirement age is stated as 65 (section 10). In a manner which gives the President control over the office, section 10

⁴⁷ Ibid, section 37& 38.

(1) provides that the president may permit a person who has attained the age of 65 to continue in office for such periods as may be necessary to enable that person to do anything in relation to proceedings that were commenced before the person attained that age.

A person appointed Director-General may be removed from office for inability to perform the function of his office, whether arising from infirmity of body and mind or from any other cause or for misbehavior (section 10 (2)). In contrast to the 1996 Act, where to remove the Director General, a resolution of the National Assembly and an independent tribunal appointed by the Chief Justice was needed⁴⁸ (section 17 (2)). The 2010 Act in section 10 (2) clearly ensures that the removal of the Director General is completely controlled by the executive and removes the parliamentary check that existed in the 1996 Act on presidential power. The section states that if the President considers that the question of removing a person holding the office of the Director-General ought to be investigated, the president shall appoint a tribunal consisting of a Chair and two other persons to inquire into the matter (section 17(3)). The Chairperson of the Committee and one other member of the tribunal shall be persons who hold or have held high judicial office. The Tribunal reports to the President. Where the tribunal advises the president that a person holding the office of Director-General ought to be removed from office for incompetence or inability or for misbehavior, the President shall remove the person from office (section 10(4)). The President has power to suspend the person from performing the functions of the Director-General while the investigation is going on. The President appoints the Deputy Director-General on such terms and conditions as the President may determine (section 12 (1)). This is an important position. In the absence of the Director-General the Deputy Director General acts and performs the functions of the Director-General. The President seems to have complete discretion in the appointment of the Deputy Director-General. The investigating officers are appointed by the Commission (section 13(1)). They do not seem to be guaranteed security of tenure. The Act in section 13 (4) states that the Director-General may, if satisfied that it is in the best interest of the Commission, terminate the appointment of any officer of the Commission and shall assign the reasons therefor, subject to any direction by the Commission⁴⁹. To enhance the security of investigating officers, the power to dismiss them from service should be vested in the Commission. The Director- General's Powers should be limited to

⁴⁸ The Anti-Corruption Commission Act, Chapter 91 of the Laws of Zambia. Section 17 (1) provided: "A person appointed Director-General may be removed from office for inability to perform the function of his office, whether arising from infirmity of body or mind or from any other cause, or for misbehavior, and shall not be removed except by or in accordance with a resolution passed by the National Assembly pursuant to subsection (2) calling for an investigation into the question of the removal of the Director-General."

⁴⁹ Ibid section 13 (4)

recommending dismissal to the Commission. This approach would also be consistent with the fact that the Commission is the appointing body.

A Review of the Anti-Corruption Commission Act

Strengths

The provisions criminalizing corruption are robust provisions. They adequately deal with corruption in both the Government sector and the private sector. These provisions generally meet Zambia's obligations under the United Nations Convention against Corruption (specifically Articles 12 (4), 15, 16, 21, 22 and 35) as well as the African Union Convention on Preventing and Combating Corruption (Specifically, Articles, 4, and 11). They are clearly in tandem with the objectives of the African Union (Articles 2 and 5) and UN (Articles 23 and 31) conventions which require national legislation to criminalize and combat corruption both in the public and private sectors. In addition the Act sets up an Independent Anti-Corruption Commission, contains recovery of assets provisions, and mutual assistance provisions⁵⁰. It is a good approach that the Commission is empowered to investigate other offences, besides corruption and this should be emphasized in its operations. This is extremely important because a corruption crime may not exist in isolation. It may occur and be intermingled with other crimes such as cheating, commercial crimes, etc. Therefore any anti-corruption agency must have the power to question suspects on the full range of offences, otherwise there will be severe limits placed on investigations and the accused person will probably be able to get away from the punishment that he or she deserves. This is not to suggest that the Commissions should have the same powers as the police. The work of the Commission should complement the work of the police.

Use of Terminology and Non-coverage of Other Crimes

Section 20 is not well drafted and the term "a public official" would be more appropriate than its first two words "a person." As stated in section 20 (1)(b), the director general may "require any person in charge of any department, office or establishment of the government or the head, chairperson, manager, or chief executive officer of any public body, to produce or furnish within such time as may be specified by the Director General, any document or a certified true copy of any document which is in his possession or under the work of the Commission would be under his control and which the Director General considers necessary for the conduct of investigation into alleged or suspected offences under t[he] act." Since the provision is alluding to a person that

⁵⁰ Ibid, section 43 (1), 42, 54

occupies a position in government, the term “public official” would be more reflective of the position than just a generic term “person”.

Recovery of Assets

The provisions on recovery of assets (sections 41, 42, 43 and 54) are weak compared with the United Nations Convention provisions (Article 31) and African Union Convention (Articles 6, 16 and 19) and should be improved upon. Section 54 which allows an investigating officer in the course of an investigation into an offence, upon obtaining a warrant, to seize property where he or she reasonably suspects that it was derived from corrupt practices or is the subject matter of an offence or is evidence relating to an offence is fairly robust and might become the teeth in the legislation. The provisions of the UN Convention on asset recovery have been praised as being the “highlights” or fundamental principles of the convention.⁵¹ This can be inferred from the fact that as per the preamble of the convention, state parties undertake to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery.⁵² As asserted by the UN Office on Drugs and Crime, provisions on asset recovery are particularly important for developing countries because plundering of the nation’s wealth and resources are attributable to the high level corruption and they are indispensable for reconstruction and rehabilitation.⁵³ Article 31 of the UN Convention states that each state party has the responsibility to take measures necessary to enable confiscation of proceeds of crime derived from offences established in accordance with the convention and property used in or destined for use of offences in the convention. In accordance with this requirement, measures need to be taken to enable the identification, tracing, freezing or seizure of these items. Moreover where such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds or where the proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds. The Anti-Corruption Commission Act however does not contain any provisions regarding these possible

⁵¹ Institute for Security Studies, Handbook: A Comparative Analysis: SADC Protocol Against Corruption (2001), AU Convention on Preventing and Combating Corruption (2003) & UN Convention Against Corruption (2003) (November 2004) 84

⁵² Institute for Security Studies, Handbook: A Comparative Analysis: SADC Protocol Against Corruption (2001), AU Convention on Preventing and Combating Corruption (2003) & UN Convention Against Corruption (2003) (November 2004) 84

⁵³ See http://www.unodc.org/unodc/en/crime_convention_corruption.html.

intricacies as envisaged by the UN Convention. They are however contained in the Forfeiture of Proceeds of Crime Act of 2010.

Independence of the Commission

The Commission is empowered to investigate a matter of corruption covered by the Act on receipt of a complaint or on its own initiative (section 47). It is generally agreed that political interference is one of the reasons why some anti-corruption agencies have failed. Political interference impedes these agencies from doing their job independently and especially from investigating officials at the higher and highest levels of government. If one examines the Hong Kong ICAC, notable for its success, it is administratively placed within the Office of the Head of Government. In order to avoid abuse of power, however, it reports independently to the legislature. Its independence from the public service and its autonomy of operation is reflected in law and practice. This is especially important in systems less committed to the rule of law. Although the Act states that the Commission is independent various provisions of the Act clearly undermine that independence. The following provisions put the independence of the Commission into question.

Consultation and Requirement to Consult with the DPP

Section 47 (4) (b) states that in making a decision as to whether the commission shall investigate a case the Director-General may consult “any appropriate authority”. This is a dangerous provision. It does not say specifically who may be consulted and what type of consultations would be appropriate. This could very well introduce political considerations in prosecutorial discretion, especially in cases of those that are politically connected. The Commission may refer any offence that comes to its notice in the course of an investigation to any other appropriate investigation authority or agency. Section 59 is an ominous sign of the lack of political will to have an independent anti-corruption body in Zambia. It completely undermines the independence of the Anti-Corruption Commission to subject prosecution under the Anti-Corruption Act to the discretionary powers of the Director of Prosecutions. Section 59 (1) provides that a prosecution for an offence under Part II shall not be instituted except by, or with, the consent of the Director of Public Prosecutions. In Section 59 (3) where a person is charged and the Director of Public Prosecutions has not yet given his or her consent, the accused shall not be called upon to plead. It is not clear why the consent of the Director of Public Prosecution is needed to commence a prosecution. The danger is that such discretion might not be used on a professional basis. It could very well be subject to improper influence. An independent prosecutor is a potential challenge to a

government that does not believe in accountability. Attempts could be made to subdue that independence, ensuring some executive control over prosecutions.

The requirement of the consent of the Director of Public Prosecutions before a prosecution is undertaken, undermines the operations of the Commission. Justice Kapembwa, former Director-General of the Commission speaking about his time at the Commission, complained that there were times when the commission thought that there was sufficient evidence, especially against influential politicians and the Director of Public Prosecutions declined to prosecute. In Zambia corruption is undoubtedly a serious obstacle to development. The Government of Zambia has declared zero tolerance for corruption. In such circumstances, one would expect the letter of the law conferring prosecutorial discretion in corruption offences to be narrowed down to absolute certainty. The law should provide for prompt and effective prosecution whenever there is evidence of corruption. Section 59 does not place any limits on the prosecutorial discretion not to prosecute. This means that the decision to enforce the laws of the land or not is not expressly regulated by any law. Taken literally it means that the Director of Public Prosecutions is vested with absolute discretion in deciding whether or not to enforce the laws of the land. The unregulated discretion is also unaccountable. The Director of Public Prosecution does not report to any one in terms of the numbers of cases where he or she has declined to prosecute and in terms of the reasons or guidelines he or she used to arrive at the decision.

One can argue that the wording of the Anti-Corruption Commission Act and its objectives leave no discretion where an offence of corruption has been committed. Some jurisdictions practice compulsory prosecution whenever there is sufficient evidence of a felony. For example section 152 (2) of the German Penal Code of Criminal Procedure provides that: "except as otherwise provided by law the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications." Under German law therefore the Prosecutor is duty bound to prosecute as long as there is sufficient evidence to justify the prosecution. The prosecutorial discretion has its origin in the common law. The courts have however shown discomfort with the norm. In the UK case, *Padfield v. Minister of Agriculture Fisheries and Food* the House of Lords reduced the difference between statutory discretion and a statutory duty to a vanishing point. In deciding that the apparent discretion of the Minister amounted to a duty, the court stated: "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act. The policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court." The House of Lords proceeded to issue a mandamus compelling the Minister

to reconsider the case afresh. In terms of the Anti-Corruption Act of Zambia prosecutorial discretion was intended to be used in line with the stated objective of the Government policy of zero tolerance on corruption and achieve the stated objective of the Act which is stated as: investigating, preventing and punishing corruption. Prosecution authority is an important public power that is prone to abuse and political influence. It is therefore important that the prosecutorial authority is independent, effective, fair and efficient. In Zambia the case of *The People v. Bulaya* illustrates the problem. In that case the state announced that it was not going to prosecute a former Permanent Secretary of the Ministry of Health. It argued that the Director of Public Prosecutions had studied his file and had concluded that the corruption case against him could not be proved in Court. Following massive protests by civil society the state changed its mind and prosecuted Bulaya. Contrary to the States's assertions Bulaya was convicted of corruption in the Magistrates court, lost his appeal in both the High Court and the Supreme Court .

Location of the Commission

According to the United Nations Convention against Corruption, states parties to the convention have the option to choose whether to grant responsibilities to fight corruption to a single organization or to divide responsibilities between various prevention and law enforcement institutions. The Zambian Government has chosen to grant the responsibility to fight corruption to the Anti-Corruption Commission established under the Anti-Corruption Act. One of the first issues is where the Anti-Corruption Agency is located in government and to whom it reports. If the agency reports to the office of the President, for example, it can be used as a weapon against political opponents. Ideally the Anti-Corruption Agency should be a completely independent body. Where the Anti-Corruption Agency is not structurally independent, the danger is that its power will depend on the strength of its bureaucratic and political patrons, who depending on the environment can be very powerful or very weak. In some cases, a combination of outside accountability and strong political support from the press and the public can overcome the absence of formal guarantees of independence. The autonomy of the Anti-Corruption Agency can also be strengthened by ensuring that the selection and appointment of the executives of the Agency is a shared responsibility of several institutions. There are several examples how this can be achieved. In Indonesia for example the Indonesian Commission for the Eradication of Corruption is appointed by Parliament from a list of candidates provided by the President. The list of candidates is prepared by a selection committee appointed by the government .

In order to guarantee its independence, the Anti-Corruption Commission should be accountable to Parliament. The role of the legislature as the watchdog over public finance is part of its oversight functions over the executive in the management of the capital and resources of Zambia in order to ensure good governance, accountability and probity. Accountability is one of the pillars of a democracy. It requires that public authorities such as the commission act in a manner that responds adequately to the needs and expectations of the people. Accountability requires that people participate in public decision making so that they can express their views and contribute to the design, development and implementation of public policies and laws . It also entails the imposition of some form of sanctions if the power holder fails to answer for the exercise of his or her powers . Anybody who receives a mandate from the people or accepts a public position must be held responsible for his acts or failures to act. Parliament is best placed to check the executive.

The Independence of the Commission's Members

In its current state, the Anti-Corruption Commission Act does not fully guarantee the autonomy of the Commission members and officers. The following aspects appear to jeopardize the independence and the integrity of the Commission's organs and members:

Term of Office of the Director General: There is no predetermined term of office for the Director General in the Act, which sets forth in its section 9(2) that the President of Zambia shall appoint the Director-General according to such terms as the President himself may determine. This provision grants considerable arbitrary power to the appointing authority. Besides, it creates a risk of undue influence by the President over the Commission in the sense that the Director-General might be inclined to accommodate the President's desires in order to entrench himself in his position and secure a subsequent appointment. Therefore, the best approach would be providing for a fixed term of office for the Director General in the Act (e.g., three or five years, renewable once). The same observation applies to the tenure of the Deputy Director-General. The non-renewability of the second term of office of the Director-General, his or her deputy and commissioners is a critical component of their independence. It ensures that they have no incentive to stay in the good books of members of the executive. Even the fairest minded and scrupulous person would find it difficult to put out of his or her mind how his or her decisions will be perceived by those who decide whether they will be reappointed. To compound the problem the President does not have to consult anyone before reviewing the terms of office of the Director-General, his deputy and commissioners. It has to be remembered that renewals are just as important as initial appointments. In fact there is even greater reason for checks and balances when it comes to renewals because there is a track

record which can be used to base the appointment. A renewable term of office, in contrast to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures.

(1) Removal Procedure for the Director General: Pursuant to section 10(3) of the Act, the Director General may be removed at the initiative of the President, whereas section 17(3) of the current Anti-Corruption Commission Act authorizes the National Assembly to instigate the removal procedure. It is not clear why the change has been made. The best approach would be if both the President and the National Assembly were granted the power to launch the removal procedure. Such a provision would adequately ensure the Director-General's removal for good cause while guaranteeing his or her due process rights. It suggested extending the grounds for removal, which are currently limited under section 10(2) to "inability to perform" and "misbehavior," to include incompetence as well.

(2) Performance of Other Jobs: Under the terms of section 9(6) of the Act, the Director-General may not "discharge the duties of any other office of emolument in the Republic" during his term of office. It is unclear as to whether this provision carries a comprehensive, absolute ban on the performance of other jobs, or whether the interdiction is limited to carrying out public functions. Regardless, the Director-General should not be allowed to perform any other job, especially a paid one, as this would create an inherent conflict of interest with his position as the head of the Commission. In other words, full independence should be required from the Director-General.

(3) Declaration of Assets: section 14(1) of the Act provides that, before taking office, the Director-General, the Deputy Director-General, the Officers and the Secretary shall "submit to the Chief Justice a written declaration of all the assets they own or liabilities owed to them." To enhance accountability, however, such a declaration of assets and liabilities should be required not only at the time of assumption of office, but also after the expiry of the term of office. As a result, officials would be more effectively discouraged from taking undue advantage of their positions. Such a measure would additionally facilitate the investigation of any suspicion or allegation of illicit enrichment against Commission members. The same observation applies to the declaration of assets and liabilities that is required from the members of the Board under section 4 of the Act's Schedule.

(4) Investigating officers: section 13 provides that the Commission may appoint investigating officers, the Secretary and such staff of the Commission, on such terms and conditions as the Commission may determine to assist the Director General in the performance of the Director-

General's functions under the Act. In section 13 (4) it is provided that the Director General may, if satisfied that it is in the best interests of the Commission, terminate the appointment of any officer of the Commission and shall assign the reasons therefor, subject to any directions by the Commission. In assessing the independence of the Commission such factors as security of tenure of all its officers especially investigating offices are important. Under section 13 (4) persons appointed as investigators for the Commission enjoy little if any special job security. The grounds for dismissal are not specified. The term "in the best interests of the Commission" are broad and can be abused. Their dismissal is subject to no special inhibitions and can occur at a threshold lower than dismissal on an objectively verifiable ground like misconduct or continued ill-health. In short the investigators enjoy no specially entrenched employment security. They like any employee have employment rights under the labor laws but no special provisions secure their employment. While there is no reason to believe that this will be abused, at the very least the lack of specially entrenched employment security is not calculated to instill confidence in the investigators that they can carry out their investigations vigorously and fearlessly. Adequate independence in a job like that of investigators of corruption requires special measures entrenching their employment security to enable them to carry out their jobs vigorously and to the best of their abilities. The proper approach would be to provide that an investigator may be removed from office only on grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit person to hold the office. The reason for the removal, must be communicated in writing to the officer and the Commission. This would serve to reduce the possibility that an individual investigator could be threatened-or could feel threatened-with removal for failing to yield to pressure in a politically unpopular investigation or prosecution.

(5) Immunity of Staff: In section 17, the Act grants immunity to the staff members of the Commission. In its current drafting, however, the immunity provisions do not make it entirely clear that the Commission members remain liable for corruption practices. The Act should expressly state that the immunity granted to the staff shall not be an obstacle to the investigation of allegations of corruption against them. Indeed, notwithstanding the immunity provisions, no Commission member should be exempt from investigation, prosecution or conviction under the Act.

(6) Composition of the Board: According to section 2(2) of the Act's Schedule, the Board shall consist of five members appointed for a term of three years, renewable once. Considering that the African Union Convention on Preventing and Combating Corruption contemplates an eleven-member board, it is open to question whether five officers suffice to guarantee the integrity and the impartiality of the Commission. A higher odd number might be more adequate. It would be useful to

suggest staggering the appointments to the Board as an additional independence measure (e.g., assuming that the board comprises nine people, one third of the contingent would be reelected each year). Finally, Article 5(4), which requires the presence of the Board's Chairman at meetings for quorum purposes, essentially grants the Chairman the power to block any decision that he is in disagreement with. Thus, the quorum provision should be amended to only require the presence of a certain numbers of Commissioners, regardless of their titles.

(7) Loans to Commission Members: section 11(3) of the Act's Schedule contemplates the making of loans to Commission members. However, such loans may give rise to potential conflicts of interest, in particular with respect to interest-free or preferential-interest loans. The Act should not tolerate the lending of the Commission's own funds to its members; at the very least, the Act should set forth restrictions, such as a requirement that the loans bear an appropriate interest rate in line with the market.

(8) Remuneration of Board Members: Under section 7 of the Act's schedule the Board itself is in charge of determining the remuneration and allowances to be paid to its individual members. Although this is a common practice, even within corporations, the Board is inherently conflicted when deciding its own compensation. Consequently, the Act should at least set some limits on the board's decision-making power, such as an interdiction against excessive remuneration or a requirement that the remuneration be reasonable in light of the commissioners' competence and performance.

(9) Funding of the Commission: section 11(1) (b) of the Act's Schedule contemplates the funding of the Commission by way of grants and donations. However, the possibility of private funding might endanger the independence and the impartiality of the Commission. The sole authorized source of funding should be the State of Zambia in order to avoid any potential conflict of interest. As a general rule, full transparency in funding should be required. There is of course a need to determine how to deal with donor funds. Though absolutely essential as the Zambia situation shows those accused of corruption can politicize the support and use it in their efforts to undermine the integrity of the Commission . One approach would be to channel donor funds through a basket arrangement so that no one donor can be accused of dealing with the Commission directly.

(10) Disclosure of Conflicts of Interest: Under section 8(1) of the Act's Schedule, Board members shall disclose any conflict of interest that they might have and refrain from partaking in the decision-making process when conflicted. However, since there are no sanctions attached to this

provision, the interdiction is essentially moot. The Act should state clearly what the sanctions are for non-disclosure of or for voting in spite of a conflicted interest which should include removal from the board.

(11) Auditor's Fees: section 13 of the Act's Schedule requires an annual audit of the Commission's accounts, but provides that the auditor's fees are at the Commission's expenses. Although auditors are generally paid by their clients, it might be wise to ensure that Zambian auditor's fees are strictly regulated and that auditors are bound by high professional and ethical standards. Otherwise, this situation might give rise to a potential conflict of interest on the auditor's side and to a risk of undue influence by the Commission. To radically avoid any such conflict, the Board could establish independent audit, nominating and compensation committees pursuant to section 6(1) of the Act, which authorizes the setting up of such committees.

(12) Report of Activities: section 14 of the Act's Schedule requires the Commission to submit an annual report concerning its financial activities to the President. This reporting obligation seems insufficient. To enhance transparency and accountability, the Act should require the Commission to report to both the National Assembly and the President and also require the report to contain information pertaining to the investigation and the prosecution of corrupt practices, including statistics of the matters handled by the Commission during the year (e.g., number of complaints received; number of complaints dismissed; number of matters investigated; number of prosecutions and convictions; breakdown into specific offenses...) One of the most important issues regarding the independence of an Anti-Corruption Commission is where the Agency reports. If the Agency reports to the President, as is the case here it can easily be used as a weapon against political opponents. The report should be made available to the public once Parliament has considered the report.

Code of Conduct for Public Officials

To facilitate the implementation of the Anti-Corruption Commission Act and foster the development of good practices within the Zambian administration, it might be a good idea if the Commission established a Code of Conduct for public officials. The Act does contemplate in its section 7 that the Commission may, by way of instructions, require non-compliant public or private bodies to change their internal practices and procedures so as to bring them in conformity with the letter and the spirit of the Act. However, this practice lacks uniformity and predictability and it might be best to establish a Code of Conduct that would provide clear guidance as to acceptable anti-corruption procedures, at least with respect to public bodies. The Commission would also be responsible for

monitoring the Code's implementation within various agencies. Each administration would designate a compliance officer as the person in charge of establishing adequate internal practices and procedures and reporting to the Commission. Zambia already has a Parliamentary Ministerial Code of Conduct Act which could serve as a model. The Code obliges members of Parliament among other things to abide by a set of norms including the requirement to disclose their assets and liabilities upon assuming office, and to disclose any pecuniary interest in any matters being discussed in the National Assembly or its committees, and any interest in government contracts. Pivotal to the code should be a scheme of declaration of assets required of every senior public officer within months of coming into office or immediately after assuming office and thereafter at the end of every four years and finally at the end of his or her term of office. It is not enough to make a declaration once at the assumption of office.

Codes of conduct are defined as "standards of good behavior that are prescribed from time to time in relation to groups of individuals, organizations or professional bodies". Many countries have codes of conduct for civil servants and elected officials to govern their professional behavior and their dealings with other parties. Some make particular focus on political leaders. It is generally agreed that to effectively prevent corrupt practices, there is a need for a clear cut code of conduct for public officers. Australia for instance has the "Guidelines on Official Conduct of Commonwealth Public Servants" which governs relationship of politicians, public servants and their staff, and the treatment of public and official information. Ghanaian Constitution on the other hand is said to have a comprehensive code of conduct for public officers who sets up notions of incompatibility of offices and of conflict of interest. Mozambique also has an ethics law defining the rights and responsibilities of governing officials and discouraging acceptance of gifts. Codes of conduct encourage leaders to lead by example. Codes of conduct inculcate a leadership dimension to the control of corruption. They may also help uplift the frustration of the public and rebuild confidence in the state in general, and the establishment in particular.

The Need for Education for the Public on Corruption

Education is another very important aspect of corruption control. There is a general agreement that the Hong Kong Independent Commission against Corruption (ICAC) model has been effective not just because of the quality and determination of its staff coupled with the excellent legal framework within which they work. The model combines concepts of prevention and prosecution. Prevention is accompanied by community education. The Commission has thus been able to develop a coherent and coordinated set of strategies, with very successful results. Lack of this coherent approach and

lack of resources is why many other models have not had much success. Some other success stories are those of Botswana, Malawi, and the New South Wales (Independent Commission against Corruption (ICAC) in Australia.

The Need for Oversight

The ability of the Anti-corruption Commission to work in an unbiased way will depend on appropriate checks and balances as well as constant scrutiny through various oversight mechanisms. Hong Kong's Independent Commission against Corruption (ICAC) for example has its activities examined by four independent committees which include representatives from civil society, in addition to an independent ICAC complaints Committee which receives, monitors and reviews all complaints against the Commission. Another way to enhance oversight over an Anti-Corruption Commission is to make it accountable to more than one authority. Many countries have decided to shift reporting lines from a single-person institution such as the president to the parliament, allowing various political parties to scrutinize the activities of the Anti-corruption Commission. Under the Zambian constitutional scheme Parliament is supposed to operate as a counter-weight to the executive, and its committee system, in which diverse voices are represented across the spectrum of political views. Parliament should also assist in ensuring that questions are asked, that conduct is scrutinized and that motives are questioned. It seems that oversight mechanisms must be put in place to check the Commission and ensure that it operates within the law.

Investigation and Prosecution Procedures

Certain procedural rules seem to threaten the efficiency, the transparency and the autonomy of the Commission's work:

(1) Decision to Investigate: section 48 of the Act provides that, upon receiving a complaint, the Commission shall examine the alleged corrupt practices, determine whether they warrant further investigation, and inform the complainant of its decision. This provision seems deficient in two respects. First, the Act specifies no timeframe for the handling of complaints, which might be harmful to the Commission's efficiency. Although the time needed for examining a complaint varies upon different factors, the Act could at least indicate a reasonable delay for responding to complainants (e.g., 90 days). Second, when responding to a complainant, the Commission need not state any reason for its decision to investigate the matter or not. This arbitrary power of the Commission to reject complaints for no stated reason likely undermines the institution's

trustworthiness and integrity. It is important that the Commission's decisions, in particular the dismissals of complaints, be motivated.

(2) Consent by the Director of Public Prosecutions: section 59(1) of the Act provides that no prosecution shall commence without the prior approval of the Director of Public Prosecutions. This provision appears to be in contradiction with the alleged autonomy of the Commission. Indeed, the necessary intervention of the Prosecutor seems at odds with the very idea of an independent commission. This provision is also unnecessary. Under the National Prosecution Authority Act, section 8 (2) (b) the Director of Public Prosecutions may take over and continue any criminal proceedings as may be instituted by or undertaken by any one person or authority. He or she may under section 8 (2) (c) discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by the Director of Public Prosecutions or any other person or authority. This provision completely undermines the autonomy of the Anti-Corruption Commission. Its insertion in the Anti-Corruption Commission Act in view of section 8 (2) of the National Prosecution Authority Act clearly demonstrates and emphasizes the intention of the government to control prosecutions coming out of the Anti-Corruption Commission. An Anti-Corruption agency to be independent, it must have the power to initiate its own investigations, allow investigators and prosecutors autonomous decision-making powers in handling cases, not be subject to undue influence from any of the branches of government or any third party and have structural and operational autonomy. Section 59(1) is clearly inconsistent with the independence of the Anti-Corruption commission. Independence of the agency from all branches of government is a fundamental requirement for a proper and effective exercise of its functions.

Definition of Corrupt Practices

(1) Definition of Corruption: The definition of corruption adopted by the Anti-Corruption Commission Act lacks simplicity and clarity. The broad definitions retained in the African Union Convention and the United Nations Convention is preferable. Both conventions define corruption in a pragmatic and broad manner. According to these international instruments, corruption essentially means: "the solicitation or acceptance by a public official, directly or indirectly, of any gratification—defined as any goods of monetary value or other benefit, such as a gift, a favor, a promise or an advantage—for himself or herself or another person, in exchange for any action or omission in the performance of his or her public functions" (and, conversely, the promise or offering of such gratification). Rather than define corruption, they establish the offences for a range of corrupt behavior. The conventions define international standards on the criminalization of

corruption by prescribing specific offences, rather than through a generic definition of offence of corruption.

(2) List of Definitions of Corrupt Practices: The Act's enumeration of corrupt practices is unnecessarily burdensome. For example, it is superfluous to burden the definitions of various corrupt practices with systematic references to participation and attempt, considering that there already exists a general provision which criminalizes attempts and conspiracies.

(3) Criminal Intent: The Act fails to specify the requisite state of mind for the commission of an offence. Nowhere in the Act does it address the question of intent. According to the United Nations Convention against Corruption, to which Zambia is a State Party, knowledge, intent or purpose shall be required for the offence of corruption.

Miscellaneous Comments

(1) Organization of the Act: In its current state, the Act appears to be chaotic and disorganized; it resembles a random succession of provisions. The Act could benefit from a complete reorganization.

a. Visual Makeover: The Act would be easier to read if it included clear-cut separations between the different levels of headings. For inspiration, the United Nations Convention against Corruption, which is distinctly divided into Parts, Articles and Paragraphs is recommended.

b. Internal Reorganization: The Act's current organization sometimes lacks logic and coherence. For instance, Part II, which is dedicated to the Commission, defines the powers and duties of most organs of the Commission, including the Director General and the Deputy-Director General, but does not say a word about the Board, which is introduced in the Schedule at the end of the Act. It would make more sense, however, to deal with all the different organs of the Commission within the same section. It is suggest that the Act be reorganized according to the following outline:

Part I: Statement of Purpose

[Insert the objectives of the Bill]

Part II: Use of Terms

[Insert the meaning of key terms for purposes of the Bill]

Part III: Scope of Application

[Insert the definitions of corrupt practices and corresponding sanctions]

Part IV: The Anti-Corruption Commission

[Insert the powers and duties of the Commission and its different organs]

Part V: Investigation and Prosecution Procedures

[Merge the existing parts concerning the investigation procedure, the powers of the Director of Public Prosecutions and rules of evidence]

Part VI: Miscellaneous

[Insert general provisions]

(2) Spelling Issues: When reading the Act, one notices several small mistakes, including typos and inconsistent spelling of frequently used terms. For instance, “Director General” is sometimes, but not systematically, spelled with a hyphen.

Statute of Limitations: The Act provides no limitation period for the prosecution of corrupt practices. Perhaps a limitation period may be found in the Criminal Procedure Code to which the Act refers in its Article 2. However, it might be best to insert a statute of limitations within the Act itself for all the acts that it purports to criminalize. Corruption cases tend to take long because of their complexity. This should be borne in mind in arriving at an appropriate limitation period.

THE UNEXPLAINED WEALTH/ILLICIT ENRICHMENT PROVISIONS

Overview of Concept

Corruption laws adopted by several countries involve the introduction of special rules of evidence, the effect of which is to ease the burden of proof resting on the prosecution and in so doing increase the odds of securing convictions. These provisions are generally referred to as “unexplained wealth” provisions. They generally require public servants to explained sudden unexplained wealth. The Zambian 1996 Anti-Corruption Act contained such a provision. This provision has been repealed in the 2010 Anti-Corruption Commission Act. This section critically evaluates the role of unexplained wealth provisions, the consistence of such provisions with the constitutional rights against self-incrimination and presumption of innocence. In the main it is argued that these provisions mandated by international conventions are useful in the fight to combat corruption and are consistent with and does not violate the right against self-incrimination and presumption of innocence. They are a legally appropriate technique and deal with corruption’s increasingly complexity.

International Conventions and Unexplained Wealth Provisions

Article 20 of the United Nations Convention against Corruption provides that: “subject to its constitution and the fundamental principles of its legal system, each state Party shall consider adopting such legislative measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”. In similar vein the African Union Convention on Preventing and Combating Corruption⁵⁴, in article 8 provides that: “(1) subject to the provisions of their domestic law, state parties undertake to adopt necessary measures to establish under their laws an offence of illicit enrichment; (2) for state parties that have established illicit enrichment as an offence under their domestic law, such offence shall be considered an act of corruption or a related offence for the purposes of this Convention.” Several other international Conventions and national legislation take a similar position. The Inter-American Convention Against Corruption, in article 9 states that: “Subject to its constitution and the fundamental principles of its legal system, each state party that has not yet done so shall take the necessary measures to establish under its laws as an offence a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earning during the

⁵⁴ African Union Convention on Prevention and Combating Corruption, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

performance of his functions.⁵⁵ Zambia is a party to both the United Nations Convention and the African Union Convention. When it joined the two conventions Zambia made no reservations to any of the provisions of the treaties. The approval of an international convention by Zambia conveys Zambia's intention to be bound at the international level by the provisions of the convention. The Vienna Convention on the Law of treaties provides that the act of approving a Convention is an "international act" whereby a state establishes on the international plane its consent to be bound by a treaty. The approval of an international agreement by Zambia therefore constitutes an undertaking at the international level, as between Zambia and other states, to take steps to comply with the substance of the convention⁵⁶. Failure to do so by Zambia is a violation of its treaty obligations.

The Removal of Unexplained Provisions in Zambia

The Anti-Corruption Commission Act of 1996 until recently in Section 37 of the Anti-Corruption Commission accurately reflected Article 20's intent to ensure that public officials do not acquire wealth or property to which they fail to account on how they acquired it. The Zambia Government recently removed section 37 from the new Anti-Corruption Commission Act, 2010. Hong Kong is said to be the home of the most effective and best known of all anti-corruption agencies. With the complete inclusion of the United Nations Convention article 20 concept of "illicit enrichment" in its anti-corruption legal framework, the ICACs power to prosecute "illicit enrichment without having to prove specific acts of corruption constitutes the core of its effectiveness in achieving the UNCAs aims. Unexplained wealth laws are relatively recent development in the world in the fight against corruption⁵⁷. The Zambian Government explained the removal of the illicit enrichment provision on the grounds that it was inconsistent with the constitution and violated the presumption of innocence, relaxed the normal burden on the prosecution to establish a case beyond reasonable doubt and violated the right of an accused person to remain silent. The Government replaced section 37 in the revised Anti-Corruption Commission with a concealment offense clause⁵⁸. The old article 37 which tracked article 20 of the United Nations Convention against Corruption, also acted as detection mechanism since it requires the accused to account for his or her incommensurate standard of living and to explain the disproportion between the amount of pecuniary resources and

⁵⁵ Inter-American Convention against Corruption, adopted, March 29, 1996.

⁵⁶ Vienna Convention on the Law of Treaties, Article 11 (1) (b)

⁵⁷ They are widely in use in Australia, where they are in place in Northern Territory, Western Australia, New South Wales and South Austria. See Treads & Issues in Crime and Criminal Justice, Australian Government, No. 395, July 2010.

⁵⁸ Article 37.

other assets in his or her control at the charge date and his total official emoluments up to the same date.

The concealment of offense clause has no relevance to “illicit enrichment” and offers no solution to securing convictions when the use of third parties to conceal corruption is at issue. Often times, a third person will hold pecuniary resources or property in trust for a public official until the completion of his or her term of office. The section evaluates the arguments given by the Zambian Government for the repeal of the “unexplained/illicit enrichment” provision in the following pages. Unexplained wealth/illicit enrichment is defined as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. By placing the onus of proof on the individual whose wealth is in dispute the concept raises a presumption that the wealth was obtained corruptly. In other words, in jurisdictions with unexplained wealth laws, it is not necessary to demonstrate beyond reasonable doubt that the wealth has been obtained by criminal activity, but instead, the state places the onus on an individual to prove that their wealth was acquired by legal means. It is "a legal device that aims at overcoming the difficulties of meeting the burden of proof in corruption-related offenses⁵⁹. It must however be emphasized that even though the accused party bears the burden of proof on this one issue, the standard of proof that applies in the case of the accused is merely an evidential burden of adducing sufficient evidence to rebut the legal presumption created by such a provision which operates in favour of the prosecution. The section takes up the claims with respect to arguments relating to shifting the burden of proof, the right to silence and look at the practice in other jurisdictions. The discussion below will demonstrate that the presumption of innocence and the right to silence are not absolute rights. On the contrary, inroads into these rights have been permitted subject to specific limitations.

The Reversal of the Burden of Proof Argument

In the last two decades, there has been a revolution in criminal law and in law enforcement theory. Since the 18th century and until a few decades ago law has been governed by a relatively steady paradigm centered at determining under what conditions the state would be able to deprive a human being of his fundamental right to freedom. In the era of what others have termed “acquisitive crimes” (crimes that generate profits) however, there has been a shift from traditional theory towards a new “profit oriented paradigm of criminal law. This approach is concerned about confiscation of ill-gotten gains.

⁵⁹ Guillermo Jorge, *The Romanian Legal Framework in Illegal Enrichment*, ABA, 2007 at Para 167

The fundamental rights provisions of the Zambian constitution guarantee the presumption of innocence in criminal trials. The fundamental rights provisions on due process and fair hearing have been sought to be deployed by persons accused of corruption by claiming that their refusal to explain the sources of their wealth was justified by the constitutional right to remain silent and not incriminate themselves. The effect of this is to impose an almost impossible task for the prosecution to discharge its burden of proving its case beyond reasonable doubt. The idea of reversing the burden of proof was first internationalized in the 1988 United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances. Article 5 of the Convention required states to confiscate proceeds of drug trafficking as well as to internationally cooperate to that end. Article 7 provided that: "state parties consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that action is consistent with principles of its domestic law and with the nature of judicial proceedings and other proceedings." Guillermo argues that the underlying theory is quite straightforward: increasing the effectiveness of legal instruments to detect, seize and confiscate ill-gotten gains will reduce the motivation for engaging in these criminal activities. When connected to criminal organizations, it will also reduce the operative capital for continuing the illegal activities⁶⁰."

There are several countries of different legal traditions that have adopted and implemented this approach in their anti-corruption legislation. France has recently introduced in its Penal Code several offences allowing the reversal of the burden of proof as a central element of the crime. Article 225-6, paragraph 3 of the Criminal Code against profiting from prostitution businesses criminalizes any person "being unable to account for an income compatible with one's lifestyle while living with a person engaged in prostitution or while entertaining habitual relationship with one or more persons engaged in prostitution. Romania had illicit enrichment legislation: the Romanian law 18/1968 (former) which was an illicit enrichment law that applied to *all citizens* (not just public officials). The burden of proof was reversed if data showed a "clear disproportion" between a person's wealth and income. The person had 10 days to justify the disproportion⁶¹. The current Romanian law 115/1996 aims to control illicit wealth of only certain classes of public officials. Creates a disclosure system--disclosure of official's assets (and spouse's and dependent children) required upon taking office and upon leaving office (or every four years). The burden of proof is still on the prosecution, but this makes it easier for prosecution to prove (w/o having to resort to more intrusive means of investigation--i.e., wiretapping, etc. In Italy section 12 of

⁶⁰ Guillermo Jorge, the Romanian Legal Framework in Illegal Enrichment, ABA, 2007, at Para 21.

⁶¹ Ibid, Para, 39

Legislative Decree 306 of 8 June 1992 adopts a similar approach for drug trafficking and organized criminal offences. The onus of proving that the assets are legitimate is placed on the defendant if the prosecution established that the assets are not commensurate with the defendant's income or economic resources. The Dutch Criminal Code article 36 allows a partial reversal of the burden of proof with regard to the illicit origin of the proceeds of several crimes. On a constitutional challenge base on the right to innocence, the Dutch Supreme Court held that the provision is compatible with the presumption of innocence of Article 6 (2) of the European Convention on Human Rights. The most important factor considered by the Dutch Supreme Court in reaching this conclusion was the fact that "once a presumption of criminal origin of proceeds has been established by the prosecution, the defense can always reverse the presumption. A mere denial will not be sufficient, however. Once the criminal origin of the proceeds has been made probable, the burden to rebut-not simply deny- this presumption lies with the defense.

The important point to remember is that the presumption does not operate automatically but has to be established by the prosecution by demonstrating that the criminal origin of the proceeds though not proven is probable. Several Australian states have enacted what in Australia are termed the "unexplained wealth laws (illicit enrichment)". Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws with the Criminal Property Confiscation Act, 2000. The Australian legislation requires courts to make an order seizing property if satisfied that a person's total wealth is greater than the lawfully acquired wealth. Courts have minimal discretion in making such orders, reversal of the onus of proof in favor of the prosecution providing that "any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary. The Australian legislation is broad and covers more than just public officials. The European Court of Human Rights has made an important ruling in this matter. The Court has observed that generally the prosecution must prove the accused person's guilt beyond reasonable doubt. Such abstract formulation is more or less far from being absolute the court observed. In *Salabiaku v. France*⁶² The European Court of Human rights stated: " in principle the contracting states may under certain conditions, penalize a simple or objective fact as such irrespective of whether it results from criminal intent or from negligence. These are not cases of reversal burden of proof, but rather cases where the prosecution is not obliged to prove the subjective part showing will and knowledge elements of the crime."

⁶² A 141-A Para. 27 (1988)

A slightly different case is that of regulatory offences, in these cases usually once the prosecution has proven the existence of a duty, the accused has a reverse burden to prove that he had complied with the duty. An example of this is driving license cases. Further, when issuing confiscation orders, being against an accused or a third party, there may be a reversal of the burden of proof with regard to the assets that are the proceeds of crime. With regard to offences that partially reverse the burden of proof, which is the case of illicit enrichment, the European Court observed: "presumptions of fact or of law operate in every legal system clearly the convention does not prohibit such presumptions in principle." It does however require a state to remain within certain limits. It requires the state to confine this approach within reasonable limits which take into account the importance of what is at stake to maintain the rights of the defense⁶³.

The House of Lords has interpreted this approach as authorizing a "proportionality" test. Common law jurisdictions use a "proportionality test" when carving out statutory exceptions to the presumption of innocence. In *R. v. Lambert*⁶⁴, the court took the view that: "legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed." Lord Steyn stated: "in a constitutional democracy limited iron roads into a presumption of innocence may be justified. The approach to be adopted as stated by the European Court of Human Rights in *Salabiaku v. France* (1988) is the proportionality test. It follows that a legislative interference with the presumption of innocence requires justification. The principle of proportionality must be observed." Canadian courts have adopted a similar approach. The Canadian Supreme Court: *In r. v. Chaulk*, drew a two prong test: "1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right of freedom; it must [be] related to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important and 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must: (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right in question "as little as possible", and (c) be such that their effects on the limitations of rights and freedoms are proportional to the objective." A similar approach has been adopted in South Africa. The South African Supreme Court, in, *In re. S v. Coetzee*⁶⁵ observed that

⁶³ *Salabiaku v. France*, A Para 28 (1988)

⁶⁴ All ER 577-672, Para. 34

⁶⁵ *S v. Coetzee & Others* (CCT 50795), 1997 (4) BCLR437

such presumption should be open to challenge held that the presumption of innocence must be balanced with the advantage for the prosecution.

Further support can be found in national constitutions among several African constitutions. In African Constitutions, there is often an "out" for the presumption of innocence. In Nigeria it is provided that: "Every person who is charged with a criminal offence . . ." Shall be presumed to be innocent until he is proved guilty; Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts." Nig. Const. § 36(5). The United States of America has reverse burden of proof for criminal asset forfeiture--confiscation of property that is alleged to be criminal proceeds or an instrument of criminality. "[T]he burden shifts to the defendant once the government shows that the defendant acquired the property around the time of the crime, and no other likely source existed⁶⁶." In sum, directly holding officials criminally liable for unexplained increases in their wealth has considerable support in the jurisprudence of several countries.

Right to Silence

Another argument used by the Zambian Government to justify the repeal of the illicit enrichment provision from the Anti-Corruption Commission Act is that it is a violation of the right to silence. In most constitutions an accused person is guaranteed a right not to incriminate him or herself when charged with a crime. The privilege against self-incrimination is made up of the right to silence or the right to remain silent and the right not to be compelled to produce exculpatory evidence. The right protects the accused against improper compulsion by the authorities, reducing the risk of miscarriage of justice. In principle, the prosecution must prove its case without resort to evidence obtained through coercion or oppression. Any compulsion to produce incriminating evidence becomes an infringement of the right to silence. This right is not absolute. All states and the European Human Rights Court have recognized the fact that the right is not absolute. One of the most important decisions made on this issue is the European Court of Human Rights decision of *Murray v. UK*⁶⁷. In this case the court observed: "on the one hand it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand it seems equally obvious that these immunities cannot and should not prevent the fact that the accused's silence in situations which clearly call for an explanation from him be taken into account

⁶⁶ <http://www.law.cornell.edu/background/forfeiture>

⁶⁷ No. 18731/9/ (8 February 1996).

in assessing the persuasiveness of evidence adduced by the prosecution. Whenever the line between these two extremes is to be drawn, it follows from this understanding of the right to silence that the question whether the right is absolute must be answered in the negative.”

The unexplained wealth laws have three objectives, namely: (a) to deter those who contemplate criminal activity by reducing the possibility of gaining or keeping a profit from that activity; (b) to prevent crime by diminishing the capacity of offenders to finance any future criminal activity that they might engage in and (c) to remedy the unjust enrichment of criminals who profit at society’s expense. In Australia the Australian Federal Police noted that investigations can often be frustrated through lack of evidence against people with significant wealth and no apparent source of legitimate income. Laws of this nature, if applied successfully, remove the financial incentive to commit corruption. In a submission to the Australian Senate Legal and Constitutional Affairs Committee (SLCAC), Professor Rod Broadhurst observed: “tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in crime is usually indirect in terms of actual commission. Indeed, unexplained wealth laws are one of the most effective means to investigate/prosecute the otherwise very difficult offences of corruption and bribery.⁶⁸”

Due Process Arguments

There are a number of other arguments against unexplained wealth provisions. Clarke for example argues that in a democratic state depriving citizens of privately-owned assets is a highly intrusive act of state⁶⁹. Such conduct is prima facie in conflict with norms such as the sanctity of property ownership, freedom of citizens from unnecessary interference by the state and the right to privacy. The other argument is that the reversal of the onus of proof raises the risk of confiscating assets from innocent people. Many of the foregoing concerns can be ameliorated through appropriate legislative drafting and administrative processes. The argument that the unexplained wealth provisions is inconsistent with the Zambian constitution provisions as it undermines the due process of law in that it relaxes the normal burden on the prosecution to establish the offense :beyond reasonable doubt is not entirely correct. The question is not so much one of the burden of proof; but the appropriate evidence to establish the offense. If you define the offense of taking bribes based on receipt of a payment coupled with other elements and not on proving the corrupt

⁶⁸ Senate Legal and Constitutional Affairs Committee (SAGAC), 2009. Report on the Crimes Legislation Amendment (Serious and Organized Crime,) Bill 2009, Canberra: SACAC.

⁶⁹ Clarke B. A man’s home is his castle or is it? How to take people’s homes without convicting them of anything” The Criminal Property Confiscation Act 2000 (WA) CCRIMINAL LAW JOURNAL 28: 263-286.

intention of what is in the head of the bribe-taker, there is no infringement on the accusers right to a fair trial. In addition, the concealment offense clause is redundant in that the offence of obstruction of justice, which includes concealing an offense of corruption, is already in the Zambian criminal code. Article 25 of the UNCAC covers it separately.

The aim of pursuing the corrupt through effective detection and investigation is enabled by legislation that embodies United Nations Convention against Corruption Article 20 because it provides the power to prosecute “illicit enrichment” without having to prove specific acts of corruption. In the Tanzanian Prevention of Corruption Act the appropriate authorities are empowered by notice in writing to require any public officer to provide a full and true account of properties that such public officer may have or have had in his possession, including a true account of how such property has been acquired. Failure to provide such a full and true account as required in the notice is in itself an offence punishable with imprisonment of up to two years⁷⁰. Moreover where a public officer is found to be or to have been in possession of property, or to have received the benefit of services that he is reasonably suspected of having corruptly acquired or received while holding public office, he may be charged with an offence under the Act. He is also required to satisfy a court of law that he did not corruptly acquire the property or receive the benefit of services as the case maybe, failing which he may be deemed to have corruptly acquired the property or received the benefit of services, as the case may be. Similarly in the Malawi Corrupt Practices Act there are provisions pertaining to a public officer who maintains a standard of living, or has pecuniary resources or property, that is not commensurate with his official emoluments, past or present, or other known sources of income, or is in receipt of the benefits of services which he is reasonably suspected of having received corruptly or under circumstances that may amount to an offense under the Act⁷¹. Although the Act does not appear to make it an offense as such for a public officer to maintain such a standard of living or to have such pecuniary resources or property, or to be in receipt of such benefit of services, it does require the officer, upon receipt of a notice in writing to that effect, to provide a satisfactory explanation of such standard of living, pecuniary resources or property, or receipt of the benefit of services, as the case may be.

⁷⁰ Tanzania Prevention of Corruption Act, section, 9(1).

⁷¹ Malawi Corrupt Practices Act of 1995 (No. 18 of 1995), section 32(1).

THE PUBLIC INTEREST DISCLOSURE (PROTECTION OF WHISTLEBLOWERS) ACT (2010)

Overview of the Act

The Public Interest Disclosure (Protection of Whistleblowers) Act provides a framework within which persons who make a public interest disclosure shall be protected. Its objective is to provide for the disclosure of conduct adverse to the public interest in the public and private sectors. It aims at setting up a framework within which public interest disclosures shall be independently and rigorously dealt with. The procedures aim to provide the terms under which employees in both the private and the public sectors are protected should they wish to disclose information regarding unlawful or irregular conduct of employers or employees at their places of work. As stated in the objects of the Act, it includes within its scope conduct that is adverse to the public interest in both private and public sectors. Moreover, it provides for disclosure of “unlawful or irregular” conduct whether it be done by high level officials or employers or by fellow employees. It ensures that whistleblowers are protected and corruption is dealt with broadly, unlike some jurisdictions which provide protection of whistleblowers for disclosure in the public sector only. In section 10, the Zambian Whistleblower Protection Act provides that an employer shall not subject an employee to any occupational detriment on account, or partly on account of the employee having made a protected disclosure or public interest disclosure. In addition, the act explicitly provides that it applies to government agencies, private or public companies, institutions, any organization, body or organ registered, established or incorporated by any law⁷².

In addition, it seeks to cover both disclosures that are formally made as well as disclosures that leak laterally as part of another case. In section 5 it provides that where information that could amount to a public interest disclosure is disclosed in the course of any proceedings of a court or tribunal, the court or tribunal shall refer the information to an interested authority. It ensures effective protection in this regard. The protected disclosures include disclosures to investigating authorities and anonymous disclosures (section 11 (1) (2)). In the case of anonymous disclosures the person making the disclosure shall identify him or herself to the head of an investigating authority and request that that person’s identity be kept confidential by the investigating authority. By keeping their identity confidential through its permission of anonymous disclosures, the law encourages

⁷² The Public Interest Disclosure (Protection of Whistleblowers) Act, 2010, section 10.

whistleblowers to come forward and report corrupt or suspicious conduct without fear of repercussions for their disclosure.

The Whistleblower Protection Law prohibits agreements in a contract of employment which go against the provisions of the act⁷³. It states that such agreements would be null and void⁷⁴. In that way the unequal bargaining power of the employer weighed against that of the potential employee is curbed which in turn would encourage the employee to come forward without fear of potential lawsuit for breach of contract.

Assessment of the Act

One of the objects of the Act is to provide for procedures in terms of which employees in both the private and the public sectors may disclose information regarding unlawful or irregular conduct. The use of the general term “irregular conduct” may be able to provide a holistic approach to corruption control and could address a wide range of conduct that could amount to corruption. However, the sweeping language could also give room for conflicting interpretation.

Definition of Terms; “to Investigate” and “Employee”

In Part I, Section 2, the Act provides definitions for important terms. It states that [to] “act” includes “to investigate”. However, it does not specify what else the word can mean in the context of the Act. It is vague as to whether this was meant to be an exhaustive definition or an illustrative one. It would be more effective if the definition could be more explicit and detailed.

The definition of “employee” as per the instrument is “any person excluding an independent contractor, who works for another person, whether incorporated or not or for a government agency, and who receives or is entitled to receive any remuneration” and “any person who in any manner assists in carrying on or conducting the business of an employer”. By distinguishing between employees and independent contractors, the law provides for different degrees of protection to the two categories.

⁷³ Ibid, section 4.

⁷⁴ Ibid section 4 provides : Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it-(a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract ; or (b) purports to preclude the employee or has the effect of discouraging the employee, from making a protected disclosure.

Malicious, Frivolous or Vexatious disclosures

The Act although designed to protect whistleblowers, discourages them from making frivolous and vexatious disclosures. Section 13(1) criminalizes public interest disclosure that is malicious, frivolous, vexatious, or made in bad faith. Disclosure for pecuniary gain or other illegal purpose is also excluded. The law provides a remedy for victims of malicious disclosure by asserting that the victims of such disclosures shall be compensated and reinstated in their employment (section 13 (4)). For a disclosure to be protected by the Act it has to satisfy the following conditions: (1) it is made in good faith; (2) made by a person who reasonably believes that the information disclosed, and any allegations contained in it, are substantially true; (3) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of reward and (4) in all the circumstances of the case it is reasonable to make the disclosure. (section 22 (1)(a, b, c) and 13(1) provides that an investigating authority may decline to act on a public interest disclosure where it considers that the disclosure is malicious, frivolous, vexatious or made in bad faith, where the disclosure is misconceived or lacking in substance, trivial, there is a more appropriate method of dealing with the disclosure reasonably available, the disclosure has already been dealt with adequately or the disclosure is made for pecuniary gain or other illegal purpose. The focus on good faith or bad faith could divert the attention from the information to the intention of the whistleblower.

Section 13(3) imposes criminal liability on a person who makes a public interest disclosure failing within the meaning of paragraphs 22 (a, b, c) and 13(1), i.e. for disclosures which are malicious, frivolous, vexatious or made in bad faith or where the disclosure was made for pecuniary gain. This provision can put off whistleblowers. The penalty can be payment of fine or even be as serious as imprisonment not exceeding seven years or both. Here, the law does not appear to consider the veracity of the claim that was made but rather depends on the intention of the whistleblower. One can envisage a situation where the disclosed information is true but the whistleblower would be disclosing it in bad faith. The bad faith of the discloser of the information should not be at issue.

Section 13(4) states that where a public interest disclosure is made against any person and the person is suspended or any other administrative action is taken against that person by the employer pending investigation into the matter and the investigating authority determines that the disclosure falls under sub section 1, then the person shall be entitled to reinstatement, compensation, relocation or any other remedy to any detriment caused to the person by the disclosure. Here the law fails to say whether the veracity of the disclosure is taken into account. It

merely provides these remedies if there was malice or bad faith on the part of the discloser. Moreover, although it prescribes that compensation should be paid to the person it does not specify who is to pay the compensation.

The Act adds further conditions for the protection of whistleblowers which seem burdensome and could very well discourage whistleblowers. Section 22 states that the disclosures will only be protected where (a) at the time of making a disclosure the employee who makes the disclosure has reason to believe that the employee shall be subjected to an occupational detriment if the employee makes a disclosure to the employer in accordance with section 38; and the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety shall be concealed or destroyed if the employee makes the disclosure to the employer. (section 38 (2) a, b) An additional condition is that the employee making the disclosure has previously made a disclosure of substantially the same information to the employer or a person or body referred to in section 38 and that the impropriety is of an exceptionally serious nature. In determining whether it is reasonable for the employee to make the disclosure, the Act states that identity of the person reported to and the likelihood of the impropriety to continue to occur in the future are to be taken into account. These are unnecessary and onerous obligations to place on someone who is coming forward and risking his or her life to help the state and society in its fight against corruption. The act seems to suggest that employees should always first try to report to their employers. This sends a wrong message to prospective whistleblowers who may be hindered from reporting for fear that they could be made subject to criminal liability for disclosing.

Liability of Employers

Part II, section 10 states that an employer shall not subject an employee to any occupational detriment on account or partly on account of the employee having made a protected disclosure or public interest disclosure. It is suggested that the language should clarify that an employer is also responsible for the actions of its agents, contractors, or sub-contractors. It should also apply to applicants for employment as well as former employees.

The Investigating Authority

In section 11(2), the Act provides that public interest disclosures may be made to an investigating authority. However, the law fails to provide what this investigating authority is. It is also unclear whether this provision is referring to internal disclosures or external disclosures. There is no specific rule as to whether this investigating authority is supposed to be within the organization

itself (i.e. internal disclosure) or whether it is a specialized agency that would be in charge of corruption investigations in general (external disclosures).

Miscellaneous Provisions

The purpose of section 11 (2) (b) is hazy as it provides that a person may make a disclosure whether or not the person is able to identify the person that the information disclosed concerns.

1) Anonymous disclosures: Section 12 provides for anonymous disclosures and it states that they can be made to any investigating authority where the disclosure does not relate to the investigating authority to which the disclosure is made. However, the person who makes the anonymous disclosure is expected to identify themselves to the head of the authority and request that his identity be kept confidential. This right to make anonymous disclosures is not unlimited however, as Article 12(4) states that the head of the investigating authority will personally consider the disclosure and make a preliminary assessment of the disclosure against matters referred to under section 13 before referring the matter without any identification of the person making the disclosure to any relevant member of staff of the investigating authority for further and full investigation.

Concluding Observations

Whistleblower protection laws are meant to encourage public interest disclosures so that disclosures will be made without any fear that the person who makes the disclosure will be subjected to ill treatment. In such a way, whistleblowing is an important means of reducing corruption and dangerous situations in addition to improving the management, efficiency and the overall internal organizational culture of organizations.⁷⁵ Not only is it a means of bringing to light corrupt acts but also preventing harmful mistakes and disasters.⁷⁶ Whistleblowing has proven to be an effective tool in the fight against corruption, such as in Kenya, where the theft of millions of dollars of public money was revealed through whistleblowing.⁷⁷ Notwithstanding the purposes that whistleblowing serves, it may result in serious repercussions for some whistleblowers.⁷⁸

Whistleblowing not only promotes accountability but also protects against sanctions. In this regard, some distinguish between internal and external disclosures. Whereas internal whistleblowing is

⁷⁵ David Banisar, *Whistleblowing International standards and developments, Estudio Especializado para la Primera Conferencia Internacional: Debatiendo las Fronteras entre Estado, Mercado y Sociedad*, Ciudad de Mexico, 23-25 de marzo de 2006, p. 2

⁷⁶ Id.

⁷⁷ Id. P. 2

⁷⁸ Id. P. 3

made to higher ranking officials in the organization, external whistleblowing is made to external bodies, such as regulatory bodies, ombudsmen, anti-corruption commissioners, elected officials and the media.⁷⁹ Moreover, whistleblowing promotes the right to free speech as well as serving as an administrative control mechanism, by ensuring that organizations are more open and accountable to their employees, shareholders and the greater public in their activities.⁸⁰

Because of the danger that whistleblowers could be subjected to criminal charges for violation of employment laws, they could be ostracized or in some extreme cases they may be in physical danger, the need to protect whistleblowers has been recognized in many anti-corruption treaties. The way in which they are protected however varies from one state to the next. An examination of various jurisdictions reveals that some choose to adopt laws that are specifically geared towards whistleblower protection while others resort to the use of other legislation including labor laws or public sector employment rules.⁸¹

Notwithstanding the diversity of the form of protection granted, there is a general agreement that all whistleblower protection laws have two major themes; a proactive and a protective or prohibitive aspect.⁸² The proactive aspect of the law is aimed at changing the behavior of individuals. By making disclosure of information culturally acceptable, it seeks to alter the culture of organizations and to facilitate the disclosure of information on negative activities in the organization. The protective/ prohibitive aspect on the other hand, consists of a series of protections and incentives that would encourage people to disclose information without fear of suffering for their disclosures.⁸³ The effectiveness of whistleblower protection laws is a function of several elements, including *inter alia*, the scope of the laws and the clarity of the definitions provided.

On the whole the Public Interest Disclosure (Whistle Blowers) legislation is sound. A notable strength of the Act is that it has a broad and inclusive approach. The Whistleblower is protected from reprisals (section 43 (1)) and his or her identity is to be kept confidential (section 44). In some states, the scope of the whistleblower laws is too narrow and applies to the public sector excluding the private sector or it may apply to a limited (exhaustive) list of wrongdoing.

⁷⁹ *Id.* P. 7, 8

⁸⁰ *Id.* P. 8

⁸¹ *Id.* P. 3

⁸² *Id.*

⁸³ *Id.* P. 4

THE NATIONAL PROSECUTION AUTHORITY ACT, 2010

Overview of the Act

As observed earlier, the international conventions to which Zambia is party require state parties to establish independent prosecutorial agencies⁸⁴. This is to ensure that prosecutorial decisions in individual cases are impartial, fair, in the broad public interest and are in accordance with constitutional and legal requirements. They should not be a product of partisan political, private or special influence or pressure or corruption. The National Prosecution Authority Act, 2010 establishes the National Prosecution Authority (NPA) and specifies its powers and functions. It also provides a framework for the effective administration of criminal justice as well as establishes the Witness Management Fund.

The National Prosecution Authority Act establishes National Prosecution Authority and Witness Management Fund. (1) National Prosecution Authority (section 3) is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power to do all such things as a body corporate may do or perform by law. The Act established the National Prosecution Authority as the primary authority for the administration of criminal Justice in Zambia. Pursuant to Section 5 of Part II, the functions of the NPA include, appointing state advocates and prosecutors, promoting standards of practice by state advocates and prosecutors, internationally comparable practice standards for prosecutors, integrity and status of state advocates and prosecutors, an understanding of professional ethics amongst the prosecutors and ensuring that the rules and guidelines for professional ethics are responsive to the effective administration of criminal justice. They also have the task of implementing an effective prosecution mechanism to maintain rule of law, conducting research into various disciplines of law, cooperating with the police, courts, legal profession and other government agencies⁸⁵. The Authority is tasked with implementing an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime and to cooperate with the police, the courts, the legal profession and other Government agencies or institutions so as to ensure the fairness and effectiveness of prosecutions⁸⁶.

⁸⁴ National Prosecution Authority Act, 2010, section 6.

⁸⁵ Ibid, section 5 (e)

⁸⁶ Ibid.

The authority is run by a Board whose membership is appointed by the minister of Justice⁸⁷. Members of the Board represent specified constituencies- Representative of the Attorney General; representative of the Public Service Management Division; a representative of the Ministry of labor and two other members appointed by the minister.⁸⁸ The act does not specify any qualifications for appointment to the Board. The members serve for three years and the term is renewable for another term of three years. It is provided that the Authority shall not in the performance of its functions be subject to the direction or control of any person or authority, other than the Director of Public Prosecution⁸⁹. This provision brings into question the role of the Authority. If it is there to ensure accountability why then would it be subject to the direction of the Director of Public Prosecutions? Section 8 provides that the Director of Public Prosecutions shall have authority over the exercising of all the powers and the performance of all duties and functions conferred upon, imposed on or assigned to, prosecutors.

Functions of the Director of Public Prosecutions

The functions of the Director of Prosecutions are: to (a) institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed by that person; (b) take over and continue any such criminal proceedings as may have been instituted or undertaken by any other person or authority; (c) and discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by the Director of Public Prosecutions or any person or authority;(d) review a decision to prosecute, or not to prosecute, any criminal offence. The Board appoints the Chief State Prosecutor, Deputy Chief State Prosecutors and State Advocates. The Director of Prosecutions has authority to appoint a person as a prosecutor for purposes of the Criminal Procedure Code as well as this Act. Section 10 (4) gives sweeping powers to the Director of Prosecutions to, at any stage of the criminal proceedings, give the Chief State Advocate, a Deputy Chief State Advocate, a state advocate or a prosecutor such general or specific directions with respect to the performance of their functions, as the Director of Public Prosecutions considers necessary and the Chief State Advocate, Deputy Chief State Advocate, State Advocate and prosecutor shall give effect to such directions⁹⁰. This is a very dangerous provision. It completely undermines the independence of the

⁸⁷ Ibid, article 7

⁸⁸ Ibid, article 7(1)

⁸⁹ Ibid, section 6.

⁹⁰ Ibid, section 10.

prosecutor. A lawyer in court must act professionally and according to his best judgment. The provision in its current form is clearly a violation of the Legal Practitioners Act.

Section 10(4) gives the Director of Prosecutor unlimited discretion to interfere with the conduct of prosecutions. Ironically, section 10 (6) proceeds to outline the duties of a prosecutor as follows(a) to carry out the prosecutors functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; (b) protect the public interest , act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; (c) keep the matters in the possession of the prosecutor confidential, unless the performance of a duty or the needs of justice require otherwise and (d) consider the views and concerns of a victim where the victims interests are affected and ensure that the victim is informed of the rights. Section 10 (6) (b) which allows the prosecutor to protect the public interest even where it disadvantages the accused is serious violation of the right to a fair trial. Who determines what is in the public interest as Lord Denning observed the beginning of the public interest is often the end of human rights. The provisions relating to witness protection do not seem to be about witness protection. Section 17 which provide what the witness protection fund shall be used for the following activities (a) the ferrying of witnesses to and from court; (b) the counseling of witnesses before testifying in any matter before the court and (c) in matter relating to witness management. There is also clearly unclear drafting in the Act for example section 20 (b) provides that it is an offense to refuse to give the Director of Public Prosecutions, a Chief State Advocate, a Deputy Chief State Advocate, a State Advocate, a prosecutor or any other staff of the Authority such reasonable assistance as the officer may require for the purpose of exercising their functions commits an offence. The provision is so vague as to be meaningless. Would an individual who refuses to give the prosecutor a ride in his car to the court be committing an offence?

The Director of Public Prosecutions and the Executive

The Director of Public Prosecutions and his staff are not adequately protected from interference by the executive. To enhance the independence of the Director of Public Prosecutions the state should ensure that the appointment of the Director of Public Prosecutions is transparent. For example it could be provided that the Director of Public Prosecutions shall be nominated and with the approval of the National Assembly be appointed by the President. The Director of Public Prosecutions should not require the consent of any person authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions shall not be under the

direction or control of any person or authority. In a number of jurisdictions, in order to ensure the independence of the Director of Public Prosecutions the term of office is fixed and the incumbent is not eligible for reappointment at the expiry of the fixed term⁹¹. It is important that the grounds upon which the Director of Public Prosecutions may be removed from office are specified. A Director of Public Prosecutions should only be removed on the following grounds: (a) inability to perform the functions of the office arising from mental or physical incapacity; (b) bankruptcy; (c) incompetence or (d) gross misconduct or misbehavior. The removal should be after a judicial tribunal composed of persons qualified to be judges of the High Court. The tribunal should inquire into the matter expeditiously and report on the facts and make recommendations to the President, who shall act in accordance with the recommendations of the tribunal. The President should have no discretion in the matter.

As observed in Zambia the Director of Public Prosecutions has complete prosecutorial discretion. He or she decides whether to bring a case or not. This power is unregulated and is also not accountable to any one or body. It also means that he or she can stop private prosecutions. The prosecutor is in law the state at the instance of the private prosecutor. Consequently the Director of Public Prosecutions retains control in such private prosecutions. The upshot of the law in Zambia is that the Director of Public Prosecutions enjoys an exclusive, unregulated, and unaccountable discretion in criminal prosecutions to enforce or not to enforce criminal law of the land. Commenting on similar provisions in other jurisdictions, James Vorenberg⁹² in his article "narrowing the discretion of Criminal Justice Officials" says that such an enormous breadth of prosecutorial discretion does not serve any valid purpose and that it is in fact power resulting from default rather than conscious legislative judgment. Another scholar Jonathan Rogers observed that something must be seriously wrong when a code for prosecutors does not incorporate the full tenor and effect of the principle of the rule of law⁹³. There is nothing in the legislation to block the influence of undue pressures. While it is important to promote prosecutorial independence, this must be balanced with the need to subject the Director of Public Prosecutions effective to accountability which will deter prosecutorial corruption. The Bulaya and Chiluba Cases are illustrative of the problems that can arise. The prosecutor must not have a completely free rein to do as he or she feels like doing. Unless the office is properly accountable to the people, then the people will not know what is being done and how it is being done and they will then not be able to

⁹¹ One such jurisdiction is the South Africa.

⁹² Duke Law Journal, Vol. 1976, No. 4 (Sept. 1976), PP 651-697, p. 688.

⁹³ Oxford Journal of Legal Studies, Vol. 20 No. 4 (2006) pp. 775-803.

respect and support the office. The most obvious way in which it is achieved is by giving reasons for decisions. There might be concerns about privacy, security etc. nevertheless the right balance must be struck.

Witness Management Fund

As observed earlier, the Act further creates a Witness Management Fund. The Fund shall consist of: (1) such moneys appropriated by the Parliament for the purposes of the Fund; (2) voluntary contributions to the Fund from any person or organization; (3) any grants mobilized from any source within or outside Zambia for the purposes of witness management; and (4) interest arising out of any investment of the Fund. The Fund shall be used for: (1) the ferrying of witnesses to and from court; (2) the counseling of witnesses before testifying in any matter before court; and (2) any other matter relating to witness management. The Witness Management Fund is not about protecting witnesses. It is about the management of witnesses. It is recommended that the country should look into enacting a comprehensive witness protection scheme. Prosecution of corruption cases can be dangerous to witnesses. Witnesses face intimidation and sometimes threats to their lives. Witness protection legislation would address these issues.

THE PLEA NEGOTIATIONS AND AGREEMENTS ACT, 2010

Overview of the Act

The Plea Negotiations and Agreement Act, 2010 introduces the concept of plea bargaining in the Zambian criminal justice system. A plea bargain is an agreement between a public prosecutor and an accused. It is offered by a prosecutor as an incentive for a defendant to plead guilty. Typically by so doing, an accused is made to plead to a lesser charge which invariably attracts a lighter sentence. The parties to a plea bargain trade various risks and entitlements. The accused relinquishes the right to go to trial (along with any chance of acquittal) while the prosecution gives up the entitlement to seek the highest sentence or pursue the most serious charges. The resulting bargains differ predictably from what would have happened had the same cases been taken to trial. On the other hand, everyone who pleads guilty is by definition convicted, while, a substantial minority of those who go to trial are acquitted. Section 4 of the Act provides that where a public prosecutor considers it desirable in any case, or where the circumstances of the case so warrant, the public prosecutor and the accused person may, at any time before judgment enter into a plea negotiation with the accused person for the purpose of reaching an agreement for the disposal of any charge against the accused person. The plea bargain shall require that the accused undertakes to plead guilty to an offence which is disclosed on the facts on which the charge against the accused person is based and fulfill the accused's other obligations specified in the agreement.

The Act in section 6(2) by requiring that plea negotiations shall be held by a public prosecutor with the accused person only through the accused person's legal representative ensures that the accused's right to representation by a legal practitioner of the accused choice is respected. Section 8 of Part III of the Act states that where a plea agreement is concluded, a public prosecutor shall where applicable and unless otherwise required by compelling reasons in the interest of justice as soon as is reasonably practicable inform the victim of the substance of and reasons for the plea agreement and that the victim is entitled to be present when the court considers the plea agreement. It is not clear from the letter of the law where it would be "applicable" or what "compelling reasons in the interest of justice" include. Therefore, the inevitable conclusion is that it could arguably be applied in any case including corruption. The rationale behind this provision is arguably to protect the right of the victim to get justice. Because of the "victimless" nature of corruption crimes, the applicability of this provision to corruption cases is questionable. In

corruption, it is not always possible to pin point one individual victim, rather it is society's interest that is being harmed. For this reason, it would be hard to enforce this provision in corruption cases.

The victim is to be informed of the plea bargain, (section) and the victim is entitled to be present when the court considers the plea agreement. The prosecutor is required to inform the court in open court of the existence of the plea agreement (section). The court may where the circumstances appear to so require, question the accused person in order to confirm the accused persons knowledge of the existence of a plea bargain. The court shall not be bound to accept any plea agreement except where the non-acceptance would be contrary to the interest of justice and public interest (section 10). The court before accepting a plea agreement shall make a determination in open court that "no inducement was offered to the accused person to encourage the accused person to enter into the plea agreement and the accused understands the nature and substance and consequence of the plea agreement. The court could refuse to accept the plea agreement where it decides that (a) acceptance of the plea agreement would be contrary to the interest of justice and public interest; (b) the offence for which the accused person is charged is not disclosed on the facts;(c) there is no confirmation by the accused person of the agreement or the admission contained in the agreement. The plea agreement may be withdrawn before sentence on the motion of the court or the accused person. (section15) The grounds for which a plea agreement may be withdrawn are spelt out in the Act as (a) (a) improper inducement; (b) where public prosecutor has breached the terms of the plea; (c) where accused entered into the agreement as a result of a misrepresentation or misapprehension as to the substance or consequence of the plea agreement. The prosecutor may withdraw the plea agreement where the prosecutor discovers that (a) he or she was misled by the accused on a material issue and (b) accused was induced to conclude the plea agreement. Section 17 allows the court to seal the record of the plea agreement where the court is satisfied that the sealing is in the interests of the effective administration of justice.

Evaluation of the Plea Bargaining Provisions

Part I of the Act defines key terms used in the act. It defines a plea negotiation as []"negotiation carried out between an accused person or the accused person's legal representative and a public prosecutor in relation to the accused person pleading guilty to a lesser offence than the offence charged or to one of multiple charges in return for any concession or benefit in relation to which charges are to be proceeded with."

Section 3 of Part I clarifies that the applicability of the accused's rights and the public prosecutor's powers under the provisions of preexisting laws will not be affected by this act. For instance, the accused person's right to plead guilty without entering into a plea negotiation or agreement is reserved. Likewise, absent an express plea agreement to the contrary, the public prosecutor's may exercise his powers whether they stem from the national Constitution or other legal instruments.

A plea bargain is an agreement between a public prosecutor and an accused. According to Part II, Section 4(3) such an agreement requires that the accused person enter a guilty plea to the charged offence and any other obligation that is specified in the agreement. The public prosecutor on the other hand, will take into consideration the undertaking of the accused person and agree to take a course of action consistent with the exercise of the specified powers, and fulfill the obligations of the state as specified by the agreement. Section 5 of Part II of the Act articulates that the prosecutor has the power to withdraw or discontinue the original charge or to accept the accused's plea to a lesser offence whether originally included or not.

There are certain provisions that seek to ensure that the defendant's rights to a fair trial and due process of law are protected. For instance, Section 6(1) of Part II of the Act states that the prosecutor has the obligation to inform the accused person's right to representation by a legal practitioner and the right to apply for legal aid in respect of the negotiations. Section 6(2) on the other hand, by limiting the conducting of plea bargains only through the defendant's legal representative ensures that the defendant is not at a disadvantage. According to section 9(1), the court needs to be informed of the existence of a plea bargain, either in open court or on showing of good cause in chambers. It is unclear why the "good cause" requirement is limited to a plea bargain announced in chambers and not to one that is announced in open court. Arguably this is based on the assumption that there are fewer possibilities for abuse in open court as a victim may be able to object. However, because of the fact that in corruption the concerned parties are usually the prosecutor, representing the people and the state in general, the defendant and the court, the possibilities for objection are rather grim. Moreover, taking into account the gravity of the offence of corruption and the fact that it affects the society as a whole, openness and accountability should be followed. It would be in the interest of justice to openly reveal to the public any decisions in corruption cases.

Section 10 of Part III gives the court discretion to not accept a plea agreement except if the non-acceptance would be contrary to the interest of justice. There are certain factors that the court should take into consideration before deciding to accept the plea bargain. The provision's purpose

is two-fold: protecting the rights of the accused and safeguarding society's interest. In the light of the former purpose, the court needs to ensure that the defendant was not induced into accepting the plea bargain and that the accused understands the nature, substance and consequence of the plea agreement. In the light of the latter, the court has to make sure that there is a factual basis for the plea agreement and that the acceptance would not be contrary to the interests of justice or public interest.

Although the former two elements are fairly easy to determine, the latter two lend themselves to interpretation. It is not clear what constitutes a factual basis for the acceptance of a plea bargain and what would be contrary to the interests of justice or public interest. The law does not provide the court with any yardstick for the determination of these two elements. The court has discretion in deciding what kind of cases would fall under these two categories. Moreover Section 12(3) the refusal of the court to accept a plea bargain does not bar future plea negotiations.

Where a plea bargain does not result in an agreement, any statement made in the course of the negotiations is inadmissible in court in both civil and criminal cases instituted against the accused as per section 16 of the Act. These statements may even be sealed by the court upon application where the court is satisfied that this is in the interest of justice in accordance with Section 17. These bars are effective where the case is instituted against the accused person. However, as per this provision, whether statements implicating another party would be admissible in a case not involving the accused is not clear.

Section 18 prescribes an obligation for secrecy and confidentiality of information contained in a plea agreement on any person who has possession of documents, information or records. In 18(2) it even imposes criminal liability for violation of this obligation of secrecy and confidentiality unless it is pursuant to a court order or the provisions of the act. This criminal liability will likely discourage whistleblowers who may wish to disclose a corrupt act that was revealed within the course of a plea negotiation or plea agreement. There is one drafting major weakness of the Act. That is that its provisions are mostly worded in very general terms. Such terminology is open to interpretation and may cause inconsistency in application. Its adequacy in light of corruption control is questionable as it does not distinguish between crimes based on their severity and it does not provide specific parameters for application.

The Act legislates into existence a process that is widely used in most parts of the world. Oddly, it would seem that as currently structured, the prosecutor can place before a court a plea agreement when all the evidence has been concluded and the court is about to deliver judgment. This is as a

result of section 4(1) which allows the prosecutor to enter a plea bargain any time before judgment. Allowing plea bargains at any stage of the proceedings is likely to undermine the reputation of the Criminal justice system. There is also a contradiction between section 12(1) and section 15 (1). Section 12 (1) states that the court should reject the plea where it is satisfied that the accused was induced to enter into the plea while section 15 (1) talks of the court allowing the withdrawal of the plea agreement where there was “improper inducement.” Clearly section 15(1) states the accurate position. In plea bargains there are always inducements with the prosecution promising lesser charges or a lesser sentence should the accused agree to plead guilty. What is inappropriate and should be prohibited are improper inducements? For example a plea bargain that is based on a promise by the accused to make a financial contribution to the ruling party’s coffers would clearly be inappropriate.

The introduction of plea bargaining into Zambian legal system raises interesting issues. It is likely to have an impact on corruption cases. Here the section draws attention to some of the issues that are likely to happen. Arguably it will have its advantages and drawbacks in light of corruption control and the enforcement of laws dealing with corruption. The Act makes no mention of the crime of corruption. As it makes no distinction between different kinds of crimes, it arguably applies to all cases, including corruption. When an accused person who has been charged with a corruption related crime agrees to plea bargain, the procedures will usually be much speedier and thus less expensive than having a full trial. This will alleviate the case load for overcrowded courtrooms and the public prosecutor’s office, which will have more time to deal with more cases. This is a clear advantage of the plea bargaining system.

Moreover, the availability of the option to plea bargain a criminal charge provides a flexible means of case disposal. In cases where you have multiple defendants plea bargaining provides the prosecutor with an opportunity to use the plea bargain as a tactic to further his or her case against co-defendants. Cooperative defendants who know that they are guilty on the other hand, will be willing to plead guilty and agree to give testimony which is damaging to a co-defendant in exchange for a reduced sentence and to avoid the uncertainty of a full criminal trial. This becomes especially important in the investigation and prosecution of sectors or government departments having high rates of corruption.

There are arguments that the option to plea bargain could be an ineffective response to corruption. The reasons presented to support this argument are varied. Primarily, it is possible that the option to negotiate and plea bargain one’s way out of criminal liability could give room for corruption. In

some jurisdictions, such as the case of Pakistan, plea bargaining was introduced particularly to deal with corruption cases. It requires the accused to accept his guilt and to return the proceeds of the corruption. In exchange, he or she will not be sentenced to jail time but will be convicted. As punishment, the individual will be disqualified to take part in elections, hold any public office, obtain a loan from any bank and is dismissed from service if he is a government official⁹⁴. Plea bargaining is arguably soft on crime in general and corruption will be no exception. In so far as the goal is to curb corruption, the option to plead out of the graver sentence via plea bargaining will send the message that punishments are not so severe and will have the potential to encourage recidivism. Knowing that they will always have the option to plea bargain and get reduced sentences or more favorable treatment, habitual corrupt officials could be encouraged to go back to the public and commit the same or more serious crimes. Plea bargaining also operates unfairly among defendant's once one of the co-defendants plea bargains and decides to give evidence the other defendants are left with nothing to offer where they to be interested in a plea bargain too.

Some will also argue that the accused's constitutional right to a defense has the potential to be violated in a plea bargain. The defendant, knowing that the outcome of a full-fledged trial will possibly be worse than that of a plea bargain will opt to plead his or her way out of it rather than present his or her defense. The argument is that plea bargaining will encourage innocent defendants to plead guilty to a crime that they may have not committed because of the prospects of a speedy trial and a certain outcome. Thinking that they are avoiding graver consequences, the accused will be inclined to accept a guilty plea in exchange for a reduced sentence in order avoid the risk of a full trial.

It is also possible to envisage a situation where police investigators and prosecutors will rely on the plea bargain to such an extent that they may neglect their tasks to find out the truth and pursue justice. This could lead to poor investigations of corrupt practices. The goal of anti-corruption legislation is to deter the crime of corruption from occurring over and over. Where investigations are not conducted well, the underlying problems will not be identified and likely to recur.

The real problem with plea bargaining is that it severely impairs the public's interest in effective punishment of the crime. In Nigeria its use in corruption cases has been very controversial. Accused persons who stole millions of dollars plea bargained and got away with fines which are pittance compared to the amount of bribes they took and without any jail time at all. In 2008 a former governor of Edo State Chief Luck Nosakhare Igbinedion was arraigned by the Federal High Court,

⁹⁴ United Nations Development Program, Tackling Corruption, Transforming Lives, 2008.

Enugu on a 191 count charge of corruption, money laundering and embezzlement. In a plea bargain the prosecution reduced the 191 count to one single count. In line with the plea bargain, on 18 December 2008, the court convicted Luck Igbinedion on one count and ordered him to refund 500 million Naira, forfeit 3 houses and sentenced him to six months imprisonment or pay a fine of 3.6 million Naira.⁹⁵ In another Nigerian case, Cecilia Ibru former Managing Director and Chief Executive Officer of Oceanic International Bank was convicted and sentenced to 18 months imprisonment on a three count charge of corruption, negligence, reckless grant of credit running into billions of dollars and mismanagement of depositor's funds. She was sentenced to six months on each count to run concurrently and was to forfeit over \$1.3 billion in assets. Ms. Ibru was originally charged on a 23 count charge count. The prosecution reduced the counts to three after a plea bargain⁹⁶. This suggests that plea bargaining should be subject to certain parameters. It should not be an escape route for those who have committed grievous crimes of corruption to get away with light sentence.

⁹⁵ Sahara Reporters, The Abuse of Plea Bargain in Nigeria, June 24, 2011. (<http://saharareporters.com/press-release/abuse-plea-bargain.nigeria>).

⁹⁶ On jailing of Cecelia Inbru, symbolism and corruption in Nigerian's banks, (<http://www.usafricaonline.com/2010/10/11/cecilia-ibru-jailed.banker-nekeopar/>)

THE FINANCIAL INTELLIGENCE CENTER ACT OF 2010

Overview of the Act

The Financial Intelligence Center Act establishes a center to detect suspicious financial transactions. The center is established as a body corporate with perpetual succession and common seal, capable of suing and being sued in its corporate name and with power to do all such things as a body corporate may do or perform by law. It is the sole designated agency responsible for the receipt, requesting, analyzing, and disseminating of the disclosure of suspicious transaction reports. Its functions include: to receive, request, and analyze suspicious transaction reports required to be made under the Act or any other written law, including information from any foreign designated authority; analyze and evaluate suspicious transaction reports and information so as to determine whether there is sufficient basis to transmit reports for investigation by the law enforcement agencies or a foreign designated authority; disseminate information to law enforcement agencies, where there are reasonable grounds to suspect money laundering or financing of terrorism; provide information relating to suspicious transactions in accordance with the Act to any foreign designated authority, subject to such conditions as the Director may determine; provide information, advice, and assistance to law enforcement agencies in furtherance of an investigation; enter into any agreement or arrangement, in writing, with a foreign designated authority which the Board considers necessary or desirable for the discharge or performance of its functions; conduct inquiries on behalf of foreign designated authorities and notify them of the outcome; inform the public and reporting entities of their obligation and measures that have been or might have taken to detect, prevent, and deter money laundering and financing of terrorism; access directly or indirectly, on a timely basis financial, administrative, or law enforcement information, required for the better carrying out of its functions under this Act⁹⁷.

The center has wide powers. Where it reasonably suspects that a transaction relates to money laundering, terrorist financing or any other serious offence or the commission of a serious offence, it may order a reporting entity to freeze an account or suspend a transaction⁹⁸. The center in section 15 prohibits reporting entities from establishing or maintaining anonymous accounts or any account in a fictitious name. A reporting entity is required to identify its customers and verify its customers identities by means of reliable and independent source of document (section 16 (1)).

⁹⁷ The Financial Intelligence Centre Act, 2010, section 5 (1) (2) a, b, c, d, e,f,g,h.

⁹⁸ Ibid, section 6

The center may issue policy directives to reporting entities regarding their obligations under measures that have been or might be taken to detect, prevent, and deter the commission of any offences connected to proceeds of crime; enter into and facilitate cooperation agreements with foreign designated authorities; and perform such other functions as are necessary to give effect to this Act. The reporting companies shall not establish or maintain an anonymous account or any account in a fictitious name; shall identify its customers and verify its customers' identities by means of reliable and independent source documents or information; may rely on an intermediary or other third party to perform the customer identification required' shall, where conducting any business relationship or executing transaction with a customer that is not physically present for purposes of identification, take adequate measures to address the specific risk of money laundering financing of terrorism and any other serious offence; ensure that the due diligence conducted is no less effective than where the customer appears in person; and require additional documentary evidence or supplementary measures to verify or certify the documents supplied by the customer, or confirmatory certification from financial institutions or other documentary evidence or measures as may be prescribed⁹⁹. The reporting companies are required to have; appropriate risk management systems for high risk customers; have systems for identification and account opening for cross-border correspondent banking relationship; maintain all the books and records with respect to their customers and transactions and shall ensure that such records and the underlying information are available, on a timely basis, to the center; develop and implement programs for the prevention of money laundering, financing of terrorism, and any other serious offences; shall exercise ongoing due diligence with respect to any business relationship with a customer; shall have systems for special monitoring of certain transactions; shall have certain obligations regarding wire transfers; require its foreign branches and majority owned subsidiaries to implement the requirements to the extent that domestic applicable laws of the host country so permit; shell banks shall not be established or permitted to operate in or through the territory of Zambia.

The reporting entity or a director, principal, officer, partner, professional, or employee has an obligation to report suspicious transactions to the center. They are further required to promptly submit a report to the center on any currency transactions in an amount equal to or above the prescribed amount, whether conducted as a single transaction or several transactions that appear to be linked. Where it appears to a supervisory authority that a reporting entity, or any of its directors, officers, or employees, is not complying or has not complied, with the obligations set out

⁹⁹ Ibid.

in this Act, it shall immediately inform the center accordingly. No secrecy or confidentiality provision in any other law shall prevent a reporting entity from fulfilling its obligations under the Act¹⁰⁰. A reporting entity shall not disclose to its customer or a third party that a report or any other information concerning suspected money laundering, financing of terrorism, or any other serious offense shall be, or it being, or has been, submitted to the center, or that a money laundering, financing of terrorism, or any other serious offence investigation is being, or has been, carried out. Reporting entities are required to protect the identity of persons and information relating to suspicious transaction reports. Where a supervisory authority has reasonable grounds to believe that a business transaction indicates that a person has or may have been engaged in money laundering, the financing of terrorism, or any other serious offence, it shall disclose, or cause to be disclosed, that information to the center¹⁰¹. The supervisory authority shall take all reasonable steps to ensure the reporting entity's compliance with its obligations under the Act. The center may communicate anything disclosed to it under the Act to a foreign designated authority if there is in existence an arrangement between Zambia and the foreign state and the center is satisfied that the foreign designated authority has given appropriate undertakings¹⁰². No order for the production of information, document, or evidence shall be issued in respect of the center or against the Minister, Director, officers, or other staff of the center or any person engaged pursuant to this Act. The Act creates a number offences and penalties as follows: (a) failure to comply with identification requirements; (b) failure to maintain or provide access to records; (c) failure to fulfill due diligence obligations or maintain internal controls; (d) failure to submit a report to the center with regard to a suspicious transaction or other reporting; (e) false or misleading statements; (f) confidentiality violation and setting up shell banks. The standard of guilty is: intentionally or negligently doing any of the specified acts¹⁰³.

Organization of the Center

The center is run by a Board established under section 7 of the Act. Board members are appointed by the President. There are no fixed terms for Board membership. A person shall not be qualified to be appointed to the Board unless the person has no less than ten years of experience in a field connected with financial analysis, law, accounting, forensic auditing, financial investigation, law enforcement or any other field as the Minister may determine. Under section 8 the Board is charged

¹⁰⁰ Ibid, section 32, provides : No secrecy or confidential provisions in any law shall prevent a reporting agency from fulfilling its obligations under this Act

¹⁰¹ Ibid, section 29 (1).

¹⁰² Ibid, section 40.

¹⁰³ Ibid, section 42 (a), 43, 44, & 54

with issuing policy directives to reporting entities regarding their obligations under measures that have been or might be taken to detect, prevent and deter the commission of any offences connected to proceeds of crime and to enter into and facilitate cooperation agreements with foreign designated authorities. The Director who is the Chief Executive of the center is appointed by the Board subject to the approval of the Minister. A person shall not be qualified to be appointed Director unless the person has no less than ten years of experience in the field connected with financial analysis, law, accounting, forensic auditing, financial investigation, and law enforcement. The Director is responsible for the management and administration of the center. The center submits its annual reports to the Minister¹⁰⁴.

Evaluation of the Act

Money transfers are the handmaiden of international corruption and efforts to curb suspicious transactions are indispensable to the fight against corruption. The linkage is clear: those who take bribes must find safe domestic and international channels through which they can move and bank their ill-gotten gains. The effective use of intelligence is key to a successful anti money laundering regime. Such a system should be run by well-resourced and well trained personnel. The substance of the Financial Intelligence Act is good and comprehensive.

Strengths of the Act 26

The reporting entity plays an important part in the implementation of the act. Among other things, the act provides that the reporting entity aims at prevention of money laundering, terrorist financing and other serious offences through some of its robust provisions including those prohibiting the establishment of anonymous accounts (section 15), requiring identification of customers (section 16 (3)), reliance on third party for identification (section 17), identification of high risk customers (section 19), cross-border correspondent banking relationships (section 20), record keeping (section), internal programs within the reporting entities to combat money laundering (section 23), financing of terrorism and other serious offences (section 23), ongoing due diligence (section 24), special monitoring of certain transactions (section 25), obligations regarding wire transfers (section), compliance by foreign subsidiaries and branches (section 27), prohibition against the establishment of shell banks (section 28), obligation to report suspicious transactions (section 29), obligations to report currency transactions (section 30), disclosure of information regarding compliance (section 31), inapplicability of confidentiality provisions (section 32),

¹⁰⁴ Ibid, section 55.

prohibition against tipping off (section 33). In addition, with regard to the protection of disclosers, the act provides for protection of identity of persons and information relating to suspicious transaction reports (section 34) and exemption from liability for good faith reporting of suspicious transactions (section 35). The entity is made subject to supervision by the supervisory authorities who have the power to enforce compliance. (Section 38)

The Executive, the Independence of the Center

The fundamental weakness of the Act relates to the excessive involvement of the President in the appointment of the persons appointed to run the Centre and matters that might affect the efficiency and independence of the center. There are matters that are likely to affect the efficiency and effectiveness of the center. These include: (1) insufficient number of Board members (section 7(1)); (2) indeterminate tenure of the Center's Director (section 9(1)); (3) broad immunity granted to the Center's staff members (section 12); (4) conflicted determination by the Board of its own compensation (Schedule, section 3); (5) no sanction specified for the non-disclosure of a conflict of interest (Schedule, section 4); (6) auditor's fees at the Center's own expenses (Schedule, section 7(3)). It is important that the Act clearly defines reporting and supervisory entities. These are key concepts in the scheme of the Act. It is important to make it clear what type of institutions these terms encompass.

Definitions of "law enforcement officer" and "officer"

In section 2, the act provides distinct definitions for "law enforcement officer" and "officer." While a law enforcement officer is an officer of a law enforcement agency, an officer is an officer of the center or a law enforcement officer authorized by the center to carry out a function under the act. This subtle distinction could open the door to confusion.

Suspicious Transactions

Although one of the major functions of the Financial Intelligence Center is the investigation of suspicious transactions, there is no explicit definition provided for suspicious transactions. Although there is a definition of suspicious transaction reports, in the interest of clarity and for effective implementation of the law, it would be advisable to provide a specific definition of the terminology. Section 5 of the Act states that the center shall be the sole designated agency responsible for the receipt, requesting, analyzing and disseminating of the disclosure of suspicious transaction reports. Suspicious transaction reports have earlier been defined as reports submitted on suspected money laundering, financing of terrorism or other serious offence or attempted

money laundering, financing of terrorism or other serious offence, whether in form of a data message or otherwise¹⁰⁵. The provision fails to include the proceeds of corruption within the list of crimes. Although it is possible to read corruption within the meaning of other serious offence, in so far as one of the major purposes of the Financial Intelligence Center is to curb corruption, it would be more effective to be specific about it. In addition, the definition contains a typo; what has been spelt as “serous”, should be “serious”. Moreover, it is unclear from the provision who is to supply information on the suspicious transactions.

Independence of the Center

Section 6(1) of the Act states that the center shall not in the performance of its functions under the act be subject to the direction or control of any person or authority. However the minister has the power to give the center such directions as the minister considers necessary in the public interest and the center shall give effect to those directions to the extent that they are not inconsistent with the act. Giving the minister such broad powers to direct the functions of the center, it may to some extent undermine the autonomy of the center. In addition, the center has a board whose members are to be appointed by the president as per section 7(3). Although some requirements have to be fulfilled in order for a person to qualify to be a member of the board, the broad discretionary powers may be susceptible to abuse and undermine the independent functions of the center. In section 7(2), the act states that a person shall not be qualified to be appointed to the board unless the person has not less than ten years of experience in a field connected with financial analysis, law, accounting, forensic auditing, financial investigation, law enforcement or any other field as the minister may determine, the broad power of appointment of the president seems counter to the independence of the center.

Staff

Although the act articulates the elements that need to be satisfied in order to be appointed in the Board, there is no provision that specifies the conditions that need to be fulfilled in order to be a member of staff of the Financial Intelligence Center. Section 8 merely enumerates the functions of the board.

¹⁰⁵ Ibid, section 2 (2)

Immunity of Officers

The director, officers or staff of the center or any person acting under the authority of the directory are immune from suit for anything that they do or omit to do in good faith in the discharge of their functions as per section 12 of the act, which states that an action shall not lie against those individuals who discharge their duties under the act in good faith. This could give rise to a potential for abuse.

Prevention of Money Laundering Reporting Entities

The act defines a reporting entity as an institution regulated by a supervisory authority and required to make a suspicious transaction report under the act¹⁰⁶. However, the act does not provide any information on how these reporting entities are established and whether or not they are independent of the supervisory authority by which they are supposed to be regulated. The supervisory authorities include the governor of the Bank of Zambia, the Registrar of Co-operatives appointed under the Pension Scheme Regulation Act, the Commissioner appointed under the Securities Act, the Registrar appointed under the Patents and Companies Registration Agency Act, the Zambia Development Agency, the licensing committee established under the Tourism and Hospitality Act, the Registrar of Estate Agents appointed under the Estate Agents Act, the Law Association of Zambia, the Zambia Institute of Chartered Accountants and any other authority established under any written law as a supervisory authority or as the Minister may prescribe. However, the provisions of the act fail to address the issue of how the reporting entity is to be established, the scope of its powers and the independence of the authority. This could be solved by stating under what laws these entities are established. According to section 17 a reporting entity may rely on an intermediary or other third party to perform the customer identification required under subsection 1 of section sixteen. But there are no requirements that this intermediary or third party needs to fulfill in order to be considered for this position.

Customers Who Are Not Physically Present

In section 18, the act states that a reporting entity shall where it conducts any business relationship or executes transactions with a customer that is not physically present for purposes of identification take adequate measures to address the specific risk of money laundering financing of terrorism or any other serious offence, ensure that the due diligence conducted is no less effective than where the customer appears in person and require additional documentary evidence or

¹⁰⁶ Ibid, section 2 (f).

supplementary measures to verify or certify the documents supplied by the customer or confirmatory certification from financial institutions. Here it is unclear what “physically present” entails. It is not entirely clear whether the customer referred to is a natural person or a legal person. If it includes legal persons as customers as well, there is no explanation what the term “physically present” means for them with regard to legal persons.

High Risk Customers

Section 19 of the act imposes on the reporting entity the duty to identify high risk customers, i.e. customers whose activities may pose a high risk of money laundering and financing of terrorism and to exercise enhanced identification, verification and ongoing due diligence. The reporting entity is also charged with the determination of a high risk customer. However, there is no yardstick against which the high riskiness is to be measured. It is totally left to the discretion of the reporting entity. For this reason, it may lead to various procedures being followed by various reporting entities which would result in discrepancies in the application of this requirement.

No Order for Production of Information

The Act provides that notwithstanding any provisions of any other written law, no order for the production of information, document or evidence shall be issued in respect of the center against the minister, director, officers or other staff of the center or any person engaged pursuant to the act¹⁰⁷. According to this provision, the personnel of the center are basically immune from any type of investigation. This is a dangerous provision as it may give rise to impunity. There is a danger that this could actually be counter-productive. It is possible to work out legislation which balances privacy, security and the rights of an individual to information held by the center.

Failure to Comply

Failure to comply with the requirements (identification requirements, maintenance of provision of access to records, fulfilling due diligence, maintenance of internal controls, reporting of suspicious transactions or other reporting, provision of false or misleading statement, violation of confidentiality, setting up a shell bank and other minor offences) intentionally or negligently will result in criminal conviction, fine and/ or imprisonment as provided in Part IV of the Act. However, failure to comply by the Financial Intelligence Center or the Supervisory Authorities seems to be treated more lightly than failure to comply by the Reporting Entities.

¹⁰⁷ Ibid section 41.

THE FORFEITURE OF PROCEEDS OF CRIME ACT, 2010

Overview of the Act

The Forfeiture of Proceeds of Crime Act provides for the confiscation of the proceeds of crime; deprivation of any person of any proceed, benefit, or property derived from the commission of any serious offence; facilitate the tracing of any proceeds, benefit, and property derived from the commission of any serious offence¹⁰⁸. It is intended to domesticate provisions of the United Nations Convention against Corruption relating to the forfeiture of proceeds of crime¹⁰⁹. In section 4(1) the Act provides that where a person is convicted of a serious offence, a public prosecutor may apply to the court for a forfeiture order against property that is tainted property in respect of the offence and/or a confiscation order against the person in respect of benefits derived by the person from the commission of the offence. Where an application under section 4 (1) is finally determined, no further application for a forfeiture order or a confiscation order may be made in respect of the offence for which the person was convicted unless the court grants leave for making of a new application on being satisfied: (a) that the property or benefit to which the new application relates was identified after the previous application was determined; (b) that necessary evidence became available only after the previous application was determined; or (c) that it is in the interests of justice that the new application be made. Under section 5 of the Act, the court has jurisdiction to make a forfeiture order irrespective of the value of the property. The amount to be recovered under any confiscation order is the amount which the court assesses to be the value of the person's benefit from the offence or, if more than one, all the offences in respect of which the order may be made. The forfeiture order is made pursuant to an application by the public prosecutor (section 6). The Public prosecutor shall give written notice of the application to the person and any other person who the public prosecutor has reason to believe may have an interest in the property.

Any other person, who claims an interest in the property, may appear and adduce evidence at the hearing of the application and the court may at any time before the final determination of the application, direct the public prosecutor to give notice of the application to any person who, in the opinion of the court, appears to have an interest in the property; or to publish in the Gazette and in a daily newspaper of general circulation in Zambia, notice of the application, in the manner and containing such particulars and within the time that the court considers appropriate. Where a

¹⁰⁸ The Fofeiture of Proceeds of Crime Act, 2010, preamble.

¹⁰⁹ Ibid.

public prosecutor applies for a confiscation order against a person the public prosecutor shall give the person written notice of the application; and the person may appear and adduce evidence at the hearing of the application. Section 9 (1) provides that where a person absconds in connection with a serious offence committed after the coming into force of the Act, a public prosecutor may, within a period of six months after the person so absconds, apply to the court for a forfeiture order in respect of any tainted property. Where a public prosecutor applies to the court for an order against any property and the court is satisfied that the property is tainted property, the court may order that the property or such of the property as is specified by the court in the order, be forfeited to the State. Where the court makes a forfeiture order against any property, the property vests absolutely in the state by virtue of the order¹¹⁰.

The Act provides protection for third parties. It provides in section 12 (1) that where an application is made for a forfeiture order against any property, a person who claims an interest in the property may apply to the court, before the forfeiture order is made, for a recognition of his or her interest. The court may make an order declaring the nature, extent and value, of the applicants interest. Where a court makes a forfeiture order in reliance on a person's conviction of an offence and the conviction is subsequently quashed, the quashing of the conviction discharges the order¹¹¹. Where the court is satisfied that a forfeiture order cannot be made executed because (a) the property cannot be locate; (b) the property has been transferred to a third party in circumstances that do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the forfeiture of the property, (c) is located outside Zambia; (d) has been mixed with other property that cannot be divided without difficulty; or (e) has been transferred to a bona fide third party purchaser for fair value without notice, the court may instead order the person to pay to the state an amount equal to the value of the property or interest¹¹².

The Forfeiture Act in section 19 (1) empowers courts to issue confiscation order. Such an order can be issued where a public prosecutor applies to the court for a confiscation order against a person in respect of that person's conviction of a serious offense and the court is satisfied that the person has benefited from the offence. Where a confiscation order is issued the convicted person is required to pay into court an amount equal to the value of the person's benefits from the offence or such lesser as the court certifies¹¹³. In assessing the value of benefits derived by a person from the commission

¹¹⁰ Section 11(1) Forfeiture of Proceeds of Crime Act, 2010.

¹¹¹ Section 13 (1), Forfeiture of Proceeds of Crime Act, 2010.

¹¹² Section 15, (a), (b), (c), (d), (e).

¹¹³ Section 22(1) Forfeiture of Proceeds Act, 2010.

of an offence or offences, the court may treat as property of the person any property that, in the opinion of the court, is subject to the effective control of the person and may lift the corporate veil to determine questions of ownership of property.¹¹⁴ The Act has several other routine provisions such as those dealing with the registration of foreign forfeiture orders and restraining the disposal of tainted property¹¹⁵.

An Evaluation of the Proceeds of Crime Act

Corruption is a far reaching, continuing and extremely profitable criminal enterprise which as we observed earlier diverts significant amounts of public money for illicit purposes. Public corruption-related schemes persist. This is despite legislation which facilitates the actual prosecution and imprisonment of individual participants. In order to further discourage corruption it is important to effectively reach the money and other assets generated by such schemes. It is therefore necessary to supplement existing sanctions by mandating forfeiture of money and other assets generated by public corruption-related activities. The Forfeiture of Proceeds of Crime Act aims at the domestication of the provisions relating to forfeiture of proceeds of corruption in the United Nations Convention against Corruption. One of its stated objectives is to deprive any person of any proceeds, benefit or property derived from the commission of any serious crime, facilitate the tracing of any proceeds, benefit and property derived from the commission of a crime. The threat of confiscation of proceeds of crime provides an important tool in the fight against corruption. It is designed to deter those who contemplate committing corruption crimes by reducing the possibility of gaining or keeping the profit from crime and to remedy the unjust enrichment of criminals who profit at the society's expense. Forfeiture diminishes the financial incentives which encourage and sustain corruption.

The Forfeiture of Proceeds of Crime Act provides that where a person is convicted of a serious offence, the public prosecutor may apply to the court for one or both of the following: (a) a forfeiture order against property that is tainted property in respect of the offence; (b) a confiscation order against the person in respect of benefits derived by the person from the commission of the crime. Article 5 gives the court jurisdiction to make a forfeiture order irrespective of the value of the property. There is lack of clarity as to the difference between a forfeiture order provided for in article 5 and a confiscation order provided for in article 6(1).

¹¹⁴ Section 24, Forfeiture of Proceeds Act, 2010

¹¹⁵ Section 18, Forfeiture Act, 2010.

Otherwise, the Act is a sound piece of legislation and fully implements the relevant provisions of the United Nations Convention against Corruption.

THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING (AMENDMENT) ACT OF 2010

Overview of the Act

The Prohibition and Prevention of Money Laundering (Amendment) repeals provisions relating to the disclosure of information of suspicion of money laundering by supervisory authorities and reporting entities, redefines the functions of the Anti-Money Laundering Investigations Unit. The Act is to be read as one with the Prohibition and Prevention of Money Laundering Act, 2001. The Prohibition and Prevention of Money Laundering (Amendment) Act defines money laundering as: where a reasonable inference may be drawn, having regard to the objective factual circumstances, any activity by a person (a) who knows or has reason to believe that the property is the proceeds of a crime; or (b) without reasonable excuse, fails to take reasonable steps to ascertain whether or realized directly or indirectly, by any person from the commission of a crime; where the person (i) engages, directly or indirectly, in a transaction that involves proceeds of a crime; (ii) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Zambia proceeds of a crime; or (iii) conceals, disguises, or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any illegal activity¹¹⁶. It further defines proceeds of crime as: property or benefit that is wholly or partly derived or realized from a disposal or other dealing with proceeds of a crime; wholly or partly acquired proceeds of a crime; and includes, on a proportional basis, property into which any property derived or realized directly from the illegal activity is later converted, transformed, or intermingled, and any income, capital or other economic gains derived or realized from the property at any time after the crime; or any property that is derived or realized, directly or indirectly, by any person from any act or omission that occurred outside Zambia and would if the act or omission had occurred in Zambia, have constituted a crime¹¹⁷.

This Act has been introduced in order to amend some provisions of the already existing Money Laundering Act of 2001. Some of the amendments that it introduces are the following. The title of the act has been shortened by deleting the words, “to provide for the disclosure of information on suspicion of money laundering activities by supervisory authorities and reporting entities.” (section

¹¹⁶ Prohibition and Prevention of Money Laundering (Amendment) Act, 2010, section, 3,(a) (b).

¹¹⁷ Ibid, section 3 (c)

2) The Money Laundering Unit where it receives a suspicious transaction report from the Centre in accordance with the Financial Intelligence Center Act, 2010 shall cause an investigation to be conducted where it has reason to suspect that a person has committed or is about to commit a money laundering offense¹¹⁸. A disclosure made by a person in compliance with the Prohibition and Prevention of Money Laundering (Amendment) Act is protected under the Public Interest Disclosure (Protection of Whistleblowers) Act, 2010¹¹⁹.

Assessment of the Act.

Definitions

The previous definition of money laundering is replaced by “whereas reasonable inference may be drawn, having regard to the objective factual circumstances, any activity by a person (a) who knows or has reason to believe that the property is the proceeds of a crime; or (b) without reasonable excuse fails to take reasonable steps to ascertain whether or realized directly or indirectly, by any person from the commission of a crime: where the person (i) engages directly or indirectly in the transaction that involves proceeds of a crime; (ii) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Zambia proceeds of a crime; or (iii) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any illegal activity”.

The definition of proceeds of crime on the other hand is deleted and replaced by section 3(c) which defines it as “property or benefit that is (b) wholly or partly derived or realized from a disposal or other dealing with proceeds of a crime; (c) wholly or partly acquired proceeds of a crime; and includes on a proportional basis, property into which any property derived or realized directly from the illegal activity is later converted, transformed or intermingled and any income, capital or other economic gains derived or realized from the property at any time after the crime or (d) any property that is derived or realized directly or indirectly, by any person from any act or omission had occurred outside Zambia and would if the act or omission had occurred in Zambia, have constituted a crime.” Although this definition includes property derived from an act that occurred outside of Zambia but would amount to a crime in Zambia, it does not include proceeds of a crime in another country. Therefore, it seems to fail short of the objectives of cooperation envisaged in the UN Convention and the African Convention. The United Nations Convention against Corruption

¹¹⁸ Ibid, section 13.

¹¹⁹ Ibid, section 14.

provides for extensive cooperation in the following areas: Prevention and detection of transfers of proceeds of crime; measures for recovery of property; and confiscation¹²⁰. However, later on The Forfeiture of Proceeds of Crime Act defines a crime as an act or omission that constitutes a crime under any written law in Zambia or any other country¹²¹.

In section 3(d), the definition of property is substituted by, “real or personal property, money, things in action or other intangible or incorporeal property whether located in Zambia or elsewhere and includes property of corresponding value in the absence of the original property whose value has been determined”. The inclusion of “property of corresponding value in the absence of the original property” is praiseworthy. Under section 12(1) unlawful disclosure of a pending investigation which is likely to prejudice the pending investigation is an offence that would result in fine or imprisonment or both. The exception however is that a legal practitioner may be allowed to disclose such information to an accused person as per the conditionality requirement. It seems as though this requirement could undermine the purpose of the instrument as it is possible for the defendant to be able to obstruct the investigative process in some way. This is generally a good Act and strengthens the provisions of the Money Laundering Act of 2001.

¹²⁰ United Nations Convention against Corruption, articles, 52, 53, 54, and 56.55

¹²¹ Forfeiture of Proceeds of Crime Act, section 2.

BEST PRACTICES WITH REGARDS TO STRUCTURING COMMISSIONS AND AGENCIES

As we saw in the discussion in the preceding pages the various new pieces of legislation create commissions and agencies as structures in the fight against corruption. This approach as explained earlier is recommended by international and regional conventions. Commissions have become an important mechanism for fighting corruption. Yet commissions by themselves cannot be answer. This section looks at what factors need to be attended to for commissions to be effective tools in the fight against corruption. To be effective they have to be properly constituted, and functionally and operationally independent. This section examines the factors that guarantee an independent and effective anti-corruption commission. There are general points that can be made to strengthen the commissions. To ensure that members of commissions do not seek to act in the interests of their securing reappointment to the commissions, members of commissions should be appointed for single terms and should not be eligible for reappointment. The grounds for the removal of commissioners should be specified. For example it could be provided that commissioners may be removed from office only for: (a) serious violation of the constitution or any other law;(b) gross misconduct, whether in the performance of the members or office holders functions or otherwise.(c) physical or mental incapacity to perform the functions of office or (incompetence or bankruptcy. The removal procedure should be clearly spelt out. Another weakness of the system as currently structured is that the various Commissions are not accountable to Parliament. It is important that the Commissions are accountable to a body outside the executive. It could be provided that after the end of each financial year, each commission and each holder of an independent office shall submit a report to the President and to the National Assembly. It should also be provided that at any time the President or the National Assembly may require a Commission or holder of an independent office to submit a report on a particular issue. Every report required from a Commission or holder of an independent office under this article should be published and publicized.

Another matter that needs to be elaborated is a code of conduct for state officials. It is important to develop a code that will govern the conduct of state officials whether in public and official life, in private life or in association with other persons in a manner that avoids: (a) any conflict between personal interest and public or official duties; (b) compromising and public or official interest in favor of a personal interest. To further ensure financial probity of government officials it is necessary to have a law which requires state officials to declare gifts received by them and also to

declare that gifts above a certain value are deemed to be gifts to the State and shall be delivered to the state unless exempted under an Act of Parliament.

One of the key factors that determines the autonomy and effectiveness of an oversight institution is its membership, including the process and criteria for appointment. This calls for the adoption of appointment procedures which ensures that commissioners are independent and are subject to public scrutiny before appointment. The essence of the appointment procedure should be that it is a confidence building exercise for government, citizens and civil society alike in the integrity, independence and ability of the commissioners. It follows that undue executive influence over the process can undermine the effectiveness of a national institution. The process of appointment should not originate from the President. The procedures adopted for appointment should be geared towards maximizing checks and balances among government organs and securing the independence of the institutions from each other so that they can act as effective checks on each other. A good appointment process for watchdog institutions is one that is transparent and involves effective consultation with civil society groups in order to identify good candidates to serve on Boards of such institutions. It follows that undue executive influence over the appointment process can undermine the effectiveness of the institution. One factor that must be considered in the selection of members of Boards is diversity. In countries with ethnic or religious tensions, it is important that the composition of the Boards reflects that diversity. Likewise gender balance serves to underline the importance of women's rights and the importance of Boards representing the whole community. In Boards that exercise quasi-judicial powers there might be need to provide for qualifications for appointment to such Boards. The major concern must remain the need to appoint demonstrably independent and able persons. In addition, adequate protection against arbitrary removal from office is vital for the work of the institution.

CONCLUSIONS AND RECOMMENDATIONS

While recognizing that laws alone are not sufficient, it is also a fact that a basic condition for corruption control is a viable legal framework. It is recommended that Zambia should review its Anti-Corruption legislation especially its Anti-Corruption Act of 2010 and The National Prosecution Authority Act of 2010. The legislation in significant areas does not accord with the standards established by the United Nations Convention against Corruption; the African Union Convention on the Prevention and Combating of Corruption and the Southern African Development Community protocol against Corruption. The institutions created under the Zambian legislation lack an adequate level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political interference. Some aspects of the legislation also do not adequately address issues of transparency and accountability. In addition, Zambia should rigorously enforce existing laws and sanctions against corruption, provide training to staff in investigation and detection of corruption, and improve the standards of prosecution. The primary obstacles faced by the police in mounting investigations into cases of corruption is lack of funding and expertise. The law enforcement agencies need a core of specialized staff and adequate financing.

Prosecution is a major tool in the fight against corruption. Prosecution ensures that corrupt offenders feel that corruption is a high risk business and that they will be caught and punished. The perception in Zambia is that many persons who commit corruption are not prosecuted. The prosecution rate is perceived to be especially low among senior government officials. The approach to prosecution should be governed by the following principles: (a) deal with all cases. No case is too small to investigate; (b) deal with cases regardless of rank and status; and, (c) deal with both givers and takers of bribes. They are equally culpable. The prosecution of corruption cases in Zambia has been modest. The major obstacle to prosecutions are the following: weak investigative capacity, poor prosecution and delays in the courts system. High-level corruption is very sophisticated and complex. The sophistication and complexity of these crimes contrast with the broad lack of sufficient capacity and appropriate training of persons charged with investigating and prosecuting these crimes. There is a clear and pressing need for more specialized training, covering especially forensic accounting. When investigating corruption crimes law enforcement agencies often face interference from politicians. Very often those close to the political power structure try to influence the course of prosecution. Often prosecution in Zambia is conducted by police officers who are not lawyers and undergo a one year prosecutor's course. Contrast this with the defendants who engage

skilled lawyers and utilize lengthy appeals, processes and other stalling tactics to wear down public opinion. Politicians also use all sorts of tactics to undermine efficacy or credibility of the prosecution. To strengthen the investigative aspect the country needs to focus on improving capacity in: Intelligence, and Forensics. Intelligence work is crucial in the investigation of corruption. It provides the bias for successful investigation. The sheer complexity of illicit transactions, whether it is at the individual level, syndicate or corporate levels, requires an incredible level of expertise and capability from investigating officers.

There is general discontent at the perceived timidity of judges to deal with corruption cases. This was especially exacerbated by the controversial acquittal of the former president Frederick Chiluba on corruption charges. Chiluba was charged with six others with several counts of corruption. The magistrate acquitted Chiluba on grounds that the prosecution had failed to prove that the monies used by Chiluba to pay his lawyers and children of a government account could be traced back to the Ministry of Finance and that the monies could have been his put in a government account. The magistrate relied on an unsworn statement that Chiluba had made. The trial magistrate erred in law in finding that an unsworn statement was sufficient to rebut evidence established on oath. Despite the desire of the lawyer prosecuting the case, the Director of Public Prosecutions declined to appeal the case¹²². The situation was made worse by the refusal of the Zambian High Court to register a judgment delivered by the London High Court on May 4, 2007 in a civil claim brought by the Zambian Government against Chiluba for the embezzlement of public funds. The Zambian Government was awarded \$46 million against Chiluba¹²³. There is a perception that the judges do not have enough independence vis-à-vis the executive power, nor at times the necessary integrity or courage to deal with corruption cases involving senior government officials. Further, there is perception that some of the judges are more interested in carrying out orders or advancing their careers than adjudicating cases fairly.

Public declarations of assets should be introduced in all Anti-corruption agencies. The duty for public officials to submit their financial situation in advance of service is part of a substantive foundation of the rule of law, as it is the requirement to justify public decisions and to act according to the principle of impartiality. Financial and interest disclosures systems constitute a highly useful device for detecting conflicts of interest and tracking illicit enrichment. Full disclosure will put to rest rumors and in that sense asset declaration systems protect honest officials. This process exposes the gains that an official has reaped from corruption and, question the legitimacy of its

¹²² See, Muna Ndulo, *The People v. Chiluba*, (on file.)

¹²³ See, Muna Ndulo. *Chiluba and others v. AG*, brief for Transnational International, (on file)

source or sources. For this to be effective it is important for the state and the general public to be able to compare the real financial worth of senior government officials before and after they assume office. Such financial worth becomes a crucial comparator when examining whether alleged corruption has occurred during and after the tenure of office. The declaration makes it easier to detect such corruption.

In terms of appointment relating to all anti-corruption agencies, the key will be in an impartial and transparent selection procedure in all anti- corruption agencies. Zambia should consider making public the names and professional backgrounds of the candidates for appointment to various Boards in order to receive support or objections from different civil society organizations and citizenry. Allowing a public debate to create consensus among different stake holders will provide officials the maximum legitimacy needed to exercise their authority.

A country determined to fight corruption must have the political will to change laws, to change the structure of government institutions, to not tolerate corrupt conduct and to allocate resources to investigate and prosecute corruption. The question then arises as to how to persuade a government to develop the political will. First, it is through increasing media consciousness about what is corrupt conduct and how the criminal justice system should be strengthened. Second, it is through the involvement of civil society, which uses democratic means to pressure governments to prosecute corruption. Civil society also creates public awareness about the need to resist corruption. It is stated that in a democracy there can be no greater voice than that of the people. For civil society and the public to play an effective role, there are two important oversight instruments that need to be in place. Procurement regulations must keep contracting and government purchasing open and fair. A freedom of information Act is the other instrument that must be in place. These laws permit citizens to request information as members of the public and use it to ensure the accountability of government agencies. In addition there is need to strengthen the role of parliament as monitor of the executive and scrutinizer of government budgets, particularly public accounts. If these recommendations are taken into account and effectively implemented, anti-corruption legislation in Zambia will be greatly strengthened.