

4. ACTS OF CORRUPTION PROHIBITED BY ANTI-CORRUPTION INSTRUMENTS, SANCTIONS AND RELATED PROVISIONS

The SADC Protocol, the AU Convention and the UN Convention require that Member States must adopt legislation to establish criminal offences under its domestic law in respect of certain acts of corruption as described in the respective instruments. For purposes of this Comparative Analysis the opinion is held that it is preferable to list the various acts of corruptions to be prohibited by Member States as set out by all three instruments. Since the main purpose of this document is to serve as a regional contribution, the acts of corruption listed in Article 3 of the SADC Protocol will be used as a basis for discussing the various specific acts of corruption. Thereafter the acts of corruption covered by the AU Convention and the UN Convention, but not directly covered by the SADC Protocol, will be discussed.

A. *SPECIFIC ACTS OF CORRUPTION PROHIBITED BY THE SADC PROTOCOL*

4.1 **Passive corruption committed by a public official SADC Protocol**

4.1.1 Article 3(1)(a) of the SADC Protocol describes this act of corruption as follows:

“The solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.”.

4.1.2 In many countries this act of corruption is called passive corruption. In short, it can be described as the acceptance of any undue advantage by a public official in exchange for performing a corrupt act relating to his or her public functions. It is important to note that the act of corruption is committed by a **public official** in the performance of his or her public functions. In terms of Article 1 of the Protocol the definition of “**public official**” is important for this act of corruption. It is defined to mean –

“any person in the employment of the State, its agencies, local authorities or parastatals and includes any person holding office in the legislative, executive or judicial branch of a State or exercising a public function or duty in any of its agencies or enterprises;”.

AU Convention

- 4.1.3 Article 4(1)(a) of the AU Convention contains an almost identical act of corruption. However, in terms of this provision the benefit may be solicited or accepted by “a public official or any other person”. It is not clear who such “other person” may be, since the benefit is solicited or accepted in exchange for any act or omission in the performance of “his or her public functions”. Although not clear, it is assumed that the intention is that “any other person” may accept the benefit on behalf of the public official in exchange for such public official performing any act or omission in the performance of his or her public functions. Article 1 of the AU Convention also defines “public official”. In terms of that definition “**public official**” means –

“any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State at any level of its hierarchy;”.

The opinion is held that, although the wording of the definitions in the SADC Protocol and the AU Convention differs to some extent, the definitions portray the same meaning.

UN Convention

- 4.1.4 Article 15(b) of the UN Convention, under the heading “Bribery of national public officials”, prohibits a similar act of corruption. It prohibits the following act of corruption:

“The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”.

In terms of Article 2(a) of the UN Convention the following persons qualify as a “**public official**”:

- (a) Any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority.
- (b) Any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.
- (c) Any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in Chapter II of the UN Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.

Again, the opinion is held that, although the wording of the definitions in the SADC Protocol, the AU Convention and the UN Convention differs to some extent, the various definitions portray the same meaning.

4.1.5 In conclusion, there appears to be minor differences in this particular act of corruption that the three instruments urge Member States to criminalise. However, the opinion is held that all three instruments envisage the same act of corruption to be criminalised.

4.2 Active corruption committed by a public official

SADC Protocol

4.2.1 Article 3(1)(b) of the SADC Protocol describes this act of corruption as follows:

"(b) The offering or granting, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions."

4.2.2 This act of corruption is known as active corruption. It can be described as the granting of any undue advantage by a public official for himself or herself in exchange for performing an act of corruption relating to his or her public functions. As in the case of Article 3(1)(a) of the SADC Protocol,

this act of corruption is committed by a public official in the performance of his or her public functions. Therefore, the definition of “**public official**” is also relevant in respect of this act of corruption.

AU Convention

- 4.2.3 Article 4(1)(b) of the AU Convention contains an almost identical act of corruption. However, it is important to note that the AU Convention, among others, describes it as the offering or granting “**to a public official or any other person**”, of any benefit for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions. The opinion is held that the wording in the SADC Protocol referring to “**by a public official**”, is wrong and should actually be similar to the wording of the AU Convention, namely, “**to a public official**”.

UN Convention

- 4.2.4 Article 15(a) of the UN Convention contains an act of corruption. This provision envisages prohibiting the following act of corruption:

“The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”.

This provision also refers to the giving of a benefit “**to a public official**”, and is in line with the act of corruption described in the AU Convention.

- 4.2.5 It therefore appears as if there are only minor differences in this particular act of corruption as described in the different instruments, and the opinion is held that all three instruments envisage that the same act of corruption be criminalised.

- 4.3 **Act by public official or other employee for purpose of obtaining undue benefit**

SADC Protocol

- 4.3.1 Article 3(1)(c) of the SADC Protocol describes this act of corruption as follows:

“(c) Any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party.”.

4.3.2 As in the case of Article 3(1)(a) and (b) of the SADC Protocol, this act of corruption involves an act in the performance of his or her duties by a “public official”. Therefore, as indicated in paragraph 4.1.2 above, the definition of “**public official**” as defined in paragraph 1 of the SADC Protocol is also important in relation to this act of corruption.

AU Convention

4.3.3 Article 4(1)(c) of the AU Convention contains an identical provision. However, it is important to note that in terms of the last-mentioned provision, the act of corruption may be committed by “a public official or any other person”. Therefore, the act of corruption as described in the AU Convention is also applicable in respect of employees in the private sector.

UN Convention

4.3.4 Article 19 of the UN Convention under the heading “Abuse of functions” contains a similar provision. This Article provides as follows:
“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.”.

As in the case of Article 3(1) (c) of the SADC Protocol, the above provision of the UN Convention only deals with the abuse of functions by “a public official”. See Article 2(a) of the UN Convention for a definition of “**a public official**”.

4.3.5 Conclusion

The SADC Protocol, the AU Convention and the UN Convention contain similar provisions. However, whereas the SADC Protocol and UN Convention provide for the act of corruption to be committed by “a public official”, the AU Convention provides that the act of corruption may also be committed by “any other person”.

4.4 Diversion of property by a public official

SADC Protocol

- 4.4.1 Article 3(1)(d) of the SADC Protocol provides that the following act of corruption must be prohibited by Member States:

“(d) the diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official received by virtue of his or her position for purposes of administration, custody or for other reasons.”.

- 4.4.2 As in the case of Article 3(1)(a), (b) and (c) of the SADC Protocol, this act of corruption is also committed by “a public official”, and, as indicated in paragraph 4.1.2 above, the definition of “public official” as defined in paragraph 1 of the SADC Protocol is also important in relation to this act of corruption. Furthermore, the definition of “**property**” is also relevant. Article 1 of the SADC Protocol defines “**property**” to include “assets of any kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible and any document or legal instrument evidencing title to, or interest in such assets;”.

AU Convention

- 4.4.3 Article 4(1)(d) of the AU Convention contains a similar prohibition. This act of corruption is described as follows:

“the diversion by a public official or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;”.

Again, it is important to note that, in terms of the AU Convention, this act of corruption may be committed by “a public official or any other person”. For the definition of “**public official**”, see Article 1 of the AU Convention. Unfortunately, the AU Convention does not contain a definition of “property”.

UN Convention

- 4.4.4 Article 17 of the UN Convention deals with a similar act of corruption. This provision provides as follows:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.”.

It is important to note that the above provision not only deals with the diversion of such property, but also with the embezzlement and misappropriation of such property. Furthermore, the provision of the UN Convention also relates to the diversion of “public or private funds or securities or any other thing of value entrusted to the public official”.

4.4.5 Conclusion

The SADC Protocol, the AU Convention and the UN Convention contain similar provisions relating to the corrupt diversion of property. However, whereas the SADC Protocol and the UN Convention provide for the act of corruption to be committed by “a public official”, the AU Convention provides that the act of corruption may also be committed by “any other person”. The UN Convention, on the other hand, also provides for the embezzlement and misappropriation of such property and relates to the diversion of public or private funds or securities or any other thing of value entrusted to the public official.

4.5 Active or passive corruption by or in respect of a person working in private sector

SADC Protocol

- 4.5.1 Article 3(1)(e) of the SADC Protocol describes these acts of corruption as follows:

“(e) The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or

for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties.”.

- 4.5.2 The elements of the above acts of corruption are similar to active and passive corruption committed by a public official as prescribed in Article 3(1)(a) and (b) of the Protocol. However, in Article 3(1)(e) above, the act of corruption is committed by “any person” working for a “private sector entity”.
- 4.5.3 This provision is in line with recent trends to also concentrate on the prevention of corrupt activities in the private sector. In this regard it is important to note that the preamble of the SADC Protocol specifically emphasises that Member States have the responsibility to hold corrupt persons “in the public **and private sectors** accountable and to take appropriate action against persons who commit acts of corruption in the performance of their functions and duties”. See also Article 2(1)(a) to (c) of the SADC Protocol in terms of which the purposes of the Protocol are prescribed to “prevent, detect, punish and eradicate corruption in the public **and private sector**”.

AU Convention

- 4.5.4 Article 4(1)(e) of the AU Convention contains an almost similar provision. This Article prohibits “the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties”. The AU Convention also emphasises the importance of preventing and combating corruption in the “public and private sectors”. See for example Article 2(1) of the AU Convention. Furthermore, Article 1 of the AU Convention defines “**private sector**” as follows:

“**Private Sector**” means the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government;”.

UN Convention

- 4.5.5 Article 21 of the UN Convention contains a similar provision dealing with “*Bribery in the private sector*”. This Article provides as follows:

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

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

4.5.6 Article 22 of the UN Convention also provides for the prohibition of “*Embezzlement of property in the private sector*”. In terms of this Article each State Party must consider adopting such legislative and other measures “as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.”.

4.5.7 Conclusion

The SADC Protocol, the AU Convention and the UN Convention contain similar provisions relating to the prohibition of corrupt activities committed by an employee in the private sector. However, the opinion is held that the UN Convention’s prohibitions are preferable in that it also provides for the prohibition of corrupt activities in the private sector relating to the embezzlement of any property, private funds or securities or any other thing of value entrusted to a person working in the private sector.

4.6 Improper influencing of any person in public or private sector relating to such person’s decision-making functions

SADC Protocol

4.6.1 Article 3(1)(f) of the SADC Protocol describes this act of corruption as follows:

“(f) The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.”.

4.6.2 It is important to note that this prohibition is applicable to persons performing functions in the “**public or private sector**”. The prohibited acts of corruption entail active as well as passive corruption committed by a person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector.

AU Convention

4.6.3 Article 4(1)(f) of the AU Convention contains an identical act of corruption.

UN Convention

4.6.4 Article 18 of the UN Convention deals with this provision. Under the heading “*Trading in influence*” this Article provides as follows:

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

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

- (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 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.”.

4.6.5 Conclusion

The SADC Protocol, the AU Convention and the UN Convention contain similar provisions relating to the prohibition of corrupt activities committed by a person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector.

4.7 Fraudulent use or concealment of property derived from acts of corruption (Laundering of proceeds of crime)

SADC Protocol

- 4.7.1 Article 3(1)(g) of the SADC Protocol prohibits the following act of corruption:

“The fraudulent use or concealment of property derived from any of the acts referred to in Article 3(1).”.

- 4.7.2 The above corrupt activities may be committed by any person in the public or private sector. In terms of Article 1 of the Protocol “**property**” includes assets of any kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible and any document or legal instrument evidencing title to, or interest in such assets.

AU Convention

- 4.7.3 Article 4(1)(h) of the AU Convention contains a similar provision. The said Article prohibits the “the use or concealment of proceeds derived from any of the acts referred to in this Article”.
- 4.7.4 The above provision differs in the following aspects from Article 3(1)(g) of the SADC Protocol:

- (a) The SADC Protocol prohibits the “fraudulent use” of property derived from acts of corruption. The AU Convention is wider in that it prohibits any use of proceeds of acts of corruption.
- (b) The SADC Protocol is applicable in respect of “property derived” from acts of corruption, whereas the AU Convention is applicable to “proceeds” of acts of corruption. However, Article 1 of the AU Convention defines “Proceeds of Corruption” to mean “assets of any kind corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to or interests in such assets acquired as a result of an act of corruption”. This definition is similar to the definition of “property” in Article 1 of the SADC Protocol. It therefore seems as if both provisions apply in respect of the same property or assets.

4.7.5 Furthermore, Article 6 of the AU Convention deals with the laundering of proceeds of corruption. This Article provides as follows:

“State Parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (a) The conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.
- (b) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;
- (c) The acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences.”.

UN Convention

4.7.6 The UN Convention deals in detail with the use or concealment of property derived from acts of corruption. The provisions of Article 23 are similar to the provisions of Article 6 of the AU Convention. Article 23 of the UN Convention deals with the “*Laundering of proceeds of crime*” and Article 24 deals with the “concealment or continued retention” of property derived from corrupt activities. Article 23 provides as follows:

- “1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
 - (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
 - (b) Subject to the basic concepts of its legal system:
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
 - (ii)
2. For purposes of implementing or applying paragraph 1 of this article:
- (a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;
 - (b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;
 - (c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;
 - (d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;
 - (e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.”.

Article 24 provides as follows:

“Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as

may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.”.

4.7.7 As mentioned in paragraph 3.4.2 above, one of characteristics of the UN Convention is that it urges State Parties to prevent, detect and deter international transfers of illicitly acquired assets in a more effective manner, and to strengthen international cooperation in asset recovery. The provisions of Articles 23 and 24 are in line with this objective of the UN Convention. However, it is important to note that Article 23(1)(a) and (b) of the UN Convention and Article 6 of the AU Convention require that the person who launders or conceals the proceeds of crime must have knowledge that such property is the proceeds of crime before that person commits the crime. The opinion is held the proposed offence should also be applicable to persons who ought reasonably to have known that the property is the proceeds of crime. In this regard it is interesting to note that section 4 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), of South Africa provides as follows:

"Any person **who knows or ought reasonably to have known** that property is or forms part of the proceeds of unlawful activities and–

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect–
 - (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
 - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere –
 - (aa) to avoid prosecution; or
 - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence."

4.7.8 The AU and UN Conventions further differ from the SADC Protocol in that the prohibitions in the latter instrument only relate to property derived

from acts of corruption referred to in Article 3(1). On the other hand, Article 4(1) of the AU Convention also applies to “**related offences**” and Article 23(2) of the UN Convention, in particular, urges State Parties to apply Article 23(1) “to the widest range of predicate offences” and to include, as a minimum, all the offences established in accordance with the UN Convention.

4.7.9 Conclusion

The SADC Protocol, the AU Convention and the UN Convention contain similar provisions relating to the use or concealment of property derived from acts of corruption. The opinion is held that the offences proposed in the UN Convention are to be preferred in that the offences are prescribed in much more detail. However, as pointed out in paragraph 4.7.7 above, the opinion is held that the proposed offences described in the AU and UN Conventions should also be applicable to persons “**who ought reasonably to have known**” that the property is the proceeds of crime.

4.8 Participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact and attempted commission of an offence

SADC Protocol

4.8.1 Article 3(1)(h) of the SADC Protocol prohibits the following acts of corruption:

“The participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in Article 3(1).”.

4.8.2 Article 3(1)(h) is an all-embracing provision providing for the following types of offenders:

- A principal.
- A co-principal.
- An agent.
- An instigator.
- An accomplice.
- An accessory after the fact.
- Any person who, in any other manner, participates in the commission or attempted commission of an offence.
- Any person who collaborates or conspires to commit or attempts to commit an act of corruption.

AU Convention

4.8.3 Article 4(1)(i) of the AU Convention contains an identical provision.

UN Convention

4.8.4 Article 27 of the UN Convention under the heading "*Participation and attempt*" contains a similar provision. This Article provides as follows:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.
2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.
3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.". (Emphasis added)

Although the above provision only refers to accomplices, assistants or instigators as possible offenders, the "participation in any capacity" in an offence is prohibited. Furthermore, Article 23(1)(b)(ii) of the UN Convention prohibits the "(p)articipation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences" established in accordance with Article 23.

4.8.5 Conclusion

Although differently worded, the SADC Protocol, the AU Convention and the UN Convention contain similar provisions relating to the type of offenders committing or attempting to commit acts of corruption.

B. OTHER ACTS OF CORRUPTION PROHIBITED BY AU CONVENTION AND UN CONVENTION

4.9 Apart from the acts of corruption prohibited by the SADC Protocol, as discussed in paragraphs 4.1 to 4.8 above, the AU Convention and the UN Convention also prohibit certain other acts of corruption that are not specifically mentioned by the SADC Protocol. These acts of corruption are the following:

4.9.1 Illicit Enrichment

(a) In terms of Article 8(1) of the AU Convention State Parties undertake to adopt the necessary measures to establish under their laws an offence of “**illicit enrichment**”. Where such an offence has been established by a State Party, it shall be considered an act of corruption or a related offence for the purposes of the AU Convention. Any State Party that has not established such an offence must, in so far as its laws permit, provide assistance and cooperation to the requesting State with respect to the offence as provided in the AU Convention.

(b) Article 20 of the UN Convention contains a similar provision. In terms of the said provision illicit enrichment is committed where there 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. Article 1 of the AU Convention contains an identical definition.

4.9.2 Funding of political parties

Article 10(1) of the AU Convention requires that each State Party must adopt legislative and other measures to prohibit the use of funds acquired through illegal and corrupt practices to finance political parties. Furthermore, in terms of Article 10(2) each State Party must adopt legislative and other measures to incorporate the principle of transparency into funding of political parties. The UN Convention does not contain a similar prohibition relating to the use of funds acquired through illegal and corrupt practices to finance political parties. However, Article 7(3) of the UN Convention is similar to Article 10(2) of the AU Convention. In terms of the first-mentioned provision each State Party must consider taking appropriate legislative and administrative measures to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties. Furthermore,

Article 7(4) of the UN Convention requires that each State Party must endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

4.9.3 **Embezzlement, misappropriation or other diversion of property by a public official**

(a) In terms of Article 17 of the UN Convention, each State Party must adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, “**the embezzlement, misappropriation or other diversion**” by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

(b) Article 3(1)(d) of the SADC Protocol and Article 4(1)(d) of the AU Convention deal partly with the above provision. However, whereas the UN Convention deals with the “**embezzlement, misappropriation or other diversion**” by a public official of any property, public or private funds or securities, the above Articles of the AU Convention and SADC Protocol only deal with “**diversion**” of such property.

4.9.4 **Obstruction of justice**

Article 25 of the UN Convention requires that each State Party must adopt such legislative and other measures as may be necessary to establish the following criminal offences:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with the UN Convention.

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with the UN Convention.

Neither the SADC Protocol nor the AU Convention contains a similar provision. See however paragraph 5.6.3 *infra*.

C. SANCTIONS

4.10 Neither the SADC Protocol nor the AU Convention deals with sanctions or penalties in case of the commission of an offence or non-compliance with prescribed measures. On the other hand, the UN Convention specifically provides for the following sanctions:

- (a) In terms of Article 30(1) of the UN Convention each State Party must make the commission of an offence established in accordance with the UN Convention liable to sanctions that take into account the gravity of that offence.
- (b) In terms of Article 30(5) each State Party must take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.
- (c) Article 30(6) provides that each State Party must consider establishing procedures through which a public official accused of an offence established in accordance with the UN Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.
- (d) Article 30(7) provides that, where warranted by the gravity of the offence, each State Party must consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with the UN Convention from holding public office and from holding office in an enterprise owned in whole or in part by the State.
- (e) Article 26(1) of the UN Convention provides for the adoption of measures by State Parties to establish the **liability of legal persons** for participation in Convention offences. In terms of Article 26(4) each State Party must, in particular, ensure that legal persons held liable in accordance with Article 26, are subject to effective, proportionate and dissuasive criminal or non- criminal sanctions, including monetary sanctions.
- (f) Article 52 of the UN Convention provides for measures relating to the prevention and detection of transfers of proceeds of crime. In terms of Article 52(5) each State Party must consider establishing financial disclosure systems for appropriate public officials and must provide

“for appropriate sanctions for non-compliance”. Furthermore, Article 52(6) provides that each State Party must consider taking measures to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country, to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures must also provide for appropriate sanctions for non-compliance.

- (g) In terms of Article 35 each State Party must take measures to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain **compensation**.
- (h) In terms of Article 34 each State Party must take measures to address consequences of corruption. In this regard State Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

D. MATTERS RELATING TO PROHIBITED CORRUPT ACTIVITIES

4.11 The UN Convention contains various provisions relating to the criminalisation of certain corrupt activities that are not covered by the SADC Protocol or the AU Convention. It is suggested that SADC Members States should take these provisions into account in developing anti-corruption legislation and measures. These provisions include the following:

(a) Knowledge, intent and purpose as elements of an offence

Article 28 of the UN Convention provides that knowledge, intent or purpose required as an element of an offence established in accordance with the UN Convention may be inferred from objective factual circumstances.

(b) Protection of witnesses, experts and victims

In terms of Article 32(1) of the UN Convention each State Party must take appropriate measures to provide effective protection from potential

retaliation or intimidation for witnesses and experts who give testimony concerning Convention offences, as well as protection for their relatives and other persons close to them. The measures may include –

- (i) establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
- (ii) providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

Furthermore, in terms of Article 32(3) State Parties must consider entering into agreements or arrangements with other States for the relocation of such witnesses and relatives. In terms of Article 32(4) the above provisions also apply to victims, insofar as they are witnesses.

(c) Criminal record

In terms of Article 41 of the UN Convention each State Party may adopt legislative or other measures to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to a Convention offence.