



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)

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FOREWORD

The Institute for Security Studies (ISS) has embarked on a three-year applied research project aimed at, amongst others, supporting the implementation of the SADC Protocol against Corruption. The Heads of State of the thirteen Members States of the Southern African Development Community (SADC) signed this Protocol in August 2001.¹ The project, supported by the Norwegian Agency for Development Cooperation (NORAD), aims to provide legislative research material to the SADC Secretariat and to SADC Member States where they have identified a need for such supportive research.

Three important international anti-corruption instruments that are of direct relevance to Southern African countries were finalised during the past three years. They are the SADC Protocol against Corruption (2001), the UN Convention against Corruption (2003), and the African Union (AU) Convention on Preventing and Combating Corruption (2003). All three aim at promoting and strengthening the development of mechanisms and policies that would prevent, detect, punish and eradicate corruption. All three instruments contain many provisions that are similar or have similar objectives. The differences that do exist are not substantive and in fact add to the overall range of measures that should be adopted to combat corruption. In short, the three legal instruments broadly complement each other.

Most SADC countries are about to commence on a process of implementing the SADC Protocol against Corruption. This will require a revision of existing anti-corruption laws, the amendment of such laws, or the introduction of new ones in order to accommodate the provisions of the SADC Protocol. If this process is to be undertaken, why only focus on the implementation of the SADC Protocol against Corruption and not simultaneously at the implementation of the UN and AU Conventions? Most countries have signed or committed themselves to the implementation of all three instruments. Killing three birds with one stone makes eminent sense, particularly when one bears in mind the many similarities between these three international instruments and the saving of scarce government resources and time that would result from a simultaneous implementation process.

This handbook is intended as a tool for lawyers, legal drafters, and policy makers who have an interest in such matters or for those who bear the responsibility in their government departments to deal with the implementation of anti-

¹ SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

corruption legislation. We hope that it will be of use and that it will serve as a modest contribution towards efforts by the SADC Secretariat and SADC states to enhance their capacity to combat corruption and improve international cooperation. The implementation of one or more of the anti-corruption instruments will contribute significantly towards the harmonisation in the sub-region of policies and domestic legislation relating to the combating of corruption in the public and private sectors.

The handbook takes it as a given that corruption jeopardises the rule of law, that it undermines citizen's confidence in democratic and accountable government and that it can threaten political stability. Corruption has a debilitating impact on institutions as well as on ethical values and on criminal justice systems. It undermines economic growth and makes it difficult to attain satisfactory levels of sustainable human development. The evidence to support these contentions is overwhelming and does not have to be repeated here.

The ISS produced the handbook with the assistance of a skilled lawyer and legal drafter, Advocate Gerhard Nel. Although he has extensive experience in this field the handbook does not pretend to be a definitive work on the subject. It should serve as a guide for practitioners and policy makers. The ISS intends to also produce separate country specific handbooks in which the existing anti-corruption legislation of a specific SADC country is analysed and then compared with the requirements of the above-mentioned three international instruments. If there is a need for such country-specific handbooks they could also contain recommendations of what legislative steps specific SADC countries should consider taking in order to meet the requirements of the SADC Protocol as well as the UN and AU Conventions.

We welcome comments and suggestions from readers of this handbook and look forward to working together with all role players to effectively counter one of the most debilitating phenomena globally and in the SADC region, namely corruption.

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HANDBOOK

A COMPARATIVE ANALYSIS

*The Southern African Development Community
(SADC) Protocol Against Corruption*

*The African Union (AU) Convention on Preventing and
Combating Corruption, and*

*The United Nations (UN) Convention Against
Corruption*

1. INTRODUCTION

It is important that the SADC Protocol against Corruption (the SADC Protocol), the African Union Convention on Preventing and Combating Corruption (the AU Convention), and the United Nations Convention on Corruption (the UN Convention) assume more than a symbolic value in the shortest possible time. For this to happen, SADC Member States should bring their laws into line with the requirements set in those instruments. This will contribute significantly towards the harmonisation of anti-corruption legislation in the SADC region and simplify mutual assistance mechanisms. This comparative analysis will hopefully serve as a small contribution towards the enhancement of effective anti-corruption measures in the SADC region. The region has illustrated its political will to address corruption by adopting and signing the SADC Protocol. The difficult task of implementing the SADC Protocol as well as the AU and UN Conventions, now constitutes a major challenge for the SADC Secretariat and each and every SADC Member State.

2. ENTRY INTO FORCE OF THE THREE ANTI-CORRUPTION INSTRUMENTS

2.1 SADC Protocol against Corruption

2.1.1 All 14 SADC Heads of State and Government signed the SADC Protocol against Corruption in Malawi on 14 August 2001.

2.1.2 Article 17 of the SADC Protocol provides that the Protocol shall be ratified by the Signatory States in accordance with their constitutional or other procedures.

2.1.3 In terms of Article 18(1) the Protocol shall enter into force 30 days after the deposit of the instruments of ratification by two thirds of the Member States. Furthermore, in respect of a Member State ratifying or acceding to the Protocol after the deposit of the ninth instrument of ratification, Article 18(2) provides that the Protocol shall enter into force in respect of that Member State, 30 days after the date of deposit of its instrument of ratification or accession.

2.1.4 As at the beginning of October 2004 the following SADC Member States had ratified or acceded to the Protocol:

No.	Country	Signature	Ratified, Accession
1	Angola	14.08.2001	
2	Botswana	14.08.2001	
3	DRC	14.08.2001	
4	Lesotho	14.08.2001	29.07.2003
5	Malawi	14.08.2001	27.09.2002
6	Mauritius	14.08.2001	04.01.2002
7	Mozambique	14.08.2001	
8	Namibia	14.08.2001	
9	South Africa	14.08.2001	15.05.2003
10	Swaziland	14.08.2001	
11	Tanzania	14.08.2001	20.08.2003
12	Zambia	14.08.2001	08.07.2003
13	Zimbabwe	14.08.2001	08.10.2004

2.2 AU Convention on Preventing and Combating Corruption

2.2.1 The AU Convention on Preventing and Combating Corruption was adopted by the Assembly of the AU on 11 July 2003 in Maputo, Mozambique.

2.2.2 In terms of Article 23(1) the Convention is open for signature, ratification or accession by the Member States of the African Union. Article 23(2) provides that the Convention shall enter into force 30 days after the date of the deposit of the fifteenth instrument of ratification or accession. In terms of Article 23(3), and in respect of each State Party ratifying or acceding to the Convention after the date of the deposit of the fifteenth Instrument of Ratification, the Convention shall enter into force 30 days after the date of the deposit by that State of its instrument of ratification or accession (Article 23(3)).

2.2.3 As at the beginning of October 2004 the following Member States of the SADC region had ratified or acceded to the AU Convention on the Preventing and Combating Corruption:

No.	Country	Signature	Ratified, accession
1	Angola	No	No
2	Botswana	No	No
3	DRC	5 December 2003	No
4	Lesotho	27 February 2004	No
5	Malawi	No	No
6	Mauritius	6 July 2004	No
7	Mozambique	15 December 2003	No
8	Namibia	9 December 2003	5 August 2004
9	South Africa	16 March 2004	No
10	Swaziland	No	No
11	Tanzania	5 November 2003	No
12	Zambia	No	No
13	Zimbabwe	18 November 2003	No

2.3 UN Convention against Corruption

2.3.1 As mentioned above, the General Assembly of the United Nations adopted the UN Convention against Corruption on 31 October 2003.

2.3.2 Article 67(1) of the UN Convention provides that the Convention shall be open to all States for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at the Headquarters of the United Nations in New York, until 9 December 2005. In terms of Article 67(3) the Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval must be deposited with the Secretary-General of the United Nations.

2.3.3 In terms of Article 68(1) the Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. Article 68(2) of the Convention provides that for each State ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, the Convention shall enter into force on the thirtieth day after the date of deposit by such State of the relevant instrument or on the date the Convention enters into force pursuant to Article 68(1), whichever is later.

2.3.4 The position in respect of ratification, acceptance, approval or accession of SADC Countries as at the beginning of October 2004 was as follows:

No.	Country	Signature	Ratification, accession, acceptance, approval
1	Angola	10 December 2003	No
2	Malawi		21 September 2004
3	Mauritius	9 December 2003	
4	Mozambique	25 May 2004	No
5	Namibia	9 December 2003	3 August 2004
6	South Africa	9 December 2003	No
7	Tanzania	9 December 2003	No
8	Zambia	11 December 2003	No
9	Zimbabwe	20 February 2004	No

3. OBJECTIVES OF THE THREE ANTI-CORRUPTION INSTRUMENTS

3.1 SADC Protocol against Corruption

3.1.1 Articles 2 and 11 of the Protocol set out four main objectives of the Protocol.

3.1.2 In the first instance Article 2 of the Protocol provides for the following objectives:

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

3.1.3 Secondly, Article 11 provides the fourth main objective, namely, to set standards so as to measure the performance of Member States in combating corruption on a periodical basis.

3.2 AU Convention on Preventing and Combating Corruption

In terms of Article 2 the AU Convention has the following objectives:

- (a) 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 sectors (Article 2(1)).
- (b) To promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa (Article 2(2)).

- (c) To coordinate and harmonise the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent (Article 2(3)).
- (d) To promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights (Article 2(4))
- (e) To establish the necessary conditions to foster transparency and accountability in the management of public affairs (Article 2(5)).

3.3 **UN Convention against Corruption**

In terms of Article 1 of the UN Convention the purposes of the Convention are the following:

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

3.4 **Comparative analysis of objectives**

- 3.4.1 In general one can say that the three instruments have the same objectives, namely, to promote and strengthen the development of mechanisms; to promote, facilitate and regulate co-operation among State Parties; and to develop and harmonize policies and domestic legislation of State Parties, relating to the prevention, detection, punishment and eradication of corruption.
- 3.4.2 The objectives of the AU Convention are almost identical to the objectives of the SADC Protocol. However, it is striking that the UN Convention emphasises international cooperation and technical assistance relating to the recovery of assets and the promotion of anti-corruption measures relating to public affairs and public property. In the preamble to the UN Convention these two aspects are also emphasised. In particular, the preamble states that State Parties –

- are determined to prevent, detect and deter international transfers of illicitly acquired assets in a more effective manner, and they are also determined to strengthen international cooperation in asset recovery;
- bear in mind that public affairs and public property should be properly managed.

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-compliances 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.

5. ADOPTION OF PREVENTATIVE MEASURES

The SADC Protocol, the AU Convention and the UN Convention urge State Parties to adopt specific measures in order to prevent and combat corrupt activities. These provisions are discussed in detail in paragraphs 5.1 to 5.12 hereunder. In summary, the following provisions of the respective instruments deal with such preventative measures:

SADC Protocol

Paragraphs (a) to (j) of Article 4 of the SADC Protocol propose the adoption of various measures, which will create, maintain and strengthen systems, mechanisms and institutions in order to fight corrupt and related activities.

AU Convention

Articles 5 to 12 of the AU Convention propose various legislative and other measures to prevent and combat corrupt and related activities.

UN Convention

The whole of Chapter II of the UN Convention deals with preventative measures. These measures include preventative anti-corruption policies and practices (Article 5); the establishment of anti-corruption bodies (Article 6); the introduction of adequate and transparent procedures pertaining to the recruitment, hiring, retention, promotion and retirement of civil servants (Article 7); the introduction of codes of conduct for public officials (Article 8); the establishment of appropriate systems for public procurement and management of public finances (Article 9); the introduction of such measures as may be necessary to enhance transparency in public administration (Article 10); introducing measures relating to the judiciary and prosecution services (Article 11); participation of society (Article 13); and the introduction of measures to prevent money-laundering (Article 14).

A. SPECIFIC PREVENTATIVE MEASURES IN SADC PROTOCOL, AU CONVENTION AND UN CONVENTION

5.1 Standards of conduct for performance of public functions

SADC Protocol

- 5.1.1 In terms of Article 4(1)(a) of the SADC Protocol, each State Party undertakes to adopt measures, which will create, maintain and strengthen standards of conduct for the correct, honourable and proper fulfilment of public functions as well as mechanisms to enforce those standards. These standards refer to the rules and regulations governing the scope of acceptable behaviour of public servants in the performance of their duties and functions. Furthermore, the establishment of mechanisms is required to enforce such standards of conduct.

AU Convention

- 5.1.2 In terms of Article 7(2) of the AU Convention State Parties commit themselves to create an internal committee or a similar body mandated to establish a code of conduct and to monitor its implementation, and sensitise and train public officials on matters of ethics.

UN Convention

- 5.1.3 Article 8 of the UN Convention deals with the application of codes of conduct for public officials. This Article provides in particular for the following matters:

- (a) Article 8(1) requires that each State Party must promote, among others, integrity, honesty and responsibility among its public officials.
- (b) In terms of Article (8)2 each State Party must endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.
- (c) Article 8(3) provides that each State Party must, where appropriate, take note of the relevant initiatives of regional, interregional and multilateral organisations.

- (d) In terms of Article 8(4) each State Party is required to consider establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.
- (e) In terms of Article 8(5) each State Party must endeavour to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, among others, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.
- (f) Finally, Article 8(6) requires that each State Party must consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with Article 8.

5.1.4 Although the above provisions differ in some respects, the opinion is held that these provisions have the same objective, namely, to set standards for the correct, honourable and proper fulfilment of public functions.

5.2 **Establishing systems of government relating to hiring and procurement of goods and services**

SADC Protocol

5.2.1 In terms of Article 4(1)(b) of the SADC Protocol each Member State must adopt measures, which will create, maintain and strengthen systems of government hiring and procurement of goods and services that ensure the transparency, equity and efficiency of such systems. This is an area that presents tempting opportunities to commit corrupt activities and usually huge amounts of money are involved. The SADC Protocol aims at compelling Member States to exercise tighter control regarding the hiring and procurement of goods and services.

AU Convention

- 5.2.2 Article 5(4) of the AU Convention, among others, deals with this measure. In terms of this measure State Parties undertake “to adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services.”.

UN Convention

- 5.2.3 Article 9 of the UN Convention under the heading “*Public procurement and management of public finances*” deals with this measure. This Article provides for the following measures:

- (a) In terms of Article 9(1) each State Party must take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective in preventing corruption. Such systems must address, among others, the following matters:
 - (i) The public distribution of information relating to procurement procedures and contracts, which may include information on invitations to tender the awarding of contracts.
 - (ii) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication.
 - (iii) The use of objective criteria for public procurement decisions, in order to facilitate the verification of the correct application of the rules or procedures.
 - (iv) The introduction of an effective review and appeal system.
 - (v) Measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.
- (b) In terms of Article 9(2) each State Party must take appropriate measures to promote transparency and accountability in the management of public finances. Such measures must include, among others, procedures for the adoption of the national budget; timely

reporting on revenue and expenditure; a system of accounting and auditing standards and related oversight; effective and efficient systems of risk management and internal control; and where appropriate, corrective action in the case of failure to comply with the requirements so established.

- (c) Article 9(3) requires each State Party to take such civil and administrative measures as may be necessary to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

5.2.4 All three instruments require the adoption of measures to create, maintain and strengthen systems of government and procedures for hiring, procurement and management of public goods and services. However, the UN Convention deals in much more detail with the matter and it is proposed that Member States should take the provisions of Article 9 into account in developing these required systems of government.

5.3 Government revenue collection and control systems

SADC Protocol

5.3.1 In terms of Article 4(1)(c) of the Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen government revenue collection and control systems that deter corruption as well as laws that deny favourable tax treatment for any individual or corporation for expenditures made in violation of the anti-corruption laws of the State Parties. This Article aims at instances where the current collection of revenue is problematic, either because it is ineffective in gathering all the outstanding revenue or the revenue is collected, but does not reach the Government coffers. Both these situations are very susceptible to corruption.

AU Convention

5.3.2 Article 5(4) of the AU Convention deals with this measure. In terms of this Article State Parties undertake "to adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services (see also paragraph 5.2.2 above).

UN Convention

5.3.3 Article 12(4) of the UN Convention provides that each State Party must disallow the tax deductibility of expenses that constitute bribes. Furthermore, Article 9(2) provides that each State Party must take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, among others:

- “(a) Procedures for the adoption of the national budget;
- (b) Timely reporting on revenue and expenditure;
- (c) A system of accounting and auditing standards and related oversight;
- (d) Effective and efficient systems of risk management and internal control; and
- (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.”.

5.3.4 Although the wording of the three instruments differs, the opinion is held that these provisions have the same objective, namely, to strengthen government revenue collection and control systems that deter corruption as well as laws that disallow favourable tax treatment for any person.

5.4 Mechanisms to promote access to information

SADC Protocol

5.4.1 In terms of Article 4(1)(d) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen mechanisms to promote access to information to facilitate eradication and elimination of opportunities for corruption.

AU Convention

5.4.2 The AU Convention contains a similar measure. Article 9 of the AU Convention deals with this measure under the heading “*Access to Information*”. This provision provides that each State Party must adopt such legislative and other measures to give effect to the right of

access to any information that is required to assist in the fight against corruption and related offences. Furthermore, in terms of Article 12(4) of the AU Convention each State Party undertakes to ensure that the media is given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial.

UN Convention

5.4.3 Under the heading *“Participation of society”*, Article 13 of the UN Convention deals, among others, with the right to have access to information. In terms of Article 13(1) of the UN Convention each State Party must take appropriate measures to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by measures such as:

- “(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
- (b) Ensuring that the public has effective access to information;
- (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;
- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary”.

5.4.4 In the final instance Article 10(b) of the UN Convention provides that each State Party must take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes. Such measures may include, among others, simplifying administrative procedures in order to facilitate public access to the competent decision-making authorities.

5.4.5 The above provisions of the three instruments intend covering the same measure. However, it is interesting to note that the purpose of the SADC Protocol in this regard is to “facilitate eradication and elimination of opportunities for corruption”, whereas the purpose of the AU Convention is to “assist in the fight against corruption and related offences”, and the purpose of the UN Convention is to promote the active participation of all persons in “the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption”. Therefore, in the SADC Protocol and the UN Convention emphasis is placed on the fight against “corruption”, whereas in the AU Convention emphasis is placed on the fight against “corruption and related offences”. The opinion is held that the last-mentioned approach is to be preferred. This is in line with recent legislation of South Africa and Namibia, for example, whose anti-corruption measures are applicable in respect of corruption and related corrupt activities.

5.5 Protection of reporting persons

SADC Protocol

5.5.1 In terms of Article 4(1)(e) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen systems for protecting individuals who, in good faith, report acts of corruption. This Article provides for the protection of whistleblowers. This is an extremely important provision, since the effective protection of whistleblowers will encourage more people to report contraventions of corruption. Corruption is in itself difficult to detect. The law enforcement agencies rely to a great extent on the assistance of whistleblowers and it is therefore important that whistleblowers be adequately protected.

AU Convention

5.5.2 In terms of Article 5(6) of the AU Convention State Parties undertake to adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.

UN Convention

5.5.3 The UN Convention contains a similar provision. Article 33 of the Convention provides that each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good

faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the UN Convention.

- 5.5.4 The SADC Protocol and the AU Convention apply to the reporting of acts and instances of "corruption". The UN Convention, on the other hand, applies to "offences established in accordance with this Convention". The provision of the UN Convention is wider in that it also provides for the establishing of offences relating to corruption, among others, offences relating to the laundering of proceeds of crime. It is suggested that Member States should adopt legislative measures in line with the provisions of the UN Convention.

5.6 Enactment of laws punishing persons who make false and malicious reports

SADC Protocol

- 5.6.1 In terms of Article 4(1)(f) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen laws that punish those who make false and malicious reports against innocent persons. This measure should be read in conjunction with the previous measure, namely, the protection of whistleblowers. Whereas the previous provision is important to encourage people to report contraventions of corruption, one does not want innocent person being prosecuted, because of false and malicious reports.

AU Convention

- 5.6.2 The AU Convention contains an almost identical provision. Article 5(7) of the AU Convention provides that State Parties must undertake to adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences. It is important to note that whereas the SADC Protocol does not mention the offences in respect of which this measurement should be applicable, the AU Convention refers to reports against innocent persons in "corruption and related offences".

UN Convention

- 5.6.3 The UN Convention does not contain a similar provision. However, the Convention contains the following provisions, which relate to such measures:

(a) In terms of Article 12(3) of the UN Convention each State Party must take such measures regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit, among others, the use of false documents.

(b) In terms of Article 25(a) of the UN Convention each State Party must adopt such legislative and other measures to establish as criminal offences 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.

5.7 Creation of institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption

SADC Protocol

5.7.1 In terms of Article 4(1)(g) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption. This provision emphasises the seriousness of Member States to establish independent institutions to deal with the implementation and enforcement of anti-corruption measures. For these institutions to be effective, they need to be independent and free of interference.

AU Convention

5.7.2 The AU Convention contains a similar provision. Article 5(3) of the AU Convention provides that State Parties must undertake to establish, maintain and strengthen independent national anti-corruption authorities or agencies.

UN Convention

5.7.3 Article 6 of the UN Convention deals comprehensively with the establishment of independent preventative anti-corruption bodies. Article 6 provides as follows:

- “1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
 - (a) Implementing the policies referred to in Article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
 - (b) Increasing and disseminating knowledge about the prevention of corruption.
2. 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.
3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other State Parties in developing and implementing specific measures for the prevention of corruption.”.

5.7.4 It is important to note that the AU and UN Conventions emphasise the fact that these bodies, authorities or agencies should be independent and free from undue influence. In terms of the UN Convention the duties of these bodies should include the overseeing and coordinating of anti-corruption policies and the increasing and disseminating of knowledge regarding the prevention of corruption.

5.8 Maintaining of books and records which accurately reflect the acquisition and disposition of assets and the establishment of sufficient internal accounting controls

SADC Protocol

5.8.1 In terms of Article 4(1)(h) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen deterrents to the bribery of domestic public officials, and officials of foreign States, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records

which, in reasonable details, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable the law enforcement agencies to detect acts of corruption.

AU Convention

- 5.8.2 The AU Convention does not contain a similar provision. However, in terms of Article 5(4) of the AU Convention each State Party undertakes to adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services.
- 5.8.3 It is important to note that the provision of the SADC Protocol aims at preventing and combating bribery of “domestic officials” and officials of foreign states. Furthermore, the provision applies to “publicly held companies”. The provision of the AU Convention also applies to systems “in particular in the public income” and in respect of “public goods and services”. Therefore, the emphasis on the measures of the SADC Protocol and the AU Convention is the prevention of corruption in the “public sector”.

UN Convention

- 5.8.4 The UN Convention proposes similar measures in the public and private sector.
- 5.8.5 In the first instance Article 9 of the UN Convention deals with measures in the public sector. In this regard Article 9(2) and (3) provides for the following measures:
- (a) In terms of Article 9(2) each State Party must take appropriate measures to promote transparency and accountability in the management of public finances. Such measures encompass, among others —
 - “(a) Procedures for the adoption of the national budget;
 - (b) Timely reporting on revenue and expenditure;
 - (c) A system of accounting and auditing standards and related oversight;
 - (d) Effective and efficient systems of risk management and internal control; and

- (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.”.
- (b) In terms of Article 9(3) each State Party must take such civil and administrative measures as may be necessary to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

5.8.6 Article 12 of the UN Convention deals with similar measures in the private sector. The said Article provides for the following measures:

- (a) In terms of Article 12(1) each State Party must take measures enhancing accounting and auditing standards in the private sector.
- (b) In terms of Article 12(2) such measures may include, *inter alia*, ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.
- (c) Article 12(3) provides that each State Party must take such measures as may be necessary, regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards.

5.8.7 The opinion is held that the measures proposed by the UN Convention are broader and it is suggested that Member States should include the measures proposed by the UN Convention relating to the public as well as the private sector.

5.9 Participation by media, civil society and non-governmental organisations in fight against corruption

SADC Protocol

5.9.1 In terms of Article 4(1)(i) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen mechanisms to encourage participation by the media, civil society and non-governmental organisations in efforts to prevent corruption. The advantage of using these institutions and organisations in the fight against corruption is firstly that the State will gain access to a lot of

additional information. Secondly, the State could utilise the resources of these institutions to enhance the success of public awareness campaigns to raise the awareness of corruption. This Article gives a clear indication that States should be open to the possibility of using as many sources and resources in their fight against corruption as possible. This provision is similar to the provisions set out in the Inter-American Convention against Corruption.

AU Convention

5.9.2 Articles 5(8) and 12 of the AU Convention deal with this measure. In the first instance Article 5(8) provides that State Parties undertake to adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitisation of the media, and the promotion of an enabling environment for the respect of ethics. Furthermore, Article 12 provides as follows:

“State Parties undertake to:

1. Be fully engaged in the fight against corruption and related offences and the popularisation of this Convention with the full participation of the Media and Civil Society at large;
2. Create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs;
3. Ensure and provide for the participation of Civil Society in the monitoring process and consult Civil Society in the implementation of this Convention;
4. Ensure that the Media is given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial.”.

UN Convention

5.9.3 Article 13 of the UN Convention deals comprehensively with this measure. This Article contains the following important provisions:

(a) In terms of Article 13(1) each State Party must take appropriate measures to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. Such participation should be strengthened by such measures as:

“(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

(b) Ensuring that the public has effective access to information;

(c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;

(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

(i) For respect of the rights or reputations of others;

(ii) For the protection of national security or ordre public or of public health or morals.”.

(b) In terms of Article 13(2) each State Party must take appropriate measures to ensure that the relevant anti-corruption bodies referred to in the UN Convention are known to the public and must provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with the UN Convention.

5.9.4 The opinion is held that the provisions of the UN Convention are preferable in that they deal in more detail with this measure and prescribe specific measures to be adopted by State Parties.

5.10 Mechanisms for promoting public education and awareness in fight against corruption.

SADC Protocol

5.10.1 In terms of Article 4(1)(j) of the SADC Protocol each State Party undertakes to adopt measures, which will create, maintain and strengthen mechanisms for promoting public education and awareness in the fight against corruption. This provision is closely related to Article 4(1)(i) of the Protocol in that it compels State Parties to increase awareness and therefore increase the sources and resources in terms of which corruption can be countered.

AU Convention

5.10.2 Article 5(8) of the AU Convention also relates to this measure. This Article provides that State Parties undertake to adopt and strengthen mechanisms for promoting the education of populations to “respect the public good and public interest, and awareness” in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics.

UN Convention

5.10.3 As indicated in paragraph 5.9.3 above, one of the objectives of the measures proposed in Article 13 of the UN Convention is to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. Furthermore, Article 7 of the UN Convention also aims at raising public awareness regarding the fight against corruption. In this regard Article 7(1)(d) of the Convention requires that each State Party must endeavour to adopt, maintain and strengthen systems that promote education and training programmes for civil servants and other public officials so as to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions.

5.10.4 It seems as if the provisions of the SADC Protocol, AU Convention and UN Convention are very similar relating to the adoption of mechanisms for promoting public education and awareness in the fight against corruption.

B. OTHER PREVENTATIVE MEASURES PRESCRIBED BY UN CONVENTION

5.11 The UN Convention contains various other preventative measures that are not specifically covered by the SADC Protocol or the AU Convention. It is suggested that SADC Members States should also take such preventative measures into account in developing their anti-corruption strategies. These measures are summarised in paragraphs 5.12 to 5.16 hereunder.

5.12 Preventive anti-corruption policies and practices

Article 5 of the UN Convention under the heading “*Preventive anti-corruption policies and practices*” deals with this measure. In terms of this Article each State Party must—

- (a) develop and implement or maintain effective, coordinated **anti-corruption policies** that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability;
- (b) endeavour to establish and promote **effective practices** aimed at the prevention of corruption;
- (c) endeavour to periodically **evaluate relevant legal instruments** and administrative measures with a view to determining their adequacy to prevent and fight corruption;
- (d) **collaborate** with each other and with relevant international and regional organizations in promoting and developing the measures referred to in Article 5. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

5.13 Systems relating to conditions of service of civil servants and other non-elected public officials

Article 7 of the UN Convention requires that each State Party must—

- (a) endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and other non-elected public officials that—

- are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;
 - include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation of such individuals to other positions;
 - promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;
 - promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions;
- (b) consider adopting appropriate legislative and administrative measures, consistent with the objectives of the UN Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office;
- (c) consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties;
- (d) endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.(See also paragraph 5.10.3 above)

The SADC Protocol and the AU Convention do not contain similar provisions. However, as indicated in paragraphs 5.10.1 and 5.10.2 above, Articles 4(1)(i) and (j) of the SADC Protocol and 5(8) of the AU Convention partly deal with this measure.

5.14 Measures relating to the judiciary and prosecution services

Bearing in mind the independence of the judiciary and its crucial role in combating corruption, Article 11(1) of the UN Convention provides that each State Party must take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.

Such measures may include rules with respect to the conduct of members of the judiciary. Article 11(2) provides that similar measures may be introduced and applied within the prosecution service.

5.15 Measures to prevent money-laundering

Article 14 of the UN Convention provides for measures to prevent money-laundering. The following measures are prescribed:

- (a) In terms of Article 14(1) each State Party must —
 - (i) institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering;
 - (ii) ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering have the ability to cooperate and exchange information at the national and international levels, and to that end, must consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.
- (b) Article 14(2) provides that State Parties must consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.
- (c) In terms of Article 14(3) State Parties must consider implementing appropriate and feasible measures to require financial institutions, including money remitters, to —
 - (i) include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;
 - (ii) maintain such information throughout the payment chain; and

- (iii) apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.
- (d) Article 14(4) call on State Parties to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

5.16 Public reporting

In terms of Article 10 of the UN Convention each State Party must take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes. Such measures may include —

- (a) adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
- (b) simplifying administrative procedures in order to facilitate public access to the competent decision-making authorities; and
- (c) publishing information, which may include periodic reports on the risks of corruption in its public administration.

6. JURISDICTION

SADC Protocol

6.1.1 In terms of Article 5(1) of the SADC Protocol each State Party must adopt measures necessary to establish its jurisdiction over the offences established in accordance with the SADC Protocol when –

“(a) the offence in question is committed in its territory;

(b) the offence is committed by one of its nationals or by a person who habitually resides in its territory; and

(c) the alleged criminal is present in its territory and it does not extradite such person to another country.”.

6.1.2 Article 5(2) of the Protocol provides that the Protocol does not exclude any criminal jurisdiction exercised by a State Party in accordance with its domestic law, and in terms of Article 5(3) the provisions of the Article are subject to the principle that a person shall not be tried twice for the same offence.

6.1.3 In terms of Article 5(1)(a) above, jurisdiction is established under circumstances where the offence is committed in a State Party’s territory notwithstanding the fact that the accused person is not a national or a person who ordinarily resides in its territory.

6.1.4 In terms of Article 5(1)(b) jurisdiction is established under circumstances where the offence is committed by a national of a State Party or by a person who ordinarily resides in its territory, notwithstanding the fact that the offence was committed in or outside its territory.

6.1.5 In terms of Article 5(1)(c) jurisdiction is established under circumstances where the alleged criminal is present in a State Party’s territory and it does not extradite such person to another country. In other words, if country A does not extradite the alleged criminal to country B, which has jurisdiction to prosecute that criminal, then country A would establish jurisdiction to prosecute that criminal. This provision clearly aims at stopping the possibility of any of the State Parties providing a safe haven for people suspected of committing acts of corruption. Therefore, if a State Party establishes jurisdiction over an alleged criminal in terms of Article 5(1)(c) of the Protocol, there is an obligation on that State Party to

prosecute that criminal. This provision must be read with Article 9(7) of the SADC Protocol, which Article regulates the question of extradition in terms of the SADC Protocol.

- 6.1.6 This type of provision is gaining popularity in other types of international instruments as well. It links with the so-called universal jurisdiction principle that certain crimes are of such a serious nature that all states are obliged to prosecute such crimes, no matter where or by whom they were committed. In this regard Resolution 1373(2001) of the United Nations Security Council provides that “all States shall deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”.

AU Convention

- 6.2.1 Article 13 of the AU Convention contains a similar provision. In terms of Article 13(1) of the AU Convention each State Party has jurisdiction over acts of corruption and related offences when —

- “(a) the breach is committed wholly or partially inside its territory;
- (b) the offence is committed by one of its nationals outside its territory or by a person who resides in its territory; and
- (c) the alleged criminal is present in its territory and it does not extradite such person to another country;
- (d) when the offence, although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party.

2. This Convention does not exclude any criminal jurisdiction exercised by a State Party in accordance with its domestic law.

3. Notwithstanding the provision of paragraph 1 of this Article, a person shall not be tried twice for the same offence.”.

- 6.3 It is important to note that the SADC Protocol applies to offences “established in accordance with this Protocol”. On the other hand Article 13 is applicable in respect of “acts of corruption **and related offences**”. Furthermore, Article 13(1)(d) of the AU Convention provides for a

broader application of the AU Convention in that it provides for an offence that, although committed outside its jurisdiction, affects, among others, the vital interests the State Party concerned.

UN Convention

- 6.4 Article 42 of the UN Convention deals comprehensively with this matter. The said Article provides as follows:

“1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

- (a) The offence is committed in the territory of that State Party; or
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

- (a) The offence is committed against a national of that State Party; or
- (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
- (c) The offence is one of those established in accordance with article 23, paragraph 1(b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1(a)(i) or (ii) or (b)(i), of this Convention within its territory; or

(d) The offence is committed against the State Party.

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.
5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other State Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those State Parties shall, as appropriate, consult one another with a view to coordinating their actions.
6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.”.

- 6.5 Furthermore, Article 47 of the UN Convention provides that State Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with the UN Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, “in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.”.
- 6.6 The opinion is held that the provisions in the three instruments providing for jurisdiction matters are very similar and should be adopted by the State Parties concerned.

7. ACTS OF CORRUPTION RELATING TO AN OFFICIAL OF A FOREIGN STATE

This prohibition emanates from the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997. The position in the SADC Protocol, AU Convention and UN Convention is as follows:

SADC Protocol

- 7.1 These acts of corruption are covered by Article 6 of the SADC Protocol and are subject to each State Party's domestic laws. Article 6(1) of the Protocol requires that each State Party must prohibit and punish the offering or granting, directly or indirectly, to an official of a foreign State of any article or monetary value, or other benefit, such as a gift, favour, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. This prohibition applies to each State party's own nationals, persons having their habitual residence in its territory, and any businesses domiciled there.
- 7.2 Article 6(2) provides that among those State Parties that have established the above offence, such offence shall be considered an act of corruption for the purposes of the SADC Protocol. Furthermore, any State Party that has not established such an offence is obliged, insofar as its laws permit, to provide assistance and co-operation with respect to this offence as provided in the Protocol.

AU Convention

- 7.3 The AU Convention does not contain a similar provision.

UN Convention

- 7.4 Article 16 of the UN Convention contains a similar prohibition. Article 16(1) deals with active corruption, whereas Article 16(2) deals with passive corruption.
- 7.5 In terms of Article 16(1) each State Party must adopt 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

public 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.

7.6 In terms of Article 16(2) each State Party must consider adopting legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public 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.

7.7 The following definitions in Article 2 of the Convention are relevant for the purposes of the application of the above provisions:

(a) In the first instance the expression “**Foreign public official**” means “any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise”.

(b) Secondly, “**Official of a public international organization**” is defined as “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization”.

7.8 Conclusion

The prohibition in the UN Convention is broader than the prohibition in the SADC Protocol. As indicated above, the UN Convention provides for—

- (a) the promise, offering or giving to a foreign public official or an official of a public international organization of an undue advantage (the so-called active corruption); and
- (b) the solicitation or acceptance by a foreign public official or an official of a public international organization of an undue advantage (the so-called passive corruption).

On the other hand the SADC Protocol only provides for the offering or granting to an official of a foreign State of an undue advantage. It is proposed that State Parties should adopt the prohibitions contained in the UN Convention.

8. CONFISCATION AND SEIZURE

SADC Protocol

- 8.1 Article 8(1) of the SADC Protocol provides that each State Party must adopt such measures as may be necessary to enable—

“(a) confiscation of proceeds derived from offences established in accordance with this Protocol, or property the value of which corresponds to that of such proceeds; and

(b) its competent authorities to identify, trace and freeze or seize proceeds, property or instrumentalities for the purpose of eventual confiscation.”.

- 8.2 Furthermore, Article 8 contains the following provisions relating to confiscation and seizure:

- 8.2.1 In order to carry out measures referred to in Article 8(1), each State Party must empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. State Parties may not invoke bank secrecy as a basis for refusal to provide assistance (Article 8(2)).

- 8.2.2 The Requesting State Party may not use any information received that is protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless the Requested State Party consents thereto (Article 8(3)).

- 8.2.3 State Parties must provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and confiscation of property, instrumentalities or proceeds obtained, derived from or used in the commission of offences established in accordance with the Protocol (Article 8(4)).

- 8.2.4 A State Party that enforces its own or another State Party's judgment against property or proceeds described in Article 8(1), must dispose of the property or proceeds in accordance with its laws (Article 8(5)).

- 8.2.5 To the extent permitted by a State Party's laws and upon such terms, as it deems appropriate, a State Party may transfer all or part of property referred to in Article 8(1) to another State Party that assisted in the underlying investigation or proceedings (Article 8(6)).

8.2.6 Article 1 of the SADC Protocol describes “**confiscation**” as “any penalty or measure resulting in a final deprivation of property, proceeds or instrumentalities ordered by a court of law following proceedings in relation to a criminal offence or offences connected with or related to corruption;”.

AU Convention

8.3 Article 16 of the AU Convention provides for a similar provision under the heading “*Confiscation and Seizure of the Proceeds and Instrumentalities of Corruption*”. The said Article contains the following provisions:

8.3.1 The provisions contained in Articles 16(1) are similar to those contained in Article 8(1) of the SADC Protocol. However, the AU Convention also provides for the adoption of such legislative measures as may be necessary to enable "repatriation of proceeds of corruption".

8.3.2 Article 16(2) requires a Requested State Party, at the request of the Requesting State Party, to seize and remit any object which may be required as evidence of the offence in question or which has been acquired as a result of the offence for which extradition is requested and which, at the time of arrest is found in possession of the persons claimed or is discovered subsequently.

8.3.3 In terms of Article 16(3) the objects referred to in Article 3(2) may, if the Requesting State so requests, be handed over to that State even if the extradition is refused or cannot be carried out due to death, disappearance or escape of the person sought. Article 8(6) of the SADC Protocol contains a similar provision.

8.3.4 Article 16(4) provides that when the said object is liable for seizure or confiscation in the territory of the Requested State Party, the latter may, in connection with pending or ongoing criminal proceedings, temporarily retain it or hand it over to the Requesting State Party, on condition that it is returned to the Requested State Party.

8.3.5 In terms of Article 17(1) of the AU Convention each State Party must adopt such measures necessary to empower its courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents with a view to implementing this Convention.

- 8.3.6 The definition of “*confiscation*” in Article 1 of the AU Convention is identical to the definition in Article 1 of the SADC Protocol.

UN Convention

- 8.4 Article 31 of the UN Convention under the heading “*Freezing, seizure and confiscation*”, contains a similar provision as the above provisions of the SADC Protocol and the AU Convention. Article 31 provides for the following measures:
- 8.4.1 Article 31 of the UN Convention is similar to Article 8(1) and 16(1) of the SADC Protocol and AU Convention, respectively.
- 8.4.2 Article 31(2) of the UN Convention is similar to Article 8(4) of the SADC Protocol and provides for measures to enable the identification, tracing, freezing or seizure of any item referred to in Article 31(1) for the purpose of eventual confiscation.
- 8.4.3 In terms of Article 31(3) each State Party must adopt such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property.
- 8.4.4 Article 31(5) provides that if such proceeds of crime 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.
- 8.4.5 In terms of Article 31(6) income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in Article 31, in the same manner and to the same extent as proceeds of crime.
- 8.4.6 The provisions of Article 31(7) are almost identical to the provisions of Article 8(2) of the SADC Protocol. See paragraph 8.2.1 above.
- 8.4.7 In terms of Article 31(8) State Parties may consider the possibility of requiring that an offender to demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation.

- 8.4.8 In terms of Article 31(9) the provisions of the Article shall not be so construed as to prejudice the rights of bona fide third parties.
- 8.5 In terms of Article 53(c) of the UN Convention each State Party must take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with the UN Convention.
- 8.6 Article 2(g) of the UN Convention describes "**confiscation**" as "the permanent deprivation of property by order of a court or other competent authority".
- 8.7 In terms of Article 3(1) of the UN Convention, the Convention applies to the prevention, investigation and prosecution of corruption and "to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention".
- 8.8 In the final instance Article 40 of the UN Convention requires that each State Party must ensure that, in the case of domestic criminal investigations of Convention offences, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

9. EXTRADITION

SADC Protocol

- 9.1.1 Article 9 of the SADC Protocol applies to all the offences established by the State Parties in accordance with the Protocol (Article 9(1)). If an extradition treaty already exists between or among State Parties, each of the offences to which the Article applies, shall be deemed to be included as an extraditable offence in such existing treaty (Article 9(2)).
- 9.1.2 In respect of future extradition treaties, Article 9(3) provides that State Parties undertake to include offences contemplated in the Protocol as extraditable offences in every extradition treaty to be concluded between or among them.
- 9.1.3 Article 9(4) provides that if a State Party makes extradition conditional on the existence of a treaty and it receives a request for extradition from another State Party with which it does not have an extradition treaty, that State Party may consider the Protocol as the legal basis for extradition with respect to any offence to which the Protocol applies. On the other hand, State Parties that do not make extradition conditional on the existence of a treaty, are obliged to recognise offences to which the Article applies, as extraditable offences among themselves (Article 9(5)).
- 9.1.4 In terms of Article 9(6), extradition is subject to the conditions provided for by the law of the Requested State Party or by applicable extradition treaties.
- 9.1.5 Article 9(7) provides that if extradition for any offence to which the Article applies is refused, because the Requested State Party is of the opinion that it has jurisdiction over the offence, the Requested State Party must, within a reasonable time, submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requesting State Party. The Requested State Party must report the final outcome to the Requesting State Party.
- 9.1.6 In terms of Article 9(8) a Requested State Party may, subject to the provisions of its domestic law and its extradition treaties, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the Requesting State Party, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure that the person is present at the extradition proceedings.

- 9.1.7 In the final instance Article 9(9) provides that State Parties must endeavour to conclude bilateral and multilateral agreements to carry out or enhance the effectiveness of extradition.

AU Convention

- 9.2. Article 15 of the AU Convention deals with extradition. Article 15 contains the following provisions, which are almost identical to those of the SADC Protocol:

- (a) Article 15(1) of the AU Convention is identical to Article 9(1) of the Protocol (see paragraph 9.1.1 above).
- (b) Articles 15(2) of the AU Convention is a combination of the provisions contained in Article 9(2) and (3) of the Protocol (see paragraphs 9.1.1 and 9.1.2 above).
- (c) Article 15(3) and (4) of the AU Convention is identical to Article 9(4) and (5), respectively, of the Protocol (see paragraph 9.1.3 above).
- (d) Article 15(6) of the AU Convention is similar to Article 9(7) of the Protocol (see paragraph 9.1.5 above). However, where the AU Convention requires that the Requested State is obliged to submit the case “without undue delay to its competent authorities for the purpose of prosecution”, Article 9(7) of the Protocol requires that the Requested State Party must “within a reasonable time”, submit the case to its competent authorities for the purpose of prosecution (see paragraph 9.1.5).
- (e) Article 15(7) of the AU Convention is identical to Article 9(8) of the Protocol (see paragraph 9.1.6 above).
- (f) The provisions contained in Article 9(6) and (9) of the SADC Protocol are not contained in the AU Convention.

UN Convention

- 9.3.1 Article 44 of the UN Convention deals comprehensively with extradition. Most of the provisions contained in Articles 9 and 15 of the SADC Protocol and the AU Convention, respectively, are also contained in the UN Convention. The UN Convention, however, also deals with various other aspects relating to extradition. The provisions of the UN Convention include, among others, the following:

(a) In terms of Article 44(1) the provisions of this Article apply to the offences established in accordance with the Convention provided that —

- the person who is the subject of the request for extradition is present in the territory of the requested State Party; and
- the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

However, Article 44(2) provides that, notwithstanding the provisions of Article 44(1), a State Party whose law so permits, may grant the extradition of a person for any of the offences covered by the Convention that are not punishable under its own domestic law.

(b) Article 44(3) provides that, if a request for extradition includes several separate offences, at least one of which is extraditable under Article 44 and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with the Convention, the requested State Party may apply Article 44 also in respect of those offences.

(c) Article 44(4) of the UN Convention is partly covered by Article 9(2) of the SADC Protocol. In terms of the first-mentioned Article each of the offences to which Article 44 applies is deemed to be included as an extraditable offence in any extradition treaty existing between State Parties. Furthermore, State Parties must undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. However, a State Party whose laws so permit, in the event of it using this Convention as the basis for extradition, may not consider any of the offences established in accordance with the UN Convention to be a political offence.

(d) Article 44(5) provides that if a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. This provision is almost identical to the provisions contained in Articles 9(4) and 15(3) of the SADC Protocol and AU Convention, respectively (see paragraph 9.1.4 above).

- (e) Article 44(6) and (7) relates to Article 44(4) above. In the first instance Article 44(6) provides that a State Party that makes extradition conditional on the existence of a treaty, must at the time of deposit of its instrument of ratification, acceptance or approval of or accession to the UN Convention, inform the Secretary-General of the United Nations whether it will take the Convention as the legal basis for cooperation on extradition with other State Parties to this Convention. If it does not take the Convention as the legal basis for cooperation on extradition, it must seek to conclude treaties on extradition with other State Parties to this Convention in order to implement Article 44. Secondly, Article 44(7) provides that State Parties that do not make extradition conditional on the existence of a treaty must recognize the offences to which Article 44 applies, as extraditable offences between themselves. The last-mentioned provision is similar to the provisions of Article 9(5) and 15(4) of the SADC Protocol and AU Convention, respectively.
- (f) Article 44(8) is similar to the provisions of Articles 9(6) and 15(5) of the SADC Protocol and AU Convention, respectively. Article 44(8) provides that extradition is subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, among others, "conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition". The last-mentioned condition does not appear in the SADC Protocol or the AU Convention.
- (g) In terms of Article 44(9) State Parties must, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this Article 44 applies. The SADC Protocol or the AU Convention does not contain a similar provision.
- (h) The provisions of Article 44(10) of the UN Convention deal with the execution of a warrant of arrest by the requested State Party and are almost identical to those of Articles 9(8) and 15(7) of the SADC Protocol and the AU Convention, respectively (see paragraph 9.1.6 above).
- (i) The provisions of Article 44(11) deal with the situation where a State Party does not extradite an alleged offender solely on the ground that he or she is one of its nationals. In such a case that State Party is obliged to submit the case without undue delay to its competent

authorities for the purpose of prosecution. It is further required that the relevant authorities must take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under its domestic law. The State Parties concerned must cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution. The above provisions are similar to Articles 9(7) and 15(6) of the SADC Protocol and AU Convention, respectively (see paragraph 9.1.5 above).

- (j) Article 44(18) of the UN Convention is identical to Article 9(9) of the SADC Protocol. These provisions require that State Parties must seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

9.3.2 It seems that the following provisions relating to extradition only appear in the UN Convention and not the SADC Protocol or the AU Convention:

- (a) Article 44(12) provides that whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that that person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of that person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and any other conditions that they may deem appropriate, such conditional extradition or surrender is sufficient to discharge the obligation set forth in Article 44(11)(see paragraph 9.3.1 (i) above).
- (b) Article 44(13) provides that if extradition, sought for purposes of enforcing a sentence, is refused, because the person sought is a national of the requested State Party, the requested State Party must, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of such sentence under the domestic law of the requesting State Party or the remainder thereof.
- (c) Article 44(14) guarantees a person fair treatment at all stages of extradition proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

- (d) Article 44(15) ensures that the provisions of the UN Convention may not be interpreted as imposing an obligation on a requested State Party to extradite if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to his or her position for any one of the above reasons.
- (e) In terms of Article 44(16) State Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.
- (f) Article 44(17) aims at enhancing a consultation process in respect of extradition decisions. In terms of this provision the requested State Party must, before refusing extradition, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its request.

9.4 As indicated above, the provisions of the UN Convention pertaining to extradition are spelled out in much more detail than the provisions of the SADC Protocol and the AU Convention, and it is therefore suggested State Parties should rather implement the provisions of the UN Convention.

10. JUDICIAL COOPERATION AND MUTUAL LEGAL ASSISTANCE

SADC Protocol

- 10.1 Article 10(1) of the SADC Protocol requires that State Parties must afford one another the widest “measure of mutual assistance” by processing requests from authorities that, in conformity with their domestic law, have the power to investigate or prosecute the acts of corruption described in the Protocol, in order to –
- (a) obtain evidence; and
 - (b) take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.
- 10.2 In terms of Article 10(2) State Parties must provide each other with the widest “measure of mutual technical co-operation” on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption.
- 10.3 Article 10(3) provides that the provisions of Article 10 do not affect the obligations under any other bilateral or multilateral treaty, which governs, in whole or in part, mutual legal assistance in criminal matters. Furthermore, nothing in Article 10 prevents State Parties from affording one another more favourable forms of mutual legal assistance allowed under their respective domestic law (Article 10(4)).

AU Convention

- 10.4 Article 18 of the AU Convention deals with “*Cooperation and Mutual Legal Assistance*”. In comparing these provisions with Article 9 of the SADC Protocol, the following aspects need to be highlighted:
- (a) Article 18(1) of the AU Convention is similar to Article 10(2) of the Protocol (see paragraph 10.1.2 above). However, it is important to note that the AU Convent requires technical cooperation and assistance to prevent, detect, investigate and punish “acts of corruption **and related offences**”, whereas the Protocol only refers to “acts of corruption”. The wider provision of the AU Convention is preferred.

- (b) Article 18(2) provides that if two or several State Parties have established relations on the basis of uniform legislation or a particular regime, they may have the option to regulate such mutual relations without prejudice to the provisions of the AU Convention. The SADC Protocol does not contain a similar provision.
- (c) In terms of Article 18(3) State Parties must co-operate among themselves in conducting and exchanging studies and researches on how to combat corruption and related offences and to exchange expertise relating to preventing and combating corruption and related offences. There is no similar provision in the SADC Protocol.
- (d) In terms of Article 18(4) State Parties must co-operate among themselves in providing any available technical assistance in drawing up programmes, codes of ethics or organizing, where necessary and for the benefit of their personnel, joint training courses involving one or several states in the area of combating corruption and related offences. The SADC Protocol does not contain a similar provision.
- (e) The provision of Article 18(5) and (6) of the AU Convention are similar to the provisions of Article 10(3) and (4) of the SADC Protocol, respectively (see paragraph 10.3 above).

UN Convention

- 10.5 Various provisions of the UN Convention deal in detail with mutual legal assistance and cooperation between State Parties and law enforcement agencies. The above provisions of the SADC Protocol and the AU Convention are similar to provisions of the UN Convention, but the latter Convention deals in much more detail with matters. The following is a summary of the provisions of the UN Convention:
 - (a) The provisions of Article 46(1) and (2) of the UN Convention are similar to the provision of the SADC Protocol and the AU Convention and require State Parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the UN Convention.
 - (b) Mutual legal assistance may be requested, among others, for purposes of taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures, and

freezing; examining objects and sites; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; facilitating the voluntary appearance of persons in the requesting State Party; identifying, freezing and tracing proceeds of crime; and the recovery of assets (Article 46(3)).

- (c) A competent authority of a State Party may transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist in undertaking or successfully concluding inquiries and criminal proceedings (Article 46(4)). Article 46(5) provides for matters relating to the confidentiality and disclosure of such information.
- (d) The provisions of Article 46 do not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern mutual legal assistance (Article 46(6)). Article 46(7) deals with the application of paragraphs 9 to 29 of Article 46. State Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.
- (e) In terms Article 46(8) State Parties may not decline to render mutual legal assistance pursuant to Article 46 on the ground of bank secrecy.
- (f) In responding to a request for assistance, in the absence of dual criminality, a requested state Party must take the purposes of the Convention into account. (Article 46(9)(a)). State Parties may decline to render assistance pursuant to Article 46 on the ground of absence of dual criminality. However, a requested State Party must, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention (Article 46(9)(b)). Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this Article 46 in the absence of dual criminality (Article 46(9)(c)).
- (g) In terms of Article 46(1) a person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification,

testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings may be transferred if—

- that person freely gives his or her informed consent;
- the competent authorities of both State Parties agree, subject to such conditions as those State Parties may deem appropriate.

If a person is so transferred, the State Party to which the person is transferred has the authority and obligation to keep that person in custody unless otherwise requested or authorized thereto by the State Party from which the person was transferred. Furthermore, the State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person and the person so transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred (Article 46(11)).

(h) Article 46(12) provides that, unless the State Party from which a person is to be transferred so agrees, that person, whatever his or her nationality, may not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which he or she is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

(i) In terms of Article 46(13) each State Party must designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities must ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it must encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations must be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to the Convention. Requests for mutual legal assistance and any communication related thereto must

be transmitted to the central authorities designated by the State Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the State Parties agree, through the International Criminal Police Organization, if possible.

- (j) In terms of Article 46(14) requests for mutual legal assistance must be made in writing or, where possible, by any means capable of producing a written record. In urgent circumstances and where agreed by the State Parties, requests may be made orally but must be confirmed in writing forthwith.
- (k) In terms of Article 46(15) a request for mutual legal assistance must contain the identity of the authority making the request; the subject matter and nature of the investigation, prosecution or judicial proceedings to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceedings; a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents; a description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed; where possible, the identity, location and nationality of any person concerned; and the purpose for which the evidence, information or action is sought.
- (l) Article 46(16) allows the requested State Party to request additional information when it appears necessary for the execution of the request.
- (m) In terms of Article 46(17) a request is executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party.
- (n) Article 46(18) permits the hearing of the evidence of a witness or expert to take place by video-conference in certain circumstances.
- (o) Article 46(19) prohibits the transmission or use of information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings without the prior consent of the requested State Party. However, the requesting State Party may disclose in its proceedings information or evidence that is exculpatory to an accused person, but must notify the requested State Party prior to the disclosure thereof.

(p) If so required by the requesting State Party, the requested State Party must keep confidential the fact and substance of the request. If the requested State Party cannot comply with the requirement of confidentiality, it must promptly inform the requesting State Party (Article 46(20)).

(q) In terms of Article 46(21) mutual legal assistance may be refused if—

- the request is not made in conformity with the provisions of Article 46;
- the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
- the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

However, a State Party may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters (Article 46(22)). Reasons must be given for any refusal of mutual legal assistance (Article 46(23)).

(r) In terms of Article 46(24) the requested State Party must execute the request for mutual legal assistance as soon as possible and must take full account of any deadlines suggested by the requesting State Party. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request and the requested State Party must respond to such reasonable requests. The requesting State Party must promptly inform the requested State Party when the assistance sought is no longer required.

(s) Article 46(25) provides that the requesting State Part may postpone mutual legal assistance on the ground that it interferes with an ongoing investigation, prosecution or judicial proceedings. However, before refusing a request or postponing its execution, the requested State Party must consult with the requesting State (Article 46(26)).

- (t) In terms of Article 46(27) a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in proceedings or to assist in an investigation, prosecution or judicial proceedings in the territory of the requesting State Party may not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. However, such safe conduct ceases when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the State Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.
- (u) In terms of Article 46(28) the ordinary costs of executing a request is borne by the requested State Party, unless otherwise agreed by the State Parties concerned. In case of expenses of a substantial or extraordinary nature, the State Parties must consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.
- (v) Article 46(29) provides that the requested State Party –
 - (i) must provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
 - (ii) may, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.
- (w) In the final instance Article 46(30) provides that State Parties must consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of Article 46.

12. ASSET RECOVERY

- 12.1 One of the highlights of the UN Convention is the provision for asset recovery. The preamble to the UN Convention makes it clear that the State Parties to the Convention are determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and “to strengthen international cooperation in asset recovery”. Furthermore, asset recovery is stated explicitly as “a fundamental principle of the Convention”. In respect of this issue, the UN Office on Drugs and Crime remarks as follows:

*“This is a particular important issue for developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.”.*²

In view of the above, the opinion is held that the Chapter dealing with asset recovery is of particular importance for SADC Member States who are in a “reconstruction and rehabilitation” phase. Paragraphs 12.2 to 12.10 hereunder summarise Chapter V of the UN Convention.

- 12.2 State Parties must afford one another the widest measure of cooperation and assistance regarding the return of assets (Article 51).
- 12.3 Article 52 provides for the consideration and implementation of measures by State Parties pertaining to the prevention and detection of transfers of proceeds of crime. This includes —
- (a) requiring financial institutions within its jurisdiction to verify the identity of customers, and to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of such accounts in order to detect suspicious transactions;

² See http://www.unodc.org/unodc/en/crime_convention_corruption.html.

- (b) implementing measures to ensure that financial institutions maintain adequate records, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner;
- (c) implementing appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group;
- (d) establishing effective financial disclosure systems for appropriate public officials and providing for appropriate sanctions for non-compliance;
- (e) taking measures to permit its competent authorities to share that information with the competent authorities in other State Parties to investigate, claim and recover proceeds of offences;
- (f) 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.

12.4 Article 53 of the UN Convention provides for measures for the direct recovery of property acquired through the commission of a Convention offence. This include measures permitting —

- (a) another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of a Convention offence;
- (b) its courts to order those who have committed Convention offences to pay compensation or damages to another State Party that has been harmed by such offences; and
- (c) its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of a Convention offence.

12.5 Article 54 of the UN Convention provides for measures for the recovery of property through international cooperation. This includes measures—

- (a) permitting its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
- (b) permitting its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law;
- (c) allowing confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases;
- (d) permitting its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation;
- (e) permitting its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation; and
- (f) permitting its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

12.6 Article 55 of the UN Convention deals with international cooperation for purposes of confiscation of property. This Article contains, among others, the following provisions:

- (a) A State Party that has received a request from another State Party, having jurisdiction over a Convention offence, for the confiscation of proceeds of crime, property, equipment or other instrumentalities situated in its territory must —

- (i) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or
 - (ii) submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party insofar as it relates to proceeds of crime, property, equipment or other instrumentalities situated in the territory of the requested State Party.
- (b) Following a request made by another State Party having jurisdiction over a Convention offence, the requested State Party must take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities for the purpose of eventual confiscation to be ordered either by the requesting State Party or by the requested State Party. A request must also contain a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law.
- (c) Decisions or actions provided for in Article 55 shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.
- (d) Cooperation under Article 55 may be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value. However, before lifting any provisional measure taken pursuant to Article 55, the requested State Party must, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

12.7 In terms of Article 56 each State Party must endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of Convention offences to another State Party without prior request, when it considers that the disclosure of such information might assist the

receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under the UN Convention.

- 12.8 Article 57 deals with the return and disposal of confiscated property. Each State Party is required to adopt legislative and other measures to enable its competent authorities to return confiscated property, when acting on the request made by another State Party. The rights of *bona fide* third parties should be taken into account. Where appropriate, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property. Furthermore, where appropriate, State Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.
- 12.9 Article 58 of the UN Convention obliges State Parties to consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.
- 12.10 In the final instance Article 59 of the UN Convention urges State Parties to consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to the application of Chapter V of the Convention.

13. COOPERATION MEASURES

Apart from cooperation measures such as extradition, mutual legal assistance and asset recovery, the UN Convention contains certain specific measures relating to cooperation with law enforcement authorities and between national and international authorities that are not covered by the SADC Protocol and the AU Convention. These measures include the following:

13.1 Cooperation with law enforcement authorities

Article 37 of the UN Convention contains measures providing for cooperation by persons who participate or who have participated in the commission of a Convention offence, or by accused persons with law enforcement authorities in the following instances:

- (a) In terms of Article 37(1) each State Party must take appropriate measures to encourage persons who participate or who have participated in the commission of a Convention offence to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.
- (b) Article 37(2) compels State Parties to consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of a Convention offence. Furthermore, in terms of Article 37(3.) State Parties must consider providing for the possibility of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of a Convention offence.
- (c) Article 37(5) provides that where a person referred to in paragraph (a) above, who is located in one State Party, can provide substantial cooperation to the competent authorities of another State Party, the State Parties concerned may consider entering into agreements or arrangements, concerning the action referred to in paragraph (b) above.

13.2 Cooperation between national authorities

In terms of Article 38(1) of the UN Convention each State Party must take measures to encourage cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include informing the latter authorities, where there are reasonable grounds to believe that any of the offences established in accordance with Articles 15, 21 and 23 of the UN Convention has been committed or providing, upon request, to the latter authorities all the necessary information.

13.3 Cooperation between national authorities and the private sector

Article 39(1) of the UN Convention requires each State Party to take measures encouraging cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions. Furthermore, Article 39(2) provides for the consideration of measures encouraging nationals and other persons with a habitual residence in the territory of a State Party, to report to the national investigating and prosecuting authorities the commission of a Convention offence.

13.4 International cooperation

Chapter IV of the UN Convention (Articles 44 to 50) provides for various measures encouraging international cooperation between State Parties. As mentioned above, these measures include provisions relating to extradition and mutual legal assistance. These measures have been dealt with in paragraphs 9 and 10 above. However, the Convention also provides for the following international cooperation measures:

13.4.1 *Transfer of sentenced persons*

In terms of Article 45 State Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for Convention offences, in order that such persons may complete their sentences there.

13.4.2 *Transfer of criminal proceedings*

See paragraph 6.5 above.

13.4.3 *Law enforcement cooperation*

In terms of Article 48(1) of the UN Convention, State Parties must cooperate closely with one another to enhance the effectiveness of law enforcement action to combat the offences covered by the Convention. State Parties must, in particular, take measures to —

- (a) enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the Convention offences, including links with other criminal activities;
- (b) cooperate with other State Parties in conducting inquiries with respect to offences covered by the Convention concerning —
 - (i) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
 - (ii) the movement of proceeds of crime or property derived from the commission of such offences;
 - (iii) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;
- (c) provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;
- (d) exchange, where appropriate, information with other State Parties concerning specific means and methods used to commit offences, including the use of false identities, forged, altered or false documents and other means of concealing activities;
- (e) facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the State Parties concerned, the posting of liaison officers;
- (f) exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by the Convention.

In terms of Article 48(2) State Parties must consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies. In the absence of such agreements or arrangements, the State Parties may consider the UN Convention to be the basis for mutual law enforcement cooperation. Furthermore, in terms of Article 48(3) State Parties must endeavour to cooperate within their means to respond to offences covered by the Convention committed through the use of modern technology.

13.4.4 *Joint investigations*

In terms of Article 49 of the UN Convention State Parties must consider concluding bilateral or multilateral agreements or arrangements in terms of which the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. However, State Parties must ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

13.4.5 *Special investigative techniques*

Article 50 of the UN Convention provides for the following measures:

- (a) Article 50(1) requires each State Party to take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
- (b) Article 50(2) encourages State Parties to conclude appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements must be concluded and implemented in full compliance with the principle of sovereign equality of States. Article 50(3) provides that in the absence of such agreement or arrangement, decisions to use such special investigative techniques at the international level must be made on a case-by-case basis.

- (c) In terms of Article 50(4) decisions to use controlled delivery at the international level may, with the consent of the State Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

13.4.6 *Technical assistance*

Article 60(2) to (8) provides, *inter alia*, for the following technical assistance measures:

- (a) In terms of Article 60(2) State Parties must consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to Article 60(1).
- (b) Article 60(3) requires that State Parties must strengthen efforts to maximize operational and training activities in international and regional organisations and in the framework of relevant bilateral and multilateral agreements or arrangements.
- (c) In terms of Article 60(4) State Parties must consider assisting one another in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.
- (d) In order to facilitate the recovery of proceeds of Convention offences, Article 60(5) encourages State Parties to cooperate in providing each other with the names of experts who could assist in achieving that objective.
- (e) In terms of Article 60(6) State Parties must consider using sub-regional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern.
- (f) Article 60(7) requires State Parties to consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply the Convention through technical assistance programmes and projects.

- (g) In terms of Article 60(8) each State Party must consider making voluntary contributions to the UN Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing the UN Convention.

13.4.7 *Exchange of information on corruption*

Article 61 of the UN Convention not only requires State Parties to consider analyzing trends in corruption in its territory, but Article 61(2) specifically compels State Parties to consider developing and sharing with each other and through international and regional organizations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption. Furthermore, each State Party must consider monitoring its policies and actual measures to combat corruption and making assessments of their effectiveness and efficiency (Article 61(3)).

13.4.8 *Cooperation measures relating to the implementation of the UN Convention through economic development and technical assistance*

Article 62, among others, emphasises the need to assist developing countries in their fight against corruption. Article 62(1) of the UN Convention requires that State Parties must take measures conducive to the optimal implementation of the UN Convention through international cooperation. The following measures are prescribed:

- (a) In terms of Article 62(2) State Parties must make concrete efforts in coordination with each other, as well as with international and regional organizations, to—
 - (i) enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat corruption;
 - (ii) enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement the UN Convention successfully;
 - (iii) provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of the UN Convention;

- (iv) encourage and persuade other States and financial institutions to join them in efforts, in particular, by providing more training programmes and modern equipment to developing countries.
- (b) In terms of Article 62(4) State Parties have discretion to conclude bilateral or multilateral agreements or arrangements on material and logistical assistance.

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The global challenge to combat corruption has many facets. One of them relates to the implementation of recent regional and international anti-corruption instruments. For countries in Southern Africa three such international instruments are of immediate relevance:

- SADC Protocol against Corruption (2001)
- AU Convention on Preventing and Combating Corruption (2003)
- UN Convention against Corruption (2003)

Policy and decision makers, legal drafters, and parliamentarians have the daunting task of making sense of the multitude of international instruments that come their way and of translating their provisions into effective domestic legislation.

Fortunately all three anti-corruption instruments overlap each other to a significant extent. This handbook compares the main provisions of the three legal instruments and points out where they overlap or differ. Some recommendations are offered. The handbook is intended as a tool for those who have the responsibility of ensuring that domestic anti-corruption legislation is updated, made effective and brought into line with internationally agreed upon good practice. For non-state actors the handbook should assist to monitor the implementation of all three key anti-corruption instruments into domestic law.

