













## List of Acronyms and Abbreviations

ADB/OECD	Asian Development Bank/ <sup>2</sup> Organisation for Economic Co-operation and Development <sup>2</sup>
APAP	Action Professionals' Association for the People <sup>2</sup>
AU Convention	African Union Convention on Preventing and Combating Corruption
CPIB	Corrupt Practices Investigation Bureau
EPRDF	Ethiopian People's Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
FEACC	Federal Ethics and Anti-Corruption Commission
ICAC	Independent Commission against Corruption
ICCPR	International Covenant on Civil and Political Rights
IGAD	Inter-Governmental Authority on Development
OAS Convention	Inter-American Convention against Corruption
OSCE	Organisation for Security and Co-operation in Europe
PAP	People's Action Party
PCO	Prevention of Corruption Ordinance
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCTOC	United Nations Convention against Transnational Organised Crime
UNODC	United Nations Office on Drugs and Crime

## ABSTRACT

Corrupt practices such as bribery and other abuses of public functions for private gain have been criminalised in almost all legal systems. Criminalisation of acts of corruption constitutes one of the major dimensions of the international anti-corruption instruments.

The clandestine nature of corruption crimes creates difficulties in gathering evidence for prosecution and effective implementation of the law. To overcome such problems, some indicators of corruption such as possession of property that far exceeds legitimate sources of income need to be criminalised. It is also imperative to deal with the challenges associated with such criminalisation. This paper tries to analyse the challenges related to due process of law in the investigation and prosecution of illicit enrichment. Further, complexities associated with the process of recovering illicitly acquired assets, such as resources and expertise, as well as effective co-operation among various jurisdictions, need to be explored. Special consideration will be given to the criminalisation of illicit enrichment and its prosecution in the Ethiopian anti-corruption legal framework.

**Key Words:** Corruption, criminalisation, illicit enrichment, prosecution, human rights, burden of proof, presumption of innocence, asset recovery, criminal forfeiture, civil forfeiture.



## CHAPTER ONE

### ILLICIT ENRICHMENT AND CORRUPTION

#### 1 Introduction

Corruption is becoming a major threat to the world. All countries of the globe are running the risks associated with it. The international community, in combating corruption, calls upon states to outlaw and criminalise certain acts of corruption, and illicit enrichment is one of them.<sup>1</sup> Since not all states of the world have criminalised illicit enrichment under the ambit of their anti-corruption legislation,<sup>2</sup> this study mainly addresses the importance of its criminalisation so as to fight corruption in a broader and more effective way.

By giving special emphasis to the Ethiopian legal framework on the matter, the nature of the offence, its prosecution, and the challenges associated with recovering the proceeds of the crime, especially such proceeds as have already gone from the country, will be considered. In this regard, the effectiveness of the law in contributing towards the effort to eradicate corruption is the central point.

In addition to the law relating to the offence of illicit enrichment, the paper analyses the Ethiopian anti-corruption laws and their effectiveness in combating corruption.

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<sup>1</sup> See, for example, Article 20 of UNCAC, Article 4(1)(g) of the AU Convention and Article IX(1) of the OAS Convention.

<sup>2</sup> For instance, the USA, Australia, Cambodia and Japan have not created the offence of illicit enrichment.

## 2 Research Questions

Ethiopia is a party to most international and regional anti-corruption instruments. It has signed and ratified UNCAC<sup>3</sup> and the African Union Convention on Preventing and Combating Corruption.<sup>4</sup>

Transparency International's Corruption Perceptions Index for 2011 ranked Ethiopia 120<sup>th</sup> on an index of 183 countries.<sup>5</sup> Also, a report by Global Financial Integrity indicates Ethiopia lost US\$ 11.7 billion to illicit financial outflows between 2000 and 2009.<sup>6</sup> These are indications of where the country's position on and commitment to combat corruption are located. Therefore, the questions that will be raised and discussed are:

- Whether the legal framework meant to prevent and combat corruption is in conformity with international instruments (with specific emphasis on illicit enrichment)?
- Whether easing the burden of proof in illicit enrichment cases is the preferable way of conducting prosecutions?
- What are the effects of such an approach to recovering the proceeds of the crime, in particular when the asset already has crossed the borders of the country?

## 3 Scope of the Study

The research paper mainly deals with the criminalisation of illicit enrichment under the Ethiopian anti-corruption legal framework. It also contemplates the implementation and effectiveness of the law in combating corruption.

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<sup>3</sup> Ethiopia signed the Convention on 10 December 2003 and ratified it on 26 November 2007.

<sup>4</sup> The Convention was signed by Ethiopia on 1 June 2004 and ratified on 18 September 2007.

<sup>5</sup> Transparency International's Corruption Perceptions Index (2011).

<sup>6</sup> Task Force on Financial Integrity and Economic Development Report (2011).

#### 4 Significance of the Study

This paper examines the legal framework of illicit enrichment and identifies the weaknesses of the anti-corruption legislation in Ethiopia. In doing so, it contributes to laying a foundation for further studies in the area; and also helps to draw the attention of policy makers to the need to amend the legal framework, as an effective and strong legal framework is a crucial mechanism by which corruption may be prevented and cured. In addition, in tackling the issue of the burden of proof in prosecutions, the paper tries to raise issues relating to basic human rights law principles, such as the presumption of innocence, and the paper takes this opportunity to contribute ideas to the ongoing academic debate in this area.

#### 5 Literature Review

Different scholars have written on the importance of illicit enrichment. Articles by Kamunde<sup>7</sup> and Lewis<sup>8</sup> set out the importance of the prosecution of illicit enrichment in fighting corruption. However, some scholars disagree. Wilsher, for example, argues that there is no need for an independent criminal act of illicit enrichment.<sup>9</sup> In line with international and other regional instruments on the subject, this paper argues in favour of an independent crime of illicit enrichment as a mechanism for fighting the enduring threat of corruption.

Within the scope of this paper, an article by Mezmur & Koen specifically criticises the institutional framework of the Ethiopian Federal Ethics and Anti-Corruption Commission.<sup>10</sup>

This article does not deal with the limitations associated with the legal framework of illicit

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<sup>7</sup> Kamunde (2010).

<sup>8</sup> Lewis (2012).

<sup>9</sup> Wilsher (2006).

<sup>10</sup> Mezmur & Koen (2011).

enrichment and its prosecution. Hence, the legal framework of the prosecution of this particular crime will be the focus of this paper.

## **6 Research Methodology**

The methodology is qualitative, comparative and critical-analytical, and will be operationalised via desktop research. This paper will analyse the criminalisation of illicit enrichment within the scope of the anti-corruption instruments. Special emphasis will be given to the Ethiopian legal framework which deals with illicit enrichment. For comparative analysis, the legal framework of Singapore and Hong Kong will be considered. The reason for choosing these countries for a comparative analysis is that both countries have already criminalised illicit enrichment under their respective anti-corruption legal regimes.<sup>11</sup> These countries are also among the most successful countries in preventing corruption.<sup>12</sup>

## **7 Structure of the Study**

This chapter has introduced the research topic and has given an overview of the need to employ different mechanisms to fight corruption.

The second chapter comprises three parts. The first part will discuss the factual situation of corruption and historical development of anti-corruption laws in Ethiopia.

The second part deals with the compatibility of Ethiopian anti-corruption laws with international instruments. The third part will attempt a comparison of the Ethiopian anti-corruption legal framework with those of Singapore and Hong Kong.

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<sup>11</sup> ADB/OECD (2004: 26).

<sup>12</sup> Transparency International's Corruption Perceptions Index for 2011 ranked Singapore and Hong Kong 5<sup>th</sup> and 12<sup>th</sup> respectively on an Index of 183 countries and territories.

The third chapter deals with the prosecution of illicit enrichment and examines the standard of evidence to prove the crime. It also tries to look further into the challenges associated with executing judgements, especially with regard to recovering assets that already have crossed the borders of the country. Based on cases decided at different levels of the federal and regional courts of Ethiopia, the effectiveness of the law with regard to illicit enrichment in combating corruption will be analysed. The questions that are posed in this research paper will be addressed in this chapter.

The fourth chapter concludes the study. It will contain recommendations on the way forward for the strengthening and effective application of the Ethiopian law of illicit enrichment.



## CHAPTER TWO

### MECHANISMS TO FIGHT CORRUPTION

In this chapter a brief explanation and analysis of the existing situation of corruption in Ethiopia will be discussed. Special consideration will be given to the historical development of the anti-corruption laws, and to the mechanisms and strategies chosen by the state to fight corruption. The implementation of the laws and their effectiveness in reducing corruption will be discussed too. The chapter also analyses the compatibility of the anti-corruption laws of Ethiopia with the international and regional anti-corruption instruments. A comparative analysis of the approach favoured by Ethiopia for fighting corruption with that of Hong Kong and Singapore will be attempted.

#### 2.1 The Factual Situation of Corruption in Ethiopia

Corruption in Ethiopia is an old phenomenon but the acts of corruption had not been recognised as illegal and immoral by society.<sup>13</sup> In the past, it was considered the right of public officials to receive gifts and undue advantages from the people whom they serve. Bribing officials was seen as legitimate. Hence the popular saying, 'He who does not benefit while in power, will regret when he comes down'.<sup>14</sup> It was usual for a person to obtain service in exchange for money or valuable property. A number of studies show that during the monarchical regimes, appointments used to be given only if the candidates were able to provide a specified amount of money. To be appointed as provincial administrator, district administrator, or regional administrator, the candidates were expected to provide 3 000,

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<sup>13</sup> FEACC (2012: 20-21).

<sup>14</sup> FEACC (2008: 18).

5 000 and 10 000 ETB respectively.<sup>15</sup>

In 2001, a nation-wide corruption survey was conducted by the Addis Ababa University Institute of Research and Education in collaboration with the FEACC. According to the survey, fraud or forgery, embezzlement of public funds, bribery, extortion, nepotism, and theft were recognised as manifestations of corruption in the country.<sup>16</sup> The study pointed out that the services provided by government offices, such as land distribution, housing allocation, judicial services and the tax collecting system, were not transparent and efficient.<sup>17</sup>

The infamous gold scam scandal that occurred in March 2008 is a recent occurrence that indicates the situation of corruption. In this case, the Ethiopian Central Bank exported a consignment of gold bars to the government of South Africa and the gold turned out to be gilded steel. The 2010 disappearance of 10 000 tons of coffee ready for export from a government warehouse can be mentioned also as an indication of the prevalence of corruption in Ethiopia.<sup>18</sup>

It is also important to note here that Ethiopia has been scoring between 3.5 and 2.7 in Transparency International's Corruption Perceptions Index from 2001 to 2011.<sup>19</sup> The data analysis for such outcome, among other factors, takes into consideration 'the enforcement of anti-corruption laws, access to information and conflict of interest'.<sup>20</sup>

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<sup>15</sup> FEACC (2008: 13) and FEACC (2012: 21).

<sup>16</sup> Tesfaye (2007: 2).

<sup>17</sup> Tesfaye (2007: 2).

<sup>18</sup> European Union and the World Bank (2010: 30).

<sup>19</sup> Transparency International's Corruption Perceptions Index (2001-2011). According to TI's Corruption Perceptions Index, a country that has scored 9.5 is perceived as free of corruption, whereas countries that have scored 1.0 are perceived as highly corrupt. A country's rank indicates its position relative to the other countries or territories included in the index.

<sup>20</sup> Transparency International (2011).

According to the 2011 Global Financial Integrity Report, Ethiopia lost US\$11.7 billion in illicit financial outflows between 2000 and 2009. Corruption is indicated to be the cause of the outflows. The Report further states that the illegal outflows of money have been increasing and in 2009 the amount reached US\$3.26 billion, which was double the amount in 2007 and 2008. The Report concluded that this amount far exceeds the total exports of the country, which was \$2 billion for the year 2009.<sup>21</sup>

## **2.2 The Development of Anti-Corruption Laws in Ethiopia**

The 1957 Penal Code enacted by the Imperial regime criminalised breach of integrity or honesty by public servants and other corrupt practices as corruption offences.<sup>22</sup> The offences that are characterised as corruption, though not comprehensive and rigorous in their punishment, were included under the Special Part, Title III of the 1957 Penal Code.<sup>23</sup>

During the Derg military regime, ethical values in public administration, institutions and various governmental organisations drastically declined and corruption was widespread.<sup>24</sup>

As a result, the government took the initiative to fight corruption by enacting additional laws, establishing special courts and creating teams to investigate and prosecute crimes of corruption.<sup>25</sup> In addition to the existing Penal Code, the Special Penal Code was promulgated in 1982.<sup>26</sup> The provisions of this Code were meant to be applicable exclusively to civil servants and military personnel. However, none of these laws criminalised illicit enrichment and other related conduct as crimes of corruption. The 1957 Penal Code was amended later by the Criminal Code of 2005. The new Criminal Code encompasses detailed

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<sup>21</sup> Global Financial Integrity Report (2011).

<sup>22</sup> Proclamation No 158/1957.

<sup>23</sup> See Articles 410-416 of the Penal Code of 1957.

<sup>24</sup> Shimelis (2005: 67).

<sup>25</sup> FEACC (2008: 14).

<sup>26</sup> Proclamation No 214/1981.



acts of corruption.<sup>27</sup> Abuse of power, owning unexplained property or illicit enrichment, obtaining undue advantages, undue delay of matters, misappropriation in discharge of duties and other corrupt practices have been included in the Criminal Code.<sup>28</sup>

In addition, for the purpose of preventing corruption and other improprieties, a law that requires the disclosure and registration of asset was enacted and entered into force in 2010. The law is applicable to appointees, elected persons and public servants of the Federal Government, and of the Addis Ababa and Dire Dawa City Administrations.<sup>29</sup>

### **2.3 The Establishment of the Federal Ethics and Anti-Corruption Commission (FEACC)**

After the Ethiopian People's Revolutionary Democratic Front (EPRDF) assumed power in 1991, the severe corrupt practices within the civil service institutions compelled the new government to begin a Civil Service Reform Programme in 1994.<sup>30</sup> A task force comprised of senior government officials and civil servants was established to conduct a survey of the performance of the civil service.<sup>31</sup> The task force produced a report that recommended the establishment of a dedicated body to fight corruption.<sup>32</sup> Based on the survey and a needs assessment conducted by the task force, in 2001 Parliament endorsed the FEACC Establishment Proclamation No 235/2001 along with Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 236/2001. After these proclamations entered into force, the 1957 Penal Code was amended by the Criminal Code of 2005. Henceforth, it became necessary to redefine the powers and duties of the FEACC in line with the new Criminal Code. Therefore, the FEACC Establishment Proclamation No 235/2001 and the Anti-

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<sup>27</sup> See Title III, Chapter II of the Criminal Code of 2005.

<sup>28</sup> See Articles 407-426 of the Criminal Code of 2005.

<sup>29</sup> Proclamation No 668/2010.

<sup>30</sup> FEACC (2008: 16).

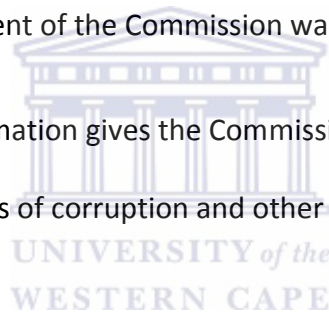
<sup>31</sup> European Union and the World Bank (2010: 7).

<sup>32</sup> European Union and the World Bank (2010: 8).

Corruption Special Procedure and Rules of Evidence Proclamation No 236/2001 were later amended by the Revised FEACC Establishment Proclamation No 433/2005 and the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005 respectively.

The establishment of FEACC, contrary to the opinion of some commentators<sup>33</sup> and international organisations,<sup>34</sup> was not for the purpose of hampering the activities of former political leaders and prominent business allies who posed a challenge or threat to the regime. Rather, as revealed by the task force survey, corrupt practices were extremely common in the public sector at the time the survey was conducted. Therefore, the driving force underlining the establishment of the Commission was as genuine as it was apparent.

The FEACC Establishment Proclamation gives the Commission a full mandate for preventing, investigating and prosecuting acts of corruption and other improprieties provided for in the Criminal Code.<sup>35</sup>



In its 2011 annual performance report, the FEACC reported that it had investigated corrupt practices in land administration and other government offices and managed to bring perpetrators to court. The Commission, on the basis of a court verdict, succeeded in transferring 8.7 million ETB, 192 152 km<sup>2</sup> of corruptly acquired land, four automobiles and the administration of one steel factory to the government. According to the report, the Commission's conviction rate has reached 86.8 per cent.<sup>36</sup> However, according to a Transparency International report, the Commission's effort in fighting grand corruption is

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<sup>33</sup> Alemayehu (2008).

<sup>34</sup> Freedom House Report (2007: 19).

<sup>35</sup> See Paragraph four of the Preamble and Article 6 of Proclamation No 231/2001, as amended by Proclamation No 434/2005.

<sup>36</sup> FEACC Annual Performance Report (2011: 12).

minimal<sup>37</sup> and there is also a concern with regard to its independence in prosecuting high profile cases.<sup>38</sup> Recently, however, the Commission has been investigating and putting on trial high ranking public officials.<sup>39</sup> For example, Mr Yaregal Aysheshim, the ex-President of Benishangul Gumz Regional State, and Mr Habtamu Hika, Speaker of the House for the region's Parliament, are currently under investigation by the Commission.

In its effort to combat corruption, the FEACC has identified areas where corruption is prevalent. Public procurement offices (grand procurement), land distribution and administration bodies, custom administration and tax collecting authorities are indicated to be the major areas where corruption is rampant. Accordingly, these are the focus areas of the strategic plan of FEACC for the years 2010-2015.<sup>40</sup>

Despite the existence of anti-corruption laws and some improvements in its detection, investigation and prosecution, corruption remains a major challenge in Ethiopia.

## **2.4 The Compatibility of Domestic Anti-Corruption Laws with International Anti-Corruption Instruments**

Ethiopia signed the United Nations Convention against Corruption (UNCAC) in December 2003 and ratified it in November 2007. It also signed the African Union Convention on Preventing and Combating Corruption (AU Convention) in June 2004 and ratified it in September 2007. In addition, it signed the United Nations Convention against Transnational Organised Crime (UNTOC) in December 2000 and ratified it in July 2007. These international instruments are essential for providing a global legal framework for combating corruption. They play an important role in setting basic standards and guidelines for

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<sup>37</sup> Transparency International (2010: 176).

<sup>38</sup> Business Anti-Corruption Portal: 'Snapshot of the Ethiopian Country Profile'.

<sup>39</sup> Tamiru 'Commission Apprehends Yaregal Aysheshim, Court Denies Bail' *The Reporter* 22 October 2011.

<sup>40</sup> Interview with FEACC Commissioner Ali Suleiman: *Ethics Magazine* Special Edition (July 2011: 20).

national legislation.<sup>41</sup> Therefore, though most provisions of the international instruments are not mandatory and contain safeguard clauses,<sup>42</sup> it is important to deal with the compatibility of domestic anti-corruption laws with international anti-corruption conventions.

#### **2.4.1 The Criminal Code**

The 1957 Penal Code of the Empire of Ethiopia, although containing in its Part III of Chapter I offences against public office, offences against official duties and other corrupt practices, failed to address properly other corruption-related criminal conduct born of advances in technology and the complexities of modern life. In its contribution to the anti-corruption campaign, the Penal Code failed to criminalise acts such as illicit enrichment and money laundering.<sup>43</sup>

With the amendment of the Penal Code in 2005, illicit enrichment has been criminalised and included within the legislative framework of the new Criminal Code.<sup>44</sup> Further, money laundering has been criminalised in the Criminal Code.<sup>45</sup>

UNCAC and the AU Convention encourage states parties to criminalise illicit enrichment.<sup>46</sup>

In the discussions preceding the adoption of UNCAC, though delegations expressed their desire for the inclusion of illicit enrichment, some were concerned about its direct criminalisation because the concept may include a reversal of the burden of proof. The

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<sup>41</sup> Transparency International: 'Anti-Corruption Conventions and Instruments Explained'.

<sup>42</sup> Babu (2006: 9).

<sup>43</sup> See paragraph two of the Preamble to the Criminal Code of 2005.

<sup>44</sup> See Article 419 of the Criminal Code of 2005.

<sup>45</sup> See Article 684 of the Criminal Code of 2005.

<sup>46</sup> See Article 20 of UNCAC and Article 8(1) of the AU Convention.

Russian Federation and member states of European Union were opposed to and expressed their wish to delete the article.<sup>47</sup>

The reasons for having an independent criminal act of illicit enrichment in the international as well as national anti-corruption legal frameworks and debates on the criminalisation of illicit enrichment and related issues will be discussed further in chapter three.

#### **2.4.2 Anti-Money Laundering Law**

Money laundering, as defined by Chaikin & Sharman, is 'the process of concealing the illicit origin of money derived from crime'.<sup>48</sup> Money acquired through the commission of corruption can be used easily for investments and other economic activities and thus ill-gotten money appears legitimate. Within this context, money laundering facilitates corruption and vice versa.<sup>49</sup> Therefore, a comprehensive and integrated response must be available in order to combat both crimes.<sup>50</sup>

The AU Convention, UNCAC and UNCTOC require states to adopt legislative and other measures that criminalise and prevent laundering of proceeds of crime and concealment or continued retention of property acquired by corruption.<sup>51</sup> The provisions of UNCAC and UNCTOC similarly provide that, to deter and detect all forms of money laundering, states are required to have a comprehensive domestic regulatory and supervisory system for banks, non-bank financial institutions and other bodies susceptible to money laundering.<sup>52</sup>

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<sup>47</sup> UNODC (2010: 198).

<sup>48</sup> Chaikin & Sharman (2009: 14).

<sup>49</sup> See paragraph two of the Preamble to UNCAC.

<sup>50</sup> Chaikin & Sharman (2009:23).

<sup>51</sup> See Articles 23 and 24 of UNCAC, Article 6 of the AU Convention and Article 6 of UNCTOC.

<sup>52</sup> See Article 14 of UNCAC and Article 7 of UNCTOC.

In response to these provisions of the conventions, and in addition to amending the Penal Code of 1957,<sup>53</sup> a law that is designed to prevent and suppress money laundering and the financing of terrorism was passed by the Ethiopian Parliament in late 2009.<sup>54</sup> The law compels banks, financial institutions and others referred to as accountable persons to disclose evidence and information they have acquired from their customers.<sup>55</sup> Pursuant to this law, obligations of confidentiality, including professional secrecy imposed by other laws, may not be a bar to report or give evidence or information.<sup>56</sup>

### **2.4.3 The Law Relating to Asset Disclosure and Registration**

Asset declaration by public officials and government employees is considered as one of the preventive mechanisms needed to control corruption.<sup>57</sup> This preventive mechanism has been recognised by both UNCAC and the AU Convention.<sup>58</sup> According to these instruments, states parties are required to commit themselves to adopting legislation and other measures that require officials to declare their external activities, employment, investments, gifts or benefits from which a conflict of interest may arise. Such declarations must be made at the time of assumption of office, during and after the term of their public service.<sup>59</sup>

In 2010, in response to its obligations under these anti-corruption instruments, the government of Ethiopia passed the Disclosure and Registration of Assets Proclamation.<sup>60</sup>

The purpose of this law is to facilitate preventive mechanisms in the fight against

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<sup>53</sup> A provision that criminalises money laundering has been included under Article 684 of the Criminal Code of 2005.

<sup>54</sup> Proclamation No 657/2009.

<sup>55</sup> See Article 4 of Proclamation No 657/2009.

<sup>56</sup> See Article 6 of Proclamation No 657/2009.

<sup>57</sup> Stolen Asset Recovery Initiative (2009: 1). See also Action Professionals' Association for the People (2001: 21).

<sup>58</sup> See Article 8(5) of UNCAC and Article 7(1) of the AU Convention.

<sup>59</sup> See Article 8(5) of UNCAC and Article 7(1) of the AU Convention.

<sup>60</sup> Proclamation No 668/2010.

corruption. In its preamble, the Proclamation says that ‘the disclosure of assets is of paramount importance in the prevention of corruption and improprieties and helps to enhance good governance’.<sup>61</sup> The applicability of the Proclamation is confined to political appointees, elected persons and public servants.<sup>62</sup> These persons are compelled to register assets that are under their and their family’s ownership or possession; and the sources of the income of themselves and their family.<sup>63</sup> The Proclamation defines ‘family’ to include ‘spouse, dependent child under the age of 18, adopted children and spouse in irregular union’.<sup>64</sup>

In addition to its preventive purpose, the asset disclosure and registration law is important for the detection of corruptly accumulated wealth and the prosecution of corrupt public officials and civil servants for the crime of illicit enrichment.<sup>65</sup> Any asset of an appointee, an elected person or a public servant not registered in accordance with the Proclamation, in the absence of proof to the contrary, is considered unexplained property.<sup>66</sup>

The effectiveness of the asset disclosure and registration law in the prevention of corruption has attracted criticism. First, in disclosing and registering assets, the information that will be provided by concerned officials in most circumstances may not be real and accurate. The body in charge of registration, that is, the FEACC, mainly relies upon the information provided by the person registering the asset. The Commission has been granted the mandate to verify the information submitted where there is sufficient ground to suspect that the information is false, incomplete and inaccurate. Even though the mechanism for

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<sup>61</sup> Paragraph two of the Preamble to Proclamation No 668/2010.

<sup>62</sup> See Article 3 of Proclamation No 668/2010.

<sup>63</sup> See Article 4 of Proclamation No 668/2010.

<sup>64</sup> See Article 2(8) of Proclamation No 668/2010.

<sup>65</sup> Mezmur & Koen (2011: 227). See also Article 13 of Proclamation No 668/2010.

<sup>66</sup> See Article 13 of Proclamation No 668/2010.

verification is provided under the Proclamation, this by itself does not guarantee the submission of accurate information. Second, it has been said that such law usually fails to control the possible transfer of properties to a third party<sup>67</sup> as it only imposes an obligation to declare personal income and assets and those of the immediate family members. It is important to mention here that in a society like Ethiopia, the relationship among members of extended families is very tight. In such instances, the probability of the transfer of assets to members of the extended family is likely to be high. Third, according to some scholars, while prescribing disclosure and registration of assets, the law fails to require officials to prove that the assets under consideration were not gained illegally.<sup>68</sup> These scholars further add that this lacuna in the law gives public officials the opportunity for validating corruptly obtained properties.<sup>69</sup>

#### **2.4.4 Anti-Corruption Laws of Ethiopia and the Private Sector**

Since 1991 there has been a political transition in Ethiopia. In the process of the transition to democracy, the bureaucratic procedures of the Derg military regime have been simplified and measures have been taken towards economic liberalisation.<sup>70</sup> Following this economic liberalisation, privately owned banks, textile industries, construction companies and other small and large industries have been growing. Accordingly, Ethiopia's economy has been expanding during the last six years.<sup>71</sup> The economic growth and free flow of money enhances the interaction within the private sector and between the private sector and public institutions and this situation creates opportunities for corruption.<sup>72</sup> Hence,

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<sup>67</sup> Action Professionals' Association for the People (2001: 21).

<sup>68</sup> Mezmur & Koen (2011: 229).

<sup>69</sup> Mezmur & Koen (2011: 229).

<sup>70</sup> The World Bank (2011) 'Ethiopia Overview'.

<sup>71</sup> The World Bank (2011) 'Ethiopia Overview'. See also the African Development Bank Report (2010).

<sup>72</sup> Transparency International (2010: 178).



preventing corruption in the private sector assists in building a commercial environment that is characterised by efficient and fair competition.<sup>73</sup>

Moreover, there is a consensus among scholars that though economic liberalisation has its own advantages for development, it does not guarantee the reduction of corruption. In fact, bribes previously demanded by public officials and public servants now will be requested by the staff of private firms.<sup>74</sup>

Against this background, UNCAC and the AU Convention encourage states parties to take legislative and other measures that can prevent and criminalise acts of corruption and related offences committed within the private sector.<sup>75</sup>

However, unless a crime involves a public official and matters such as public-private collusion, corruption in the private sector is not covered by the Ethiopian anti-corruption legal framework.<sup>76</sup> The amended FEACC Establishment Proclamation No 433/2005 mandated the Commission only to have jurisdiction over public offices and public enterprises.<sup>77</sup> Also, the Criminal Code does not regulate corruption-related offences committed within the private sector.<sup>78</sup> Therefore, the anti-corruption law in this respect lags behind the international anti-corruption instruments.

#### **2.4.5 Anti-Corruption Laws and Civil Asset Forfeiture**

In the fight against corruption, civil asset forfeiture plays a crucial role. The importance of asset forfeiture is based on its deterrent effect.<sup>79</sup> Further, civil forfeiture serves as a

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<sup>73</sup> OSCE (2004: 139).

<sup>74</sup> Rose-Ackerman (2006: 5).

<sup>75</sup> See Articles 12, 21 and 22 of UNCAC and Articles 4(1)(e), (f) and Article 11 of the AU Convention.

<sup>76</sup> Transparency International (2010: 178).

<sup>77</sup> See Article 7(3) of Proclamation No 433/2005.

<sup>78</sup> See Part III Chapter II Section I of the Criminal Code of 2005.

<sup>79</sup> Mezmur & Koen (2011: 230).

mechanism by which stolen public property could be recovered and returned to the public. It is also important to note that asset recovery constitutes one of the centrepieces of international anti-corruption conventions, especially UNCAC.<sup>80</sup> UNCAC and the AU Convention require states parties to have a domestic legal structure for the confiscation of the proceeds of corruption.<sup>81</sup>

Corruptly acquired property can be forfeited either through criminal conviction or civil proceedings.<sup>82</sup> As the ultimate goal of corrupt public officials is the accumulation of wealth, the deterrent effect of a criminal conviction should not be limited to deprivation of liberty. Indeed, in most criminal jurisdictions, including Ethiopia, experience shows that following criminal conviction, properties acquired through corrupt practice are transferred to the government.<sup>83</sup> In criminal law, forfeiture of proceeds of the crime upon which the accused is convicted constitutes part of the punishment.<sup>84</sup> Criminal asset forfeiture is based on the principle that the liability follows the suspect himself – *in personam* – and, hence, it is only his conviction that allows a claim over the property obtained by the criminal conduct of which he is found guilty.<sup>85</sup> This theory is based on the classic criminal law principle of individualisation of guilty.

In the case of civil action, the proceeding is not against a particular person but against the property that the alleged offender obtained corruptly - an *in rem* action.<sup>86</sup> According to this principle, such action can be instituted even in the absence of the defendant.<sup>87</sup> In civil

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<sup>80</sup> Transparency International: 'Summary Overview of UNCAC'. See also Article 51 of UNCAC.

<sup>81</sup> See Article 31 of UNCAC and Article 16 of the AU Convention.

<sup>82</sup> Young (2009: 15).

<sup>83</sup> FEACC Annual Performance Report (2011: 12).

<sup>84</sup> Cassella (2007: 2).

<sup>85</sup> Young (2009: 14).

<sup>86</sup> Young (2009: 14).

<sup>87</sup> Cassella (2007: 2).

litigation, the procedure differs from that of criminal litigation, and the evidential requirement to prove the facts in issue is proof on 'a balance of probability'.<sup>88</sup>

The Ethiopian Criminal Code contains provisions for criminal forfeiture. Property acquired directly or indirectly through the commission of a crime for which the criminal was convicted will be confiscated.<sup>89</sup> In addition, both the Revised FEACC Establishment Proclamation No 433/2005 and the Revised Special Procedure and Rules of Evidence Proclamation No 434/2005 provide for forfeiture upon criminal conviction of assets and wealth obtained corruptly.<sup>90</sup> If the defendant is acquitted, the confiscation of property will not occur. The option of civil forfeiture is not provided under any of these laws.<sup>91</sup> In the absence of criminal prosecution and conviction, having a mechanism by which looted properties can be returned to the public is of paramount importance. Therefore, it is important to have a domestic legal framework on civil forfeiture for it ensures the due process of law in adjudicating property rights.<sup>92</sup>

It is fair to mention here that though criminal forfeiture is provided for both under the general criminal law and anti-corruption laws, these laws have not been implemented fully. The FEACC has not made the best use of these laws yet. It is only in recent times that asset confiscation is being carried out following a criminal conviction.<sup>93</sup>

#### **2.4.6 Anti-Corruption Legal Framework and International Co-operation**

Corruption may not be confined to a single state or territory. In certain circumstances, its commission starts in one sovereign state and ends in another, thus affecting the interests of

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<sup>88</sup> Young (2009: 14).

<sup>89</sup> See Article 98 of the Criminal Code of 2005.

<sup>90</sup> See Article 7(6) of Proclamation No 433 /2005 and Article 29 of Proclamation No 434/2005.

<sup>91</sup> See also Mezmur & Koen (2011: 231).

<sup>92</sup> Young (2009: 151). See also paragraph nine of the Preamble to UNCAC.

<sup>93</sup> Interview with FEACC Commissioner Ali Suleiman: *Ethics Magazine* Special Edition (July 2011: 21).

two or more states. With technological advances, the commission of the crime is even more complicated and imposes difficulties in tracing the evidence. The proceeds of the crime leave a country of origin as fast as the speed of light. Criminals hide their corruptly obtained money in offshore banks where the rules of secrecy are strict.<sup>94</sup> Moreover, suspects flee the jurisdiction of the state where the crime was committed in search of a safe haven. The organised nature of the crime of corruption that transcends a single state is therefore becoming a pressing reason for the international community to co-operate in the fight against corruption.<sup>95</sup>

International co-operation is one of the four pillars upon which UNCAC is founded.<sup>96</sup> In addition, one of the objectives of the AU Convention is to promote, facilitate and regulate co-operation among states parties to combat corruption and corruption-related offences in Africa.<sup>97</sup> Further, it has been reaffirmed that promotion of co-operation among states is the main purpose of UNCTOC in combating transnational organised crime, including corruption.<sup>98</sup>

International co-operation is strengthened further by bilateral and multilateral treaties which include extradition treaties, mutual legal assistance, freezing and confiscation of proceeds of crimes and transfer of proceedings.<sup>99</sup> With regard to international co-operation, Ethiopia mainly relies on international conventions it has ratified.<sup>100</sup> Recently it

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<sup>94</sup> Natarajan (2011: 5).

<sup>95</sup> Dandurand *et al* (2007: 261).

<sup>96</sup> Babu (2006: 8). See also Chapter IV of UNCAC.

<sup>97</sup> See Article 2(2) of the AU Convention.

<sup>98</sup> See Article 1 of UNCTOC.

<sup>99</sup> Dandurand *et al* (2007: 262).

<sup>100</sup> FEACC: *Ethics Magazine* Special Edition (July 2011: 9).

ratified one of the regional multilateral conventions on mutual legal assistance on criminal matters.<sup>101</sup>

It is important to mention that effective implementation of international co-operation depends on national substantive or procedural laws.<sup>102</sup> However, to enforce international multilateral as well as regional agreements on co-operation, the existing domestic law in Ethiopia is inadequate. The Criminal Code of 2005, for instance, deals only with extradition matters and fails to provide for other matters that concern international co-operation.<sup>103</sup>

## 2.5 Comparative Analysis

This section of the paper is devoted to a comparative analysis of the anti-corruption legislative framework of Hong Kong and Singapore in relation to Ethiopian anti-corruption legislation. As pointed out in the preceding chapter, these countries have been selected because of their successes in controlling corruption.

Ethiopia adopted its preventive, detection, and investigative approach to combating corruption mainly from the experience of the Hong Kong anti-corruption agency.<sup>104</sup>

Therefore, it is reasonable to compare the Ethiopian legislative framework with the legislative framework of these countries and learn important lessons from their accomplishments in the fight against corruption.

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<sup>101</sup> IGAD Convention on Mutual Legal Assistance on Criminal Matters Ratification Proclamation No 732/2012.

<sup>102</sup> Dandurand *et al* (2007: 262).

<sup>103</sup> See Article 21 of the Criminal Code of 2005.

<sup>104</sup> European Union and the World Bank (2010: 10).

### 2.5.1 Hong Kong: 'Corruption-Free Place in the World'<sup>105</sup>

During 1960s and 1970s, corruption was a major problem in Hong Kong.<sup>106</sup> In response to the threat which corruption posed to all government departments, the Independent Commission against Corruption (ICAC) was established pursuant to the Independent Commission against Corruption and Matters Incidental Thereto Ordinance 7 of 1974.<sup>107</sup> This body is independent of any executive branch of the government and reports to the Chief Executive.<sup>108</sup> The privilege of being independent gives the ICAC a strong arm in exercising its mandate free from any political intervention.<sup>109</sup> The ICAC adopted a tripartite approach to fighting corruption: prevention, prosecution and education. Its objectives are explained by its former Director of Administration, Mr Andrew HY Wong:

'to enforce anti-corruption laws effectively, detect and eradicate opportunities for corruption in government institutions, promote corruption prevention in private sectors and educate the community about the evils of corruption and enlist their support in the battle against corruption.'<sup>110</sup>

It has been reported also that the ICAC has achieved much in eradicating corruption in public and government bodies. It is the first anti-corruption agency in the world to implement successfully laws against private sector corruption, and to succeed in creating public awareness and promoting international co-operation.<sup>111</sup>

Hong Kong has comprehensive anti-corruption laws. In addition to bribery, illicit enrichment and accepting gifts, loans and discounts unless specifically authorised are criminalised.<sup>112</sup>

Unlike many countries which are suffering from the ravages of corruption, Hong Kong

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<sup>105</sup> Gupta (2011).

<sup>106</sup> Gupta (2011).

<sup>107</sup> Manion (2004: 83-84).

<sup>108</sup> Manion (2004: 83-84). See also Chapter 204 Section 17 of ICAC Ordinance.

<sup>109</sup> Man-wai (2004: 200).

<sup>110</sup> Wong (2003: 1).

<sup>111</sup> Man-wai (2004: 196).

<sup>112</sup> See Chapter 201 Prevention of Bribery Ordinance, §3 and 10. See also Man-wai (2004: 200).

regulates private sector corruption equally with public sector corruption. It is indicated also that the ICAC investigates any offence that has connections with corruption.<sup>113</sup> The ICAC, with its dedication and independence, adequate professionals, resources and political backing is considered to be the most effective law enforcing institution in the fight against corruption.<sup>114</sup>

Generally, with its comprehensive legislative regime and independent and strong anti-corruption institution, Hong Kong demonstrated the possibility of controlling corruption. Currently, Hong Kong is recognised as one of the cleanest places in the world.<sup>115</sup> Countries that are striving to win the battle against corruption can learn a lot from the Hong Kong experience. Some countries, including Ethiopia, have taken the experience of the ICAC and adopted a three-pronged approach to fighting corruption.

Though there is no single approach to fighting corruption, it is most important to have an effective legal framework. Hong Kong has such a comprehensive legislative framework. The Hong Kong experience shows that for a successful anti-corruption campaign, an effective institutional framework and a comprehensive anti-corruption strategy are indispensable.

The analysis in this section shows that the Hong Kong legislative framework is far-reaching in its applicability. It covers corruption in the private sector and the acceptance of benefits by civil servants even if not associated with corruption.

Under the Hong Kong Prevention of Bribery Ordinance, the offence of illicit enrichment, which is central to this paper, receives severe punishment which has a deterrent effect. The punishment for this offence may vary from a fine of \$500 000 to \$1 000 000 and

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<sup>113</sup> Man-wai (2004: 200).

<sup>114</sup> Man-wai (2004: 201).

<sup>115</sup> Transparency International (2011) 'Corruption Perceptions Index: The Result'.

imprisonment of 7 to 10 years, depending upon the circumstances.<sup>116</sup> These are the areas where the Ethiopian legislative framework has fallen short. The offence of possession of unexplained property under the Ethiopian Criminal Code carries only a maximum of five years' imprisonment and a fine.<sup>117</sup> It is important to emphasise that this has little deterrent effect for public officials who wish to abuse their power to accumulate millions either in domestic or in foreign banks. This is evident in the cases of *Prosecutor v Elizabeth Welde Gebriel et al*<sup>118</sup> and *Hankara Harka Hamoya v Prosecutor*<sup>119</sup> where the Federal High Court has imposed three years' imprisonment and 7000 ETB fine against the defendant in the first case and the Federal Supreme Court Cassation Bench has confirmed four years' imprisonment given by subordinate courts against the defendant in the second case.

## 2.5.2 The Singapore Anti-Corruption Laws

Before 1960, corruption was a way of life in Singapore. An effective anti-corruption campaign began after the People's Action Party (PAP) assumed power in 1959.<sup>120</sup> The Corrupt Practices Investigation Bureau (CPIB) is the agency that was established to curb corruption. It was founded in 1952 pursuant to the Prevention of Corruption Ordinance (PCO).<sup>121</sup> The CPIB is devoted entirely to the investigation of corrupt acts and preparation of evidence for prosecution.<sup>122</sup> The CPIB's main powers and functions are 'to receive and investigate complaints regarding corruption in the public and private sectors, to investigate malpractices and misconducts by public officers and to examine the practices and the

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<sup>116</sup> See Chapter 201 Section 12 of Prevention of Bribery Ordinance.

<sup>117</sup> See Article 419(1) of the Criminal Code of 2005.

<sup>118</sup> *Elizabeth Welde Gebriel et al* (The Federal High Court, File Number 62293), judgement given on 8 July 2011, pages 1-4.

<sup>119</sup> *Hankara Harka Hamoya* (The Federal Supreme Court, File Number 58514), judgement given on 18 January 2011, pages 278-279.

<sup>120</sup> Quah (2001: 29).

<sup>121</sup> Heilbrunn (2004: 6).

<sup>122</sup> Heilbrunn (2004: 6).



procedures in the public service to minimise opportunities for corrupt practices.<sup>123</sup> The PAP government reorganised the CPIB and it also amended the Prevention of Corruption Ordinance (PCO) several times.<sup>124</sup> The law was later renamed the Prevention of Corruption Act (Chapter 241).<sup>125</sup>

The Corruption, Drug Trafficking and Other Serious Crimes Act of 1999 confers broad powers on the CPIB and also prescribes severe punishment for corruption. The Singapore anti-corruption law is known for its deterrent effect. A conviction for corruption may carry a \$100 000 fine and five years' imprisonment.<sup>126</sup> A person convicted of corruption has to pay the amount he has received as a bribe in addition to any other punishment imposed by the court.<sup>127</sup> Corruption in both the public and private sectors is punishable.<sup>128</sup> Other corrupt practices including illicit enrichment and receiving loans, discounts and other forms of benefits are criminalised.<sup>129</sup>

Moreover, unlike the Hong Kong and the Ethiopian anti-corruption legal regime, the Singapore anti-corruption law includes civil forfeiture in the absence of a criminal conviction. The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits Act of 1999) was enacted in order to provide for confiscation of proceeds of such crimes. This Act enables courts to order confiscation of proceeds of criminal conduct where the accused fails to stand trial because he has died, cannot be found, cannot be

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<sup>123</sup> Quah (2001: 33).

<sup>124</sup> Heilbrunn (2004: 6).

<sup>125</sup> Heilbrunn (2004: 6).

<sup>126</sup> See Section 5 of the Prevention of Corruption Act (Chapter 241).

<sup>127</sup> See Section 13 of the Prevention of Corruption Act. See also Quah (2001: 32).

<sup>128</sup> Heilbrunn (2004: 6).

<sup>129</sup> ADB/OECD (2004: 32). See also Prevention of Corruption Act (Chapter 241).

apprehended or cannot be extradited.<sup>130</sup> Any questions of fact that have to be decided by a court in such proceedings are decided on the balance of probability.<sup>131</sup>

Further, the strict and consistent enforcement of anti-corruption laws by CPIB helped the anti-corruption campaign become fruitful in Singapore.<sup>132</sup> In addition to the existence of a strong and comprehensive legislative framework and strict application of the laws, an effective anti-corruption agency, effective judiciary and political commitment play a leading role in combating corruption in Singapore.<sup>133</sup> Today, Singapore is one of the states that have controlled corruption successfully.<sup>134</sup>

Notwithstanding the uniqueness of its cultural, socio-economic and political context, Ethiopia can learn a lot from the anti-corruption campaign experience of Singapore. To combat corruption effectively, anti-corruption measures and strategies such as comprehensive anti-corruption legislation and a strong and independent anti-corruption agency play an important role. The anti-corruption legal framework must be comprehensive so as to prevent loopholes and must be revised periodically in order to introduce amendments whenever necessary.<sup>135</sup>

## **2.6 Summary of Chapter Two**

This chapter has given a general overview of corruption and the historical development of anti-corruption legislation in Ethiopia. Motivated by the widespread prevalence of corruption in the country, the government took the initiative by establishing an anti-

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<sup>130</sup> See Part IV of Corruption, Drug Trafficking and Other Serious Crimes Act (Confiscation of Benefit Act of 1999).

<sup>131</sup> See Section 55(1) of the Act.

<sup>132</sup> Quah (2001: 20).

<sup>133</sup> Quah (2001: 6-7).

<sup>134</sup> According to Transparency International's Corruption Perceptions Index of 2011, Singapore has scored 9.2 and ranked 5<sup>th</sup> among 183 states and territories, being the cleanest country in the world.

<sup>135</sup> Quah (2001: 34).

corruption body and enacting relevant laws. Various acts of corruption are criminalised within the existing anti-corruption laws and relevant international and regional anti-corruption conventions have been ratified.

Comparative analyses of the Hong Kong and Singapore legislative frameworks reveal the weakness and lacunae that exist in Ethiopian anti-corruption laws. Despite their categorisation as ‘strong and comprehensive’,<sup>136</sup> the analysis made in relation to the international anti-corruption instruments reveals that the anti-corruption laws of Ethiopia do not regulate corruption in the private sector. Civil asset forfeiture in the absence of a criminal conviction is also another area which the anti-corruption legislative framework fails to cover. Further, the analysis of the law shows that to enforce multilateral international or regional agreements on matters of international co-operation, the domestic law, especially the Criminal Code, is weak and does not cover all aspects of international co-operation.



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<sup>136</sup> Global Integrity Report: Ethiopia (2008). See also Mezmur & Koen (2011: 234).

## CHAPTER THREE

### PROSECUTING ILLICIT ENRICHMENT

This chapter deals with the criminalisation and prosecution of illicit enrichment. The justifications for the need to have an independent offence of illicit enrichment are provided. The lower standard of proof and its implication for basic principles of human rights will be analysed. Advantages and drawbacks of having an independent offence of illicit enrichment with regard to recovering assets situated in foreign jurisdictions and related issues will be examined. In this discourse, special emphasis will be given to the Ethiopian law of illicit enrichment.

#### 3.1 Justifications for Criminalising Illicit Enrichment

The crime of corruption by its nature is committed in secret, which creates difficulties for its detection and investigation. However, property in the hands of public officials and their families that are manifestly in excess of their legitimate income would be relatively easy to detect, investigate and prosecute.<sup>137</sup> The extreme difficulties in obtaining evidence to prove bribery and other related acts of corruption demand a consideration of the criminalisation of a significant increase in the property of public officials. The inclusion of the offence of illicit enrichment in the list of crimes of corruption is perceived to be an effective way of combating corruption.<sup>138</sup>

The offence of illicit enrichment has been criminalised in various international and regional anti-corruption instruments.<sup>139</sup> These instruments give the definition of illicit enrichment. UNCAC defines it to mean 'a significant increase of the assets of a public official that he or

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<sup>137</sup> ADB/OECD (2004: 37).

<sup>138</sup> OSCE (2004: 138).

<sup>139</sup> See, for example, Article 20 of UNCAC, Article IX(1) of the OAS Convention and Article 8(1) of the AU Convention.

she cannot reasonably explain in relation to his or her lawful income'.<sup>140</sup> While the scope of UNCAC seems restricted to the wealth of the public official, the AU Convention transcends such limitation by including the term 'any other person'.<sup>141</sup> This term was incorporated because assets can be transferred easily to third parties who are affiliated with public officials in one way or another.

### **3.2 The Advantages and Disadvantages of Criminalising Illicit Enrichment**

The advantages of criminalising illicit enrichment are associated with the standard of proof required for conviction. In prosecuting illicit enrichment as a crime of corruption, the prosecutor should prove beyond a reasonable doubt the disproportionate assets in the hands of the accused in relation to his legitimate income. In this respect, the prosecutor is not required to prove the fact that the accused has received a bribe or committed any other form of corruption.<sup>142</sup> Wealth that is not proportionate to the legitimate income of a public official is presumed to have originated from corruption unless the contrary is proved. In such circumstance, the burden of proof is eased and the prosecutor is not required to prove corruption as a source of the wealth in question.

However, because of the human rights debates raised by illicit enrichment, many countries are hesitant to criminalise it as an independent corruption crime. The impact of this response upon the anti-corruption effort will be discussed below.

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<sup>140</sup> See Article 20 of UNCAC.

<sup>141</sup> See Article 1(1) of the AU Convention.

<sup>142</sup> See also the discussion under sub-section 3.3.1 below.

### 3.2.1 Advantages of Criminalising Illicit Enrichment

The advantages of establishing an independent crime of illicit enrichment will be discussed in the following sub-sections. Criminalising illicit enrichment mainly solves the problems associated with gathering evidence for the prosecution of corruption offences. Further, the investigation and prosecution of corruption offences require resources and skilled personnel. Hence, criminalising illicit enrichment is important, especially for underdeveloped countries which often lack such resources and personnel.

#### 3.2.1.1 Overcoming Hurdles Associated with Collecting Evidence

The greatest obstacle for investigating and prosecuting the crime of corruption is linked to the gathering of evidence. One of the unique features of the crime of corruption is that it is 'a secret offence'.<sup>143</sup> Most of the time, the persons who can be major witnesses are involved in the commission of the crime.<sup>144</sup> Hence, it remains confidential among the parties who are involved in the crime and there would be no single individual victim to disclose and report it to the appropriate authorities.<sup>145</sup>

Further, corrupt public officials in power have the ability to intimidate potential witnesses not to testify against them or to distort documentary evidence. Additionally, witnesses may die or leave.<sup>146</sup> These situations problematise the detection, investigation and prosecution of corruption cases and make it hard to obtain direct evidence to prove corruption offences.

Accordingly, the importance of criminalising illicit enrichment and easing the burden of proof to prosecute the offence has been growing considerably.<sup>147</sup> In this regard, the offence

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<sup>143</sup> Derenčinović (2012: 1-2).

<sup>144</sup> Perdriel-Vaissiere (2012: 4).

<sup>145</sup> Derenčinović (2012: 1-2).

<sup>146</sup> Perdriel-Vaissiere (2012: 4).

<sup>147</sup> Lewis (2012: 7).

of illicit enrichment is considered to be an effective tool for combating corruption. However, despite its usefulness for the anti-corruption campaign, none of the international or regional anti-corruption instruments imposes an obligation on states to criminalise it.<sup>148</sup>

Further, states have different options with regard to the standard of proof required in illicit enrichment cases.<sup>149</sup> Either they can require the prosecution to prove beyond a reasonable doubt only the property that is manifestly disproportionate to the legitimate income or both the disproportionate property and the unlawful source of the property.<sup>150</sup> However, requiring the prosecutor only to establish beyond a reasonable doubt the luxurious and disproportionate property as compared to the accused's official income eases the burden of proof and assists in overcoming the challenges associated with obtaining evidence. It also facilitates the successful prosecution of corrupt public officials.

### **3.2.1.2 Promotion and Protection of Human Rights**

There is a direct link between fighting corruption and the protection and promotion of human rights. According to the UN Human Rights Council, 'the fight against corruption at all levels plays an important role in the promotion and protection of human rights and in the process of creating an environment conducive to their full enjoyment'.<sup>151</sup>

It has been established that where corruption is rampant in a society, there usually is a high level of human rights violations.<sup>152</sup> Corrupt public officials discriminate among citizens on the basis of economic status, social and family backgrounds or any other grounds. Nepotism and other corrupt practices erode the principles of equality and non-discrimination based

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<sup>148</sup> See, for example, Article 20 of UNCAC, Article 8(1) of the AU Convention and Article IX(1) of the OAS Convention.

<sup>149</sup> Lewis (2012: 11).

<sup>150</sup> Lewis (2012: 11).

<sup>151</sup> UN Human Rights Council Res 7/11.

<sup>152</sup> Transparency International (2008: 1).

on social origin, colour, language, religious or political opinion, sex, property or other status as enshrined in international human rights instruments<sup>153</sup> and domestic constitutions.<sup>154</sup>

Further, public officials divert public resources allocated for economic and social development for their private gain, thereby retarding the overall development that has been recognised as a right by international human rights regimes<sup>155</sup> and domestic constitutions.<sup>156</sup> It is agreed generally that combating corruption through effective anti-corruption tools, such as criminalising and prosecuting illicit enrichment, has positive implications for the protection and promotion of human rights.<sup>157</sup> Combating corruption through the criminalisation of illicit enrichment also assists states in breaking the cycles of impunity.

Moreover, states parties to international human rights instruments and anti-corruption conventions have obligations to implement the provisions of the instruments. In this respect, criminalising and prosecuting illicit enrichment allows states to fulfil the obligations they have undertaken under international human rights and anti-corruption regimes.

It is important to note that the criminalisation of illicit enrichment can have a prominent impact on the anti-corruption campaigns of developing and transitioning states. Anti-corruption agencies in developing countries suffer from inadequate resources both in terms of skilled human resources and financial and material resources. These countries do not have the required capacity to detect and prosecute complex crimes of corruption.

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<sup>153</sup> See, for example, Article 2(1) of the ICCPR, Article 2 of UDHR, Article 2 of the African Charter on Human and Peoples' Rights.

<sup>154</sup> See, for example, Article 25 of the FDRE Constitution.

<sup>155</sup> International Covenant on Economic, Social and Cultural Rights. See also Article 22 of the African Charter on Human and Peoples' Rights.

<sup>156</sup> See, for example, Article 43 of the FDRE Constitution.

<sup>157</sup> Stolen Asset Recovery Initiative, the World Bank and UNODC (2011: 7). See also Transparency International (2008: 2).



Inadequate capacity could render the anti-corruption efforts of developing countries ineffective. This scenario also affects adversely the obligation of states to 'respect, promote and fulfil human rights values'.<sup>158</sup> It is in this context that the offence of illicit enrichment can be used as an effective anti-corruption tool in underdeveloped countries and thereby promote and protect their citizens' fundamental human rights.

### **3.2.1.3 Building Public Confidence in the Government**

Corruption undermines the effectiveness and efficiency of public institutions and erodes public trust in government.<sup>159</sup> In particular, corruption affects the ability of governments to realise their objectives of social and economic development for vulnerable and marginalised groups of the society.<sup>160</sup> Therefore, in order to reduce the risk that corruption poses to society, it is important to take measures such as criminalising and prosecuting illicit enrichment as it is one of the simplest tools for holding corrupt public officials accountable.<sup>161</sup>



### **3.2.2 Challenges of Criminalising and Prosecuting Illicit Enrichment**

The challenges associated with the criminalisation of illicit enrichment will be discussed in the following sub-sections. Particularly, the weights given to illicit enrichment by international and regional anti-corruption instruments will be explored. Additional challenges in the area of asset recovery will be considered also.

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<sup>158</sup> Stolen Asset Recovery Initiative, the World Bank and UNODC (2011: 9).

<sup>159</sup> Turner (2004: 2).

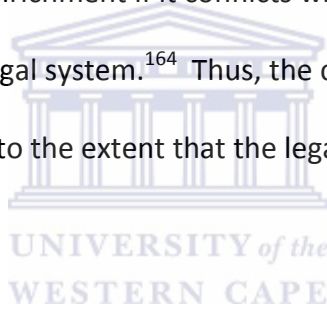
<sup>160</sup> Stolen Asset Recovery Initiative, the World Bank and UNODC (2011: 8).

<sup>161</sup> Stolen Asset Recovery Initiative, the World Bank and UNODC (2011: 8).

### 3.2.2.1 The Status of Illicit Enrichment in International and Regional Anti-Corruption

#### Instruments

The international and regional anti-corruption instruments do not bind states parties to take legislative and other measures to criminalise illicit enrichment. Criminalisation is not mandatory either under UNCAC or the AU Convention. These instruments require the criminalisation of illicit enrichment to be compatible with the constitution and fundamental principles of the domestic law of states parties.<sup>162</sup> These conventions and other regional anti-corruption instruments have made optional the criminalisation of illicit enrichment. They particularly employ a 'safeguarding clause'<sup>163</sup> that exempts states parties from the obligation of criminalising illicit enrichment if it conflicts with their constitutions and fundamental principles of their legal system.<sup>164</sup> Thus, the criminalisation of the offence of illicit enrichment is possible only to the extent that the legal principles of the domestic law of states parties allow.



The non-mandatory nature of the provisions on illicit enrichment in the various international anti-corruption legal frameworks emanates from the concern that creating an independent offence of illicit enrichment could undermine basic human rights conferred upon the accused. In particular, the criminalisation of illicit enrichment has been considered as an infringement of the presumption of innocence. However, the non-obligatory nature of the provisions regarding illicit enrichment in international and regional anti-corruption

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<sup>162</sup> See, for example, Article 20 of UNCAC and Article 8(1) of the AU Convention.

<sup>163</sup> Babu (2006: 8).

<sup>164</sup> See, for example, Article 20 of UNCAC, Article 8(1) of the AU Convention and Article IX(1) of the OAS Convention.

instruments creates a risk of failure to develop common standards for the full implementation of the conventions.<sup>165</sup>

### **3.2.2.2 The Offence of Illicit Enrichment and Asset Recovery**

Asset recovery is a core constituent of international as well as regional anti-corruption instruments.<sup>166</sup> It has been shown that the provisions of asset recovery embedded in the anti-corruption conventions, especially in UNCAC, encouraged ratification by many developing countries as a large amount of their wealth has been stolen by corruption.<sup>167</sup>

The fact that UNCAC and the other regional anti-corruption instruments do not oblige states to criminalise illicit enrichment in their domestic law may pose a challenge in relation to recovering assets located in countries which have not criminalised illicit enrichment.<sup>168</sup>

However, UNCAC provides for international co-operation for effective implementation and enforcement of its provisions.<sup>169</sup> With respect to international co-operation regarding asset recovery, UNCAC firmly requires each state party 'to afford one another the widest measure of co-operation and assistance'.<sup>170</sup> Where dual criminality is required in international co-operation, UNCAC further states that dual criminality 'shall be deemed satisfied irrespective of whether the laws of the requested state party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting state party'.<sup>171</sup> Accordingly, the states parties that have not criminalised illicit enrichment under their domestic law may not refuse to co-operate in returning corruptly acquired assets to the countries of origin. In this respect, UNCAC has closed the legal loopholes that could

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<sup>165</sup> Transparency International: 'Summary Overview of UNCAC'.

<sup>166</sup> See, for example, Chapter V of UNCAC and Article 16 of the AU Convention.

<sup>167</sup> Hechler (2010: 2). See also Babu (2006: 21).

<sup>168</sup> Transparency International (2011: 2).

<sup>169</sup> See Chapter IV of UNCAC.

<sup>170</sup> See Article 51 of UNCAC.

<sup>171</sup> See Article 43(2) of UNCAC.

have been created by the dual criminality requirement to recover proceeds of the offence of illicit enrichment across different jurisdictions. In addition, the AU Convention encourages states parties that have not criminalised illicit enrichment to provide assistance and co-operation to the requesting states insofar as their law permits.<sup>172</sup>

The different approaches that exist in different jurisdictions in regard to the standard of proof in illicit enrichment are creating a challenge in the recovery of corruptly acquired assets that are located in other jurisdictions.<sup>173</sup> In this respect, the UN Secretary-General report to the General Assembly stated that:

‘Obstacles are created by the diversity of approaches taken by different legal systems, in particular between common and civil law, with respect to matters such as jurisdiction, evidential requirements, the relationship between criminal prosecution and recovering proceeds and whether civil proceedings could be used. Countries seeking the return of assets often face severe challenges. High evidential and procedural standards required by the laws of developed countries where substantial proceeds of corruption are more likely to be concealed often pose a challenge. Obtaining domestic freezing and confiscation orders that can form the basis for the transnational request and enforcement of such request, in particular depends upon high evidential and procedural standard requirements of the requested states’.<sup>174</sup>

Further, asset recovery becomes more difficult where the proceeds of two or more crimes are intermingled. In addition, it may involve two or more states claiming the recovery of the assets, making the process even more complicated.<sup>175</sup> It has been established also that asset recovery is a costly, complicated and time-consuming process.<sup>176</sup> A successful asset recovery exercise requires expertise, resources and commitment for tracing, freezing and confiscating.<sup>177</sup>

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<sup>172</sup> See Article 8(3) of the AU Convention.

<sup>173</sup> UN Secretary-General Report (2006: 9).

<sup>174</sup> UN Secretary-General Report (2006: 9).

<sup>175</sup> UN Secretary-General Report (2006: 9).

<sup>176</sup> Thelesklaf (2009: 3-4).

<sup>177</sup> UN Secretary-General Report (2006: 9).

In Ethiopia, there has been as yet no case of asset recovery from a foreign jurisdiction on the basis of an illicit enrichment prosecution.<sup>178</sup> However, in the embezzlement case of the former Deputy Prime Minister and others, the Federal Supreme Court of Ethiopia convicted the accused for a criminal transaction involving 1 000 tons of coffee that belonged to the government.<sup>179</sup> The court, in addition to imposing 18 years' imprisonment, ordered the defendants to return the proceeds of their corrupt activity. Following this judgement, the federal government filed a civil action against the defendants to collect expenses related to the transportation of and custom tax and excise tax on the coffee, plus interest associated with it.<sup>180</sup> The Federal High Court decided the case in favour of the state by ordering the respondents to pay ETB 52 million, which is equivalent to USD 5.2 million, and the Federal Supreme Court Cassation Bench confirmed the judgement.<sup>181</sup>

The process of recovering the proceeds of the crime started in June 2000, but the government could not recover the whole amount. This was partly because the proceeds were transferred to foreign banks such as Swiss Bank in Switzerland and Banque Indo-Suez Mer Rouge in Djibouti. To recover the assets in a foreign jurisdiction there was a need to have resources and professional expertise. Unfortunately, these were lacking.

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<sup>178</sup> See the FEACC Annual Performance Report (2011).

<sup>179</sup> *Prosecutor v Tamerat Layne et al*, (The Federal Supreme Court, File Number 1/89), judgement given on 14 March 2000, page 56.

<sup>180</sup> *Ministry of Justice v Shadia Nadim et al* (The Federal High Court Civil Case, File Number 11986). *Sheik Mohamed Hussein al-Amoudi v Shadia Nadim et al* (The Federal Supreme Court, File Number 10797), judgement given on 2 January 2005, page 95. The respondents were found guilty of corruption along with the former Deputy Prime Minister Tamerat Layne in File Number 1/89. Accordingly, in the latter case, the court ordered the applicant to pay the government after he collects the money from the respondents.

<sup>181</sup> Lemlem 'Ministry of Justice Requests Judgement Execution' *The Reporter* 29 October 2011.

### 3.3 Illicit Enrichment and Human Rights Principles

In addition to its recognition by international and regional anti-corruption instruments, different countries have criminalised illicit enrichment in their domestic laws.<sup>182</sup>

As mentioned earlier, the criminalisation of illicit enrichment is important because often it is challenging or impossible for the prosecutor to establish that a public official has accepted a bribe or an undue advantage or committed any other form of corruption. Therefore, the criminalisation of illicit enrichment is important in that the property or pecuniary possession that is disproportionate to the legitimate income of public officials can create a *prima facie* case that a public official has been corrupted.<sup>183</sup>

However, it was argued during the drafting of UNCAC that the criminalisation of illicit enrichment would be in violation of the presumption of innocence. Further, some delegations to the discussions prior to the Convention expressed their concern as to the implementation of the provision on illicit enrichment, fearing that it would face constitutional challenges. They believed that constitutional difficulties could arise as the provision would include a reversal of the burden of proof.<sup>184</sup>

Hence, some delegates suggested that the criminalisation of illicit enrichment should be non-binding upon states parties and moved to the chapter dealing with prevention in order to allow states to adopt administrative measures that encompass the concept.<sup>185</sup>

It was argued also that the criminalisation of illicit enrichment does not necessarily include a reversal of the burden of proof *per se*. Rather, the onus upon the prosecutor to prove his

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<sup>182</sup> For example, Ethiopia, Botswana, Zambia, India, Hong Kong, Singapore and Argentina are among the countries that have criminalised illicit enrichment.

<sup>183</sup> OSCE (2004: 138).

<sup>184</sup> UNODC (2010: 196).

<sup>185</sup> UNODC (2010: 196).

case beyond a reasonable doubt is confined to the disproportionate assets of the accused.<sup>186</sup> In such circumstances, it would be convenient for the court to convict the accused if the prosecutor can prove beyond a reasonable doubt that the luxurious life which the accused is living is disproportionate to his legitimate income. As agreed in the discussions preceding the adoption of UNCAC, the inclusion of such provision is important for the effective prosecution of crimes of corruption.<sup>187</sup>

### **3.3.1 The Presumption of Innocence**

Countries that have a strong constitutional tradition, such as the United States and some European countries, are still reluctant to establish the offence of illicit enrichment as an independent crime of corruption.<sup>188</sup> These countries are concerned about the presumption of innocence enshrined in their constitutions. In addition, the right to be presumed innocent as a requirement of the due process of law has a firm grounding, especially in the common law legal systems.<sup>189</sup>



The International Convention on Civil and Political Rights (ICCPR) provides that: 'Every one charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law'.<sup>190</sup> The principle of the presumption of innocence encompasses, among other elements, the burden of proof being upon the prosecution, the accused being protected against self-incrimination and the accused having the right to remain silent.<sup>191</sup>

According to some commentators, criminalising illicit enrichment contradicts these human rights principles recognised by the ICCPR and other international and regional human rights

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<sup>186</sup> UNODC (2010: 197).

<sup>187</sup> UNDOC (2010: 198).

<sup>188</sup> Derenčinović (2012: 2).

<sup>189</sup> Wilsher (2006: 29).

<sup>190</sup> See Article 14(2) of the ICCPR.

<sup>191</sup> Kamunde (2010: 4).

instruments.<sup>192</sup> Wilsher observes that the criminalisation of illicit enrichment would exempt the prosecutor from having to prove the charge against the accused beyond a reasonable doubt as the prosecutor is not required to produce direct evidence that can establish the commission of corruption by the accused.<sup>193</sup> He argues further that in the prosecution of illicit enrichment, the prosecutor should prove beyond a reasonable doubt the fact that the public official has received bribes or has committed any other form of corruption.<sup>194</sup>

But, this line of argumentation overlooks the fact that corruption is a clandestine offence and that certain corrupt acts are naturally difficult to detect and it is hardly possible to discover evidence of their commission.<sup>195</sup> Hence, to prove the offence of illicit enrichment to the extent of establishing the fact that the accused has received a bribe or other undue advantage would undermine the anti-corruption campaign significantly.

As accepted in the discussions leading to the adoption of UNCAC, the possession of wealth that is manifestly disproportionate to the legitimate income of the accused constitutes a *prima facie* ground that the public official is corrupt.<sup>196</sup> Thus, the prosecutor is required to present evidence only as to the wealth and lifestyle that exceeded the legitimate earnings of the accused.

### **3.3.2 The Burden of Proof in the Prosecution of Illicit Enrichment**

In any lawsuit, including civil litigation, the party who brings the action or claim bears the burden of proving that the claim has both legal and evidential substance. In criminal litigation, the prosecutor is the one who initiates the litigation and thus carries the burden

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<sup>192</sup> See, for example, Article 11(1) of UDHR and Article 7(1) of the African Charter on Human and Peoples' Rights.

<sup>193</sup> Wilsher (2006: 28).

<sup>194</sup> Wilsher (2006: 28).

<sup>195</sup> UNODC (2002: 29).

<sup>196</sup> OSCE (2004: 138).



to prove every element of the crime. This is sometimes called ‘the legal onus or burden of proof’.<sup>197</sup>

In the case of illicit enrichment, the prosecutor has the legal duty to produce evidence to prove the property in the possession of the public official is quite disproportionate to his or her lawful income. The fact in issue that needs to be proved by the prosecutor is the accumulation of wealth by a public official that he or she cannot explain legitimately. In other words, in an illicit enrichment prosecution, it is the accumulation of wealth that is manifestly high as compared to the public official’s lawful income that needs proof beyond a reasonable doubt.<sup>198</sup> This would give rise to the presumption that the accused has acquired the property through corruption or in some other illegal way. It is important to note here that this is a rebuttable presumption that requires the accused to give a reasonable explanation as to the lawful sources of the assets.<sup>199</sup> This burden of producing evidence is sometimes known as the ‘evidential burden’.<sup>200</sup>

As mentioned, the presumption of innocence does not prohibit a presumption of fact or law against the accused insofar the accused is given the chance to rebut it.<sup>201</sup> In other words, the legislation creating illicit enrichment as an offence of corruption places an evidential burden upon the accused to provide reasonable evidence for the significant increase in his or her assets.<sup>202</sup> It has been recognised that placing an evidential burden on the accused to rebut the presumption of corruption does not infringe the presumption of innocence.<sup>203</sup> It

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<sup>197</sup> De Speville (1997).

<sup>198</sup> UNODC (2002: 29).

<sup>199</sup> UNODC (2006: 104).

<sup>200</sup> De Speville (1997).

<sup>201</sup> See the discussion under section 3.4.1 below. See also De Speville (1997).

<sup>202</sup> UNODC (2006: 104).

<sup>203</sup> *Salabiaku v France* (European Court of Human Rights, Application Number 10519/83), judgement given on 7 October 1988, paragraph 26.

is important to note that creating an evidential burden does not mean that there is presumption of guilt as the burden of proof remains upon the prosecution.<sup>204</sup>

Therefore, it is possible to conclude that criminalising and prosecuting illicit enrichment does not shift the burden of proof to the accused and if there is a presumption of corruption, this presumption is a permissive presumption that can be rebutted upon contrary evidence being produced by the accused. The presumption of fact which an accused is required to rebut is not necessarily contrary to the accused's fundamental right to be presumed innocent.<sup>205</sup>

### **3.3.3 Alternative Approach: The Proportionality Test**

In some jurisdictions, creating illicit enrichment as an independent offence of corruption is regarded as contrary to the right to be presumed innocent.<sup>206</sup>

However, if creating an evidential burden to rebut an allegation infringes the presumption of innocence at all, this right, like many other rights, is not absolute.<sup>207</sup> In combating corruption, two competing interests must be considered. These are: the threats corruption is posing to the overall socio-economic and political developments of society or the public interest, on one hand, and the protection of the presumption of innocence, on the other hand.

In these circumstances, the risks and damages posed by corruption against the public interest are very high. Here, 'the test of proportionality'<sup>208</sup> is applicable, requiring the accused to produce evidence as to the lawful sources of his wealth after the prosecutor has

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<sup>204</sup> De Speville (1997).

<sup>205</sup> De Speville (1997). See also OSCE (2004: 138-139).

<sup>206</sup> For example, the USA, Russia and Japan have not recognised illicit enrichment as an independent offence.

<sup>207</sup> UN Human Rights Committee (2007: 2). See also Tadros (2007: 196).

<sup>208</sup> De Speville (1997). See also Fung (1997).

established that the assets in the hands of the accused could not have come reasonably from his or her legitimate income. In the proportionality test, the seriousness of the corruption would justify the deviation from the protection given to the presumption of innocence.

Therefore, if restriction of and the encroachment on the presumption of innocence in cases of prosecution of illicit enrichment exist at all, an effective anti-corruption campaign to protect the broader public interest justifies it.

### **3.4 Illicit Enrichment in Ethiopian Anti-Corruption Law**

This section will deal specifically with the criminalisation and prosecution of illicit enrichment under Ethiopian anti-corruption law. The legal provision pertaining to this offence is found in Article 419 of the Criminal Code of Ethiopia.

The offence of illicit enrichment contained in Article 20 of UNCAC has been incorporated into Article 419 of the Criminal Code of Ethiopia. The provision that governs the offence of illicit enrichment in the Criminal Code is termed 'Possession of Unexplained Property'.<sup>209</sup> It reads as follows:

- (1) any public servant, being or having been in a public office, who:
- a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or
  - b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means, shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.

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<sup>209</sup> See the heading of Article 419 of the Criminal Code of 2005.

(2) Where the Court, during proceedings under sub-article (1)(b), is satisfied that there is reason to believe that any person, owing to his closeness to the accused or other circumstances, was holding pecuniary resource or property in trust for or otherwise on behalf of the accused, such resources, or property shall, in the absence of evidence to the contrary, be presumed to have been under the control of the accused.<sup>210</sup>

The article is applicable to public officials. The article employs the wording adopted in UNCAC, but also goes beyond it. In this respect, the offence of illicit enrichment in the Criminal Code encompasses any property or pecuniary resource that is manifestly disproportionate to the legitimate income either in the hands of a public official or any other person on behalf of the public official.<sup>211</sup> Here, the offence of illicit enrichment in the Criminal Code corresponds with the AU Convention.<sup>212</sup> The AU Convention defines the crime of illicit enrichment as ‘the significant increase of assets of a public official or any other person that he or she cannot reasonably explain in relation to his or her legitimate income’.<sup>213</sup>

As mentioned, Article 419 of the Criminal Code explicitly extends to property that is possessed by another person on behalf of the public official. A further distinct feature of the offence of illicit enrichment in the Criminal Code is that the unexplained property in the hands of a public official or a third party related to him must pertain to his or her present or past employment.<sup>214</sup> The time element in article 419 of the Criminal Code is similar to the provision on illicit enrichment contained in the Inter-American Convention against Corruption.<sup>215</sup>

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<sup>210</sup> Article 419 of the Criminal Code of 2005.

<sup>211</sup> See Article 419(2) of the Criminal Code of 2005.

<sup>212</sup> See Article 1(6) of the AU Convention.

<sup>213</sup> See Article 1(6) of the AU Convention.

<sup>214</sup> See Article 419(1)(a) of the Criminal Code of 2005.

<sup>215</sup> See Article IX(1) of the OAS Convention.

### 3.4.1 Easing the Burden of Proof and the Presumption of Innocence in Ethiopian Law

The presumption of innocence is a fundamental principle of human rights and criminal justice in Ethiopia, as in other legal systems. The presumption of innocence imposes on the prosecutor the burden to prove the charge against the accused beyond a reasonable doubt.<sup>216</sup>

The right to be presumed innocent is provided for under Article 20(3) of the Ethiopian Constitution, which states that: 'During proceedings accused persons have the right to be presumed innocent until proven guilty according to law and not to be compelled to testify against themselves'.<sup>217</sup> This article of the Constitution does not provide for how and when the presumption of innocence could be subject to restriction.

The objective of the Ethiopian criminal law, as stated in the Criminal Code, 'is to ensure order, peace and the security of the state, its people and inhabitants for the public good'.<sup>218</sup> Further, the Criminal Code emanates from the Constitution and serves to pursue the goals sought to be achieved by the Constitution.<sup>219</sup>

The burden of proof required for the prosecution of illicit enrichment in Ethiopian anti-corruption law is that of producing evidence to demonstrate that the accused is in possession of property or maintains a standard of living that is manifestly disproportionate to his lawful income.<sup>220</sup> The prosecutor still retains the legal burden to prove beyond a reasonable doubt the significant increase in the wealth and the standard of living above that

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<sup>216</sup> UN Human Rights Committee (2007: 3).

<sup>217</sup> FDRE Constitution Proclamation No 1/1995.

<sup>218</sup> See Article 1 of the Criminal Code of 2005.

<sup>219</sup> Federal Justice Organs Training Centre (2008: 13).

<sup>220</sup> See Article 419 of the Criminal Code of 2005.

which is commensurate with the lawful income of the accused.<sup>221</sup> This is evident from the cases of *Elizabeth Welde Gebriel et al* and *Mekonnen Workeneh Welde Semayat* which will be discussed below.

However, the provision in the Criminal Code dealing with the offence of illicit enrichment creates an evidential burden for the accused. It requires the accused to give a reasonable 'explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resource or property came under his control'.<sup>222</sup>

In this respect, the Criminal Code eases the burden of proof for the prosecutor but requires him to prove beyond a reasonable doubt the disproportionate assets and the standard of living of the public official. Further, the law requires the accused to produce evidence to prove the legitimate sources of the assets in question. The evidential burden imposed upon the accused in illicit enrichment cases does not necessarily violate the presumption of innocence under Article 20(3) of the Constitution, since the accused is given the opportunity to produce the evidence that can refute the allegation brought against him.<sup>223</sup>

Therefore, the offence of illicit enrichment in the Ethiopian Criminal Code does not involve a shift of the burden of proof to the accused *per se*, and thus does not violate the constitutional right to be presumed innocent.

### **3.4.2 Prosecuting Illicit Enrichment in Ethiopian Anti-Corruption Law**

In Ethiopian criminal litigation, the burden of proof primarily rests upon the prosecutor.<sup>224</sup>

In an illicit enrichment case, the prosecutor retains the duty to prove beyond reasonable

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<sup>221</sup> See Article 419(1)(a) of the Criminal Code of 2005.

<sup>222</sup> See Article 419(1)(b) of the Criminal Code of 2005.

<sup>223</sup> Australian Government Attorney-General's Department: 'Presumption of Innocence'.

<sup>224</sup> See Articles 136 and 137 of the Ethiopia Criminal Procedure Code of 1961.

doubt the fact that the accumulation of wealth in the hands of the public official exceeds his or her lawful income. Once the court is satisfied with this assertion, then an evidential burden rests upon the accused to give an explanation as to how he was able to maintain such a standard of living or how such pecuniary resource or property came under his control. It is important to emphasise that this approach is crucial for protecting innocent defendants from being convicted where reasonable doubt exists as to their misuse of entrusted power for private gain.<sup>225</sup>

In the case of *Prosecutor v Elizabeth Welde Gebriel et al*,<sup>226</sup> the Federal High Court found Mulugeta Yayeh Zewdei guilty of the offence of possession of unexplained property. The accused was an employee of a metal factory, a public enterprise, with a monthly salary of 3 778 ETB. The charge against him shows that the accused owned four houses and two plots of land in Addis Ababa, the capital of Ethiopia. He also had 158 964.8 ETB in his personal banking account.



The prosecutor produced witness testimony and documentary evidence and proved that the accused owned assets disproportionate to his present and past employment and other legitimate income. The accused defended the charge against him by stating that he had received 60 000 ETB from his family to build a house and bought the land from the earnings of the house rent. However, his reasons were not convincing, as the expenses to build a house far exceeds 60 000 ETB and he could not build four houses with this amount only. In addition, the accused failed to give a satisfactory explanation as to the amount of money found in accounts at three different banks.

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<sup>225</sup> Wilsher (2006: 28); See also Tadros (2007: 197).

<sup>226</sup> *Prosecutor v Elizabeth Welde Gebriel et al* (The Federal High Court, File Number 62293), judgement given on 8 July 2011, page 24.

Accordingly, the Federal High Court after found him guilty of possession of unexplained property within the meaning of Article 419(1)(a) and (b) of the Criminal Code and sentenced him to three years' imprisonment and a 7000 ETB fine.

In the case of *Prosecutor v Mekonnen Workeneh Welde Semayat*,<sup>227</sup> the Federal High Court acquitted the accused on the ground that he had given a credible explanation as to the source of his wealth. The charge against the accused stated that, while working in Ethiopian Revenue and Customs Authority, he had accumulated 1 136 541.47 ETB in banks and thus was found in possession of unexplained property.

At the trial, the prosecutor presented to the court evidence concerning the present and past employment and earnings of the accused. He was earning 1000 ETB to 10 000 ETB from July 2003 to September 2010. The prosecutor adduced evidence from the banks where the accused kept the money.

The court, after hearing evidence brought against the accused, ordered him to produce evidence in his defence. In so doing, the accused demonstrated that he inherited four hectares of land from his father and he was operating an agri-business on it with his two brothers. He also produced evidence that, in addition to the four hectares of land, he leased two hectares and he had been working on six hectares of land. Further, the accused presented evidence to show that the proceeds from the sale of the farming products, money he received from his sister living abroad, and the proceeds from the sale of a house in one of the regional state towns, supported by documentary evidence, were the sources of his income.

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<sup>227</sup> *Prosecutor v Mekonnen Workeneh Welde Semayat* (The Federal High Court, File Number 97832), judgement given on 24 August 2011, page 8.



The court, after evaluating the evidence presented by both the prosecutor and the accused, acquitted him pursuant to Article 149(2) of the Criminal Procedure Code of Ethiopia. The court, in its acquittal judgement, reasoned that though the income from the employment cannot be the source of more than one million Birr in the banking account, the accused had additional means of income which could be the source of such money. The judgement further stated that the accused had explained sufficiently the sources of his wealth and thus it cannot be said that he had committed the crime of possession of unexplained property within the meaning of Article 419 of the Criminal Code.

This particular case, however, shows that in prosecuting illicit enrichment, in addition to proving that the standard of living and the wealth are manifestly disproportionate to legitimate income, the prosecutor, during an investigation, must also make enquiries as to whether the accused has another means of income. If this is not done, at the trial stage the accused could disprove the allegation against him easily. The failure on the part of the prosecution will have a negative effect also upon the scarce resources of government, especially for a developing country like Ethiopia.

Such occurrences are an indication of the need to build the capacity of prosecutors in investigating and prosecuting corruption cases. Of course, the legal and material complexities of organised crime, including corruption, demand specialised prosecution teams.<sup>228</sup> This practice would create opportunities to enhance the overall capacity of the prosecution service to deal with complex cases in corruption and other organised crime matters.<sup>229</sup>

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<sup>228</sup> Dandurand (2007: 233-234).

<sup>229</sup> Dandurand (2007: 233-234).

### 3.5 Summary of Chapter Three

This chapter has dealt with the criminalisation and prosecution of illicit enrichment. The clandestine nature of corruption creates difficulties in finding evidence to take corrupt public officials to court and to end impunity. Prosecuting public officials for disproportionate increase of assets after careful investigation will assist in overcoming evidential hurdles in investigating and prosecuting the crimes of corruption.

Further, it is important to note that criminalising illicit enrichment assists in implementing and enforcing UNCAC and other regional anti-corruption instruments fully and effectively. In addition, the prosecution of the offence of illicit enrichment has been recognised as an effective anti-corruption tool in many developing countries. The complex and sophisticated nature of corruption crimes makes the investigation expensive in terms resources and expertise.

However, because of certain human rights concerns, such as the presumption of innocence and other related rights, many countries, especially developed countries, are still reluctant to criminalise illicit enrichment.

The case analysis that has been done in regard to the Ethiopian law of unexplained property demonstrates the advantages associated with criminalising illicit enrichment. Further, the analysis that has been made with regard to the embezzlement case of *Tamerat Layne et al* shows the challenges related to asset recovery in corruption cases in general.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

#### 4.1 Conclusion

Corruption is an age-old phenomenon in Ethiopian Society. Gift-giving to public officials in order to get matters done long has been a tradition. In the past, bribery and nepotism were not regarded as corruption. Such traditional gift-giving practices were transformed gradually into an open exercise during the Imperial regimes. Corrupt practices, such as embezzlement of public funds and abuse of power for personal gain, escalated during the Derg military regime and have continued after its fall. It was also difficult to carry out routine business without involving some form of gift-giving. This situation gave rise to the attitude among public officials and civil servants that corruption was a normal and unofficial source of income.<sup>230</sup> Hence, it is possible to say that corruption in Ethiopia is rooted in the country's social cultural, political and bureaucratic traditions.<sup>231</sup>

Studies by international and regional organisations show that corruption is becoming a serious problem in Ethiopia.<sup>232</sup> The first comprehensive survey carried out in 2001 by the Institute of Educational Research of Addis Ababa University, in collaboration with the FEACC, revealed that corruption is one of the main challenges hampering the development of the country.<sup>233</sup> According to the latest Ethiopian corruption perception survey conducted in 2012, corruption is the country's seventh most serious socio-economic problem.<sup>234</sup>

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<sup>230</sup> FEACC (2012: 21).

<sup>231</sup> Shimelis (2005: 62-63).

<sup>232</sup> Transparency International (2010: 178). See also Global Financial Integrity Report (2011).

<sup>233</sup> FEACC (2012: 22).

<sup>234</sup> FEACC (2012: 106-107).

Motivated by the widespread prevalence of corruption in the country, the current government took the initiative by establishing the FEACC, a body dedicated to fighting corruption. The Ethiopian government, in its efforts to promote anti-corruption, ratified UNCAC, UNCTOC and the AU Convention.

Further, the Penal Code of 1957 was amended in May 2005 by the Criminal Code, resulting in the criminalisation of illicit enrichment, money laundering and other corruption and corruption-related conducts. This research paper, in line with the international and regional anti-corruption instruments and domestic legislation, examined the usefulness of criminalising illicit enrichment in combating corruption. The clandestine nature of corruption creates difficulties in finding evidence to prosecute corrupt public officials and end impunity. The complex and sophisticated nature of corruption makes the investigation expensive in terms resources and expertise. Prosecuting public officials for disproportionate increase of assets after careful investigation will assist in the fight against corruption.

Further, it is important to note that criminalising illicit enrichment assists in implementing and enforcing UNCAC and other regional anti-corruption instruments fully and effectively. In addition, the prosecution of the offence of illicit enrichment has been recognised as an effective anti-corruption tool in many developing countries.

The case analysis that has been done in regard to the Ethiopian law of unexplained property demonstrates the advantages associated with criminalising illicit enrichment. In addition, the analysis that has been made of the embezzlement case of *Tamerat Layne et al* shows the challenges, such as the lack of resources and expertise related to asset recovery, inherent in corruption cases in general.

However, because of certain human rights concerns, such as the presumption of innocence and the right against self-incrimination invoked against it, many countries, especially developed countries, remain reluctant to criminalise illicit enrichment.

Comparative analyses of the Hong Kong and Singapore legislative frameworks reveal the weakness and lacunae that exist in Ethiopian anti-corruption laws. Despite their categorisation as ‘strong’<sup>235</sup> and comprehensive, the analysis made in relation to the international anti-corruption instruments reveals that the anti-corruption laws of Ethiopia do not regulate corruption in the private sector. Civil asset forfeiture in the absence of a criminal conviction is another area where the anti-corruption legal framework falls short. Further, the analysis of the law shows that to enforce multilateral international or regional agreements on matters of international co-operation, the domestic law, especially the Criminal Code, is weak and does not cover all aspects of international co-operation.



## **4.2 Recommendations**

A well-crafted and comprehensive law cannot by itself curb corruption. Of course, the failure to control corruption in most countries, including Ethiopia, is attributed partly to the fact that the laws are not enforced properly. It is important to have in place an appropriate law enforcement mechanism to curb corruption. Accordingly, the following recommendations are proposed for effective implementation of anti-corruption legislation.

### **4.2.1 Anti-Corruption Law Enforcement**

Ethiopia has been scoring between 3.5 and 2.7 in Transparency International’s Corruption Perceptions Index from 2001 to 2011. The data analysis for such outcome, among other factors, takes into consideration the enforcement of anti-corruption laws in the country.

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<sup>235</sup> Global Integrity Report: Ethiopia (2008). See also Mezmur & Koen (2011: 234).

Therefore, proper implementation of the law is urgent in order to create a corruption-free Ethiopia or at least ensure that corruption is reduced to minimum level. In this regard, the experience of Hong Kong and Singapore shows that the implementation of anti-corruption laws has contributed greatly to their success in eradicating corruption.

Though there are certain lacunae in the anti-corruption legal framework, as identified in this research paper, Ethiopia has put in place the most important legal and institutional mechanism to combat corruption. The challenge that remains is the effective implementation of the anti-corruption legislation. Laws that have criminalised illicit enrichment and other forms of corruption need to be enforced against corrupt public officials effectively. Proper implementation of the anti-corruption legislation ensures the accountability of those who commit the crime of corruption. If the criminal law is enforced properly, criminals never will walk free and enjoy impunity. Proper enforcement deters criminals from committing other crimes and sends a message to others who would like to commit corruption.

#### **4.2.2 Amendments to the Anti-Corruption Laws**

The enactment of new laws and amendment of existing ones are a first step towards countering corruption. According to the second national corruption perception survey conducted in 2012, weak or non-existent laws were indicated to be one of the reasons for widespread corruption in the public sector.<sup>236</sup> The analysis that has been made in Chapter Two of this paper also reveals that Ethiopia needs to improve and amend its anti-corruption laws in certain respects. Accordingly, specific areas that need amendment or legislative intervention will be identified in this section.

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<sup>236</sup> FEACC (2012: 81).

An amendment to the provision dealing with the offence of possession of unexplained

property: The provision of the Criminal Code which deals with the offence of possession of unexplained property, without prejudice to the confiscation of the property, prescribes a maximum of five years' imprisonment and a fine. While the criminalisation of the possession of unexplained property is welcome as one of the most useful anti-corruption tools, the punishment attached to it is minimal in terms of its deterring effect. In this respect, the case of Mulugeta Yayeh Zewdei<sup>237</sup> shows that the accused had owned 158 964.8 ETB in his personal banking account in three different banks. He also owned four houses and two plots of land. The Federal High Court, in addition to ordering the confiscation of the property, sentenced him to three years' imprisonment. In the case of Hankara Harka Hamoya,<sup>238</sup> the Federal Supreme Court confirmed four years' imprisonment given by the subordinate regional courts against the defendant. These cases show that the assets in the hands of the accused are counted in millions. Obviously, the law should have imposed severe penalty in terms of imprisonment that can convey a meaningful message to potential offenders.

Therefore, the legislator should bear in mind the threats posed by corruption to the all-round development of the country and reconsider the effectiveness of illicit enrichment for the country's anti-corruption effort. In this respect, the legislator should be more aware of the clandestine and the sophisticated nature of the commission of corruption crimes and amend the Criminal Code to prescribe a more effective punishment for the crime of possession of unexplained property.

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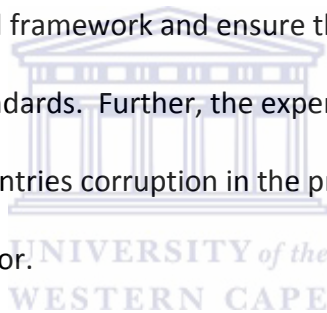
<sup>237</sup> He was an accused in *Prosecutor v Elizabeth Welde Gebriel et al* (The Federal High Court, File Number 62293).

<sup>238</sup> *Prosecutor v Hankara Harka Hamoya* (The Federal Supreme Court, File Number 58514).

An amendment to the existing FEACC Establishment Proclamation No 433/2005 to include

corruption in the private sector: The Ethiopian anti-corruption law needs to regulate corruption in the private sector. The fast economic growth that we are witnessing in the country today and the economic liberalisation that has been taking place are expanding the engagement of private actors in key economic sectors. The economic growth and free flow of money enhance the interaction within the private sector and between the private sector and public institutions and this situation creates opportunities for corruption.

Therefore, the government should take legislative measures to prevent corruption in the private sector. In this regard, the legislator should incorporate corruption in the private sector in the anti-corruption legal framework and ensure the compatibility of the law with international anti-corruption standards. Further, the experiences of Hong Kong and Singapore show that in these countries corruption in the private sector is regulated on a par with corruption in the public sector.



Amendments to international co-operation provisions: In matters of international co-operation, Ethiopia mainly relies on the international and regional anti-corruption conventions which it has ratified. The domestic law, particularly the Criminal Code, only covers matters of extradition and thus further adjustments are required in the domestic law with regard to other aspects of international co-operation.

Adoption of a civil forfeiture law: In the fight against corruption, the issue of civil asset forfeiture is not given attention in the Ethiopian anti-corruption legal framework. In the absence of a criminal conviction, it is not clear whether it is possible to forfeit corruptly acquired assets. Also, it is not certain whether it is possible to bring a civil suit against the property if the criminal is unable to stand trial for one reason or another. In the case of an



acquittal, though it may be possible to bring a civil action against the property since the standard of proof is proof on a balance of probability, it would be difficult in practice to obtain a court order for forfeiture. In the absence of clear authorisation in the anti-corruption legislation, the Ethiopian trend shows that the prosecution service is reluctant to bring a civil action against corruptly acquired property to secure an asset forfeiture order.

Therefore, the adoption of a civil asset forfeiture law into the Ethiopian anti-corruption legal framework would be a major step forward in implementing the principles of UNCAC in the fight against corruption. Further, the experience of Singapore shows that civil asset forfeiture plays an important role in combating corruption.

#### **4.2.3 Capacity Building in the Investigation and Prosecution of Corruption Cases**

The fight against corruption using the legal framework requires trained and skilled human resources and capable institutions to enforce the anti-corruption legislation.<sup>239</sup> Capacity building for law enforcement staff plays an important role in implementing anti-corruption laws. As long as the law enforcement staff continues to be under-capacitated, it will be difficult to prosecute successfully those suspected of engaging in corruption. In this respect, constant effort has to be made to train professionals in law enforcement agencies, including judges.

Technological advancement complicates the commission of corruption crimes and, hence, continuous training programmes aimed at raising the investigative and prosecution capacity of the law enforcement staff should be provided. Special training programmes have to be put in place by the FEACC and the Federal Supreme Court in collaboration with NGOs and

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<sup>239</sup> FEACC & UNDP (2010: 6).

international organisations such as the UNODC in the areas of investigation and prosecution of illicit enrichment and asset recovery.

The case analysis made in Chapter Three clearly urges the need to enhance the capacity of investigators and prosecutors in anti-corruption cases. The prosecution of Mekonnen Workneh Welde Semayat for the offence of illicit enrichment and the prosecution of the case of Tamerat Layne to recover corruptly acquired asset demonstrate the need to strengthen the skills of our investigative officers and prosecutors in corruption cases.



**Word Count: 15 732**

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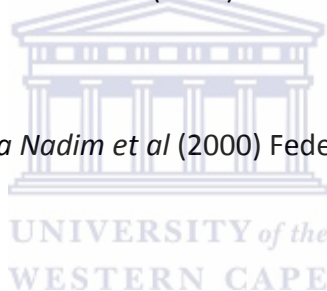
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