

THE LEGAL REGIME OF CORRUPTION IN ETHIOPIA: AN ASSESSMENT FROM INTERNATIONAL LAW PERSPECTIVE

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ABSTRACT

Corruption is a universal problem which compromises people's quest for development, peace, democracy, and human rights though its degree of severity varies. Due to its universality, there was global campaign against corruption and has resulted in an international regime of law. Law is one of the strategies of combating corruption; however, there are other strategies which should be implemented to contain corruption. Nonetheless, the article focuses on the legal measures for the fight against corruption by excluding other measures. It explores the strategies provided by the United Nations and African Union anti-corruption conventions with a view to evaluate the Ethiopian legal regime on corruption. Especially, it critically examines to what extent the legal regime of corruption in Ethiopia incorporate the measures provided by these conventions; to what extent the existing laws/institutions are adequate to prevent and combat corruption effectively; and the measures which should be taken. The article argues that the fight against corruption in Ethiopia is limited both in scope and design. It is suggested that revisiting the legal regime and incorporation of internationally accepted strategies are necessary to enhance the national fight against corruption.

Key Words: Corruption, Federal Ethics and Anti-Corruption Commission, Ethiopia

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INTRODUCTION

*“Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least a bit of the King’s revenue. Just as fish under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out taking money”.*¹

The available scholarship reveals that corruption is endemic in all governments, and that it is not peculiar to any continent, region and ethnic group.² It cuts across faiths, religious denominations and political systems and affects both young and old, man and woman alike though it hurts more the poor and the vulnerable. Corruption is found in democratic and dictatorial politics; feudal, capitalist and socialist economies.³ This does not, however, mean that the magnitude of corruption is equal in every society. Some countries are more corrupt than others. However, corruption is more readily condemned than defined and explained. It is a subject of research by many scholars from various disciplines.⁴ Nevertheless, disagreements persist not only about how to curb it, but even about its definition, causes, forms and

¹ CR. Kumar, ‘Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India’, *Colum. Journal of Asian Law*. (2003), Vol. 17, No.3, p.1.

²See k. Ronald and B. chikulo (eds), *Corruption and Development in Africa: Lessons from Country Case Studies*, palgrave Macmillan press, (2000); P. Maldonado and G. Berthin (2003-2004), *Transparency and Developing Legal Frameworks to Combat Corruption in Latin America*, 10 Sw. J. L. & Trade Am.; V. Bhargava and E. Bolongaita (2004), *Challenging Corruption in Asia: Case Studies and a Framework for Action*, The International Bank for Reconstruction and Development / The World Bank; P. szarek (2010), *The European Union’s Fight against Corruption: The Evolving Policy towards Member States and Candidate Countries*, Cambridge university press.

³For details see J. Girling, *Corruption, Capitalism and Democracy*, Routledge Taylor & Francis Group, (2002).

⁴ See for example, A. Miller, *The Erotics of Corruption: Law, Scandal, and political Perversion*, (State University of New York Press, 2008); Albany T Andrei and A. Matei, *The Corruption: An Economic and Social Analysis*, (2009); *Editura Economica*; K. Jain (ed), *The Political Economy of Corruption*, Routledge, London (2001); and M. Nuijten and G. Anders (eds), *Corruption and the Secrete of law-A Legal Anthropological Perspective*, Ashgate, Hampshire, England, (2007).

consequences. Such a lack of consensus reflects the complexity of the problem. Defeated by the problems of defining corruption, Justice Potter Stewart asserted that “I know it when I see it”⁵.

Talking about corruption in the international realm was a taboo before the end of the cold war.⁶ But the end of the cold war has led to “the consolidation of democracy, political stability, and respect for the rule of law, as well as effective development and expansion of open and competitive markets”.⁷ Besides, the compelling need to support corrupt regimes for national security reasons has removed partly.⁸ It is after this that the international community began to bring the issue of corruption on board as corruption seriously threatens the stability of international order, the creation of democratic regimes and the emergence of open markets. Since then many nations and leading international organizations such as the United Nations, World Bank, International Monetary fund, the Council of Europe, the Organization of American States, the African Union, the Organization for Economic Cooperation and Development and many other regional and sub-regional organizations have articulated anti-corruption laws, policies, action plans and strategies⁹ and all these have become the foundation for the international legal regime against corruption.

The problem of corruption in Ethiopia is pervasive though there are legal and administrative mechanisms to combat it.¹⁰ The establishment of the

⁵ W. Robert, *Political Corruption in Africa*, 2nd ed, Dartmouth publishing company, Hampshire, England, (1991), p. 11.

⁶ B. John and H. Fritz, ‘Tackling International Corruption No Longer Taboo’, 77 *Foreign Aff*, (1998), p.17.

⁷ C. Hams, ‘Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption’, 33 *Cornell Int’l L.J.* (2000), p.159.

⁸ R. Ackerman, *Corruption and Government: Causes, Consequences and Reform*, Cambridge University Press, Cambridge, (1999), p.177.

⁹ N. kale, ‘The Right to a Corruption Free Society as an Individual and Group Human Right: Elevating Official Corruption to a Crime under International Law’, *Journal of International Law and Politics*’1 L., p. (2000), 149-178.

¹⁰ Freedom House, *Countries at the Crossroads 2011 - Ethiopia*, 10 November 2011, available at: <http://www.unhcr.org/refworld/docid/4ecba64d32.html> (last accessed 6 February 2013).

Federal Ethics and Anti-Corruption Commission marked the beginning of the institutionalized attack against corruption. In addition to establishing a specialized anti-corruption agency, Ethiopia adopted laws, rules of procedures, revised penal law to incorporate different acts which constitute corruption, and ratified international anti-corruption conventions adopted by the United Nations and the African Union to mention some. Despite these efforts, Ethiopia did not take those legislative measures devised by the international conventions which it is a party as expected. Due to such failure in legislative intervention, the fight against corruption in Ethiopia is limited both in scope and design.

It is a simple truth that law is simply a means to an end not an end by itself.¹¹ Hence, fighting corruption by law is one of the measures and one of the means to combat corruption. There are other strategies which are helpful to address the problems of corruption in societies. For instance, change in the value system of the society, assuring ethics in governance especially transparency, accountability and responsibility (in general terms guaranteeing good governance), adhering to the constitutional principles of separation of power with the system of checks and balances, and creating an enabling environment for the participation of the society, local and civil society organizations and the media in the decision making will have a significant impact in addressing the root causes of corruption.¹² However, the article specifically focuses on preventing and combating corruption through the instrument of law. The objective is to examine the Ethiopian legal response to corruption in light of international law of corruption so as to give constructive recommendations with a view to enhance the existing legal system.

The article is organized into three sections. The first section explores the literature on corruption with a view to locate it within the framework of the legal discourse and response which form the main part of the article.

¹¹ For a detailed discussion see Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, Cambridge University Press, Cambridge, (2006).

¹² See J. Pope, *infra note 19*; A Body of Doctrinal Divinity, *infra note 21*; A. Ringera, *infra note 22* and K. Anukansai, *infra note 25*.

The second section examines and evaluates the strategies which are adopted by the international legal regime to fight corruption especially the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating of Corruption. The third section is about the Ethiopian legal regime of corruption. The article investigated the legislative response of Ethiopia for the fight against corruption in light of its international treaty commitments. There is also a conclusion which summarizes the main parts of the discussion and the findings.

1. CORRUPTION: AN INTRODUCTION

1.1 .THE DEFINITION OF CORRUPTION

The term “corruption” comes from the Latin word *corruption* which means “moral decay, wicked behavior, putridity or rottenness”.¹³ Defining the concept of “corruption” is not as easy as one recognizes its occurrence. It varies from region to region and remains largely contextual.¹⁴ As the causes and effects of corruption are different depending on the context of the country, it is perhaps not surprising that it is difficult to formulate a single comprehensive definition that covers all the manifestations of corruption. However, literature unanimously recognizes that “corruption is an ancient, wide and pervasive problem that continues to be a factor in every-day live around the world. It can be said that corruption is a universal problem without universal definition. Sometimes, however, the definition of corruption is culturally relative. For instance, “one man’s bribe may be another man’s gift”.¹⁵

Even though there is no single universally agreed definition of corruption, it is defined in various ways. Usually corruption is defined as “an illegal act that involves the abuse of a public trust or office for some

¹³ M. Milic (2001), ‘*Endogenous Corruption in Privatized Companies*’, Collegium, Budapest, available at, <http://www.cerge.cuni.cz/pdf/gdn/RRCI_17_paper_01.pdf> (last accessed 6 February 2013).

¹⁴ *Ibid.*

¹⁵ S. Underkuffler, ‘*Defining Corruption: Implication for Action*’, (2009), in I. Rotberg (ed), *Corruption, Global Security and World order*, (World Peace Foundation and American Academy of Arts & Sciences), pp. 27-46

private benefit”, or “the misuse of public office for private gain.”¹⁶ Transparency International (TI), the leading anti-corruption campaigner defines corruption as “misuse of entrusted power for private gain”¹⁷. The World Bank (WB) also defined corruption as “an abuse of public authority for the purpose of acquiring personal gain”.¹⁸ But for the purpose of this article, the working definition of corruption is a misuse of entrusted power for private gain against the rights of others.

1.2 .THE CAUSES OF CORRUPTION

Available researches show that the causes of corruption are diverse and depend on the different contextual environments. TI held that corruption is rearing its ugly head in more and more severe ways due to “the weakening of social values, with the broader public interest and social responsibility being subordinated to the enhancement of material status in the personal ethics of many”.¹⁹ Besides, lack of transparency and accountability in the public integrity systems are contributing factors for corruption.²⁰ There is also a biblical explanation for the causes of corruption. After Adam broke the law and committed sin to his posterity, what follows upon this is, “the corruption of nature derived unto them from him”; by which is meant, “the general depravity of mankind, of all the individuals of human nature, and of all the powers and faculties of the soul, and members of the body”.²¹ As Human nature is imperfect, corruption will exist in all human endeavors. Selfishness and greed are

¹⁶ D. Fantaye, ‘*Fighting Corruption and Embezzlement in Third World Countries*’, 68 *Journals of Criminal Law*, (2004), p. 171.

¹⁷ Transparency International, *The Anti-Corruption Plain Language Guide*, (2009), <http://www.transparency.org/content/download/45306/725785/file/TI_Plain_Language_Guide_280709.pdf> (last accessed 1 February 2013).

¹⁸ D. Kaufmann, ‘*Corruption, Governance and Security: Challenges for the Rich Countries and the World*’, World Bank Global Competitiveness Report, (2004/2005) available at, <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf> (last accessed 22 February 2013).

¹⁹ J. Pope, *Confronting Corruption: The Elements of a National Integrity System*, TI Source Book, (2000), available at, < <http://www.transparency.org/content/download/2439/14493/file/sourcebook.pdf.zip>> (last accessed on 1 March 2013), p.7.

²⁰ *Id.* p. 8.

²¹ A Body of Doctrinal Divinity, Book 3 - chapter 11, *Of The Corruption of Human Nature*, available at, <http://www.pbministries.org/books/gill/Doctrinal_Divinity/Book_3/book3_11.htm> (last accessed 1 March 2013).

the constituting elements of human imperfection which leads to corruption.

As noted by Ringera in a speech delivered at the Commonwealth lawyer's conference, the causes of corruption are economic, institutional, political or societal.²² The economic causes of corruption are related to pecuniary considerations, representing corruption that is need-driven as opposed to greed driven. This assertion is further confirmed by TI in attributing poverty and low salary as causes of corruption.²³ Increase of wants and inability to maintain one's family lives forces officials to compromise public trust and honesty for some fringe benefits. Institutional causes of corruption include "monopoly and wide discretionary powers for public officers, poor accountability, lack of effective and efficient enforcement of the law, absence of institutional mechanisms to deal with corruption, existence of a weak civil society, and the absence of press freedom".²⁴ Klitgaard shares the same view with Ringera by holding that corruption is prevalent when "someone has monopoly power over a good or service, has the discretion to decide whether you receive it and how much you get, and is not accountable".²⁵ The political causes of corruption arise from the structure and functions of political institutions, and the acquisition and exercise of political power. While societal causes refer to the attitudes and practices of the community. Hence, as the problem of corruption is multi-faceted, its causes are also diverse.

1.3 THE FORMS OF CORRUPTION

Corruption manifests itself in different ways in different circumstances. But there are some forms of corruption which recur in every system.

²² A. Ringera, Speech delivered at the Commonwealth Lawyers Conference, Nairobi, available at, <[http://www.kacc.go.ke/archives/speeches/COMMON WEALTH-CONFERENCE.pdf](http://www.kacc.go.ke/archives/speeches/COMMON%20WEALTH-CONFERENCE.pdf)> (last accessed 1 March 2013).

²³ J. Pope, *supra note* 19, p.9.

²⁴ A. Ringera, *supra note* 22

²⁵ K. Anukansai, 'Corruption: The Catalyst for the Violation of Human Rights', available at <<http://www.nacc.go.th/images/journal/kanokkan.pdf>> (last accessed 1 March 2013), p.7.

These are grand corruption, petty corruption, political corruption and systematic corruption.

Grand corruption occurs when a high level government official committed acts that “distort policies or the central functioning of the state, enabling him/her to benefit at the expense of the public good”²⁶. It is a form of corruption which pervades the highest levels of a national government, leading to a broad erosion of confidence in good governance, rule of law and economic stability.²⁷ It distorts the functioning of the central government.

Petty corruption is an everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.²⁸ It is a situation where a public official demands or expects money for doing an act which he or she is ordinarily required by law to do, or when a bribe is paid to obtain services which the official is prohibited from providing.²⁹ Bribery, embezzlement, theft, fraud, extortion, nepotism, favoritism, and clientelism (classifications of corruption by the United Nations Office on Drug and Crime)³⁰ can be grouped under either grand corruption or petty corruption depending upon the amount of money lost and the sector where it occurs.³¹ Political corruption on the other hand is the manipulation of policies, institutions and rules of procedure in the

²⁶ TI Plain Language Guide, *supra note 17* p. 23.

²⁷ See C. Maria and K. Haarhuis, ‘Promoting Anti-Corruption Reforms: Evaluating the Implementation of a World Bank Anti-Corruption Program in Seven African Countries 1999-2001’, (2005), available at, <<http://ics.uda.ub.rug.nl/root/Dissertations/2005/KleinHaarhuis-Promot>> (last accessed 3 March 2013).

²⁸ Global Integrity and UNDP Oslo Governance Centre, ‘*A User’s Guide to Measuring Integrity*’ (Oslo: UNDP); U4 Corruption Glossary, (2008), available at <<http://www.u4.no/document/glossary.cfm>> (last accessed 3 March 2013).

²⁹ C. Sandgren, ‘*Combating Corruption: The Misunderstood Role of Law*’, 13 *International Lawyer*, (2005), p. 717.

³⁰ See UNODC, ‘*The Global Program against Corruption: UN Anti-Corruption Toolkit*’ (2004), available at, <http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf> (last accessed 3 March 2013).

³¹ TI Plain Language Guide, *supra note 17*.

allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.³²

Systematic corruption occurs where “corruption permeates the entire society to the point of being accepted as a means of conducting everyday transactions”.³³ It is a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which many people have few practical alternatives to deal with corrupt officials.³⁴ It affects institutions and influences individual behavior at all levels of a political and socio-economic system. Such form of corruption is embodied in specific socio-cultural environments, and tends to be “monopolistic, organized and difficult to avoid”³⁵.

Corruption in its various forms may occur both in the public and private sector.³⁶ Public sector corruption is a corruption which occurs in public offices and public enterprises and has a long history. Traditionally, corruption was considered as a public sector problem only. However, corruption can also distort the functioning of the private sector. Private sector corruption on the other hand occurs in individual business practices, business organizations, national and transnational companies, community based organizations and Non-Governmental Organizations (in general activities outside of the public office) and thereby affects the functioning of market systems and societies.³⁷

³² See R. Hodess, ‘Introduction’, in TI, *Global Corruption Report 2004 - Political Corruption*, Berlin TI, (2004); and I. Amundsen, ‘*Political Corruption: An Introduction to the Issues*’, (CMI Working Paper 7, Bergen: CMI. (1999)).

³³ C. Heymans and B. Lipietz, ‘Corruption and Development: Some perspectives’, 40 *Institute of Security Studies Monograph Series*(1999), p.8.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ See the United Nations Convention against Corruption Art. 12 and African Union Convention on Preventing and combating corruption Art. 11.

³⁷ Global Corruption Report, Corruption and the private sector, Transparency International (2009).

1.4 .THE IMPACTS OF CORRUPTION

*“Corruption deepens poverty, it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world’s major faiths”.*³⁸

Corruption is damaging for the simple reason that important decisions are determined by ulterior motives, with no concern for the consequences for the wider community. As Balogun describes it, “depending on its *form* and *gravity*, corruption is capable of rewarding indolence and penalizing hard work, undermining morale and *esprit de corps*, compromising a nation’s external security, threatening internal order and stability, and generally slowing down the pace of economic growth and sustainable development”.³⁹ Kumar also notes that corruption affects “economic growth, discourages foreign investment, diverts resources for infrastructure development, health and other public services, education, and anti-poverty programs”.⁴⁰ He further adds that corruption poses serious challenges for governance, as states cannot achieve the goals of development without ensuring corruption-free governance.

Corruption lowers investment, which in turn adversely affects overall economic performance.⁴¹ Perhaps more importantly, corruption

³⁸The Durban Commitment to Effective Action Against Corruption, signed by 1600 delegates from 135 countries the October 1999 Anti - Corruption Conference sponsored by Transparency International, available at<http://9iacc.org/durban/durban_commitment.html> (last accessed 3 March 2013).

³⁹ M. Balgun, ‘Causative and Enabling Factors in public Integrity: A focus on Leadership, Institutions and character Formation’, *Public Integrity* (2003) Vol.5, No. 2 (spring), pp.127-147, as quoted by RA. Johnson and S. Sharma, ‘*About Corruption*’, in RA. Johnson (ed), *The Struggle Against Corruption: A Comparative Study*, PALGRAVE MACMILLAN, P.10.

⁴⁰CR. Kumar, ‘Corruption, Human Rights and Development: Sovereignty and State Capacity to Promote Good Governance’,(2005) *99 Am. Soc’y Int’l L. Proc.* 416. (2005).

⁴¹ S. Knack and P. Keefer, ‘*Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*’, *7 Econ. & Pol.* 207, (1995).

undermines social welfare by redistributing a nation's wealth in a "manner that generates tensions or exasperates existing ones".⁴² Keuleers notes that high levels of corruption significantly aggravate poverty.⁴³ Above all, corruption affects the integrity of the political system and neither allows for the protection of human rights and the promotion of human freedoms nor for the development of democracy.⁴⁴ It implies discrimination and injustice and disrespect for human dignity.⁴⁵

While corruption violates the rights of all those affected by it, "it has a disproportionate impact on people that belong to groups that are exposed to particular risks; such as women, children, minorities, indigenous peoples, migrant workers, persons with disabilities, those with HIV/AIDS, refugees, prisoners and those who are poor".⁴⁶ In some cases, it is their vulnerability that makes certain groups easy victims of corruption. For instance, corrupt officials may extract money from migrant workers who lack a residence permit by threatening them with deportation in the knowledge that they cannot complain.⁴⁷

Some would argue that corruption can have beneficial effects such as non-violent access to government affairs and administration, when political channels are clogged, or as a means of lessening the potentially crippling tension between the civil servant and the politician by linking them in an easily discerned network of self-interest.⁴⁸ However, counter-arguments are more acceptable. They focus on the fact that corruption

⁴² R. Sinder and W. Kidane, 'Combating Corruption through International Law in Africa: A Comparative Analysis', 40 *Cornell Int'l L.J.*, (2007), p.691.

⁴³ P. Keuleers, Speech on Corruption, development and human rights – *Fighting corruption as a means to achieve the Millennium Development Goals* on the 5th regional anti-corruption conference, 28-30 September 2005, Beijing, PR China.

⁴⁴ CR. Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', 16 *Mich. St. J. Int'l L.* 475. (2007-2008).

⁴⁵ *Ibid.*

⁴⁶ Transparency International, *Corruption and Human Rights: Making the Connection*, International Council on Human Rights Policy, (2009), available at <http://www.ichrp.org/files/reports/40/131_web.pdf> (last accessed 10 March 2013), p.7.

⁴⁷ *Ibid.*

⁴⁸ See C. Maria et al, *supra* note 27 and R. Ackerman, 'Corruption and Democracy', 90 *American Society of International Legal Proceedings*, (1996), p.83.

leads to economic inefficiency and waste, because of its effect on the allocation of funds, on production, and on consumption. Gains obtained through corruption are unlikely to be transferred to the investment sector as “ill-gotten money is either used in conspicuous consumption or is transferred to foreign bank accounts”.⁴⁹ Rose Ackerman further argues that corruption is able to feed on itself and thereby produce higher illegal payoffs that ultimately, outweigh economic growth.⁵⁰

2. THE INTERNATIONAL LEGAL REGIME TO PREVENT AND COMBAT CORRUPTION

Any discussion of international measures to prevent and combat corruption must begin with the United States.⁵¹ It is because the controversies surrounding President Richard Nixon's presidency relating to the Watergate incidents of 1972 could rightfully be characterized as the *sine qua none* of contemporary efforts to combat corruption by law.⁵² The Watergate incident leads to the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977. From 1977 to 1996, the FCPA was the only law that targeted international corruption though it binds only those multilateral companies in the United States in their interaction with foreign officials.⁵³

It is after this national commitment of the United States to prevent and combat corruption that the regional and global commitment for corruption began to emerge. The Inter-American Convention against Corruption was the first international convention aimed at combating

⁴⁹ *Ibid.*

⁵⁰ R. Ackerman, *supra note* 8.

⁵¹ W. Schroth, ‘National and International Constitutional Law Aspects of African Treaties and Laws against Corruption’, 13 *Transnat'l L. & Contemp. Probs.* (2003), p.83.

⁵² For details of the Watergates incident see, R. Snider et al, *supra note* 46.

⁵³ See A. Low et al, ‘*The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*’, 38 *Va. J. Int'l L.* (1998), pp. 243-244.

corruption and thereby marked the beginning of an international legal regime to combat corruption.⁵⁴

The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Corruption Convention) was the second international convention on corruption. This convention was adopted by the efforts of United States with her trading partners at the OECD. United States did this due to the absence of parallel legal obligation in Europe to abstain from certain business practices in foreign countries and placed its business community in a disadvantageous position.⁵⁵

In 1999, the Criminal Law and Civil Law Conventions on Corruption are adopted under the inter-governmental framework of the Council of Europe to deal with the problems of corruption by proposing criminal sanctions and civil remedies as solutions.

The increasing consciousness of the adverse global economic consequences of corruption brought previously regional efforts to combat corruption through international law to the global level.⁵⁶ As of November 15, 2000, corruption is criminalized internationally as a result of the coming into effect of the United Nations Convention against Transnational Organized Crime and as of October 31, 2003, the UN adopted a convention fully dedicated for preventing and combating corruption, United Nations Convention against Corruption. Africa like the other regions of the world adopted its convention on corruption named African Union Convention on Preventing and Combating Corruption in 2003.

⁵⁴*Ibid.*

⁵⁵ R. Snider et al, *supra note* 42, p. 4.

⁵⁶*Ibid.*

These are not the only anti-corruption instruments in the world. There are other conventions, declarations, protocols, action plans and initiatives.⁵⁷ But the article did not address them all for the simple reason that Ethiopia is not a party to these instruments. Rather, the United Nations convention against corruption and the African Union convention on the preventing and combating of corruption will be critically examined and discussed with a view to examine the legislative framework for preventing and combating corruption in Ethiopia.

2.1 . UNITED NATIONS CONVENTION AGAINST CORRUPTION

The United Nations Convention against Corruption (UNCAC) was adopted by the General Assembly in its resolution 58/4 of 31 October 2003 at United Nations Headquarters in New York.⁵⁸ It is the first genuinely global, legally binding instrument on corruption and related matters and developed with an extensive international participation.⁵⁹ It is after this that corruption is no more the concern only of national and regional laws but also of international laws. It elevated anti-corruption actions at the international level in the form of legally binding obligations.

⁵⁷ See for example, United Nations Declaration against Corruption and Bribery in International Commercial Transactions; Southern African Development Community Protocol against Corruption; Economic Community of West African States Protocol on the Fight against Corruption, Convention on the Protection of the European Communities' Financial Interests; Protocol to the Convention on the protection of the European Communities' Financial Interests; Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union; Council of the European Union Framework Decision on Combating Corruption in the Private Sector; the Anti-Corruption Action Plan for Asia and the Pacific and Good Governance for Development (GfD) Initiative of the Middle East.

⁵⁸The Global Compact, '*Background Information on the Fight against Corruption*', (2003), available at <http://www.transparency.org/global_compact_2003_background_information_on_the_fight_against_corruption_pdf> (last accessed 5 February 2013).

⁵⁹ See A. Argandona, 'The United Nations Convention Against Corruption and its Impact on International Companies, *Working Paper WP No. 656*, IESE Business School, University of Navarra, (2006), available at <<http://www.iese.edu/research/pdfs/DI-0656-E.pdf>> (last accessed 4 February 2013).

The UNCAC obliges states parties to implement a wide and detailed range of anti-corruption measures affecting their laws, institutions and practices. It is unique when compared to other conventions, not only in its global coverage but also in the detail of its provisions.⁶⁰ Objectives and coverage, definition of corruption, preventive measures, criminalization, remedies to victims and asset recovery are some of the main substantive rules of the convention. Against this background note, the sections below explore and analyze the approaches taken by the UNCAC to prevent and combat corruption globally.

2.1.1 Objectives

The purposes of the UNCAC are “to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and to promote integrity, accountability and proper management of public affairs and public property”.⁶¹ The substantive provisions are formulated to achieve this end. The UNCAC wants to strengthen measures against corruption through international cooperation and technical assistance among states. It further promotes measures against corruption by promoting values such as, integrity, accountability and proper management. UNCAC approach the problem of corruption from a political (i.e. international cooperation and technical assistance) and economic (asset recovery) point of view.

With these objectives, originally the convention was designed to cover corruption in the public sector, private sector and politics.⁶² But due to the United States refusal to countenance any mandatory provision on transparency in political party funding, the provision on political party funding was tucked away in an article entitled ‘public sector’.⁶³ It is said

⁶⁰Explanation of the UNCAC, available at <http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/uncac> (last accessed 5 March 2013).

⁶¹ See, UNCAC, Art. 1.

⁶² Transparency International, *Global Corruption Report 2004- Political Corruption*, Pluto press, London, (2004), p. 112.

⁶³ *Ibid.*

that, if the UNCAC fails to deal adequately with this, “one third of the subject matter of the convention is missing”, a reference to the need to equally address corruption in the public sector, the private sector and politics.⁶⁴ However, on the other hand, UNCAC aims to prevent and combat corruption both in the private and public sphere.

2.1.2 Measures

The UNCAC did not attempt to define corruption in clear terms though there were proposals for the definition of corruption.⁶⁵ The authors of the convention preferred to offer for a broad category of offences, rather than a definition of corruption. These are bribery (active and passive) both in the public and private sector;⁶⁶ embezzlement, misappropriation of funds and other diversions of property;⁶⁷ trading in influence,⁶⁸ abuse of functions,⁶⁹ illicit enrichment,⁷⁰ laundry of the proceeds of crime⁷¹, concealment⁷² and obstruction of justice⁷³. These are acts of corruption by which the UNCAC tries to prevent and combat by devising different measures.

The UNCAC adopts an approach to prevent corruption from being occurred in both the public and the private sector in the first place. With regard to the public sector, states parties are at discretion to implement effective anti-corruption policies⁷⁴ and create organizations specifically to fight corruption.⁷⁵ states parties must endeavor to ensure that their public services are subject to safeguards that promote integrity, transparency and accountability among civil servants and hiring based on efficiency

⁶⁴ *Ibid.*

⁶⁵ A. Argandona, *supra note* 59 p.5.

⁶⁶ See, UNCAC, Arts.15, 16 and 21.

⁶⁷ UNCAC, Arts.17 and 22.

⁶⁸ UNCAC, Art. 18.

⁶⁹ UNCAC, Art. 19.

⁷⁰ UNCAC, Art. 20.

⁷¹ UNCAC, Art. 23.

⁷² UNCAC, Art. 24.

⁷³ UNCAC, Art. 25.

⁷⁴ UNCAC, Art. 5.

⁷⁵ UNCAC, Art. 6.

and merit.⁷⁶ Once hired, public officials must be subject to codes of conduct,⁷⁷ including measures such as declarations of assets, and disciplinary measures. States must also promote transparency and accountability in public procurement and management of public finances,⁷⁸ and must take measures to preserve integrity in especially critical areas such as the judiciary and prosecution services,⁷⁹ and to prevent money laundering⁸⁰.

With regard to the private sector, states parties are required to “enhance accounting and auditing standards, develop codes of conduct, promoting transparency, keep the maintenance of books and records, and disallowing tax deductibility for bribes”⁸¹. The Convention also advocates for the participation of society in the prevention of and fight against corruption including access to the appropriate administrative and judicial bodies,⁸² reporting to the national investigating and prosecuting authorities,⁸³ and the protection of reporting persons⁸⁴ and of witnesses, experts and victims.⁸⁵

While most articles dealing with prevention of corruption commences with a mandatory obligation ‘shall’ but the manner in which they are implemented is subject to “the fundamental principles of the legal system of states parties”.⁸⁶ This implies that states parties are not obligated to implement a specific measure to prevent corruption. However, they are obligated to take measures to prevent corruption by taking into consideration their legal system.

⁷⁶UNCAC, Art. 7.

⁷⁷UNCAC, Art.8.

⁷⁸UNCAC, Art. 9.

⁷⁹UNCAC, Art. 11.

⁸⁰UNCAC, Art. 14.

⁸¹UNCAC, Art. 12.

⁸²UNCAC, Art. 13.

⁸³UNCAC, Art. 39.

⁸⁴UNCAC, Art. 33.

⁸⁵UNCAC, Art. 32.

⁸⁶ Transparency International, *Global Corruption Report 2004- Political Corruption*, *supra note 62*, p. 112.

Even though preventive measures are adopted, it may not always prevent the incidence of corruption. Due to this fact, States Parties must take legislative measures to establish as criminal offences not only active and passive bribery of national public officials⁸⁷, but also active bribery of foreign public officials or officials of public international organizations⁸⁸, embezzlement, misappropriation and other diversion of property by a public official⁸⁹, money laundering⁹⁰, obstruction of justice⁹¹, and participation as an accomplice, assistant or instigator in an offence of corruption.⁹² States parties are also advised to take legislative measures to establish as criminal offences though not mandatory, the solicitation or acceptance by a foreign public official of an undue advantage⁹³, trading in influence⁹⁴, abuse of functions⁹⁵, illicit enrichment⁹⁶, concealment⁹⁷, attempt and preparation for an offence of corruption⁹⁸, bribery and embezzlement in the private sector.⁹⁹ But the optional strategy to criminalize the taking of bribes by public officials though the responsibility of the official's home country, it will leave with impunity bribes taken by officials of international public organizations as there is no home government which takes responsibility.¹⁰⁰

Besides the punishment of offenders of corruption, the UNCAC imposes on states parties to ensure that victims of corruption have the right to initiate legal proceedings against those who are responsible in order to obtain compensation.¹⁰¹ But, corruption in general and the institutionalized

⁸⁷UNCAC, Art. 15

⁸⁸UNCAC, Art.16(1).

⁸⁹UNCAC, Art. 17.

⁹⁰UNCAC, Art. 23.

⁹¹UNCAC, Art. 25.

⁹²UNCAC, Art.27(1).

⁹³UNCAC, Art.16(2).

⁹⁴UNCAC, Art. 18.

⁹⁵UNCAC, Art. 19.

⁹⁶UNCAC, Art. 20.

⁹⁷UNCAC, Art. 24.

⁹⁸UNCAC, Art.27 (2 and 3).

⁹⁹UNCAC, Art.21 and 22.

¹⁰⁰ Transparency International, Global Corruption Report 2004- Political Corruption, *supra note* 62.

¹⁰¹UNCAC., Art. 35.

form of corruption in particular causes or creates mass victimization.¹⁰² Victims of violations of human rights (as corruption is a violation of human rights) are often unable to bring their cases before judicial or quasi-judicial organs by themselves, partly as a result of their victimization.¹⁰³ Though such remedial provision is important, but the most victimized and vulnerable sections of the society like, women, children, indigenous peoples and the poor are not in the position to go through the legal avenues by themselves.

Public interest litigation or *action popularies* would have been important to address the issue of mass victimization. However, the UNCAC did not allow this since those who claim compensation for the acts of corruption must prove that they have a vested interest. That is, whether they suffer damage out of the acts of corruption. If it is a human rights issue one can avail of the procedural devices of public interest litigation to address mass claims which arise out of acts of corruption. Besides, the vulnerable sections of the society can have a voice through lawyers, civil society organizations and human rights activists; and they can get their compensation by availing public interest litigation.

Asset recovery, however, is the fundamental principle of the convention.¹⁰⁴ It is especially vital for developing countries where cases of grand corruption have exported national wealth to international banking centers and financial havens, and where resources are badly needed for the reconstruction of societies under new governments.¹⁰⁵ The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned.¹⁰⁶ A further issue was the question of whether assets should be returned to requesting state parties

¹⁰² See CR. Kumar, *supra note 1*.

¹⁰³ See S. Yeshanew, 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia', 8 *Afr. Hum. Rts. L.J* (2008), p.273.

¹⁰⁴ UNCAC, Art. 51.

¹⁰⁵ P. Webb, 'The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?' *Journal of International Economic Law* (2005) Vol.8 No.1, pp 191–229.

¹⁰⁶ See UNCAC, Art. 51-59.

or directly to individual victims. The result was a series of provisions which favor return to the requesting state party, depending on how closely the assets were linked to it in the first place.¹⁰⁷ Thus, funds embezzled from the state are returned to it, even if subsequently laundered¹⁰⁸ and proceeds of other offences covered by the Convention are to be returned to the requesting state party if it establishes ownership or damages recognized by the requested state party as a basis for return.¹⁰⁹ In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for compensating victims.¹¹⁰ This chapter of the convention is having an ample benefit in minimizing the economic impacts of corruption though its effectiveness is measured to the extent of cooperation among states parties.

2.2 AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

The African Union (AU) seeks a continental approach to the problem of corruption which is similar to human rights issues in the 1980s.¹¹¹ It is due to the regional peculiarities that the AU adopts a regional sensitive anti-corruption convention. The African Union Convention on Preventing and Combating Corruption (AU anti-corruption convention) is the most recent regional anti-corruption convention. The AU anti-corruption convention was adopted on 11 July 2003 at the AU summit in Maputo, Mozambique and entered into force on 5 August 2005.¹¹²

The AU anti-corruption convention came into effect as one of the mechanisms within the AU framework with the goal of achieving “the

¹⁰⁷ D. Vlassis, ‘*The United Nations Convention against Corruption*’, Resource Material Serious No. 66, available at <http://www.unafei.or.jp/english/pdf/RS_No66/No66_15VE_Vlassis1.pdf> (last accessed 4 February 2013).

¹⁰⁸ See UNCAC, Art. 15.

¹⁰⁹ UNCAC., Art.57 (3(b)).

¹¹⁰ UNCAC., Art.57 (3(C)).

¹¹¹ Transparency International, *Global Corruption Report 2004- Political Corruption*, *supra note* 62, p. 117.

¹¹² The AU anti-corruption convention, available at <<http://www.africa-union.org/root/au/Documents/Treaties/Treaties.htm>> (last accessed on 4 January 2013).

legitimate aspirations and better life for the peoples of Africa, promoting and protecting human and peoples' rights, consolidating democracy, and enhancing economic and political development in the region by preventing and combating corruption".¹¹³

It provides a comprehensive framework on measures of prevention, criminalization, cooperation, asset recovery and education about corruption as strategies to prevent and combat corruption in the region. It is unique in containing mandatory provisions with respect to private-to-private corruption and on transparency in political party funding. The AU anti-corruption convention makes a clear reference to the impacts of corruption on human rights both in its preamble and in its objective.¹¹⁴ It also gives emphasis to the human rights of offenders of corruption by guarantying them fair trial¹¹⁵ and punishing those who make false and malicious reports.¹¹⁶ The sections to come will explore and assess the contents of the AU anti-corruption convention especially its purpose and scope, its definition of corruption, measures such as prevention, criminalization, remedies to victims and asset recovery.

2.2.1 Objectives

In its statement of objectives, the AU anti-corruption convention aims to achieve five objectives. These are, "promote and strengthen the development of anti-corruption mechanisms in Africa,¹¹⁷ promote, facilitate and regulate cooperation among states parties,¹¹⁸ coordinate and harmonize policies and legislations between states parties,¹¹⁹ remove obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights,¹²⁰ and establish necessary conditions to foster

¹¹³ See the preamble of the AU anti-corruption convention.

¹¹⁴ The AU Anti-Corruption Convention, Art.2(5), Para 4 of the preamble, and Art. 2(4).

¹¹⁵ The AU Anti-Corruption Convention, Art. 14.

¹¹⁶ The AU Anti-Corruption Convention, Art.5(7).

¹¹⁷ The AU Anti-Corruption Convention, Art.2 (1).

¹¹⁸ The AU Anti-Corruption Convention, Art.2 (2).

¹¹⁹ The AU Anti-Corruption Convention, Art.2 (3).

¹²⁰ The AU Anti-Corruption Convention, Art.2 (4).

transparency and accountability in the management of public affairs”¹²¹. It has also a statement of principles which guide states parties in the implementation of the convention.

The States parties to this convention undertake to abide by the following principles. These are, “respect for democratic principles and institutions, popular participation, the rule of law and good governance; respect for human and peoples’ rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments; transparency and accountability in the management of public affairs; promotion of social justice to ensure balanced socio-economic development and condemnation and rejection of acts of corruption, related offences and impunity”¹²².

The AU anti-corruption convention covers corruption both in the public and private sectors.¹²³ The objectives and principles are equally applicable in public and private sector corruption. The AU anti-corruption convention also deals with political party funding.¹²⁴ It is one of the unique features of the convention in areas of coverage.

Taking into account the regional particularities of Africa, i.e., poverty, lack of good governance and democracy, and serious violations of human rights, the drafters of the AU anti-corruption convention took good governance and rights based approach in preventing and combating corruption.¹²⁵ The statement of objectives and principles of the AU anti-corruption convention reflects this assertion. Combating corruption without respect for fundamental principles of the convention will be futile.¹²⁶ Without ensuring accountability and transparency in public affairs, without respect for democratic principles and institutions such as popular participation, rule of law and good governance, the anti-

¹²¹The AU Anti-Corruption Convention, Art.2 (5).

¹²²The AU Anti-Corruption Convention., Art. 3.

¹²³The AU Anti-Corruption Convention., Art.2 and 11.

¹²⁴The AU Anti-Corruption Convention., Art. 10.

¹²⁵ R. Snider et al, *supra note* 42 p. 25.

¹²⁶*Ibid.*

corruption campaign in Africa may not be effective. That is why the AU anti-corruption convention makes them fundamental principles in the implementation of the convention.

The rights based approach is apparent in both the statement of objectives and principles and some other articles of the AU anti-corruption convention. Removing the obstacles to the enjoyment of human rights as an objective and respect for human rights in preventing and combating corruption as a principle especially guarantying offender's fair trial, malicious prosecution and prohibition of double jeopardy shows that the convention takes a human rights approach in its strategies.¹²⁷ Conversely, the AU anti-corruption convention did not look from a human rights perspective the victims of corruption. Despite its clear reference to human rights, it adopts a crime control approach. It does not take a human rights approach to protect the victims of corruption.

2.2.2 Measures

Like UNCAC, the AU anti-corruption convention did not attempt to define corruption. Instead, it tries to list some acts and related offences which constitute corruption. For the AU anti-corruption convention, "corruption means the acts and practices including related offences prescribed in this convention".¹²⁸ Most of the acts of corruption and related offences are stated in article 4 of the convention which deals with the "scope of application". These acts and related offences include, bribery (both active and passive) in both the public and private sector,¹²⁹ any act or omission in the discharge of duties for the purpose of illicitly obtaining benefit,¹³⁰ diversion of property,¹³¹ illicit enrichment,¹³² the use or concealment of proceeds derived from the acts enumerated in the convention,¹³³ and participation as a principal, co-principal, agent, instigator, accomplice, accessory after the fact, in a conspiracy to commit

¹²⁷ See, AU anti-corruption convention, Art. 2(4), 3(2), 5(7), 13(3) and 14.

¹²⁸The AU Anti-Corruption Convention, Art. 1.

¹²⁹The AU Anti-Corruption Convention, Art.4 (1(a, b, e, and f).

¹³⁰The AU Anti-Corruption Convention, Art.4 (1(c).

¹³¹The AU Anti-Corruption Convention, Art.4 (1(d).

¹³²The AU Anti-Corruption Convention, Art.4 (1(g) and Art. 8.

¹³³The AU Anti-Corruption Convention, Art.4 (1(h).

the enumerated acts,¹³⁴ and laundering the proceeds of corruption.¹³⁵ The convention can also be applicable for any other act or practice of corruption and related offences not described in the convention by the mutual agreement of two or more states parties.¹³⁶ By so doing, the AU anti-corruption convention covers a wide range of acts of corruption and related offences. In other words, it gives a wide definition for the term corruption.

States parties undertake to adopt “legislative and other measures to establish the acts stated in article 4 as offences;¹³⁷ strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a state party shall be subject to the respect of national legislation;¹³⁸ establish, maintain and strengthen independent national anti-corruption authorities or agencies;¹³⁹ and adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest’ and awareness in the fight against corruption and related offences”.¹⁴⁰ Besides, adopting “legislative and other measures to create, maintain, and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services” also form part of the preventive strategy.¹⁴¹

There are also some specific preventive measures of corruption in the public sector. States parties should require public officials to declare their assets at the time of assumption of office during and after the term of office in the public service.¹⁴² They are also required to establish an internal committee or a similar body which establishes a code of conduct

¹³⁴The AU Anti-Corruption Convention, Art.4 (1(i).

¹³⁵The AU Anti-Corruption Convention, Art. 6.

¹³⁶The AU Anti-Corruption Convention, Art. 1(2).

¹³⁷The AU Anti-Corruption Convention, Art. 5(1).

¹³⁸The AU Anti-Corruption Convention, Art. 5(2).

¹³⁹The AU Anti-Corruption Convention, Art. 5(3).

¹⁴⁰The AU Anti-Corruption Convention, Art. 5(8).

¹⁴¹The AU Anti-Corruption Convention, Art. 5(4).

¹⁴²The AU Anti-Corruption Convention, Art. 7(1).

and monitors its implementation.¹⁴³ In addition, “develop disciplinary measures and investigation procedures in corruption and related offences;¹⁴⁴ ensure transparency, equity and efficacy in the management of tendering and hiring procedures in the public service;¹⁴⁵ and revoking the immunity of public officials for the purpose of investigation and prosecution of corruption” are measures taken by states parties to prevent corruption in the public sector.¹⁴⁶

With regard to the private sector, states parties undertake to “adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector”.¹⁴⁷ The establishment of mechanisms which “encourage the participation of the private sector in the fight against unfair competition, respect for the tender procedures and property rights” also form a preventive strategy of corruption in the private sector.¹⁴⁸ The involvement of civil society and media by guarantying the right to access to information are also the preventive strategies of acts of corruption and related offences developed by the AU anti-corruption convention.¹⁴⁹

The AU anti-corruption convention criminalizes acts of corruption and related offences.¹⁵⁰ It criminalizes those offences established by the convention and by the mutual agreement of states parties. The various acts explained above are criminalized. To this effect, the AU anti-corruption convention establishes jurisdiction for states parties to adjudicate acts of corruption and related offences.¹⁵¹

Despite the apparent reference to the impacts of corruption to human rights in the preamble, statement of objectives and principles; the AU

¹⁴³The AU Anti-Corruption Convention, Art. 7(2).

¹⁴⁴The AU Anti-Corruption Convention, Art. 7(3).

¹⁴⁵The AU Anti-Corruption Convention, Art. 7(4).

¹⁴⁶The AU Anti-Corruption Convention, Art. 7(5).

¹⁴⁷The AU Anti-Corruption Convention, Art.11 (1).

¹⁴⁸The AU Anti-Corruption Convention, Art.11 (2).

¹⁴⁹The AU Anti-Corruption Convention, Art.9 and 12.

¹⁵⁰The AU Anti-Corruption Convention, Art.4, 5 (1), 6, and 8.

¹⁵¹The AU Anti-Corruption Convention, Art. 13.

anti-corruption convention did not stipulate a substantive provision to this effect. The AU anti-corruption convention though takes a rights based approach in preventing and combating corruption, it did not take rights formulation from the perspectives of victims of corruption. It neither provides for the compensation of victims of corruption nor provides any means by which the victims of corruption claim remedy for the violation of their rights. Though the AU anti-corruption convention brings some striking novelties to international efforts against corruption specifically by linking corruption and human rights, it does not spell out “the precise content of this relationship or reflect a coherent framework of remedies for individuals or groups whose human rights are violated as a result of corruption”.¹⁵² Rather, it focuses on criminal sanctions, and leaves out victims, especially vulnerable and excluded individuals or groups, thus denying them direct access to remedies, such as compensation and restitution.¹⁵³

Like the UNCAC, the AU anti-corruption convention devises a mechanism for asset recovery. In 2001, the TI-sponsored Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth found that “an estimated \$20 to \$40 billion worth of assets have been corruptly misappropriated in Africa and shipped to foreign countries”.¹⁵⁴ The AU anti-corruption convention requires states parties to adopt legislative measures for the search, seizure, freeze, confiscation, and repatriation of corruption.¹⁵⁵ States parties are required to cooperate in asset recovery and assets derived from corruption should be returned to the requesting state even if extradition is not possible.¹⁵⁶ The AU anti-corruption

¹⁵² K. Olaniyan, ‘The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal’, 4 *Afr. Hum. Rts. L.J.* (2004), p.74.

¹⁵³ *Ibid.*

¹⁵⁴ Press Release, Transparency International, ‘*The Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth Illegally Appropriated and Banked or Invested Abroad*’, (2001), available at <http://www.ipocafrika.org/cases/assestsrecovery/official_documents/NyangaDeclaration.pdf> as cited by R. Snider et al, *supra* note 42.

¹⁵⁵ AU Anti-corruption Convention, Art. 16(1).

¹⁵⁶ The AU Anti-Corruption Convention., Art.16 (2 and 3).

convention makes asset recovery not a mere criminal punishment but also a tool to further development objectives.¹⁵⁷

3. THE LEGAL REGIME OF CORRUPTION IN ETHIOPIA

As discussed in section 1, corruption is not a unique problem to a specific society or country. It is a universal problem which demands universal action. However, for the meaningful international intervention against corruption, the contribution and commitment of individual states to a campaign against corruption is having a paramount importance. In this regard, the role of states in ensuring international cooperation for the fight against corruption and in bringing accountability, transparency, integrity and rule of law to the governance practice is crucial.

Ethiopia had been both under imperial and military rules for a long time. Under these regimes the peoples' quest of democracy, human rights and good governance had been compromised. These regimes brought maladministration, corruption, poverty and socio-economic and political crisis to the people at large. All these lead to various revolutions which brought the end of both the imperial and the military regimes. After the end of the military rule and the coming into effect of the Federal Democratic Republic of Ethiopia's constitution (FDRE constitution), the ideals of democracy, human rights, good governance and development becomes both a legal and public discourse.

To further the practice of democracy, human rights, good governance and development in Ethiopia, the government believed that preventing and combating corruption will be of a great help. The government's commitment to fight corruption can be shown by its legislative action of criminalizing corruption by the criminal code, by the ratification of UNCAC and AU anti-corruption convention, by establishing the Federal Ethics and Anti-corruption commission with its special procedure and rules of evidence by proclamation. Recently, the parliament also enacted a proclamation for the disclosure and registration of assets with a view to

¹⁵⁷ R. Snider et al, *supra note* 42, p. 24.

enhance transparency and accountability in the conduct of public affairs; and witness and whistleblower proclamation to safeguard the safety of those who cooperate with the law enforcement agencies.

Legislative action is one of the measures to fight corruption, but, it is not the only measure. There are also other measures as mentioned in the introductory part of the article which are helpful in fighting corruption though they are outside of this piece. Even the mere existence of law doesn't serve any purpose unless it is practically tested and there is a government commitment to implement it. Within this context, the legislative framework to fight corruption will have a huge impact in preventing and combating corruption. In this sense, the article aims to investigate the legislative framework of corruption in Ethiopia from UNCAC and AU anti-corruption convention perspectives.

3.1 .THE FEDERAL ETHICS AND ANTI-CORRUPTION COMMISSION

After the adoption of the FDRE constitution, overall reform in the socio-economic and political system of the country was required. One of such reforms was the civil service reform program. The ethics sub program was one of the components in the national civil service reform program which was mainly designed to tackle corruption and improve the service delivery.¹⁵⁸ To strengthen the anti-corruption struggle the government established the Federal Ethics and Anti-Corruption Commission (FEACC) by proclamation in May 2001.¹⁵⁹

The why of the FEACC are clearly stated in the preamble of the establishing proclamation. It is due to the fact that “corruption and impropriety hinders socio-economic and political development,

¹⁵⁸T. Shambo, Anti-corruption efforts in Ethiopia, conference paper presented on the theme Fighting corruption and safeguarding integrity, Global Forum V, Sandton, South Africa, 2-7 April 2007; see also Institute of Educational Research, Corruption in Ethiopia – submitted to the Ethics Sub-Programme of the Civil Service Reform Programme, 2001 Addis Ababa.

¹⁵⁹Federal Ethics and Anti-corruption Commission establishment proclamation, Proclamation No. 235/2001, Federal Negarit gazzeta.

democratic process and sustainable development in the country”.¹⁶⁰ Besides, to create a corruption free society an independent government institution with a triple mandate of prevention, investigation and prosecution of corruption was deemed important. It is with these views that the FEACC was established.

The Anti-Corruption Authorities (ACAs) elsewhere has some common universal functions though not identical to fight corruption. These are investigation, prosecution, prevention, creating public awareness and disseminating education on the issue of corruption, and coordination of anti-corruption efforts and policies.¹⁶¹ Not all ACAs integrate all of the above-mentioned functions in their anti-corruption efforts. For instance, while the Hong Kong Independent Commission Against Corruption model includes all functions except prosecution, other ACAs focus on just corruption prevention and education or may include investigation and prevention functions as well. In this regard, the determination of which functions ACAs include is usually consistent with the country’s national anti-corruption strategy.¹⁶²

The FEACC seems to incorporate all functions which can be run by ACAs. It has the objective and power of educating the society about the evils of corruption; it has the role of prevention, investigation and prosecution of corruption offences and impropriety.¹⁶³ In its struggle to

¹⁶⁰*Id.*, Preamble.

¹⁶¹ For a detail explanation see Alan, D. Watt and R. Williams, Why do developing country anticorruption commissions fail to deal with corruption? Understanding the three dilemmas of organizational development, performance expectation, and donor and government cycles, *Public Administration and Development*, (2007), Vol. 27 Issue 3, pp. 251 – 259; C. Nicholas, Mapping and Measuring the Impact of Anti-Corruption Agencies: A New Dataset for 18 Countries, The Quality of Government Institute, University of Gothenburg, (2008); and M. Patrick, Anti-Corruption Agencies: Rhetoric Versus Reality, University of Maryland, *The Journal of Policy Reform*,(2004) Vol. 8, No. 69 – 103,

¹⁶² A. Tamyalew, A Review of the Effectiveness of the Federal Ethics and Anti-corruption Commission of Ethiopia, European Union and the International Bank for Reconstruction and Development /The World Bank, (2010).

¹⁶³See The Revised Federal Ethics and Anti-corruption Commission Establishment proclamation, Proclamation No. 433/2005, Art 6 and 7.

avert corruption and endeavor to create a society who no longer tolerates the incidents of corruption and impropriety, the FEACC works in close cooperation with relevant bodies especially with investigation and prosecution offices both at the federal and regional level.¹⁶⁴ Even the FEACC can delegate its investigation and prosecution powers to the above mentioned offices.¹⁶⁵

There is also a room by which the FEACC works with civil society organizations (CSOs) as there are CSOs which work on corruption issues. Nonetheless, the FEACC didn't utilize its opportunity of working with CSOs due to "concerns regarding the CSOs impartiality and individual political agendas".¹⁶⁶ However, up on the ratification of the UNCAC and AU anti-corruption convention, the government promises to work with CSOs and mass media. The AU anti-corruption convention calls states parties to create an enabling environment that will enable CSOs and mass media to hold governments to the highest level of transparency and accountability; especially it urges states parties to ensure the full participation of CSOs and the mass media in the fight against corruption.¹⁶⁷ Moreover, the UNCAC provides that, "Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption."¹⁶⁸ One of the important factors which impact the effectiveness of ACAs like FEACC is its collaborations with CSOs, mass media and non-governmental watchdogs.¹⁶⁹ In this regard, the activities of FEACC to let this happen is very minimal both from

¹⁶⁴ *Id*, proclamation No433/2005., Art 8 and 9.

¹⁶⁵ *Ibid*.

¹⁶⁶ A. Tamyalew, *supra note* 162 p. 31.

¹⁶⁷ AU Anti-corruption Convention, Art 12.

¹⁶⁸ UNCAC, Art 13.

¹⁶⁹ J. Michael and J. Sahr, *Building a Clear Machine: Anticorruption Coalitions and Sustainable Reform*, (The World Bank Institutional Working Paper, Washington DC, The World Bank, (2002)).

practical and legislative points though it is given a mandate to undertake all acts necessary to implement those conventions at the time of ratification.¹⁷⁰

The prevention, investigation and prosecution power of the FEACC is limited to the public sector. Cases of corruption in the private sector are beyond the reach of the FEACC. However, it is pretty clear that corruption may happen in every sector, categorically public sector, private sector and politics. A decision to exclude the private sector will be futile in the fight against corruption as the private sector contributes much to the national economy. The share of the private sector in Ethiopian GDP in 2008-9 was 84.8% and 80.1% respectively.¹⁷¹ Hence, corruption in the private sector will adversely affect the development processes of the country; endanger human rights and fundamental freedoms of individuals, and hamper the anti-corruption struggle.¹⁷² Moreover, both the UNCAC and the AU anti-corruption convention cover corruption both in the public and private sector. Under the AU anti-corruption convention, for instance, States Parties are required to take legislative and other measures to prevent and combat corruption and related offences committed in and by agents of the private sector.¹⁷³ Furthermore, UNCAC provides a detail account of measures which states should take to prevent corruption in the private sector. Even the provisions are of a mandatory character, “Each State Party *shall take measures*, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where

¹⁷⁰See common article 3 of Proclamation No. 544/2007, a proclamation to provide for the ratification of the United Nations convention against corruption and proclamation no. 545/2007, a proclamation to provide for the ratification of the African Union convention on preventing and combating corruption.

¹⁷¹ R. Kolli, A Study on the Determination of the Private Sector in Ethiopian Gross Domestic Product, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectorial Associations, (2010), p. 69.

¹⁷²For a detail discussion of the impact of corruption on human rights and development see B. Adugna, Rethinking International Anti-corruption Conventions: Elevating Corruption-Free service as a Human Right, *Lap Lambert Academic Publishing*, (2011).

¹⁷³AU Anti-corruption Convention, Art 11.

appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures”.¹⁷⁴ However, the Ethiopian government in general and the FEACC in particular did not take such measures to date.

Both UNCAC and AU anti-corruption convention urge that independence of the ACAs be ensured.¹⁷⁵ There is a directly proportional relationship between the independence of ACAs and their success. Thus, the sovereignty of these bodies must be promoted and protected as far as possible and they must be given the opportunity to perform their mandates free of political interference. The revised establishment proclamation tries to guarantee the independence of the FEACC. The FEACC is free from any interference or direction by any person with regard to cases under investigation or prosecution or to be investigated or prosecuted.¹⁷⁶ The FEACC is autonomous only for its task of criminal jurisdiction. The cumulative reading of Article 4 with Article 3(2) has the intention and effect of according the Prime Minister the power to intervene in those areas of the Commission’s work which do not involve its prosecutorial and investigative roles. “In a word, the Prime Minister may intrude into such matters as the administrative procedures, organizational structure, strategic planning, budgetary dispositions and public profile of the FEACC.”¹⁷⁷

Furthermore, the appointment and removal of the Commissioners of the FEACC will have an impact on the independence of the institution. The FEACC has two established executive posts, namely, Commissioner and Deputy Commissioner.¹⁷⁸ The Commissioner is nominated by the Prime Minister and appointed by the House of Peoples’ Representatives, while the Deputy Commissioner is appointed directly by the Prime

¹⁷⁴UNCAC, Art. 12.

¹⁷⁵ See Arts 6 and 36 of UNCAC and Art 5(3) of the AU anti-corruption convention.

¹⁷⁶Revised Federal Ethics and Anti-corruption Commission Establishment proclamation, Art. 4.

¹⁷⁷T. Mezmur and R. Koen, *The Ethiopian Federal Ethics and Anti-corruption Commission: A Critical Assessment*, *Law, Democracy & Development* (2011), Vol. 15, p.6.

¹⁷⁸The Revised Federal Ethics and Anti-corruption Establishment Proclamation, Art 10.

Minister.¹⁷⁹ It is apparent that these executive positions are both political appointments, in which the wishes of the Prime Minister loom large. “Appointees who are perceived to be ruling party yes-men or women will hardly be in a position to secure the public confidence which is indispensable to the success of the anti-corruption programs of the FEACC.”¹⁸⁰ TI has recommended that an appointment mechanism which operates through parliamentary consensus, together with an external accountability mechanism such as multi-party Parliamentary Select Committee, can reduce opportunities of abuse of the appointments process or biased appointments.¹⁸¹ The independence of the FEACC is questioned; even there are arguments that the FEACC was created principally to pursue powerful political figures who had fallen out of favor with the regime.¹⁸²

With regard to removal of the executive bodies of the FEACC, there are three grounds for removal from office; violations of code of conduct, manifest incompetence and inefficiency and mental or physical illness.¹⁸³ Removal founded upon manifest incompetence and inefficiency are valid grounds, however, there should be an objective criteria. Otherwise, it will be prone to manipulation. Though, it is necessary to remove leaders who prove to be manifestly incompetent and inefficient; but it is necessary, too, to ensure that the ground of removal does not operate as a weapon of retaliation against “recalcitrant” anti-corruption leaders.¹⁸⁴ This may happen, for instance, in a situation where the FEACC has opted to investigate and possibly prosecute “protected” public officials.¹⁸⁵ It would appear that the crucial consideration here is the need for

¹⁷⁹*Id.*, art 10(1) & 10(2).

¹⁸⁰T. Mezmur et al, *supra note 177* p. 7

¹⁸¹ See J. Pope, *supra note 25*.

¹⁸²EJ. Keller, Ethnic federalism, fiscal reform, development and democracy in Ethiopia, *African Journal of Political Science* (2002), Vol.7, No 21, p.19; See also J. Dizard, S. Kelly and C. Walker, *Countries at crossroads: a survey of democratic governance*, Maryland: Rowman& Littlefield Publishers, (2008), p. 315.

¹⁸³The Revised Federal Ethics and Anti-corruption Establishment Proclamation, art 14(2).

¹⁸⁴T. Mezmur, *supra note 177*.

¹⁸⁵*Ibid.*

clearly delineated criteria of competence and efficiency. Absent such yardsticks, decisions on competence and efficiency stand to be bedeviled by political machinations.¹⁸⁶

For instance, the first commissioner of the FEACC, W/o Enwey G/medihin, was removed from office before the expiry of her term of six years due to her decision to investigate the then chairman of the National Election Board, Ato Assefa Biru though he was released due to his acceptance of *Gile His*, self-critique.¹⁸⁷ W/o Enewey G/Medihin was removed from FEACC and appointed as a director of Government Housing Agency (*Yekiray Betoch Astedader*).¹⁸⁸ Even recently, the position of the Deputy Commissioner was vacant for ten months due to the removal of Ato Addisu Mengistu based on the allegation of his improper use of public property for private gain.¹⁸⁹ However, Ato Addisu Mengistu was transferred to the Ministry of Justice and assumes a post there.¹⁹⁰ Both Commissioners are members of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and removed from office due to party critics or *gimgema*. However, the grounds for removal are stated in the proclamation and *gimgema* is not a ground for removal.¹⁹¹ Even if it is said there is a violation of code of conduct, the violator should be brought to justice than assuming another post. It is a plain fact that the party affiliation of Commissioners and Deputy Commissioners will compromise the independence of the FEACC. It will be worse when the party politics gets involved in the FEACCs work.

In addition, even the investigation and prosecution of high level government officials on corruption charges has been a point of

¹⁸⁶ *Ibid.*

¹⁸⁷ ስዮ አብርሃ ነፃነት እና ዳኝነት በኢትዮጵያ፣ ዜናዬ ማተሚያ ቤት፣ (2002)፣ ገፅ 63.

¹⁸⁸ *Ibid.*

¹⁸⁹ The Ethiopian Reporter, Feb 6, 2013.

¹⁹⁰ *Ibid.*

¹⁹¹ The Revised Federal Ethics and Anti-corruption Establishment Proclamation No 433/2005, Art 14; and the Repealed Federal Ethics and Anti-corruption Commission Establishment Proclamation No. 235/2001, Art. 10.

controversy to the public.¹⁹² It is not clear whether these officials are brought to justice due to their commission of the crime or their political dissent. There is diverse public opinion on these measures of the FEACC due to the perception of the public that the FEACC is not independent on the grounds mentioned above. Hence, the FEACC is unable to build public confidence due to its partisan affiliations.

3.2 SPECIAL PROCEDURE AND RULES OF EVIDENCE ON ANTI-CORRUPTION

In addition to the ordinary criminal law and evidence rules which regulate criminal prosecution including corruption, the parliament enacted a proclamation on special procedure and rules of evidence on anti-corruption.¹⁹³ The special procedure and rules of evidence proclamation is provided with a view to effectively investigate and prosecute corruption offences.¹⁹⁴ Moreover, there is also a need to regulate a system under which a property acquired through a criminal offence could be restrained, administered and confiscated; and to provide for the rules of evidence compatible with offences relating to corruption.¹⁹⁵

The proclamation deals with restraining and confiscation of property acquired by corruption offence, preparatory hearing, rules of evidence and protection of whistle blowers.¹⁹⁶ Under such headings there are detailed rules and procedures. Most of the rules and procedures are commendable to fight corruption if implemented properly. However, there are some rules which are in clear contradiction with procedural and evidence laws. For instance, if we see the confiscation procedure, the

¹⁹²Tamrat Layne (the then Prime Minister), Seye Abraha (the then ministry of defence), Abate Kisho (the then President of the Southern Nations, Nationalities and Peoples Region), and recently Melaku Fanta (Director of the Ethiopian Revenue and Customs Authority) and Gebrwahid W/giorgis (Deputy Director of the Ethiopian Revenue and Customs Authority).

¹⁹³Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 236/2001, *Federal Negarit Gazzeta*.

¹⁹⁴*Id.*, preamble

¹⁹⁵*Id.*, Proclamation No 236/2001.

¹⁹⁶*Id.*, Proclamation No 236/2001 See section two-six.

standard of proof expected to prove whether the person is benefited from the criminal conduct is that of the civil proceeding.¹⁹⁷ Nonetheless, corruption is a criminal offence and the standard of proof for criminal offence is proof beyond reasonable doubt not preponderance of evidence as in civil proceedings. Moreover, the proclamation also shifts the burden of proof from the prosecutor to the defendant “if the service is a government or a public service; if there is a ground which indicates a gratification has been sought, exacted a promise of, or received by the accused; and if the person who has sought or exacted promise of, or received gratification has a working relationship with the corrupter”.¹⁹⁸ But in criminal investigations, the prosecutor has a duty to prove the guilty of the defendant, not the defendant to prove his innocence in principle. However, the defendant has a right to prove his innocence by producing adverse evidence. In corruption cases however, the defendant may be found guilty not because the prosecutor proved his guilt beyond reasonable doubt but due to the defendant’s inability to prove his innocence.¹⁹⁹ More strikingly, the silence of the defendant may be considered as an admission of the offence of corruption.²⁰⁰ Though there is a constitutional guarantee to remain silent.

The special procedure didn’t guarantee expressly the procedural rights of defendants though the constitutional rights are applicable. Even by an amendment, the right to bail is not available for the offence of corruption.²⁰¹ However, both in the statement of objectives and principles, the AU anti-corruption convention clearly states that the fight against corruption should be in conformity with human rights and

¹⁹⁷*Id.*, Proclamation No. 236/2001 Art. 24 see also Revised Anti-corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005, Federal Negarit Gazeta, Art 33.

¹⁹⁸Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 236/2001, Art 37.

¹⁹⁹ In Crimes of terrorism and crimes against the constitutional order, the burden of proof may be transferred from the prosecutor to the defendant. See Ministry of Justice, Criminal Policy of Ethiopia (2011), p. 33

²⁰⁰Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 236/2001, Art 38.

²⁰¹Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation, Proclamation No. 239/2001 Federal Negarit Gazeta. Art 2.

fundamentals freedoms.²⁰² In no way the fight against corruption will be successful by violating the human rights of corruption perpetrators.²⁰³ In 2005 the special procedure and rules of evidence proclamation was revised.²⁰⁴ The revised proclamation comes up with some procedural guarantees like the right to apply to court to be released on bail and the right to appeal to the higher court if aggrieved by the decision of the lower court.²⁰⁵ In addition, it confers the Federal and regional high courts a first instance jurisdiction to adjudicate corruption offences failing under the jurisdiction of federal and regional government respectively.²⁰⁶ It also repealed the rules of silence of the defendant as an admission.

The revised proclamation gives immunity to persons who provide substantial evidence as to the offence of corruption though they themselves are participants.²⁰⁷ Moreover, in the case of hostile witnesses, the person who called the witness is authorized to raise leading questions to a prosecution or defense witness who, being unwilling to tell the truth, has given a statement contradictory from his previous statement.²⁰⁸ The revised proclamation also has special rules which protect whistleblowers.²⁰⁹

There is also a rule regarding asset recovery. “Where the property acquired by corruption offence is a property of a public office or public enterprise or any other person, the appropriate organ shall inform such person to sue for the recovery of the property. The appropriate organ shall follow up the civil suit instituted by the public office or the public enterprise.”²¹⁰ Recovering assets is one of the measures which states parties are required to take to prevent and combat corruption as discussed

²⁰²See the AU anti-corruption convention, Art 2 - 3.

²⁰³ሕፃ ኦብርፕ: 192 ላይ የተጠቀሰው.

²⁰⁴, Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation, Proclamation No. 434/2005, *Federal Negarit Gazeta*.

²⁰⁵*Id*, Proclamation No 434/2005, Art 4 & 5.

²⁰⁶*Id*, Proclamation No 434/2005., Art 7.

²⁰⁷*Id*, Proclamation No 434/2005., Art 43, the repealed proclamation had also the same rule.

²⁰⁸*Id*, Proclamation No 434/2005, Art 44.

²⁰⁹*Id*, Proclamation No 434/2005, Art 48-54.

²¹⁰*Id*, Proclamation No 434/2005., Art 32.

in section 2. Nonetheless, recovering assets is not sufficient by itself; the offense of corruption may bring damage to individuals, groups or peoples in general. Whenever, damage occurs as always will be, there should be a legal mechanism by which victims of corruption claim their compensation. The UNCAC urges signatories to take measures which can allow victims of corruption to claim compensation against those responsible for the damage.²¹¹ As the justification of the special procedure and rules of evidence proclamation, as mentioned above, is to effectively fight corruption and devising procedures which are compatible to corruption; it is also necessary to devise a legal mechanism by which the victims of corruption are redressed. However, the proclamation didn't take into account the concern of victims of corruption; even if it attempts, it is only to the extent of recovering their own property.

As some commentators argue the proclamation did not take a human rights based approach of fighting corruption.²¹² Moreover, it is also argued that the special procedure and rules of evidence are devised to dismantle the business of suspect corruption offenders.²¹³ Even if suspects may be free at the end of the trial, their properties (business) which are restrained will be dismantled due to improper use.²¹⁴ If it is the case, it will be against the right to property which is constitutionally guaranteed. Observance of constitutional and human rights principles in the fight against corruption will boost the public confidence on the FEACC, encourage COSs and media in particular and the society in general to fully participate and support the FEACCs struggle to avert corruption. Moreover, the objective of the criminal justice administration is to balance between the crime control and the due process model.²¹⁵ The public needs protection against crimes by “detection, apprehension,

²¹¹UNCAC, Art 35.

²¹²ሰዩ አብርሃም፣ 187 ላይ የተጠቀሰው.

²¹³*Ibid.*

²¹⁴*Ibid.*

²¹⁵ SK. Assefa, The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process, *Mizan Law Review* (2012), Vol. 6 No.2, p. 275.

prosecution and punishment of offenders” and at the same time the public also needs the observance of constitutionally guaranteed rights of suspects in the process.²¹⁶ The efficiency of the criminal justice administration is measured against the achievement of a balanced result between protection of the general public against crime and the right of the suspect and accused in the process.²¹⁷ Hence, it is important to respect the due process rights of corruption suspects in the struggle against corruption.

3.3. CORRUPTION UNDER THE CRIMINAL CODE OF ETHIOPIA

The new Criminal Code of Ethiopia contains a fairly large list of acts which constitute corruption. These crimes are categorized under two sections which deal with crimes against public office. The first section deals with corruption crimes committed by public servants in breach of trust and good faith. These crimes are abuse of power, corrupt practices/bribery, acceptance of undue advantage, maladministration, unlawful disposal of object in charge, appropriation and misappropriation in the discharge of duties, traffic in official influence, illegal collection or disbursement, undue delay of matters, taking things of value without or with inadequate consideration, granting and approving license improperly and possession of unexplained property.²¹⁸

When public servants commit these crimes, depending upon the circumstances and the offence they will be punished by simple or rigorous imprisonment not less than one year up to twenty five years and a fine of two hundred thousand.²¹⁹ In addition to public servants, councilors, arbitrators, jurors, trustees or liquidators, translator or interpreters engaged by the public authorities will also be criminally liable if they commit corrupt acts.²²⁰ However, the criminal code makes

²¹⁶*Ibid.*

²¹⁷*Ibid.*

²¹⁸ The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Arts. 407-419.

²¹⁹ FDRE Criminal Code, Arts 407-419.

²²⁰ FDRE Criminal Code, Art 410.

liable national public servants only. Nonetheless, the UNCAC in mandatory terms require states parties to criminalize bribery not only of national public officials but also foreign public officials and officials of public international organizations as corruption has an international dimension.²²¹ By the same token, the AU anti-corruption convention also criminalizes bribery by public officials or any other person in the performance of public duties.²²² Though the AU anti-corruption convention didn't expressly mention officials of foreign and public international organizations, it can include them all as it say any person running public duties.

More importantly, the criminal code lists acts of corruption are offences which will be punished if committed against public office as the title of the section clearly shows. Anyone with the exception of public officials is free to commit these offences in the private sector. Nevertheless, both the AU anti-corruption convention and the UNCAC criminalize corruption in the private sector as corruption in this sector greatly harms the society and the country at large.²²³ Especially, the UNCAC provides the criminalization of bribery and embezzlement of property in the private sector.²²⁴

Furthermore, the UNCAC urges States Parties to adopt measures which are necessary to establish the liability of legal persons for participation in corruption offences.²²⁵ The liability of legal persons can be "criminal, civil and administrative; however, such liability is without prejudice to the criminal liability of the natural persons who have committed the offences".²²⁶ But, the criminal code did not consider the criminal liability of legal persons which participated in corruption offences as far as they are not in contact with the public offices.²²⁷

²²¹UNCAC, Art. 15 &16.

²²²AU Anti-Corruption Convention, Art 1(a &b).

²²³AU Anti-Corruption Convention, Art.11 and UNCAC, Art. 21 &22

²²⁴UNCAC, Art 21 & 22.

²²⁵ *UNCAC, Art 26.*, Art 26.

²²⁶ *UNCAC, Art 26*

²²⁷ The FDRE Criminal Code, Art, 427(5).

The second section deals with crimes of corruption committed by third parties in connection with public office. The contrary reading of this section shows that third parties may commit corruption offences outside the realm of public office and left unpunished. Corrupt practices such as bribery, giving things of value without or with in adequate consideration, acting as a go-between, use of pretended authority and traffic in private influence are punishable acts if committed by third parties.²²⁸ The punishment ranges from simple imprisonment or rigorous imprisonment up to fifteen years and a fine of fifteen thousand birr depending up on the offence and the circumstances.²²⁹

3.4. DISCLOSURE AND REGISTRATION OF ASSETS PROCLAMATION

In order to develop and maintain public trust and confidence in government and its officials, it is important to develop and maintain systems of accountability and transparency.²³⁰ These include putting in place the right legal, institutional and administrative arrangements that enable and support transparency and accountability in public service.²³¹ The disclosure and registration of assets proclamation is provided with a view to enhance transparency and accountability in the conduct of public affairs.²³²

Moreover, it also aims to avoid the possible conflict of interests, i.e. between public interest and private interest.²³³ There are several mechanisms for dealing with conflict of interest in relation to elected and appointed officials and public servants. However, the most widely used

²²⁸ The FDRE Criminal Code., Arts 427-431.

²²⁹The FDRE Criminal Code, Arts 427-431

²³⁰G. Larbi, *Between Spin and Reality: Disclosure of Assets and Interests by Public Officials in Developing Countries*, (2005) (paper presented to conference on Redressing The State? Political Corruption in Development Policy and Practice, IDPM, University of Manchester).

²³¹*Ibid.*

²³²A Proclamation to Provide for the Disclosure and Registration of Assets, Proclamation No. 668/2010, Federal Negarit Gazeta, Preamble.

²³³*Id., Proclamation No. 668/2010.*

mechanisms are those that try to avoid or minimize a conflict of interest from arising.²³⁴ These include disqualifications from office and disclosure of personal interests.²³⁵ Ethiopia opts to adopt the later approach by enacting disclosure and registration of assets proclamation. The proclamation is applicable to appointees, elected persons and public servants of the federal government and the Addis Ababa and Dire Dawa city administrations.²³⁶ Regional governments will have their own disclosure and registration of assets proclamations; Tigray, Gambela, Southern Nations, Nationalities and Peoples, Oromia, Amhara and Benshagul Gumz enacted their respective proclamations and finalized their preparation to implement it.²³⁷ However, all proclamations and regulations which are enacted to fight corruption are applicable both at the level of federal and regional governments. But in the case of disclosure and registration of assets proclamation, the same rule was not followed. Regional governments may have their own laws. One of the justifications for regional laws is to give each region a chance to incorporate its own peculiar features as regions are diverse in culture, custom and traditions. However, in the case of disclosure and registration of assets there is no compelling reason which justifies different laws.²³⁸ If it is the case, the federal proclamation would have been applicable in the regions. There are also practical problems of enforcement; for instance, the FEACC registered the assets of 49, 833 appointees, elected persons and public servants; while the Tigray region Ethics and Anti-corruption commission registered the assets of 993.²³⁹ Moreover, the other regions didn't begin registration.²⁴⁰ More surprisingly the regional State of Somali, Afar and Harari didn't enact their own disclosure and registration

²³⁴ C. Gerald, *Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International, Berlin, (1998).

²³⁵ *Ibid.*

²³⁶ A Proclamation to Provide for the Disclosure and Registration of Assets, Proclamation No. 668/2010, Art 3.

²³⁷ Annual report of the FEACC, Addis Ababa, 2012.

²³⁸ Regional governments can enact laws by taking into consideration their peculiar features and consequently the nine regions may come up with different laws. If the nine regional laws are similar with themselves and the federal law, there may not be a need to have regional laws while the federal law can be applicable in the regions.

²³⁹ Annual report of the FEACC, *supra note* at 237.

²⁴⁰ *Ibid.*

of assets laws.²⁴¹ All these will have an impact on the national fight against corruption. Like its investigation and prosecution power, the FEACC can delegate its power of registration of assets to the regional Ethics and Anti-Corruption Commissions.

The review of disclosure practices shows that there are some basic questions which need to be addressed by disclosure laws.²⁴² These are i) who must disclose? ii) What must be disclosed? iii) What is the frequency of disclosure? iv) Where to disclose? v) Who has access to the information? Within these basic questions, the disclosure and registration of assets proclamation will be analyzed. By such standard the proclamation has a potential to further the fight against corruption in the federal government of Ethiopia.

Any appointee, elected persons or public servants are under obligation to register and disclose their assets.²⁴³ In the definition part of the proclamation, the term appointees, elected persons and public servants are defined.²⁴⁴ The legislative, executive and judicial organ officials; public servants and officials of public enterprises are under a duty to register and disclose their assets. The proclamation covers a wide range of appointees, elected persons and public servants; and thereby has an impact in safeguarding public confidence in the conduct of public affairs. The above mentioned persons are obligated to register and disclose their assets²⁴⁵ “under their ownership or possession of themselves or their families and the sources of income and those of their families”.²⁴⁶ However, common property acquired through inheritance and held by the

²⁴¹ *Ibid.*

²⁴² L. George, Assessing Infrastructure for Managing Ethics in the Public Service in Ethiopia: Challenges and Lessons for Reformers, *International Review of Administrative Science*, (2001), Vol.68, No2, pp.251-262.

²⁴³ A Proclamation to Provide for the Disclosure and Registration of Assets, art 4.

²⁴⁴ For a detail list of persons who are obligated to register and disclose their assets see a Proclamation to Provide for the Disclosure and Registration of Assets , art 2 (4,5,6).

²⁴⁵ *Id.*, Proclamation No. 668/2010 Asset means any movable or immovable or tangible or intangible property and includes landholdings and debts as per article 2(1).

²⁴⁶ *Id.*, Proclamation No. 668/2010, Art 4(1).

heirs for private use, household goods and personal effects, and pension benefits are excluded from registration and disclosure.²⁴⁷

The FEACC is the custodian of the proclamation. It has a duty to register the assets of appointees, elected persons and public servants.²⁴⁸ However, the FEACC can delegate fully or partially as the case may be to Ethics Liaison Units to register assets of appointees, elected persons and public servants.²⁴⁹ Each Ethics Liaison Units should send the document of registration of assets to the FEACC within 30 days from the date of registration.²⁵⁰

In addition to its signal of government commitment to transparency and accountability, the disclosure of information on personal interest may be used as an early-warning mechanism, an indicator that a person whose financial profile and life style are inconsistent with his/her financial income should be required to explain the situation.²⁵¹ Such disclosure of information should be made on a regular basis; it is not a onetime activity. The frequency of disclosure and registration of assets in the proclamation is two years.²⁵² Within these two years' time if there are things which are inconsistent in the financial life of the appointee, elected person and public servant, they should explain it otherwise it can be an offense by holding unexplained property.²⁵³ Even in times when the generated illegal income or asset may not be provable, the disclosure of information can be used as a separate vehicle for the detection of illicit enrichment and contribute to investigation and disciplinary procedures.²⁵⁴

²⁴⁷Id., Proclamation No. 668/2010, Art 5 .

²⁴⁸Id., Proclamation No. 668/2010, Art 6(1).

²⁴⁹Id., Proclamation No. 668/2010, Art 6(2).

²⁵⁰Id., Proclamation No. 668/2010, Art 6(3).

²⁵¹Organization for Economic Cooperation and Development (OECD, 2000), Trust in Government: Ethics Measures in OECD Countries, OECD, Paris.

²⁵²A Proclamation to Provide for the Disclosure and Registration of Assets, Art 7(3).

²⁵³Id, Proclamation No. 668/2010, Art. 13

²⁵⁴ See Organization for Economic Cooperation and Development, *supra* note 251 and United Nations Center for Social Development and Humanitarian Affairs, (Crime Prevention and Criminal Justice in the Context of Development: Realities and Perspective of the International Cooperation: Practical Measures against Corruption,

With regard to the registered information, the public has access to all information regarding the registration of assets of an appointee, elected person or a public servant.²⁵⁵ The FEACC and the concerned Ethics Liaison Units should make all information accessible to the one who wants once the person makes a written request to this effect.²⁵⁶ Nonetheless, information regarding family assets is confidential unless the interest of justice or FEACC requires.²⁵⁷ There is a calculated comprise between individual rights of privacy and public interest. The individual interest needs to be protected like the public interest.

The proclamation also puts some mechanism of avoiding conflict of interest. Whenever, there is conflict of interest appointees, elected persons and public servants have two duties.²⁵⁸ The first is to refrain from giving decision or opinion on the case as well as from taking any action that may be inconsistent with their official duty or may compromise their loyalty. And the second is to disclose the situation to the concerned higher official. Accepting gifts, hospitality and sponsored travel is prohibited if it puts public interest in jeopardy though it is possible to accept when doing so is required for work relationship under the condition of deposit of the gift or disclosure to the FEACC or relevant ethics liaison units.²⁵⁹ Following the event of conflict of interest, “any appointee, elected person or public servant should admit his fault and ask for apology or resign from office on his own initiative or required to do so by his superior”.²⁶⁰ Furthermore, these persons are under a duty to avoid conflict of interest even after their post-employment for two years.²⁶¹ Such measures will have a huge contribution in safeguarding public trust if properly implemented and monitored.

International Review of Criminal Policy, Nos. 41 &42, New York: United Nations, 1993).

²⁵⁵A Proclamation to Provide for the Disclosure and Registration of Assets, Proclamation No. 668/2010, Art 12(1).

²⁵⁶*Id.*, Proclamation No. 668/2010, Art 12(1)

²⁵⁷*Id.*, Proclamation No. 668/2010, Art 12(1)

²⁵⁸*Id.*, Proclamation No. 668/2010, Art 16.

²⁵⁹*Id.*, Proclamation No. 668/2010, Art 15.

²⁶⁰*Id.*, Proclamation No. 668/2010, Art 17

²⁶¹*Id.*, Proclamation No. 668/2010, Art 18.

3.5. PROTECTION OF WITNESSES AND WHISTLEBLOWERS

Protection of witnesses is an essential element in preventing crimes. As crimes are committed within the society, the cooperation of the society with law enforcement agencies especially in terms of informing, testifying and preventing have a significant effect in making the streets free from crimes. At the same time, however, those persons who makes testimony or collaborate with law enforcement agencies in the prevention of crimes should be protected against retaliation measures by the wrong doer or some other persons. Especially in corruption cases the degree of protection to witnesses should be strong given the power and the money the accused may have and the measure s/he takes to destroy any potential evidence.

Due to the imminent danger to witnesses and whistleblowers, the UNCAC urges States Parties to take appropriate measures to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony to corruption offences.²⁶² Likewise, the AU anti-corruption convention also calls for States Parties to take legislative and other measures to protect informants and witnesses in corruption and related offences.²⁶³ Equally important, the AU anti-corruption convention also requires States parties to adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons.²⁶⁴ However, on the contrary, the UNCAC seems in favor of protecting those who make reports against corruption offences in good faith and on reasonable grounds.²⁶⁵ Even if the reports were false, it doesn't require signatories to punish those persons who made false reports.

²⁶²UNCAC, Art 32.

²⁶³AU Anti-Corruption Convention, Art.5 (5).

²⁶⁴AU Anti-Corruption Convention., Art 5(7).

²⁶⁵UNCAC, Art 33.

Protection of whistleblowers in Ethiopia was part of the special procedure and rules of evidence proclamation.²⁶⁶ However, it deals with whistleblowers only and the rules were not detailed. In 2010, a proclamation was enacted to protect witnesses and whistleblowers in criminal offences.²⁶⁷ When we see the scope of application of the proclamation, it focuses on grave corruption cases and extends protection to witnesses and whistleblowers in its endeavor of fighting corruption. The protection provided will be applicable with respect to information or testimony or investigation under taken on a suspect punishable with rigorous imprisonment for ten or more years or with death without having regard to the minimum period of rigorous imprisonment.²⁶⁸ Moreover, the protection will be given if two cumulative conditions are fulfilled. The first one is where the testimony or information of the witness or whistleblowers is the only evidence which proves the commission of the crime and the second one is where there is a “threat of serious danger to the life, physical security, freedom or property of the witness, the whistleblower or a family member of the witness or a whistleblower”.²⁶⁹ However, for corruption crimes the punishment of which is below ten years, the proclamation will not be applicable. Due to the limited scope of application, one may infer that, corruption crimes the punishment of which is less than ten years will not be investigated and punished due to want of evidence though persons may have and failed to communicate due to the absence of protection.

Though the proclamation provides some protective measures to persons who are not protected, the measures are not strong and effective as they are related to payment of transport allowance and per diem, suspension of retaliatory administrative measure or taking some compensatory measure and the provision of counseling service to the witness or

²⁶⁶See section 7 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005

²⁶⁷A Proclamation to Provide for the Protection of Witnesses and Whistleblowers of Criminal Offences, Proclamation No. 699/2010, *Federal Negarit Gazeta*.

²⁶⁸*Id.*, Proclamation No. 699/2010, Art.3 (1).

²⁶⁹*Id.*, Proclamation No. 699/2010, Art 3(1(a,b)).

whistleblower.²⁷⁰ Even if the provisions of those protective measures need resource and economy, the fight against corruption should not be compromised for economical explanation. Since corruption consumes a large amount of money and the countries precious resources; so the fight against corruption should be pursued at any cost.

The protective measures available for witnesses and whistleblowers range from physical protection of person and property to concealing identity and ownership, to change in identity, to provision of self-defense weapon and immunity from prosecution for an offence for which he renders information.²⁷¹ Furthermore, “prohibiting an accused person from reaching the protected person’s residence, work place or school before or after a final judgment is delivered on the crime for which information is given; not to disclose the identity of a witness until the trial process begins and the witness testifies; hearing testimony in camera; hearing testimony behind screen or by disguising identity; producing evidence by electronic devices or any other method; provision of medical treatment free of charge at government hospitals in case of injury sustained as a result of retaliatory measure; covering costs of basic needs in case of incapacity to work as a result of retaliatory measure; in case of death as a result of retaliatory measure, covering funeral expenses and provision of pecuniary subsidy to family and assisting the protected person to secure job and education opportunity” are some of the protective measures.²⁷²

Despite the AU anti-corruption conventions call for the adoption of legislative measures to punish those who make false and malicious report against innocent persons, the proclamation didn’t address it. But by being a party to the convention, it is commendable to have such legislative measure to punish those who make false and malicious reports as it is equally important to safeguard the rights and freedoms of innocent people. The human rights approach of fighting corruption should be

²⁷⁰*Id.*, Proclamation No. 699/2010, Art 3(2).

²⁷¹*Id.*, Proclamation No 699/2010, Art 4

²⁷²*Id.*, Proclamation No. 699/2010, Art 4

adhered by States Parties such as Ethiopia to prevent and combat corruption.

3.6. ETHICS LIAISON UNITS

In addition to the FEACC which leads the fight against corruption at the national level, there are ethics liaison units in each public office or enterprise which coordinates ethical issues.²⁷³ Ethics liaison units are established with three objectives in view. These are, “endeavor to create public employees who do not condone corruption by promoting ethics and anti-corruption education, work discipline, professional ethics, consciousness of serving the public and sense of duty among employees; prevent corruption and impropriety in public offices and public enterprises; and endeavor to cause acts of corruption and impropriety be exposed and investigated and appropriate actions are taken against the perpetrators”.²⁷⁴

In order to achieve these objectives, ethics liaison units are tasked with numerous functions such as raising awareness on corruption policies, laws and good conduct to officers and staffs of public offices and enterprises; continuous follow up as to the implementation of these laws and advising heads of public offices and enterprises.²⁷⁵

Ethics liaison units are accountable to the head of the respective public office and enterprise.²⁷⁶ Due to this fact, the effectiveness of the ethics liaison unit to some extent depends on the commitment of the head of the public office or enterprise. Especially, on issues of ethical violations and corruption which may be made by high level officials, the determination of the ethics liaison units highly relies on the head of the public office or enterprise. Though there is a room for manipulation, the commitment and dedication of the ethics officer will play a significant role in bringing non-ethical and corrupt practices to the public. As the ethics officer is not removed without good cause, she will have as confidence in revealing

²⁷³The Council of Ministers Regulation to Provide for the Functioning of Ethics Liaison Units, Regulation No. 144/2008, *Federal Negarit Gazeta*, Art 3.

²⁷⁴*Id.*, Reg. No 144/2008, Art. 4.

²⁷⁵*Id.*, Reg. No 144/2008, Art. 7.

²⁷⁶*Id.*, Reg. No 144/2008, Art 7.

non-ethical and corrupt practices.²⁷⁷ More meaningfully, ethics liaison units can participate in an endeavor to create a corruption free society by dissemination of the ideals of public service, democracy, human rights, good governance and the evils of corruption. If they are allocated the necessary budget, human resource and independence, they can play a magnificent role in the respective public offices and enterprises in fighting corruption through investigation and awareness creation.

CONCLUSION

Corruption has existed over millennia as one of the worst and the most widespread forms of behavior which is incompatible with the ideals of justice, democracy, the moral fabric of the society and human rights.²⁷⁸ Due to the universality of the problem, the international community devised a law with different measures to contain corruption. Hence, prevention, criminalization, remedies to victims and asset recovery are some of the measures which the UNCAC and the AU anti-corruption conventions urge States Parties to take both in the public and private sector.

Ethiopia joined this international movement against corruption by establishing a specialized anti-corruption agency, FEACC, and by ratifying the UNCAC and the AU anti-corruption conventions. Especially, after the establishment of the FEACC, the issue of fighting corruption in Ethiopia gets momentum. This is reflected in the adoption and revision of laws, rules of procedures and establishment of ethics liaison units. Though the above initiatives are essential ingredients in fighting corruption in Ethiopia, there are some loopholes in the legislative measures. First, the Ethiopian legal regime on corruption excludes the private sector though it contributes much to the national economy in terms of GDP and employment opportunity.

²⁷⁷*Id.*, Reg. No 144/2008, Aart 16.

²⁷⁸Criminal Law Convention on Corruption, Explanatory Report, available at, <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm> (last accessed 1 February 2013).

Second, the issue of independence of the FEACC in running its duties is questionable especially due to the government's involvement in tasks other than investigation or prosecution. Especially, the legal procedure and the practice of appointment and removal of the executive bodies of the FEACC fuels fire on its independence. Moreover, the FEACC is not in the position to work with CSOs and the media due to partisan concerns.

Third, the legal regime of corruption in Ethiopia didn't take a human rights approach; for instance, there is no adequate procedural guarantees for corruption perpetrators (the right to bail and appeal only are expressly provided in the Special Procedure and Rules of Evidence Proclamation), there is shift in the burden of proof (against the right of presumption of innocence), and there is a practice of improper use of restrained property (against the right to property). In general, it didn't take a human rights approach of fighting corruption as outlined by the AU anti-corruption convention. With regard to criminalization, as stated in the criminal code, it didn't cover corrupt practices/bribery which may be committed by foreign public officials and officials of public international organizations though the UNCAC mandatorily requires states to do so.

Fourth, there is no uniformity in the disclosure and registration of assets between the federal government and regional governments and within regional governments themselves. Some regions adopt their own laws; some are on the process and others didn't begin even the process. Due to such legislative measure, the implementation of disclosure and registration of assets laws at the national level is very low due to the fact that the regional governments didn't fulfill their own respective obligations. Even with regard to witnesses and whistleblowers proclamation, the scope of application is limited to grand corruption and excludes petty corruption and systematic corruption though the later types of corruption greatly affect the day to day lives of the society. Moreover, as a calculated compromise between individual right of freedom and public interest, there should be a law which punishes those who make false and malicious reports against innocent persons as

provided in the AU anti-corruption convention. However, this is not the case in Ethiopia.

More importantly, however, ethics liaison units can participate in an endeavor to create a corruption free society by dissemination of the ideals of public service, democracy, human rights, good governance and the evils of corruption. If they are allocated the necessary budget, human resource and independence, they can play a magnificent role in the respective public offices and enterprises in fighting corruption through investigation and awareness creation.

Finally, revising and incorporating the measures provided by the UNCAC and the AU anti-corruption conventions as discussed in the article will enhance the anti-corruption campaign in Ethiopia. The FEACC should take the lead in giving life to the measures envisaged by these conventions. To this end, especially, working with CSOs and the media is having a paramount importance.