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Crossing Political hurdles to good governance  
and human rights: The Executive Branch Vs. The  
Director of Public Prosecutions in Zambia

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# Summary

The thesis is inspired by the events that surrounded the Office of the Director of Public Prosecutions and it seeks to elaborate the fact that political interference has repercussions on human rights as stated by both national and international law. It looks at fighting corruption under the theme of good governance at another angle.

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# Abbreviations

ACC      Anti Corruption Commission

DPP      Director of Public Prosecutions

ICCPR    International Covenant on Civil and Political Rights

UDHR    Universal Declaration of Human Rights

# 1 Introduction

## 1.1 Overview of the problem

*The DPP's office is the pillar of criminal justice  
but a dark cloud now hangs over this important  
office and it is your duty to correct the dent.*<sup>1</sup>

Chief Justice Ernest

Sakala

Political intervention in the operations of the office of the Director of Public Prosecutions (DPP) in Zambia came to the fore when the incumbent President, Levy Mwanawasa, as head of the Executive branch, attempted to sack the DPP contrary to constitutional procedures. This move was prompted by allegations that the DPP was mishandling some of seemingly important corruption cases involving the past head of state, ex-president Frederick Chiluba and his close associates. That meant that if the allegations were true then this would result in the acquittal of Chiluba and his colleagues.

In accordance with the Constitution, the DPP cannot be sacked or removed from Office unless his conduct has been investigated by the tribunal composed of judges and they recommend for his removal or sacking if they find that his/her conduct amounts to misbehaviour as provided for under the constitution.

Under pressure from some sectors of society and the then incumbent DPP, Mukelabai Mukelabai the President proceeded to appoint a tribunal consisting of three serving judges of the High Court of Zambia. Among the assertions the tribunal had to investigate included misbehaviour, negligence, and failure to supervise and provide leadership in cases of national plunder resulting in suspicious acquittals incompetence.<sup>2</sup>

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<sup>1</sup>. The Chief Justice of Zambia. Refer to the Times of Zambia, "[Restore DPP's dented image-Chief Justice.](http://www.times.co.zm/news/viewnews.cgi?category=2&id=1075440106)" < <http://www.times.co.zm/news/viewnews.cgi?category=2&id=1075440106> > Visited on 24<sup>th</sup> September 2004

<sup>2</sup>. Legal Brief "[Zambia: Chief prosecutor has new charges thrown at him](http://www.legalbrief.co.za/publication/archives.php?mode=archive&publication=LegalbriefAfrica&issueno=63&format=html)" < <http://www.legalbrief.co.za/publication/archives.php?mode=archive&publication=LegalbriefAfrica&issueno=63&format=html> > Visited on 4<sup>th</sup> September 2004

Proceedings of the tribunal were held *in camera*. The Office of the Attorney General represented the government and after all the concerned parties had presented their testimonies, the tribunal submitted its recommendations to the President. The DPP was cleared of all allegations and that the saga was as a result of mistrust, suspicion and lack of confidence, which existed between the DPP on one hand and the executive chairman of the Task Force and the Nchito brothers on the other hand, the working relationship between the two offices had degenerated to a level beyond redemption.<sup>3</sup> The tribunal recommended that the Mukelabai be retired. He was therefore retired in public interest with full benefits.

The President set up the Task Force, referred to above, in July 2002. Its main function was to assist the DPP and various law enforcement agencies, such as Anti Corruption Commission (ACC), Drug Enforcement Commission (DEC), and the Police Force, to ‘investigate allegations of economic plunder against the former president and his associates.’<sup>4</sup> In fact, it comprised officers seconded to it from the same law enforcement institutions and two private lawyers and an executive head.

All the above activities have had serious repercussions on the administration of criminal justice and the protection and promotion of human rights affected in the course of prosecutorial functions. This is with regard to human rights encompassed under both national and international laws.

The independence and security of the office has also been shaken, especially with the creation of a seemingly more powerful inter-agency body (the Task Force) and mishandling of the removal of the former DPP. This is contrary to the provisions of the national and international laws relating to the relationship between the executive branch of government and the prosecutorial authority.

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<sup>3</sup>. Times of Zambia ”DPP Mukelabai cleared, retired in public interest.” <

<http://www.oneworld.net/article/view/76729/1/>> Assessed on 4<sup>th</sup> September 2004

<sup>4</sup>. Alfred Chanda, ”National Integrity Systems: Country Study Report- Zambia 2003 ” p. 79.

Available online < [www.u4.no/document/showdoc.cfm?id=86](http://www.u4.no/document/showdoc.cfm?id=86) > Assessed on 30<sup>th</sup> September 2004



## **1.2 Aim and purpose of study**

The public attack on the DPP leading to his removal was the first of its kind in Zambia. Besides very little research has been conducted on the significance of the DPP's office, presumably due to the fact that the office is viewed as a non-consequential. Thus, the main aim of this study is three-fold; firstly, to underscore the importance of DPP's constitutional authority in the fight against corruption and to question the political interference in the office exuded by the Executive branch of the government in the course of fighting corruption; secondly, to examine the constitutional and international law provisions on the removal or disciplinary measures against the DPP so as enquire into the procedure adopted by the Executive in the removal of the past DPP and further probe the findings and recommendations of the tribunal and lastly to highlight the effects of the said political interference in the realisation of criminal justice. Also bringing out the fact that the process leading to the realisation of good governance is as equally important as the end result.

Therefore, the purpose of undertaking this study is to contribute to the discussion that political intrusion in the running of an established institution of governance such as the office of the DPP can have a negative impact on society. Thus, it is the contention of the study that, in as much as political will is inevitable in the struggle against corruption too much of it on a well established institution such as the DPP, will result in unjustified political interference and finally have repercussions on criminal justice and governance. It is further contended that non-governmental organisations have a major role to safeguard against such political interventions.

## **1.3 Research questions**

- What role is the executive playing in the fight against corruption?
- What role does the DPP play in criminal justice especially with regard to the fight against corruption?

- In relation to both the national and international law on the independence of the operations of the Office of the DPP, is this Office independent?
- Has the executive adhered to the principles enunciated by international law as regards the promotion and protection of rights of accused persons under international human rights law?
- Is it possible to revisit the DPP *vis a vis* the Executive constitutional status?
- Using an established concept such as rule of law is it possible to restrain the powers of the executive in relation to the criminal justice?
- As regards the removal of the DPP, were the constitutional and international law procedures adhered to?
- In the scenario before us, should the end justify the means?
- Where national law has failed can we use international law to compel the government to comply with human rights standards and how can this be achieved?

## **1.4 Theory**

To enable us achieve the intended purpose of this study regard will be had to the following concepts and principles: the rule of law, and the notion of good governance. Good governance shall be used as the theme pertaining to the fight against corruption that is the main topic of the subject at hand. Whereas as the principle of rule of law is to highlight the fact that activities undertaken by any government organ, herein referring to the executive, are to be done within certain stipulated laws and powers.

## **1.5 Scope and limitations of study**

The scope of the study is restricted to the relationship existing between the executive and the DPP's office, with regards to the fight against corruption, which the government embarked upon. The thesis dwells on the recent events that shrouded the DPP's office and ultimately led to the retirement of its Director. This scenario shall be compared and contrasted with a similar position in South Africa. It will also refer to the judiciary. In this respect, the adherence to the rule of law and protection of human rights

are dependent on the independence and impartiality of the judiciary.

## **1.6 Hypothesis**

The assumptions in this study are as follows:

Despite there been a constitutional provision that empowers and secures the office of the DPP, the Executive still impinges in the operations of the office.

That the political interference has continued through the creation of the Task Force thus circumventing the constitutional powers of the DPP.

That the President violated the provisions of the Constitution of Zambia and major international law provisions relating to prosecutions authority in the way he handled the DPP's removal.

That the process to good governance does require political will but too much political will amounts to distorts the notion and merely amounts to political interference.

## **1.7 Methodology**

This is basically a library research relying on the materials found in the library, such as textbooks, articles and journals and the Internet. National laws have been extensively utilised. Research through unscheduled interviews with some former and current officials from the DPP's department and academicians and some private lawyers. Several human rights instruments have been relied upon as well. Reference was also made to the Constitutions of Zambia and South Africa and many international law instruments.

## **1.8 Structure**

This thesis is arranged in chapters and these are follows- There is the introduction that consists of the background of the case study and the theme of the paper. The first chapter identifies the concepts that relate to the topic. Chapter two forms the core of the thesis and gives an extensive look at the relationship between the office of the DPP and the Executive branch led by the president in the context of the fight against corruption. In chapter three, examines the international law as regards the criminal justice system and Chapter four looks at the practical aspect of the national law in conformity to the set international standards. Chapter five traces the human rights obligations under criminal justice and highlights any possible implications that may have arisen due to political intrusion in the DPP's duties. The last Chapter will conclude the thesis and make necessary recommendations.

## 2 Relevant concepts identified and discussed

### 2.1 Good Governance

In this thesis, the fight against corruption shall be encompassed under the notion of good governance. The reasons for this shall be given in the course of the paper.

There is no single connotation as to what good governance actually means. Not even its scope, rational or objective has been defined. Governance itself is a broad concept and encompasses activities relating to politics, development, economics and social. Numerous definitions have been advanced and one of them states that governance is the ‘sum of the many ways individuals and institutions, public and private, manage their affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative actions may be taken.’<sup>5</sup> This definition does not restrict itself to a group of individuals or institutions and can be applicable in any given situation. In this circumstance, it will relate to the activities of the government and anti corruption institutions.

It ought to be emphasised that ‘governance does not begin and end with the government;’<sup>6</sup> thus, it should not be synonymous with the government. There are various players involved in this quest, such as politicians, professional staff, administration, civil society and donors. However, the political system is the key player since governance is dependent on the relations between government on one side and institutions of governance or administrative wings on the other hand.

Politicians are inevitable in all governance projects, because they have been mandated to guard interests of those they govern. The World Bank has stated that governance implies the ‘ability,

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<sup>5</sup>. Commission on Global Governance our Global Neighbourhood, Oxford, University Press. 1995. p 2. < <http://elin.lub.lu.se/sockets/webzc/bs> > Visited on 16th September 2004

<sup>6</sup>. Good Governance and Global Governance Conceptual and Actual Challenges < <http://elin.lub.lu.se/sockets/webzc/bs> > Visited on 16th September 2004

capacity and willingness of political authorities to govern effectively in the common interest.<sup>7</sup> The exact nature and extent to which the politicians need to be involved has not been elucidated. There is also the question of accountability to human rights. **Sano**<sup>8</sup> argues that in many conceptualisations of good governance, accountability to human rights is presupposed, but its not well defined.’ Perhaps it has to do with the way the concept was formulated as the World Bank sought to deal with the aspect of economic development and whether a government is democratic or not falls outside its mandate.

This study examines the aspect of human rights from an angle of the criminal justice system. Reason being that in the quest of attaining the notion of good governance, the rights of accused persons have been greatly affected by the interferences exerted on law enforcement institutions from the executive branch as a political wing of the government. Hence, we speculate on the motives that the government would have had to fight corruption in that manner.

There are a number of definitions of good governance that have been proposed. However, this thesis shall not endeavour to question the definitions. In its simplest state good governance strives to attain; transparency and accountability in the managing of public affairs, eradication of corruption, supremacy of the law (rule of law), public participation in decisions that effect them and improving human rights norms. In terms of the market arena, it aims at securing fair competition. The United Nations (UN) Secretary-General Kofi Annan stated that ‘good governance is ensuring respect for human rights and the rule of law; strengthening democracy, promoting transparency and capacity in public administration.’<sup>9</sup> This is not only a simple but also an inclusive definition and shall be the basis of our study.

Good governance is a fashionable notion being promulgated by everyone in society; be it a politician within or without government, human rights advocates, the donors etc. For the

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7. Carlos Santiso, “Good Governance & Aid Effectiveness: The World Bank & Conditionality,” The Georgetown Public Policy Review, Vol. 7 No. 1 Fall 2001. p 5. Also available online < [www.sti.ch/pdfs/Swap108.pdf](http://www.sti.ch/pdfs/Swap108.pdf). > Visited on 24th September 2004

8. Hans-Otto Sano in “Human Rights and Good Governance: Building Bridges,” Hans-Otto Sano and Gudmundur Alfredsson, Martinus Nijhoff Publishers, The Hague. 2002. p 131

9. “Good Governance & Global Governance Conceptual & Actual Challenges.” Supra

financial institutions and donor countries the notion of good governance has become a political and economic conditionality that is inseparable from debates about appropriate bilateral and multilateral financing for developing and former socialist bloc countries.<sup>10</sup> Most countries in dire need of aid have outlined some outstanding plan of actions or programmes designed to assist them in persuading the lending States. It must be inquired as to whether this is the practical way of realising good governance because essentially these plans may remain only on paper and are not put into practice/usage. The government pays lip service to the same programmes of action and in most cases the ordinary citizens have no means of monitoring the implementation or lack thereof.

One may argue that perhaps lack of resources inhibits the real implementation of these policies or programmes. This argument may be sustained where the good governance process requires a large budgetary allocation. However, there are some areas that may merely require the addressing of key human rights issues such as removal of restrictions on freedom of expression so as to open up public participation or adhering to laid procedures relating to independence of legal institutions, these do not require exorbitant amounts of money hence should not be constrained. What is actually required is the political commitment to put programmes into action.

As stated above, good governance has become the condition upon which a developing country can secure aid from international lending institutions: the World Bank and International Monetary Fund (IMF) and donor countries. These in turn apply pressure on the borrowing country to address numerous social, political, economic and civil ills or weaknesses, and one of these is the eradication of endemic corruption. The World Bank in 1998 identified the essentials of good governance to be transparency, voice the free flow of information, a commitment to fight corruption and a well-trained, properly remunerated civil service.<sup>11</sup> Thus, a good governance agenda that is designed to tackle the corruption issue is vital in that it also affords public administration the opportunity to be transparent

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<sup>10</sup>. Ibid

<sup>11</sup>. Wolfensohn in “Africa in the rise of rights-based development” by Kate Manzo  
<[www.elsevier.com/locate/geoforum](http://www.elsevier.com/locate/geoforum)> Visited on 16<sup>th</sup> September 2004

and accountable to the public at large and inadvertently ensuring human rights. In fact, the World Bank has admitted to supporting “a broader range of human rights” indirectly through a good governance agenda designed to fight corruption, improve transparency and accountability...<sup>12</sup>

However, the pressures imposed by donors on developing countries may have their own repercussions; for instance, a government that has taken up the task of fighting corruption, could take an initiative to strengthen the legal and administrative mechanisms enabling its systems to follow ascertained procedures to successfully combat corruption or may basically hasten through the procedure to achieve a presumed result with the legal mechanisms limping behind, that is, leaving them as weak as they were in the beginning.

In the latter situation, corruption has the propensity to continue as the preventive and punitive measures are never adequately addressed and there may be other dangers that may result. Therefore, there is need to strike a balance when tackling the corruption issue. Due care must be taken to identify the weak links in the administrative system to curtail corrupt practices and the legal framework must be firmly supported for it to contain the practice. In a nutshell, governments should not be hurried to achieve costume makeovers, as good governance can be meaningful only if it can be implemented through specific and concrete action plan.<sup>13</sup>

### **2.1.1 Corruption; Definitions and effects**

One main feature of a good governance undertaking is the combating of corruption. Corruption has many definitions and it manifests itself in a number of ways. In this case, corruption is defined as follows ‘the behaviour of private individuals or public officials who deviate from the set responsibilities and use their position of power in order to serve private ends and secure

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<sup>12</sup>. Ibid.

<sup>13</sup>. “Human Rights, Good Governance and Civil Society.” National Commission on Human Rights Publications, Malaysia. 2000. p 36



private gains.<sup>14</sup> As regards public officials, these abuse their power for illegitimate personal gain.

Corruption permeates society and if condoned can break down society as it uproots moral, social and human rights values. It therefore poses a serious threat to development. The United States Agency for International Development (USAID)<sup>15</sup> has broken down the consequences of corruption on some of the most significant aspects of human endeavour. It stated that corruption in the political realm, undermines democracy and good governance by subverting formal processes; in elections and legislative bodies reduces accountability and representation in policymaking; in the judiciary suspends the rule of law; in public administration results in the unequal provision of services. And that it also undermines economic development, by creating unfair competition.

In all the areas outlined above human rights are greatly affected as the government system collapses. When state funds are illegally diverted public services such as health care, education or public transport suffers hence; the poor suffer the most, as they are least able to absorb its costs.<sup>16</sup>

In order to deliver in the quest of good governance, the government has an obligation to put in place legislative and administrative measures to help curb corruption efficiently and effectively. This is an ongoing process, as the task cannot be accomplished a short time, however there must be concrete steps taken. These steps must also include either reforming or respecting institutions established to enforce the law and upholding of human rights.

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<sup>14</sup>. Information International in Lebanon, "Lebanon Anti-Corruption Initiative Report 1999" at < <http://www.unodc.org/unodc/en/corruption.html> > Accessed on 29<sup>th</sup> October 2004

<sup>15</sup>. Refer to "Fighting Corruption," [http://www.usaid.gov/our\\_work/democracy\\_and\\_governanc/publications/df/pnance070.pdf](http://www.usaid.gov/our_work/democracy_and_governanc/publications/df/pnance070.pdf). Visited on 15<sup>th</sup> September 2004

<sup>16</sup>. Un Office on Drugs and Crime, "Why a Global Programme against Corruption." < <http://www.unodc.org/en/corruption.html> > As current as 29<sup>th</sup> October 2004

## 2.1.2 Fighting against corruptions internationally

Due to the effects that corruption brings on the citizenry, especially the poor, of any given society the international community has come in full force to find means of eradicating it. Chief among them is the emphasis placed on fighting corruption for good governance and as a means of financial assistance. The international community from various sectors be it the government or leading figures have come together to create guidelines on how to combat corruption through the documents such as the *Declaration of Paris - A call for Action Against Large Scale Corruption*.<sup>17</sup> This Declaration makes recommendations on punishing offenders (not allowing them to benefit from impunity) and reforming laws and, making investigations effective and no less fair<sup>18</sup> *Convention against Transnational Organized Crime*<sup>19</sup> and the *United Nations Convention against Corruption*.<sup>20</sup>

This extends to regional groupings as well. For example there is the *Inter-American Convention Against Corruption*,<sup>21</sup> under the OAS Convention. This was the first international convention dealing with corruption when it was adopted in 1996 by the member states of the Organisation of American States; in Europe under the Council of Europe there are the Strasbourg Conventions against corruption under both Criminal<sup>22</sup> and Civil<sup>23</sup> laws; in Africa, there is the *SADC Protocol against Corruption*, which was adopted in 2001 and all 14 SADC member States demonstrating a clear political commitment and regional response to addressing corruption, signed the Protocol.<sup>24</sup>

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<sup>17</sup>. Involved were leading public figures, judges and prosecutors

<sup>18</sup>. Transparency international at:

[http://www.transparency.org/pressreleases\\_archive/2003/2003.06.18.paris\\_declaration.html](http://www.transparency.org/pressreleases_archive/2003/2003.06.18.paris_declaration.html)  
> Visited 21<sup>st</sup> November 2004

<sup>19</sup>. Includes some limited criminal law and measures against corruption, was adopted by the General Assmby in 2000

<sup>20</sup>. Adopted by the General Assembly by Resolution 58/4 of 31 October 2003

<sup>21</sup>. <http://www.u4.no/document/conventions/oasconvention.cfm> > Accessed 2nd November 2004

<sup>22</sup>. Adopted on 27<sup>th</sup> January 1999 >

<http://conventions.coe.int/treaty/en/Treaties/Html/173.htm> > Visited on 21st November 2004

<sup>23</sup>. Adopted on 4<sup>th</sup> November 1999 <

<http://conventions.coe.int/treaty/en/Treaties/Html/174.htm>

<sup>24</sup>. [http://www.unodc.org/pdf/southafrica/southafrica\\_corruption.pdf](http://www.unodc.org/pdf/southafrica/southafrica_corruption.pdf) > Visited 24th October 2004

Zambia is one of the founding members of the Southern African Development Community (SADC).

The case study is Zambia; the government commenced a vigorous campaign to eradicate corruption as one of the government's commitment to the good governance programme.<sup>25</sup> This is evidence that the political will is present; nevertheless, an attempt will be made to highlight how this fight is been conducted. That is, the roles the key participants, the government and the institutions of governance in particular the DPP, are playing in this fight. How far the political will has gone and whether the government is being unnecessarily pressurised to fight corruption. This further calls for the assessment of the protection and promotion of human rights of both, the victims of corrupt practices and the perpetrators of corruption. Here only the rights of the persons suspected of perpetuating corrupt practices are addressed.

## 2.2 Rule of law

The rule of law was originally a western philosophy but it now it has become accepted under international law as the powerful, dimensional and living. The first description of this concept is credited to an English scholar Albert Venn Dicey. He is said to have described it as a paramount characteristic of the English Constitution. And to him it embodied three "kindred conceptions": (1) that the government must follow the law that it makes; (2) that no one is exempt from the operation of the law-that it applies equally to all; and (3) that general rights emerge out of particular cases decided by the courts (Dicey, 1885).<sup>26</sup> This marked the beginning of one of the most politically accurate ideal that keeps bouncing back on the platforms as governments and foes attempt to utilise it to their advantages.

Although, Dicey propagated those three attributes of the rule of law, the main component has yet to be agreed upon thus it is still

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<sup>25</sup>. Speech by Hon George Kunda, SC., MP Minister of Legal Affairs and Attorney General, at the Governance Dissemination Workshop held at Mulungushi International Conference Centre. 6<sup>th</sup> November 2002. < [http://www.gdu.gov.zm/mola\\_speech\\_GDU\\_workshop.htm](http://www.gdu.gov.zm/mola_speech_GDU_workshop.htm) ≥ Accessed on 7th October 2004

<sup>26</sup>. "Constitutional Keywords," [http://www.law.ualberta.ca/ccskeywords/rule\\_law.html](http://www.law.ualberta.ca/ccskeywords/rule_law.html). Accessed on 17th October, 2004

subject to debate and consequently, it can be abused by politicians to further their political agendas. Randell Peerenboom,<sup>27</sup> states that at its basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law and equality of all before the law.

Using the foregoing definition one can state that there exist a few minimum standards that should be embraced for a system to qualify as embodying the concept of the rule of law, the minimum standards are elaborated as follows, however it ought to be stressed that the list is non-exhaustive in nature:

- (i) There must exist certain agreed rules or norms for determining entities that have authority to make laws. These laws ought to be made as stipulated by the authorising norms or rules, if they are to be valid.
- (ii) The laws that are made must be of public knowledge and general in application. In this regard, the laws should not segregate in application so as to target a certain group of people in society: be it an individual, minority or even against the majority. Furthermore, the laws must 'enshrine and uphold the political and civil liberties that have gained status as universal human rights.'<sup>28</sup> In this aspect, the laws will attain the notion of non-discrimination, fairness and equality among the people they will be applied to.
- (iii) The existence of law enforcement institutions that are to enforce the laws in accordance with the institution's specific establishment. These law enforcement institutions need not only exist and enforce laws, but must be independent and impartial.

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<sup>27</sup>. Randall Peerenboom, "Asian Discourse of the Rule of Law," Routledge Curzon, London. 2004. p 4 -5

<sup>28</sup>. Thomas Carothers. 1998.

<<http://www.ceip.org/files/Publications/rulelaw.asp?from=pubauthors%20>> Visited 30<sup>th</sup> September 2004

These institutions can only be meaningful to individuals in a given society if they exude some semblance of independence and impartiality in practice. If the converse applies, the populace tend to lose confidence because they perceive them to be weak and incapacitated to handle their demands for justice.

Some scholars have gone further to state that ‘the presence of a critical mass of professionals in various institutions for law enforcements such as the police, the prosecution authorities, the courts, including administrative tribunals...who have the capacity to enforce the laws,<sup>29</sup> is crucial to the concept.

Moreover, one can state that this critical mass of professionals must be suitably qualified for the particular offices they take up, in order to loosen the grip that the appointing authority may have on them. If not suitably qualified, appointed officers tend to owe allegiance to the appointing authority regardless of the independence or autonomy required by the institution.

- (iv) The existence of organised and active formations in civil society, especially in the professions and academics, who are conscious and committed to human rights, social justice and the rule of law.<sup>30</sup>

The civil society is notorious for its observer status over government affairs. They are essential in the provision of checks on government power. Hence, there is need for an alert and fearless civil society, which reminds the government of its obligations towards its citizenry.

However, rule of law is not an abstract and as such it needs to be realised so that the citizenry can derive some benefits. The correct environment has to be set through political will. This would entail that the respective ‘government will be embedded in a comprehensive legal framework; its officials accept that law will be applied to their own conduct and that the government seeks to be law abiding.<sup>31</sup> If a government sets the foregoing as its standards then the other conditions can come in, for example

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<sup>29</sup>. Prof. Shadreck B.O Gutto, “The Rule of Law, Human & People’s Rights & non-compliance of regional & International Agreements & Standards by African States.” A paper presented in Nairobi, Kenya, 26-29 April 2002. p 7

<sup>30</sup>. Ibid. P 7

<sup>31</sup>. Thomas Carothers, *supra*.

the strengthening and reforming of institutions of law enforcement. How the institutions are devised is the key to the concept of the rule of law, so that impartiality and independence are upheld.

Through the discussion above it can be noted that the rule of law plays a very important part in the human rights setting. This has been acknowledged under international law. It is said that when an individual is brought into contact with the criminal justice system, that individual is confronted with the might of the State. The State has resources of the police, prosecution, court administration and judiciary at its disposal, whereas an accused stands alone. How an individual is treated when accused of a crime is a test of a state's commitment to respect for the rule of law.<sup>32</sup>

With that in mind, one would be right to conclude that it is the qualities of the rule of law that are enshrined in most international law treaties that encompass criminal justice for instance the need to have an independent and impartial judiciary and prosecutorial authority, equality before the law and equal protection, the right to fair trial and the principle of equality of arms. For example, the Privy Council has stated that the phrase 'due process of law' invoked the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations.<sup>33</sup>

In the subject at hand, the rule of law serves two purposes; first to find out how the selected enforcement mechanisms are functioning. Whether the enforcement is by established anti-corruption institutions that are acting independently and impartially. The second purpose is in relation to the exercise of power among the branches of the state. It is argued that any exercise of power by a state organ, in this case the executive; over another (the office of the DPP) has to be within the permits of the law otherwise the act is illegal. Whatever the case 'there must be a law authorising everything that the state does. If it acts

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<sup>32</sup>. "Rule of law, fair trial and judicial reform"> [http://www.ichr-law.org/english/expertise/areas/rule\\_of\\_law.htm](http://www.ichr-law.org/english/expertise/areas/rule_of_law.htm) > Accessed as recent as 21<sup>st</sup> November 2004

<sup>33</sup>. *Thomas Vs. Baptiste* (1999) 3 WLR 249, 259 in Richard Clayton and Hugh Tomlinson, "Fair Trial Rights," Oxford University Press, Great Clarendon Street. 2001. p 6

without legal authority it is acting lawlessly, something, which a constitutional democracy cannot permit.<sup>34</sup>

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<sup>34</sup>. Johan De Waal, Ian Currie & Gerhard Erasmus, “The Bill of Rights Handbook,” 4<sup>th</sup> ed. Juta & Co. Lansdowne. 2001. p 10

### 3 Waging the war against corruption

Zambia is one of the poorest countries in the world, with 86 per cent of its 10.3 million population living below the poverty line.<sup>35</sup> This is in total contrast to the time she was obtaining her independence, as she was one of the most prosperous countries in the sub-Saharan region.<sup>36</sup> Almost throughout its short history as an independent country Zambia has been cited for mismanagement of the economy and corruption.<sup>37</sup> This in fact led to the creation of the Anti-Corruption Commission in 1982, the first of its kind to deal strictly with corruption in the Southern African region. At the moment, a survey conducted by Transparency International ranked Zambia 11<sup>th</sup> most corrupt nation among 146.<sup>38</sup>

The current MMD government under the theme of 'New Deal' have embarked upon a serious fight to eradicate corruption especially with regard to bringing the former President Fredrick Chiluba and his colleagues to face the law. As pointed out this has been done as a good governance project. The political commitment to fight rampant corruption was missing in the Chiluba regime. Actually, most people argue that the former President tolerated it.<sup>39</sup> Mwanawasa has been applauded for this

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<sup>35</sup>. "Zambia locke in hideous AIDS and Hunger." Available at: <[http://www.dehai.org/archives/AW\\_news\\_archive/0187.html](http://www.dehai.org/archives/AW_news_archive/0187.html)> Assessed on

<sup>36</sup>. "On the Frontline." Available on < [http://www.actsa.org/Debt/zambia\\_front\\_line.htm](http://www.actsa.org/Debt/zambia_front_line.htm)> Accessed 15th September 2004

<sup>37</sup>. Refer to Richard Holloway, The 9th International Anti-Corruption Conference < [http://www.transparency.org/iacc/papers/day1/ws1/d1ws1\\_rholloway.html](http://www.transparency.org/iacc/papers/day1/ws1/d1ws1_rholloway.html)> Visited on 30th September 2004. He states that the economic climate is harsh and high levels of corruption have contributed this to.

<sup>38</sup>. Refer to PhilStar, "Philstar Editorial: 11<sup>th</sup> Most Corrupt." 10/10/04 at <http://www.newsflash.org/2004/02/ht/ht004752.htm> > Visited 30th October 2004 and refer also to The Post Newspaper, "Zambia's Corruption Ranking." <http://www.zamnet.zm/zamnet/post/neo.html> > Accessed 30th October 2004

<sup>39</sup>. Ibid and refer to C.R Matenga, "Corruption: Is it endemic in Zambia?" Paper presented at the Citizen Forum Discussion in Lusaka, Zambia. 28th February 1998. p 8. Available online at: <http://www.fiuc.org/iaup/sap/> > Accessed on 7th October 2004

Also refer to Gero Erdmann and Neo Simutanyi, "Transition in Zambia: The Hybridisation of the Third Republic." [http://www.kas.de/db\\_files/dokumente/7\\_dokument\\_dok\\_pdf\\_4368\\_1.pdf](http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4368_1.pdf) > Visited 14th October 2004



move,<sup>40</sup> as it was the first of its kind in Africa. Other countries are trying to follow suit, notably Kenya and Malawi.

### **3.1 Suggested motives for undertaking fights against corruption**

There are diverse reasons for undertaking hard stance on corrupt practices and whichever reason that is given there are repercussions on the human rights of the individuals. These can involve victims of corrupt practices or the perpetrators of corrupt practices. As highlighted above, it is the severity of the effects of corruption that promoted states to adopt the *Convention against Corruption* in 2003.<sup>41</sup> This Convention provides for inter alia, articulation of preventive policies, criminalisation of corruption, international cooperation and most importantly asset recovery.

In this particular case, the first rationale for vehemently fighting corruption would be the monies involved. At the core is the fundamental interest of the nation, which was jeopardised as leaders allegedly siphoned a lot of money out. When requesting Parliament to lift Chiluba's immunity so that he could face prosecution, the President stated that his predecessor, President Chiluba, 'had been involved in corrupt deals that cost the government tens of millions of dollars during his 10-year reign.'<sup>42</sup>

Economic deterioration has been attributed to these alleged crimes,<sup>43</sup> thus it was justifiable that the 'New Deal' government would pursue the lifting of Chiluba's presidential immunity, so that he could face the law. Chiluba is facing 165 counts of abuse of office and theft by public servant. This could also serve as a practical illustration for the applicability of the rule of law against a powerful or influential individual such as the former head of state. In terms of the rule of law, this serves to show that individuals are equal before the law. It is a further example, that the current government shall operate a transparent and

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<sup>40</sup>. Refer to Finnigan Wa Simbeye, "Can Mwanawasa's magic traverse across Africa?" The Perspective, Paris, France. 16th July 2002. Available online at: [www.theperspective.org](http://www.theperspective.org) > Visited on 05 September, 2004

<sup>41</sup>. United Nations Convention against Corruption. Available online at: [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf)

<sup>42</sup>. The Zambian, "Mwanawasa asks Parliament to cancel Chiluba's immunity," 12<sup>th</sup> July 2002. < <http://www.geocities.com/maiddie/zamtropjuly14.html> > Accessed 15th September 2004

<sup>43</sup>. Refer to Richard Holloway, supra and also Finnigan Wa Simbeye, supra.

accountable government; now that the precedence has been set that the rule of law can be applied to a former president when he/she has left the comforts of the office.

The third reason would be that this fight is for the incumbent President to sweep off the dirt hence start on a clean slate, especially with the fact that he is coming from the same political party as Chiluba. It has been argued that if properly planned an election of a new government opens a window of opportunity enabling it to launch audacious reforms.<sup>44</sup> Hence, the incumbent is taking his opportunity.

If good governance is the main goal for combating corruption then the government has to create conducive conditions to fight it. That is to say, strengthen or reform the institutions of governance to serve as strong watchdogs of its activities. In the first place, these institutions must have been weak for them to allow corruption of that magnitude to penetrate the public sector, hence the need for re-establishment. In short, there must be put in place a comprehensive plan that has to assess the weaknesses in the system, whether relating to the law or the institutions that enforce the law. The programme should include educational campaigns on the prevention and effects of corruption, etc.

Analysing the current situation in Zambia, the fight against corruption was commenced only in 2002 hence speaking of substantial eradication of corrupt practices is far-fetched. Nevertheless, concrete steps that have been taken to ensure that corruption is fought ferociously can be utilised to measure the progress. These steps include the infamous lifting of Chiluba's immunity and the creation of a Task Force. The Task Force was created to assist the law enforcement agencies in the investigation of corruption and the 'cases involving the plunder of the national economy,'<sup>45</sup> and receives a lot of funding from donors agencies.<sup>46</sup>

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<sup>44</sup>. Carlos Santiso. *Supra*

<sup>45</sup>. Draft document on National Capacity Building Program for Good Governance in Zambia, Ministry of Justice, Lusaka, Zambia. 2002. p 36

<sup>46</sup>. Refer to U4 Project Information < <http://www.u4.no/project.cfm?id=545> > Accessed on 17th September 2004. It states that the activity is funded through a joint Memorandum of Understanding signed with the Zambian Government and the Netherlands, DfID, Denmark, Norway, Sweden and Ireland.

Initially, it was the private media and civil society that pressured the President into submitting to fight corrupt practices allegedly committed by the Chiluba regime. As **Chanda** notes that it was as a result of civil society's pressure that President Mwanawasa embraced the anti-corruption fight, which was in fact not part of his manifesto.<sup>47</sup> Hence, it can be argued that the fight was essentially to appease the populace. Or due to donor pressure since the economic of Zambia since it is the donors that provide 50 per cent of the government budget.<sup>48</sup>

Another reason for undertaking this battle would be for advancement of a political agenda on the part of the President. It must be pointed out that President Mwanawasa won the 2001 the elections amid accusations of rigging and electoral corruption.<sup>49</sup> The incumbent won by a mere 28.69 per cent as against his closest rival who polled 26.76 per cent of the votes.<sup>50</sup> The presidential results have been challenged and are currently been heard in the Supreme Court for Zambia. Zambians were discontented and felt cheated.<sup>51</sup> Moreover, even within the MMD party there were some divisions since the President was a handpicked successor to former Chiluba.

The question that could be posed is what other concrete steps have thus been taken? Apart from the creation of the Task Force, there is nothing substantial or comprehensive that has been done. All the attention is focused on the Task Force and the other law enforcement institutions relating to anti-corruption have remained weak. Whilst acknowledging that the other institutions are not in a position to handle sophisticated cases like the plunder

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<sup>47</sup>. Alfred W. Chanda. Supra. p 81. Also refer to Ecumenical International News, "[Zambian President takes action after churches criticise him](http://www.christianitytoday.com/ct/2002/130/43.0.html)" <  
<http://www.christianitytoday.com/ct/2002/130/43.0.html> > Accessed 11th November 2004

<sup>48</sup>. Tom Lodge, "Southern Africa – Global Corruption Report," <  
<http://unpan1.un.org/intradoc/groups/public/document/APCITY/UNPAN008454.pdf>>  
Assessed on 12<sup>th</sup> October, 2004. Also refer to Declan Walsh, "[Home Of Former Zambian Leader Raided In Drugs](http://www.mapinc.org/ccnews/v02/n1632/a08.html?347)." (02/09/02)

<http://www.mapinc.org/ccnews/v02/n1632/a08.html?347> > He states that drought has left 40 per cent of Zambians facing starvation and a clampdown on graft is the price being asked for \$1.3bn in aid from the World Bank and Western donors. Accessed 17<sup>th</sup> September 2004

<sup>49</sup>. Ibid. Tom Lodge

<sup>50</sup>. The Electoral Commission of Zambia <  
<http://www.elections.org.zm/results/Presidential%20Results.pdf>> Assessed 4<sup>th</sup> September, 2004

<sup>51</sup>. Refer to Afronet report. Supra

cases, officers in these institutions still remain untrained and the institutions under funded.

Moreover, the current government has not, in practice, taken the lead in this fight. There have been many instances that the executive has made questionable or suspicious decisions and hiding behind the accusations echeloned against Chiluba. In the recent past, there have been accusations levelled against the President's confidantes and colleagues. A good illustration is that his deputy minister for finance, Derrick Chitala.<sup>52</sup> Senior members of the government accused him of corrupt practices and the matter has since been reported to the Anti-Corruption Commission. The deputy minister still retains his position in the government despite being of questionable character.

Furthermore, there is still the issue that the current executive was elected through the same corrupt means<sup>53</sup> and that they cannot expunge corruption if they cannot rectify the illegitimate means that got them into office. One of the ministers who dared to testify against the President in the on-going presidential petition was expelled from his portfolio for failing to give his allegiance to the appointing authority and he was expelled from party immediately thereafter.<sup>54</sup>

The above briefly illustrates the selectivity involved in this good governance project.

### **3.2 Executive powers *vis a vis* selected institutions in criminal justice system**

Under the Constitution,<sup>55</sup> all executive power is vested in the President of the Republic. He is the head of state and government and also the Commander-in Chief of the armed forces.<sup>56</sup> The

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<sup>52</sup>. The Times of Zambia, "[Chitala under Probe.](http://www.times.co.zm/news/viewnews.cgi?category=2&id=1090462740)"

<http://www.times.co.zm/news/viewnews.cgi?category=2&id=1090462740> > Accessed 2<sup>nd</sup> November 2004. Chitala is allegedly to have offered the Commissioner for Lands US\$20,000 to act in his favour.

<sup>53</sup>. Refer to Erdmann and Simutanyi. Supra

<sup>54</sup>. Zana-Arts, "[Eastern province MMD suspends Levison Mumba.](http://www.zana.gov.zm/news/viewnews.cgi?category=1&id=1040745664)"

<http://www.zana.gov.zm/news/viewnews.cgi?category=1&id=1040745664> > Accessed 24<sup>th</sup> September 2004

<sup>55</sup>. The Constitution of Zambia, 1991 as amended by Act 18 of 1996

<sup>56</sup>. Ibid. Articles 33 and 34

President is vested with enormous powers in comparison to the other branches namely, the Legislature and the Judiciary. Among the powers that the Constitution has granted the office holder is:

To appoint executive heads of strategic government institutions and constitutional office holders be it the 'Public Service, statutory corporations and parastals, such as judges of the High Court and Supreme Court, the Chief Justice, the Deputy Chief Justice, the Auditor General, the Director of Public Prosecutions (DPP), the Attorney-General, the Chairperson and commissioners of the Electoral Commission, the Human Rights Commission, the Drug Enforcement Commission (DEC), the Anti-Corruption Commission (ACC), ... etc.;<sup>57</sup> and he has power to exercise disciplinary control over, or remove any of the above appointees subject to the provisions of the law;<sup>58</sup>

He also exercises disciplinary control over, and has power to remove any of the above appointees subject to the provisions of the law.<sup>59</sup>

The above means that the President is vested with a lot of powers over the members of the Bench and the Office of the DPP

### **3.3 Institutions involved in the fight against corruption**

#### **3.3.1 The Director of Public Prosecution**

This forms the core part of this thesis. It is dealt with in light of the fight against of corruption. The appointment of the DPP as the executive head of the Office of the Director of Public Prosecutions (Office of DPP) is done under Article 56 of the Constitution and as stated, the President has the authority to discipline or remove the holder of the office. The can be done under Article 58 of the Constitution.

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<sup>57</sup>. Alfred W. Chanda, "National Integrity systems-Country Study Report: Zambia 2003."  
Supra. P7

<sup>58</sup>. Article 61 (2)

<sup>59</sup>. Article 61 (2)

### 3.3.1.1 Establishment and authority

In accordance with the Constitution the DPP is empowered to undertake any criminal prosecution or appeal before all the courts of law and against any person, as he is the sole prosecuting authority. This excludes the court martial. His powers include inter alia, commencing, continuing or discontinuing any criminal proceedings. Other institutions such as the police derive their authority from his delegation of his powers. Even the Anti-Corruption Office is obliged to prosecute under his direction.<sup>60</sup>

There is no single instrument that stipulates the powers of the DPP. The powers of the DPP are not contained under any specific Act.<sup>61</sup> The source of the powers of the DPP is mainly contained in sections 81-89, 241, 251 and 321A of the Criminal Procedure Code (CPC)<sup>62</sup> One of the most discussed functions of this office is the power to enter a *nolle prosequi*. This gives the DPP power to halt or put on hold any criminal proceedings at any stage, if a matter is before the courts then before judgment is passed.

The Criminal Procedural Code gives him power to issue fiats, sanctions and consent for certain types of offences to be instituted or commenced before the courts of law. Without such consent then the case would be null and void. Examples of these would be possession of obscene materials under Section 177(5) of the Penal Code, abuse of office under Section 99 of the Penal Code and most importantly corruption cases under Part V of the Anti-Corruption Act.

In the exercise of his powers, the DPP is authorised to appoint public prosecutors from among people employed in the public service.<sup>63</sup> In practice, he also consents to application for private prosecution. Here, a private practitioner may make an application to prosecute a matter before any Court of law. In all instances, the DPP oversees the work and may in the interest of justice terminate the services of these prosecutors.

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<sup>60</sup>. Mulela M. Munalula. "Government Watchdogs Institutions: A position paper on the effectiveness of Government watchdog institutions in Zambia," August 2002. P 21. Also available online at: [www.tizambia.org.zm/.../](http://www.tizambia.org.zm/.../)> Visited on 29<sup>th</sup> September 2004

<sup>61</sup>. Ibid. P 21

<sup>62</sup>. Chapter 88 of the Laws of Zambia.

<sup>63</sup>. Ibid. Section 86 and see the Constitution of the Republic of Zambia, Article 56 (3)

In practice, through the analysing of dockets forwarded to him by various institutions of investigation he/she may advice on the evidence presented and if there is need to do further investigations before consent to prosecute to can be granted.

### **3.3.1.2 The DPP and the Corruption Cases**

The DPP is the sole prosecuting authority in Zambia and has the powers of this Office has been elaborated above. In some cases it is a mandatory requirement that prosecution of those offences require the consent of the DPP and corruption cases are an example. All offences stipulated under the Anti-Corruption Commission Act are indictable only when there is consent from the DPP.<sup>64</sup> It is this prerequisite and the fact that prosecutors operate under his direction that this Office is an inevitable part in the quest of good governance.

I will state here that the task of investigating and prosecuting corrupt practices has been given to the Anti-Corruption Commission. This is an autonomous Commission that is headed by a Director-General. The Commission is empowered to prosecute offences after the DPP has issued consent.<sup>65</sup> Thus, the DPP acts as a check on how the evidence has been obtained and stops any frivolous or malicious prosecutions. Under the same Act, the DPP has also been given the authority to tender pardons for accused persons.<sup>66</sup>

### **3.3.2 The Judiciary**

The Constitution provides for the separation of powers among the three branches of government; namely the executive, legislature and the judiciary. The judicature in Zambia is constituted under the Republican Constitution,<sup>67</sup> and is vested with all judicial powers.

The structure of the Courts is as follows; the highest court of the land is the Supreme Court headed by the Chief Justice, the second is the High Court, in which the Chief Justice is an ex-

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<sup>64</sup>. Refer to Section 46 of the Anti-Corruption Commission Act, 1996 and Section 99 of the Penal Code, Chapter 87 of the Laws of Zambia

<sup>65</sup>. Anti-Corruption Act, Part V

<sup>66</sup>. Ibid. Section 54

<sup>67</sup>. The Constitution of Zambia, articles 91-99

officio judge, and there is also the Industrial Relations Court that deals exclusively labour matters, then the Magistrates Court and the last are the Local Courts. The latter only administers unwritten customary law.

The President appoints the judges subject to ratification by the National Assembly. He has also the discretionary power to promote High Court Judges to the Supreme Court. Magistrates are appointed by the Judicial Service Commission, which has, more members affiliated with the executive, for example the Attorney General, the Secretary to the Cabinet, the Solicitor General and a member appointed by the President.

Let me point out here that the relationship between the executive and the Judiciary is highly restrictive especially in terms of applying the rule of law. The reasons being that Judicial Orders do not apply to the executive branch. This does not augur well with the spirit behind having an entrenched bill of rights because when the state intrudes into the individual liberties and freedoms, neither the bill of rights nor the constitution can overcome the obstacle of the State proceedings Act.<sup>68</sup>

### **3.3.3 The Task Force**

The President set up the Task Force on economic plunder in July 2002. Its main function was to assist the DPP and various law enforcement agencies, such as the Anti-Corruption Commission, Drug Enforcement Commission (DEC), and the Police Force, to 'investigate allegations of economic plunder against the former president and his associates.'<sup>69</sup> In fact, it comprises officers seconded to it from the same law enforcement institutions, these include almost all the heads of institutions of governance, the Inspector-General of Police, Director-Generals of the Drug Enforcement Commission (DEC) and the Anti-Corruption Commission (ACC)<sup>70</sup> and two private lawyers, hereinafter

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<sup>68</sup> Michelo Hansungule. *Supra*

<sup>69</sup> Alfred W. Chanda, "National Integrity Systems: Country Study Report- Zambia 2003," p.

79. Available online < [www.u4.no/document/showdoc.cfm?id=86](http://www.u4.no/document/showdoc.cfm?id=86) > Assessed on 30<sup>th</sup> September 2004

<sup>70</sup> The Times of Zambia, "Security Chiefs join Task Force." < <http://allafrica.com/stories/200409210937.html> > As current as 23rd September 2004



referred to as the Nchito brothers. A civilian executive heads it and reports to the President.

Creating the Task Force has shown the political commitment that the current government has towards its goal to eradicate corruption for improving of good governance. The main aim of the Task Force was to bring in some expertise in the investigation of the plunder cases. It has, reportedly, succeeded in recovering cash and property worth billions of Kwacha from suspected plunderers.<sup>71</sup> The properties that have since been recovered have been handled over to government sectors such as the Ministries of education and health.<sup>72</sup> Thus, there is worthwhile progress that is coming out of this fight.

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<sup>71</sup>. “Task Force recovers billions worth of property...”<  
<http://www.zana.gov.zm/news/viewnews.cgi?category=1&id=1031413371>> Accessed on  
23<sup>rd</sup> September 2004.

<sup>72</sup>. Ibid.

# 4 International Human rights laws applicable under the criminal justice system

## 4.1 Introduction

There are various international human rights instruments that contain a number of human rights entitlements that are applicable whenever the process of criminal litigation is activated. Every individual be it the victim or the accused person affected by this process is entitled to these stipulated rights. It is the obligation of the government to ensure that the rights are respected and fulfilled and protected.

As stated, criminal justice is embodied in many international instruments, but chief among them is the International Covenant on Civil and Political Rights (ICCPR). Other important ones in this case are the Universal Declaration on Human Rights (UDHR), the Convention Against Torture and Other, inhuman and Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the regional, African Charter on People's and Human Rights (ACHPR), European Convention on Human Rights (ECHR) and American Convention on Human Rights (ACHR). The rights are also stipulated in some national Constitutions.

Criminal justice starts with the investigation process. It goes through final adjudication and sometimes can be terminated when the accused is acquitted and if this is not the case, then it goes further up to the time that he finally finishes serving his/her sentence of imprisonment or other forms of punishment. Hence, the rights of suspects and accused persons are triggered through out this process and law enforcement officials must act according to the stipulated rules. The rights embraced under various treaties and national laws include the right to a fair trial,<sup>73</sup> prohibition against retroactive criminal laws,<sup>74</sup> right to humane treatment as a

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<sup>73</sup>. ICCPR Article 14, UDHR Articles 10 and 11, ECHR Article 6 and ACHR Article 8

<sup>74</sup>. ICCPR Article 15, UDHR Article 11 (2), ACHPR Article 7, ECHR Article 7 and ACHR Article 9

detainee<sup>75</sup> and right to equality before the law and equal protection.<sup>76</sup> In this study only two rights have been selected and these are the right to a fair trial and the right to equality before the law.

Although this study has narrowed its area of examination of the rights involved in the criminal justice system there are various instruments that can be referred to when dealing with the criminal justice system. These can also be contested under the right to fair trial especially those involving investigations, arrests and detention. The list of some selected instruments is presented below with a short summary to back the instrument:

The Code of Conduct for Law Enforcement Officials<sup>77</sup>

This applies to all law enforcement officials including all officers of the law, whether appointed or elected who exercise police powers of arrest or detention.

The Body of Principles for the Protection of all Persons under any Form of detention or Punishment<sup>78</sup>

This applies to persons who have been apprehended for an alleged commission of an offence, deprived of personal liberty resulting from a conviction for an offence or for any other reason.

The Standard Minimum Rules for the Treatment<sup>79</sup>

It is not an international treaty but gives content to international instruments. It deals with prisoners and relate to prison conditions both in terms of establishment and individual prisoners.

Also refer to the Economic and Social Council Resolution of 1984 and the UN Standard Minimum Rules for Non-Custodial Measures adopted in 1990.

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<sup>75</sup>. ICCPR Article 10

<sup>76</sup>. ICCPR Article 26, UDHR article 7, ICESCR Article 3, ECHR Article 14, ACHR Articles 1& 24

<sup>77</sup>. Adopted By General Assembly resolution 34/169 of 17<sup>th</sup> December 1979>  
<http://fpphr.iatp.org.ge/librari/helsinki/EN-RTF/en-5-3.htm>

<sup>78</sup>. G.A Res. 43/173 (9/12/88)

<sup>79</sup>. Adopted by the First UN Congress on the Prevention of Crime and Treatment of Offenders in 1955

## 4.2 Right to a fair trial

It has been pointed out above that this right is embodied in various international and regional instruments; these are-

1. The UDHR under Article 10 states that; *“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”* And article 11(a) states that *“everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence*

This provides a moral foundation upon which other international and regional instruments draw their inspiration. It is not a binding instrument although of late arguments have been advanced that it represents customary international law<sup>80</sup>;

2. The ICCPR states in part that; *“all persons shall be equal before the courts and the tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal established by law...”*(article 14 (1), and it proceeds to state that *“everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty”*(article 14(2)

There are also other international and regional instruments that contain this right, namely, the African Charter on Human Peoples’ Rights (ACHPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR).

It has been argued that the right to a fair trial is the most important of all the rights and that its importance ‘lies in the fact that it is the only human right whose effective respect is itself a

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<sup>80</sup>. Refer to Javaid Rehman, *“International Human Rights Law: A practical approach,”* Hery Ling Ltd, Dorset. 2003. P 58-59

condition for the effective monitoring of the implementation of all the other rights established by the international instruments concerned.<sup>81</sup> This means that it is like a precondition to the monitoring of the implementation of all other rights. At the international law platform, this right is highly recognised.

It been noted that ‘the criminal justice system is based on the fundamental legal value that an accused is legally presumed to be innocent, until adjudication after a trial.’<sup>82</sup> This entails two things, first the accused must not be prejudiced against and secondly, he/she must be afforded an opportunity to be heard by an impartial and independent court or tribunal.

The Human Rights Committee (HRC) that monitors the implementation of the ICCPR has issued a general comment on Article 14 entitled, Equality before the courts and the right to a fair and public hearing by an independent court established by law.<sup>83</sup> On the presumption of innocence<sup>84</sup> it stated that ‘no guilt can be presumed until the charge has been proved beyond all reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.’<sup>85</sup> This demands that public figure particularly, government officials holding senior offices; the prosecutors, and police should not make statements about the guilt of an accused before and during the trial.<sup>86</sup> Hence, the presumption of innocence ensures that the accused is protected against miscarriage of justice due to frivolous allegations levelled against him.

There other significant aspects of the right to fair trial, and these include are the access to court, preparation for defence, right to be informed, the publicity of the hearing<sup>87</sup> and that an accused be

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<sup>81</sup>. Fatsah Ouguerouz, “The African Charter on Human and Peoples’ Rights,” Kluwer Law International, The Hague, The Netherlands, 2003. P 136

<sup>82</sup>. Philip Rosen, “Wrongful convictions in the criminal justice system.” January 1992. <http://www.parl.gc.ca/information/library/PRBpubs/bp285-e.htm> > Visited on 24th October 2004

<sup>83</sup>. CCPR General Comment 13: 13/04/84 Twenty first session

<sup>84</sup>. ICCPR, Article 14 (2)

<sup>85</sup>. Ibid. para. 7

<sup>86</sup>. ”Criminal Justice System ’reforms.”< <http://www.indiatogether.org/2003/dec/hrt-2malimath.htm> > Current as of 30th October 2004

<sup>87</sup>. ICCPR, Article 14 (1)

tried without undue delay.<sup>88</sup> As regards, the publicity of hearing, this includes allowing the public to hear and be informed about the hearing and the involvement of the press. This has to be accorded to the accused, except in specific stipulated circumstances.

The general right to public proceedings and public judgement constitute essential transparency safeguards that protect both the accused and the general public.<sup>89</sup> However, in relation to the press there are some concerns regarding the extent to which the press impinges on this right. The argument is that ‘the press have a commercial objective ... the effort to satisfy the commercial objective can often lead to a clash between the freedom of the press and the right to a fair and public trial. The dilemma is obvious, we need the press to ensure publicity which itself ensures fairness, but that very publicity can prevent a fair trial.’<sup>90</sup> Thus, the press must exercise caution in the interest of justice.

The accused ought to be safeguarded from prejudicial outbursts by the public and state officials as this may result in unfairness. However, the question that needs to be answered is ‘to what extent should the human rights of the suspect and the accused be protected when other important interests of society are under attack and in possible conflict with the interests of the accused?’<sup>91</sup> This is extremely difficult to balance against the pressure from the public who, in most cases, demand and believe that justice is only achieved when an accused is convicted and not otherwise. Another point to consider is where the crime allegedly committed affects the fundamental interests of society.

The right to a fair trial is a core concept of the rule of law. It has not been totally defined but its constituents have been elaborated upon. And some allude to the fact that it is the most dynamically interpreted by the organs set up for the international protection of human rights.<sup>92</sup> Thus one may argue that there are a number of definitions that can be given to this right. Nevertheless, the

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<sup>88</sup>. Ibid. Article 14 (3) (c)

<sup>89</sup>. Scott N. Carlson & Gregory Gisvold, ”Practical Guide to the International Covenant on Civil and Political Rights’ Transnational Publishers, New York. 2003. p 42

<sup>90</sup>. John A. Andrews. Supra. p 72

<sup>91</sup>. John A. Andrews, “Human Rights in Criminal Procedure; A Comparative Study.” Martinus Nijhoff Publishers, The Hague. 1982. p 8

<sup>92</sup>. Lauri Lehtimaja and Matti Pellonpää in “The Universal Declaration of Human Right,” Gudmundur Alfredsson and Asjorn Eide.Eds. Martinus Nijhoff Publishers, 1999. P 225

procedural guarantees have been identified and these include an independent and impartial tribunal established by law, independent prosecutors and diligent defence counsel.

### **4.3 Right to equality before the law**

This right is elucidated under the following instruments;

Under article 7 of the UDHR, “*all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*” And article 26 of the ICCPR provides that “*all persons are equal before the law and are entitled without any discrimination to the equal protection of the law...*”

This right is also stipulated in the International Covenant on Economic Social and Cultural Rights (ICESCR), ECHR, and ACHR. This study examines the rights of the suspects under the context of equality before the law. The concept essentially requires that ‘no one is to be dealt with in either a preferential or prejudiced manner by the police, courts, or other governmental agencies.’<sup>93</sup> Thus, law enforcement officials when faced with like situations they should deal with them in similar circumstances and in accordance with the law as stipulated in respective countries.

### **4.4 Obligations on the part of the state**

Under international law a State, which is a party to these international instrument, has an obligation to provide minimum guarantees for the assurance that these human rights are respected, fulfilled and protected.

Under the topic of discussion, the state has a positive obligation under the Covenant to guarantee the right to fair trial by undertaking a number of measures that warrant fulfilment such as

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<sup>93</sup>. Russell Madden, “Equality before the law,” <  
[http://home.earthlink.net/~rdmadden/webdocs/Equality\\_Before\\_the\\_Law.html](http://home.earthlink.net/~rdmadden/webdocs/Equality_Before_the_Law.html)> Visited  
on 7th October 2004

ensuring that due process at trial exists, especially with the establishment of an independent and impartial judiciary, enhancing accessibility to an independent press (access to information) and that the investigative and prosecution processes are professional and free from abuse. The latter is imperative because an independent and impartial prosecutorial authority assures the effective maintenance of human rights standards.

The state also has negative obligations to protect the rights of the accused persons, that is, of ensuring that third parties do not in any way inhibit the attainment of this right, for example ensuring that law enforcement agents do not torture suspects for the purpose of securing a confession or evidence, or prevent the public from demonstrating within the proximity of the Courts.

#### **4.4.1 Requirement of an independent and impartial judiciary**

It is a requirement in relation to the rights stipulated above and under the concept of the rule of law is that law enforcement agencies ought to be independent and impartial in order to ensure that justice is served. There is to be no undue pressure from the State, as it must be subjected to the same law under the principle that no one is above the law.

What the actual independence entails is subject to debate and this paper does not dwell on that. An agreed aspect is that for the judiciary to render justice impartially, the public must have full confidence in the ability of the judiciary to carry out its functions in this independent and impartial manner.<sup>94</sup> This is important as it is the public that are to judge the deeds of the judiciary and it is them that bear the consequences of the law as meted out by the judges.

The ICCPR, to which Zambia is party, enumerates that an independent judiciary as one of the essential elements for safeguarding human rights.<sup>95</sup> It is only an independent and

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<sup>94</sup>. Independence and Impartiality of Judges, Prosecutors and Lawyers at. <http://www.iap.nl.com/stand2.htm>

<sup>95</sup>. Linda Camp Keith, Judicial Independence and human rights protection around the world, Jan-Feb 2002, Vol. 85 No. 4



impartial judiciary that may effectively guarantee the protection of human rights.<sup>96</sup>

Under general comment No 13 it is required for states to specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for the appointment...the conditions governing the promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive and legislative.

The HRC has had the opportunity to elaborate further on this aspect of the right to fair trial through the complaints before it. In one instance, it stated that in a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14 (1)<sup>97</sup>

The HRC has also had occasion to comment on political pressure exerted on the judiciary. Case in point is that of Cambodia, it noted that the new judiciary in Cambodia was susceptible to bribery and political pressure...thus it recommended that the State party should take urgent measures to strengthen the judiciary and to guarantee its independence, and to ensure that all allegations of corruption and undue political pressure on the judiciary are dealt with promptly.<sup>98</sup>

It has been stated that civil and political rights are by their nature considered to be absolute and immediate and justiciable unlike economic, social and cultural rights.<sup>99</sup> Therefore, the independence and impartiality of the judiciary as encompassed under the right to a fair hearing and equality before the law can readily be implemented. This does not mean that the State party should merely enact legislation but also put effective measures in place to ensure that the legal norms as set are put into usage.

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<sup>96</sup>. Ibid

<sup>97</sup>. *Bahamonde V. Equatorial Guinea* (468/91) para 6.2

<sup>98</sup>. UN doc. GAOR, A/54/40 (Vol. 1), para 266

<sup>99</sup>. Refer to Asbjorn Eide and Allan Rosas in "Economic, Social and Cultural Rights," Asbjorn Eide et al. Ed. Kluwer Law International, Netherlands. 2001. p 10

#### **4.4.1.1 Basic Principles on the Independence of the Judiciary**

It is not only binding international instruments that have been developed but also guidelines consented to by the international community, such as the Basic Principles on the Independence of the Judiciary,<sup>100</sup> formulated by the United Nations as a way of assisting States in the judicial arena. These principles are elaborate although they are mere guidelines, with a global consensus behind them, which states should use as a model for national laws.

Principle 2 of the above ensures that decisions made by the judiciary are made impartially without restrictions, pressures, threats or interferences directly or indirectly, from any quarters or for any reason. Any quarter includes the executive. As regards to their qualifications, Principle 10 requires that they must be suitably qualified individuals of integrity and ability. And the national laws ought to guard against appointments for improper motives. It, further, states on promotions of judges that these must be on objective factors.<sup>101</sup>

The international practice has belaboured to improve the independence and impartiality of the judiciary in its endeavour to promote and protect human rights. It is up to the States to conform to these standards through both legislative measures and practice.

#### **4.4.2 The need for independent and impartial Prosecuting authority**

**“The independence of prosecutors is a bedrock of our system of justice and a key constitutional safeguard. It is essential for public confidence in the conduct of criminal cases.**

**Attorney General Lord Goldsmith QC<sup>102</sup>**

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<sup>100</sup>. Adopted by the General Assembly 1985 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Available at; [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm)

<sup>101</sup>. Ibid. Principle 13

<sup>102</sup>. [http://www.hm-treasury.gov.uk/newsroom\\_and\\_speeches/press/2003/press\\_131\\_03.cfm](http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2003/press_131_03.cfm)  
> Visited 3rd November 2004

In order to boast human dignity and human rights the international community has arisen to the challenges posed in criminal law by developing several guidelines/rules that ought to guard the conduct of prosecutors. This is in accordance with the rights stipulated under a variety of international instruments.

The independence of the prosecuting authority is of constitutional importance, since casework decision taken with fairness, impartiality and integrity help justice for victims, witnesses, defendants and the public.<sup>103</sup> The courts of law actually rely on the independence and impartiality of the prosecutors to dispense justice in criminal matters.

Whilst the role of the prosecutor is not expressly acknowledged in the International Bill of Rights, these instruments provide the outlines of the basic rights and freedoms states and their institutions are expected to uphold.<sup>104</sup> Thus, it can be argued that one of the institutions pertaining at least to criminal justice system is the Office of the DPP.

Taking the lead is the **Guidelines on the Role of the Prosecutors**<sup>105</sup>, which were adopted under the auspices of the United Nations. This is adopted with the backdrop of the UDHR. The second preambular paragraph acknowledges the enshrined principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal and the last one lays out the aim of the Guidelines; to assist Member States in their task of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings.

There is also the recognition that prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned

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<sup>103</sup>. The Code for Crown Prosecutors, available at; [http://www.cps.gov.uk/victims\\_witnesses/code.html](http://www.cps.gov.uk/victims_witnesses/code.html) > Accessed 28th September 2004

<sup>104</sup>. Director of Public Prosecutions Document, <http://www.serve.com/com/pfc/policing/dpp/introduction.html> > Accessed on 22nd November 2004

<sup>105</sup>. Adopted by the Eighth United Nations on the Prevention of Crime and the Treatment of Offenders, 1990. U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990). Available online at: [http://www.unhchr.ch/html/menu3/b/h\\_comp45.htm](http://www.unhchr.ch/html/menu3/b/h_comp45.htm) > Viewed 3rd November 2004

principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime.<sup>106</sup>

Essentially, the Guidelines act as a safe measure against any malicious or frivolous prosecutions. In relation to the case at hand, the notable Guidelines are relate to the qualification of a person as a prosecutor. This person must be integrity and ability<sup>107</sup> and that state parties shall ensure that selection for prosecutors embody safeguards against appointments based on partiality or prejudice.<sup>108</sup>

Other important ones are; Guideline 4 that states that States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability, then there is Guideline 10 that requires that the office of prosecutor shall be strictly separated from judicial functions and 11 states that Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

These highlighted Guidelines and those that relate to disciplinary proceedings (this shall be dealt with later) are crucial in the analysis of the relationship between the DPP and the Task Force on national plunder and also the removal of the DPP.

As regards the Guidelines, emphasis has been made to the Prosecutors to perform an active role in criminal proceedings in accordance to the law applicable in their respective states. This follows the fact that in some jurisdiction the prosecutor can perform other functions such as taking the lead in the investigations. Whilst in most jurisdiction the Office of the DPP and that of the investigative wings are kept apart to ensure that there is no political interference and that the prosecution can act as a check on violations of human rights in relation to the

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<sup>106</sup>, Ibid. fifth preambular paragraph

<sup>107</sup>, Ibid. Guideline 1

<sup>108</sup>, Ibid. Guideline 2

unlawful methods of obtaining evidence by the investigative wings (usually the police).

In Australia, it was said that the most important underlying principle for the creation of the DPP's Office was that of separating the role of the prosecutor from that of the investigator and give the prosecutor independence from the political process.<sup>109</sup> In India, there were recommendations that the investigative wing (the police) should be merged with the prosecutions authority; this move was criticised as being retrogressive and that the Police are an interested party in the criminal justice system and that this retrograde step will adversely affect the perception of prosecutors and undermine public confidence in them.<sup>110</sup>

#### **4.4.2.1 Dicipinary measures**

In relation to their security of tenure, there are provided guidelines as regards disciplinary proceedings. This must be in a bid to inhibit unwarranted interference or harassments. The Guidelines on the Role of the Prosecutor states as follows:

*21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors, which allege that they acted in a manner clearly out of the range of professional standards, shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.*

*22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.*

#### **4.4.2.2 The International Association of Prosecutors**

The International Association of Prosecutors in 1999 also adopted its own standards relating to prosecutors. This is entitled

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<sup>109</sup>. Rozenes M. "The role of the DPP in investigation and prosecution of complex fraud," (16/09/94)

<sup>110</sup>. "Limited and Dangerous reform of Criminal Justice Institutions," at [Bikram Jeet Batra](#). Visited on 3<sup>rd</sup> November 2004

the Standards of Professional Responsibility and Statements of Essential Duties and Rights of Prosecutors.<sup>111</sup> These equally elaborate the need for prosecutors to protect an accused person's right to fair trial, and in particular ensure that the evidence favourable to the accused is disclosed in accordance with the law or requirements of a fair trial. And alludes to the need of the public to have confidence in the integrity of the criminal justice system and the crucial role that prosecutors play in the administration of criminal justice.

By analysing all the above, the importance that is attached to the office of the prosecutor in international law is formed. International law aims at ensuring that justice is served, in that quest an independent and impartial prosecutor stands in the forefront.

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<sup>111</sup>. Refer to <http://www.iap.nl.com/stand2.htm> > viewed on 21st November 2004

# 5 The Practice in Zambia

In this chapter the practicability of the international human rights obligations outlined above are discussed. The main focus is in line with the relationship between the executive branch and the Office of the DPP, I shall allude to the judiciary in brief. And once again I must stress that this is in regard to the fight against corruption.

It is worth pointing out that although Zambia has ratified almost all the major international treaties alluded to in this work, according to the Zambian legal system, these international instruments are not self-executing and before they could become law they require legislative implementation. Hence, they cannot be invoked directly in the courts. Nevertheless, courts have, in some cases, given judicial notice of international instruments to which Zambia is a state party even though not incorporated in domestic law and have accordingly given redress.

## 5.1 Is the DPP independent of the executive?

The Constitution provides for the independence of the Office of the DPP, although the executive branch has a leeway through the Attorney General with whom the DPP can consult in regard with matters involving general considerations of public policy. The DPP must act in accordance with the directions given by the Attorney General. However, what public policy is not defined this is apt for abuse by the Attorney General. There have been several instances when the DPP has been directed not to prosecute close associates of the President or the ruling party.<sup>112</sup>

However, the executive has in the recent past usurped the powers of the DPP thereby directly impugning on the independence of the prosecutions authority, which is totally contrary to the minimum standards as elaborated under international law. The President issues instructions<sup>113</sup> in relation to cases being handled

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<sup>112</sup>. Refer to Matenga. C.R, "Corruption: Is it endemic in Zambia?" A paper presented at the Citizens Forum discussion in Lusaka, Zambia on 28th February 1998. p 14-15. Also available online at: < <http://www.fiuc.org/iaup/sap> > Assessed 18th August 2004

<sup>113</sup>. Amos Malupenga, "It's not surprising the State entered a nolle- Diangamo," The Post Newspaper < <http://www.post.co.zm/homenews2.html> > Assessed 7th September 2004.

by the Task Force which work is reserved for the Office of the DPP. And the fact that the Task Force reports directly to him is another way of by passing the checks of a professional and diligently qualified DPP. It cannot be over emphasised that the executive and the prosecuting authority should be strictly separated so that there is no political interference or harassment as this has an impact in the administration of justice.

Through the creation of the Task Force, the executive can with some claim to '*legitimacy*' abrogate the both the constitution and international norms by actively participating in investigations and taking the lead in the prosecution of the cases. It has been noted that under Zambian law the investigative wing and the prosecutorial are separate. The importance that this has in assuring rights of accused persons has been elaborated.

The Guidelines also provide that prosecutors ought to be selected based on proper qualifications, integrity and ability. In the discussion under the rule of law, suitably qualified professionals are required in the law enforcement agencies. An argument can be advanced that this serves the human rights of those affected by these institutions, as people who know what they are doing will run them. In the case of the Task Force, the criteria for the selection of selecting its officials are unknown and it is left to the discretion of the executive.

By leaving the process of appointing the head of the Task Force and his deputies to the executive, without any form of transparency or accountability, the process can be open for abuse by the appointing officer.

### **5.1.1 The Removal of the DPP**

Although, the constitution provides for the security of tenure, this has been put to a test and unfortunately; it proved that it could not endure the political pressure exuded by the executive.

In summation, Article 58 of the Constitution provides that when a DPP is unable to perform the functions of his/her office due to infirmity of body or mind or misbehaviour, his removal shall be in accordance with the said Article. It proceeds to stipulate that

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This was an interview with Diangamo where he stated that 'President Levy Mwanawasa had advised the Task Force on corruption that they would not secure conviction against me.'



the removal ought to be investigated by a tribunal appointed by the President and consisting of a chairperson and not less than two other members, who hold or have held high judicial office. They then report back to the President and advise him on whether the person holding the office ought to be removed or not depending on the findings.

The DPP's removal was based on anonymous allegations that he had connived with the accused persons in the corruption cases and was seen attending the meeting of one of the allegedly serious offenders, a close confidante of Chiluba. Before the tribunal was constituted the President 'vowed that the then DPP was not going to go back to the Office.'<sup>114</sup>

Finally, a tribunal of three serving judges of the High Court of Zambia was constituted. It conducted investigations *in camera* recommended that the DPP be retired in the interest of the public. This was after it found that the working relation between the Nchito brothers (the two private prosecutors at the Task Force) and the executive head of the Task Force and Mukelabai (the DPP then) had deteriorated beyond redemption and this is what led to the said allegations.

The first point to make is that the security of tenure was threatened by private prosecutors appointed by the DPP and who are under his instruction or command as the head of the prosecuting authority in Zambia. This is unfortunate and goes contravenes rules as laid down by the United Nations.

Furthermore, the actions of the President undermined the professional integrity of the Office, which in turn leads to the loss of public confidence in its operations.

### **5.1.2 Analysis of the removal of the DPP**

In a similar case that involved the South African National is the National Director of Public Prosecutions (NDPP) the removal was done in a more transparent way. The President, of the Republic of South Africa, appoints the NDPP<sup>115</sup>, like the DPP in

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<sup>114</sup>. Neo Simutanyi, "Deportation and the rule of law," <  
[allafrica.com/stories/200401120691.html](http://allafrica.com/stories/200401120691.html)

Visited on 18<sup>th</sup> August 2004

<sup>115</sup>. Section 179 of the Republic of South African Constitution

Zambia. The NDPP is in charge of all public prosecutions on behalf of the state.

The NDPP was accused of having being a spy in the apartheid era and the President immediately constituted a one-man Commission of inquiry constituted by a retired judge. It was a public inquiry and urged all concerned citizens to participate in the proceedings. All parties concerned tendered evidence and it submitted its findings to the President three months later. The NDPP was cleared of any wrong doings.

The reasons for having this tribunal and holding it in public was given by the Commissioner himself and he stated that, the appointment of the NDPP is derived from the Constitution, thus it follows that anything which may discredit either the institution or the office of the National Director or any person holding the office, is manifestly of constitutional significance and indubitably of public importance...an inquiry into allegations of the misuse of power on the part of the National Director is of national interest.<sup>116</sup>

The differences between the two cases include the fact that the South African President followed the laid down procedure with regard to both the national and international rules in the investigations of the offences, whereas in the Zambian scenario, as stated above, the removal procedure did not conform with any laid down law or norms, national or international.

There was no interference in the running of the Commission of Inquiry as it was transparent in the case against the NDPP, in contrast to the DPP, the President knew who was going to testify and what the respective testimonies were hence instructed the tribunal to sit *in camera*.

In line with international standards, the DPP was never given a fair hearing because the President had already stated that the DPP would not be going back to the Office. And true to his words the DPP was retired contrary to the provisions of the Constitution. Regard should also be given to the fact that the tribunal was constituted by serving judges who are at the mercy of the executive in terms of promotions. In the South African matter,

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<sup>116</sup>. "The Hefer Report." Para 16: <http://www.iss.co.za/cjm/pdf/heferreport.htm> > Available as of 3<sup>rd</sup> September, 2004

the President or other government officials did not allude to the position in which the NDPP found himself.

Even if he was aggrieved with the recommendations of the tribunal, contrary to laid down norms, the DPP had no way of appealing the findings. Reason being that the President's acknowledging of the findings is final and non-appellable. This in a way protects the interests of the executive over that of an official in the criminal justice system.

For the foregoing reasons, the Office holder of the DPP is essentially in a weak position as such he/she can be easily intimidated by the executive and act contrary to the functions in the administration of justice. Moreover, this saga came at a time when the executive was all out in force to ensure a conviction against Chiluba and his associates. In fact, when one refers to the allegations against the former DPP, this confirms the claim that the executive is doing every thing possible for the plunderers to be convicted.

## **5.2 Brief assessments of independence of the Judiciary**

The relationship between the executive and the judiciary is vital considering that the cases at hand are significant to the government of the day.

All the cases are before the Magistrates Courts. So far, the Courts have shown some independence in that there have been acquittals for some of Chiluba's close associates and some opposition leaders. However, the executive still exerts undue pressure on the Judiciary. This brings into question its independence or impartiality.

The executive has authority to offer better incentives,<sup>117</sup> which may result in the appointees appeasing its head, the President, either because they have been promoted or in anticipation for promotion.<sup>118</sup> And the fact this power is sometimes exercised arrogantly for example the President openly castigated a Judge at

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<sup>117</sup>. These incentives can also include salary increaments. Refer to Alfred W. Chanda. Supra. p 32

<sup>118</sup>. In Mulela M. Munalula states that a judge who threw out an application by the opposition presidential candidates to prevent the returning officer declaring a winner in the 2001 elections has since risen to the Supreme Court Bench. Supra p 36

press conference, which was televised on national television for granting an injunction against him,<sup>119</sup> threatens the appointees as they do not have protection against a powerful executive head.

In reference to the cases of corruption, the Task Force reportedly consulted the Chief Justice on whether to turn an accused person into a witness and this accused person was to choose his own judge to preside over his matters.<sup>120</sup> The judiciary should not be partisans in the criminal justice system in order to ensure fairness in the proceedings.

The cited examples demonstrate that members of the judiciary are unlikely to exercise their functions in a free and impartial way, thereby violating the Principles stated above. In that way, the rule of law is toasted aside, consequently human rights are also infringed upon.

### 5.3 Implications of political interference on human rights

**The most innocent man, pressed by the awful solemnities of public accusation and trial, may be incapable of supporting his own cause.<sup>121</sup>**

William Rawle, a Philadelphia lawyer (1825)

The cases involving the former President, Frederick Chiluba have attracted a lot of attention, shaken up the law enforcement institutions and contributed to the abridging of the fundamental law of the land. Due to their perceived significance, the cases have become too politicised and everyone is involved. For example, the first President of Zambia, Kenneth Kaunda and a senior member of the Bench have all been co-opted by the prosecutions led by the Task Force, all in the name of a good case.

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<sup>119</sup>. Re Brigadier General Godfrey Miyanda V. President Levy Mwanawasa (1st Respondent) and Attorney General (2nd Respondent) unreported. High Court of Zambia.

<sup>120</sup>. Zambia Daily Mail, "Sata roasts Kaunda over Shansonga affair," <http://www.zamnet.zm/newsys/news/viewnews.cgi?category=3&id=1083173624> > Accessed 24<sup>th</sup> October 2004

<sup>121</sup>. "Rights of the People: Individual freedom and the Bill of Rights" < <http://usinfo.state.gov/products/pubs/rightsof/accused.htm> > Accessed n 2nd November 2004

This interference has a negative impact on the causes of justice and ought to be addressed. Assurance of the values of human rights is an important aspect in good governance and needs serious consideration under international law. The effects of political interference on some selected guaranteed human rights of the accused person are examined below.

The Constitution of Zambia provides for a number of rights that relate to the criminal justice system. These are the right to fair trial,<sup>122</sup> right to personal liberty,<sup>123</sup> and protection from inhuman treatment

### **5.3.1 The right to a fair trial**

This right has already been discussed in light of international law. In Zambia, it is encompassed under article 18 of the Constitution, which is entitled provision to secure protection of the law. It is a thorough provision and it outlines rights afforded to an accused person, such as the right to be afforded a hearing within reasonable time by an independent tribunal,<sup>124</sup> the presumption of innocence until proven guilty and many more. Even with an elaborate provision in the Chiluba cases, there are a few factors that are hindering the attainment of this right.

For a start, there have been insinuations of his guilt and that of his colleagues. The President has on several occasions stated that Chiluba shall be forgiven if he returned at least 75 per cent of what he had stolen.<sup>125</sup> The papers have also been at the heels of Chiluba. For a case of this magnitude, it is very difficult to balance the interests of the rights of the individual defendant against the wider interest of society.<sup>126</sup>

The government has negative obligation under the right to fair trial to ensure that the media does not in any way prejudice the outcome of cases before Courts of law. However, government

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<sup>122</sup>. The Constitution of Zambia, Article 18

<sup>123</sup>. Ibid. Article 13

<sup>124</sup>. Ibid. Article 18 (1)

<sup>125</sup>. The Post (Zambia), “Chiluba rejects President’s amnesty offer,” 19/06/04 <

<http://www.zamnet.zm/zamnet/post/> > Visited on 8<sup>th</sup> September 2004 and also Stephen Mvula, “Chiluba’s lawyers urge Court to cite Levy for Contempt.”

<http://www.dispatch.co.zm/modules.php?name=News&file=article&sid=258> > Accessed 3<sup>rd</sup> November 2004

<sup>126</sup>. Richard Clayton and Hugh Tomlinson. *Supra*.

officials should not be in the lead in perpetuating guilt insinuations. This point was highlighted by the HRC in its General Comment mentioned above that there is the duty on all public authorities to refrain from prejudicing the outcome of a trial.

At an international level borrowing a regional ruling in a European Court of Human Rights case of *Ribemont v France*,<sup>127</sup> the Court held that Article 6 (2) which deals with the presumption of innocence was breached by a government official (Minister of Interior) who made a comment at a press conference that the applicant was one of the instigators of the murder. In the case at hand it is a breach of both the Constitution and international law.

In fact, when senior government officials are in the forefront of stating that Chiluba is a thief then the task becomes more arduous on the part of magistrates as they carry out their duties without appearing to be influenced. One has to remember that these magistrates depend on the executive branch for incentives, for example promotions.

The pressure does not end up with the Courts but is on the Task Force, as well. The Force has to do everything possible to ensure that Chiluba is convicted, either as a way of justifying their funding, including their extravagant pays or merely to please the masses who have grown impatient. In fact on the issue of funding the donors have also grown impatient as the cases against Chiluba are dragging and there is no conviction yet.<sup>128</sup> This led to Chiluba to request for international observers, meaning international NGOs, to attend his court proceedings to ensure fair trial.<sup>129</sup>

Another factor that could stand in the way of fair trial is the way the cases are being handled. Under the Task Force, the private prosecutors have taken up the role of active investigators, which functions are supposed to be distinct. The fact that there is no other authority that provides checks on the investigators, this

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<sup>127</sup>. *Alenet de Ribemont v. France*, Judgment of 10 February 1995, Series A, 308

<sup>128</sup>. The Times of Zambia, "Chiluba invites international observers." Supra

<sup>129</sup>. Ibid

may result in malicious prosecutions. The malice can result from the executive since it heads the Task Force.

International law stipulates that it is the government responsibility to ensure that human rights are upheld, be it for a victim or a suspect. It has been stated that a fair trial, involving the age-old struggle of the individual against all-powerful government, is the most basic, the most essential of all human rights.<sup>130</sup> Against this backdrop the executive branch has to safeguard the criminal justice system so as to provide for fair trial for the accused persons in these high profile cases even though they allegedly plundered much of the wealth of Zambia.

### **5.3.2 The right to equality before the law**

This right requires that there is general application of the law in all like situations. The public in Zambia has noted with concern that there is selective justice when applying the law to corruption. Transparency International<sup>131</sup> stated that the fact that the fight has been concentrating on people with close ties with Chiluba and people who are no longer in power shows that a selective application of justice. The Task Force has harassed almost all prominent opposition leaders.<sup>132</sup> Those that have been cleared either rejoin the ruling party or are given portfolios in government.

Then there is also the issue of the President extending an olive branch to Chiluba if he returned a specified percentage, but this has not been extended to others. What then would happen supposing that Chiluba, the main culprit, returned the money? Would the same olive branch apply to the ones that held lesser positions than Chiluba? Such representations should be made transparently and the same laws ought to apply to everyone regardless of their status in life.

The above is an illustration of law being made applicable differently to people in a similar position depending on whom

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<sup>130</sup>. Donald M. Gillmor, "Free Press and Fair Trial." Public Affairs Press, Washington, DC. 1966. P 4

<sup>131</sup>. "Transparency International 'unimpressed with Zambia's fight against Corruption.'" 23/08/03. < <http://www.zedspot.com/boards/viewtopic.php?t=74> > Accessed 2<sup>nd</sup> November 2004

<sup>132</sup>. For example Ben Mwila leader of Zambia Republican Party and Micheal Sata leader of Patriotic Front

you are supporting. The concept of the rule of law is bended in order to suit political agendas. In these instances people's liberties are at stake and a pure violation of international norms.



## 6 Concluding Remarks

### 6.1 How can international human rights law be utilised to improve the domestic situation?

This paper has elaborated the extent to which human rights have been violated due to the political interference in the running of the Office of the DPP. In terms of promotion of human rights, the executive branch has failed to uphold the constitutional human rights provisions. As a result one may ask which way forward for the accused persons; in this regard the former President and his close associates.

Since Zambia is a party to major international and regional instruments, perhaps, the answer may lie in international law using the implementation and monitoring mechanisms available. There are various means through which international human rights obligations can be achieved. These models include state reporting, individuals or inter state complaints, fact-finding or investigative missions, inquiry procedures and many more.

Under state reporting, the State reports on issues of law, policy and proposed legislation to the treaty body concerned and this is scrutinised by the respective body. The advantage and disadvantage is that government representatives are quietly but persistently questioned in public about their countries' human rights records.<sup>133</sup>

The non-governmental Organisations (NGOs) can also step in. The primary concern of these is the prevention or elimination of human rights violations.<sup>134</sup> These NGOs are also able to present their own version of state reports; known as *shadow reports* and these reports have been heavily relied upon by a large number of institutions specifically the UN.<sup>135</sup>

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<sup>133</sup> . Rachel Brett in The UN Human Rights Treaty System in the 21<sup>st</sup> Century, Bayesky Anne F. Ed. MPG Books, Bodmin. 2000. P 57

<sup>134</sup> . Manoj Kumar Sinha, "Implementation of Basic Human Rights," Manak Publications Pvt. Ltd. 1999. P 158

<sup>135</sup> . Ibid. 158-159

Another mode would be individual complaints through international and regional treaties, for this particular case it would be through the HRC under the ICCPR as stipulated by the Optional Protocol and the African Commission on Human and Peoples' Rights under the ACHPR. Individuals whose rights have been violated can complain through these mediums. In the case of the African Commission, the victim requirement is not necessary thus even the NGOs or any affected person can lodge a complaint.

It ought to be pointed out that the above mechanisms open ways in which debate is stimulated within the country and scrutinised outside the State, and that countries are usually sceptical to criticism in the international forum. This fear can be a means of ensuring that human rights as stipulated under the national and international laws are conformed to and implemented.

## **6.2 Conclusion**

My working definition was taken from the UN General-Secretary, Kofi Annan, in which he stated that good governance ensures respect for human rights and the rule of law, strengthens democracy, promotes transparency and capacity in public administration. All these have been disapproved in this study.

This paper has belaboured to show the intricacies of politics as it affects a good cause such as good governance. It has brought to light the fact that the drive against corruption can be done under the ambit of good governance with comprehensively outlined plan or it can be hurried with a lot of casualties along the way. These casualties can be institutions or individuals. In the case at hand, it has been well-established law enforcement institutions such as the Office of the DPP and the rights of individuals suspected of partaking in corrupt practices.

There is need for political commitment behind every good governance project, however, how much of that political force has not been stated and in this paper it has been shown that too much of it may serve political ambitions or other agendas. The political will in Zambia has spread beyond the provision of structural framework for institutions to function within a specified environment to actual take over by the all-powerful

executive. And institutions such as the Office of the DPP have failed to perform their mandated task without political interference. In this light, there is need to revisit the relationship between the DPP and the executive.

Since the national law has failed to protect the institution of the DPP and to respect the values placed on human rights under criminal justice system then we may look to the international law provisions on human rights to which Zambia is a part of or are considered as customary international law. This can be done through various means as elaborated above.

It is my view that the executive should merely provide an enabling environment in which the nation can eradicate corrupt practices and should exude confidence in the institutions that the government has created to enforce the stipulated law in a specified procedure. There is a reason why such law was made and why a particular office was created and the executive should not overrun these. Political expediency should not be allowed to penetrate the wheels of criminal justice, as the process of attaining the goal of good governance is as important as the end result.

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