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Thank you for inviting me to open this conference. I am privileged to be here. The conference programme contains some timely and important discussions that we should have. I therefore hope to participate in some of the discussions which will take place in the parallel sessions of this conference.

Before I proceed with my address, I would like to mention the late Professor Lovell Fernandez, one of the founders of the Journal of Anti-Corruption Law and a member of the Department: Criminal Justice and Procedure. I met him in 1999 when he supported South Africa's first National Director of Public Prosecutions, Mr Bulelani Ngcuka, whom I worked for at the time. I was an office assistant then to the National Director of Public Prosecutions. This was more than 30 years ago. I recall that Professor Fernandez provided important strategic support to the National Prosecuting Authority. He led the drafting process of the National Prosecuting Authority's first prosecution policy. To my dismay, the policy has not undergone significant amendment since then.

Recently, I read an op-ed by Professor Lukas Muntingh of the Dullah Omar Institute in the *Daily Maverick*. Prof Muntingh pondered the state of the NPA and questioned whether it is in crisis. He noted that this is a particular shortfall of the management of the NPA today. I agree

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with this view. In that context, however, I want to pose the question of: how are we doing from a global perspective? Put differently, how are prosecuting authorities around the world faring in holding powerful politicians and corporations to account for corruption? Corruption has a devastating effect on human rights, especially the rights of poor people in many countries around the world. I pose this question mindful of the fact South Africa currently faces a looming grey listing by the Financial Action Task Force. I think one of the key issues that will influence that grey listing is the lack of the ability of the South African government to deal with not only corruption, but the use of the South African financial infrastructure to enable the enjoyment of the fruits of corruption from other parts of Africa and even other parts of the world. Consequently, I am going to do it with reference to three case studies that I have had some involvement in, and I chose these three case studies because I want to illustrate how almost universal the current challenges of our prosecuting authority are. Other prosecuting authorities, in Africa, Europe, Southeast Asia, the former Soviet Union members, south America and even well-established democracies, like the United States of America, are also facing enormous challenges.

The three cases which I will briefly reflect on illustrate a number of issues that we face in South Africa and in the rest of Africa. I want to deal with the Swedish case involving Bombardier, a multinational corporation domiciled in Canada. It is involved in rail and aviation infrastructure projects around the world. Recently, the Norwegian Sovereign Fund recorded that Bombardier is believed to be involved in orchestrating corruption in a number of jurisdictions. Three of the matters relate to South Africa and South Africans will be well aware of these matters.

It is recorded in the summary that the bank put out that Bombadier is involved in the Gautrain project, as well as the 10 64 locomotives contract that Transnet procured. It also involves, the acquisition of an aircraft by the notorious Gupta family. I will, however, not discuss any of those matters. I will focus on the attempts by Swedish prosecutors to prosecute a subsidiary of Bombadier. The allegation was that a Bombardier official was involved in bribery of an Azerbaijan national. The contract was in Azerbaijan and the allegation is that the Swedish subsidiary of Bombardier set up an intermediary and used that intermediary for corruption.

The contract was for installing railway signal systems in the country and Bombardier led the consortium. The prosecution involved an attempt to secure the conviction of the Bombardier official. The prosecution is taking place in Sweden because the multinational was located there, but other parts of the world, for example, Belgium and a few other countries had already taken action to secure the proceeds of the corruption that took place.

I want to focus on the bribe. The intermediary is alleged to have received a bribe of a hundred million US dollars. It was the second biggest case of alleged bribery to reach a Swedish court. The outcome of this matter was reached earlier this year. Now, bear in mind, this corruption took place in 2012 and we are in 2022. The verdict was thus reached about ten years later, and it is an acquittal. The court made the following remarks in Sweden: "While it is accepted that there are many inappropriate circumstances in the case, the evidence, is thin in parts." The court also held that it is not obvious that the tender was rigged to Bombardier's benefit. For instance, the court said it is not clear to what extent a railway official could influence the procurement and the prosecutors have not been able to disprove that Bombardier for acceptable business reasons chose the intermediary as its local partner in Azerbaijan. The need for a local partner may have been the reason for the partnership. The impact of that kind of language in a judgment of a superior court in Sweden will have devastating effects on the prosecution of corruption around the world. Bear mind in South Africa, I think Bombardiers local partner was connected to the Gupta family, for example.

The allegation is that Bombardier like other organisations worked with supplier development partners in South Africa. Localisation is a requirement of the South African government. With this in mind consider what the court held in Sweden. It is difficult to conclude beyond a reasonable doubt that the reason companies and multinationals partner with local intermediaries is to bribe them. The evidence shows that intermediaries do nothing but receive what we would call bribes, but they would call it facilitation or a consultancy fee.

Sweden has not done many of these prosecutions. The two prosecutions pursued have both failed for similar reasons. Sweden is set back significantly by a judgment that requires fairly onerous evidence. In this case, it is my view that the payment of a hundred million US dollars

to an intermediary who did nothing to support the execution of the contract, established the connection between someone within the railway authority in Pakistan and the intermediary.

In the Bombadier case there was evidence of the contract happening and of the payment made, but the court held that this could have happened for a whole host of reasons and the authorities did not exclude all the other possibilities. Consequently, an acquittal followed.

The second case I want to talk about briefly is a case that was prosecuted in Italy. It involved the contract related to the acquisition of an offshore Nigerian oil block known as OPL 245. The Milan prosecuting authority indicted ENI and Shell on charges of corruption. The companies were said to have paid 1.1 billion US dollars for bribes to government officials, including the president of Nigeria, Goodluck Jonathan; Oil Minister, Diezani Alison-Madueke; and the attorney-general, Abubakar Malami. Two intermediaries were successfully prosecuted in a fast track prosecution in September 2018 and they were jailed for four years. However, their sentence was overturned on appeal in March 2021. Following a full trial, the court of first instance in Milan, fully acquitted ENI, Shell and other defendants on the grounds that the underlying criminality was held not to have occurred.

Arguments of proof of an agreement between the corporations were central. Now bear in mind, this case was brought before court by three NGOs. They lobbied extensively for Italy to bring these charges against these two corporations. They have since filed a complaint with the OECD to say that what this judgment by Italy means is that the bribe and payment to the intermediary company were established, yet the convictions were overturned.

The underlying unlawful activity in Nigeria was established, but what the Italian court was looking for was an agreement or evidence of an agreement between the officials in the two corporations, the public official in Nigeria, the Minister of Energy and the intermediaries and an advanced meeting, to show that there was an intentional plotting to achieve the advantage for the corporations and the payment of the bribe to the public official. Again, setting an incredibly high bar for the prosecution of corruption. In both cases the sum of money had already been recovered in other jurisdictions where these problems were not seen as obstacles to getting those results.

The last example I want to use is a prosecution in Switzerland, again relating to an allegation that Gulnara Karimova, daughter of the former President of Uzbekistan had inserted herself in the country's efforts to open up its cell phone operating market. She is alleged to have exacted and extracted bribe payments from a number of role players in the market. The prosecution that happened in Switzerland involved a Russian telecoms company, VimpelCom based in Amsterdam. VimpelCom has already paid $ 835 million to settle US and Dutch charges that it paid massive bribes to enter the Uzbekistan telecommunications market.

Russia owned the sixth largest mobile phone operator in the world whose biggest shareholders are Russian. Mikhail Friedman, LetterOne and Norway's Telenor were accused under the US Foreign Corrupt Practices Act of paying more than a $100 million to a relative of the Uzbek President Islam Karimov. $850 million in Swiss and other European accounts controlled by the relative came from bribes paid by VimpelCom, its subsidiary, Unitel and other companies doing business with Uzbekistan. This has been established in other jurisdictions. However, in August 2022, in Switzerland, the court acquitted, Teller executives of a Swedish based subsidiary. The Swedish trial court acquitted the defendants because it said Karimova was not a public official under the relevant law. The appellate court affirmed the acquittal and once again, concluded that Karimova was not a public official under the relevant law. We must reflect upon this and determine what it means for South Africa when a public official, for example lets the son of the President receive money from intermediaries who do business with government. You would want to be able to say that in South Africa he received the benefit on behalf of the public official and therefore a conviction should still stand. However, Swedish prosecutors failed to show that multinationals in Sweden and in Switzerland were unable to hold a multinational who clearly was involved in bribery and corruption to account because the onus of proof is so hard to overcome.

The bar is set even higher to show that what on the face of it clearly points to corruption is in fact corruption. I could provide many more examples to prove that worldwide prosecuting authorities are really struggling to hold corporations and powerful political figures to account. I think that we need to question why that is happening and then reflect on what can be done to improve accountability for corporations. The examples I provided show how difficult it is

for prosecutors to present evidence of corruption beyond a reasonable doubt. However, at least the three examples illustrate how a corporation can actually be taken through the courts. A bigger problem as we in South Africa, and in the rest of Africa know, is that the prospect of seeing these corporations and powerful political figures in the dock and having a prosecution commence, is a pipe dream. I just want to give one anecdote in that regard. I did some work a few years ago in Sri Lanka when the Sri Lankan prosecuting authority told me that on average, it takes about 15 years for a prosecution of a major corruption to conclude. I was supposed to assist with finding ways in which that process could be expedited and how the timeframe could be shortened.

I am sure most of you are horrified by that statistic, but when I came back to South Africa and looked at what is happening in our courts, it occurred to me that we do not even have that metric. We do not have a sense of how long it takes for prosecutions in this country to commence and once they have commenced, how long it takes for them to conclude. How long does it take if they are opposed and not if they are settled?

We have one particularly notorious example of the prosecution of the former President Jacob Zuma for arms-deal related allegations of corruption. The deal took place in 1998 and the prosecution commenced in the early 2000s. We are now in 2022, and we have not yet seen the commencement of the trial. In other words, the charges have not been put and a plea has not been entered. The picture is fairly grim in terms of prosecuting authorities' capacity to hold powerful figures to account.

I think that we need to confront the reality that prosecuting authorities have to act without fear, favour, or prejudice. They have to be independent, and they have to be able to make decisions independent of who it is on the other side. The reality is that the situation is also impacted by who is in the prosecuting authority. Law graduates from law school occupy these positions and this is the case around the world except in the USA. I want to come back to the example of the US prosecuting authority and its ability to withstand very serious challenges that arise from attempting to hold a powerful political figure, like a former president, to account. Law students around the world, tend to look for well-paying jobs. And those jobs are invariably in the private sector. Law graduates tend not to go into the public sector if they

want to pay off their student loans and want to make a decent living. The clients are big multinationals and big corporations who can afford those fees and process fees onto the law graduates.

Prosecuting authorities around the world are therefore already on the back foot because the funds and resources that the powerful can throw at a defence are enormous. Prosecuting authorities on the other hand, have limited budgets. They have the sheer numbers in prosecution. In an asset recovery matter involving corruption in South Africa, we had two lawyers on the side of the state and then a cast of 14 counsel for three accused persons on the other side and they were the best that money could buy in the country. Apart from the fact that it is the prosecution that has to establish beyond reasonable doubt, that corruption happened, they then also have to overcome what the defence can throw at them, which is usually substantial. With all that said, of course we need to spend time on looking at how we can equip prosecuting authorities to be better resourced, and better capacitated to do the work of holding the powerful to account. This includes things like looking more carefully at how we recruit prosecutors, and the prosecuting authority has to be independent, but no one can give the prosecuting authority its independence. Independence is developed in the culture of the institution.

Prosecutors must assert their independence in relation to prosecuting decisions daily and we need to be able to hold them accountable for those decisions. The work that academics, civil society and journalists do in holding prosecutorial authorities to account for decisions that they make is important. It is important to develop the capacity of a prosecutorial authority. Parliament needs to do better at holding the prosecuting authority accountable. I think the best way to ensure independence of a prosecutorial authority is by insisting and demanding that it is held accountable for decisions, because in that way it practices muscle to stand up and defend decisions that it has taken.

This is how independence in a prosecutorial authority is developed. As I mentioned earlier the resource imbalance is always going to be there. I think we need to come up with more creative ways to attract the best and the brightest to the prosecuting authority. The way to do that is to offer excellent training, to advertise the kind of experience that prosecutorial

authorities can give to law graduates early in their career and to make it acceptable for them to leave to get more lucrative jobs, but to come back to make sure that there is mobility between the prosecutorial authority and the rest of the legal profession.

In most countries, the prosecuting authorities are the pariahs of the legal profession. They are not taken seriously as lawyers. I think those kinds of things must be dealt with, but I want to say that we are not going to hold the powerful to account just by depending and relying on our prosecutorial authorities. The three examples that I gave are actually civil society and investigative journalists who have brought about the initiation of those prosecutions. They have done the work and they have knocked on the door of prosecuting authorities and not allowed them to look the other way, but they had to confront the evidence of corruption. I think that is why civil society organisations are so important. They play the role that Parliament should be playing. I think Parliament is not playing that role because we have such powerful executives, and those very same powerful executives also wield powerful control over prosecuting authorities that fall under the executive. I think we do need to expand energy and support investigative journalism and non-profit organisations that act fearlessly, to hold corporations to account.

We should also look at other role players; regulatory bodies like the law society and the regulatory body for accountants all need to be doing their part to be the regulatory authority for banks. These institutions all need to be held to account again by role players outside of government and outside of even the regulatory bodies.

To ensure that they do their part to hold people to account, they usually don't have the onus or standards to prove misconduct that the prosecuting authorities have. I want to conclude with saying, things like non-trial resolution policies can be considered. I know the organisation that I work for, Open Secrets, have grave reservations about supporting plea deals with corporations, where they pay back the money and are allowed to continue doing business.

My own view is that we need to examine alternatives, especially since we so easily characterise corruption in our society as being endemic. Personally, I agree that it is endemic and the best example I have of that was listening on the radio a few days ago to a woman in

the Eastern Cape who owns a confectionary business. She tried to tender for business in the local municipality, and she was expressing her frustration that it is impossible for her to get a government contract without having to pay a bribe and I would say that that reality characterises doing business with government today. It is very hard to get a government contract without having to make some arrangements to pay somebody for some aspect of getting that contract. In that context, when it is so pervasive to think that we can only expect the prosecuting authority to solve the problem is unrealistic. We need to look at engaging all sorts of mechanisms.

The last mechanism, I think, is the one that worked very effectively for Bombardier. The Norwegian Sovereign Fund just declared Bombadier, is involved in corrupt tendencies in its business transactions. That has caused major problems and held Bombardier to account.

I want to leave you with this thought and I know that we are going to discuss many of these ideas today, but that we need to look at how we as role players outside of the formal government system can hold government to its responsibility, to prosecute and hold accountable, powerful role players.

We must also look at the power that we have to advance that agenda. THANK YOU