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**Keynote Speaker: Advocate Donald J Jacobs****[[1]](#footnote-1)\***

Good morning everybody, Professor Nanima, thank you for the invitation. Professor Hamman, thank you for those kind words, the payment will follow soon. The topic I will address is titled*A Tale of Corruption: State Capture, the South African Experience.* At the end of the address, I will create an opportunity for a question and answer (Q & A) session. For now, I will provide a broad overview of the journey South Africa has undergone in this regard.

On 9 October 2003, South Africa became a signatory to the United Nations Convention Against Corruption (UNCAC), which was adopted by Resolution 58/4. South Africa ratified the Convention on 22 November 2004.[[2]](#footnote-2) At the time, the Secretary-General of the United Nations stated that the adoption of UNCAC sent a clear message: The international community was determined to prevent and control corruption. Fast forward to June 2022, Chief Justice Raymond Zondo completed the Zondo Commission of Inquiry into state capture.[[3]](#footnote-3) This Commission investigated what became known as state capture, focusing on a period after South Africa had already signed and ratified the UNCAC. I draw this comparison early in my address to give you food for thought as we proceed to explore the similarities and to understand what truly transpired during the state capture era, a unique manifestation of corruption in the South African context.

At this moment, I urge you to picture in neon lights, two significant dates: the adoption of the UNCAC in 2003 and the conclusion of the Zondo Commission in 2022. These dates are critical, because they highlight the contradiction between South Africa’s commitment to the Convention and its subsequent actions. Despite agreeing to combat corruption, South Africa acted contrary to the principles it had pledged to uphold. To punctuate this narrative, I must introduce a key figure who featured prominently in the Zondo Commission’s inquiry, former President Zuma. It is essential to note that his involvement in corrupt activities predates South Africa’s adoption of the UNCAC.

Between October 1995 and September 2002, a period relevant to this context, Mr Zuma, while in public office, received payments exceeding R 1.5m (one and a half million Rand) from his associate, Schabir Shaik.[[4]](#footnote-4) These payments were made in exchange for Mr Zuma shielding a company from scrutiny in the arms deal inquiry. Schabir Shaik was later convicted of corruption and fraud, and his appeal to the Supreme Court of Appeal was unsuccessful.[[5]](#footnote-5) He was sentenced to a prison term of approximately 15 years. Despite this, Mr Zuma’s political career continued to flourish. He became Deputy President of South Africa and, later, served as President from 2009 until his resignation on 14 February 2018.[[6]](#footnote-6) With this brief pitstop to provide context, I now resume the journey to the Zondo Commission of Inquiry.

The terms of reference of the Zondo Commission of Inquiry were broad in scope, with a mandate, and I quote, “to investigate matters of public and national interests concerning allegations of state capture, corruption and fraud”. The terms of reference emphasised the actions and practices of the executive branch including senior politicians, such as the President and Ministers and their relationship with private individuals, notably members of the Gupta family. An early report by the former Public Protector, Thuli Madonsela, published in October 2016, investigated some of the nefarious activities involving the Gupta family and Gupta led companies.[[7]](#footnote-7) This report recommended the establishment of a Judicial Commission of Inquiry. The findings in the Madonsela Report offered only a glimpse of the larger issues that would later be addressed by the Zondo Commission.

The Commission delved into the role of the Gupta family and Duduzane Zuma, the son of former President Zuma, in influencing key government decisions. This included their involvement in the appointment and dismissal of Ministers, the issuing of mining licenses, and the appointment of advisors to the National Treasury. For example, Mr Des van Rooyen who holds the record for being South Africa’s shortest serving Finance Minister, was one such appointment of questionable merit.[[8]](#footnote-8) However, the scope of the Zondo Commission extended far beyond the findings of the Madonsela Report. While the terms of reference refer to *state capture*, it is interesting to note that this term was neither defined within the terms of reference nor in court cases, of which there are few addressing this concept. Furthermore, South African legislation does not explicitly reference state capture. This left the Commission investigating a phenomenon that was in essence, undefined.

The work of the Zondo Commission focused on irregular public appointments, misconduct by the national executive and public officials, orchestrated efforts of the Gupta family enterprise to seize control of government functions and procurement. It examined the capture of state-owned enterprises and government agencies, as wells as corruption, money laundering, fraud and other illegal activities in public institutions. The Commission solicited extensive evidence to trace the flow of money from state institutions into the Gupta network. In doing so, it also investigated the role of private sector players implicated in these transactions, including activities related to the International Airport.

The Zondo Commission conducted investigations over a period of almost three and a half years, hearing evidence from nearly 300 witnesses. The record of the proceedings spans nearly two million pages, comprising statements, reports and affidavits. For those familiar with the language of the 21stcentury technology, I am told that this documentation amounts to over one million gigabytes of data. What an extraordinary volume of information we are talking about, an absolute digest of paper and digital records.

The Zondo Commission arrived at some of the following key findings, and if it was possible to present these in 3D, to give you a tangible sense of their weight, I would do so. However, I must rely on a summary to convey the gravity of these findings:

* *State capture evolved as a deliberate and coordinated project.* A small group of individuals, acting within a network of collaborators both inside and outside the state, conspired to redirect resources from state coffers for their personal gain.
* *Exploitation and weakening of state institutions.* This project was marked by calculated efforts to exploit or undermine key state institutions, public entities, law enforcement agencies, and intelligence services.
* *Strategic appointments and dismissals.* Achieving their objectives required strategic appointments and dismissals at public entities, as well as the reorganisation of procurement processes to favour their interests.
* *Undermining oversight mechanisms and public discourse***.** Oversight mechanisms and public debate were systematically eroded to advance the interests of those seeking to capture the state.
* *Subversion of democratic processes.* Democratic processes were subverted in ways designed to secure future political power and to reshape and control the political order.

What a monumental and audacious undertaking this was. The evidence unearthed by the Commission is, metaphorically speaking, harrowing. It paints a vivid picture of the bludgeoning of South Africa’s constitutional institutions. One can almost visualise the metaphorical blood on the floor. Money was systematically extracted from state institutions, primarily through procurement. This was achieved by either circumventing procurement rules or blatantly ignoring them. A striking example is found in *S v Scholtz*[[9]](#footnote-9) which demonstrates the mechanics of corruption and state capture in the Northern Cape. In this case, private companies colluded with politicians to manufacture a need for rental property for the state. These companies then provided the required properties to the state at exorbitant rental rates, bypassing procurement processes altogether. The evidence uncovered by the Commission further revealed that, in the absence of proper procurement protocols, prices were grossly inflated to include additional role players and further their interests. Furthermore, the state often received substandard goods and services in return.

The Commission also produced evidence of how money extracted from state institutions was laundered through international jurisdictions, concealing both its origins and its ultimate beneficiaries.[[10]](#footnote-10) The private sector played a willing and complicit role in this state capture project. Well established and respected companies joined the feeding frenzy, by entering into kickback agreements to secure their share of the spoils. Shockingly, professionals such as accountants, auditors and bankers, despite their ethical codes of conduct imposed by the professional bodies, discarded their obligations.[[11]](#footnote-11) Even lawyers, traditionally latecomers to such scandals, were among the first to scramble for their share of the illicit proceeds. Perhaps of greater concern is the evidence of networks centred around powerful individuals, particularly former President Jacob Zuma. Various entities, including state-owned enterprises, acquiesced to Mr Zuma’s influence, enabling a virtual free for all on state resources.[[12]](#footnote-12) This widespread collusion was aided and abetted by the former president himself. The consequences of the state capture project extended far beyond the loss of financial resources. While the financial toll is substantial, the most damning damage is immeasurable. It resulted in the destruction of state institutions, the erosion of public trust and the loss of critical expertise.

The Zondo Commission made various recommendations, which should be emphasised for their importance. These include:

* *Criminal Prosecutions*: The Commission recommended the criminal prosecution of various individuals involved in wrongdoing.
* *Recovery of funds*: State-owned enterprises, along with the National Prosecuting Authority Asset Forfeiture Unit, were urged to recover monies improperly diverted to individuals and entities through irregular procurement contracts.
* *Anti-corrupt measures*: The publication of a National Charter Against Corruption in Procurement. The establishment of an independent agency dedicated to combatting corruption in procurement.
* *Governance of state-owned enterprises*: The recommendation establishes a board for identifying, recruiting and selecting board members for state-owned enterprises to ensure merit based and transparent appointments.
* *Legislative reform*: Consideration of creating a statutory offence for any person vested with public power who intentionally misused that power in bad faith or for purposes other than legitimate, proper governance.

This last recommendation vividly highlights the nature of the state capture project, underscoring the importance of integrity and accountability in public office. As I wind down my speech, I must shift my gaze to Latin America, not because of the common definition of corruption, which implies two willing parties, best described by the phrase , *it takes two to tango*. Rather, my focus is to observe the intricate “fancy foot work” often associated with corruption. I noticed on the programme that you will have a few speakers addressing the topic of Brazilian corruption. I refer to it for a different purpose, one which will become clear shortly. *Operation Car Wash* in Brazil began as a money laundering investigation that targeted the black market dollar operator, who funnelled money through gas stations and car washes.[[13]](#footnote-13) Further investigations revealed the purchase of a Range Rover for the director of Petrobras, the semi-public oil company. The funds received by Alberto Youssef, a key figure in the scandal, came from companies which were unlawfully awarded refinery contracts.[[14]](#footnote-14) Youssef eventually struck a plea bargain, revealing additional corrupt practices, including illicit funds that found their way to politicians. Subsequent investigations implicated former President Lula da Silva.[[15]](#footnote-15) Allegations surfaced regarding the role played by another former president in protecting Lula from legal consequences. The significance of the Brazilian corruption scandals lies in the swift and decisive manner in which the country addressed the consequences of *Operation Car Wash*. Brazil arrested 160 individuals and secured 193 convictions.[[16]](#footnote-16) The Brazilian Anti-Corruption Law introduced administered sanctions and strengthened civil liability for companies involved in corrupt activities.[[17]](#footnote-17) These sanctions can reach up to 20 per cent of a company’s gross revenue from the year prior to the commencement of an investigation. The Federal Prosecutors Office in Brazil introduced *10 Measures Against Corruption*,[[18]](#footnote-18) which included:

* Harsher penalties for corrupt practices;
* Faster convictions;
* Limitations on the rights of appeal; and
* The authorised use of unlawfully obtained evidence, provided it was obtained in good faith.

As I indicated at the start of my address, this is a tale of corruption. However, my story is far from complete. We face a number of questions: When will this story end? How will it end? I do not know. It has been nearly two years since the Zondo Commission handed its report to the State President, and yet no prosecutions based on the report have followed. Will the nature of the corruption exposed by the Zondo Commission test the elasticity of the legal definition of corruption? Will the resources at hand be sufficient to tackle the prosecutions recommended by the Zondo Commission? The National Prosecuting Authority has reportedly added 1 000 prosecutors to its ranks to address these cases, but will it be enough? In conclusion, I leave you with a question: My tale is not over, but where do we go from here?

Thank you very much.

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3. See Judicial Commission of Inquiry into Allegations of State Capture, available at https://www.statecapture.org.za (visited 20 December 2024). [↑](#footnote-ref-3)
4. *S v Shaik and Others* 2007 (1) SA 240 (SCA). [↑](#footnote-ref-4)
5. *S v Shaik and Others* 2007 (1) SA 240 (SCA). [↑](#footnote-ref-5)
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9. *S v Scholtz* 2018 (2) SACR 526 (SCA). [↑](#footnote-ref-9)
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11. As above. [↑](#footnote-ref-11)
12. As above. [↑](#footnote-ref-12)
13. Valarini E & Pohlmann M (2019) “Organizational Crime and Corruption in Brazil a Case Study of the ‘Operation Carwash’ Court Records” 59 *International Journal of Law and Crime* 100340. [↑](#footnote-ref-13)
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16. Valarini & Pohlmann (2019). [↑](#footnote-ref-16)
17. The Brazilian Anti-Corruption Act (Portuguese: Lei anticorrupção), officially Law No. 12,846 of 1 August 2013. commonly known as the Clean Company Act (Lei da Empresa Limpa), is a Brazilian law enacted in 2013 targeting corrupt practices among legal entities doing business in Brazil. [↑](#footnote-ref-17)
18. FGV EPGE (28 November 2016) “10 Measures Against Corruption − Reflection Proposals”, available at <https://epge.fgv.br/en/media/80356> (visited 20 December 2024).

 [↑](#footnote-ref-18)