



INTERNATIONAL  
COUNCIL  
ON **HUMAN RIGHTS** POLICY

**Corruption  
and Human Rights:  
Making the Connection**

## **International Council on Human Rights Policy**

The International Council on Human Rights Policy was established in Geneva in 1998 to conduct applied research into current human rights issues. Its research is designed to be of practical relevance to policy-makers in international and regional organisations, in governments and inter-governmental agencies, and in voluntary organisations of all kinds. The Council is independent, international in its membership, and participatory in its approach. It is registered as a non-profit foundation under Swiss law.



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# **Corruption and Human Rights: Making the Connection**

The International Council thanks the Department for International Development (DFID), United Kingdom; the Netherlands Ministry of Foreign Affairs; the Ministry for Foreign Affairs of Finland; the Swedish International Development Cooperation Agency (Sida); the Swiss Agency for Development and Cooperation (SDC); the United Nations Development Programme (UNDP); the Ford Foundation, United States; an anonymous donor through the Tides Foundation; and the Catholic Agency for Overseas Development (CAFOD), for their financial contributions to this project.

# **Corruption and Human Rights: Making the Connection**

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*Corruption and Human Rights: Making the Connection*, 2009.  
International Council on Human Rights Policy. Versoix, Switzerland.

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ISBN 2-940259-85-2

Cover illustration: © Karen Massier, [www.iStockphoto.com](http://www.iStockphoto.com). Spider's web with dew.

Design and layout: Cover by Fairouz El Tom, Research & Publications Officer at the International Council on Human Rights Policy. Interior by Oscar Vazquez.

Printed by ATAR Roto Press SA, Vernier, Switzerland.

This report is available from:

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## ACRONYMS

AU	African Union
ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ALAC	Advocacy and Legal Advice Centre
CAT	Committee against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CSR	Corporate social responsibility
DPLF	Due Process of Law Foundation
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECOSOC	United Nations Social and Economic Council
ECOWAS	Economic Community of West African States
ESC rights	Economic, social and cultural rights
EU	European Union
GOPAC	Global Organization of Parliamentarians Against Corruption
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
IACAC	Inter-American Convention against Corruption
I/A Court H.R.	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ILO	International Labour Organization
INECIP	Instituto de Estudios Comparados en Ciencias Penales y Sociales
KNCHR	Kenya National Commission on Human Rights

NGO	Non-governmental organisation
NHRI	National human rights institution
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCIJ	Philippines Centre for Investigative Journalism
SADC	Southern African Development Community
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNODC	United Nations Office on Drugs and Crime
UPR	Universal Periodic Review
USAID	United States Agency for International Development

## ACKNOWLEDGEMENTS

This report was prepared by Magdalena Sepúlveda Carmona, Research Director at the International Council on Human Rights Policy (ICHRP), on the basis of working papers commissioned by the ICHRP, and in particular the preparatory reports of Christian Gruenberg and Julio Bacio Terracino. Robert Archer edited the report.

The following papers were commissioned: *Hard Law Connections between Corruption and Human Rights* by Julio Bacio Terracino, Associate Human Rights Officer at the Office of the United Nations High Commissioner for Human Rights (OHCHR), Geneva; *How to Combat Corruption while Respecting Human Rights* by Noel Kututwa, then Executive Director and founding trustee of the Human Rights Trust of Southern Africa (SAHRIT), Chairperson for the Zimbabwe Human Rights NGO Forum, and Vice-Chairperson for the Zimbabwe Election Support Network; *Corruption, Human Rights and Gender: An Empirical Investigation* by Namawu Alhassan Aloo, then Research Associate for the Religions and Development Programme, University of Birmingham; *The Impact of Corruption on the Rights to Equal Access to Justice and Effective Remedy* by Victoria Jennett, then Senior Researcher at Transparency International; *The Impact of Corruption on the Right to Health* by Brigit Toebe, Lecturer, University of Aberdeen; *The Role of National Human Rights Institutions* by Maina Kiai, then Chair, Kenya National Commission on Human Rights; *The Right to Information as a Tool to Combat Corruption* by Helen Darbishire, Executive Director of Access Info Europe; *The Correlations between the Human Rights Situation in a Country and Levels of Corruption* by Todd Landman, Chair of the Centre for Democratic Governance at the University of Essex; *A Comparative Assessment of the Compliance of Anti-Corruption Legislation with Human Rights Standards* by Christian Gruenberg, Director of Transparency Policies at the Center for the Implementation of Public Policies Promoting Equity and Growth (CIPPEC); *The Challenges of Investigating Corruption: An Insider View* by Carlos Castresana, former prosecutor at the Public Prosecutor's Office, Spain; *A Human Rights Approach to National Integrity Systems* by Lucy Koechlin, Programme Manager at the Basel Institute on Governance; and *The Politicisation of Anti-Corruption Campaigns* by Jose Ugaz Sanchez-Moreno, President of the *Consejo Nacional para la Etica Pública* (National Council for Public Ethics), Peru. All the papers as well as information on the researchers can be found at: [www.ichrp.org/en/projects/131](http://www.ichrp.org/en/projects/131).

The research team worked under the supervision of an Advisory Group, whose members were: Chong San Lee (Malaysia), Board member, Transparency International (TI), former executive of ExxonMobil; Sandra Coliver (USA), Senior Legal Officer, Freedom of Information and Expression, Open Society Justice Initiative; Stuart Gilman (USA), Deputy Director, Stolen Asset Recovery Initiative (StAR) and Senior Advisor, Governance, Security and Rule of Law Section, United Nations Office on Drugs and Crime (UNODC); Colin Gonsalves (India),

Executive Director, Human Rights Law Network; Nihal Jayawickrama (Sri Lanka), Coordinator, UN-sponsored Judicial Integrity Group, former Executive Director, Transparency International, Berlin; Ivan Krastev (Bulgaria), Chair, Centre for Liberal Strategies, Sofia; Philliat Matsheza (Zimbabwe), Policy Adviser, Anti-Corruption and Democratic Governance Group, Bureau for Development Policy, United Nations Development Programme (UNDP); C. Raj Kumar (India), Assistant Professor, School of Law, City University of Hong Kong, China; Eduardo E. Rodriguez Veltzé (Bolivia), former President of the Republic and former President of the Supreme Court of Bolivia; and Ibrahim Wani (Uganda), Chief, Development, Economic and Social Issues Branch, Office of the United Nations High Commissioner for Human Rights (OHCHR). The ICHRP is grateful to them for their invaluable engagement.

On 28-29 July 2008 an expert meeting convened by ICHRP brought together members of the research team, authors of supporting papers, and a variety of experts from anti-corruption and human rights organisations. The following experts participated (affiliation on the date of the meeting): Anna Bossman (Ghana), Deputy Commissioner at the Ghana Commission on Human Rights and Administrative Justice; Michael Hershman (USA), co-founder of Transparency International (TI); Rodrigo Lara (Colombia), Executive Director of Colombia's Presidential Program to Fight against Corruption; Shervin Majlessi (Iran), Associate Human Rights Officer, OHCHR; Devendra Raj Panday (Nepal), former Finance Minister of Nepal, elected member of the International Board of Directors of TI, ICHRP Council Member; Dimitrina Petrova (Bulgaria), Executive Director of the Equal Rights Trust, ICHRP Council Member; Roy Poses (USA), President of the Foundation for Integrity and Responsibility in Medicine; Balakrishnan Rajagopal (India), Director of the Program on Human Rights and Justice at the Massachusetts Institute of Technology (MIT); Nuhu Ribadu (Nigeria), Chairman of the Economic and Financial Crimes Commission (EFCC), Nigeria; Rita Roca (USA), Education Manager at the Danish Institute for Human Rights; Flora Sapio (Italy), Researcher; Daniel Smilov (Bulgaria), Programme Director at the Centre for Liberal Strategies, Sofia; Ursula Wynhoven (USA), Head of the Legal and Policy Department of the Global Compact Office.

A draft of the report was sent out for comment. The Council would like to thank those who read the draft, provided advice and comments, or otherwise gave time or support to the project over its duration, particularly Sion Assidon, Guitelle Baghdadi-Sabeti, Maggie Beirne, Gerardo Berthin, Shaazka Beyerle, Jim Chalmers, Roberto de Michele, Jan Hrivnak, Ramiz Huremagic, Bryane Michael, Mitchell O'Brien, Paul Okojie, Joachim Pohl, Roy M. Poses, Svend Robinson, Paul Russell, Bernardo Sorj, Brigit Toebes, Transparency International, Frank Vogl, Claudio Weber Abramo and Peter Wilkinson.

Thanks also are due to Idowu Ajibade, Angela Osmond and Juho Siltanen, interns at ICHRP, who provided support to the project.

# INTRODUCTION

In recent years, the subject of corruption has received considerable attention. Work on governance has brought it into the light and it is no longer taboo. Corruption is being addressed by financial institutions, government agencies, bilateral donors, international organisations, non-governmental organisations (NGOs) and development professionals. Its causes have been measured empirically, as have its impacts on human development. Institutions and administrative procedures have been overhauled. Countries have negotiated and signed international anti-corruption conventions. The United Nations Office on Drugs and Crime (UNODC) Global Programme against Corruption has acted as a catalyst, helping countries to implement the United Nations Convention against Corruption (UNCAC). Transparency International (TI) and other civil society actors<sup>1</sup> have created a large forum for discussion and advocacy around its many forms; an international coalition of NGOs has emerged, challenging corruption “from below”.

Yet corruption clearly remains a challenge. Despite countless policy diagnoses, public campaigns to raise awareness, and institutional and legal reforms to improve public administration, research shows that it continues to flourish. Indeed, opinion polls suggest that the public is more pessimistic than before about the likelihood of eliminating it.<sup>2</sup> Combating corruption requires strong collective efforts from different sectors in society acting in co-ordinated ways. The aim of this report is to encourage and assist individuals and institutions which work to promote and protect human rights to engage with corruption issues and collaborate more closely with anti-corruption organisations. It may also assist those who combat corruption to recognise the value of human rights to their work and the advantages of closer collaboration with human rights organisations. In addition, the report may help to raise awareness among key stakeholders and the public of the links between corruption and human rights, thereby diminishing public tolerance of corruption and strengthening public support for anti-corruption measures. It suggests some additional tools that individuals can use to denounce corruption as well as to protect those who combat it.

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1 Other relevant international civil society actors include but are not limited to: Global Integrity ([www.globalintegrity.org](http://www.globalintegrity.org)); Global Witness ([www.globalwitness.org](http://www.globalwitness.org)); the Revenue Watch Institute ([www.revenuewatch.org](http://www.revenuewatch.org)); Tiri ([www.tiri.org](http://www.tiri.org)); and the Global Organization of Parliamentarians Against Corruption (GOPAC) ([www.gopacnetwork.org](http://www.gopacnetwork.org)). In addition, a large number of anti-corruption organisations are doing significant work at national level.

2 Though institutions have used various methodologies to measure levels of corruption in different countries, due to its covert nature, and the unwillingness of those engaged in corruption to discuss it, objective documentation remains difficult to obtain. Most information relating to corruption is still therefore based on *perceptions* of corruption in a country or profession. While these perceptions are useful to researchers, activists and policy-makers, it should be understood that most of the information available on corruption remains subjective.

This is the first of two reports prepared by the International Council. The second will examine how human rights might be integrated within anti-corruption programmes. It discusses where use of a human rights framework can strengthen national and local programmes, and some of the obstacles and conflicts that may inhibit effective cooperation.

## **SCOPE OF THE PROJECT**

The International Council recognises that, to combat corruption effectively, policies must deal with corrupt practices in the private sector. Corporate social responsibility (CSR) programmes take this view. The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has included corruption among the abuses of human rights committed by transnational corporations.<sup>3</sup> The CSR initiative of the UN, the Global Compact, also contains an Anti-Corruption Principle: “Business should work against corruption in all its forms, including extortion and bribery.”<sup>4</sup> When preparing this research, nevertheless, the International Council chose to focus on state responsibility, and neither of its reports examines the degree to which private companies have legal responsibility for human rights violations, including those associated with corruption. This decision was made on practical grounds. The project already set itself a demanding objective when it sought to clarify the formal links between violations of rights and acts of corruption by state officials. Extending the analysis to cover the subject of private corruption would have made the work extremely complicated to complete.

Private sector corruption should be the subject of another inquiry; however, this report does refer to the duty of states to protect individuals against acts committed by private persons or entities. As we will see, states contravene their human rights obligations when they fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities” (Human Rights Committee (HRC), General Comment 31).

The Council also acknowledges the importance of dealing with corruption in development assistance: both donor and recipient countries need to tackle corruption in aid programmes because it seriously undermines their usefulness and no doubt harms the human rights of beneficiaries. The subject is not examined directly here because it is already on the agenda of policy-makers

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3 UN. Doc. E/CN.4/2006/97, paras. 25-27.

4 This principle was not enunciated when the Global Compact was launched in 2000. It became the Compact’s “tenth principle” in 2004, after it was realised that work on this issue was essential. Companies that participate in the Compact must oppose corruption in their strategy, culture, and day-to-day operations. For more information on the Global Compact, see [www.globalcompact.org/AboutTheGC/index.html](http://www.globalcompact.org/AboutTheGC/index.html).

and has been extensively researched.<sup>5</sup> To the extent that policies to end corruption in aid programmes need to be aligned with domestic accountability, nevertheless, several of this report's recommendations may be useful to those addressing corruption in aid. Moreover, opening up discussion of the links between corruption and human rights may encourage aid agencies to address the subject more publicly.

Some scholars have argued for recognition of a right to live in a corruption-free world. They do so on the grounds that endemic corruption destroys the fundamental values of human dignity and political equality, making it impossible to guarantee the rights to life, personal dignity and equality, and many other rights. While acknowledging the merits of such a proposal, this project takes a different approach. It focuses on the human rights recognised in major international treaties. These rights are legally binding on states that have ratified them (state parties). The report builds a case for saying that, where rights are guaranteed and implemented, corruption will drastically reduce.

The project does not advocate human rights as a policy panacea for every challenge faced by anti-corruption specialists, however. Rather, it examines when and how the use of human rights might improve performance in specific areas; it also identifies the limits of a human rights approach in this field. The goal is to provide an operational framework that will make it possible to apply human rights principles and methods usefully in anti-corruption programmes.

## THE REPORT

The commitments that states have made to combat corruption have run parallel with their commitments to promote and respect human rights. However, international anti-corruption conventions rarely refer to human rights; and major human rights instruments rarely mention corruption.<sup>6</sup> The absence in international law of direct references to the links between corruption and human rights mirrors the way these two issues are discussed politically, but is at odds with experience: in reality many links are evident.

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5 See, for example, TI policy paper No. 1/2007.

6 There are exceptions. The Preamble of the *Council of Europe Criminal Law Convention on Corruption* emphasises that “corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society”. Interestingly, the Preamble of the *Declaration of Human and Citizen's Rights* of 1789 considered that ignorance, forgetfulness or contempt for human rights are the only causes of public misfortune and the corruption of governments. [*Déclaration des droits de l'homme et du citoyen* “considérant que l'ignorance, l'oubli ou le mépris des droits de l'homme sont les seules causes des malheurs publics et de la corruption des gouvernements...”.]

This is not to say, of course, that all acts of corruption imply a violation of rights. The assumption that one implies the other is quite often made, nevertheless – and, if taken to extremes, it will tend to banalise and overextend the sensible application of human rights principles.

The aim of this report is, therefore, first, to show how links between acts of corruption and violations of rights can be described accurately; and second, to distinguish cases where acts of corruption do imply violations of rights from cases where they do not.

The report begins by discussing the definition of corruption, because the term is often applied loosely, and different definitions and classifications have been used by different organisations in various contexts. The report then elaborates upon the different acts of corruption as they have been defined by the UNCAC. Then, it examines where the human rights framework could add value to the anti-corruption work. Special attention is given to the impact of corruption on the human rights of groups exposed to particular risks, including women and children.

Subsequently, the report examines more closely the ways in which corrupt practices may violate specific human rights and the protection of human rights of anti-corruption advocates. Finally, it explores the possibilities of collaboration between human rights and anti-corruption organisations, and where such collaboration will create opportunities and obstacles. It provides some recommendations for human rights organisations that wish to work on corruption.

It is hoped that, if the links between corruption and human rights are made clear, organisations and agencies working in the field of human rights may see the value of collaborating more closely with national and international anti-corruption agencies, and vice versa.

This is therefore not a scholarly treatise but a report written mainly for human rights specialists and organisations who want to know how they might effectively address corruption and the harm it causes.

## **I. WHY IT IS RELEVANT TO LINK HUMAN RIGHTS TO CORRUPTION**

This report explores the links between corruption and human rights on the assumption that, if corruption occurs where there is inclination and opportunity, a human rights approach may help to minimise opportunities for corrupt behaviour and make it more likely that those who are corrupt are caught and appropriately sanctioned. A human rights approach also focuses attention on people who are particularly at risk, provides a gender perspective, and offers elements of guidance for the design and implementation of anti-corruption policies.

If corruption is shown to violate human rights, this will influence public attitudes. When people become more aware of the damage corruption does to public and individual interests, and the harm that even minor corruption can cause, they are more likely to support campaigns and programmes to prevent it. This is important because, despite strong rhetoric, the political impact of most anti-corruption programmes has been low. Identifying the specific links between corruption and human rights may persuade key actors – public officials, parliamentarians, judges, prosecutors, lawyers, business people, bankers, accountants, the media and the public in general – to take a stronger stand against corruption. This may be so even in countries where reference to human rights is sensitive.

Human rights standards, as established in major international treaties and domestic legislation, impose obligations on states. Focusing on specific human rights will help to identify who is entitled to make claims when acts of corruption occur and who has a duty to take action against corruption and protect those harmed by it. A clear understanding of the practical connections between acts of corruption and human rights may empower those who have legitimate claims to demand their rights in relation to corruption, and may assist states and other public authorities to respect, protect and fulfil their human rights responsibilities at every level.

Connecting acts of corruption to violations of human rights also creates new possibilities for action, especially if, as we will argue, acts of corruption can be challenged using the different national, regional and international mechanisms that exist to monitor compliance with human rights. In the last sixty years, following the adoption of the Universal Declaration of Human Rights (UDHR), many mechanisms have been created to hold states and individuals accountable for human rights violations. In addition to judicial accountability, parliamentary reporting plays an important role in many countries, while monitoring by civil society has become more extensive. Intergovernmental institutions have also developed, and the main UN mechanisms are now supported by regional mechanisms such as the European Court of Human Rights (ECtHR), the African Court on Human and Peoples' Rights (ACtHPR) and the Inter-American

Court of Human Rights (I/A Court H.R.). The evolution of national human rights institutions is equally significant.<sup>7</sup>

When acts of corruption are linked to violations of human rights, all these institutions could act to force accountability and so create disincentives for corruption. While they do not replace traditional anti-corruption mechanisms – primarily the criminal law – they can give cases prominence, may force a state to take preventive action, or may deter corrupt officials from misusing their powers. They can therefore both raise awareness and have a deterrent effect. In chapter VI, we examine how human rights mechanisms can be employed to enhance accountability.

Taking a human rights approach is critically about empowering groups that are exposed to particular risks. The human rights framework emphasises explicitly that vulnerable and disadvantaged groups must be protected from abuse.

It does so by applying cross-cutting principles – in particular principles that focus on non-discrimination, participation and accountability – that have the effect of empowering people who are disadvantaged. Human rights law requires states to take these principles seriously. Populations should not be consulted in a superficial manner, for example; they should be allowed and encouraged to participate actively in efforts to fight corruption.<sup>8</sup> A human rights perspective requires policy-makers to ask how the design or implementation of anti-corruption programmes will affect people who are marginalised or impoverished, subject to social discrimination, or disadvantaged in other ways. Adhering to human rights principles implies identifying and overcoming obstacles (such as language differences, cultural beliefs, racism and gender discrimination) that make such people vulnerable to corruption. While there seems to be agreement that corruption has specific impacts on vulnerable and disadvantaged groups, the incorporation of vulnerability and gender in the design of anti-corruption programmes is still limited and exceptional. Making fuller use of human rights would help to strengthen these dimensions of policy. The principle of non-discrimination could be particularly useful as a guide to attain this objective.

Under international treaties against corruption, anti-corruption measures must be compatible with human rights principles and should not adversely affect

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7 The term “national human rights institution” (NHRI) covers a range of quasi-governmental or statutory institutions with a human rights mandate, that enjoy various powers and degrees of independence: human rights commissions, ombudsmen, *defensores del pueblo*, procurators for human rights and a variety of other institutions competent to protect and promote human rights. Most NHRIs can receive and investigate complaints on human rights. NHRIs will be more inclined to work on corruption if they have legal autonomy, are independent and impartial, and have adequate resources and skilled staff.

8 The ICHRP’s second report on corruption will examine different ways in which active and broad participation may be incorporated in strategies against corruption.

the rights of those involved. However, the treaties give little guidance on how officials are to reconcile their commitment to fight corruption with their obligation to promote and protect human rights. Analysing anti-corruption programmes from a human rights perspective may assist states to comply with human rights standards when they draft and implement laws and procedures to detect, investigate and adjudicate corruption cases. The International Council's second report on corruption will address issues of implementation in more detail.

## **VULNERABILITY AND DISADVANTAGE**

While corruption violates the rights of all those affected by it, it has a disproportionate impact on people that belong to groups that are exposed to particular risks (such as minorities, indigenous peoples, migrant workers, disabled people, those with HIV/AIDS, refugees, prisoners and those who are poor). It also disproportionately affects women and children.

Those who commit corrupt acts will attempt to protect themselves from detection and maintain their positions of power. In doing so, they are likely to further oppress people who are not in positions of power, including most members of the groups listed above. The latter tend both to be more exploited, and less able to defend themselves: in this sense, corruption reinforces their exclusion and the discrimination to which they are exposed.

In some cases, it is their vulnerability that makes certain groups easy victims of corruption. For instance, corrupt officials may extract money from migrant workers who lack a residence permit by threatening them with deportation in the knowledge that they cannot complain. It seems that Roma people, when compared to other groups, are disproportionately asked to pay bribes when they seek access to health and education services.<sup>9</sup> Corruption in such cases can magnify and exacerbate the pre-existing human rights problems of such groups.

### **Women**

Corruption impacts men and women differently and reinforces and perpetuates existing gender inequalities. Women's lack of access to political and economic power excludes them from networks that permit access to decision-making bodies. Where institutions are controlled by men, women do not have enough power to challenge corruption or clientelism. Corruption in the legislative and executive branches can allow discriminatory laws to stand, while corruption in the judicial branch can discriminate against women who do not have the means

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9 For example, see the analysis of the UN Special Rapporteur on the sale of children, child prostitution and child pornography, U.N. Doc. E/CN.4/2006/67/Add.2, para. 47.

to pay bribes to gain access to the justice system. In some societies, women have traditionally been perceived as non-active participants in court processes (where they may be represented by their male relatives). Many non-formal or parallel decision-making processes, moreover, have no checks on corruption.

Women's access to justice is compromised in other ways. Trafficking, for example, often involves the corruption of border officials, police and members of the judiciary. As illegal immigrants, often without proof of identification and subject to (sexual) violence, trafficked women are obviously hindered in seeking protection from courts.

Many women also have fewer opportunities than men to achieve an education, or obtain land, credit and other productive assets. When they have access to work, they are often paid lower salaries. They tend to assume the domestic responsibilities of taking care of children and older adults, which means they are financially dependent, cannot work or are poorer. For all these reasons – but essentially because women are over-represented in the poorest social segments of society and under-represented in decision-making bodies – corruption and clientelism affect them in particular ways, often disproportionately. For example, corruption that diverts public resources from essential services or anti-poverty programmes will particularly harm the welfare of women and their dependents, who rely heavily on such services. In the same way, bribery that adds to the cost of public services will also disproportionately affect women, because they are on average less able to afford bribes, depend more on public services, and sometimes (for example during pregnancy) require services that men do not.

## **Children**

Corruption may also have a disproportionate impact on children. While children possess in general the same civil, political, economic, social and cultural rights as adults, they also have certain rights specific to them. Most of these are identified in the 1989 United Nations Convention on the Rights of the Child (CRC), in Article 24 of the International Covenant on Civil and Political Rights (ICCPR), and in Article 10(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Corruption can violate many of the rights that children share with adults, including the right to life and the right to health. In addition, some rights, such as the right to education, are particularly important to children. As explained in more detail in the section on the right to education, corruption in the education sector very often violates the rights of children.

Corrupt practices harm three other rights that are particularly relevant to children: a child's right to be protected during adoption procedures; the right to protection from trafficking and sexual exploitation; and the right to be protected from child labour.

## **1. Corruption and Children's Rights**

### *Adoption*

Children possess a right to special protection during adoption, particularly in cases of intercountry adoptions. States must ensure that an adoption is authorised by a competent authority following legal procedure, taking into account the child's best interest. In addition, states are required specifically to take measures to ensure that an adoption does not result in improper financial gain for those involved in it (CRC, Article 21(d)). Despite this, corruption occurs in many cases of intercountry adoption. Judges and orphanages sometimes receive large bribes to speed up the adoption process; or judges may accept false documents, against payment, purporting to contain the consent of the birthparents. Such practices violate the right of the child to be protected, because parties involved in the procedure gain financially, legal procedures are breached and the child's best interest is not prioritised. All this violates Article 21 of the CRC. Corruption in intercountry adoptions can also violate other rights of the child, such as the right to identity.

### *Right to identity*

Every child has the right to preserve his or her identity, including nationality, name and family relations (CRC, Article 8). In cases of corrupt intercountry adoptions, in order to remove the traces of an illegal procedure, those involved may efface evidence of a child's family lineage, ethnic roots and medical history. Corruption in intercountry adoptions facilitates the commercialisation of children with all the risks and abuses that this implies.

### *Trafficking*

Those who traffic or sexually exploit children commonly engage in corruption. Corruption in such cases clearly impairs the rights of children, in particular girls. Children must be protected from all forms of sexual exploitation and sexual abuse (CRC, Article 34), and from abduction, sale and trafficking (CRC, Article 35, and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography).

### *Child labour*

Children have the right to be protected from economic exploitation and from performing any work that is harmful to their health and development (CRC, Article 32). Children under an age determined by law should not be allowed to work. In many countries, the enforcement of laws against child labour remains minimal because the labour inspectorate is underfunded or because employers bribe labour inspectors to overlook abuse. In such cases, the state fails to meet its obligation to protect the child, whose rights to be free from economic exploitation and labour are violated.

## **People living in poverty**

Corruption has a severely detrimental impact on the lives of people living in poverty when compared with higher income groups. Corruption not only affects economic growth and discourages foreign investment, thereby indirectly affecting the poor, but reduces the net income of those living in poverty, distorts policies, programmes and strategies that aim to meet their basic needs, and diverts public resources from investments in infrastructure that are crucial elements of strategies to lift them out of poverty. Where corruption is generalised, for example, poor people are as exposed as others to the small-scale bribery of public officials (notably in the healthcare, law enforcement and judicial sectors) but the effect on their purse will be heavier. Large-scale corruption, meanwhile, damages the quality of public services on which the poor depend particularly, to meet basic needs. Here again they are disproportionately affected.

## **Indigenous people and minorities**

Indigenous people and minorities suffer particularly from corruption. They are often among the poorest and most disadvantaged groups in society. Indigenous women are additionally exposed to risk.

Indigenous communities that are closely linked to land they live on collectively are especially vulnerable to corruption of infrastructure programmes that displace them, and smaller-scale corruption associated with land sales and registration.

Many indigenous communities also lack access to education and are consequently less aware of their legal rights. Mechanisms for reporting and tackling corruption are often out of their reach as a result. Lack of access to justice compounds the risks of harm they face. Since indigenous voices are rarely heard in policy discussions, these populations often have little influence on the design and implementation of anti-corruption policies and programmes that could improve their status.

## **HUMAN RIGHTS AS PREVENTIVE MEASURES**

If weak human rights protection may create opportunities for corruption, policies that promote human rights may prevent corruption. This section briefly describes human rights principles that are relevant to the prevention of corruption.<sup>10</sup>

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10 The ICHRP's second report will examine prevention in more depth and will explore the points of entry for applying human rights in anti-corruption programmes.

*The right to freedom of expression, assembly and association.* These rights enable participation and are vital to efforts to combat corruption. Where governments permit information to flow freely, it should become easier to identify and denounce cases of corruption. However, since reporters and editors can also be bribed, protection of this right is not enough. Governments should also guarantee conditions for a diversity of independent media and protect the political independence of public service media. In the absence of a tradition of respect for freedom of expression, weak media are unable to expose corruption without exposing themselves to defamation lawsuits or risks to their personal security. Protection of the freedom to form and affiliate to formal and informal associations, such as human rights organisations, is also a vital element of anti-corruption efforts.

*Political rights.* Where political rights are not effectively protected, opportunities for corruption increase. Low political participation creates conditions for impunity and corruption. The effective exercise of political rights counterbalances state power and its abuse, including corruption. In this regard, a gender-sensitive approach is important. As discussed, women are disproportionately affected by corruption and policies should guarantee their participation in decision-making.

*The right to information.* Until recently this right was interpreted as an obligation on states not to obstruct the flow of information. In 2002, however, the African Commission on Human and Peoples' Rights introduced explicitly the notion of a positive obligation to have access to information, and in 2006 the Inter-American Court of Human Rights (I/A Court H.R.) ruled unambiguously in favour of a right to access to public information. According to this ruling, states should make administrative documents public (see textbox 2).

## **2. A "Right to Know": The Human Right to Seek and Receive Information**

A crucial difference of opinion about whether the right to know implied a right of access to publicly-held information or a looser freedom to gather and disseminate information from willing providers was finally resolved (in legal terms) in September 2006, when the Inter-American Court of Human Rights concluded that:

*[B]y expressly stipulating the right to "seek" and "receive" "information", Article 13 of the Convention [American Convention on Human Rights] protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this Article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate*

*restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.*

(Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile*, Judgment of 19 September 2006, para. 77.)

Human rights organisations may play a role in helping to expand state interpretations of the right to access to information, and advocating where necessary for the inclusion of this right in constitutions and national laws. An access to information law should guarantee the right of all citizens to request and obtain public information, without being required to justify that request. In case of refusal, there should be effective mechanisms for filing administrative and judicial complaints. Access to information should be guaranteed for vulnerable groups, which often lack the economic resources or knowledge they need to obtain information from governments successfully. Some governments, in addition, tend to discriminate by putting up barriers or simply denying access. Human rights organisations can encourage and assist such groups to demand information to which they are entitled. More broadly, the same strategy can support broader efforts to prevent and expose corruption.

### **3. Access to Information under the UNCAC**

#### ***1. Adoption of Access to Information Laws***

Article 13 of the UNCAC promotes the participation of society. It specifically requires States Parties to ensure the public has “effective access to information”. In addition, states are required (Article 10) to adopt procedures or regulations that allow members of the general public to obtain information about the “organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public”.

Article 13 of the UNCAC also contains a requirement that States Parties respect, promote and protect the “freedom to seek, receive, publish and disseminate information concerning corruption”, subject to the restrictions provided for by international law. In light of the Inter-American Court of Human Rights decision cited above (*Claude Reyes et al. v. Chile*, 19 September 2006), this provision can be interpreted as imposing an obligation on states to release information concerning corruption should it be requested and to publish it proactively.

## 2. Transparency of Specific Information

The UNCAC identifies several categories of information that should be made publicly available to assist the fight against corruption and to ensure effective government accountability.

(i) *Employment of Public Officials*: There shall be transparency with respect to the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials (Article 7). The elements of public sector employment outlined in Article 7 include in particular that there shall be objective criteria such as merit, quality and aptitude (Article 7(1)(a)) and adequate remuneration and equitable pay scales (Article 7(1)(b)).

(ii) *Conflict of Interest-related Information*: States Parties are required to “endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest” (Article 7(4)).

(iii) *Public Administration*: States Parties are required to enhance transparency in the public administration with regard to its organization, functioning, and decision-making processes (Article 10).

(iv) *Decision-making Process in Government*: States Parties are required to enhance the transparency of and promote the contribution of the public to the decision-making process (Article 13(1)(a)).

(v) *Public Sector Finances*: States Parties are required to promote transparency and accountability in the management of public finances (Article 9(2)). This is to be achieved *inter alia* by:

- (a) Procedures for the adoption of the national budget;
- (b) Timely reporting on revenue and expenditure;
- (c) A system of accounting and auditing standards and related oversight;
- (d) Effective and efficient systems of risk management and internal control.

(vi) *Public Procurement*: States Parties are obliged to ensure that systems of public procurement are based on the principle of transparency (Article 9). This should be achieved by:

- Public distribution of information relating to procurement procedures and contracts;
- Publicly available information on invitations to tender;
- Publicly available information on awarding of contracts;
- Clear rules for the tender process;
- Clear, objective and predetermined selection and award criteria;
- Rules for publication of tender announcements;
- Submission of assets declarations of those involved in public procurements.

(vii) *Election Campaign Funds/Political Parties*: States Parties are required to “enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties” (Article 7(3)).

*The right to participate.* Human rights organisations may also help to promote active participation of people at every level of society and enable them to monitor how well government officials and other actors carry out their responsibilities. If lawyers, doctors, members of parliament, business executives, engineers, scientists, journalists, etc. cannot participate in public life or exercise their rights, they cannot conduct their work professionally. This can harm the realisation of rights at many levels and facilitate failures of performance and accountability, thus leading to corruption in these professions as well as in government. In addition, the human rights framework gives particular attention to the participation of groups that are disadvantaged or vulnerable. Public engagement in elections is only one aspect of participation: it is equally important to ensure that indigenous people participate in decisions relating to the use of their land and that slum dwellers participate in development decisions that affect their homes, and so forth. Interesting work has been done in a number of countries to improve the quality and probity of official decisions by using together the right to information and the right to participate.

A second report by the ICHR will examine in more detail how the right to participate might add force to anti-corruption strategies. The report confirms that the right to participation requires a strong legal framework and an open political system. In addition, when they act to combat corruption or promote human rights, individuals, communities and civil society organisations can make their governments more accountable.

## II. DEFINITIONS

The term “corruption” comes from the Latin word *corruptio* which means “moral decay, wicked behaviour, putridity or rotteness”.<sup>11</sup> The concept may have a physical reference, as in “[t]he destruction or spoiling of anything, especially by disintegration or by decomposition with its attendant unwholesomeness and loathsomeness; putrefaction”; or moral significance, as in “moral deterioration or decay... [the] [p]erversion or destruction of integrity in the discharge of public duties by bribery or favour...”.<sup>12</sup>

These definitions are representative of two common shortcomings: they define corruption only in terms of bribery, or in terms that are very general. As a result, corruption definitions tend either to be too restrictive or excessively broad. In fact, this is not as contradictory as it may seem. Corruption has indeed broad causes and consequences. As Michael Johnston, a Professor at Colgate University, has stated: “In rapidly changing societies the limit between what is corrupt and what is not is not always clear and the term corruption may be applied broadly.”<sup>13</sup>

Corruption demands a multidisciplinary approach, and many fields of study, from political science to economics, have addressed the issue. Each has a different perception of the problem and therefore generates different policies: operational definitions tend therefore to start broad and become more specific as they try to render corruption measurable. A well-known classification distinguishes grand from petty corruption. *Grand corruption* refers to the corruption of heads of state, ministers, and top officials and usually involves large amounts of assets.<sup>14</sup> *Petty corruption*, also called “low” and “street” corruption, indicates the kinds of corruption that people experience in their encounters with public officials and when they use public services (hospitals, schools, local licensing authorities, police, tax offices, etc.).<sup>15</sup> It generally involves modest sums of money.

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11 Milovanovic, 2001.

12 Oxford English Dictionary, 1978, pp. 1024-1025.

13 Johnston, 2005, p. 11.

14 See Anti-Corruption Resource Centre, *Corruption Glossary* available at: [www.u4.no/document/faqs5.cfm#grandcorruption](http://www.u4.no/document/faqs5.cfm#grandcorruption). The term “Grand Corruption” was first used by Sir George Moody-Stuart to make reference to the bribery of foreign public officials by international corporations. See, Moody-Stuart, 1997. The term later evolved to cover all corruption at the top levels of the public sphere, where policies and rules are formulated. It is usually (but not always) synonymous with political corruption.

15 See Anti-Corruption Resource Centre, *Corruption Glossary*, available at [www.u4.no/document/faqs5.cfm#pettycorruption](http://www.u4.no/document/faqs5.cfm#pettycorruption).

Others have classified corruption by type. *Political corruption* involves lawmakers (monarchs, dictators, legislators) acting in their role as creators of the rules and standards by which a polity operates. Such officials seek bribes or funds for their political and personal benefit and provide favours to their supporters at the expense of broader public benefits.<sup>16</sup> *Administrative corruption* includes the use of bribery and favouritism to lower taxes, escape regulations and win low-level procurement contracts.<sup>17</sup> *Corporate corruption* occurs between private businesses and suppliers or private service providers. It also involves illegal behaviour by corporate officials for private monetary gain.<sup>18</sup> *Institutionalised corruption* names the behaviour of those who exploit institutional positions to influence institutional processes and actions, such as law enforcement personnel and members of the judiciary; *operational corruption*, narrower, describes specific activities and goals.<sup>19</sup>

Another approach to definition has been specific to a given field of study. In the economics field, for example, Robert Klitgaard has defined corruption in terms of an equation: Corruption = Monopoly Power + Discretion – Accountability.<sup>20</sup> According to the United States Agency for International Development (USAID) *Handbook for Fighting Corruption* (1999), corruption can assume various forms: “It encompasses unilateral abuses by government officials such as embezzlement and nepotism, as well as abuses linking public and private actors such as bribery, extortion, influence peddling and fraud. Corruption arises in both political and bureaucratic offices and can be petty or grand, organized or disorganized.” Development banks and other national and international organisations have also variously defined corruption. Probably the most used definition is the one adopted by TI: “corruption is the abuse of entrusted power for private gain”.<sup>21</sup>

However, to link corruption with human rights, a definition of corruption based on law is necessary. In the legal field, the term corruption is usually used to group certain criminal acts which correspond to the general notion of an abuse of entrusted power. International conventions against corruption reflect this, since they do not define and criminalise corruption but instead enumerate criminal acts that amount to corruption. Even here, they follow different approaches. For example, some conventions use the term “corruption” interchangeably with

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16 On *political corruption* see the comprehensive work of Heidenheimer et al., 2002.

17 Johnston, 2005; see also note 14, p. 11.

18 Clinard and Yeager, 2005; Almond and Syfert, 1997, pp. 389-447.

19 Bassiouni and Vetere, 1999, p. 891.

20 Klitgaard, 1988. See also, UNDP, 2004. In this Note, UNDP takes into account other factors such as integrity and transparency, which work as a balance to monopoly and discretion. For UNDP, therefore, the definition of corruption is: Corruption = (Monopoly Power + Discretion) – (Accountability + Integrity + Transparency).

21 See [www.transparency.org](http://www.transparency.org).

one of the most common criminal acts that encompass it: bribery. This is true of the United Nations Convention against Transnational Organised Crime, the Council of Europe Civil Law Convention on Corruption,<sup>22</sup> the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (EU),<sup>23</sup> and the Council of the European Union's Framework Decision on Combating Corruption in the Private Sector (EU Decision on Corruption in the Private Sector).<sup>24</sup> The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions follows the same line, although the approach is reflected in the title.<sup>25</sup>

In its chapter titled "Criminalization and law enforcement" (chapter III), the UNCAC explicitly enumerates acts to be criminalised without stipulating that such acts amount to corruption.<sup>26</sup> A similar approach is followed by the Council of Europe Criminal Law Convention on Corruption.<sup>27</sup>

A third group of conventions distinguishes corruption as a term to group criminal acts more explicitly from actual acts that involve corruption. Two such conventions are the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption (ECOWAS Protocol against Corruption),<sup>28</sup> and the Inter-American Convention against Corruption (IACAC).<sup>29</sup> In Article 6, entitled "Acts of Corruption", both conventions provide a list of acts that constitute

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22 See A Civil Law Convention on Corruption, Article 2, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999, entered into force on 1 November 2003, *European Treaty Series*, No. 174.

23 Convention drawn up on the basis of Article K.3(2c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, adopted by Council Act of 26 May 1997, *Official Journal C* 195, 25 June 1997, pp. 1-11.

24 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, entered into force 31 July 2003, *Official Journal L* 192, 31 July 2003, pp. 54-56.

25 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the OECD on 21 November 1997, entered into force on 15 February 1999, DAFFE/IME/BR(97)20.

26 UNCAC, adopted by the General Assembly, resolution 58/4 on 31 October 2003, entered into force on 14 December 2005. See textbox 4.

27 See Chapter III of the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, entered into force on 1 July 2002, *European Treaty Series*, No. 173.

28 ECOWAS Protocol on the Fight against Corruption, adopted by the Heads of State and Government of the ECOWAS on 21 December 2001, not yet entered into force.

29 IACAC, adopted at the third plenary session of the Organization of American States, 29 March 1996, entered into force on 3 June 1997.

corruption. Two additional conventions distinguish even more clearly between corruption and the acts that constitute it. The African Union (AU) Convention on Preventing and Combating Corruption (AU Convention against Corruption)<sup>30</sup> states in Article 1 that “[c]orruption means the acts and practices including related offences proscribed in this Convention”. Subsequently, it lists acts of corruption, such as the bribery of a national public official, abuse of function and embezzlement (Article 4). An even clearer differentiation is provided by the Southern African Development Community (SADC) Protocol against Corruption.<sup>31</sup> This not only separates corruption and the acts that constitute it, but provides a general definition of corruption.<sup>32</sup>

Notwithstanding the different approaches taken by international conventions, it is clear that in law these do not consider corruption to be an individual and identifiable criminal act. When referred to in a legal context, corruption is the generic heading for a cluster of different and specific criminal acts. An appropriate *legal* definition of corruption would therefore be: “corruption is the list of acts criminalised by law under the heading ‘Corruption’.” It is therefore essential to identify the different acts that fall under the general heading of corruption.

## **CORRUPT ACTS**

By reviewing the agreements that states reached while adopting international conventions, it is possible to gain an idea of what they generally agree are “corrupt acts”. The best such source is the UNCAC because it provides the most recent and comprehensive list of such acts. Moreover, it represents a wide range of views because it is the only anti-corruption treaty open to universal membership, all other conventions against corruption being regional. The following is the list of core corrupt acts. It is important to note, however, that this is not an exhaustive list. Progressive development could enlarge this list to include other acts in the future.

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30 AU Convention on Preventing and Combating Corruption, adopted by the 2nd Ordinary Session of the Assembly of the Union on 11 July 2003, entered into force on 4 August 2006.

31 SADC Protocol against Corruption, adopted by the SADC Heads of State and Government on 14 August 2001, entered into force on 6 July 2005.

32 Article 1 states: “Corruption” means any act referred to in Article 3 and includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others.

## **Bribery**

May be defined as the promise, offer or gift, to a public official, or the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or another person or entity, in order that the official act or refrain from acting in the exercise of his official duties.

Several different forms of bribery are recognised. The act of offering a bribe is commonly referred to as active bribery and the act of accepting the bribe as passive bribery. In addition, the definition of bribery changes when the act involves a foreign public official, or when it takes place exclusively within the private sector. The bribery of foreign public officials and officials of public international organisations, also called transnational bribery, adds the condition that the undue advantage given to the official must be in the context of international business.

Bribery in the private sector, or private-to-private bribery, may be defined as the promise, offering or giving of an undue advantage, directly or indirectly, to any person who directs or works, in any capacity, for a private sector entity; or the solicitation or acceptance of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, acts or refrains from acting.

## **Embezzlement**

May be defined as the misappropriation or other diversion by a public official, for purposes unrelated to those for which the assets were intended, for his benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his position. The embezzlement of property can also occur in the private sector in the course of economic, financial or commercial activities.

## **Trading in influence**

May be defined as the promise, offering or giving to a public official or any other person, or the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his real or supposed influence with a view to obtaining from an administration or public authority an undue advantage for the original instigator of the act or for any other person. For some it is irrelevant whether or not the influence is ultimately exerted and whether or not it leads to the intended result. Trading in influence is also commonly divided into its active form (giving an advantage in exchange for influence) and its passive form (requesting or accepting an advantage in exchange for influence).

## **Abuse of functions or position**

May be defined as the performance of, or failure to perform, an act, in violation of the law, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

## **Illicit enrichment**

May be defined as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. This is a particularly controversial matter. Some argue that criminalisation on such grounds infringes the principle of presumption of innocence and reverses the burden of proof, while certain judicial decisions take a contrary view. This topic will be examined in detail in a second report.

### **4. The UNCAC**

The United Nations Convention against Corruption is a legally binding international anti-corruption instrument created under the auspices of the United Nations Office on Drugs and Crime; it entered into force on 14 December 2005. The main chapters of the Convention deal with:

*Prevention* (chapter II): commits States to establish and promote effective practices preventing corruption in both the public and private sectors. These include:

- Model preventive policies such as establishing anti-corruption bodies and enhancing financial transparency;
- Measures to promote transparency and accountability, for example in public financing;
- Measures that ensure public officials are subject to certain safeguards, such as financial disclosure;
- Measures that raise awareness of corruption;
- Specific requirements in critical areas, for example public procurement or the judiciary.

*Establishing criminal and other offences* to cover acts of corruption that are not already crimes under domestic law (chapter III). States are:

- Legally obliged to establish basic offences (such as bribery and embezzlement by public officials);
- Required to consider establishing more sophisticated offences (such as, trading in influence, abuse of functions and illicit enrichment).

The Convention deals with:

- Basic forms of corruption such as bribery and embezzlement;
- Complex forms of corruption such as trading in influence, laundering of proceeds;
- Offences committed in support of corruption such as money laundering or obstructing justice;
- Private sector corruption.

*International cooperation* in the prevention, investigation and prosecution of offenders (chapter IV). States are to:

- Provide specific forms of mutual legal assistance, in prosecuting, judicial proceedings, etc. (Article 46);
- Undertake measures that will support the tracing, freezing, seizure and confiscation of the proceeds of corruption (Article 54).

*Asset-recovery* is stated in Article 51 to be a fundamental principle of the Convention (chapter V). In this area:

- The treaty reconciles the needs of countries seeking illicit assets with legal and procedural safeguards in countries whose assistance is sought;
- Establishes several provisions specifying how cooperation and assistance are to work:
- Article 43 obliges states to extend the widest possible cooperation to each other in the investigation and prosecution of offences defined in the Convention;
- Article 51 provides for the return of assets to countries of origin.



### III. CORRUPTION AS A VIOLATION OF HUMAN RIGHTS

An analysis of corruption that draws on human rights will emphasise the harm to individuals that corruption causes. From this perspective, it is often taken for granted that corruption “violates” human rights. When people make this claim, they have a range of issues in mind. They mean that, when corruption is widespread, people do not have access to justice, are not secure and cannot protect their livelihoods. Court officials and the police pay more heed to bribes than to law. Hospitals do not heal people because the medical staff give better treatment to patients who pay backhanders or because clinics lack supplies due to corrupt public contracting procedures. Poor families cannot feed themselves because social security programmes are corrupt or distorted to support a patronage network. Schools cannot offer their students a sound education because the education budget has been looted and as a result teachers cannot be paid and books cannot be purchased. Farmers and market sellers cannot earn a living because police take a cut of their produce and sales. In numerous ways like these, corruption encourages discrimination, deprives vulnerable people of income, and prevents people from fulfilling their political, civil, social, cultural and economic rights.

UN treaty bodies and UN special procedures have concluded that, where corruption is widespread, states cannot comply with their human rights obligations.<sup>33</sup> Some international documents have even considered corruption to be a “crime against humanity”, a category of crimes that includes genocide and torture.<sup>34</sup> However, these statements are generally framed in broad terms. The extent to which acts of corruption directly violate human rights, or lead to violations, is rarely defined or explained. Most existing work examines the causes of corruption, mechanisms and policies to prevent it, and forms of technical cooperation to assist developing countries and countries in economic transition. Little work has been done to describe in precise terms what the links are between acts of corruption and violations of human rights.

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33 See, for example, statements by the Committee on Economic, Social and Cultural Rights that “states face serious problems of corruption, which have negative effects on the full exercise of rights covered by the Covenant [ICESCR]” E/C.12/1/ADD.91 (CESCR, 2003, para. 12); and by the Committee on the Rights of the Child that it “remains concerned at the negative impact corruption may have on the allocation of already limited resources to effectively improve the promotion and protection of children’s rights, including their right to education and health” CRC/C/COG/CO/1 para 14. See also the statement by the UN Special Rapporteur on independence of judges and lawyers in E/CN.4/2006/52/Add.4, para 96.

34 See, for example, the Seoul Findings, 11th International Anti-Corruption Conference, Seoul, May 2003; and the Nairobi Declaration, adopted at the Regional Conference on the Human Rights Dimensions of Corruption convened by the Kenya National Commission of Human Rights (KNCHR), March 2006.

This chapter therefore sets out an operational framework that tries to establish when a corrupt act violates human rights or leads to a violation of human rights. The aim is to provide a technique for analysing corruption in human rights terms. The presentation here is inevitably illustrative; a complete description of every possible link would be impossible. Readers are therefore invited to make use of the logic employed in this chapter to assess other cases and other forms of corruption to see whether they violate human rights and, if they do, what rights they violate.

## **DETERMINING WHEN HUMAN RIGHTS ARE VIOLATED**

Because all forms of corrupt practice may in the long-run have an impact on human rights, it cannot be concluded mechanically that a given act of corruption violates a human right. This means that, to apply the human right framework usefully (that is to say, with potential effect in law), it is necessary to distinguish corrupt practices that directly violate a human right from corrupt practices that lead to violation of a human right (but do not themselves violate a right), and from corrupt practices where a causal link with a specific violation of rights cannot practically be established.

A state is responsible for a human rights violation when it can be shown that its actions (or failure to act) do not conform with the requirements of international or domestic human rights norms. To determine whether a particular corrupt practice violates a human right, therefore, it is first necessary to establish the scope and content of the human right's obligation in question and whether it derives from domestic law, international treaty, custom, or general principles of law. In this report we focus on obligations that states have voluntarily assumed because they have ratified international human rights treaties.

Human rights obligations apply to all branches of government (executive, legislative and judicial) at all levels (national, regional and local). According to human rights jurisprudence, an act (or omission) is attributable to the state when committed, instigated, incited, encouraged or acquiesced in by any public authority or any other person acting in an official capacity.

From an anti-corruption perspective, it is interesting to note that the UNCAC has a broad understanding of "public official" which includes "any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party" (UNCAC, Article 2) (see textbox 5).

## **5. Definition of “Public Official” According to the UNCAC**

Any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.

### **Three levels of state obligation**

It is now commonly understood that states have three levels of obligation in relation to human rights: the obligations “to respect”, “to protect” and “to fulfil”.

*The obligation to respect* requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts. This type of obligation is often associated with civil and political rights (e.g. refraining from committing torture) but it applies to economic, social and cultural rights too. With regard to the right to adequate housing, for example, states have a duty to refrain from forced or arbitrary eviction.

*The obligation to protect* requires the state to prevent violations of human rights by third parties. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states: (a) to prevent violations of rights by individuals or other non-state actors; (b) to avoid and eliminate incentives to violate rights by third parties; and (c) to provide access to legal remedies when violations have occurred, in order to prevent further deprivations.

Non-compliance with this level of obligation may be a vital determinant of state responsibility in corruption cases. By failing to act, states may infringe rights. If they do not criminalise particular practices or fail to enforce certain criminal provisions, for example, they may not prevent, suppress or punish forms of corruption that cause or lead to violations of rights.

The obligation to protect may also provide the link required to show that corrupt behaviour by a private actor triggers state responsibility. Although it might be difficult to establish, a state might be held responsible for violating a right, for example, if it failed to enact appropriate legislation to prevent or punish corruption committed by private corporations. Or a state might be judged negligent if employers breached labour laws (minimum wage requirements, health and safety regulations) and systematically bribed government labour

inspectors to overlook this behaviour. In the case of transnational corporations, the home and host states might both have responsibilities, although the former are often better equipped to ensure that companies comply with human rights.

This level of obligation is relevant to privatisation processes. The privatisation of public services (such as health, transport or telecommunications) may multiply opportunities for corruption and may harm the enjoyment of particular rights (access to clean water, for example). In some instances of privatisation, the state clearly retains direct responsibility for the service in question (for example, when state companies retain certain public functions after privatisation). In others, the state devolves authority to private companies; but in these cases too it is still responsible for violations of rights that they commit, and will be liable if it fails to prevent corruption (or exposure to it) as privatisation occurs, or does not protect the rights of vulnerable groups who depend on the services in question.

*The obligation to fulfil* requires the state to take measures to ensure that people under its jurisdiction can satisfy basic needs (as recognised in human rights instruments) that they cannot secure by their own efforts. Although this is the key state obligation in relation to economic, social and cultural rights, the duty to fulfil also arises in respect to civil and political rights. It is clear, for instance, that enforcing the prohibition of torture (which requires states to investigate and prosecute perpetrators, pass laws to punish them and take preventive measures such as police training), or providing the rights to a fair trial (which requires investment in courts and judges), to free and fair elections, and to legal assistance, all require considerable costs and investments.

A violation of a human right therefore occurs when a state's acts, or failure to act, do not conform with that state's obligation to respect, protect or fulfil recognised human rights of persons under its jurisdiction. To assess a given state's behaviour in practice, however, it is necessary to determine in addition what specific conduct is required of the state in relation to each right. This will depend on the terms of the state's human rights obligations, as well as their interpretation and application; and this in turn should take into account the object and purpose of each obligation and the facts of each case. The term "violation" should only be used formally when a legal obligation exists.

The use of this tripartite typology is a practical analytical tool to better understand the complexities of real situations. They are guidelines that assist us to approach the complex interconnections and interdependencies of the duties that must be complied with in order to achieve protection of human rights. In this regard, it is crucial to keep in mind that other obligations must be considered as well, at all three levels, such as the duty to establish norms, procedures and institutional machinery essential to the realisation of rights; and the duty to comply with human rights principles such as non-discrimination, transparency, participation and accountability.

## **The causal link**

### *Direct violations*

Corruption may be linked directly to a violation when a corrupt act is deliberately used as a means to violate a right. For example, a bribe offered to a judge directly affects the independence and impartiality of that judge and hence violates the right to a fair trial. When an official has not deliberately caused the harm in question, due diligence becomes the test. If a violation of human right was foreseeable, did officials exercise reasonable diligence (all the means at their disposal) to prevent it? In such cases, the responsibility of the state depends both on the specific circumstances and the right violated.

Corruption may also directly violate a human right when a state (or somebody acting in an official capacity) acts or fails to act in a way that prevents individuals from having access to that right. To illustrate, when an individual must bribe a doctor to obtain medical treatment at a public hospital, or bribe a teacher at a public school to obtain a place for her child at school, corruption infringes the rights to health and education.

### *Indirect violations (corruption as a necessary condition)*

In other situations, corruption will be an essential factor contributing to a chain of events that eventually leads to violation of a right. In this case the right is violated by an act that derives from a corrupt act and the act of corruption is a necessary condition for the violation. This situation will arise, for example, if public officials allow the illegal importation of toxic waste from other countries in return for a bribe, and that waste is placed in, or close to, a residential area. The rights to life and health of residents of that place would be violated, indirectly, as a result of the bribery. These rights are not directly violated by the bribe in this example, but the bribe was an essential factor without which the violation would not have occurred. Even without a direct connection, therefore, corruption may be an essential contributing factor in a chain of events that leads to a violation, and so may violate human rights indirectly.

Corruption often causes violations of women and children's rights in this way. When women or children are trafficked (particularly for sexual exploitation and abuse, abduction, sale, prostitution and pornography), those responsible commonly corrupt officials. Usually in return for bribes, the latter supply documents for crossing borders, or turn a blind eye to the trafficking activity. In these cases too, corruption is an essential condition and in its absence the violation would not occur.

Corruption may also be an indirect cause where corrupt authorities seek to prevent the exposure of corruption. When a whistleblower (someone

investigating or reporting a corruption case) is silenced by harassment, threats or imprisonment, or killed, the rights to liberty, freedom of expression, life, and freedom from torture or cruel, inhuman or degrading treatment may all be violated. In such a case, in addition to the original act of corruption that the whistleblower was trying to denounce, it is highly probable that the acts that subsequently infringed his or her rights would also have corruption as a cause (for example, corruption at the level of law enforcement). Again, acts of corruption will then be essential factors in the violation.

### *Remote violations (where corruption is one factor among others)*

Sometimes corruption will play a more remote role. When corruption during an electoral process raises concerns about the accuracy of the final result, social unrest and protests may occur and these may be repressed violently. In such a case, the right to political participation may be violated directly, and repression of the social protests may also cause serious violations of human rights (for example, the rights to life, prohibition of torture and ill-treatment and freedom of assembly). Nonetheless, the electoral corruption would not necessarily be the only or determining cause of such riots or their repression. Many other factors might contribute and, to that extent, the corruption has a more remote link to the violations in question.

## **6. Summary Review of a Human Rights Violation**

Identify the corrupt practice.

- Establish what corrupt act is involved (bribery, embezzlement, etc.).
- Identify perpetrator(s):
  - A state actor (e.g. a government official) or someone acting in partnership with a government official (e.g. if a private party commits the violation, but government officials are significantly involved in ordering, furthering or allowing the violation; or, if government officials commit the violation, private parties are significantly involved in furthering it);
  - A private party through the failure of the state to prevent it.

Identify the state's human rights obligations.

- Study the scope and content of the human right in question;
- Establish what were the acts or omissions of the state required by the right in question.

Identify the victim(s).

- Identify who is the rights-holder of the human right in question;
- Identify the harm;
- Establish if the harm suffered by the victim reflects the failure of the state to respect, protect, or fulfil the human rights in question.

Evaluate the causal link between the corrupt practice and the harm.

- Establish how direct the connection is between the corrupt act and harm suffered by the victim on the one hand, and the content of the human right and the obligation required from the state on the other hand:
  - Direct: the corrupt act itself goes against the content of the human right;
  - Indirect: the corrupt act is an essential factor in the chain of events that led to the infringement of human rights;
  - Remote: the corrupt act itself does not violate human rights.

Evaluate the responsibility of the state for the damage caused.

- Determine if the state has undertaken an effective investigation and prosecuted those found responsible;
- Determine which forms of reparation would be adequate for the given case (e.g. restitution, compensation, satisfaction, etc.).



## **IV. LINKING ACTS OF CORRUPTION WITH SPECIFIC HUMAN RIGHTS**

This chapter provides an analytical tool that should assist in determining when and how violations of human rights and acts of corruption can be connected. It begins with a description of the scope and content of different human rights that have been developed by international human rights bodies. It goes on to provide specific examples of how the content of specific rights can be violated by acts of corruption, as the latter have been defined by the UNCAC. This is one of the several stages necessary to determine the links between acts of corruption and violations of human rights that we identified in the previous chapter.

The chapter takes a human rights perspective and speaks in human rights language. The aim is to assist human rights organisations to address impacts of corruption on human rights, and to introduce international human rights standards to anti-corruption advocates.

For practical reasons, this report refers to human rights that have been recognised in widely ratified international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC), each of which imposes binding obligations on state parties. It is important to keep in mind that several of these rights are also found in regional human rights instruments, such as the Inter-American Convention on Human Rights, the African Charter on Human and People's Rights (ACHPR), and the European Convention on Human Rights (ECHR), as well as in many domestic constitutions and laws.

The chapter examines some rights that are regularly harmed by corruption. It should be noted, however, that the impact of corruption on human rights is not restricted to the rights examined in this section. Corruption is frequently implicated in the violation of other rights (such as the right to life, or the prohibition of torture), in particular when corruption is present in the police, military and other law enforcement agencies.

While we address each right separately, the interdependency of human rights should be kept in mind. In practice, corruption is likely to affect the enjoyment of several rights simultaneously. Failure to protect rights associated with political participation, for example, may have an impact on several economic, social and cultural rights because it may affect the design and implementation of social policies and thus the enjoyment of those rights.

## **WHEN CORRUPTION MAY VIOLATE THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION**

The principles of equality and non-discrimination are fundamental principles of human rights. The principle that every individual is equal before the law and has the right to be protected by law on an equal basis is affirmed in all the main human rights treaties (see textbox 7). These principles do not imply, however, that every difference in treatment implies discrimination. It is not discriminatory to differentiate, for example, if the criteria used are reasonable and objective, and the purpose is legitimate. Affirmative action, and other forms of preferential initiative, for instance, do not necessarily violate the principle of non-discrimination and in some instances may be required in order to remove discrimination.

The UN Human Rights Committee has defined discrimination as “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.<sup>35</sup>

Four features of this definition are relevant with respect to corruption. First, acts of discrimination are defined widely (“any distinction, exclusion, restriction or preference”), and corrupt acts intrinsically distinguish, exclude or prefer. Second, the definition lists a number of “grounds” for discrimination (race, religion, colour, sex, etc.) but those grounds are not exclusive; inclusion of the term “or other status” shows this. As a result, discrimination on *any* ground is prohibited. Third, the definition of discrimination prohibits acts that have a discriminatory “purpose or effect”. By definition, corruption has both a discriminatory purpose and a discriminatory effect. Fourth, discrimination must bring about the specific result of nullifying or impairing the equal recognition, enjoyment or exercise of a human right, such as the right to life, right to education or right to health. Many corruption cases have such effects; they create distinctions, or exclude, restrict or prefer, in ways that impede individuals from exercising one or more rights.

At the same time, discrimination can take place even if no specific right (apart from the right to equality) is affected. Article 26 of the ICCPR prohibits discrimination in law or in fact in any field regulated and protected by public authorities, and its application is not limited to those rights which are provided for in the ICCPR. When a person obtains privileged treatment by means of a bribe (when applying for an official document such as a passport or visa, for example, or clearing goods from customs without paying duties and taxes), no other human right is necessarily directly affected except the right to equality, i.e. the right to be treated equally when obtaining the visa or when clearing goods

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35 HRC, General Comment No. 18, para. 7.

from customs. This right stands independently from other human rights. Having said this, it is likely that privileged treatment of the abovementioned kinds would in fact affect other rights indirectly. For example, if many people do not pay custom clearances, the fees could rise, affecting poor families receiving goods from relatives abroad; if some people are fast-tracked in visa procedures, others could face delay; etc.

In short, every individual is entitled to be treated equally by public officials; and if a person bribes a public official, that person acquires a privileged status in relation to other similarly placed individuals who have not partaken in bribery.

Similarly, when a person is asked for a bribe in order to obtain a service to which that person is entitled without payment, that person suffers discrimination in relation to other individuals in the same situation. There is a violation of the right in both examples because similar cases are treated in a different manner and the difference in treatment results from corruption which is not an objective or reasonable justification.

Corrupt practices commonly produce unequal and discriminatory outcomes with regard to human rights. If corruption restricts a person's access to adequate housing, for instance, it is discriminatory. Housing should be accessible to all, and disadvantaged groups in particular should be granted some degree of priority. After eviction, people are often promised alternative housing, but they may subsequently be denied effective access because the officials in charge require bribes. Well-intentioned low cost housing programmes, designed to benefit disadvantaged groups, may be exploited to the economic advantage of officials in the same way.

Corruption in the health sector often violates the right to equality and non-discrimination. As described below, when bribes are requested from patients, their access to health is severely restricted; in such cases, states have a duty to act at once to ensure that the right to health can be accessed without discrimination. An interesting link between bribes paid to health workers and the accessibility and quality requirements of health services may be noted here. Sometimes, when a payment or gift is made to a health worker, it is difficult to say whether the purpose of the payment was to obtain treatment, to save time, to ensure proper treatment by corrupt means, or to express gratitude. There is a fine line here that should be analysed carefully. First of all, if a bribe was extorted by the health worker, or given as a condition of receiving adequate healthcare, the right to health has been violated. By contrast, secondly, if the payment was made out of gratitude or to obtain a superior quality of treatment, what matters is whether the patient would have received care to a good standard whether or not she made the payment or gift. Third, the difficulty remains that, even in such a situation, the right to equality (the prohibition on discrimination) applies in all cases. As a result, even if the bribe or informal payment has no effect on the treatment received, or on access to treatment, corrupt acts may still technically violate the right to health.

## **7. Equality and Non-Discrimination in Human Rights Treaties**

These principles are explicitly affirmed in most international human rights documents and implicitly embedded in almost all individual human rights provisions. Various formulations of the prohibition of discrimination are contained in, for example, the UN Charter (Articles 1(3), 13(1)(b), 55(c), and 76); the Universal Declaration of Human Rights (UDHR) (Articles 2 and 7); the International Covenant on Civil and Political Rights (ICCPR) (Articles 2(1) and 26); and the Convention on the Rights of the Child (CRC) (Article 2). Some instruments prohibit discrimination on specific grounds (the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). Others prohibit discrimination in the exercise of various rights: for example the International Labour Organization's Convention 111 on Discrimination (employment and occupation) addresses the right to work, and a United Nations Educational, Scientific and Cultural Organisation (UNESCO) convention addresses discrimination in education.

The principle of non-discrimination and equal treatment is asserted in regional instruments, including the American Declaration on Human Rights (Article 2), the American Convention on Human Rights (ACHR) (Article 24) and the African Charter on Human and Peoples' Rights (ACHPR) (Articles 2 and 3).

Sometimes the references to discrimination make clear that prohibition is not limited to the rights set out in the instrument concerned. For example, Article 26 of the ICCPR, Article 3 of the ACHPR, Article 24 of the ACHR, and Protocol No. 12 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) establish free-standing rights to equality; their application is not confined to the rights contained in those Conventions.

The importance of this distinction is illustrated by Article 14 and Protocol No. 12 of the ECHR. Article 14 gives limited protection because it prohibits discrimination only with regard to the "enjoyment of the rights and freedoms" set out in the Convention itself. To fill this gap, Protocol No. 12 not only asserts a free-standing right to equality on several specific grounds (including sex, race, colour, language, religion, national or social origin, and birth) but includes a general non-discrimination clause. As a result, its protection extends beyond the rights and freedoms which the Convention sets out.

Under human rights law, any discrimination which has the purpose or effect of nullifying or impairing equal enjoyment or exercise of rights is prohibited. This implies that indirect as well as direct forms of discrimination are prohibited. Indirect discrimination occurs when an apparently neutral law, practice or criterion, if applied equally to everyone, has the effect of advantaging one group over another. In determining the presence of indirect discrimination, it is not relevant whether or not there was intent to discriminate on any prohibited grounds; what matters is the consequence or effect.

## **WHEN ACTS OF CORRUPTION MAY VIOLATE THE RIGHTS TO A FAIR TRIAL AND TO AN EFFECTIVE REMEDY**

The right to a fair trial is established in several human rights treaties as well as domestic legislation (e.g. ICCPR, Article 14; ECHR, Articles 6 and 7; ACHR, Articles 8 and 9; and ACHPR, Article 7). It is composed of a broad range of standards that provide for the fair, effective and efficient administration of justice.

These standards address the administration of justice including the rights of the parties involved, the efficiency of procedure and effectiveness. We address each below. Again, it should be noted that, when referring to the scope and content of the right to due process, we are applying standards that human rights supervisory bodies have developed on the basis of treaties that are binding on states that have ratified them. As mentioned below (see textbox 9), some important “soft law” standards are also relevant – like the Bangalore Principles of Judicial Conduct established by the Judicial Integrity Group. “Soft law” standards do not have the same binding authority as treaties.

### **8. The Judicial Group on Strengthening Judicial Integrity**

The group, also referred to as the Judicial Integrity Group, is an independent and autonomous entity run by its members, all of whom are, or have been, heads of the judiciary or senior judges in their respective countries or in regional or international fora. Consisting of eight Chief Justices from four African and four Asian countries, the group aims to uphold the integrity of the judiciary by providing a set of recommendations to other judges worldwide. Adhering to the principle of judicial independence, the group maintains that it is the duty of judicial officials to assert and protect their integrity as well as the integrity of processes over which they preside.

The Judicial Integrity Group was formed in early 2000 under the auspices of the UN Global Programme against Corruption to address the public perception in large parts of the world that judicial integrity was in decline. In 2001 the group formulated a set of recommendations which have come to be known as the Bangalore Principles of Judicial Conduct (see textbox 9).

In the context of the judicial system, corruption may be defined as “acts or omissions that constitute the use of public authority for the private benefit of court personnel, and result in the improper and unfair delivery of judicial decisions. Such acts and omissions include bribery, extortion, intimidation, influence peddling and the abuse of court procedures for personal gain”.<sup>36</sup> “Private benefit” includes both financial or material gain, and non-material gain such as the furtherance of professional ambition.

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36 Transparency International, 2007.

This definition of judicial corruption covers a wide range of acts carried out by actors at different points in the judicial system (the judiciary, the police and prosecutors). For example a judge may be paid a bribe to exclude evidence that would otherwise lead to the conviction of a criminal. A court official may be paid a bribe to allocate a case to a sympathetic judge, to lose a case file, or to speed up the hearing of a case. Police can be bribed to tamper with criminal evidence. Prosecutors can be paid to avoid bringing a case forward or to assess the evidence in an unfair manner. Any actor within the judicial system is acting corruptly if he or she applies inappropriate influence affecting the impartiality of the judicial process. As we will see, such acts imply a direct violation of the right to due process.

It may be that public perceptions of judicial corruption are incorrect or exaggerated. However, the judiciary cannot afford to ignore such perceptions: the causes need to be identified and remedied, because judicial authority finally depends on public acceptance of the moral integrity of judicial officials.

### **9. Bangalore Principles of Judicial Conduct**

The Bangalore Principles of Judicial Conduct were formulated by a group of Chief Justices (the Judicial Integrity Group) in response to a growing body of evidence that in many countries the public was losing confidence in judicial systems, mainly due to a perception that judicial officials were corrupt. Following extensive consultations with senior judges in over seventy countries, the Bangalore Principles were revised and adopted at a Round Table Meeting of Chief Justices at The Hague in 2002. They were then included as an annexe to the ninth report of the UN Special Rapporteur on the independence of judges and lawyers (E/CN.4/2003/65, 10 January 2003). They have since been used as a model for national codes of judicial conduct in several countries, and are an element of the Global Programme against Corruption of the UN Office of Drug Control and Crime Prevention.

The document outlines principles that should be taken into account by judges in all judicial activity. It identifies six core values, namely: independence, impartiality, integrity, equality, propriety, and competence and diligence. Each of these values is elaborated into a principle and its application.

Although a number of accountability mechanisms safeguard judicial integrity, the Bangalore Principles are unique in that they were formulated by judicial practitioners themselves. Other mechanisms primarily emphasise the responsibility of the state. This means also that they have no legal status: the Principles are a code of professional responsibility that, though legally non-enforceable, establishes a foundation for the proper exercise of judicial responsibility.

The document has been well received in the international community. It has been translated into several languages and is being used by several international institutions, as well as by NGOs working on strengthening judicial integrity. Even though it is not a "hard law" instrument, the United Nations Economic and Social

Council (ECOSOC) invited Member States in 2006 to submit to the UN Secretary-General their views regarding the document and to suggest revisions. These views were placed before an ECOSOC-mandated Open-ended Intergovernmental Group of Experts who concluded that it was premature to consider amending it but that clarifications should be included in a commentary. In resolution 2004/23, adopted unanimously and reaffirmed the following year in resolution 2007/22, ECOSOC recognised the Bangalore Principles of Judicial Conduct “as representing a further development of, and as being complementary to, the UN Basic Principles on the Independence of the Judiciary 1985” and invited “Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct, annexed to the present resolution, when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary”.

The Bangalore Principles have great potential value for judiciaries but also for the general public; human rights NGOs should also use the Principles more often. The UNODC has published “A Commentary on The Bangalore Principles of Judicial Conduct” (2007) which is an authoritative guide to their application.

### **Standards relating to the administration of justice**

These standards require compliance with several principles, including the independence, competence and impartiality of tribunals. Corruption may jeopardise judicial independence in several ways. Corruption in appointment processes, for example, will interfere with the principles in several respects.

Political interference in the judicial system occurs when those in political power use their influence (including threat, intimidation or bribery) to force or induce a judge (or other court official) to act and rule according to their interests and not in accordance with the application of the law. Political interference also occurs when judicial appointments, salaries and conditions of service are manipulated, allowing those in political power to have leverage over judges, prosecutors and court staff, thereby creating a judicial system which is pliant and deferential. Judges can be forced to stand down or reassigned from sensitive positions; they may not be promoted or may be physically intimidated or harmed. Political interference also includes the application of immunity laws to judges. While corrupt judges can sometimes shelter behind outdated immunity laws, in the absence of an immunity law independent judges may become the target of vexatious cases mounted by the political authorities. Contempt laws can be used in a similar way to hound independent judges out of office, or protect corrupt ones unjustly.

Bribery can be used by political powers to control judges, as suggested above. In this typology, however, it refers primarily to bribes that are demanded from, or given by, civil society actors, including vulnerable and low-income citizens who can ill afford to pay them. Every official in the system – a judge, court

administrator or police investigating officer – can potentially solicit bribes for services that should be provided as a matter of normal duty.

The principle of impartiality is of great importance: there must be impartiality in objective terms and there should be no appearance of partiality.

In this context, it should be noted that corruption in the process of appointment of judges and judicial officials may have the effect of lowering their quality. Appointments should be based on personal qualifications, moral authority and competence; if they are influenced by corrupt interests, the judiciary is likely to become less able as well as less independent, and the rights of those who apply to the justice system will not be fully protected.

In addition, corruption affects the administration of justice and the right to a fair trial when corrupt acts take place before a case reaches court, often at the investigation level. The police may manipulate evidence in favour of one of the parties, for example, or a prosecutor may alter the facts of a case. This is not a minor issue. The value of prosecuting and punishing acts of corruption can evaporate if evidence is mishandled.

### **Standards related to the rights of the parties involved**

Other standards protect the rights of parties to a trial. Individual rights and principles related to the right to a fair trial include: the right to a public hearing and pronouncement of judgement; equality of arms; presumption of innocence; freedom from compulsory self-incrimination; the right to know the accusation; adequate time and facilities to prepare a defence; the right to legal assistance; the right to examine witnesses; the right to an interpreter; the right to appeal in criminal matters; the rights of juvenile offenders; no punishment without law; *ne bis in idem* (not to be punished twice for the same act); *ex post facto* (law that makes illegal an act that was not illegal when committed); and the right to compensation for miscarriage of justice.

These are basic rights to procedural guarantees to which all human beings are entitled. If acts of corruption impair any of these elements, there would be a violation of the right to a fair trial. Acts of corruption might take the form of a bribe for a favourable judgement, or a more subtle infringement of the principle of equality during the trial process (such as impeding some parties from being in a procedurally equal position during a trial).

### **Standards related to efficiency of the procedure**

Standards that refer to efficiency require that hearings take place “within reasonable time”. According to human rights bodies, the determination of the meaning of “undue delay” or “expeditious procedure” depends on the

circumstances and complexity of the case as well as the conduct of the parties involved (see textbox 10).

The right to be tried without undue delay will be infringed if, for example, a judge is bribed to delay the proceedings as much as possible. Although in this case the right to a fair trial would be infringed by the bribe itself, in cases where there is insufficient evidence to prove that a judge has been bribed, violation of the requirement that hearings should take place in a “reasonable time” may enable a corrupt process to be challenged.

### **10. Uses and Abuses of Due Legal Process**

While the principle of due process can be used to fight corruption, it can also be abused. In litigation over crimes of corruption and financial fraud, one of the most common legal defence strategies consists of filing delaying motions that block the development of the judicial investigation, such as motions to disqualify judges, objections to expert evidence, motions to nullify procedural acts, or other manoeuvres to delay proceedings or have charges dropped. In most such cases, the abuse of procedure is less problematic than excessive tolerance of it by judicial authorities, raising issues of judicial independence. From a human rights perspective, the European Court and other major supervisory mechanisms have assessed “reasonable time” on a case-by-case basis. Elements to be considered include: (a) national legislation; (b) what is at stake for the parties concerned; (c) the complexity of the case; (d) the conduct of the accused and other parties to the dispute; and (e) the conduct of the authorities. Trials lasting as long as 10 years have been deemed reasonable, while others lasting less than one year have been found to be unreasonably delayed. Nevertheless, the wealth of case law has generated excellent criteria by which to assess the efficiency of courts and standards of administration of justice (including legislation allowing for efficiently functioning courts).

### **Fair trial when investigating corruption**

The right to a fair trial should naturally also be respected in corruption cases. The International Council’s second report will discuss in more detail how corruption may be combated while respecting human rights. It will examine the potential tensions between effective investigation of corruption and adherence to human rights principles, and signal the most important elements that need to be borne in mind if anti-corruption investigations, prosecutions and punishments are to comply with human rights. In reality, reconciling anti-corruption practices with human rights does not present insuperable difficulties; on the contrary, if care is taken, there is no reason why good anti-corruption practice should not be consistent with human rights.

Some preliminary remarks may nevertheless be made here.

The principle of presumption of innocence is highly relevant to corruption cases, and particularly to cases of illegal enrichment. The right to be presumed innocent requires that judges and juries and all other public officials refrain from prejudging any case. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial. It implies too that the authorities have a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits. In accordance with the presumption of innocence, the rules of evidence must ensure that the prosecution bears the burden of proof throughout a trial.

This principle is extremely important in corruption cases where the prosecution has all the machinery of the state at its disposition. The principle is clearly violated if an accused is not granted access to information that is necessary to prepare a defence, is denied access to expert witnesses, or is excluded from an appeal hearing at which the prosecutor was present.

The right to a fair trial is also infringed when independent judges, prosecutors or members of anti-corruption commissions that are investigating cases of corruption are illegitimately dismissed or are prevented from carrying out their lawful functions by threats, inducements or an arbitrary reduction of funds.

In a corruption case, an effective witness-protection system can have an important dissuasive impact and can increase denunciations and judicial investigation. Offering adequate protection to victims and witnesses in corruption cases is a very effective incentive for obtaining information that can help to investigate this kind of crime and obtain appropriate punishment for those responsible. In this context, the absence of firm witness-protection rules in many countries is a glaring weakness. Where intimidation, extortion, and threats against witnesses and their families cause witnesses to withdraw evidence, victims' rights and the right to a fair trial are violated, but harm is also done to the authority of the judicial system and its capacity to prosecute corruption effectively.

### **11. Whistleblower Laws**

Prosecution relies heavily on the participation of witnesses, to provide information about acts of corruption, the destination of corrupt payments and the organisation of corrupt activities. While this information is essential, it is equally important to protect the identity of witnesses and in particular to make sure that they are not treated unfairly or put at risk for having made information available. The UNCAC requires states to pass domestic legislation that will protect persons who report corruption to the authorities and provide witness protection in criminal cases. Leaving witnesses and victims unprotected encourages corrupt practices and impunity, and discourages witnesses from fulfilling a public responsibility.

Whistleblower laws protect individuals, who reveal maladministration, corruption and other illicit behaviour within their organisations, from victimisation, dismissal or other forms of reprisal. They also affirm that the information provided by such witnesses should be acted upon, even if its veracity cannot be determined or if the whistleblower broke the law by breaching confidentiality, provided that the whistleblower acted in good faith and had no malicious intent.

Whistleblowing is nevertheless open to abuse because false allegations can defame and damage the reputation of innocent persons. In this matter, whistleblower laws and human rights principles can collide. Whistleblower laws therefore need to include arrangements that protect and restore the reputation of individuals who are falsely and maliciously accused, and sanction individuals who knowingly make false reports. Mechanisms should be put in place to prevent malicious or “bad faith” whistleblowers.

### **Vulnerable groups and the right to a fair trial**

Several factors prevent vulnerable and disadvantaged people from gaining access to courts and tribunals: they include economic costs, lack of information, complex and bureaucratic procedures, barriers of language and geographical distance. From a human rights perspective, it is important to consider the effect of judicial corruption on vulnerable and disadvantaged groups, because judicial systems that require citizens to pay bribes effectively exclude those who are very poor from access to justice, denying them opportunities to settle disputes impartially with neighbours or the authorities. Because they are generally poorer than men, women tend to bear the brunt of such injustice.

According to human rights standards, states should adopt appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice. In addition, to prevent corruption at judicial level, states must put in place appropriate procedures that make access possible for groups at particular risk, including provision of information about their legal entitlements, legal aid, facilities that enable them to communicate in a language they understand, and mechanisms for reporting abuses and corruption.

Judicial corruption that takes the form of political interference in the selection of judges or the assignment of cases also has an impact on the poor, because they are disadvantaged relative to people who are well-connected or well off. Judicial corruption not only harms those seeking justice economically; it also undermines confidence in justice itself. In post-conflict societies the judicial infrastructure is often damaged. This also creates an environment in which corruption is likely to occur. Institutions espousing transparency and accountability are likely to be weak and, where a state is unable to pay adequate salaries, judicial officials are vulnerable to bribery. Because conflicts often have an ethnic or religious dimension, members of some minority or religious groups

may be particularly subject to exploitation or corruption. After conflicts and where state institutions are weak, security and paramilitary forces are also likely to seek to influence judicial processes – by physically preventing people from gaining access to courts unless a bribe is paid, or influencing the outcome of cases by threatening judicial officials.

While anti-corruption organisations have analysed these problems at length, human rights organisations have not yet engaged deeply with judicial corruption as a human rights issue. For their part, anti-corruption organisations may find it useful to apply human rights principles and methods to the work they do on judicial corruption.

### **The right to an effective remedy**

The right to an effective remedy is guaranteed by most international human rights instruments (e.g. ICCPR, Article 2(3); CEDAW, Articles 2 and 3; CERD, Article 6; ICESCR, Articles 2 and 3; CRC, Articles 12, 13 and 37(d)). It asserts that, when a human rights violation occurs, a state has a duty to provide victims with an effective remedy. Failure to do so can create a climate of impunity, particularly when states intentionally or regularly deny remedies.

States are under an obligation to provide accessible, effective and enforceable remedies to uphold civil and political rights. A person claiming a remedy is entitled to have his or her claim determined and enforced by a competent domestic authority, and states must ensure that this can occur.

Ending an ongoing violation is also an essential element of the right to an effective remedy.<sup>37</sup> A state that fails to investigate allegations of violations or bring perpetrators to justice is in breach of the ICCPR. Effective administration of justice is essential to enjoyment of this right. To achieve this, states must ensure that equality before the courts is established by law and guaranteed in practice. Corruption in the administration of justice infringes both the right to a fair trial and the right to an effective remedy. Suppose, for instance, that a woman, unfairly dismissed, brings a lawsuit against her employer, and that the employer then bribes the judge to obtain a favourable ruling. The woman's right to a fair trial and her right to an effective remedy for unfair dismissal are both violated. States must guarantee that remedies are accessible, effective and enforceable. This implies equal access to courts, fair and public hearings, and competent, impartial and independent judicial officials.

In sum, from a human rights perspective a good system of fair trial requires compliance with numerous international human rights standards and norms. States are required to organise their judicial system in a manner that respects the requirements of due process. If states do not take measures to organise

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37 See HRC, General Comment No. 31, para. 15.

their judicial systems effectively and to give judges, court staff, prosecutors, attorneys and police officers sufficient capacity to deal with cases, they may create the conditions for corruption.

If there is corruption in the justice system, it is probable that some of these standards are not respected. This may provide opportunities to challenge the process or specific decisions even in cases where a supposed act of corruption cannot be proven.

## **WHEN CORRUPTION MAY VIOLATE THE RIGHTS OF POLITICAL PARTICIPATION**

From a human rights perspective, the right to participation affirms that all citizens should be entitled to engage in decision-making processes that affect them. The major political expressions of the rights to participation are the freedom to vote and stand for elections, the right to equal access to public services, and the freedoms of association and assembly. These rights are enshrined in several human rights treaties (such as ICCPR, Article 25; CEDAW, Article 7; ECHR, Article 3 of the First Protocol; ACHR, Article 23; and ACHPR, Article 13).

*The freedom to vote and stand for elections* refers to the right of every citizen to be involved in the conduct of public affairs, directly or through chosen representation. People directly participate in the conduct of public affairs by exercising their right to vote or their right to be a candidate, at free and fair elections carried out on the basis of universal and equal suffrage by secret ballot that guarantees the free expression of the will of the electors.

With regard to the right to vote, the state has the duty to ensure that individuals eligible to vote can exercise this right freely. Persons entitled to vote must be free to vote for any candidate without undue influence or coercion of any kind that may distort or inhibit the free expression of their will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference. States must protect voters from any form of coercion or compulsion and from any unlawful or arbitrary interference with the voting process.

*The right to equal access to public services* means that everyone has the right to equal access to the public services in his or her country and that access should be based on objective and reasonable criteria.<sup>38</sup>

*The right to freedom of association* allows individuals to join together to pursue collective interests in groups, such as sports clubs, political parties, NGOs and corporations. The freedom of association affirms the right to form and

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38 See HRC, General Comment No. 25, para. 23.

join associations freely; but, in order for the right to be enjoyed, associations themselves must be free from excessive interference by governments.

It is fairly straightforward to determine that bribing voters to persuade them to vote or refrain from voting interferes with the integrity of an election and therefore violates the right to vote. Bribing election officials to interfere with the electoral process, by stuffing ballot boxes in favour of a particular candidate or party and falsifying the count, violates the right to vote in a similar way. States must take effective measures to ensure that all persons entitled to vote are able to exercise their right. The UN Human Rights Committee has stated that any abusive interference with registration or voting, including intimidation or coercion of voters, should be prohibited by penal laws that must be strictly enforced.<sup>39</sup>

The right to stand for election may be restricted by various corrupt means. An Electoral Commission may be co-opted politically, or be complicit in influence trading, or bribed, and may for all these reasons disqualify a candidate or refuse him or her permission to register. Trading in influence occurs when electoral commissioners abuse their position to obtain an undue advantage (monetary or otherwise) from a person who will benefit as a result. Corruption of this kind violates the right to stand for election.

Corrupt practices can also negatively affect another right of political participation: the right to equal access to public service. Access to positions in the public service should be based on an objective and reasonable appointment process. Various forms of direct and indirect discriminatory practices exclude women, and so impede their ability to participate in political organisations and activities.

In other cases, people engage in acts, such as bribery, that are recognised to be corrupt, to obtain public service employment. When they give or accept such bribes, they clearly violate the right to equal access to public service. In general, distinctions are not permitted between citizens in the enjoyment of this right on any ground. Any distinction should be on the basis of objective and reasonable criteria, and without discrimination. If individuals are refused employment, or lose their jobs in the public service because they will not bribe, their right to equal access to public service and their right to equality and non-discrimination are both violated as a result of corruption.

All the examples presented in this section violate the right of citizens to take part in the conduct of public affairs, directly or through chosen representation. By definition, corruption is incompatible with a free and fair electoral process or a merit-based approach to appointment to public service. As important, bribery, abuse of function and trading in influence infringe the free expression of the will

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39 HRC, General Comment No. 25, para. 11.

of the electorate and as such directly violate the rights of all citizens, whether they are voters or candidates.

Corruption also poses a threat to the broader normative and institutional framework of democratic governance. In a repressive regime where political participation is curtailed and accountability is poor, for example, the rights to life, liberty, security of the person, and freedom of expression and association are all less likely to be respected. In addition, the suppression of rights essential to political participation, such as freedom of expression and association, may increase opportunities for corruption. Promoting political freedoms and effective participation are likely to improve transparency and access to information.

### **WHEN CORRUPTION MAY VIOLATE ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

It is especially important to give attention to the impact of corruption on economic, social and cultural rights. Corruption is likely to violate enjoyment of these rights because, as we will see, states have accepted, under human rights law, a wide range of duties to provide or regulate public services in relation to health, housing, water and education. These services generate large public contracts which not only create opportunities for corruption but have a disproportionate impact on vulnerable and disadvantaged groups, in particular women. Widespread corruption in health or educational services deters the poor from seeking healthcare and education, and depresses living standards and opportunities for poorer people in particular.

Where states privatise services in areas such as healthcare, education and the water sector, the distinction between the public and private sector may become blurred. Nonetheless (as discussed earlier in chapter III), even when public services are privatised, a state is still responsible for some violations of rights that private companies commit, and will be liable if it fails to prevent corruption (or exposure to it) as privatisation occurs, or does not protect the rights of vulnerable groups which depend on the services in question.

It should be noted that the rights examined below serve as examples. Corruption will have an impact on the enjoyment of all economic, social and cultural rights.

When assessing whether or not an act of corruption violates economic, social and cultural rights, two essential obligations should be taken into account: the duty that a state has to take steps to realise these rights progressively; and its duty to prioritise human rights when allocating resources. In addition, it is helpful to apply two analytical tools: the three levels of state obligation (to respect, to protect and to fulfil, see chapter III); and the principles of availability and accessibility.

## **Progressive realisation**

This issue merits specific analysis because it applies explicitly to all economic, social and cultural rights. When states ratify the ICESCR, they accept a general legal obligation to take steps to the maximum of their available resources to progressively achieve the full realisation of economic, social and cultural rights (ICESCR, Article 2). In doing so, a state accepts three obligations: to take immediate steps to make sure that economic, social and cultural rights will progressively become available to all those under its jurisdiction; to prohibit retrogressive measures; and to devote a maximum of available resources to this purpose. States must take deliberate, specific and targeted steps towards the goal of full realisation of the relevant rights.

The obligation is an immediate one and states are required to adopt a range of different measures (such as enacting relevant legislation, providing judicial remedies, and taking administrative, financial, educational or social measures). States must move as quickly and effectively as possible towards full realisation; any deliberate retrogressive measures need to be justified by reference to the use of maximum available resources.

Corruption implies that the state is not taking steps in the right direction. When funds are stolen by corrupt officials, or when access to healthcare, education and housing is dependent on bribes, a state's resources are clearly not being used maximally to realise economic, social and cultural rights. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, referring specifically to this, has argued that, when a state does not progress towards realising the right to health because of corruption in the health sector, it has failed to comply with its obligations concerning the right to health.<sup>40</sup>

The UN Committee on the Rights of the Child has noted that corruption reduces the resources available to implement the Convention on this right. It has suggested that states in which corruption is widespread cannot comply with their obligation to implement the economic, social and cultural rights of children as provided under Article 4 of the Convention.<sup>41</sup> High level embezzlement of public funds would also reduce the resources for law enforcement that are needed to protect children from human trafficking and from sexual and labour exploitation.

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40 E/CN.4/2006/48, para. 40.

41 CRC/C/15/Add.136, para. 5; CRC/C/15/Add.160, para. 9; and CRC/C/15/Add.124, paras 18 and 19.

## **The prohibition on taking deliberately retrogressive measures**

The UN Committee on Economic, Social and Cultural Rights (CESCR) has noted that “any deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.<sup>42</sup>

In order to understand the Committee’s statement, it is important to analyse what constitutes a “deliberately retrogressive measure”. The Committee has not provided a definition. However, some guidance is to be found in General Comment No. 4, which states that “[A] general decline in living and housing conditions, directly attributable to policy and legislative decisions by States Parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant”.<sup>43</sup> It is therefore possible to argue that a “deliberate retrogressive measure” means any measure that implies a step back in the level of protection accorded to the rights contained in the Covenant resulting from an intentional decision by the state concerned.

## **The duty to accord a degree of priority to human rights in the allocation of resources**

Because resources are always limited, states need to prioritise. While they are entitled to decide where and how they allocate their resources, when they ratify human rights treaties, in particular the ICESCR, states assume obligations that limit their discretion.

This follows from the obligation to take steps to realise economic, social and cultural rights progressively. If a state ratifies the ICESCR, it will not comply with its obligation under Article 2(1) of the Covenant if it does not give some priority to its implementation. It is bound therefore to acknowledge that its discretion on expenditure is not absolute.

## **The three levels of state obligations**

As mentioned, states have an obligation to respect, protect and fulfil human rights. Regarding economic, social and cultural rights (ESC rights), the *obligation to respect* requires states to refrain from interfering directly or indirectly with these rights. The *obligation to protect* requires states to prevent third parties from interfering in any way with the enjoyment of ESC rights. The *obligation to fulfil* requires states to take positive measures to assist individuals and communities to enjoy their rights.

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42 HRC, General Comment No. 3, para. 9.

43 HRC, General Comment No. 4, para. 11.

The obligation to fulfil requires special attention. Governments comply with the duty to fulfil economic, social and cultural rights in several ways. These can involve a wide variety of operations, ranging from the provision of public services to the creation of social programmes for reducing poverty. All these activities give rise to opportunities for corruption and, where corruption occurs, it will have a disproportionate impact on the poor.

Social programmes redistribute sizeable resources through direct subsidies, income transfers and provision of services, and they represent a vital source of food, housing, health, jobs and income for people who live in poverty, even if the support they offer is insufficient to meet need. Wherever such programmes lack transparency, are weakly monitored, or are inappropriately discretionary, they offer major opportunities for patronage and other forms of corruption. In many parts of the world, social welfare programmes have become one of the instruments that are most highly valued by political parties to maintain or develop their support networks. Using targeted social programmes, political parties can favour certain groups and discriminate against others – a practice that neutralises the steady fulfilment of ESC rights, even though these rights have been formally recognised at national and international levels and the state has committed financial resources to their fulfilment.

Ensuring that social programmes are properly regulated and accountable is the most effective way to reduce corruption. If accountability is to be sustained, moreover, it will be important to ensure that the beneficiaries of such programmes, including disadvantaged and marginalised populations, are consulted and involved in decisions about their design, implementation and monitoring. Participation needs to be authentic; members of the public need to have good access to information, and have opportunities to express their opinions, and have their opinions heard.

### **The principles of availability and accessibility**

The practice of human rights has led to the development of standards for measuring fulfilment of social rights. Four standards – availability, accessibility, acceptability and adaptability – are generally used to assess the delivery of public services such as health, education, housing, food and drinking water.

These standards protect the core content of economic, social and cultural rights. They ensure that public services are made available in sufficient quantity and quality to meet the needs of the community in question (availability); that services are allocated and provided to the whole community without discrimination, and are within reach (accessibility); that physical access to goods and services is safe; and that services are organised in ways that avoid discrimination. In addition, cost should not be prohibitive: for essential services (like water) this means that the poorest users should not be excluded from access by price.

Corruption in the provision of public services affects and distorts the delivery of services in a wide variety of ways. It can cause under-provision, depress quality, increase cost, waste materials, generate fictitious expenditure and projects, or simply destroy the service or make it unavailable.

## **WHEN CORRUPTION MAY VIOLATE THE RIGHT TO FOOD**

The right to food, also referred to as the right of everyone to be free from hunger, is a component of the more general right to an adequate standard of living (ICESCR, Article 11(2)). The right to adequate food asserts that all people should be in a position to feed themselves.

It should be made clear that the right to food does not imply that states must provide food to everyone. The obligation on a state is to take steps that will gradually make it possible for all people to feed themselves, will provide access to food in an equal and non-discriminatory way, and will assist people to obtain food if they are not in a position to feed themselves.

### **Core content of the right to food**

According to the CESCR's General Comment 12, the core content of the right to food implies that food should be made *available* in a quantity and quality that is sufficient to satisfy the dietary needs of individuals. Individuals should be able to feed themselves from productive land or other natural resources, and distribution, processing and market systems should be able to move food from the site of production to where it is needed in accordance with demand. Food must be *safe* (free from adverse substances). This means that the government must set and enforce health and safety standards for food quality. Food should also be *acceptable* within a given culture. This implies the need to take into account, as far as possible, perceived non-nutrient values attached to food and food consumption and informed consumer concerns. *Accessibility* includes both economic and physical accessibility. *Economic accessibility* implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be such that households can meet other basic needs. Socially vulnerable groups may need specific attention through special programmes. *Physical accessibility* implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Refugees, victims of natural disaster and other specially disadvantaged groups may need special attention and priority consideration.

Corruption can seriously undermine the realisation of the right to food. The UN Special Rapporteur on the right to food identified corruption as one of the seven major economic obstacles that hinder or prevent the realisation of the

right.<sup>44</sup> In 1996, the Declaration of the World Food Summit expressly mentioned corruption as one of the causes of food insecurity. As it does with other ESC rights, corruption diverts essential resources from social spending and thus, directly or indirectly, hinders realisation of the right to food.

In addition, corrupt practices related to the possession and use of land and natural resources can restrict the availability of food and violate the right. For example, if bribes are required to purchase or obtain a license to farm land, this may prejudice access to food. The right will also be violated if land is allocated in a discriminatory manner as a result of corrupt practises.

Indigenous populations may be particularly vulnerable to violations of their right to food as a result of corrupt sale or expropriation of land on which they depend. Logging, oil and mining ventures, many of which are frequently non-transparent about land acquisition, have displaced numerous indigenous communities from their ancestral lands, and in doing so have sometimes violated their right to food and other ESC rights.

Corruption may also affect other elements of the right to food. Food security may be compromised if food producers obtain licenses by bribing the authorities; and the right to health (and life) may be compromised, if such food producers subsequently put adulterated or unsafe products on the market. Corruption in food programmes and schemes designed to meet the needs of socially vulnerable people may also prevent them from obtaining food; when a person embezzles funds from a food programme, or diverts food into the black market for personal profit, the right to food of those who are embezzled is clearly compromised.

## **WHEN CORRUPTION MAY VIOLATE THE RIGHT TO ADEQUATE HOUSING**

The right to adequate housing derives from the right to an adequate standard of living. It focuses on the obligation to ensure that everyone has housing that is safe, healthy and adequate (ICESCR, Article 11(1)). In addition, the right forbids discrimination in the field of housing, as well as forced or arbitrary evictions or acts of unjust dispossession. The right to adequate housing does not entail that the government has to build housing for the entire population or that housing must be provided free of charge to whoever requests it. It is primarily a right of access. What constitutes adequate is dependent on social, economic, climatic, ecological and other factors. However, certain minimum elements are integral to the right and should always be taken into account. Corruption may violate this right by restricting one or more of its elements.

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44 E/CN.4/2001/53, para. 69.

## **Core content of the right to housing**

The core elements of the right to housing have been defined by CESCR, General Comment No. 7. All persons should possess a degree of legal *security of tenure*, guaranteeing protection from forced eviction, harassment and threats. Housing must also be *affordable*: the price of housing should not be so high that households cannot meet other basic needs. Housing must be *habitable*. Houses must contain facilities essential for health, security, comfort, and nutrition, such as heating, safe drinking water, lighting, sanitation and washing facilities. They must be adequately spacious and protect from cold, rain, threats to health and structural hazards. Housing must be *accessible*, and disadvantaged groups in particular should be ensured some degree of priority in housing. *Location* matters too: housing should permit access to employment, healthcare services, schools, childcare centres and other social facilities; it should not be located in polluted areas. Finally, housing policies should be culturally appropriate, enabling the expression of cultural identity.

Corruption undermines security of tenure. Companies may bribe officials to grant leases on land that is already occupied. Officials or businesses may bribe homeowners directly to sell up, often throwing poor tenants on the street. Village leaders may be bribed into signing blank contracts with the local land administration, which then sells the land on to developers. Embezzlement of funds in a programme destined to build housing units, or bribery in the selection of contractors, may result in construction of substandard quality, impairing habitability.

Accessibility too can be affected by corruption. In many countries, the easiest way to obtain a house is by bribing the relevant officials. Subsidised programmes may be hijacked by their administrators in case they demand payments before they agree to allocate or if they allocate to friends.

Where land is owned by a provincial or regional government, informal settlements often squat public land. This creates conditions in which corruption, exploitative renting or abusive eviction can easily arise.

## **WHEN CORRUPTION MAY VIOLATE THE RIGHT TO HEALTH**

The right to health is included in several human rights treaties. Most notably, Article 12 of the ICESCR established the “right to the highest attainable standard of physical and mental health”, defined as the “right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health”.<sup>45</sup> While this right is broad, it does not imply that people have a right to be healthy. The right to health includes

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45 CESCR, General Comment No. 14.

healthcare, but also the underlying determinants of health, such as safe drinking water, adequate sanitation, adequate supply of safe food, nutrition, housing, occupational health, environmental health and access to health-related information. Another core component of the right has been identified, which the state must guarantee under all circumstances regardless of its available resources: access to maternal and child healthcare, including family planning, immunisation against the major infectious diseases, appropriate treatment of common diseases and injuries, essential drugs, adequate supply of safe water and basic sanitation, and freedom from serious environmental health threats.

### **Core content of the right to health**

The core elements of the right to health are set out in CESCR, General Comment No. 14. Health facilities, goods and services as well as programmes must be made *available* in sufficient quantity. States therefore need to ensure that the availability of health goods and facilities is not negatively affected by acts of corruption which, in the health sector, can have mortal consequences.

Health facilities, goods and services must also be *accessible* to all persons without discrimination. Accessibility has four overlapping dimensions. *Non-discrimination*: health facilities, goods and services must be within appropriate physical reach of all people, including vulnerable or marginalised groups. Health sector corruption can also lead to direct discrimination when healthcare providers and professionals treat patients differently, based on their income or their personal relationships with medical staff. *Physical access*: health facilities, goods and services must be within safe physical reach of all sections of the population, including vulnerable and marginalised groups. Health sector corruption may lead to decisions that are less favourable to a community. For example, hospitals may be built in cheaper areas of a city, or in unhealthy locations, or in locations inaccessible by public transport. *Economic access* (affordability): whether they are provided by public or private institutions, health facilities, goods and services must be affordably priced. The affordability of health services is affected by corruption when, for example, health officials request fees for drugs that have been provided free of charge by pharmaceutical companies or donor organisations, or demand “informal payments” for treatment. When a person seeking a health service is asked for a bribe, this not only violates his or her right to health but also the principle of non-discrimination, because the bribe places the patient in a position of inequality *vis-à-vis* others. Women suffer most from corruption in the health sector because they tend to seek healthcare for themselves or for their children more often than men, and are more regularly exposed to corruption in the sector. Pregnant women and women with reproductive health problems, who have no money to pay bribes, are particularly likely to be at risk as a result.

*Access to information*: patients and the public as a whole should have the right to seek, receive and impart information and ideas. States must take

measures to ensure that patients are in a position to make informed choices and select appropriate providers at appropriate prices and standards of quality. This component is particularly important in regard to the right to health due to the many asymmetries of health information. Physicians typically have more information than patients, while pharmaceutical companies frequently have more information than governments.

*Acceptability:* health facilities must respect medical ethics and should be culturally appropriate. Among other things, health facilities must be designed to respect confidentiality and improve the health status of those concerned. States should put in place guarantees that ensure that health professionals do not abuse their position of power and thereby disregard the “acceptability” of the services they provide.

*Quality:* health facilities must be scientifically and medically of good quality. Corruption can affect the quality of medicines, for example, when regulators are bribed to carry out less rigorous checks or to approve medicines without adequate investigation, or when hospital administrators purchase cheaper, less effective (or even expired) drugs and embezzle the difference in cost. States should ensure that the quality of health services is guaranteed at all levels of the health sector and that the quality of health services is not negatively affected by corruption. Corruption affecting the quality of health services and particularly the quality of medicines is a serious infringement not only of the right to health but also of the right to life.

Corrupt practices in the pharmaceutical industry are particularly relevant. Unethical drug promotion can generate conflicts of interest for physicians and ultimately can harm patients' health. If drug marketing by pharmaceutical companies is not well regulated, studies have shown that physicians may prescribe treatments under the influence of marketing inducements that may bring no benefit (and may even be harmful) to patients and the health system. If states do not guard against this kind of abuse, they will violate their duty to protect the right to health (see textbox 12).

In general terms, corruption in the health sector occurs in three main forms: in management of financial resources (budget allocation, etc.); in the distribution of medical supplies (purchasing, marketing); and in the relationships of health workers with patients.

## 12. State Violations of the Right to Health Associated with Corruption

### *Violations of the “obligation to respect”:*

The obligation to respect includes the duty of states to refrain from activities that harm health. States may violate this level of obligations if they or their agents:

- misappropriate funds that have been allocated to the health sector;
- accept bribes in exchange for, for example, a construction permit for a health facility;
- embezzle or steal money from the health budget;
- trade in influence in the health sector;
- abuse their function in relation to the health sector;
- collude with an organisation that fakes drugs or sells counterfeit drugs;
- divert drugs that are destined for their country back into the international drug market.

### *Violations of the “obligation to protect”:*

The obligation to protect requires states to protect people from health infringements by third parties (e.g. private companies and other organisations that provide healthcare goods and services). To this end, states should adopt legislation or policies ensuring equal access to healthcare and health-related services provided by third parties; should control the marketing of medical equipment and medicines by third parties; and should ensure that medical practitioners and other health professionals meet appropriate standards in terms of education, skill and ethical conduct.

States may violate their obligations with respect to health if they or their agents fail institutionally to adopt legislation and other measures to:

- protect individuals from health sector corruption (e.g. deceptive marketing or advertising by companies);
- regulate and monitor the actors in the health sector (e.g. against manipulation of medical research);
- provide redress for victims of health sector corruption.

### *Violations of the “obligation to fulfil”:*

The obligation to fulfil requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards full realisation of the right to health. States may violate the obligation to fulfil the right to health if they fail to adopt and implement strategies to tackle corruption in their health system.

## **Other actors**

### *Violations of the “obligation to respect”:*

Actors in the health sector may violate their obligations if they:

- accept informal payments;
- discriminate against patients on the basis of their health status, age or financial means;
- overproduce care when third parties cover the costs;
- let themselves be influenced by the pharmaceutical industry, or, as a pharmaceutical company or producer of medical equipment, improperly influence healthcare providers to select their drugs or medical equipment.

*Violations of the “obligation to protect”:*

Healthcare providers and other actors in the health sector may violate their obligations with regard to health if they fail to adopt regulations and do not take other measures to protect against:

- illegal and inflated invoicing;
- overconsumption of medical services;
- overproduction of care by physicians when third parties cover the costs;
- overpayment for goods and services;
- unnecessary medical interventions that maximise fee revenue;
- sale of public positions and requiring bribes for promotion;
- diversion of budgets or user-fee revenue for personal advantage, or theft of medicines or medical supplies or equipment;
- acceptance of informal payments by health personnel;
- preferential treatment for well-connected individuals;
- use of hospital equipment for private business;
- improper referrals of public hospital patients to private practices;
- absenteeism of medical personnel while being paid.

*Violations of the “obligation to fulfil”:*

Healthcare providers and other actors in the health sector may violate the obligation to fulfil the right to health if they fail to adopt an anti-corruption strategy that addresses corruption in their hospital, health centre, pharmaceutical company or other health-related institution.

## **WHEN CORRUPTION MAY VIOLATE THE RIGHT TO EDUCATION**

The right to education is guaranteed in several international instruments, notably Articles 13 and 14 of the ICESCR and Article 28 of the CRC. In general terms, this right has two main dimensions. The *social* dimension affirms the right to receive an education that reflects the aims and objectives identified in Article 13(1) of the ICESCR. States are required to make various levels of education available (primary, secondary and higher) and these should be easily accessible to all. Education also has a *freedom* dimension: it requires academic freedom and institutional autonomy and implies the personal freedom of individuals or

their parents or guardians to choose educational institutions that reflect their educational, religious and moral convictions. This in turn implies that individuals should be free to establish and direct educational institutions.

### **Core content of the right to education**

The core elements of the right to education are availability, accessibility, acceptability and adaptability (CESCR, General Comment No. 13). *Availability* requires states to ensure free and compulsory primary education to all, while secondary and higher education must be made available and accessible to all through the progressive introduction of free education. In addition, the provision of educational institutions and programmes must be adequate, and educational institutions and programmes must be equipped with what they need to function (buildings, trained and paid teachers, teaching materials, sanitation, drinking water, etc.). Corrupt practices in the education sector harm the availability of education. Most notably, embezzlement removes resources required to equip educational institutions. *Accessibility* implies that education should be accessible to everyone without discrimination. It refers not only to physical but also economic access. In this context, all education should be affordable, and primary education should be free. *Acceptability* requires that the form and content of education programmes should be acceptable to students and parents (in terms of relevance, cultural appropriateness and quality). *Adaptability* implies that education should adapt to the needs of societies as they change.

Corruption is frequent in the education sector. In most countries, educational institutions occupy a large place in the public sector. This creates many opportunities and incentives for corruption. Frequent forms of abuse include: rigged tenders and bids; embezzlement of funds; illegal registration fees; absenteeism; and examination fraud.

Most corrupt practices in the education sector infringe one or more elements of the right to education. Corruption may restrict access to education in many ways. Children may be requested to make informal payments for services, for example, or required to pay a bribe on admission, or parents may be asked to pay the teacher fees for additional private lessons (covering material from the core curriculum that should be taught during the school day) or for correcting their child's work. In such cases, access to education is not based on equality but on ability to pay a bribe, which amounts to discrimination and puts vulnerable groups at particular disadvantage because they are least able to pay. All corrupt practices that entail the disbursement of money for primary education violate the right to education, because primary education should be free.

Corruption that harms the quality of education affects its acceptability. Corruption in procurement affects the acquisition of educational material, meals, buildings, and equipment, and usually lowers their quality. Corruption of recruitment

procedures may result in the appointment of less qualified teachers, lowering the standard of education that pupils receive. These effects infringe the right to education.

Corruption in the education system may discriminate against girl children and limit their opportunities. For example, when families living in poverty have to pay a bribe to send their children to school, many will prioritise the education of their male children at their daughters' expense, for religious, socio-cultural or economic reasons.

Corruption in education is particularly damaging because it has long-term effects. It undermines access and harms the quantity and quality of education services and facilities. This has a disproportionate effect on vulnerable groups who, without access to education (or with access only to education of poor quality), stand little or no chance of breaking the cycle of poverty. As a result, corruption in the education sector is a catalyst for other serious rights violations. Children who drop out of school because their parents cannot afford bribes will earn less, and are more likely to work in more dangerous jobs and to live shorter lives.

Moreover, if children are exposed to corruption in school, it is difficult to create a culture of transparency and integrity. The effects of corruption in education, like the effects of education, have lifelong, even generational consequences; it is therefore an area in which corruption has especially deep and pernicious effects.

## **WHEN CORRUPTION MAY VIOLATE THE RIGHT TO WATER**

The right to water and the right to an adequate standard of living are linked. Access to clean water is essential for fulfilment of the right to an adequate standard of living (ICESCR, Article 11) and the right to health (ICESCR, Article 12). Without it, these rights are not attainable.

### **Core content of the right to water**

The core content of the right to water is analysed in CESCR, General Comment No. 15. *Availability*: each person has the right to a water supply that is sufficient and continuous for personal and domestic use (such as drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene). Water must be of adequate quality. Water for personal or domestic use must be safe and free from micro-organisms, chemical substances and radiological hazards that constitute a threat to health. Furthermore, water should be of an acceptable colour, odour and taste for personal or domestic use. *Accessibility*: water facilities and services must be physically and economically accessible to everyone without discrimination. *Information accessibility* is defined as including the right to seek, receive and impart information concerning water issues.

It has been argued that the shortage of clean water and rising water pollution are not caused by a lack of natural supply or engineering problems but by corruption.<sup>46</sup> Corruption will violate the right to water when, for example, companies bribe state water regulators to allow them to draw excessive amounts from rivers and groundwater reservoirs, ultimately denying water access to neighbouring communities. Corruption also occurs when citizens have to pay bribes in order to be connected to the national water grid, or to avoid drinking unclean water from sources such as rivers or dams. Women tend to use more water because of their roles as caretakers of the home. In poor female-headed households, lack of money to bribe water officials exposes them to unhygienic water sources, increasing their exposure to water-borne diseases. Where women are responsible for providing the household with water, interruptions of the supply due to corruption will mean that women have to walk further to fetch water.

Corruption can harm the quality of water as well. If a company bribes a public inspector to overlook the discharge of waste into water resources, water supplies will be polluted and the right of people who depend on that water will be infringed. Again, the right of indigenous and minority populations to water is frequently threatened because many indigenous settlements are located by lakes or rivers.

#### **WHEN EMBEZZLEMENT OF FUNDS ALLOCATED TO SOCIAL PROGRAMMES MAY VIOLATE HUMAN RIGHTS**

The claim that corruption violates human rights is usually based on reasoning that money lost to corruption could have been used to buy medicine, equip schools or supply water. It is therefore useful to analyse embezzlement in more detail, particularly the embezzlement of funds allocated to social programmes. This corrupt practice may affect a wide range of human rights.

As described earlier, the right to health (ICESCR, Article 12) is usually understood in terms of the availability, accessibility, acceptability, and quality of public health and health-care facilities, goods, services and programmes. Health facilities, as well as goods and services, have to be available in sufficient quantity, must be accessible to everyone without discrimination, and must be scientifically and medically appropriate and of good quality. Most corruption cases affect several of these elements. This is particularly true in the case of embezzlement of public funds by public officials. Part of the health budget can “disappear” before it is paid out by the Ministry of Finance to the Ministry of Health. More money may then be siphoned off in the course of channelling funds from the national government to provincial administrations, and eventually by the directors or managers of local hospitals. As these resources are drawn off by embezzlement and procurement fraud, less money remains to pay

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46 Swedish Water House, 2006, p. 3. See also, World Water Assessment Programme, 2006, p. 9.

salaries, fund operations, and maintain equipment and buildings. Effects on staff, infrastructure and the quality of care will follow. In this way, corrupt acts, especially embezzlement, can simultaneously interfere with the availability, accessibility, and quality of the right to health.

Embezzlement may also affect the food safety and dietary needs recognised in the right to food (ICESCR, Article 11(2)). When a public official misappropriates part of a subsidy scheme or other funds allocated to a food programme, and instead purchases low-cost and substandard food, the programme may fail to meet dietary needs and may even provide food that is unsafe to eat. Both effects will violate the right to food of beneficiaries. Food must also be accessible to everyone; it must be affordable and physically accessible. In particular, it should be within reach of socially vulnerable groups (such as people who are particularly impoverished or without land) whose needs qualify them for special attention. Corruption undermines accessibility when it affects such programmes – and in practice assistance programmes of this kind are particularly vulnerable to corruption, because they have large budgets and large numbers of (relatively anonymous) clients, creating many opportunities and incentives for abuse. When an official embezzles funds that have been set aside to buy and distribute food, steals the food or sells it, the effect is to deprive people of food they need, to which they are entitled. The right to adequate food is clearly violated by such behaviour.

The embezzlement of education funds removes resources that are needed to equip educational institutions and pay teachers. The right to education (ICESCR, Articles 13 and 14) provides that educational institutions and programmes must be available in sufficient quantity. Availability also means that educational institutions and programmes must be equipped with what they require to function, including teachers who are trained and paid, teaching materials, buildings, sanitation facilities, drinking water, etc. Several different corrupt practices in the education sector harm the availability and quality of education. When funds are stolen, pupils suffer because educational equipment will be of lower quality and teachers will lack resources. Failure to pay teachers' salaries leads in turn to other corrupt practices, such as regular absenteeism or bribe-taking. In this way, embezzlement creates new corruption. In these conditions, the state clearly does not comply with its obligation to fulfil the right to education and thus the right to education is violated.

Funds to finance prison services are also embezzled. This practice has the same effect as in education: it depresses the quality of facilities, and the quality of the services provided. All persons who are deprived of their liberty and placed in prisons, hospitals, detention camps, correctional institutions or elsewhere, have the right to be treated with humanity and dignity (ICCPR, Article 10). In prisons, this implies that each prisoner should have a minimum of personal floor space and access to a minimum cubic content of air, adequate sanitary facilities, clothing that is neither degrading nor humiliating, a separate bed and food of adequate nutritional value (United Nations Standard Minimum Rules for

the Treatment of Prisoners).<sup>47</sup> Embezzlement of prison funds can occur at many levels, from ministerial level to the warder. Corruption of this type will certainly affect the treatment of prisoners, possibly to a degree that will render their treatment inhumane in violation of human rights treaties (e.g. ICCPR, Article 10). This may happen, for example, if lack of funds results in a shortage of prison food, or failure to provide blankets or beds. In such a case, corruption can be associated with violation of the right of a person deprived of liberty to be treated humanely and with dignity.

Embezzlement or misappropriation of assets may also affect the right to a fair trial and to an effective remedy (ICCPR, Articles 14 and 2(3)). Embezzlement deprives the justice system of resources and this will affect its quality and effectiveness. The same lack of resources may mean that insufficient staff are employed, which in turn may create a backlog of cases and slow procedures, infringing the right to be tried without undue delay as provided under Article 14(3)(c) of the ICCPR and consequently violating the right to a fair trial and an effective remedy.

When public money goes missing, the state is not complying with one of its principal human rights obligations: to use the *maximum of its available resources* to achieve the full realisation of economic, social and cultural rights (ICESCR, Article 2(1)). In addition, embezzlement usually expropriates assets that were destined to provide goods or services to members of the public. In most cases, therefore, it prevents the state from fulfilling human rights obligations and is likely to result in human rights violations.

The cumulative effect of corruption becomes evident especially in large scale social programmes. Numerous officials administer such programmes and, if corruption is endemic and widespread, levels of embezzlement can be very high.

### **13. Situations of High Risk**

In certain situations, corruption is particularly likely to be associated with widespread violations of human rights. This is so, for example: in countries rich in natural resources that lack strong democratic institutions; during periods of reconstruction after conflict; and when major infrastructure projects are implemented without careful attention to human rights.

Where democratic institutions are not strongly established, and government is not adequately accountable, countries rich in natural resources provide fertile ground

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47 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

for corruption. The revenues from non-renewable resources (oil, gas, minerals and metals) and renewable resources (forests, fisheries, land) are both substantial and concentrated. Corrupt government officials have opportunities to steal a great deal of money, and to do so in a single take or from a single revenue stream. In these conditions, it is not surprising that corruption often becomes institutionalised and supports large patronage systems. This in turn further undermines political accountability and can soon create conditions in which institutionalised political violence (financed by corruption and public revenues) generates severe violations of rights. In this regard, the establishment of sound democratic institutions, including checks on executive privilege, can be said to be particularly important in countries that are both rich in natural resources but economically dependent on them.

Similar situations arise in countries that are emerging from conflict because, almost by definition, the judicial, parliamentary and governance institutions in such countries are themselves in reconstruction and are able only imperfectly to fulfil their responsibilities. New aid resources and new investments tend to pour into such countries while governance systems are still weak, creating a large window of opportunity for corruption and other forms of crime. In addition, there is a particular risk that groups of people who have become vulnerable as a result of the conflict can be expropriated or exploited. Those at risk include very poor communities whose title to land is not well documented; people displaced by war, who may return to find their land or property expropriated; people associated with the defeated party to a conflict; groups that historically have suffered discrimination (for example, on grounds of religion or race); women and children who have been widowed or orphaned and lack income and homes; etc. A wide range of rights may be violated in these conditions, and corruption is frequently pervasive in such environments.

Major infrastructure projects involve large commitments of public money as well as private investments. Because of their size, they also require regulation, which means that public officials are brought into a close working relationship with the large corporations that tend to manage and implement such projects. This creates numerous opportunities for corruption, sometimes on a large scale: to secure tenders, to simplify procedures, to loosen contractual obligations, to conceal problems or tolerate delays, to hide the corruption itself, or protect those involved from investigation or prosecution. If the project is very large and the country is small, such corruption can even undermine the integrity of official institutions. It certainly creates conditions in which human rights violations are likely to occur and amplifies their effects. It leads to the commissioning of unnecessary work (at public cost); use of materials of lower quality (at public cost, including additional maintenance costs, sometimes endangering health or life); it compromises workplace safety (violating labour laws and sometimes causing risks to health and life); it exacerbates the ecological impact of projects (harming the interests of local communities); it corrupts the implementation of compensation programmes and programmes to mitigate harm (depriving local communities of compensation and potentially violating their rights); and it is frequently associated with the co-optation of monitoring authorities and critics (affected communities, parliamentarians, the media).



## V. PROTECTING THE RIGHTS OF THOSE INVESTIGATING CORRUPTION

Some governments have used anti-corruption campaigns to suppress critics or political opponents, or curb the rights of those who combat corruption. When this occurs, instead of contributing towards increased transparency and accountability, anti-corruption campaigns may weaken democracy and public trust. In such cases, the human rights of those who are politically targeted may be violated.

This chapter examines protection of the human rights of anti-corruption advocates. It reviews rights that are often violated, and identifies human rights mechanisms that can be used to claim redress and create accountability. It also discusses issues that arise when anti-corruption campaigns become politicised, for example when they are exploited for electoral advantage. The chapter concludes that it is necessary to protect the rights of anti-corruption advocates as well as reduce opportunities to exploit anti-corruption campaigns politically: these objectives offer key entry points for collaboration between human rights and anti-corruption organisations.

### THREATS TO HUMAN RIGHTS THAT ANTI-CORRUPTION ADVOCATES FACE

Those who campaign against corruption and call for transparent government often themselves become victims of human rights violations. Risks and threats take many forms. Journalists and anti-corruption defenders are often harassed, threatened and sometimes killed to prevent them from making corruption cases public.<sup>48</sup> Whistleblowers are silenced by imprisonment, threats or violence. Sometimes those who investigate or report instances of corruption find themselves facing criminal charges that have been fabricated or applied inappropriately (laws against dishonouring the government or subversion, for example, or national security laws). Prominent journalists or human rights advocates may be accused (falsely) of accepting bribes or misrepresenting their finances. Opposition candidates may be prevented from standing for election until they have cleared themselves of (bogus) corruption allegations. Such practices infringe not only the right to life, liberty and security, but also the right to freedom of opinion and expression and the right to seek and receive information without interference (see textbox 14). They also discourage other individuals from denouncing corruption in the future.

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48 See reports by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, particularly *The Right to Freedom of Opinion and Expression: Addendum: Summary of Cases Transmitted to Governments and Replies Received*, U.N. Doc. E/CN.4/2005/64/Add.1, 29 March 2005. See also reports on the state of freedom of expression in different countries by Article 19, at [www.article19.org](http://www.article19.org).

Media campaigns and pressure of public opinion may also cause authorities to feel obliged to punish people alleged to be responsible for acts of corruption, even when evidence to convict them is lacking. Judges, as well as prosecutors and other authorities who are responsible for prosecuting corruption cases, are often accused of being “soft” on corruption, or even complicit with it, if they do not punish alleged abuses swiftly and conspicuously. This can incline them to violate the guarantees of due legal process (see chapter IV).

While governments are entitled in law to deprive individuals of their liberty, they cannot do so in an illegal or arbitrary manner and use of that power must comply with legal standards of due process that are designed to prevent its abuse and misuse.<sup>49</sup> Criminal procedure must be fair, and should comply with established legal standards. If these standards are not met, the human rights of those accused are violated.

#### **14. The Rights of Anti-Corruption Advocates that Are Often Violated**

##### *Freedom of opinion and expression*

All persons have the right to hold opinions and express them without interference (see ICCPR, Article 19; and HRC, General Comment No. 10: Freedom of Expression, Article 19). This right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media. These rights should be protected against interference by public authorities and private parties alike.

Certain restrictions or limitations on freedom of expression are permitted under human rights law. In general, these protect the rights or reputation of others; national security or public order (*ordre public*); and public health or morals (see ICCPR, Article 18(3)). These limitations should be interpreted narrowly. Other restrictions violate human rights law. In addition, a human rights framework presumes and requires a pluralistic media and an independent judiciary.

##### *Right to liberty and the right to personal security*

The right to liberty of the person does not grant complete freedom from arrest or detention. Instead, the right provides a substantive guarantee that arrest or detention will not be arbitrary or unlawful. Thus, the right to liberty of the person entails that no one should be arbitrarily deprived of his or her liberty (see ICCPR, Article 9). A person may only be deprived of their liberty on the basis of grounds and procedures established by law, and a series of minimum guarantees must be respected. For

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49 On due process, see chapter IV. As we have seen, a state is obliged under human rights law to protect individuals from abuses by state or private actors, even when it is not directly responsible for them. States contravene their human rights obligations when they fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities” (HRC, General Comment 31).

example, a detained person is entitled to take *habeas corpus* proceedings before a court and must be: informed promptly of the reasons for his arrest and any charges against him; brought promptly before a judge or other officer exercising judicial powers who must either release him or authorise pre-trial detention; subjected to trial within a reasonable time; and compensated if detention was unlawful. Pre-trial detention should be the exception and not the rule. This right concerns all kinds of deprivations of liberty, whether based on criminal activity, mental illness, vagrancy, drug addiction, educational purposes or immigration violations.

Though the right to security was originally intended to cover the personal security of individuals deprived of liberty, it is now accepted as an independent right, and has been recognised in cases concerning death threats, assassination attempts, harassment and intimidation. States are obliged under human rights law to take reasonable and appropriate measures to protect people from such threats.

#### *Rights to privacy*

Family, home, correspondence, honour and reputation constitute the main aspects of private life but are by no means the only ones (see ICCPR, Article 17). Other specific aspects of privacy are personal data protection, control over one's name, sexual privacy, and searches and surveillance.

All persons have the right to be protected against arbitrary or unlawful interference with their privacy and family life, whether this interference emanates from state authorities, individuals or companies.

To prevent such outcomes, independent judges play a vital role in overseeing anti-corruption investigations, to ensure full compliance with due process guarantees. Independent civil society monitoring of the rights of those accused also provides an important element of protection. People accused of corruption have rights and are entitled to judicial guarantees.

### **The politicisation of anti-corruption campaigns**

Anti-corruption campaigns do not operate in a political vacuum. Many anti-corruption campaigns that claimed to tackle corruption (often at the highest levels of government) also promoted political interests.

In Thailand in 2007, Bangladesh in 2007 and Fiji in 2006, elected heads of government were deposed by military leaders on grounds of corruption. Military involvement in anti-corruption programmes poses particular threats to human rights. The constitution is often suspended. Restrictions on civil liberties, such as freedom of assembly, are frequently imposed. Opposition politicians and activists are often unlawfully detained. In many instances press freedom is severely restricted.

## **HUMAN RIGHTS MECHANISMS THAT PROTECT ANTI-CORRUPTION ADVOCATES AND PREVENT ABUSES**

Human rights and anti-corruption organisations therefore have good reason to collaborate to protect the rights of anti-corruption advocates and reduce the risk that anti-corruption campaigns can be exploited politically.

Those who campaign against corruption or call for transparent government do not necessarily think of themselves as human rights advocates and may not use the term “human rights” when describing their work. When they expose corruption cases they are nevertheless seeking to make institutions accountable, end impunity and improve the quality of government, and these activities are also human rights objectives. Journalists too, may be acting as human rights defenders when they investigate and report on corruption cases. All such people need and deserve protection because of the work they do.

Two of the UN mechanisms of protection are particularly relevant for anti-corruption advocates: the treaty bodies and the “special procedures” (see textbox 15).

The most useful “special procedures” are the UN Special Rapporteur on the situation of human rights defenders; the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Working Group on Arbitrary Detention; and the UN Special Rapporteur on extrajudicial, summary or arbitrary execution.

When the rights of an anti-corruption advocate are violated or threatened, it is possible to send a “communication” (a letter, fax or cable) to these bodies, documenting the violation in question. They can make concerns public and, where an advocate is in serious danger, can write to the authorities for clarification or request action that will guarantee the rights of the person at risk. Anti-corruption advocates and organisations should be encouraged to use these mechanisms systematically.<sup>50</sup>

### **15. UN Human Rights Reporting and Accountability Mechanisms**

The UN has developed two distinctive types of human rights procedures. The main *Charter-based mechanisms* are the Universal Periodic Review (UPR) and the Special Procedures (Special Rapporteurs, Independent Experts and Working Groups) of the Human Rights Council. The *Treaty-based mechanisms* are committees created under

50 See reports of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (Doc. E/CN.4/2006/53/Add.1, 27 March 2006, p. 145 and Doc. E/CN.4/2004/7, 22 December 2003, paras. 65, 92 and 93), and Opinions adopted by the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.1, 26 November 2003, pp. 3-6 and 23-25.

the terms of international human rights treaties to supervise and monitor compliance with those treaties. They include the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. There are four kinds of treaty-based mechanisms: (a) a reporting procedure; (b) an inter-state procedure; (c) an inquiry procedure; and (d) a complaints procedure.

*Reporting procedure.* Most human rights treaties include a system of periodic reporting. A State Party (that is, a state that has ratified the treaty in question) is obliged to report periodically to a supervisory body on measures it has adopted to implement the treaty's provisions. Its report is analysed by a committee, which comments and may request further information. In general, treaty reporting procedures are meant to facilitate a "dialogue" between the supervisory body and the state. At the end, the committee usually publishes "Concluding Observations". In these statements, several treaty monitoring bodies have explicitly affirmed that corruption violates human rights, though they have done so in broad terms. For example, the Committee on Economic, Social and Cultural Rights has noted that "States face serious problems of corruption, which have negative effects on the full exercise of rights covered by the Covenant [ICESCR]" (E/C.12/1/ADD.91), while the Committee on the Rights of the Child has said that it "remains concerned at the negative impact corruption may have on the allocation of already limited resources to effectively improve the promotion and protection of children's rights, including their right to education and health" (CRC/C/COG/CO/1, para. 14).

*Inter-state procedure.* Under some human rights instruments (for example ICCPR, Article 41; Committee against Torture (CAT), Article 21; and European Court of Human Rights (ECtHR), Article 33), a state may initiate a procedure against another state that is considered not to be fulfilling its obligations under the instrument. In general, such a complaint may only be submitted if both states have recognised the competence of the supervisory body to receive this type of complaint.

*Inquiry procedure.* This mechanism allows the supervisory body to investigate particularly severe or systemic violations of human rights in a country, at its own initiative or on the basis of reliable information.

*Complaints procedure.* Several international conventions make it possible for individuals or groups of individuals to bring a complaint to an international monitoring body alleging a violation of human rights. The procedure can be brought to a body of experts for quasi-judicial adjudication or for a binding decision to an international court such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (I/A Court H.R.), or the African Court on Human and Peoples' Rights (ACtHPR). Some other regional courts may also be useful such as the Court of Justice of the Economic Community of West African States, the Southern Africa Development Community Tribunal, and the East Africa Court of Justice.

It should be added that, although the above mechanisms have potential to assist victims of corruption, both by providing redress and drawing attention to abuses, they have been poorly utilised.

Several of the treaty bodies will receive complaints in case of violations of human rights, though as a general rule the petitioner must have exhausted domestic remedies. They have sometimes acted to protect individuals who have been threatened or subjected to ill-treatment after witnessing or denouncing corruption.<sup>51</sup>

The presence in a country of active human rights organisations and effective national human rights mechanisms will also help to protect against abuse. Where laws promote transparency, prevent impunity and guarantee access to information and freedom of expression, individuals and organisations who denounce corruption will be better protected and governments or private actors will find it more difficult to exploit anti-corruption laws for political objectives.

#### **16. Anti-Corruption Advocates and the Declaration on Human Rights Defenders**

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms provides for the support and protection of human rights defenders in the context of their work. The Declaration does not create new rights but articulates existing rights in ways that make them easier to apply to the needs and experience of human rights defenders.

The Declaration considers a “human rights defender” to be one who, individually or with others, acts to promote or protect human rights. It appears to be widely agreed that those who advocate good governance, democratisation and an end to corruption and abuses of power are human rights defenders [see: [www2.ohchr.org/english/issues/defenders/who.htm](http://www2.ohchr.org/english/issues/defenders/who.htm)].

If they decide to use UN human rights procedures, anti-corruption organisations may find it helpful to consult human rights advocates, many of whom are familiar with the mechanisms and with human rights law, and know what categories of case different mechanisms can address. Collaboration may usefully extend further, of course: human rights and anti-corruption organisations might cooperate to promote the adoption of improved laws on access to information, legal guarantees of freedom of opinion and expression, the independence of judicial authorities, plural media, and laws that properly balance national security concerns with the right to information. Opportunities for cooperation are discussed in the next chapter.

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51 See for example, Committee against Torture, *Communication No. 221/2002 M.M.K. vs. Sweden*, CAT/C/34/D/221/2002, 18 May 2005.

## **VI. OPPORTUNITIES FOR COLLABORATION**

In this report we have highlighted the connections between acts of corruption and different violations of human rights, mentioning the risks that those who campaign against corruption face. A separate report will discuss how human rights might be integrated practically in anti-corruption programmes, and the difficulties that anti-corruption specialists are likely to face when they make use of human rights.

This chapter highlights some opportunities for collaboration between those who promote and defend human rights and those who work to end corruption, and makes some recommendations.

### **ENTRY POINTS**

Civil society organisations, including NGOs, trade unions, business associations, think tanks, scholars and the media, play a crucial role in efforts both to combat corruption and to promote and protect human rights. Nevertheless, even though much of the work they do is complementary, with some important exceptions human rights and anti-corruption organisations do not regularly collaborate or share their knowledge and experiences.

To an extent this is because anti-corruption organisations are perceived to work with governments and to be more “official”, while human rights organisations are perceived to be more adversarial. Yet where levels of corruption are high, human rights are less likely to be respected: both types of organisations have good reason to promote civil and political rights that hold power to account and enable civil society to organise and work effectively. Nor are the relationships that human rights organisations have with governments always adversarial. Many civil society and government organisations act cooperatively to implement human rights reforms and human rights training. In short, opportunities exist for both human rights and anti-corruption organisations to collaborate in a broad range of activities – from participatory budgeting and tracking of public expenditure to the formation of citizens’ advisory boards and lobbying and advocacy campaigns.

Collaboration may nevertheless not be easy to achieve. One obstacle is that anti-corruption specialists often find the language and concepts of human rights alien and abstract. They generally do not use human rights mechanisms and complain that a “human rights approach” does not provide practical solutions. On the other side, people working on human rights largely ignore the specificity of different acts of corruption and the legal instruments available to combat it. Useful collaboration will require efforts on both sides to overcome differences of language and practice. Human rights organisations will need to find new ways of communicating their legal skills; adoption of rigorous but less abstract and legal forms of expression, for example.

## **Raising awareness and empowering people**

Bottom-up, demand-driven approaches offer good opportunities for cooperation. Tested across the world from Amnesty International letter-writing campaigns to civil rights mass action and civil disobedience movements, these place public opinion and civil society at the centre of change. Though reform proposals are often easier to introduce from the top, sustained change is clearly more likely when it is supported and demanded by the public, because this promotes accountability and transparency.

National human rights institutions can help to strengthen the impact of anti-corruption organisations. Several successful examples of joint collaboration can already be cited (see textbox 17). In general, they combine the traditional human rights practice of “naming and shaming” with the technical expertise of anti-corruption organisations.

### **17. Living Large – Counting the Cost of Official Extravagance in Kenya**

The Kenya National Commission on Human Rights (KNCHR) has “translated” the cost of corruption scandals in terms that make its impact more obvious to citizens. The first issue of *Living Large – Counting the Cost of Official Extravagance in Kenya*, published jointly with Transparency International-Kenya in January 2006, explains how the purchase of luxury official cars affects the lives of ordinary people. Another series, titled *Unjust Enrichment: The Making of Land Grabbing Millionaires* chronicles the cost to the public of illegal allocations of public land. Written jointly with the Kenya Land Alliance, it unmasks public figures who have profited handsomely from acquiring free public land and selling it on to third parties. [See: [www.knchr.org](http://www.knchr.org) for available reports.]

## **Enforcement of existing law and the creation of new law and codes of conduct**

Human rights and anti-corruption organisations could explore common interests in several areas. They could work to enact laws and develop policies that will reduce the secrecy of government decision-making processes and promote access to information and transparency; campaign for freedom of expression and plural media; and campaign to ratify anti-corruption treaties such as the UNCAC. Codes of conduct can set a standard for public servants by ensuring that they do not use their public office for private gain or show bias in carrying out their public duties.

## 18. Access to Information and Citizen Participation

Public access to official information can lead to more effective, efficient and less corrupt government. Public scrutiny of official institutions can reduce abuses of power, including corruption. Participation in policy formation can improve the quality of policy and public support for it. To achieve these goals, the public needs to be well-informed, and government officials need not only to divulge information but ensure that mechanisms of consultation are taken seriously and are properly inclusive.

A number of recent laws specifically recognise that access to information can contribute to protecting human rights. Many of these prohibit government bodies from withholding information about human rights violations and other abuses of office. They include, for example, Mexico's Law on Transparency and Access to Public Information and Peru's Law 27806 on Transparency and Access to Public Information. Some access to information legislation includes provisions that specifically apply to corruption: for example Trinidad and Tobago's Freedom of Information Act [Article 35, available at [www.nalis.gov.tt/Socio\\_economic/THE-FREEDOM-OF-INFORMATION-ACT1999.htm](http://www.nalis.gov.tt/Socio_economic/THE-FREEDOM-OF-INFORMATION-ACT1999.htm)].

Civil society actors have lobbied for access to information legislation in many countries and in many cases these laws witness to the potential of active citizen engagement. Citizen participation is based on the simple premise that individuals affected by a decision should become meaningfully involved in the decision-making process. Access to Information legislation ensures that citizens can monitor and influence policies and decisions on matters, such as corruption, that directly or indirectly affect human rights.

- In Mexico, the NGO *Fundar-Centro de Análisis e Investigación* [see: [www.fundar.org.mx](http://www.fundar.org.mx)] successfully used Mexico's Law on Transparency and Access to Information to monitor public spending, by gathering evidence of nepotism and corruption in the allocation and use of funds earmarked for promoting women's health and HIV/AIDS prevention programmes. It found that money had been granted to a pro-life organisation which spent more than 80% of the funds to hire public relations companies to campaign against supplying contraceptives to women. As a result of the ensuing scandal, the Health Ministry requested reimbursement of the funds and the Ministry *de la Función Pública* started a criminal investigation.
- In some instances, use of access to information techniques has brought down corrupt political regimes. In 2000 the Philippines Centre for Investigative Journalism (PCIJ) began to investigate the personal wealth of President Joseph Estrada. It carefully established documentary evidence, based on official records and interviews, about the acquisition of real estate and the formation of shell companies by members of Estrada's family. The evidence they gathered suggested presidential corruption on a large scale, and played an important role in deposing President Estrada. In this case, though the Philippines has no specific access to information law in place, the PCIJ was able to use other mechanisms, including precedents established by litigation under a constitutional guarantee of access.

Human rights and anti-corruption organisations can also work together to develop firmer professional standards and codes of conduct, ideally in cooperation with law enforcement officials and members of the judiciary. In this regard, wider dissemination of the Bangalore Principles of Judicial Conduct would be a useful common objective.<sup>52</sup> They could also target other actors, such as bankers, accountants, real estate agents and other professionals, without whose assistance corruption and its proceeds cannot be concealed; and work to raise awareness among journalists and media professionals.

### **Using human rights mechanisms for protection, redress and accountability**

Various institutions and procedures exist that can hold states accountable for their policies and actions. Domestic mechanisms include those provided by NHRIs and parliamentary reporting; international mechanisms include those provided by the UN and regional human rights courts such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights, each of which can help to protect anti-corruption advocates when their rights have been prejudiced. In addition, where clear links between acts of corruption and human rights obligations can be established, the same mechanisms might sometimes be used to make those who commit acts of corruption more accountable. International mechanisms will not replace but can complement the essential role of criminal prosecution.

In addition, human rights mechanisms may assist advocates to circumvent legal obstacles that prevent domestic prosecution. Some corrupt practices are not necessarily illegal: when these cannot be made subject to standard law enforcement, they can sometimes be addressed using human rights fora. To illustrate, in many judicial systems nepotism and political favouritism are not considered to fall under the concept of corruption in strictly legal terms, and therefore are not prohibited by law. However, such practices may result in a violation of the right to political participation or the right to equal access to public service. In these cases challenges on human rights grounds, using human rights mechanisms, may provide paths to reform or redress which a strictly legal approach would not offer. In addition, recourse to human rights may increase help to achieve public accountability (even if enforcement remains imperfect).

### **Promoting social accountability – budget and statistical analysis**

One effective way to restrict corruption and protect human rights (and economic, social and cultural rights in particular) is to give the public and civil society better tools and more authority to assess social programmes in which they have

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52 See chapter IV. The Commentary on the Bangalore Principles was prepared by the Judicial Integrity Group (March 2007).

an interest. Communities and civil society organisations have developed many ways to hold governments accountable, in addition to litigation and voting at elections. They include lobbying and advocacy, citizen advisory boards and budget analysis. Sharing experiences on how to implement these mechanisms effectively is another entry point for collaboration between human rights and anti-corruption organisations.

For these mechanisms to work, disadvantaged groups in society need to be enabled to participate in their design, implementation and monitoring. Participation must be real, involving access to information and a degree of influence in the decision-making process.

Budget analysis (a methodology for inquiring into government priorities by breaking down and comparing official expenditures on different items) and analysis of official statistical information are powerful tools for increasing transparency and compliance with human rights obligations. While human rights organisations are increasingly considering these tools, anti-corruption organisations have more experience of using them and can assist the former to develop their skills.

Despite the potential of budget analysis, in many countries budget information is shrouded in secrecy. Whereas budget plans and processes of approval may be relatively public, governments are less often required to provide information about expenditure. Since corruption generally occurs when money is spent, it is therefore important to ensure that such information is accessible and of good quality. Both human rights and anti-corruption organisations have a common interest here, and could combine their efforts to persuade governments that they should collect accurate statistics on expenditure and make the information available.

### **Monitoring public contracting and international aid**

Human rights advocates working to end corruption should pay particular attention to public contracting. This implies monitoring contract procedures at every level, from municipal authorities, to provincial and national or federal government. While contracts at federal or national level are likely to be larger, local government contracts also involve considerable public expenditure and have impacts that are more directly obvious for the public. Public contracting, more than any other area, is a natural point of entry for cooperative work between human rights and anti-corruption organisations. Over the last ten years, for example, the national chapters of TI have developed tools and technical skills for monitoring complex public contracting processes. Human rights organisations could apply the language and practice of human rights to complement this technical work.

Human rights and anti-corruption organisations could also join together to improve the transparency and accountability of international aid. Since donor governments are accountable to taxpayers in their countries and recipient governments to intended beneficiaries of aid, both movements can press for better information and compliance with human rights standards throughout the process of aid delivery. The need to do so will grow following the introduction of policies that will increase the scale on which aid donors directly fund national budgets.

## **Litigation**

This report has argued that, by connecting acts of corruption to violations of human rights, new channels of action can be created, especially if corruption can be challenged through the many national, regional and international mechanisms that exist for monitoring compliance with human rights. The same mechanisms can be used to protect anti-corruption advocates whose rights have been violated. Litigation also provides an opportunity for collaboration between human rights and anti-corruption organisations.

Litigation can raise awareness, and can oblige states to take action against corruption. A successful lawsuit, in addition, may bring compensation for the victims and establish new legal rules that will help others. However, the effectiveness of litigation has limits. It will not always provide a solution. To be successful, cases require evidence of high quality and good cooperation between victims, lawyers and human rights advocates. Success usually requires too the services of a professional legal team, which can be expensive. On the other side of the equation, courts may be corrupt, laws may be poorly drafted, the judicial system may be weak. Success is not guaranteed in the best of circumstances and those who most require protection are usually least able to launch expensive and time-consuming court cases.

Public interest litigation could address some of these challenges. Some human rights organisations have gained considerable experience of public (or strategic) litigation that could be shared and disseminated. When it is appropriate, anti-corruption organisations should consider using public interest litigation, for example to recover assets.

A particular limitation of litigation is the problem of evidence. By definition corruption is covert and leaves no paper trail. Collecting evidence is therefore a major challenge. We have also mentioned the limits of judicial redress. If litigation is to have effect, for victims or perpetrators, advocates also need to identify victims, secure their consent to a prosecution and perhaps recruit them as witnesses, all of which can prove difficult. In addition, where repressive regimes are involved, lawsuits may bring serious risks of harm for those involved. For a mixture of reasons, therefore, while litigation has value, its difficulties should not be underestimated and it should be carefully considered alongside other

options for redress. This said, it is a distinctive tool that is worth exploring in cases where other approaches have not brought results, and can be most effective when it is one element of a broader strategy.

Some anti-corruption organisations are already focusing on litigation. In several countries, Advocacy and Legal Advice Centres (ALACs), run by TI national chapters, offer *pro bono* legal advice on corruption-related cases (see textbox 19). This type of work resembles the traditional public interest litigation on human rights cases that is undertaken by many human rights organisations and university human rights law clinics. This too is an area ripe for collaboration. Organisations working with legal clinics and advice centres should keep in mind one risk: the possibility that, if ALACs become increasingly the first point of contact on corruption issues, this might have the effect of weakening official anti-corruption mechanisms and institutions.

### **19. Advocacy and Legal Advice Centers**

The first pilot ALACs were founded in 2003 by three national chapters of Transparency International in Eastern Europe (Bosnia and Herzegovina, Macedonia and Romania). Surpassing early expectations, the ALAC model took off and is now one of the most dynamic elements in the global TI movement. There are over 20 ALACs in more than a dozen countries, the majority still in Eastern Europe.

ALACs operate free telephone lines and walk-in services staffed by trained volunteers and law students. In some cases they offer direct outreach services to rural communities. They collect complaints from victims or witnesses of corruption. Clients are provided with legal advice and information on how to file a case using the appropriate channels. According to TI's non-investigative principle, ALACs do not themselves engage in investigations because this is perceived to be the duty of police and prosecutors.

ALACs differ from other legal clinics and advice centres because, in addition to focusing on corruption, "ALACs seek to translate citizens' concerns about and experiences with corruption into structural changes for better local and national governance". Part of the ALAC philosophy is to "reject the notion that people are apathetic in the face of corruption". They empower people to tackle corruption while at the same time contributing to systemic change. Due to their popularity, ALACs have been able to collect large amounts of consistent data on various forms of corruption in particular geographical areas, which over time can be used for policy advocacy. In this respect they offer valuable information to governments that wish seriously to tackle corruption. For examples of ALACs see: [www.transparency.org/global\\_priorities/other\\_thematic\\_issues/alacs/faq](http://www.transparency.org/global_priorities/other_thematic_issues/alacs/faq). Besides empowering individual citizens and advocating for systemic change, ALACs have the potential to protect whistleblowers.

Finally, litigation should be seen as one element in a broader strategy designed to encourage social accountability and public participation. In the absence of civil and political rights guarantees such as freedom to organise, access to information and access to the judicial system, it will be hard to fight corruption. Where corruption is prevalent, it will be equally hard to promote human rights. It is in the common interest of anti-corruption and human rights organisations to build a broader and more inclusive strategy that alone is likely to be effective.

## **RECOMMENDATIONS TO NHRIS AND HUMAN RIGHTS ORGANISATIONS**

NHRIs and other organisations that promote and protect human rights must find their own ways to address the impact of corruption. There is no “one fits all” solution. Nonetheless, they should be prepared to meet several challenges, and should be guided by human rights principles and values.

While this section primarily addresses civil society organisations and NHRIs, its analysis is relevant to other bodies and organisations that monitor or regulate human rights or corruption. These include, for example, parliamentarians who oversee compliance with human rights standards or monitor anti-corruption policies and institutions (such as the Global Organization of Parliamentarians Against Corruption (GOPAC)).

### **Apply new analytical techniques: budget monitoring**

Embezzlement of public funds is frequent in both national and local government, notably from social budgets (health, education, housing, social security). NHRIs and other human rights organisations that wish to address corruption are likely to find that it will be useful to learn how to analyse budgets forensically. A great deal of work has been done recently to assess how public resources are spent. Budgets can be analysed at many levels, from a sectoral perspective (education, health, transport, infrastructure), or from the perspective of specific groups (minorities, women, indigenous communities, prisoners, etc.). This expertise can be applied to the issue of corruption.

Indeed, a data and measurement revolution is underway in many areas of programming, from human development and poverty to good governance and anti-corruption reforms. This has implications for human rights. For practical and philosophical reasons, human rights organisations have always been wary of quantifying the fulfilment of human rights. Today, nevertheless, there is a growing need for sound statistics and their analysis, and human rights organisations will need not necessarily to collect but to advocate the collection, classification and analysis of quantitative as well as qualitative data.

## **Strengthen new alliances**

Anti-corruption strategies require the creation of national and international alliances involving actors from across civil society, government and the private sector. Although they have already begun to develop new alliances and forms of cooperation, human rights organisations and NHRIs will need to strengthen their relationships with politicians and journalists, development and business associations, and grassroots and popular movements. This work requires human rights experts to find new ways of communicating their legal skills to a wider public, and in this instance to organisations working against corruption.

NHRIs and human rights organisations should also develop their existing relationships with the judiciary and police – to provide training and advice on the impact of corruption, to assist with policy formation, and to ensure that anti-corruption programmes are not used to suppress critical voices. In addition to monitoring anti-corruption programmes and policies (investigation, prosecution, enforcement, legislation, surveillance) to ensure that they conform with human rights principles, human rights advocates can work with anti-corruption institutions to improve the impact and quality of such programmes.

NHRIs and human rights organisations should also seek to work in smart and innovative ways. For example, members of corrupt elites often travel abroad for medical treatment or education or to bank their money. Use of smart sanctions, that threaten such officials with prosecution or deny travel visas, can highlight issues of criminality and bring effective pressure to bear on individuals. If such actions are taken, they should not result in any human rights violations.

### **20. Checks and Balances on Lawyers**

The Kenya National Commission on Human Rights is working with the Law Society of Kenya to prevent private lawyers hired by public agencies from charging exorbitant and unpredictable fees that imply public officials are receiving kick-backs. They are also discussing how lawyers' confidential client accounts might be scrutinised with a view to making sure that accounts have not been used to launder money from corruption, crime and drug-trafficking.

## **Set an example**

Of course, human rights organisations and NHRIs should be financially transparent themselves. They should be ready to disclose financial information and can set an example by opening their financial reports to public scrutiny, subjecting their accounts to independent audit and establishing mechanisms for internal financial control. Whenever NGOs participate in bidding processes for private or public funds, these should be transparent and open.

Information needs to be socially contextualised. While financial information – sources of income, budgets, evaluations – should be available on websites, this may not be sufficient, because many people may be unable to access information, or submit their views, complaints or suggestions electronically. Organisations therefore need to make information available in an appropriate form to those who have a legitimate interest in their work.

NGOs and other institutions also need to take steps to avoid becoming corrupt themselves. Codes of conduct that clearly identify and sanction corrupt forms of behaviour, promote good practises (on recruitment of staff for example), and protect staff when attempts are made to corrupt them, may be useful.

### **Zoom in: give attention to local government**

Local governments deliver crucial public services (healthcare, education, infrastructure projects, etc.) that are especially vital for vulnerable and disadvantaged groups. Corruption can increase the cost of such services, lower their quality and distort their distribution. Clientelism and patronage are one of the greatest challenges at local government level. Human rights organisations and NHRIs should encourage local governments to be publicly accountable by promoting participatory budget analysis, social auditing and other innovative mechanisms.

Human rights organisations can play an essential role in monitoring corruption in local governments and assisting communities and the public to identify and denounce it. When doing so, they should give special attention to disadvantaged groups, minorities and less organised groups. Women's participation may be essential to ensure that their rights are defended and that gender-sensitive policies are adopted. There are opportunities to use inventive techniques – use of radio and theatre, and adoption of participatory investigation techniques and innovative methods for gathering information.

To work effectively with excluded and marginalised groups, human rights and anti-corruption organisations will need to build relationships that overcome the understandable scepticism such groups often have of outsiders. These groups are likely to need to develop relationships over a long period, to work closely with people and organisations who are trusted in the communities concerned, and adopt approaches that allow members of the community to speak and act for themselves.

When local government corruption is persistent and where national government has made commitments to human rights, human rights organisations should also work closely with ministries to ensure that they support appropriate interventions at local level, both to sanction corruption and ensure that sectoral services such as health, education and water are provided equitably and to a correct standard.

## **Engage the media**

The media naturally play an important role because it is through international or local media that people generally become aware of human rights violations and corruption. Sensitising the media to corruption, and linking it to human rights violations, has enormous educational and advocacy potential.

To combat corruption in the long-term, it will be essential to change the attitudes towards corruption of younger people. If the next generation grows up perceiving corruption to be normal, the battle has already been lost. The media have a great capacity to influence the development of anti-corruption awareness among young people.

## **CHALLENGES HUMAN RIGHTS ORGANISATIONS MAY CONFRONT**

Human rights organisations, including NHRIs, may confront a number of challenges when they try to address corruption from the perspective of human rights. While these will take specific forms according to context, they should be prepared for the following:

### **Structural corruption and low salaries**

A human rights approach may not be well-received or understood in societies where corruption is endemic and public servants receive low salaries. Underpaid officials who corruptly receive a regular supplement to their salary may consider corruption necessary to safeguard a minimum level of pay or meet the needs of their families.

Such conditions undoubtedly encourage acts of corruption by public officials. Parents who must struggle to get access to health services or to enrol their children in school will tend to pay bribes rather than be excluded from a service. There is a growing recognition that reorganising bureaucracies and increasing the accountability of public officials will not reduce corruption in the absence of broader civil service reform, in which raising public sector wages may be part of the package. Corrupt acts take place as a result of rational behaviour that responds to incentives and opportunities. Unless officials and the public are convinced that their rights will be guaranteed and implemented, those who suffer most from corruption may in fact prefer to consent to corruption, if the alternative is to be excluded from access to essential services.

### **Ensuring credibility**

As noted, some governments use anti-corruption campaigns to suppress political opponents and human rights critics, or curb the rights of those who combat corruption. In these cases, far from increasing transparency and the

accountability and quality of government, anti-corruption campaigns may weaken democracy and public trust. These situations create a particularly difficult environment for human rights NGOs to work in, because if they involve themselves in anti-corruption work they run the risk of becoming politically compromised or being corrupted themselves.

In other cases, governments appear to take measures to counter corruption (by establishing anti-corruption agencies or passing legislation) but the measures are not effective or are not prosecuted with seriousness. In such cases, human rights NGOs again need to exercise care before they support reform processes. Does a new anti-corruption body have the powers and authority to be effective? Is it autonomous? Does it have financial resources and skilled staff? Does it have authority to prosecute? Other elements also need to be in place for effective action to be feasible. Are the media free? Are judges independent? Are civil society institutions robust and competent? Human rights NGOs will need to carefully analyse the social, legal and political context when they develop strategies for working on anti-corruption programmes or with anti-corruption institutions.

They also need, obviously, to take the measure of government institutions, which are not monolithic. The executive, legislative and judicial branches of government offer different points of entry for work on corruption. Particular ministries, or provincial or local governments can become allies or obstacles to effective advocacy, investigation or other kinds of human rights work in this area.

### **Combating cynicism**

In practice, applying human rights to strengthen anti-corruption policies will come down in the end to putting individuals at the centre of anti-corruption programmes. To the degree that this is the case, one obstacle will be that many of those who are most in need of protection are not aware of their rights, and in particular of their economic, social and cultural rights. Rights-awareness training and confidence-building ought therefore to be an element of human rights programmes. If a woman does not know what health services she is entitled to receive, or which services should be free of cost, she will not know whether her doctor or other health officials are treating her correctly, or cheating her. If human rights NGOs wish to work on corruption effectively with and on behalf of groups who are poor or exposed to discrimination, they will probably need to develop new methods of working and new alliances that will enable them to have more sustained contacts at local and community level.<sup>53</sup>

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53 See International Council on Human Rights Policy, 2004.

## **The limits of access to information laws**

This report has argued that human rights NGOs and NHRIs should advocate for greater transparency as a means to prevent corruption. At the same time, the adoption of access to information laws will have limited effects. Corrupt officials will simply become more careful. Despite positive examples from countries that have adopted access to information laws, in countries where government secrecy has been the norm and corruption has flourished, access to information laws alone are unlikely to achieve reform.

Indeed, if access to information is elevated into the main tool against corruption, this could divert attention from the primary responsibility of government authorities (including prosecution services and courts). It may be wise to describe access to information less as a tool to identify cases of corruption, and more as a preventive mechanism that reduces the space in which government corruption can occur. To fulfil this role, the amount of information automatically available to the public should increase.

The UNCAC requires states to promote transparency and establish mechanisms that will ensure respect for the right to information. It also requires states to provide and disseminate information about the functioning of the administration and about its anti-corruption policies measures. These provisions are important because they set standards that are not met in practice or in law in the majority of signatory states. Research shows that there is no commonly agreed standard about what budget information must be released, or what declarations of interest and assets should be made by officials, or indeed whether such declarations should be required. The World Bank gathers data on asset declarations but does not impose a standard for their collection and publication.

The same is true for information concerning public procurement and government contracts. While national jurisprudence establishes what information contained in contracts should be released, there is no common comparative standard. This is an area where much work could usefully be done to promote coherent government policies and set minimum standards.

## **Weak prosecutors and anti-corruption offices**

Anti-corruption reforms promoted by the good governance agenda have called for the creation of new independent control institutions (the offices of Prosecutor, Attorney General and General Inspector). Creating control institutions, however, does not always guarantee greater accountability. Although they are now numerous and have developed a variety of institutional arrangements (in terms of location, autonomy, financing, rules of selection and appointment), many of the new control institutions do not have authority to impose legally binding sanctions. As a result, the impact of their reports, rulings or resolutions depends on the response of judicial authorities.

Many of the new autonomous control institutions have failed to achieve their objectives at least partly because of lack of action by the judiciary. By and large, the problem seems to be due to the fact that some judicial authorities refuse to accept (or understand) the evidence provided by the anti-corruption agency. Often, this is due in turn to judicial corruption. As a consequence, the reports and rulings of independent anti-corruption agencies have sometimes not been supported, or have been reinterpreted, by judges, undermining their impact. Failures of prosecution can have a similar effect. If prosecutors are not independent, and investigate and convict on a selective basis, the independence and authority of the judiciary is also compromised. These are both areas to which human rights advocates should give attention.

### **Working beyond borders**

Much corruption is international; it involves the jurisdiction of two or more states. It may be associated with transnational organised crime (money laundering, drug trafficking); foreign states may be implicated; transnational companies may use corruption to obtain contracts. NHRIs and human rights organisations should develop alliances and working methods that enable them to address acts of corruption outside the jurisdiction of one state.

## CONCLUSIONS

This report has not asked human rights organisations to become anti-corruption organisations; or anti-corruption organisations to convert to human rights organisations. It argues that human rights organisations will collide with, and will need to address the issue of corruption in the course of their work, because problems of corruption have human rights consequences; and that mainstreaming of human rights by the UN and many other institutions will mean that anti-corruption institutions will need (and want) to know how to apply human rights.

Our aim has been to provide some tools that will enable them to begin to exchange expertise and may help each to deal with the human suffering caused by corruption more effectively.

This said, those who work to end corruption have created their own institutions, practices and laws – their own tradition – as human rights organisations have. Efforts to apply human rights will not be effective in practice unless they take account of this context. We deal with this broader issue in a second report.



## **APPENDICES**



## I. SELECTED CORRUPT PRACTICES AND THEIR IMPACT ON HUMAN RIGHTS

<b>Corrupt Practice</b>	<b>Act of Corruption (UNCAC)</b>	<b>Potential Harm</b>	<b>Possible Human Rights Violation</b>
Officials bribed to allow toxic waste to be dumped illegally in an area planned for residential use.	Bribery (UNCAC, Article 15).	Exposure to radio-activity which has serious health and life consequences.	Right to life (ICCPR, Article 6). Right to adequate housing (CESCR, Article 11). Right to health (ICESCR, Article 12).
Immigration or police officers bribed to allow trafficking, sale or abduction of children as sex workers or other forms of exploitation.	Bribery (UNCAC, Article 15).	Sexual exploitation and abuse; forced labour; denial of liberty and dignity.	Right to be protected from trafficking and sexual exploitation (CRC, Articles 34 and 35). Right to be protected from child labour (CRC, Article 32). Right to freedom from slavery or servitude (ICCPR, Article 8).
Plaintiff offers a bribe to a judge to obtain a favourable ruling in a lawsuit.	Bribery (UNCAC, Article 15).	Unfair and partial trial; denial for the victim of a right to effective remedy and justice.	Right to a fair trial (ICCPR, Article 14). Right to non-discrimination (ICCPR, Article 2(2)). Right to equal protection of the law (ICCPR, Article 26).

<b>Corrupt Practice</b>	<b>Act of Corruption (UNCAC)</b>	<b>Potential Harm</b>	<b>Possible Human Rights Violation</b>
Oil company offers bribes to public officials to build an oil pipeline on a site sacred to indigenous peoples; a business bribes officials to seize lands of a minority group, or the shelter of urban slum dwellers.	Bribery (UNCAC, Article 15).	Arbitrary eviction and dispossession; denial of right to adequate shelter; denial of enjoyment of family heritage; denial of means of subsistence; restriction of access to natural resources.	Right of self-determination (ICCPR, Articles 1 and 47; ICESCR, Articles 1 and 25). Right to privacy, and family life (ICCPR, Article 17). Rights of minority groups (ICCPR, Article 27). Right to adequate housing (ICESCR, Article 11).
Official demands a bribe to award state registration to religious group.	Bribery (UNCAC, Article 15).	Potential threat to freedom of religion if followers are unable to gather without state permission.	Right to freedom of thought, conscience, religion and belief (ICCPR, Article 18).
Bribery of voters and rigging of election by incumbent officer holders.	Abuse of functions (UNCAC, Article 18). Trading in influence (UNCAC, Article 19). Bribery (UNCAC, Article 15).	Denial of free and true participation in political and governance process.	Right of political participation (ICCPR, Article 25).

<b>Corrupt Practice</b>	<b>Act of Corruption (UNCAC)</b>	<b>Potential Harm</b>	<b>Possible Human Rights Violation</b>
Bribery of labour inspector by an employer to prevent enforcement of labour law.	Bribery (UNCAC, Article 15).	Poor working conditions; unreasonable working hours; low remuneration; unhealthy or unsafe conditions of work.	Right to just and favourable conditions of work (ICESCR, Article 7).
Companies offer illegal payment to water regulator, to exceed water extraction permit.	Bribery (UNCAC, Article 15).	Shortage of water to neighbouring communities; water pollution.	Right to water (ICESCR, Articles 11 and 12).
Illegal diversion or sale of medicines from public clinics to private practice by doctors and health officers.	Misappropriation (UNCAC, Article 17).	Reduction in drug availability; poor and discriminatory service by health officials.	Right to health (ICESCR, Article 12). Right to non-discrimination (ICESCR, Article (2)(2)).
Illegal payment to a judge or orphanage owner to speed up the adoption of a child in breach of rules.	Bribery (UNCAC, Article 15).	Loss of identity, family lineage, ethnic roots and medical history.	Right to best interest protection (CRC, Article 3). Right of the child to preserve identity (CRC, Article 8). Right to best interest protection in adoptions (CRC, Article 21).

<b>Corrupt Practice</b>	<b>Act of Corruption (UNCAC)</b>	<b>Potential Harm</b>	<b>Possible Human Rights Violation</b>
Student at primary level has to bribe teachers to obtain a place at school.	Bribery (UNCAC, Article 15).	Restriction of access to education; unfair privilege given to certain students.	Right to education (ICESCR, Articles 13 and 14). Right to equality and non-discrimination (ICCPR, Articles 2(1) and 26; ICESCR, Article 2(2)).
Persons who request an official document, such as passport, visa or identification card, are asked for bribes to obtain them.	Bribery (UNCAC, Article 15).	Unfair privilege given to certain people; restriction of access to personal official documents; restriction in liberty to move within and leave a country.	Right to equality and non-discrimination (ICCPR, Articles 2(1) and 26; ICESCR, Article 2(2)). Right to liberty of movement (ICCPR, Article 12).
Corrupt police officers arrest individuals for no reason and without a warrant and request bribes for their release.	Bribery (UNCAC, Article 15).	Arbitrary restriction of liberty.	Right to liberty and security (ICCPR, Article 9).

<b>Corrupt Practice</b>	<b>Act of Corruption (UNCAC)</b>	<b>Potential Harm</b>	<b>Possible Human Rights Violation</b>
A public official obtains favourable press from a media group in exchange for extending the cable-television license of the group; or bribes are given to journalists to cover up or misrepresent information.	Trading in influence (UNCAC, Article 19).  Bribery (UNCAC, Article 15).	No fair and free information for population; no efficient and fair competition for cable-television license; deception of public and misinformation.	Right to freedom of opinion, expression and information (ICCPR, Article 19).  Right to equality and non-discrimination (ICCPR, Articles 2(1) and 26; ICESCR, Article 2(2)).
Hospital patients are asked for bribes to be treated.	Bribery (UNCAC, Article 15).	Restriction in access to health; unfair privilege given to certain patients.	Right to health (ICESCR, Article 12).  Right to equality and non-discrimination (ICCPR, Articles 2(1) and 26; ICESCR, Article 2(2)).



## **II. LIST OF TEXTBOXES**

1. Corruption and Children's Rights
2. A "Right to Know": The Human Right to Seek and Receive Information
3. Access to Information under the UNCAC
4. The UNCAC
5. Definition of "Public Official" According to the UNCAC
6. Summary Review of a Human Rights Violation
7. Equality and Non-Discrimination in Human Rights Treaties
8. The Judicial Group on Strengthening Judicial Integrity
9. Bangalore Principles of Judicial Conduct
10. Uses and Abuses of Due Legal Process
11. Whistleblower Laws
12. State Violations of the Right to Health Associated with Corruption
13. Situations of High Risk
14. The Rights of Anti-Corruption Advocates that Are often Violated
15. UN Human Rights Reporting and Accountability Mechanisms
16. Anti-Corruption Advocates and the Declaration on Human Rights Defenders
17. Living Large – Counting the Cost of Official Extravagance in Kenya
18. Access to Information and Citizen Participation
19. Advocacy and Legal Advice Centers
20. Checks and Balances on Lawyers



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The International Council on Human Rights Policy was established in 1998 following an international consultation that started after the 1993 World Conference on Human Rights in Vienna. It conducts practical research into problems and dilemmas that confront organisations working in the field of human rights.

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