

THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Review Meeting

Corruption and Human Rights

Geneva, 28-29 July 2007

THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN COMBATING CORRUPTION

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I. IS CORRUPTION A VIOLATION OF HUMAN RIGHTS?

1. There is recently emerging consensus that corruption is indeed a human rights issue that should be the subject of work by human rights practitioners. This is especially so after the Vienna Declaration stated that all human rights were “indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings.” Further, human rights work is about accountability and holding the duty bearers accountable on a day to day basis which brings corruption under the purview of human rights protection.
2. The Committee on Economic Social and Cultural Rights (CESCR) has provided a fuller interpretation of Article 2 of the ICESCR—where much of the legal rationale for treating corruption as a human rights issue emanates from--by emphasizing that while “progressive realization” constitutes recognition of the fact that full realization of all economic, social and cultural rights cannot be achieved in a short period of time, there is, nevertheless, a core duty for States to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights incumbent upon every State party¹. Clearly, misdirecting resources that could be used to satisfy these obligations is a direct violation of this obligation.
3. We need to see this interpretation in the context of the World Bank’s definition of corruption as “the abuse of office for private gain” through such acts as bribery to circumvent public policies, through patronage and nepotism, through the theft of public resources or through the diversion of state resources. Transparency International has further classified corruption into various categories including “grand corruption” which is essentially high level and high value corruption often perpetrated by political and social elites, and “petty corruption” which is the lower level, smaller value corruption that occurs in everyday life. In some countries this is known as “greasing the palm;” “tea;” or “transport.”
4. For the purposes of this discussion paper, we are using the concept of “grand” corruption, as the more insidious and dangerous form of corruption, on the basis that once there is accountability for grand corruption, there is often a corresponding decrease in petty corruption.

¹ CESCR General Comment 3, Fifth Session, 1990

5. In much of the developing world, corruption is responsible for the non-realization of basic human needs such as health care, education, infrastructure and clean water by diverting into private pockets, resources meant for the purchase of public goods. Corruption further hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging domestic and foreign investment and aid.²
6. Corruption further impacts on civil and political rights, and for instance, presents a daunting range of challenges to electoral administration and has an impact on campaigning, campaign finance and administration of the polls during voting. It makes the right to vote and electoral administration subject to the direction and manipulation of corruptly-enriched politicians and others. Practices such as vote buying and intimidation directly impede on the democratic rights of citizens.
7. Moreover, corruption is a direct challenge on the core tenet of human rights of non-discrimination. Corruption benefits those with access to power and decision-making positions to the detriment of the rest of the population.
8. The Fiji Human Rights Commission argues that good governance is an integral aspect of human rights protection, defining good governance as the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights³, basing its understanding on Resolution 2004/70 of the Commission on Human Rights and other resolutions that state that:
 - i) Good governance is central to the enhancement of a universal culture of human rights.
 - ii) The promotion of the rule of law, strengthening democratic institutions and participation and combating corruption in private and public sectors are all aspects of good governance.

II. HUMAN RIGHTS AND GOOD GOVERNANCE APPROACHES FOR FIGHTING CORRUPTION AVAILABLE TO NATIONAL HUMAN RIGHTS INSTITUTIONS

Education and Information Roles

9. Access to information is critical in combating corruption. Corruption thrives on secrecy and opaque governmental procedures especially in procurement and in extractive industries. It is not coincidental that the countries rated the worst in matters of corruption are those where laws exist protecting “official secrets” in most government business, and where access to information laws are non-existent or are weak. Thus, one of the critical roles that NHRIs can play is campaigning with civil society organizations for the enactment of laws and policies that reduce secrecy in government and promote access to information and transparency. Citizens must have a right to access information held by Government provided it does not compromise national security or the privacy of individuals. We note that access to information is a core human rights issue articulated in Article 19 of the International Covenant on Civil and Political Rights. Only about 70 countries in the world have access to information laws yet, government does not hold information for itself: Rather it is a trustee of information for the citizens.

² See Prof Larry Diamond, “Building a comprehensive system of Accountability to control corruption” Published by the Stanford University Center on Democracy, Development and the Rule of Law, August 2005 pg 181

³ Dr Shaista Shameem, Director the Fiji Human Rights Commission “Good Governance and Human Rights: Key Challenges for the Fiji Human Rights Commission”

10. In addition to efforts to increase transparency and access to information at the domestic level, it is to be noted that there is no international standard or law obligating states to moves towards access to information beyond the treatment of this matter in the International Covenant on Civil and Political Rights. This is one area that NHRIs together with concerned civil society actors can make contributions to enlarging the corpus of international law in this regard.
11. Linked to campaigns for increased transparency within government and access to information, there is a duty for NHRIs to engage in human rights education and awareness that shows the linkage between human rights and corruption, translating the cost of corruption into every-day realities for the citizens. For instance, the Kenya National Commission on Human Rights (KNCHR) has developed an approach where it “translates” the amounts from corrupt scandals into more understandable concepts so that citizens can see the opportunity cost of corruption. KNCHR has started a series of publications, dubbed “Living Large”. The first issue published in January 2006 quantified the cost of official extravagance on luxurious vehicles for senior officials. This joint report with Transparency International-Kenya documents how the purchase of expensive luxurious vehicles for the personal use by Government Ministers and other senior officials negatively impacts on the lives of ordinary folk⁴.
12. In addition, the KNHCR has also begun a series of reports entitled “Unjust Enrichment” chronicling endemic grabbing of forest land and what the public has lost as a result of these illegal and irregular allocations of public land⁵. This joint report with the Kenya Land Alliance unmask well known public figures who profited from free public land allocations and later sold the allocated land to third parties for handsome returns. The report’s key findings are that public officials from the former President, to Ministers, State House Officials and the provincial administration, abused their offices and benefited unjustly from these illegal allocations.

Advocacy Role in Dealing with Impunity

13. Impunity for the powerful and connected is the single most important factor in the perpetuation of corruption, and indeed in all human rights violations. Yet, “equality under the law⁶ is an internationally accepted standard which means that the law should apply equally to both the mighty and the meek. But with many developing countries having outdated, and often colonial legal systems in place that favor the minority powerful⁷, there is a need to go beyond criminal law in fighting corruption.
14. In this context, NHRIs could engage in “name and shame” campaigns, borrowing from traditional human rights work. Moreover, an emphasis on public interest litigation, where applicable, would be helpful especially in efforts to achieve asset recovery where the standard of proof is lower (balance of probabilities, rather than proof beyond reasonable doubt). This is of course dependent on the effectiveness of the growing practice of public wealth declaration of public officials which should be subjected to scrutiny.

⁴ See “LIVING LARGE: Counting the Cost of Official Waste in Kenya”.

⁵ See “Unjust Enrichment: The making of land grabbing millionaires”.

⁶ Article 7 Universal Declaration of Human Rights provides “All are equal before the law and are entitled without any discrimination to equal protection of the law”. Article 26 ICCPR states that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

⁷ Many African countries are still largely using the colonial legal systems inherited at independence, which systems were mostly set up to protect the minority colonial class against the majority colonized. Today the role of “minority colonial class” has been taken by the minority ruling and business elite.

15. Focus by NHRIs should be on the complete circle of corruption and not just one part of it. One of the major gains in human rights has been the approach that looks at, for instance, the supplier of weapons used to commit genocide and not just the genocidaire alone. For corruption, it is important to also focus on the lawyers, the accountants, the bankers, the real estate agents and other professionals without whom it would be impossible to hide corruption or its proceeds. And tighter professional standards, international in nature, should be put together to guide these professionals in much the same way that Corporate Governance has become a norm in human rights.
16. To this end, NHRIs could work with professional bodies to tighten the loopholes that encourage corruption to thrive in a society. This is something the KNCHR has started with the Law Society of Kenya, working together to close the avenues where private lawyers hired by public agencies charge astronomical and unpredictable fees, suggesting that the public officials are receiving kick-backs. In addition, discussions on having some sort of scrutiny of lawyers confidential client accounts are ongoing, given that these accounts have been used for money-laundering for the proceeds of corruption, crime and drug-trafficking.
17. Because much of the proceeds of grand corruption end up in banks and as investments in the global “North,” there is a responsibility for NHRIs in the North especially to campaign for more transparency in the banking and investment sectors in their countries. Part of this is campaigning to ratify and domesticate the UN Convention against Corruption, but active campaigning and engagement with international banks is especially important.
18. Northern NHRIs could also work on the principle of Extra Territorial Obligations focusing on the obligations of host countries to hold accountable companies and individuals who commit corruption and other forms of human rights abuses outside their home nations. In every single major grand corruption scheme there is always a “foreigner” facilitating, assisting or hosting the proceeds of corruption and attention to these foreigners would be useful in the fight against corruption. Thus, for instance, Sani Abacha’s billions of looted cash from Nigeria were traced to Switzerland, Great Britain and other Northern countries in banks and other forms of investment.
19. Northern NHRIs could also lead advocacy work in their countries for “smart” or “targeted” sanctions against corrupt leaders from the South. We must not underestimate the psychological impact of denying visas to the West for African elites and their children where it is not clear how they have become rich. Indeed, many of the corrupt come for medical treatment in the West where they also educate their children. Loss of this privilege is exceedingly humiliating and adds to some probity.
20. The role of the media as an ally in the war against corruption can not be gainsaid and NHRIs should make issues of media freedom and diversity central to their work. This of course has benefits for other aspects of human rights, and in many developing and countries in emerging democracies, this means working to ensure that there is widespread ownership of media; that media owners give journalists sufficient resources to avoid bribery and journalists for sale; and promoting continuous capacity building for journalists to increase understanding and professionalism.
21. A broad approach to dealing with impunity is helpful in the fight against corruption. For instance, the work of the South African Truth and Reconciliation Commission in laying the basis of a new value system in that country after apartheid and especially in tackling accusations of human rights violations on all sides has been critical to dealing with impunity.

22. Of course a responsive leadership helps in this broad approach to impunity and the fact that President Mandela easily honored a summons to attend a court hearing on a flimsy rugby related case early in his term helped lay the foundation for a country which respects the law and where no one is above the law.
23. Similarly, the approach by President John Kuffor of Ghana that he would respond to any summons issued by the Ghana Commission on Human Rights and Administrative Justice – which has a dual mandate as anti-corruption and traditional NHRI role – as it was investigating an allegation of possible conflict of interest and abuse of office has been helpful in eroding the sense of impunity that powerful people cultivate.
24. Indeed, the strategy of the Ghana CHRAJ where it decides to investigate any and every expenditure item from the Presidency in its work is critical in engendering respect for law and an end to impunity. For if the President can be investigated, and he welcomes scrutiny to boot, then who else can escape it?

Empowerment role

25. One of the key human rights approaches that should be used in the fight against corruption is the “bottom-up, demand driven” approach where the citizenry themselves are the key players in advocating change and reform and holding political elites accountable. This is a tested method across the world, from Amnesty International style letter writing campaigns; to civil rights era mass action and civil disobedience campaigns; to the apartheid era use of funerals and boycotts to raise public anger. While change is often easier when it is “top-down” it is clearly more sustainable when it is bottom up and demand driven, as this promotes accountability and transparency.
26. This bottom-up approach is often a civil society driven approach. But since NHRIs are both part civil society and part government, they are often in a special place that can focus, direct and indeed influence the bottom up empowerment approaches. In fact the Paris Principles allude to such a role by mandating NHRIs to work closely with civil society in the protection and promotion of rights. In Africa and other regions where the state has assumed a predatory role over the years, this role is particularly important for NHRIs to gain legitimacy with the population and have relevance to issues that affect the majority. It is also quite a risky area of work that repressive governments will react against, but this is but one of the challenges that NHRIs face.
27. In engaging in this role it is critical that NHRIs catalyze and bring together broad-based actors with the same goal. The fact that NHRIs are state bodies helps in reducing potential tensions within the broader human rights movement, and its involvement in this role also opens a space for others and provides protection against reprisals to all especially with the special relationship that NHRIs enjoy with the UN through the office of the High Commissioner for Human Rights.

Policy role

28. NHRIs can also work to strengthen other actors that are necessary for the fight against corruption. Key among these actors is the judiciary, which is a critical pillar in anti-corruption work. NHRIs can shape policy changes towards judiciaries that are well resourced, independent and efficient. If the judiciaries are slow, overwhelmed in ordinary cases, then the likelihood of their being open to compromise is much easier.

29. Similarly, an effective and accountable police force is necessary as police forces are most often the most corrupt institution in most countries. Lacking a sense of public purpose and discipline, regime police forces tend to function poorly and corruptly. Effective and independent investigative, prosecution and judicial agencies must be created that see public confidence as their major constituency rather than political support. And their functions need to be separated clearly to avoid using anti-corruption as a political weapon against critical voices.
30. Further, independent and effective Electoral administration with powers to punish bribery and also to question where funds for campaigns come from is important in dealing with campaign-driven corruption.
31. Effective and Cooperating Oversight/Ombudsman offices are key as they are normally mandated to receive and investigate public complaints of abuse of office and other violations and occasionally come upon evidence which the Anti-Corruption bodies may not have or which reinforces investigations already being undertaken. Ideally, Human Rights Institutions and anti-corruption bodies should cooperate closely.

Challenges NHRIs confront when they link corruption to their work

32. Most National Institutions--even those with an express mandate to fight corruption in their constituting law like the Ghanaian Commission--have faced some serious challenges. These include:
 - i) Lack of political will and commitment from Government: In most corrupt-ridden countries, the possibility of enriching oneself is often the *raison d'être* for engaging in politics whether it is for selfish and personal reasons or for patronage purposes to entrench oneself in power. And corruption is often the easiest way to enrich oneself. Thus no matter the rhetoric on this issue, until a paradigm shift occurs in the rationality of politics, efforts to engage in corruption in many weak and poor countries will continue.
 - ii) Conflicting and confusing legal and institutional frameworks: Many countries have criminal laws on corruption scattered in a plethora of legislation. Further, many of the criminal codes when they attempt to address corruption prove inadequate.
 - iii) Resource constraints: Ancillary to lack of political will, one of the easiest ways to counter anti-corruption efforts is to limit resources to the NHRIs to keep them in check and limit their effectiveness.
 - iv) Weak judicial systems: A genuine rule of law further requires the support of a professional and effective judiciary to act as a check against State excesses. If salaries for the magistracy and Judges are too low, they become highly prone to subversion through bribes.
 - v) Poor conditions of service in some of the institutions lead to staff exodus of qualified core staff which hampers service delivery. The Ghanaian Commission has for instance lost many of its legal officers who take alternative employment and this has caused severe back log with some of their cases

Obstacles confronted by NHRIs when interacting with anti-corruption agencies and other relevant institutions.

33. Ideally, NHRIs and Anti-Corruption bodies should cooperate. In ideal situations, anti-corruption bodies should focus on investigation while NHRIs should focus on public education, advocacy and policy changes that assist the war on corruption, cross fertilizing each other toward a common goal.

34. The reality is somewhat different. First, many of the anti-corruption bodies in existence today are dysfunctional and ineffective⁸. Even for some which are well endowed with resources, there are few citizens who repose much confidence in their ability to resolve serious corruption issues and the miniscule returns to show for the enormous resources pumped into their operations and/or are compromised.⁹
35. Further, in an environment where there is little political will to prosecute the truly corrupt, some anti- corruption bodies granted powers to prosecute have interpreted it to target opponents of the state. Abuse of such power demonstrates the need for separation of investigation and prosecutorial functions in order to protect the integrity of anti-corruption efforts.
36. For some NHRIs that have dabbled into issues of corruption, they have faced fierce and robust resistance from Anti-Corruption bodies which wrongly perceive them to be competition of mandate. When there is little political will in Government to fight corruption, an NHRI taking up “sensitive” corruption issues is bound to elicit discomfort from the Anti-Corruption body.
37. Further, victimization by the State is never far from the surface. For instance, the Kenya National Commission on Human Rights as a result of its work found itself at the end of accusations that it was itself guilty of suspect transactions. Many governments are thus tempted to adopt this tactic; that those who speak most loudly against corruption could themselves be complicit.

An assessment of the Advantages and disadvantages of NHRIs having a dual mandate:

38. From the experience of the Ghanaian Commission, it sure helps if an NHRI has the specific mandate to fight corruption written into its mandate. But again, where this is not granted, it is clear that NHRIs should not shy away from taking up matters of corruption as being outside their purview since clearly corruption of itself is a human rights violation.
39. NHRIs can act as a supplementary channel of public access to a remedial authority when the power granted to an Anti-Corruption Commission is abused or not exercised or when the anti-corruption body does not seem to be doing its job.
40. NHRIs can induce and put pressure to bear on anti-corruption bodies to take their work seriously and avoid the tendency to ignore difficult undertakings on the excuse that it falls outside the scope of their authority.
41. In a context of systemic corruption and abuse of power, it helps when members of the anti-corruption commission know that they will be exposed to public outcry if they fail to move aggressively on evidence corruption-and the NHRI knows that it has to meet the same standards of honest public conduct as all other public officials or it will itself be held accountable. The assumption we make is that the NHRI itself will be effective but in situations where the NHRI is ineffective, then it means its establishment was never intended to further human rights protection but rather a public relations exercise to show that respect for human rights is taken

⁸ A study of the Anti-Corruption Commissions that have been established so far suggests that it is only in Hong Kong where the anti-graft agency has been effective in combating corruption

⁹ The Kenya Anti-Corruption Commission, KACC, is a prime example of a well endowed but ineffective anti-corruption body, often seeming to be the political weapon for the government. A survey by the National Anti-Corruption Campaign Steering Committee in Kenya in August 2006 which ranked the effectiveness of public institutions in Kenya in fighting graft did not rank the KACC anywhere which is a sign of the lack of confidence in the institution tasked to fight corruption

seriously by the Government in question. If both institutions are ineffective, the clear diagnosis is that the Government is only interested in window dressing and not addressing the serious structural changes needed to improved governance.

Lessons learnt from applying HRBA approaches to anti-corruption initiatives

42. First and foremost is the ability of corruption to fight back. There will always be a price to pay for confronting corruption head-on
43. Clearly, a multi-sectoral, multi-faceted approach to dealing with corruption is what is needed. And this must be both domestic and international. There are many lessons to learn from the various struggles for human rights and democracy, but the central one must be that it is the people themselves who are the first and last bastions in the war against corruption. Thus empowerment strategies – not just civic education strategies – must be implemented so that public umbrage and scorn attends those elites engaging in corruption.
44. Advocacy for the practice of lustration is also critical since corruption is always associated with public office at some levels. If public officials fear that they could lose not just their reputations but the ability to work in public office, then they will probably be more probity.
45. Dealing with impunity for past human rights violations including corruption should be done immediately after a transition to more democratic government. This sends a message that the practices of the past will not be tolerated and a new chapter has been opened.
46. Stringent Corporate Governance is needed to weed out the “wheeler dealers” most often involved in grand corruption. This partly includes more transparent and open business registration process so that ownership of companies is known and clear without resorting to holding companies, or trustee held companies. This would also eliminate the conflict of interest type corruption where public officials award contracts to their own or relative’ companies but it is impossible to know without extensive investigations.