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**HOW TO COMBAT CORRUPTION
WHILE RESPECTING HUMAN RIGHTS**

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CHAPTER ONE

CRIMINAL LAW AS A TOOL TO FIGHT CORRUPTION

Introduction

1. The fight against crime in any country and at the international level starts with the setting up of the necessary legislative framework to fight the crimes. In view of the nature of corruption, even the most carefully crafted law will not be sufficient to stem out corruption.¹ Having good laws however assists in the identification, the investigation and the prosecution of the crime. What is important is the fact that in cases where the crime has been committed, it should be possible to secure a conviction. There are a range of laws that are necessary for an effective fight against corruption. The laws that are relevant include the following:

- Access to information laws.
- Resolution of conflict of interest laws.
- Freedom of expression laws.
- Independence of the media laws.
- Whistle blower laws.
- Protection of privacy laws.
- Rules that regulate who is qualified to hold a public office.
- Rules that relate to the giving and receiving of gifts by public officials.

2. It is necessary to determine to what extent the criminal laws of a country seek to criminalise corruption but at the same time, safeguard the rights of individuals. Human rights are sacrosanct and cannot be taken away from individuals unless in certain circumstances that meets international standards. The Office of the Co-ordinator for Economic and Environmental Activities² has identified eight general principles which should be observed when developing criminal laws to fight corruption. These are the following:

- Compliance with international human rights standards.
- Avoidance of unduly repressive provisions.
- Clear guidelines on sentencing so that sentences are consistent.
- Consolidation of various criminal laws dealing with corruption.
- Regular review of the criminal law framework.
- Special provisions for corruption cases which require individuals to establish the origins of unexplained wealth to the satisfaction of the court.
- Forfeiture of the proceeds of corruption to the state.
- Definition of corruption as including both payment and receipt of bribes.

International Anti-Corruption Treaties

3. International anti-corruption treaties all call for the criminalisation of corrupt acts. The reason for doing this is that it is now accepted that as corruption is a crime, one of the ways of dealing with a crime is to legislate against conduct that is seen as crime. Chapter III of the United Nations Convention Against Corruption is on criminalisation and law enforcement. A number of articles in this chapter deal specifically with the criminalisation of certain acts of corruption.

¹ Writing An Effective Anticorruption Law: Prem Notes No. 58, October 2001.
<http://www.worldbank.org/afr/findings/english/find203.pdf>.

² Best Practices in Combating Corruption, Office of the Co-ordinator for Economic and Environmental Activities, Karntner Ring 5 -7, A – 1010 Vienna Austria.

The convention provides that each State Party to the convention should adopt such legislative and other measures as may be necessary to establish criminal offences when committed intentionally. The convention specifically provides that the following acts should be established as criminal offences when committed: bribery of national public officials,³ bribery of foreign public officials and officials of public international organisations,⁴ embezzlement, misappropriation or other diversion of property by a public official,⁵ trading in influence,⁶ abuse of functions,⁷ illicit enrichment,⁸ bribery in the private sector,⁹ embezzlement of property in the private sector,¹⁰ laundering of the proceeds of crime,¹¹ concealment,¹² and the obstruction of justice.¹³

4. Regional instruments that deal with corruption also contain articles that encourage state parties to these conventions to criminalise all acts of corruption. The Inter-American Convention Against Corruption provides in Article VI a number of acts of corruption.¹⁴ Article V then makes it mandatory for State Parties to the Convention to adopt such measures as may be necessary to establish its jurisdiction over the offences that may be committed by persons in cases where the offences are committed within the territory of that state party. The article goes further to make it compulsory for state parties to ensure that all persons become liable at law for acts that they commit that are in breach of the acts of corruption as defined in the convention. The convention specifically mentions that nationals, persons who habitually reside in the state party's territory and where the alleged criminal is within the territory of the state and that state has not extradited the offender.¹⁵ Article V (4) of the Convention goes on to provide that the convention does not preclude the application of any other rule of criminal jurisdiction established by a state party under its domestic law.
5. Similarly, the African Union Convention on Prevention and Combating Corruption defines corruption acts and goes on to encourage state parties to criminalise the acts of corruption so identified. Article 4 (1) (a) – (i) sets out the acts of corruption. Included in the list of corrupt acts under Article 4 (1) is bribery; diversion of funds by a public official from the intended recipient of the money; illicit enrichment; concealment of proceeds; and participating in any act of corruption either as a principal or a co principal. Article 5 of the Convention provides for legislative and other measures that state parties to the convention should adopt.¹⁶
6. The SADC Protocol Against Corruption defines acts of corruption in Article 3. Article 3 (1) (a) – (h) defines acts of corruption as bribery; diversion of money or property by a public official for purposes for which this money or property was not intended; the offering or receipt of an

³ Article 15 of the Convention.

⁴ Article 16 of the Convention.

⁵ Article 17 of the Convention.

⁶ Article 18 of the Convention.

⁷ Article 19 of the Convention.

⁸ Article 20 of the Convention.

⁹ Article 21 of the Convention.

¹⁰ Article 22 of the Convention.

¹¹ Article 23 of the Convention.

¹² Article 24 of the Convention.

¹³ Article 25 of the Convention.

¹⁴ The Inter-American Convention Against Corruption provides in this article the following acts of corruption: bribery where the solicitation and receiving of a gift or favour has been made a crime; any act or omission by a government official or a person who performs public functions for the purpose of illicit benefits; the fraudulent use or concealment of property derived through any of the acts mention in article VI and the participation in any of these crimes either as a principal, co principal, instigator, accomplice or accessory after the fact in any of the acts that are referred to in article VI.

¹⁵ Article V (1), (2), and (3) of the Inter-American Convention Against Corruption.

¹⁶ Specifically, Article 5 (1) provides that "...State Parties undertake to: Adopt legislative and other measures that are required to establish as offences, the acts mentioned in Article 4 paragraph 1 of the present Convention."

undue advantage by any person who directly works for a private sector entity for him to act or to refrain from acting in breach of his duties; the fraudulent use or concealment of property derived from any of the acts that the convention has established as offences; and the participating in any act of corruption either as a principal or a co principal.¹⁷

7. The Protocol also provides that each State Party shall adopt legislative and other measures under its domestic law to prevent and combat acts of corruption committed in and by private sector entities.¹⁸As illustrated, the fight against corruption includes amongst other things, the establishment of laws at the domestic level that deal with specific acts of corruption. Like any law, laws that deal with corruption matters must also pass the test when it comes to compliance with accepted international human rights standards. If these laws fail this test, then there is a very good chance that any person who is charged with having committed an act of corruption can easily challenge any prosecution and be successful. This is also because of the fact that most constitutions contain bill of rights and individuals at the national level are protected through these provisions.

Content of Anti-Corruption Laws

8. Given the complexity of corruption and the need to adopt drastic measures to effectively fight corruption, the laws that have evolved that deal with acts of corruption are specialised and have been developed to deal with the unique feature that corruption is. Whilst it is accepted that human rights are sacrosanct and that individuals cannot be arbitrarily deprived of their rights, there are certain instances where human rights are limited for the good of the public. This section will look at these instances and draw conclusions regarding whether the practices that have been adopted meet the strict human rights standards.
9. In looking closely at the criminal laws that have been developed in the countries around the world that seek to deal with the phenomenon of fighting corruption, it is important to first go back to the definition of human rights. Human rights have already been defined in an earlier chapter. What was not done is to state that human rights themselves fall into three broad categories. These categories are as follows:
 - Absolute rights – these rights can never be taken away by a state under any circumstances. An example of such a right is the right to protection from torture and inhuman and degrading treatment. This is an absolute right and no state under international law can ever take this right from individuals.
 - Limited rights – these are rights that a state may limit under explicit and finite circumstances and are subject to the law of that particular country. An example of such rights that can be limited is the right to liberty. Liberty can be taken away from an individual in circumstances that the law allows for example when such individual has committed a crime and is arrested for purposes of being taken to court.
 - Qualified rights – these are rights that require a balance between the rights of the individual and the needs of the wider community or state interest. Examples of qualified rights include the right to freedom of expression and freedom of assembly and association. With regards to the freedom of expression, states have laws regarding matters that relate to decency and what form of information can be freely expressed. To the extent that the laws of a state allow, freedom of expression can be limited by

¹⁷ See Article 5 (1) of the SADC Protocol.

¹⁸ Article 4 (2) of the SADC Protocol Against Corruption.

the need to maintain a certain level of decency in that particular state. This is the same for freedom of assembly and association. This right can be limited by law in order to maintain peace and security for example. In certain instances, in order to maintain moral standards, a state can ban the formation of certain associations that seek to further causes that a state will not allow. Interference with qualified rights is permissible only if:

- There is a clear legal basis for the interference with the qualified right that people can find out about and understand, and
 - The action or the interference seeks to achieve a legitimate aim. Legitimate aims are set out in each article that contains the qualified right. Legitimate claims vary from article to article and can also vary from state to state given that states have different moral and religious beliefs and values. Examples of legitimate aims include state security issues, the prevention of disorder or crime and the need to maintain peace and security and public safety, and
 - The action is necessary in a democratic society. This means that the action to restrict the qualified right is necessary and it is being taken in response to a pressing need in society. The limiting action taken by the state must not be more than what is necessary to address the social need.
10. The three categories of human rights give rise to the issue of the need for states to balance one person's rights against those of the community. International human rights law makes it obligatory for states to take appropriate legislative, administrative and other measures to ensure that the human rights of individuals are respected. Specifically, states have a duty to respect, enforce, protect and promote the rights of individuals. Restricting rights does not necessarily mean that a state has failed to comply with its obligations under international human rights law. As stated above, if this restriction of a qualified right has a legitimate aim, then such restriction will be in line with the aims of international human rights law. International human rights law recognises that there are situations where a state must be allowed to decide what is in the best interests of its citizens. This is the area where conflict between combating corruption and human rights arise. Those that wish to continue with corrupt acts and who are fully aware of the difficulties and complexities associated with investigating and prosecuting corruption argue that some of the laws that are enacted to fight corruption are too harsh and fail to meet the necessary standards of respecting the rights of individuals. A counter argument to this is that corruption is so complex and corrupt acts are perpetrated in most cases by willing participants that it is necessary to put in place special mechanisms to deal with corruption.

Reversing the Onus of Proof

11. The creation of corruption offences comes together with the issue of who the onus of proving these offences lies with. In a number of jurisdictions, the law recognises more than one type of burden of proof. There are basically two types of burdens, a legal burden and an evidential burden. A legal burden refers to the situation whereby a person charged with a criminal offence has to prove or disprove at least one element of the offence. If the person facing criminal charges fails to disprove this element of the offence, then that person will be found guilty of the offence. The evidential burden on the other hand refers to the requirement for the person facing criminal charges to present some evidence of the defence. Simply defined, proof refers to the evidence that is required to be put before a tribunal or court so as to satisfy it that the person charged has committed the offence.

12. The question as to whether or not this evidence is acceptable is one that the trial judge has to make. It then becomes the duty of the prosecution to disprove the existence of that defence to the required standard of proof, which in most cases in criminal law, is proof beyond a reasonable doubt. Viscount Sankey LC¹⁹ stated as follows with reference to on who the burden of proof lies in criminal cases:

“Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to ...the defence of insanity and subject also to any statutory exception”.

13. This statement quoted above encapsulates the fundamental principle in criminal law cases that the burden of proof lies with the prosecution unless the defence is raising a defence of insanity or a statutory provision places the onus on the defence. Taken further, this statement also means that it gives effect to a fundamental principle that underpins any criminal justice system, that a person is presumed innocent until proven guilty. In the case of *McIntosh v Lord Advocate* [2001] 3 WLR 107 Lord Bingham of Cornhill referred to the judgement of Sachs J in *State v Coetzee* [1997] 2 LRC 593 where the significance of the presumption of innocence was explained. Lord Bingham had this to say about the presumption:

*“...the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing inquiry where constitutional rights are concerned must be that public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book...hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in enduring integrity and security of the legal system.”*²⁰

14. In spite of this presumption of innocence, the burden of proof has been imposed on a defendant in many instances. There are numerous statues that place the legal burden of proof on the defendant. This means that significant inroads have in fact been made on the presumption of innocence. This has changed the way in which certain crimes are dealt with by the courts. This reversal has led to the rise of the question to what extent is this reversal consistent with the need to protect the human rights of individuals.
15. The presumption of innocence is a fundamental right in human rights law. All the major international and regional declarations of human rights and fundamental freedoms protect the right of the individual to be presumed innocent until proven guilty. Article 11 of the Universal Declaration of Human Rights provides that *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law...”* The African Charter on Human and Peoples’ Rights in Article 7 (1) provides that *“Every individual shall have the right to have his cause heard. This comprises:...the right to be presumed innocent until proved guilty by a competent court or tribunal...”* The American Declaration of the Rights and Duties of Man in Article 26 provides: *“Every accused person is presumed to be innocent until proved guilty.”* Similarly the Convention for the Protection of Human Rights and Fundamental Freedoms of Europe in article 6 (2) provides that: *“Every accused person is presumed to be innocent until proved guilty”*. Finally, Article 14 (2) of the International Covenant on Civil and Political Rights provides as follows: *“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”*. Domestic courts have faced arguments that placing a legal burden of proof on a defendant in criminal cases contravenes this fundamental human rights principle. This argument does have some merit. This is because if a defendant faces a possibility of conviction on the basis that the

¹⁹ *Woolmington v DPP* [1935] AC 462, at page 461.

²⁰ See Cooper, S. (2003), Human rights and the Legal Burden of Proof [2003] 3 Web JCLI <http://webjcli.ncl.ac.uk/2003/issue3/cooper3.html> accessed on 15 June 2007.

specified offence presumes certain facts to exist unless the defendant can prove to the contrary, this derogates from the presumption of innocence and breaches all the articles from the various international and regional treaties referred to above. The same argument can be advanced if a statute requires that a defendant must be found guilty unless he can prove that certain facts should form part of his defence.

16. The issue of the burden of proof has been the subject of many critiques by legal scholars and has come up in many a court cases. This is not an easy area and there are no easy answers. Ng'ong'ola in her paper discussed the reversal of the burden of proof that section 283 of the Penal Code of Malawi creates vis-à-vis the protection of individuals guaranteed under section 42 of the constitution of the republic of Malawi. The issue that was discussed in this paper was with respect to the provision that provides that as public servants have public resources in their custody or under their control; their position is similar to that of trustees. This means that certain duties arise with respect to the responsibilities of the public servants. The duties include the duty not to unjustly enrich themselves, the duty to avoid conflict of interest and the duty to account for this property. The net effect of this section is to reverse the burden of proof. The courts in Malawi have agreed with this interpretation and have stated that all that the prosecution has to prove beyond reasonable doubt is the following: that the accused was employed in the public service, that by virtue of that employment he received or had certain property in his custody and that he was unable to produce to his employer such property or make due account of it to his employer.²¹ By proving these elements, a presumption is then made that the accused person has stolen the property. The accused person must now prove to the court that he did not steal the property meaning that the burden of proof is now firmly placed on the accused. Ng'ong'ola goes further to argue that this reversal of the burden of proof has the effect of denying an accused person of the right to a fair trial as provided for in section 42 of the Constitution of the Republic of Malawi.
17. This issue was also looked at closely by Cooper (2003)²² where he looked critically at the provisions of section 5 (2) of the Road Traffic Act 1988 in the United Kingdom as they arose in the case of *Sheldrake v DPP* [2003] EWHC 273. In this case, the accused person was charged with driving a motor vehicle in a public place after consuming so much alcohol that the proportion of alcohol in his breath exceeded the prescribed limit. The trial magistrate found that section 5 (2) of the statute imposed a legal burden of proof on the appellant and that the appellant had failed to discharge this burden of proof.²³ The trial magistrate convicted the accused person after rejecting the accused person's contention that driving was an essential element of the offence. The accused person appealed against this decision. The appeal court quashed the conviction and the court held, amongst other things, that the defence in section 5 (2) does interfere with the presumption of innocence and derogates from Article 6 (2) of the European Convention. In reaching its decision, the court reviewed both European and the English jurisprudence on the issue of the reversing of the burden of proof. The leading case in European jurisprudence on this subject is the case of *Salabiaku v France* (1988) 13 EHRR 379. A number of cases have followed the principle that was laid down in this case and the starting point in examining the issue of burden of proof is the following statement:

“Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law...[Article 6(2)] requires states to confine [presumptions] within

²¹ Chatsika J in the case *Rep v Assani Msosa* case Number 642 of 1993.

²² See Cooper, S. (2003), Human rights and the Legal Burden of Proof [2003] 3 Web JCLI <http://webjcli.ncl.ac.uk/2003/issue3/cooper3.html> accessed on 15 June 2007.

²³ The section in question provides as follows: “(2) It is a defence for a person charged with an offence under subsection (1) (b)...to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath...remained likely to exceed the prescribed limit.

reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”

18. From the foregoing statement, it follows that the presumption of innocence is not absolute and that interference with it may be justified. The only question that arises is when it is proper to interfere with this presumption. Cooper (2003)²⁴ went on to discuss the English law jurisprudence as was raised in the judgement. The court in the case of *Sheldrake*, considered the leading English case of *R v Lambert* [2001] s Cr App R 511 HL. The issue that the court had to deal with in this case was that of the offence of possession of a controlled drug with intent to supply contrary to the Misuse of Drugs Act 1971. Section 28 of the Misuse of Drugs Act 1971 provides that it is a defence for the accused person to prove that he neither knew of nor suspected nor had any reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove. The House of Lords held that, applying the ordinary principles of construction, section 28 imposed a legal burden of proof on the accused to prove the absence of relevant knowledge, suspicion or reason to suspect. The question whether this derogated from Article 6 (2) of the European Convention was considered by the House of Lords. It was held by the court that a statute may place a legal burden of proof on a defendant, despite Article 6 (2) of the European Convention, in pursuit of a legitimate aim so long as the nature of the burden is proportionate to the aim to be achieved. Lord Steyn cited with approval a statement made by Dickson CJ in the Canadian Supreme Court decision of *R v Whyte* (1988) 51 DLR (4th) 481 where it was said:

“The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence...if an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.”

19. Cooper (2003) went onto to deal specifically with the facts of this case and discussed the various issues which the court said were necessary in order to come to a decision as to the extent to which the burden of proof can be reversed. The relevant part that has been referred to above clearly suggests that the reversal of the burden of proof is something that the courts have embraced in the appropriate circumstances. This also illustrates that reversing the burden of proof does not necessarily breach the rights of an accused person. This further shows that reversal of burdens of proof can be done in a variety of offences and it all depends on the circumstances of the offence and the mischief that the legislators will be seeking to avoid.
20. A number of anti-corruption laws rely a lot on the reversal of the burden of proof. The main reason for doing this was captured so well by a famous judge in Hong Kong who had this to say:

“Bribery is probably the most difficult of all offences to detect and prosecute successfully in the courts. Any law-enforcement agency entrusted with this difficult job deserves all the assistance the Legislature feels it can reasonably give.”²⁵

21. It is agreed that corruption is a very complex phenomenon. These complexities make it very difficult to discover what is going on when it comes to investigating corruption. It is also very difficult to obtain sufficient evidence to place before a court when prosecuting an offender

²⁴ See Cooper, S. (2003), Human rights and the Legal Burden of Proof [2003] 3 Web JCLI <http://webjcli.ncl.ac.uk/2003/issue3/cooper3.html> accessed on 15 June 2007.

²⁵ de Speville, B. *Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms* paper presented at the 8th International Anti-Corruption Conference (IACC) http://ww1.transparency.org/iacc/8th_iacc/papers/despeville.html

charged with any act of corruption.²⁶ As stated earlier, one of the ways of fighting corruption is to identify specific acts of corruption and then make these offences. As discussed by de Speville any criminal matter brought before any court requires that there be evidence that is placed before such a court. The gathering of evidence in corruption cases is made more complicated by reason of the fact that corruption is an offence that is usually committed by two or more persons acting willingly together to achieve mutually beneficial results. The likelihood of either of the beneficiary of this act owning up and making known to law enforcement agents of what they would have done is very limited. This requires additional powers and procedures to assist not only the law enforcement agents but courts as well in arriving at a decision either to convict or to acquit.²⁷ This then raises the need to reverse the onus of proof. Reversal of the onus of proof as we have seen above is not necessarily a breach of individual rights. The reason for this is that this reversal of the burden of proof means that the accused person must prove an issue that he has raised himself. The reversal does not mean that the defendant is required to prove the contrary of an assertion made by the prosecution. It has been accepted as an essential element of a fair trial that he who asserts must prove. de Speville put it this way:

“So the question here is not so much whether having to contradict an assertion by the other party is inconsistent with human rights norms – such a reversal is in obvious breach of a fundamental precept of every modern legal system – but rather whether requiring the defendant in criminal proceedings to prove any element of his defence is inconsistent with those universal norms established for the protection of the individual.”²⁸

22. The question that arises therefore when crafting anti-corruption legislation is how to strike the balance between the successful investigation, prosecution and subsequent conviction of an accused with the need to safeguarding the rights of the accused person. It is also important to note that the international and regional legal instruments on human rights impliedly recognise that the presumption of innocence is one of those rights that falls into the category of qualified rights. There is no prohibition by these instruments on the placing of the burden of proof on the defendant provided that the onus of proving the charge against the accused person remains firmly on the prosecution. The issue of reversing the onus of proof in corruption cases was specifically dealt with in England by the Salmon Commission in 1976. The issue that came up for discussion was whether there should continue to be a provision placing a burden of proof on the defence in corruption cases. The Commission concluded as follows:

“Such a burden can be justified only for compelling reasons, but we think that in the sphere of corruption the reasons are indeed compelling. It is difficult enough to prove the passing of a gift to a public servant from an interested party but, when it occurs, it is normally strong prima facie evidence of corruption. If there is an innocent explanation it should be easy for the giver and the recipient of the gift to furnish it; the facts relating to the gift are peculiarly within their own special knowledge... We are satisfied that the burden of proof on the defence is in the public interest and causes no injustice.”²⁹

²⁶ In this case, act of corruption refers to the wide range of corruption offences that have been discussed under the section dealing with the definition of corruption. The term “corruption acts” will be used to refer generally to the various specific acts of corruption.

²⁷ It is difficulties such as the one described here that has led to justifications of making it an offence for example, for a public official to own wealth that was acquired after he got into public office that far exceeds his salary without good and sufficient explanation of how he acquired that wealth.

²⁸ de Speville, B. *Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms* paper presented at the 8th International Anti-Corruption Conference (IACC)
http://www1.transparency.org/iacc/8th_iacc/papers/despeville.html

²⁹ de Speville, B. *Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms* paper presented at the 8th International Anti-Corruption Conference (IACC)
http://www1.transparency.org/iacc/8th_iacc/papers/despeville.html referring to The royal Commission of conduct in Public Life (1976) Cmnd 6524.

23. de Speville went on to quote a United Kingdom Government statement on the subject of the prevention of corruption which states as follows:

“Reversing the onus of proof in criminal cases is a serious step to take and requires full justification. Nonetheless in circumstances where a person is expected to exercise impartial judgement, it is arguable that that person should order his or her private affairs in such a way as to avoid any impression of corrupt activity. It may be reasonable therefore to expect a person in these circumstances to justify any questionable payments made to them. The Government therefore believes that it is right to consider carefully an extension of the presumption of corruption.”

24. From the foregoing discussion, it is clear that even in corruption cases the reversal of the burden of proof has been considered and has been applied in a number of jurisdictions around the world. This reversal is not only applied to corruption matters but to other crimes as well. Accordingly, this is not unique to corruption cases. A question that arises is how have the courts dealt with this reversal and does this stand the test of not breaching the rights of persons charged with the various acts of corruption?

Cases on the Aspect of Reversal of the Burden of Proof

25. The foregoing discussion on the content of anti-corruption laws was necessary in order to address one of the fundamental questions of this research viz: when is the collision due to the design of the law and where is it due to the problems of interpreting or the abuse of power of the law. The anti-corruption laws identified in the foregoing section all deal with the reversal of the burden of proof and shifting the onus thereof on the defendant. Related to the issue of the reversal of the burden of proof, certain crimes that are specific to the fight against corruption have been created and have been used extensively in a number of jurisdictions. One such law is making it a criminal offence for public officials to possess wealth that is in excess of their official salary unless he gives a satisfactory explanation for his possession of such wealth. What this law does is to place a burden on the defendant to establish that the wealth that he has acquired was not done through illegal means. The value of this law in dealing with corruption cases has proved to be important. There are two issues that arise in crafting an offence in this manner. The first is whether such a law of possession of excessive wealth infringes the right to a fair trial and the second is whether placing on the person charged with the onus of establishing the defence of satisfactory explanation infringes the right to be presumed innocent until proven guilty.³⁰
26. In Hong Kong, such a law has been used effectively to deal with instances where public servants have been found in possession of excessive wealth. This law has been used effectively and has resulted in successful convictions of persons who would have engaged in corrupt activities. As expected, those charged under this law have routinely raised the argument that the placing of the onus and the burden of proof on them as defendants has the effect of denying them the right to be presumed innocent until proven guilty. On 4 April 1990, the Chinese Parliament promulgated the Basic Law of Hong Kong. This effectively is the constitution of Hong Kong as a Special Administrative Region of the People’s Republic of China. The Basic Law of Hong Kong contains within it, a standard of protection of human rights. The Basic Law in Chapter III constitutes a Bill of Rights. In addition to the incorporation of a number of the fundamental rights as contained in various international human rights instruments, there is article 39 which provides as follows:

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the international labour conventions as applied to Hong Kong

³⁰ Ibid at page 6.

shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative region...the rights and freedoms enjoyed by the Hong Kong residents shall not be restricted unless prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

27. After the law in Hong Kong came into force, a senior public servant was charged with possessing excessive wealth.³¹ In the case of *Attorney General v Hui Kin Hong* Court of Appeal No 52 of 1995, a public official challenged the validity of this offence arguing that the offence was not consistent with the Bill of Rights in that it infringed his right to be presumed innocent and should therefore be repealed.³² This argument was rejected by the Hong Kong Court of Appeal.³³ The Court of Appeal accepted that placing an onus on the accused to provide an explanation is a deviation from the principle that it is for the prosecution to prove its case. The court went on to state however that there are exceptional situations which are compatible with human rights to justify a degree of deviation from the normal principle. The court cited with approval another Hong Kong case which was determined by the Privy Council of London England. This was the case of *Attorney General v. Lee Kwong-keut* [1993] AC 951. In this case, the Privy Council stated that although the prosecution has the primary responsibility of proving the guilt of the accused, the imposition of the exception will be looked at with respect to whether or not it is reasonable. If the prosecution retains the responsibility for proving the essential ingredients of the offence, the less likely that the exception will be regarded as unacceptable. The court went further to state that what is decisive is the language creating the offence rather than its form. If an offence requires that certain matters should be presumed until the contrary is proved, then the court said that it would be difficult to justify the presumption. However, if it can be shown with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is dependent, then the presumption will be justified. The Privy Council referred with approval to the United States of America Supreme Court case of *Leary v. United States* (1969) 23 L. Ed. 2d 57, 82. In the *Hui Kin Hong* case, the Court of Appeal concluded that the offence which had been challenged was consistent with the Bill of Rights. The court stated that the offence did what is necessary to deal with the scourge of corruption and that the balance between the interests of the individual and that of the public was right.³⁴
28. The Privy Council in this case went further to state that in applying this law, it was important for law enforcement agents not to use this as a source of injustice. It was pointed out that it is necessary to maintain the balance between the interests of the individual and that of society as a whole. What has evolved therefore is the use of the principle of proportionality. Some of the rights that are contained in the International Covenant on Civil and Political Rights and incorporated into the Hong Kong Basic Law are qualified in that they are subject to reasonable limitation. The principle of proportionality requires that a balance be struck between two competing sets of interests that of the general public and that of the individual.³⁵ Fung stated as follows:

³¹ This offence is sometimes called illicit enrichment in other countries and would have the same evidentiary burden as discussed above.

³² Specifically, the Bill of Rights Ordinance provided in Article 11 (1) thereof that *everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.*

³³ This case was referred to extensively by de Speville quoted above in note 58 and this section refers to the discussion contained in that paper.

³⁴ It should be noted that in the twenty five years that Hong Kong has had this offence in its statute books, about fifty cases have been prosecuted involving very senior public officials. It is noted that without this law, proving certain evidence against these senior public officials would have been very difficult. The law is regarded as a very essential tool by law enforcement agencies as well as legislators in Hong Kong. These same laws exist in other countries and the interpretation given here is what other countries have also followed.

³⁵ Fung, D. R. Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience 8th IACC: Anti-Corruption and Human Rights Protection: http://ww1.transparency.org/iacc/8th_iacc/papers/fund.html accessed on 15 June 2007.

“Restrictions on individual rights are justified provided they pursue a legitimate aim and are proportionate to that aim. In other words, the restriction must be proportional to the problem being addressed and given that it is restricting guaranteed rights, should go no further than is reasonably necessary to safeguard the relevant public interest.” The availability of other effective, but less rights-restrictive, measures to tackle the problem will usually indicate a failure to comply with the principle of proportionality.³⁶

29. In another case, the Privy Council, when faced with an offence of possessing or controlling wealth which could not be satisfactorily explained, the court said the burden of giving that explanation rested on the defendant. This means that there is a burden on the accused to prove that there has been no corruption committed by the defendant. What this effectively means is that only when the prosecution has proved that the wealth of the accused person could not have reasonably come from his salary does the accused have to provide satisfactory explanation. This explanation must account for the wealth in excess of his salary. The argument for this is that it is the accused person who knows where his wealth came from and it is he who should explain how he came to having so much wealth. The Privy Council has said that strong justification is needed for the reversal of this burden. Bribery has been identified as strong justification for the departure from the ordinary burden of proof as it *threatens the foundations of any civilized society*.³⁷

Conclusion

30. In conclusion, the right to a fair trial and the right to be presumed innocent until proven guilty according to law require that the onus of proof must fall upon the prosecution. This onus may be transferred to the accused when he is seeking to establish a defence. This is not unique to corruption cases. A number of instances have been created by the legislature that would otherwise be very difficult to prove should this burden not be shifted to the accused person. This has assisted in the prosecution of corruption cases. More importantly, this has illustrated that laws can be crafted in a way that combats corruption but does not infringe on the rights of individuals. It is important to always remember that not all rights are absolute. The fact that it is possible to lawfully limit human rights, illustrates the balancing act that the legislature has to play in seeking to safeguard the interests of the general public.

³⁶ Ibid at page 4.

³⁷ Attorney General v. Reid [1944] AC 324 at page 330H.

CHAPTER TWO

ADMINISTRATION OF JUSTICE AND THE FIGHT AGAINST CORRUPTION

Introduction

31. This chapter will look at the role that the administration of justice plays in fighting corruption. In dealing with this section, the question that will be answered is the one that was answered in Chapter Two. The question that will be looked at is the following: when is the collision due to the design of the law and where it is due to the problems of interpretation or abuse of power in the application of laws. The focus of this chapter will be on the second half of the question. Put differently, what will be sought to be explained is the question of whether or not in the administration of justice in corruption cases, human rights are infringed. It is important to accept that the law in many countries when it comes to the prosecution of corruption cases does not have any additional or peculiar standards that are different to other crimes. Where this is necessary and is required, the law provides for these mechanisms specifically as we have seen in Chapter Two where certain laws are crafted with specific reference to the issues of corruption that require evidence to be adduced by an accused person. Administration of justice in this chapter refers to the entire range of legal issues possible in a jurisdiction. Specifically, administration of justice in this paper will refer to the role of judges, lawyers, prosecutors in the fight against corruption. As corruption cases are significant and require special laws of enforcing them as well as techniques, matters around pre-trial detention and investigations will also be looked at. Other areas in the administration of justice will not be looked at as these are beyond the scope of this paper.

The Judiciary³⁸

32. The independence and impartiality of the judiciary and prosecutors are the bedrock of any democratic society. Experience has shown that without the rule of law, efforts to combat corruption would be futile. If judges are not independent in their work, any effort to use the criminal law to fight corruption would not yield any result. If judges are corrupt, then the situation would be far worse. In addition to this, the independence of lawyers is equally important and is also fundamental in ensuring that the rights of individuals are looked after. The independence of the judiciary has its origins in the theory of the separation of powers. This recognises that the Executive, Legislature and the Judiciary form three separate branches of government with a system of checks and balances between the three of the branches. The need to have checks and balances is to ensure that no one branch of government abuses the power that it has to the detriment of the society. This also means that the Judiciary as an institution as well as the individual judges should have sufficient “freedom” to exercise their functions without interference or undue influence from either the Executive or the Legislature. It is now well recognised that only an independent judiciary is able to render justice impartially on the basis of law. This ensures that the fundamental freedoms and human rights of individuals are protected. This judicial freedom was therefore created for the benefit of individuals in society against abuses of power. This means that judges cannot act according to their personal preferences but their job is to apply the law as it stands.
33. It is important to note that corruption in the judicial system undermines democracy and human rights as well as diminishing growth and human development. If a judicial system becomes

³⁸ This section will refer to the paper prepared by Victoria Jennett as part of the papers that support this research. The title of the paper is “*The Relationship Between Human Rights and Corruption: The Impact of Corruption on the Rights To Equal Access To Justice and Effective Remedy*”. Extensive reference to Victoria Jennett’s paper will be made and her ideas are accordingly acknowledged.

corrupt, public officials and members of the public generally will know that if their acts of corruption are exposed, they can get away with these in that there will be no punishment that will be meted against them. Public confidence in governance and the institutions of state will be eroded should the judiciary be corrupt. It is therefore essential that the judiciary be corrupt free in that it is the judiciary who are also gate keepers to ensure that no one in society gets away with acting corruptly. Corruption in the judiciary also leads to the breakdown of the rule of law, which is a key aspect in a democracy. Where the rule of law has broken down, it becomes impossible for this state to be part of the community of states. The state will also fail to attract foreign investment and to engage in other legitimate business with other states. This is because there will be no guarantees that whatever investment that a state makes in such a state will be secure and will be protected. The international community and international law recognises the important role played by all players in the administration of justice. In view of this recognition, a number of instruments have been developed that deal with and seek to strengthen the role of the key players in the administration of justice.³⁹ These instruments have created set standards on judicial independence but there is less emphasis on developing standards on judicial accountability.⁴⁰ Article 11 of the United Nations Convention Against Corruption is of particular significance in tackling corruption in the judicial sector. The Article provides that each state party shall take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary including where necessary the development of rules with respect to the conduct of members of the judiciary.

34. There are a number of players in the judicial system that can add to corruption in the judiciary. Court officials, prosecutors, judges interact with a wide array of people who affect the way in which they perform their duties. Judges as individuals have many responsibilities and these include adjudicating matters relating to corruption. A number of countries have experienced instances where the judiciary has been put under pressure to make decisions that are not in line with their independence and the law. This is one area where the collusion between the protection of human rights and the need to fight corruption is inevitable. Jennett states that for a judge to maintain his independence and accountability, when making a decision, a judge should not accept any kind of incentive or inducement and should not be influenced by external pressures or threats.⁴¹ In addition to the need for judges to be independent and to be accountable, high standards of integrity are placed on the judges. This high standard of integrity goes beyond the work of judges as it also goes into their private lives. In this context, judges are expected to carry out their functions with integrity, due diligence and professionalism. Their main aim should always be to uphold the dignity of the judicial office. This was noted and commented upon by a chief judge in the Peoples Republic of China. Chief Judge Xiao Yang pledged to keep up the fight against judicial corruption after the court system of China rooted out 292 judges in 2006 because of unethical deeds.⁴² The Chief Judge was talking about the extent to which the problem of corruption in the judiciary had gone to in China. The Chief Judge is quoted as having said the following in reference to further efforts to fight corruption: "*We must never relax our vigilance on corruption*". The Chief Judge made these remarks after he reported to the National People's Congress in early March that, last year, 292 judges were subjected to power abuse investigations, with 109 of them prosecuted.⁴³ Examples are abound

³⁹ These standards include the Bangalore Principles on Judicial Conduct (2002), Un Basic Principles on the Independence of the Judiciary (1985), Un Basic Principles on the Role of Lawyers (1990) and the UN Basic Principles on the Role of Prosecutors (1990).

⁴⁰ Jennett, V, op cit at page 2.

⁴¹ Jennett, V. op cit at page 4.

⁴² *Chief judge pledges to fight judicial corruption* Xie Chuanjiao (China Daily)
Updated: 2007-03-24 08:29

⁴³ The article went further to talk about the problems that the Chinese judiciary was experiencing with respect to corruption in the judiciary. The article stated as follows: *In 2006, two high-level group corruption cases were reported by the Chinese court system. The first involved three top judges from Fuyang Intermediate People's Court in East China's Anhui Province, who were arrested for taking bribes since 2005. Two of the former judges were sentenced to 9 and 10 years respectively, with the other one still*

on the issue of corruption in the judiciary. Jayawickrama (2006)⁴⁴ states that there is evidence of widespread corruption in judicial systems in many parts of the world. The writer in his paper refers to the examples that are given by the former president of the Supreme Court of Jordan which include judges being pressurized by executive authorities to render justice contrary to the law, judges seeking to obtain material and moral advantages and benefits from the executive, internal interference by a higher ranking judge on a lower ranking judge which if resisted could result in the transfer of the lower ranking judge, judges acting partially on the grounds of kinship, religion, nationality and political orientation.

35. In another example of how the integrity of judges is very important, a private citizen in California United States of America challenged one of the judges who was hearing his case.⁴⁵ The case involved a local man who claimed that his legal battle with public officials was being ignored by the local press, even though the issues involved could have a significant impact on the lives of people throughout the state. The issues involved was a disciplinary inquiry of Santa Barbara Superior Court Judge Diana R. Hall which caught the attention of state-wide media because of a document that was issued in a separate case that accused judges of wrong-doing and provided evidence to support the claims. The allegations were that judges were fixing court cases, and working closely with other state officials to control and manipulate court findings. The declaration was entered into evidence in *Forte v. O'Farrell* M72599 (Monterey Super. Ct., filed 2004). The impact of that evidence was damaging to the highest level officials and judges in the state that Attorney General Bill Lockyer immediately halted the disciplinary proceedings against Hall, even though the declaration was not entered into evidence in the Hall inquiry. In spite of insurmountable odds, Forte won many legal battles in a case that has the potential to bring powerful officials down. Media in other parts of California have covered Forte's quest for justice recently, but the local media remains silent and the people of Monterey are wholly uninformed as a result. The private citizen in this report was reported as being concerned that the corrupt officials who are exposed by his legal actions are being assisted by a silent local press. This case illustrates the importance of having a judiciary that is credible and that upholds its functions. Without this, all confidence in the judiciary falls and members of the public are left with no options but to seek resolution of their disputes using other means.
36. The training and education of judges in the national and international law are important. This ensures that when judges deal with human rights issues as well as corruption cases, these issues are indeed addressed. The Human Rights Committee has on several occasions emphasized the importance of providing training in human rights law to judges as well as other law enforcement officials.⁴⁶ The Human Rights Committee in its concluding observations on the report of the Republic of the Congo emphasized the need to give attention to the training so that judges are free from political, financial and other pressures. This will ensure that their security of tenure and will enable them to render justice promptly and impartially.⁴⁷ One can extend the meaning of this recommendation to include training in anti-corruption matters as well. There is no specific reference to anti-corruption measures and the function of the judiciary in the fight against corruption. Whilst this is the case, this does not mean that judges' training excludes the

on trial. The second case involved five senior judges from Shenzhen's Intermediate People's Court in South China. Three of them were sentenced to jail terms ranging from 3.5 to 11 years, with the other two still on trial. Corrupt judges have disrupted the working of the court system and sometimes resulted in wrong verdicts, Xiao said. A "firewall" against corruption will be consolidated, he said, with the apex court on its way to make four important sets of rules on fee charges, court discipline, judge discipline, and court supervision. The first two sets of rules will be implemented this year, with the other two released for public comment.

⁴⁴ Jayawickrama, N op cit at page 7. In Kenya, for example, 6 judges of the Court of Appeal, 17 judges of the High Court and 82 magistrates were held to have been involved in acts of corruption.

⁴⁵ See report titled "*Corruption by California Judges and Officials Unreported by Local Press*" Distribution Source : ArriveNet, Date : Tuesday, November 29, 2005.

⁴⁶ See Libyan Arab Jamahiriya UN doc. GAOR, A/54/40 (vol 1), para. 134; and as to Sudan, UN doc. GAOR, A/53/40 (vol. I), para. 132.

⁴⁷ UN doc. GAOR, A/55/40 (vol. I), para. 280.

area of anti-corruption. This is probably an area where treaty bodies that have been set up under the various human rights instruments can pay more attention to.

Arrest and Detention in Corruption Cases

37. In the area of administration of justice, the whole process of investigation continually comes up as a problematic area. This is not a unique situation to matters that are corruption related but this applies generally across the board in all criminal matters. This is an area where there is conflict between the law and the interpretation of that law. It is a fundamental human right that all individuals should enjoy their liberty and security. Notwithstanding this accepted universal human right, there is evidence that individuals continue to suffer violations of these rights in that arrests without cause continue to take place very regularly. International law has developed a body of rules to protect individuals from such arbitrary arrests and detention. It is essential that these rules be implemented and enforced at the national levels to ensure that individuals receive maximum protection from excesses and abuses from law enforcement agents. All major human rights instruments guarantee a person's right to liberty and security. Article 9 (1) of the International Covenant on Civil and Political Rights, article 6 of the African Charter on Human and Peoples' Rights, article 7 (1) of the American Convention on Human Rights and article 5 (1) of the European Convention on Human Rights all provide this guarantee. The International Court of Justice in its dictum in the case *United States of America v. Iran* ICJ Reports 1980 page 42 para 91 stated as follows:

"...wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself incompatible with the principles enunciated in the Universal Declaration of Human Rights article 3 of which guarantees the right to life, liberty and security of the person".

38. This clearly shows that notwithstanding what a state may have not ratified any of the main human rights instruments; it is still bound by other sources of law to ensure the liberty and security of individual persons.
39. The legal instruments referred to above all provide that deprivation of liberty must be carried out in accordance with the law. What this means is that whatever crime a person is charged with, should the authorities decide to arrest that person, this must be done in accordance with the laws of that country. In other words, the arrest of the accused person must be legal. Arrest should therefore not be arbitrary. The principle of legality is violated *"if an individual is arrested or detained on grounds which are not clearly established in domestic legislation."*⁴⁸ The Human Rights Committee has defined what arbitrary arrest as contained in Article 9 (1) means in the following way:

*"arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law...this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime".*⁴⁹

⁴⁸ Communication No. 702/1996, *C. McLawrence v. Jamaica* UN doc. GAOR, A/52/40 (vol. II), pp. 230 – 231, para. 5.5.

⁴⁹ Communication No. 458/1991, *A. W. Mukong v. Cameroon* UN doc. GAOR, A/49/40 (vol. II), p. 181, para 9.8.

40. Remand in custody must be pursuant to lawful arrest and must not only be lawful but also reasonable and necessary in all the circumstances of the case. In the *Mukong*⁵⁰ case the applicant alleged that he had been arrested and arbitrarily detained for several months. This allegation was rejected by the state of Cameroon. The State party argued that the arrest and detention had been carried out in accordance with the domestic law of Cameroon. The Committee concluded that article 9 (1) had been violated since the detention was neither reasonable nor necessary in the circumstances of the case. The state had not shown that the custody in remand was necessary to prevent flight, interference with evidence or the recurrence of the crime. The Committee concluded that the appellant's arrest and detention were contrary to article 9(1) of the Covenant.
41. The use of arbitrary arrest and detention has been witnessed in a number of countries where the fight against corruption is "pursued". This is especially so in African states where incumbent presidents or heads of state would have been voted into power on an anti-corruption campaign. The issue of corruption in Africa is on the top agenda of most African governments, so they say. A number of heads of state have been elected into power on the promise of fighting corruption and bring to book all those involved in corrupt activities under previous governments. This has happened in Kenya, Malawi and Zimbabwe. In Kenya, the government of Mwai Kibaki campaigned vigorously that should the electorate vote it into power, their major objective would be to eradicate corruption which had become a way of life in Kenya. Corruption was indeed rampant under the government of Dr. Daniel Arap Moi. In November 1991, the World Bank suspended aid to Kenya and a week later, the Paris Club of donor countries followed suit. The reasons for these suspensions included the human rights situation, the political situation and the endemic corruption that the country was under.⁵¹ This promise and other issues which were relevant to the election at that time which issues are not relevant and are beyond the scope of this paper resulted in Mr. Kibaki winning the elections in Kenya in December 2002. Once in office, a lot of "noise" was made with respect to the fight against corruption. This included arresting persons who were suspected of having participated in corruption in the former government of Dr. Daniel Arap Moi. Most of these arrests were arbitrary and were not in terms of the law. When challenged in the courts, the result was the release of the individuals so charged.
42. Similarly in Malawi, when the present government came into power under President Bingu Wa Mutharika, the government promised that it would deal with issues of corruption. Corruption had become a problem in Malawi and Malawi was now experiencing difficulties in accessing aid from various multilateral donors. The government promised that it would deal with the issue of corruption and that it would leave no stone unturned in its quest to ensure that corruption was dealt with. This resulted in the arrest of the former president of the country, Mr. Bakhili Muluzi on allegations that he had misappropriated funds whilst he was still in office. When this was challenged, Mr. Muluzi was released from detention. In fact, his detention had been very temporary. After Mr. Muluzi's release from detention, counter accusation went between the police and the head of the anti-corruption agency resulting in the head of the anti-corruption agency being dismissed from his job. This example illustrates the undesirable results of arresting before getting full information and gathering sufficient evidence against those alleged to be involved in acts of corruption. It also illustrates that fact that the fight against corruption has been misused by a number of governments in an effort to win over the people of the country and to hold themselves out to be champions of the fight. The arrests that are arbitrary are also in violation of individual rights.

⁵⁰ As summarized in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 166.

⁵¹ The Centre For Public Integrity: Kenya Corruption Timeline
<http://www.publicintegrity.org/ga/country.aspx?cc=ke&act=timeleine> accessed 21 August 2004.

43. In Zimbabwe, the government of Mr. Robert Mugabe also embarked on a similar theme, that of wanting to deal ruthlessly with persons involved in corrupt acts. Mr. Mugabe has been in office since the independence of the country in 1980 first as prime minister and then later in 1987 as president. In 2004 and in an effort to fight the economic decline of the country, Mr. Mugabe's government embarked on what it termed the cleaning up of the financial sector. Banks were accused of fuelling the parallel market of foreign currency and of fuelling the economic decline of the country. This resulted in a number of banks being forced to close and the arrest of chief executive officers of these banks. No charges were brought before some of these bank officials and they were simply arrested. At the time of the arrest of these bank officials, no crime in fact existed. Included in these arrests was a businessman, Mr. James Makamba who had interests in the retail sector, farming sector and the communications sector. He was arrested and charged with dealing with money on the parallel market. The offence that he was charged with was that he had changed foreign currency on the parallel market instead of taking this money to the bank and have it changed at the official rate of exchange. The result of the economic decline in Zimbabwe was the emergence of the formal market as well as a parallel market. This parallel market was sometime referred to as the black market.
44. Given the vast differences between the rates of exchange between the parallel market and the formal market, many Zimbabweans were opting to change their money on the parallel market. Indeed the parallel market became the source of most of the foreign exchange in the country and the rate used in that market was the rate at which money was changed and the rate at which prices of goods and services were pegged. Even some government departments and businesses resorted to using this rate of exchange in their dealings. Mr. Makamba was arrested on allegations that he had changed money on the parallel market in violation of exchange control regulations. This was referred to as a corrupt act. Corruption was used because the government argued that changing money on the parallel market when the formal market was there was an act of corruption. Mr. Makamba was incarcerated for a lengthy period of time. A new law was drafted which law has been referred to as the James Makamba regulations in view of the fact that it seemed to most people that these regulations were simply to deal with this unique situation that had arisen. Mr. Makamba was eventually tried and he paid a fine, after having spent many months in remand prison for a crime that most people in Zimbabwe viewed as not needing detention. Whilst eventually Mr. Makamba was tried and he paid a fine upon conviction, this case illustrates the point that arrest and detention can be used in an arbitrary manner. Law enforcement agents can over step the limits of their powers under the guise of fighting corruption and wishing to ensure that corruption is fought against.
45. In instances where law enforcement agents arrest individuals, this must be done on reasonable suspicion that the person so arrested has committed an offence. This is the same for all crimes including corruption crimes. International law recognises that liberty is the rule to which detention must be the exception. Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures, (also known as the Tokyo Rules) provides as follows:
- “..pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim”.*⁵²
46. How to define reasonableness is a difficulty that is often encountered by law enforcement agents as well as the courts. The European Court has held that reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention. The European Court went on to state that reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. In connection with arrest and detention under

⁵² Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 173.

criminal legislation enacted to deal with acts of terrorism connected to Northern Ireland, the European Court explained that:

“...in view of the difficulties inherent in the investigation and prosecution of terrorist – type offences,...the reasonableness of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of reasonableness to the point where the essence of the safeguard secured by article 5.1 (c) is impaired...”⁵³

47. To understand the dictum above by the European Court, it is necessary to state the facts of the case that was involved. In the case of *Fox, Campbell and Hartley*, the European Court accepted that the applicants had been arrested and detained “on a bona fide suspicion” that they were terrorists. However, neither the fact that the two of them had “previous convictions for terrorism connected with the IRA”, nor the fact that they were all questioned during their detention about specific terrorist acts did more than confirm the arresting officers had a genuine suspicion that they had been involved in those acts. It could not satisfy an objective observer that the applicants may have committed these acts. These elements alone were insufficient to support the conclusion that there was reasonable suspicion. Consequently, there was a breach of article 5 (1).
48. Although no decided case has been identified that has been dealt with by treaty bodies that deals specifically with corruption, the elements that are raised in the case above are relevant. In fact, one could argue that the standard of investigating terrorism needs to be different from other crime. This argument is the same for corruption. Like terrorism, corruption is a crime that is very difficult to detect and as a result of this, there is need for there to “stretch” the standard of reasonableness. It can also be argued that public opinion is a good barometer with which to measure the extent to which some of the actions of law enforcement agents are reasonable. Referring to the James Makamba case above that occurred in Zimbabwe, to this day, very few Zimbabweans actually believe and are of the view that James Makamba committed an offence and that he got the punishment he deserved. Most persons are of the view that what happened in his case was just a symptom of a sick economy. Indeed, the parallel market economy to this day exists in Zimbabwe. The arrest, detention and subsequent conviction of James Makamba have not ended the parallel market. It has also not deterred persons from using the parallel market in their everyday dealings with foreign exchange. This illustrates the need to define what crime was committed. In this case, the crime was linked to corruption and it seems that anything that might have a hint of dishonesty in it could be likened to corruption.

Specialised Investigative Techniques

49. It has already been said that detecting corruption is extremely difficult. This is because corruption is a crime that is committed between two or more willing participants who each have something to gain from their actions. In view of the perceived benefits from their crime, these persons will not be willing neither would they be ready to disclose to the authorities that they have committed an act of corruption. The legislatures of many countries as well as national courts have noted this fact and have put mechanisms in place to make it easier to detect, investigate and to prosecute acts of corruption. While investigating corruption cases however the persons affected by such investigations continue to enjoy their fundamental rights and freedoms although these can be limited in cases where liberty would have been deprived. One of the rights however that continue to come under jeopardy in investigating corruption is the right to privacy. This right can be violated using very sophisticated methods. Such actions can easily

⁵³ Ibid at page 174.

be justified using the argument that corruption investigations are complex and as a result there is need to “assist” law enforcement officials by making their work easier.

50. All the major human rights instruments guarantee the right for one’s privacy, family, home and correspondence. The international instruments guarantee these rights in different terms. Article 17 of the International Covenant on Civil and Political Rights, article 11 of the American Convention on Human Rights and article 8 of the European Convention on Human Rights all guarantee this right. This right is however limited in certain circumstances.⁵⁴ The right to privacy is clearly a limited right and can be “violated” by a state as long as this violation is in terms of the law and seeks to achieve a legitimate aim.
51. Investigating corruption sometimes involves special investigative techniques. Article 50 of the United Nations Convention Against Corruption deals with the issue of using special investigative techniques. UNCAC acknowledges the need to use these techniques but provides that the use of such techniques must be in accordance with the domestic laws of the particular country. These methods are widely used and authorities have realised that they can achieve certain set objectives. The question of the use of this method of investigation has not come up for determination in the Human Rights Committee. The question has also not come up with specific reference to the investigation of acts of corruption. We will probably not see this in the near future although it is clear that this is a mechanism that human rights defenders and anti-corruption activist should start working together to create a body of cases to take to these treaty bodies. The European Court of Human Rights has however had the opportunity to deal with the issue of wire tapping. The European Court has consistently held that telephone tapping amounts to interference by a public authority with respect to the privacy of an individual. Accordingly, such interference amounts to a violation of the rights contained in article 8 (2) of the European Convention on Human Rights. The recourse to tapping must have a basis in domestic law which must not only be accessible but also foreseeable as to what this tapping entails. What article 8 (2) does is simply not to say refer to the domestic law but goes back and looks to check on the quality of that domestic law.⁵⁵ The need to check on the quality of the law is to safeguard and to ensure that there is adequate legal protection in domestic law against arbitrary interferences by public authorities for the rights safeguarded in the convention. Without these adequate measures, the executive will be a liberty to exercise its powers in secrecy and the risk of arbitrariness become evident. Specifically, the European Court stated as follows when dealing with the issue of what the law should state:

“...be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for the private life and correspondence.”⁵⁶

⁵⁴Article 17 (1) of the International Covenant on civil and Political Rights provides the limitation in the following manner: “...no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, correspondence, nor to unlawful attacks on his honour and reputation”. Similarly, article 11 of the American Convention on Human Rights places a limitation on the enjoyment of this right in the following manner: “...no one may be the object of arbitrary and abusive interference with...”According to article 8 of the European Convention on Human Rights, “there shall be no interference by a public authority with the exercise of” the right to respect for one’s private and family life, home or correspondence. This right is however limited and the limitation are expressed in the following: “...except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

⁵⁵ See generally for the discussion on wire tapping in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 224.

⁵⁶ See European Court HR, *Malone Case v. The United Kingdom*, Series A, No. 82, page 32 paragraph 67 quoted in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 224.

52. The requirement of legal protection means that the domestic law must provide adequate legal safeguards against abuse where the law confers a power of discretion on the authorities. In the *Huwig* case, the applicants had been subjected to telephone tapping for two days by the judge investigating charges of tax evasion and false accounting. The European Court accepted that the disputed measures had a basis in French law, the Code of Criminal Procedure and further that the law was accessible. In terms of the quality of the law however, the court said that the law did not indicate the reasonable clarity and scope and manner of exercise of the relevant discretion conferred on public authorities. The court concluded that since the applicants had not enjoyed the minimum degree of protection required under the rule of law in a democratic society, there had been breach of article 8 in this case.⁵⁷ It is pointed out that the law in so far as it relates to wire tapping is the same for all crimes. What this means is that in circumstances where an authority wishes to include wire tapping as a means of investigating a corruption case, the law must meet the criteria that has been set by the jurisprudence of the European Court. It is argued that this jurisprudence of the European Court can be extended to other regions of the world.⁵⁸ This is particularly so when one looks at the wording of Article 50 (1) of UNCAC which has been set out above. As long as wire tapping is done according to the law of the country and as long as this law meets the criteria that have been set by the European Court, it would be a correct conclusion that that law will not be in violation of the rights of individuals.
53. International law does not provide detailed rules on the subject of search and seizure.⁵⁹ There is no detailed jurisprudence on this subject but the European Court has had the opportunity to deal with this subject although this was in the context of civil proceedings.⁶⁰ In the case of *Chappel v. The United Kingdom* European Court Series A, No. 152, page 51, which concerned a copyright action, the European Court had to deal with the compatibility of article 8 of the European Convention with a search that was carried out in the applicant's business premises for the purposes of securing evidence to defend the plaintiff's copyright against unauthorised infringement. The Government accepted that there had been an infringement with the exercise of the applicant's rights to the respect for his private life and home and the applicant agreed that the search was legitimate under article 8 (2) for the protection of the rights of others. The question that had to be determined by the court was whether the search had been carried out in accordance with the law and whether it was necessary in a democratic society. The order in question which the authorities used to gain entry and to conduct the search was an interlocutory order which could be obtained without giving notice to the defendant. The court was satisfied that the search was based on English law and that it complied with both the conditions of accessibility and foreseeability. Upon examining the question of whether such a law was necessary in a democratic society, the court observed that the order was accompanied by certain safeguards which ensured that the law would be kept within reasonable bounds. The court observed that the order was granted for a short period, that there were restrictions that were placed on the times at which and the number of persons who could perform the search and that any material seized were to be used solely for the purposes for which they were seized.⁶¹
54. It would appear therefore that in cases of searches, any law must also meet a certain set criteria. This is the general criteria that have been determined by the European Court on Human Rights which has had the opportunity to deal with cases of searches although this was a civil search. The principles, it can be argued, are the same and the protection that the court will be seeking to

⁵⁷ Facts of the case are summarised from *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 225.

⁵⁸ The writer has been unable to find cases that refer specifically to corruption. This explains why the examples that have been given refer to other types of crime. The legal principles however remain the same.

⁵⁹ *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 227.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

have is the same, that is, to ensure that executive authorities are not given so much power as to violate the rights of individuals. In the event of a search pursuant to investigating a corruption case, the same rules that apply to conventional crimes must also apply. There are no special procedures or powers that the law enforcement agents have as a result of investigating a corruption case.

The Need For Special Protection of Vulnerable Groups

55. International human rights law has identified vulnerable groups that exist in society that require special protection. These vulnerable groups include women and children and ethnic minority groups. Given their special place in international human rights law, it is important to examine whether or not there are any special procedures that apply to the fight against corruption in a manner that protects their rights. It is argued that no additional protection measures have been set up to take care of these groups other than what international standards on the administration of justice have set with respect to all crimes that are committed by persons that are in these vulnerable groups. As stated earlier, corruption is a crime and hence any person charged with the offence of corruption must first be “criminally” responsible. The Convention on the rights of the Child fixes no limit with respect to the age for criminal responsibility. Article 40 (3) (a) of the convention provides that states parties shall in particular seek the establishment of a minimum age below which children shall be presumed to not have capacity to infringe the law. The minimum age for criminal responsibility must not be too low and must respect the best interests of the child and the principle of non-discrimination. Juveniles below the age of eighteen years of age should be able to benefit from the special protection provided by criminal law to the child. In the administration of justice particularly in criminal proceedings, states are required to respect the following basic principles:

- The principle of non-discrimination;
- The best interests of the child;
- The child’s right to life, survival and development; and
- The child’s right to be heard.⁶²

56. These same principles apply equally if a juvenile is involved in a corruption case.

57. Women still suffer violations of their most basic human rights. In view of this fact, women are treated as a vulnerable group and international standards on the administration of justice has special place for women. The seriousness of the violations that are often perpetrated against women are compounded by the fact that many of the victims are not in a position to change their circumstances either because of extreme poverty or traditional or cultural practices which make it very difficult to change their position. As a result of this, women often find themselves in a vicious social, cultural, religious, political and legal circle and may not be able to break out of it alone. To do so they need the assistance of independent and impartial legal professions that are familiar with international human rights law and its application to women and are capable of exercising their responsibilities diligently and fearlessly.⁶³ Women have the right to be recognized as a person on an equal basis with men. This right is absolute and must be guaranteed in all circumstances and at all times.⁶⁴ Women accordingly have the right to equality with men before the law. This right to legal equality is independent of a woman’s civil status.

⁶² Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 408.

⁶³ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 448.

⁶⁴ General Comment No. 28 (Article 3 – Equality of rights between men and women), in UN doc.

HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies.*

The prohibition based on sex includes gender-based violence. Women's right to legal equality with men means that states have to eliminate all legal and factual discrimination against women in both the public and private sectors. It also implies that states are duty bound, as a minimum, to take all appropriate measures to modify local customs and traditions that impede the full realization of women's rights to equality.⁶⁵ The fight against corruption does not place any additional or special mechanisms that apply to vulnerable groups. Vulnerable groups are accordingly protected by the same principles that apply to all other criminal matters in the administration of justice. In the fight against corruption, human rights will be respected if the authorities comply with the standards that have already been set for the protection of vulnerable groups in the criminal justice system.

Conclusion

58. Investigating corruption is not an easy task. It is necessary for law enforcement agencies to be given special powers to be able to detect and go beyond the usual limitations that they have in order to investigate and detect acts of corruption. However, whatever special powers that investigative authorities have cannot result in the violation of the rights of individuals in a country. It is important that the rights of suspects be respected throughout the investigation of a case. Rules and procedures have been developed under international human rights law that allow for the limitation of certain individual fundamental rights but at the same time giving sufficient powers for law enforcement authorities to carry out their functions. The role of the judiciary is particularly important in two very special ways. The first is that the judiciary itself must be free from corruption. This will ensure that when cases come before the courts, judges will apply the law as it is and that whoever would have committed an offence will be brought to justice. The second important function of the judiciary is to check the excesses of executive authority. The judiciary plays the role of making sure that individual rights are not infringed by playing the role of interpreting the Bill of Rights at the domestic law level. The judiciary must play its role of interpreting the rights that are limited by a state in the light of international human rights law. This will ensure that the public has confidence in the judiciary in the sense that where an accused person is before the courts, justice will be done and in cases where an accused person's rights have been violated, the courts can give such a person the protection that they will require in their particular circumstances.

⁶⁵ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers Professional training Series No. 9 United Nations, New York and Geneva, 2003 at page 457.

CHAPTER THREE

FURTHER AREAS OF POTENTIAL CONFLICT

Introduction

59. The following chapter will look at other areas where there is potential for conflict between the fight against corruption and the need to protect human rights. This examination is important because it is in these further areas where the highest number of potential conflicts arises. This chapter will identify the conflict areas and will draw conclusions as to how the fight against corruption could be improved, should this prove necessary. This chapter will look at the question of amnesty from the point of view of transitional justice in situations where there have been gross violations of human rights and the country wants a break with the past, specific “deals” or individual amnesties that the prosecution sometimes makes with accused persons and general amnesties that are passed when a new anti-corruption law or agency is put in place. The chapter will also examine other areas of potential conflict such as whistle blower legislation; witness protection; asset forfeiture, seizure and confiscation; the use of torture and the protection of vulnerable groups.

Amnesty and Transitional Justice

60. The question of amnesty has always been a troubling human rights issue. The conflict that arises when dealing with transitional justice is how to deal with perpetrators of gross human rights violations with the view of having societies “heal” and emerge from past atrocities. The argument is between having to balance punishment and reconciliation and what human rights advocates have long advocated for, that justice is a precondition for reconciliation.⁶⁶ The difficulties that have been encountered with the approach of seeking justice first as a precondition, there has generally not been a clear definition of what conditions and through what methods should this justice be achieved. Amnesties are usually executed after long periods of extreme violence or civil war. In some cases, those responsible for the violence will no longer be in power and in some cases; those responsible will in fact enact such laws in order to protect themselves. This paper will look at the amnesty laws that were passed in three countries and then comment on these in the light of the fight against corruption and the respect and protection of human rights. The three countries that will be looked at are Chile, Peru and South Africa.
61. In Chile for example, General Augusto Pinochet overthrew Salvador Allende who was the president then in September 1973. General Pinochet led a military junta in order to achieve his purpose. After getting into power through this unlawful means, a campaign of disappearances, abductions, torture and executions was carried out. This was to weed out sympathizers and anyone who opposed the new government.⁶⁷ It is reported that one thousand five hundred civilians had been killed by December 1973 and that at least a further five hundred and ninety nine civilians were killed between January 1974 and August 1977.⁶⁸ In 1978, General Pinochet issued an amnesty decree to all persons who had committed offences during the period of the State Siege. This is the period in which the government had declared a State of Siege and had referred to this time as a time of war. Although technically, this amnesty decree applied to all persons who had committed various crimes during the relevant period, the beneficiaries of this

⁶⁶ Roht-Arriza, N. and Gibson, L. (1998) *The Developing Jurisprudence on Amnesty* Human Rights Quarterly 20 843 – 845 The John Hopkins University Press.

⁶⁷ See Edward C. Snyder (1995), *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973 – 1995*, 2 Tulsa J. Comp & Int’L. 253, 259 – 60.

⁶⁸ Ibid.

amnesty were by and large the military. This is because the military was responsible for most of the atrocities that were committed. This amnesty prevented investigations into human rights abuses because it allowed the courts to close cases and investigations before indictments were handed down.⁶⁹ The successor government of Patricio Aylwin could not rescind the amnesty as a result of failing to get the necessary support from the country's congress. What it managed to do however was to set up a National Commission on Truth and Reconciliation whose aim was to clarify the truth about the most serious human rights abuses where death occurred. The commission in line with its mandate was able to produce a report that contained information on individuals who had disappeared, deaths that had occurred and the report also identified the groups that had been responsible for these acts. The mandate of the National Commission on Truth and Reconciliation was however limited as it was prevented from examining cases involving violations of human rights where the victims survived including cases involving torture.⁷⁰

62. In Peru, from 1912 to 1980, most of the Peruvian governments faced military coups. In the latter part of this period, armed insurgencies including the Sendero Luminoso (hereinafter referred to as the Sendero), a Maoist guerilla movement grew.⁷¹ In April 1992, Alberto Fujimori took power in Peru through a self coup. Soon after this, the guerilla attacks from the Sendero increased and the government responded with brutal force. The government started a campaign of detention, disappearances and extrajudicial executions of persons suspected to be sympathizers of the Sendero. After the capture of the leaders of the Sendero, the violence of the past began to decrease. It is reported that during this time of violence, close to thirty thousand persons were killed of whom eleven thousand were not involved in the conflict.⁷² In 1995, three years after the capture of the leaders of the Sendero, a sweeping amnesty law was passed. Unlike what amnesty laws are passed, that is to promote national reconciliation, this laws was not passed in order to promote national reconciliation after the fall of an authoritarian rule. The law granted amnesty to the police, military personnel and civilians condemned for acts linked with the fight against terrorism for the fifteen year period between 1980 and 1995. the amnesty law is limited to counterterrorist, Sendero members or those found to be associated with the Sendero may be found criminally liable for any of their actions. There was neither truth commission nor other means of reparation for victims of human rights abuses.

63. In South Africa, the fight against apartheid was extremely violent and it ended in negotiations in 1993 that produced a new constitution for South Africa. During the negotiations, the de Klerk government wanted a blanket amnesty which the African National Congress refused.⁷³ An amnesty provision was however included in the Interim Constitution of 1993 that granted protection from acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. The Truth and Reconciliation Act of 1995 (TRA) was enacted in the light of the amnesty provision contained in the constitution. Persons in South Africa do not receive amnesty unless they present themselves to the Truth and Reconciliation Commission and make a full disclosure of all the relevant facts relating to acts associated with a political objective. The commission's duties include allowing the victims an opportunity to relate their own accounts of the violations and recommending reparations. Thus, the particular circumstances and the party responsible for the crimes will be identified and the information will be viewed in conjunction with the victim's account of the acts of abuse.⁷⁴ Amnesty applies to

⁶⁹ Roht-Arriza, N. and Gibson, L (1998) *The Developing Jurisprudence on Amnesty* Human Rights Quarterly 20 843 – 845 The John Hopkins University Press.

⁷⁰ Ministerio Grl. De Gobierno, *Report of the National Commission for Truth and Reconciliation* (Santiago, Chile 1991)

⁷¹ Roht-Arriza, N. and Gibson, L (1998) *The Developing Jurisprudence on Amnesty* Human Rights Quarterly 20 843 – 845 The John Hopkins University Press.

⁷² Ibid at page 855.

⁷³ Ibid at page 856.

⁷⁴ Ibid at page 857.

security forces and liberation movement members engaged in a political struggle. The TRC must consider motive, context, gravity of the offence, whether the person was following orders, the relationship between the act and the objective pursued and the acts proportionality to the objective. Those who do not come forward and request amnesty within the limited period of availability will be subject to prosecution.

64. In the three examples, issues of corruption were not raised specifically. This is generally the trend with amnesty provisions. The main focus tends to be the need to “resolve” the human rights violations that would have occurred. What is not taken into account is the fact that for these gross human rights violations to occur, a lot of corrupt activities would have taken place. Generally, corruption thrives in instances where systems no longer work. The fact that a government that is sitting can embark on a campaign to “eliminate” all perceived opposition like what happened in Chile and Peru illustrates that a lot of corruption existed in these countries. It is argued that for transitional justice mechanisms especially to be very effective, issues of corruption must be raised and dealt with. It is my view that simply seeking to achieve justice without looking beyond human rights violations and not looking at the corruption that allowed this to happen in the first place will leave a number of issues unresolved.
65. The passing of amnesty law as in the case of Peru illustrates that the government was seeking to protect its armed forces that were carrying out orders to eliminate the opposition. In such a case, there is a clear link between corruption and human rights. Evidence has now been found that the government of Fujimori was engaged in rampant corruption and that this is what kept his government going. The perpetration of corrupt acts in this case enhanced the violation of human rights. To satisfy the argument that human rights advocates make that justice is a necessary precondition of reconciliation, it is the view of the writer that issues of corruption must be dealt with when issues of transitional justice are dealt with as well as issues of granting general amnesties. As anti-corruption activists say, for corruption to occur, something would have already gone wrong. When one compares the amnesty that was created in the South African context where a TRC was set up and persons appearing before it were asked to tell everything, this is a far better approach. Issues of corruption will also come out especially the fact that the TRC also looked at who gave the orders to carry out activities and the issues of motive on the part of the perpetrators of the atrocities. Cognizance of the fact that these two amnesties were granted for different reasons is noted and it is this fact that makes it evident. The South African model of the TRC will make it possible to fight corruption. This is because in telling the TRC everything that happened including motive, the TRC was given sufficient information and evidence to deal with issues of corruption as well.

Individual Amnesty When New Laws Are Created

66. Another form of amnesty that arises and is relevant to the discussion of corruption is that that is granted to individuals in the course of the prosecution of an offence or when a new law is created. The United Nations Anti-Corruption Tool Kit explains that the purpose of such amnesties that are granted when new laws are passed or when a new anti-corruption agency is created is to avoid these new initiatives being overwhelmed by the past. Such amnesties make it possible for a fresh start to be made without going back into the past. With respect to individual offer of amnesties, what happens here is that parties to offences can be encouraged to come forward and offer evidence. Such laws which permit the prosecution to grant amnesty to persons offering evidence do exist in Central and Eastern Europe. In this part of the world, legal provisions grant immunity from prosecution to bribe –givers who report crime within twenty-four hours. Similarly, in the United States of America, the first person involved in an offence sanctioned by the Securities and Exchange Commission who “blows the whistle” is granted immunity. This generally creates the problem of one of the parties having power over the other.

The granting of immunity itself creates problems in that whilst the whistle blower has been granted immunity he or she is equally criminally liable. This creates an unfair situation which is a violation of human rights in that the principles of equality and non-discrimination will be violated. The right to equality and non-discrimination are fundamental human rights that are protected by all the major human rights instruments.⁷⁵ What these two rights mean is that all persons are equal before the law and that all persons must receive the same treatment without any discrimination. However, the granting of immunity to one of the parties to a corrupt activity changes this situation and the party who now has immunity is not longer being treated equally.

67. It has been argued that the investigation and prosecution of corruption cases requires some exceptions to the general rules. The granting of amnesties have been justified on the basis that there is need to encourage members of the public to make known such crime. On the other hand, by granting amnesty to the person who would have disclosed the offence, this action communicates a clear message to those engaged in such offences that should someone tell on them, they will be prosecuted. Such legislation although creating this imbalance and an apparent violation of the rights of the person who will now face prosecution, it is argued that at the time of commission of the offence, the perpetrator knew of the risks involved in engaging in such criminal activity. It is not a defence to a criminal charge to say that the witness was also involved. All that the accused person can say is to try and get a reduced sentence and argue in mitigation that the state witness was also part of the commission of the offence. Amnesty laws exist in certain circumstances and can only be given in cases where certain conditions are met. Should the offence and the offender fail to meet these criteria, amnesty will not be granted. The principle of proportionality discussed earlier applies and is used to make this determination.
68. When considering granting general amnesty where a new law has come into force, certain important parameters should be taken into consideration. The United Nations Anti-Corruption Tool Kit gives two parameters that should be taken into account in the granting of a general amnesty after the enactment of new legislation. These are as follows:
 - The person or persons granting the amnesty for past crimes committed must have the trust of the public, and
 - The decision to proceed must be definitive.
69. The mechanism used to determine the crimes to except and to grant amnesty should have the trust of the public and the persons making such a decision must be people of high integrity and who enjoy the trust of the public. The tool kit referred to above further provides that it is advisable to use amnesty, reconciliation and other forms of dealing with the past than the traditional criminal justice system if:
 - The government is creating a newly organized anti-corruption agency corruption has been, or still is, systemic and the large number of cases will probably paralyse the new agency; and
 - Many of the public servants, because of their low salaries, were forced to use corrupt practices in order to survive.
70. It is clear that the granting of amnesty both to individuals and generally in instances of new legislation or new anti-corruption agencies, what authorities will be trying to do will be to strike a balance between the need to fight corruption and the need to break with the past. In any criminal prosecution, evidence is vital. No criminal case will be successful unless the prosecution adduces evidence in the relevant court that meets the required level of proof. This is the

⁷⁵ For a full discussion of these rights, see Julio Bacio Terracino in the other paper to this project, *Hard Law Connections Between Corruption and Human Rights*.

dilemma that the criminal justice system has and this raises the need to seek assistance from the public in return for amnesty in certain difficult cases. The granting of general amnesty has its problems and few countries have in fact granted this. Those that have, have met some resistance that has made it difficult to conduct its anti-corruption drive.⁷⁶ While the granting of amnesty does violate the principle of equality and non-discrimination, in the fight against corruption, this is necessary that it be so. As long as the amnesty is exercised in cases that have been made public and is not exercised in an arbitrary manner with due regard to the rule of law, this will not be a violation of individual human rights. A person who breaks the law cannot cry foul when he or she is investigated when that crime has been detected.

Whistle Blower Laws and Protection of Witnesses

71. For the fight against corruption to be effective and successful, it is imperative that there be in place whistle blower legislation as well as witness protection programmes in countries where corruption has become systemic. The United Nations Convention Against Corruption provides for States Parties to put in place appropriate measures in their domestic legislation to protect persons who make genuine reports of corruption to the authorities.⁷⁷ Not only is the need for witness protection and whistle blower laws paramount, the availability of credible witnesses which in turn also means evidence adduced in a court of law will be reliable and used to convict is a cornerstone of any criminal justice system that is fair. Witnesses need to be sure that they can give evidence in court without fear of retribution. In addition to giving evidence in court, witnesses as well as whistle blowers need the assurance that they will be safe prior to, during and after a criminal trial. The complex nature of corruption is a point that has been stated before and need not be repeated. The need to have whistleblower as well as witness protection is based on the fact that corruption must be reported and that there is need to protect those who make such reports against victimization, dismissal or other forms of reprisal.
72. It must be pointed out that whistle blower legislation is found in many fields. Whistle blower legislation is not confined to anti-corruption legislation. Specific statutes in areas like health, safety and the environment also contain whistleblower provisions.⁷⁸ In these other areas, whistleblower legislation provides express protection to employees who complain that their company has violated environmental protection statutes.⁷⁹ Similarly, in the United States of America whistleblower legislation has been enacted in environmental laws, labour standards, labour relations, occupational health and safety, workers compensation and civil rights legislation.⁸⁰ Each of these areas has legislation that is specific to it and contains provisions of

⁷⁶ See the United Nations Anti-Corruption Tool Kit where the example of the events that occurred in Hong Kong is given. In Hong Kong an amnesty that was granted by the Governor of Hong Kong provoked a negative reaction that almost threatened the whole anti-corruption reform process. The Governor of Hong Kong announced an amnesty after two thousand police marched to the Independent Commission against Corruption (ICAC) headquarters and almost caused a riot. The amnesty was highly controversial since it was claimed that it was timed to catch petty criminals while the big fish were allowed to escape. Confidence in the ICAC dipped and so did staff morale. However, after some time the amnesty was considered a blessing in disguise even though its timing had been forced. It gave those who were corrupt a chance to go straight, while those that did not change their behaviour were shown no mercy. The police themselves were the first to acknowledge that this was the correct procedure.

⁷⁷ Article 32 and 33 of the United Nations Convention Against Corruption.

⁷⁸ *Whistleblowing Study – Models of Whistleblower Protection* Competition Bureau Canada <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1373&lg=e> accessed on 8 August 2007.

⁷⁹ See for example, *Whistleblowing Study – Models of Whistleblower Protection* Competition Bureau Canada <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1373&lg=e> accessed on 8 August 2007. the following example is given in the paper Ontario's two main environmental statutes, the Environmental Protection Act, R.S.O. 1990, c. E. 19 and the environmental Bill of Rights, S. O. 1993, c. 28 contain extensive provisions for employees who have been discharged, disciplined or harassed for complying with Ontario's environmental legislation.

⁸⁰ Ibid.

how to deal with complaints that are made by employees. Each of the pieces of legislation contains its own administrative rules to deal with such complaints. These rules generally deal with the protection of employees in the event of reports being made by such employees.

73. As correctly put in the United Nations Anti-Corruption Tool Kit, the culture of silence and secrecy breeds corruption. This has been found to be true in other areas as well hence the enactment of whistleblower legislation in other areas as well. The need to remain silent is often fuelled by the fact that those who know what is going on and can report fear reprisals. These reprisals can sometimes mean death. This therefore means that this fear is real and genuine. To counter this fear, there is need to put in place a framework that both encourages the reporting of corrupt activity and protects such whistleblowers from possible victimization or retaliation. Accordingly, whistleblower laws should seek to protect those in good faith report cases of maladministration, corruption and other illicit behaviour within their knowledge. For this to work effectively, the law must provide for a mechanism that allows the institution to deal with the content of the message and not necessarily the messenger. The disclosure must be treated objectively and even if it proves to be false, the law must take its course for as long as the whistleblower acted in good faith and had no malicious intent.
74. The aim of whistle blowing is to get as much information as possible to enable a successful prosecution while protecting the identity of the person making the disclosure from being victimized, dismissed or treated unfairly in any way for having made that information available. Failure to have this protection may result in unreliable evidence being placed before a court or worse still, in the prosecution failing to prove a *prima facie* case against an accused person.⁸¹ Whistle blowing is a double edged sword. This is because if this process is not used correctly, it can be used to defame and to damage the reputation of innocent victims. This is where a collision between whistle blowing legislation and the respect of the human rights of individuals arise. There is need for the law to have in place mechanisms that protect the innocent from malicious reports whose sole aim would be to damage the reputation of an innocent victim. Whistle blower legislation must contain minimum standards for the restoration of a damaged reputation. It must also contain possible criminal sanctions for a person who knowingly makes a false report. Whistle blowers must be made aware of the fact that these rules apply to them and that should they not take heed of the warning, they will face serious criminal consequences. Whistle blowing will not be in violation of human rights if there are adequate measures that are put in place in order to protect innocent victims. These laws have been used with a great deal of success in many areas and the issue of human rights violations has not been a major impediment.
75. Related to the issue of whistle blowing is the issue of witness protection. These two are very similar in that the justification of having them is based on the fact that any justice system that complies with international standards of administration of justice depends upon having proper evidence brought before the courts. If there is no evidence before a court that court must dismiss the case as courts can only deal with matters that are brought before them for adjudication. This is why the United Nations Convention against Corruption has provided that its member states should endeavour to have both witness protection and whistle blower legislation in place. In a statement issued by the Asian Legal Resource Centre⁸² the key point on

⁸¹ Human Rights Watch in an article in which the organization was monitoring the trial of war crimes in the Balkans state that the lack of adequate witness protection is hampering trials and forcing witnesses to take unnecessary risks. Although these comments were made with reference to war trials, the same issues arise when applied to corruption cases as witnesses will also go up against the same formidable forces as those that are found in war trial situations – see *Witness Protection* Human Rights Watch Publications <http://hrw.org/reports/2004/icty1004/7.htm> accessed on 8 August 2007.

⁸² [ALRC Statement] THAILAND: Justice depends on witness protection dated 30 June 2006 <http://www.abrchk.net/statements/mainfile.php/2006statements/616> accessed on 8 August 2007

witness protection was made. The statement made the point that if a complainant is not afraid to come up and report a crime immediately after it is committed and describes in detail what transpired and identifies all persons involved in the crime all of which are supported by evidence, the chances are that the prosecution of the accused person is likely to be a success. If the complainant is fearful however, little success if any will be achieved. The statement goes further to state that the duty to protect witnesses rests with the state and if the state fails to provide this protection, justice will be denied to the entire society. The aim of witness protection is to get to the message and not the messenger. This effectively means that as long as the contents of the message are correct, and there is a threat on the life of the witness, that witness must be protected.

76. South Africa runs a witness protection programme. This programme sets out who may be admitted to the programme and how that person is admitted. The programme provides that any potential witness, a dependant of a potential witness or a member of the family of a witness can be admitted into the programme provided that the offence to which the witness can testify is a First Schedule offence or the offence of bribery, blackmail, perjury of defeating the ends of justice. Any person wishing to be admitted to this programme makes an application either to the investigating officer of the case, the head of a police station, the head of a prison or a provincial coordinator of the witness protection programme. The Attorney General makes the decision either to approve or not to approve the application. Once approved, the person is admitted into the programme and must sign a memorandum of understanding with the State which sets out the terms and conditions of the protection. It has been found to be very effective to place key witness on this programme as this secures the adducing of evidence before a court of law. Ultimately, the court in which such a witness appears will also ensure that the rights of the accused person are protected. There are no special powers or special mechanisms that have to be followed should it happen that this is a corruption case. The potential collusion between human rights and the fight against corruption in this instance will be false evidence being led against the accused person. The protection for the accused person is that the evidence must meet the required standard of evidence in order for the court to secure a conviction.

Asset Recovery

77. All the international and regional anti-corruption conventions provide for the recovery and or forfeiture of assets that would have been obtained through the crime of corruption.⁸³ The underlying premise of having asset forfeiture provisions in the legal texts is to make it clear that crime does not pay. Indeed the Directorate on Corruption and Economic Crime of Botswana uses a catch phrase that it intends to make corruption a high risk and low return activity for anyone to engage in. The aim of all this is to make sure that whoever engages in corruption should not derive financial benefits through the illegal activity. Asset forfeiture therefore is seen as a vehicle through which the state recovers the ill begotten proceeds of crime for the benefit of the society. In societies that are rights based and where there are laws that protect private property, it is generally not permissible to deprive arbitrarily, any individual of their property. There accordingly is potential conflict between asset recovery processes and human rights standards. It will be necessary to examine some asset recovery laws and to express an opinion as to the adequacy or otherwise of these laws when measured against human rights standards. It must be remembered however that there must be a balance between the interests of minimizing the benefits derived from ill begotten gains and the need to respect the rights of individuals.

⁸³ See the following articles of the major anti-corruption instruments which provide for asset forfeiture - Article 31 of the United Nations Convention Against Corruption, article XV of the Inter-American Convention Against Corruption, article 16 of the African Union Convention on Prevention and Combating Corruption and article 8 of the Southern African Development Community Protocol Against Corruption.

78. Redpath (2000)⁸⁴ states that there are a number of issues that lead to potential conflict between human rights and the need to seize assets. The reason for this is that there are property rights that individuals have which encompass the following:
- The state may only seize property in terms of general application and for compensation,
 - Before seizure takes place, criminal guilt must first be established at the required proof beyond reasonable doubt,
 - The guilt may only be punished by the state, and
 - All persons should be treated equally before the law.
79. A number of countries do have civil asset forfeiture laws but these vary from country to country. Most of these laws do cast a shadow over the principles stated above.⁸⁵ South African law for example does not meet fully the criteria set out above. The reason for this is the following:
- The standard of proof required for civil forfeiture of property is based on a balance of probabilities and not the usual strict proof required in criminal cases of proof beyond reasonable doubt.
 - Assets may be forfeited without anyone being convicted of a crime. This means that the owner of such forfeited property who may never be convicted of a crime will be punished through the forfeiture of his or her property.
 - The state has the option to choose which assets to forfeit and this choice makes it evident that not all persons will be treated equally.
80. To fully appreciate the law in South Africa on asset forfeiture, it is important to discuss briefly the history of the law and its origins. The Prevention of Organized Crime act which has provisions of both civil and criminal forfeiture clauses is based on the racketeer Influenced Corrupt Organizations Act of the United States of America.⁸⁶ This law was passed in the United States of America with the aim of dealing with the difficulties in policing drug laws and in tackling syndicates and gangs involved in illegal enterprises. In terms of the Prevention of Organized Crime Act, 1998, assets can be seized using civil forfeiture proceedings. For civil forfeiture, the required standard of proof is on a balance of probabilities. The reasoning behind this is that the property is an instrumentality of an offence or the proceeds of unlawful activities for the property to be forfeited. In civil forfeiture, the applicant is the state. Although at first glance it may appear fine to use the burden of proof if a balance of probabilities, this is in essence a real problem. The state has all the resources it needs to carry out a proper investigation. Standard of proof in cases of forfeiture even if they are civil ones for this reason should be on a strict proof beyond reasonable doubt basis. This clearly is a violation of the property rights of affected individuals. There is need for the law to better protect the rights of individuals. This is more so when one considers the fact that at this stage, the private individual has not been convicted of an offence. Indeed, the person may not even be convicted of any offence but in the meantime his or her property has already been forfeited to the state.
81. In addition to seizure of the property, other action can also be taken against any person to prevent them from dealing with the property. In such cases a preservation order which precedes

⁸⁴ Redpath, J. (2000) *Forfeiting Rights? Assessing South Africa's ASSET Forfeiture Laws* Institute for Human Rights and Criminal Justice Studies, Cape Town, Published in African Security Review Vol 9 No 5/6, 2000 available at <http://www.iss.co.za/ASR/9No5And6/Redpath.html> accessed on 8 August 2007.

⁸⁵ Ibid at page 1.

⁸⁶ Ibid at page 2.

a forfeiture order can be brought against any person and not against the property.⁸⁷ The preservation order requires only the showing of reasonable grounds to believe that the property is either proceeds of or an instrumentality in crime. The act requires that the state must give notice that the order to preserve the property has been given to all interested parties. Anyone intending to oppose the order and to oppose the order to forfeit must at this stage communicate their interest to the court at this stage. Property subject to a preservation order may be seized by a police official if there are reasonable grounds to believe that such property will be removed. This is a clear case of violation of the property rights of individuals by the state.⁸⁸ One could argue that the encroachment of the right to property that is provided for in this act is in the interests of the public and is to ensure that no person benefits from the proceeds of crime. The difficulty with this argument is that the burden of proof required is on a balance of probabilities. Furthermore, as indicated above, the person who stands to lose their property may not even be convicted of criminal offence. This makes it very difficult to justify what one may call an extreme measure. This is a clear collision between the fight against corruption and the need to protect the rights of an individual.

82. Canada has civil forfeiture laws that must be contrasted to the South African law. The civil forfeiture law in Canada can be described as very conservative when compared to the law in South Africa. The law which the civil forfeiture is contained refers to the Canadian Charter of Rights and Freedoms.⁸⁹ In Canada, civil forfeiture is only possible after criminal proceedings have commenced against the accused person and the accused has absconded or is deceased. The proof that is required must be proof beyond reasonable doubt, which is the standard of proof required in criminal proceedings. The law in Canada prohibits the forfeiture of immovable property unless it can be shown that the property was built or modified expressly for the purposes of carrying out criminal activity. The South African Prevention of Organised Crime Act also provides for criminal forfeiture. Criminal forfeiture occurs upon the conviction of an accused person who has benefited from criminal activity sufficiently related to the offences. Upon conviction, the court may issue a confiscation order. A confiscation order may be preceded or followed by a restraint order. A restraint order is an order that seeks to prevent the removal of property from the location of that property. The act also makes provision for a realization order for the conversion to money of realizable property. Anyone likely to be affected by the realization or who has suffered damages as a result of the offences that would have been committed may apply to the court for redress.

Torture As A Tool For Investigating Corruption?

83. The need to prosecute successfully persons accused of having committed corrupt acts sometimes places a burden on the police and other investigating authorities the need to cut corners to secure such evidence. The means that authorities end up using is that of torture. Torture has always been a very problematic process that the police in certain jurisdictions actually believe is a method of choice in the investigation of any crime. There is a belief that torture gets the desired results and reduces the amount of work need to investigate properly any crime that the police or other authority is required to investigate. International human rights law does contain very strict rules about the treatment of any person in custody which are applicable

⁸⁷ Ibid at page 4.

⁸⁸ Article 14 of the African Charter on Human And Peoples' Rights guarantees the right to property. The article states that this right can only be encroached upon in the public interest of the community and in accordance with the provisions of appropriate laws.

⁸⁹ Redpath, J. (2000) *Forfeiting Rights? Assessing South Africa's Asset Forfeiture Laws* Institute for Human Rights and Criminal Justice Studies, Cape Town, Published in African Security Review Vol 9 No 5/6, 2000 available at <http://www.iss.co.za/ASR/9No5And6/Redpath.html> accessed on 8 August 2007.

at all times. States are under a legal duty to take necessary legislative and practical measures to put an end to all practices that violate these rules. Article 7 of the International Covenant on Civil and Political Rights provides that no one shall be subjected to cruel, inhuman or degrading treatment or punishment. The purpose of this provision is to protect both the dignity and the physical and mental dignity of the individual.⁹⁰ Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. The use of torture is absolutely prohibited in international law.⁹¹ There are numerous cases which have been brought before international tribunals that define and interpret what amounts to torture. Once a person is tortured, that person is no longer properly before the court and whatever evidence that the prosecution may seek to adduce will not be admissible.⁹² Confessions may not be obtained by illegal means such as torture or other forms of ill-treatment of human rights violations. Guideline 16 of the Guidelines on the Role of the Prosecutors provides that prosecutors shall refuse to use such evidence against anyone other than those who used such methods or inform the court accordingly and shall take the necessary steps to ensure that those responsible for using such methods are brought to justice.

84. Although no specific cases that relate to corruption have been identified, it is clear that should the fight against corruption include the use of torture, then such a case will not stand scrutiny in a court of law. Courts are obligated to refuse to hear matters where torture has been used to obtain confessions or any other evidence. At initial remains in criminal cases, a court is obligated to first enquire as to whether or not an accused person has any complaint against the police. If a person states that they have been tortured, then the court must order an investigation into such allegations. This ensures that the human rights to dignity of the accused person are protected. Failure to meet these strict standards on the prohibition of torture could mean that the prosecution's case may fail for this reason alone. For a successful prosecution therefore, it is imperative that no torture is used during the investigations into the case. Acts of corruption in this regard, fall into the same category as other crimes. There is no additional or special protection that is given to the investigation of corruption. There is no rule which says that because corruption is so rampant and so difficult to investigate, it is fine for law enforcement officials to use torture to investigate and obtain the evidence that they need in order to secure a conviction.

Conclusion

85. From the foregoing, it is evident that there are real potential areas of conflict between the fight against corruption and the need to respect the human rights of individuals. This conflict is real and must be approached taking into account what is in the best interests of the individual as well as what would be in the best interests of the society. If individual human rights are violated, any case that is brought before a court of law will fail. This however is dependent on the robustness of the human rights culture of that particular jurisdiction. What sometimes complicates this is the need to stamp out corruption and to communicate a clear message to all that corruption will not be tolerated. This explains legislation like the one found in South Africa on civil forfeiture.

⁹⁰ General Comment No. 20 United Nations Compilation of General Comments, p 139 para 2.

⁹¹ In the case of *European Court of Human Rights, Soering v. The United Kingdom, judgment of 7 July 1989, Series A, No.161*, p 34 para 88. This case is authority for the absolute prohibition of torture in international law.

⁹² *ACHPR, World organization against Torture and Others v. Zaire, Communications Nos 25/89, 49/90, 56/91 and 100/93, decision adopted during the 19th session, March 1996, para 65* of the text where the court stated as follows: "...beating of detainees with fist, sticks and boots, the keeping of prisoners in chains and subjecting them to electric shock, physical suspension and submersion in water...offend the human dignity". The court accordingly held that such acts violate article 5 of the African Charter.

Whilst one can appreciate the need for such a law, the burden of proof that is required and the fact that property can be forfeited and the owner of such property is not convicted of any offence makes it very difficult to accept that there is no violation of human rights of the individual. This is still a relatively “young” law and it remains to be seen whether it will stand scrutiny and will pass a human rights test, should this law be challenged in a human rights treaty body.

CHAPTER FOUR

ANTI-CORRUPTION PREVENTATIVE MEASURES

Introduction

86. The need to fight corruption and to achieve complete eradication of corruption⁹³ has necessitated the development of a multifaceted approach to the fight against corruption. As the corrupt become more sophisticated and the methods and means with which corrupt acts are perpetrated, conventional law enforcement mechanisms are not equal to the task of fighting corruption. The result has been the creation of anti-corruption commissions or agencies whose main role is to implement government policies for the fight against corruption. The aim of this chapter is to look at what anti-corruption commissions are and their role in the fight against corruption. The chapter will also seek to answer one of the research questions which is: *To what extent are anti-corruption agencies required to comply with human rights standards?* The need to create, strengthen and maintain anti-corruption commissions came out of a realisation that it is impossible to fight corruption using just law enforcement measures. This realisation is bolstered by the fact that anti-corruption commissions do a wide range of activities that seek to increase the integrity of the entire system within a country. Anti-corruption commissions or agencies are bodies that are specifically set up to deal with the issue of corruption. They are normally created by statute and form part of the law enforcement mechanism within a country that fights corruption. This explains why it is relevant to look at these commissions in the light of human rights as they are potential violators of human rights. Although in many instances anti-corruption agencies or commissions are independent of the state, their functions complement that state and for many countries, they are regarded as one of the many state institutions that is responsible for fighting corruption.

International Anti-Corruption Treaties

87. The major international and regional anti-corruption conventions recognise the need and importance of a state party in setting up an anti-corruption institution or institutions to carry out this type of work. Article 6 of the United Nations Convention against Corruption is on *Preventive Anti-Corruption body or Bodies*. Article III of the Inter-American Convention against Corruption deals with *Preventive Measures*. Article 5 (3) of the African Union Convention on Preventing and Combating Corruption provides for the setting up of anti-corruption agencies. Similarly article 4 of the SADC Protocol Against Corruption is on *Preventative Measures*. Accordingly, there is consensus within the regions of the world that anti-corruption institutions are an important part in the arsenal of the fight against corruption. The question then is, how are these created and do they have as one of their conditions the adherence to human rights standards.
88. The success of anti-corruption commissions in dealing with the scourge of corruption is an area which has been critiqued by Heilbrunn (2004).⁹⁴ Heilbrunn (2004) argues that anti-corruption commissions fail to reduce public sector venality in all but very few cases. One of the reasons why this is so is that few political leaders are in fact able to bind themselves effectively to anti-corruption reforms over an extended period of time. Heilbrunn (2004) further argues that for anti-corruption commissions to be successful there is need for there to be a demand for reform from a broad base of domestic constituents. These demands generally occur after a crisis has

⁹³ A number of anti-corruption experts have argued that corruption can never be eradicated. All that can be achieved is to reduce the levels to more manageable ones and to ones that are less devastating on an economy.

⁹⁴ Heilbrunn, J. R. (2004) *Anti-corruption Commissions: Panacea or Real Medicine to Fight Corruption?* The International Bank for Reconstruction and Development/The World Bank 1818 H Street, N. W. Washington, D. C. U. S. A. a discussion of anti-corruption commission models that exist will follow based on this article.

happened in the country and a consensus is developed that there is need for there to be reforms to deal with whatever crisis that would have occurred. This crisis must have cause economic hardship to the extent that all persons will be of the view that it is necessary to have these reforms and there is sufficient will to implement those reforms. Without this consensus, building the necessary coalitions and support for such reforms is very difficult even for the most popular leaders.⁹⁵

Models Used By Anti-Corruption Commissions in Fighting Corruption

89. Anti-corruption commissions follow certain models that have evolved over time. Which model to use is dependent on the preferences of a particular country given the unique legal and administrative framework of that particular country. There are four models which this paper will look at:
1. The Hong Kong Model: The Universal Model. This model has investigative, preventative and communicative functions.
 2. Singapore Model: The Investigative Model. This is characterised by a small and centralized investigative commission as operates in Singapore's Corrupt Practices Investigative Bureau. (CPIB).
 3. The New South Wales Model: The Parliamentary Model. This is made up of commissions that report to parliamentary committees and are independent of the executive and judicial branches of the state.
 4. The United States Office of Government Ethics: The Multi – Agency Model.⁹⁶ This is characterised by a number of individually distinct offices which together weave a web of agencies that fight corruption.
90. In 1974, the Hong Kong Independent Commission Against Corruption (ICAC) was founded and it has enjoyed a lot of success since it came into being. the setting up of ICAC was as a result of the fact that corruption had grown to such unacceptable levels in Hong Kong that there was consensus that it was necessary for drastic action to be taken to deal with the issue around corruption. A commission was set up under the chairmanship of Justice Alastair Blair-Kerr. The Blair-Kerr Commission concluded that corruption was systematic in Hong Kong and that high level police officers as well as lower ranking officers were accepting bribes. The Blair-Kerr Commission recommended the setting up of a special agency to investigate allegations of corruption, to prevent bribery in business and government and to educate citizens about corruption through outreach programmes. The result of these recommendations was the creation of ICAC in 1974. To enable the new ICAC to be effective, it was recognised that there was need to enact new laws and to change the legal framework so as to ensure that what was contained in those laws was as a strong and effective as it could be made. Existing laws were revised and new ones enacted to meet the new requirements of the ICAC. The ICAC is organised into three departments, investigation, prevention and education also referred to as community relations. The largest department is the Operations Department which is charged with investigating alleged violation of laws and regulations. The Corruption Prevention Department is responsible for the prevention aspects of the work of ICAC. This work includes corruption studies, conducting seminars for business leaders and assists the public and private

⁹⁵ Ibid.

⁹⁶ See generally Heilbrunn, J. R.(2004) *Anti-corruption Commissions: Panacea or Real Medicine to Fight Corruption?*The International Bank for Reconstruction and Development/The World Bank 1818 H Street, N. W. Washington, D. C. U. S. A.

sectors to develop strategies to fight corruption. The Prevention Department through its research work reviews laws regularly and suggests revisions based on the outcome of the studies that would have been conducted. The Community Relations Department informs the general public of revisions of laws and regulations. Its role is to alert the public of the dangers of corruption and the need to stamp out corruption and not to aid those involved in corrupt activities. ICAC has built an impressive record of investigations that have resulted in numerous convictions. Hong Kong now ranks as one of the least corrupt jurisdictions in East Asia and beyond. Ronald Noble, the Secretary General of Interpol in 2003 described Hong Kong as the "Anti-Corruption Capital of the world". This is an indication of the successes that ICAC has scored in the fight against corruption.

91. In Singapore, the development of the anti-corruption commission also followed similar patterns to that of Hong Kong. Corruption was rampant in Singapore throughout its colonial history.⁹⁷ When the police was involved in the theft of one thousand tons of narcotics during the 1950s, the Crown administrator passed the Prevention of Corruption Ordinance and established the Corrupt Practices Investigation Bureau (CPIB). The creation of the CPIB did not have the immediate results that would have been expected. This is because the ordinance was not enforced and the reputation of Singapore as a country where corruption was rampant continued. In the 1970s the CPIB was reorganised and it was given powers to curb rampant corruption with a special focus on investigation and enforcement. After the reorganising, corruption in Singapore was reduced and presently, Singapore is recognised as a highly favourable investment climate. The CPIB gets its power from legislation and it has a lot of discretion from that piece of legislation that creates it. The CPIB is very small in size and has a narrow police emphasis. It has relied mainly on deterrent strategies and fines can be as high as \$100,000.00 and up to five years in prison for a conviction of corruption. The CPIB is run on semi-authoritarian grounds just like the government of Singapore is run. The CPIB is directly within the executive branch of the state and it is strictly hierarchical. The president is at the top and he receives all reports and decides what action to take against the allegedly corrupt person. The CPIB reports to an Anti-Corruption Advisory Committee that reports directly to the president. Since the establishment of the CPIB, there has been a decline in public sector corruption. Singapore is an interesting and special case in that its anti-corruption commission created a climate for conducive international investments while its citizens live under a semi-authoritarian rule. This is not the usual case. Singapore illustrates the point that political will more than anything else is very relevant to the fight against corruption and where a government has high levels of political will, the chances of success in the fight against corruption increase.
92. The New South Wales ICAC was established in 1987 after it had emerged in the 1980s that a chief magistrate, a cabinet member and numerous public officials had received bribes from drug traffickers. This was after law enforcement officials in NSW had made contact with their counterparts in Hong Kong as most of the narcotics which were being traded were originating from Southeast Asia. In 1987, political leaders in NSW decided to establish an agency that would have many of the core functions as the Hong Kong ICAC with a crucial difference of an emphasis on prevention.⁹⁸ Since its establishment, ICAC has effectively built public trust through its emphasis on leadership in government and the private sector. The organisational hierarchy of the ICAC includes a Commissioner, an Assistant Commissioner and directors of four operational units. Operational units include investigations, legal corruption prevention and a corporate commercial services unit. The legal unit serves as the liaison to the parliamentary oversight committees. Accountability in the NSW ICAC is imposed by a requirement that it submit annual reports and internal and external audits must be prepared on ICAC operations. This provision recognises that effective oversight is crucial if the commission is to be

⁹⁷ Heilbrunn, J. R.(2004) *Anti-corruption Commissions: Panacea or Real Medicine to Fight Corruption?* The International Bank for Reconstruction and Development/The World Bank 1818 H Street, N. W. Washington, D. C. U. S. A.

⁹⁸ Ibid.

accountable for its actions. The NSW ICAC operates under the supervision of two committees: a Parliamentary joint Committee and an Operations Review Committee. The eleven member Parliamentary Joint Committee has the function of supervising and reviewing the activities of ICAC. As part of its responsibilities, the Parliamentary Joint Committee submits regular reports and responds to questions from the House of Parliament. This committee also answers any questions from the public and complaints that may be raised from the public that are made to the Ombudsman or Parliament. The distinguishing roles of the two committees is that whilst the Parliamentary Joint Committee is answerable to Parliament and deals with all of Parliament's concerns, it is the Operations review Committee that holds the ICAC accountable for its actions, investigations and general operations as a government agency. The Operations Review Committee has eight members whose task is that of advising the Commissioner whether to continue, suspend or terminate an investigation. Any investigation must first be vetted by the Operations Review Committee after a review of evidence. If the committee finds merit in the evidence, it approves the investigation. Thereafter the committee provides oversight on the investigations and this is a critical source of accountability of the NSW ICAC. Every three months, the committee determines the appropriateness of in going investigations, reviews on-going investigations and it communicates its findings regularly to the commissioner. Other methods of accountability include term limits for the Commissioner, budgetary accountability to the Treasury, privacy laws and freedom of information laws.

93. In the United States of America, corruption has prompted reforms and laws against bribery and corrupt acts. Reforms in the United States of America on the corruption front go back to 1870 and many other numerous scandals that occurred thereafter. Scandals continued to rock the United States until the passing of the Foreign Corrupt Practices Act (FCPA) which prohibits the payment of bribes by American corporations operating overseas. As part of efforts by the United States authorities to fight corruption, the Office of Government Ethics (OGE) was established as part of a multi-agency approach to fighting bureaucratic corruption. The anti-corruption policy in the United States is characterised by cross-cutting agencies that investigate, prevent and educate the public sector on corruption. The OGE represents one component of a multi-agency approach to fighting corruption. Its legal foundation is the Ethics in Government Act of 1978. The OGE operates with a variety of offices in the executive branch including the Office of Management and Budget, Government Accounting Office and police agencies in the Justice Department. The OGE exercises leadership in the executive branch to inform public servants about conflicts of interest and to resolve any issues that may occur. In partnership with Federal police agencies and the justice department, this office has created high ethical standards for employees and public confidence has been strengthened. The public are now confident that official business is being conducted with impartiality and integrity. The OGE's organisational goal is to create an ethical environment by coordinating multi-agency cooperation while acknowledging the independence of each individual agency.
94. The successes of these anti-corruption agencies have encouraged the creation of anti-corruption agencies in other parts of the world. The experiences of Hong Kong have led to a number of countries establishing anti-corruption commissions based on the Hong Kong model, the universal model. Countries like Argentina, Bosnia-Herzegovina, Guinea, India, Mauritius, Malawi, Botswana and South Korea have all established independent anti-corruption commissions along the lines of the Hong Kong model.⁹⁹ Botswana after having gone through a series of corruption scandals in the 1990s involving government's purchase of schoolbooks, land distribution and housing management, three presidential commissions of enquiry were held. These commissions of enquiry revealed that cabinet ministers were involved in corruption and that highest level public officials were also involved in the scandals. There was a lot of political commitment needed and in 1994, the Corruption and Economic Crime Act was enacted. This act established the Directorate of Corruption and Economic Crime (DCEC). The

⁹⁹ Ibid.

Act sets out the functions, prescribes the powers and the duties of the Director and states the procedures to be followed in handling a suspect and specifies the offences involving public bodies and those in the private sector. The DCEC follows the Hong Kong model and adopts the three pronged attack involving investigation, prevention and education. Investigation involves investigating specific acts of corruption that will be reported to the DCEC. The reports are received in a number of ways which include phone, fax, letter or in person and they can be from the general public or from public bodies and public officials. Corruption prevention involves studying current processes in both the government and the private sector. The aim of this would be to identify potential areas of corruption and then to engage in work to reduce the chances of corrupt practices occurring. The idea here is to reduce the opportunity for corruption by ensuring that issue like discretion and powers are limited and all procedures particularly in government offices follow a strict procedure which makes it clear for individuals what they should expect from a particular government office. Public education aims at raising awareness among members of the public on the effects of corruption, what constitutes corruption and the need to fight corruption. This action of public awareness also aims at getting the support of the public in combating corruption. The DCEC is an autonomous institution headed by a director who reports directly to the president. The decision to prosecute any offender is that of the Attorney General. Today, Botswana is ranked as the least corrupt country in Africa according to Transparency International. What militates against the DCEC is the fact that it falls under the office of the president. This to a large extent compromises its independence. It would be more desirable if it reported to parliament as this would safeguard its independence better.

95. India has also set up mechanisms to fight corruption. The Central Vigilance Commission (CVC) was set up in February 1964 on the recommendations of the Committee on Prevention of Corruption to advise and guide central government agencies in the field of vigilance. The CVC is the apex institution and is free of executive control, it monitors all vigilance activity under the central government and it advises authorities in central government in the planning, executing, reviewing and reforming their vigilance work. The jurisdiction of the CVC extends to the Central Bureau of Investigations (CBI), all central government departments and all central government companies including nationalised banks. The CBI was established in 1963. Initially, the work of the CBI only involved offences committed by employees by central government servants. In time, the employees of persons working in public sector undertakings were also included under the CBI. India passed the Prevention of Corruption Act in 1988 with the view to consolidating and amending the law relating to the prevention of corruption and related matters. It would appear however that even with all the legislation and the framework that has been put in place, India is not achieving much in the fight against corruption. Pilapitiya (2004)¹⁰⁰ quotes the following statement from Iyer J. N. who said the following:

“If 54 years after independence we have made no progress to effectively control corruption it is because our politicians and their cohorts in the bureaucracy and the corporate world have no will to eliminate or control corruption. They are the beneficiaries of the corrupt system and pay only lip service to probity in public life.”

96. This clearly illustrates that not all anti-corruption commissions are scoring the successes that they should be.

¹⁰⁰ Pilapitiya, T (2004) “The Impact of Corruption On The Human Rights Based Approach To Development” United Nations Development Programme, Oslo Governance centre, The Democratic Governance fellowship Programme, UNDP September 2004 at page 36.

Anti-Corruption Commissions and the Human Rights Based Approach To Programming

97. The discussion in the foregoing section was to set out how anti-corruption agencies have been organised in a few selected countries and was not meant to be exhaustive. The discussion also tried to look at the different models that are around the world and how each model differs from the next. This next section will seek to examine to what extent, if at all, are anti-corruption agencies concerned with human rights and whether or not in their work, anti-corruption agencies take into account human rights issues as they arise. The starting point for such a discussion would be the human rights based approach to programming. A human rights based approach to programming has been defined as follows:

“A rights-based approach to programming is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.”¹⁰¹

98. As pointed out by Pilapitiya (2004)¹⁰² in 2004, the United Nations agreed that human rights must be mainstreamed in all its programmes. The United Nations went on to define three points of the human rights based approach to programming:

1. *all programmes for development cooperation, policies and technical assistance should further realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments;*
2. *human rights standards contained in, and principles derived from, the UDHR and other human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process;*
3. *development cooperation contributes to the development of the capacities of duty bearers to meet their obligations and/ or of rights holders to claim their rights.*¹⁰³

99. The human rights based approach to programming is based on the concept of right-holders or claim-holders on the one hand and on the other, duty-bearers. Right holders refers to persons whether they are corporate or individuals who hold specific rights whilst duty bearers refers to persons who have a legal obligation to take appropriate measures to fulfil this obligation.¹⁰⁴ Koechlin (2007)¹⁰⁵ explains the key principles that are imbedded in the human rights approach to development and identifies those principles as the following ones:

- Express linkage to rights – the full range of rights are considered and there can be no trade off between these rights.
- Accountability – this refers to ensuring that there is accountability on the part of all stakeholders and that duty bearers in fact translate the rights into appropriate laws, institutions and procedures.
- Empowerment – the aim is to ensure that those communities that are the beneficiaries of development programmes are empowered to determine their own destiny.
- Participation – the beneficiaries of the development programmes must participate in their own development. This is a natural consequence of the empowerment that they

¹⁰¹ UN High Commissioner for Human Rights www.unhchr.ch/development/approaches.html

¹⁰² Pilapitiya, T (2004) “The Impact of Corruption On The Human Rights Based Approach To Development” United Nations Development Programme, Oslo Governance centre, The Democratic Governance fellowship Programme, UNDP September 2004 at page 7.

¹⁰³ Ibid.

¹⁰⁴ UNDP (2005) Human Rights in UNDP Practice Note, April 2005.

¹⁰⁵ Koechlin, L. (2007) *An Evaluation of National Integrity Systems (NIS) From A Human Rights Perspective* Basel Institute on Governance Basel Switzerland at page 4.

would have received as a result of one of the key principles of the human rights based approach to programming.

- Non-discrimination and attention to vulnerable groups – human rights are anchored on the principles of equality and equity. This applies to vulnerable and other marginalised groups and whatever development programmes that are developed, this must be taken into account and considered as a key outcome, that all persons should be involved.

100. The aim of the human rights based approach is to ensure that all citizens enjoy the full range of rights in any development initiative. This approach ensures that whatever action that is taken by a state will be sensitive to human rights and will seek to include the full range of rights in the development of policies and in the implementation of those policies.
101. Anti-corruption commissions form part of a country's National Integrity System. A National Integrity System is an approach that was developed by Transparency International to assess the multiple causes of corruption in a country and to develop relevant reform processes with this information in mind.¹⁰⁶ In developing the National Integrity System, Transparency International took note of the fact that corruption is rarely a one-dimensional phenomenon and that it is caused by a number of factors and it manifests itself in several ways. From the foregoing, it is clear that anti-corruption commissions are but one part of the National Integrity System. The work of anti-corruption commissions can be described as that of developing a nation. This is because the definition of development, as set out in the Declaration on the Right to Development is comprehensive and contains any action whose aim is to improve the well being of the entire population.
102. Anti-corruption commissions aim at reducing if not eradicating corruption in a particular country. The eradication of corruption is clearly beneficial to all members of society given the devastating effects of corruption. Once corruption is eroded, many of the citizens will be able to access those services that the government is supposed to provide at a cost that is fair and at a higher quality of these goods and services. It is therefore argued that the work of anti-corruption commissions can safely be said to form part of the development agenda of a nation and to ensure that there is continuous improvement of the livelihoods of the people to which the government is responsible for.
103. What should be noted is that the human rights based approach to programming literature does not expressly consider corruption neither does corruption literature expressly discuss the human rights based approach to programming. In addition to this, an analysis of the anti-corruption commissions as discussed above in the fore going section does not refer to human rights. In fact, there is no explicit reference to human rights in any of the anti-corruption laws that set up these anti-corruption commissions. One could argue that the only reference to human rights is from the point of view of the rights of suspects which in some laws talk about arrest and the fact that arrests must only be done on the basis of reasonable suspicion. This falls far short of the standard as discussed above that the human rights based approach refers to a holistic application of all the rights and not a select few. The human rights based approach is based on the premise of the interdependence and the interrelatedness of all human rights something which is not the case in the work of anti-corruption commissions.
104. Koechlin (2007)¹⁰⁷ in her paper has two case studies of Tanzania and China. These cases studies look at the National Integrity Systems of the two countries. The writer then makes an assessment of the national Integrity Systems with respect to their strength and weaknesses from

¹⁰⁶ Ibid at page 6.

¹⁰⁷ Koechlin, L. (2007) *An Evaluation of National Integrity Systems (NIS) From A Human Rights Perspective* Basel Institute on Governance Basel Switzerland at page 15.

a human rights based approach perspective. With respect to Tanzania, she states as follows on page 15 of her paper:

“Express linkage to rights: As is clear from the Source Book and the NIS Guidance Document, neither the NIS approach as a whole nor the country studies are conceived in an explicitly human rights-sensitive manner, if human rights are understood in a more specific term than generally fostering development and good governance”.

105. Having made this statement however, the writer points out that human rights issues are mentioned in the country report of Tanzania in the section of key issues where the issue of lack of political will is mentioned. Human rights are also implicitly mentioned where the links between corruption and poverty is mentioned which link has led to the rise of socio-economic inequalities. With respect to the findings on China, two problems were identified at the outset. The problems are firstly that there is no clear clarification of the role of the various players in China given the dominant state and the lack of independence and secondly, there is a culture in China of a lack of transparency and accountability that tends to produce administrative unresponsiveness, secrecy and leads to bureaucratic inefficiencies. When assessing the strengths and weaknesses of the National Integrity System in China from human rights based approach, this is the conclusion that Koechlin (2007)¹⁰⁸ arrived at:

*“Express linkage to rights: As outlined in the previous section, the understanding of rights in the Chinese Integrity system, based on centralised, one-party authority, is very different to the understanding of rights in an integrity system stemming from a democratic and pluralist political system. This is also reflected in the report. The rule of law is referred to, but the systemic risks of arbitrary and discretionary decisions backed by the monopolistic exercise of power by the CCP [Chinese Communist Party] is only indirectly alluded to. The right that is accorded the most attention is the right to report and disclose, which is seen to be **“a major democratic right of Chinese citizens protected by the constitution”** (p.19). The Chinese system of preventing and investigating corruption relies heavily on encouraging informants to report corrupt practices, and has whistleblower-protection in place. However, there is no mention in the report of core political and civic rights that are being denied or repressed in China, or of the risks this bears with respect to the lives and dignity of accused persons. Equally, there is no mention of social, cultural and economic rights that are not respected or fulfilled, and the role of corruption in entrenching these inequities.”*

106. Koechlin, L. (2007) draws the following conclusion on the relationship between the National Integrity System and human rights:

*“The main objective and the founding principle of the NIS is the prevention and control of corruption. Hence, human rights only play a role inasmuch as they affect systems, institutions, rules and procedures that strengthen (or weaken) the integrity system framing corrupt practices. This is a central premise, and evidently the main difference between a NIS and a human rights-based approach (HRBA) to development.... Still, having observed the noticeable lack of the human rights discourse in the concept of NIS, **by definition human rights form a crucial and integral part of any integrity system.** An integrity system that does not respect fundamental human rights does not fulfil the basic premise of integrity.... **Corruption is a central issue of human rights and vice versa: first, corruption, even in its most minimal understanding as the waste of public resources, is both a prime source and facilitator of obstacles to development, which constitutes a human right***

¹⁰⁸ Koechlin, L. (2007) *An Evaluation of National Integrity Systems (NIS) From A Human Rights Perspective* Basel Institute on Governance Basel Switzerland at page 18.

in itself; second, corruption is a cause and facilitator of specific human rights abuses, undermining such core rights as equality before the law and nondiscrimination.”

Conclusion

107. From the anti-corruption legislation that has been examined, there is no discussion of human rights nor is there a discussion of the human rights based approach to the work of anti-corruption institutions. This is true for all the various models that have developed. The main focus of the work of anti-corruption commissions is to fight corruption using the three main approaches of investigation, prevention and education or public outreach. By and large, these are the key approaches even in the multi-agency models the difference being that each of these approaches is based in a different agency and each agency focuses on this one aspect. The question that was posed at the beginning of the chapter was to what extent are anti-corruption agencies required to adhere to human rights standards. In their operations, the normal human rights standards that are contained in the constitution of a particular country will regulate the extent to which anti-corruption commissions abide by human rights standards. When it comes to investigations for example, the anti-corruption agency will have to comply with the rules of evidence that are applicable. In investigating, the anti-corruption commission will also have to respect the fundamental rights of suspects before the trial up to the end of the trial.
108. The respect and the promotion of human rights would be enhanced however if anti-corruption agencies were to change the thrust of their work. As has been noted above, many anti-corruption agencies were created after a crisis had emerged in a country. This crisis then forced the authorities to take drastic action to curb the scourge. In view of the history of the development of anti-corruption agencies, there was more emphasis on the crime prevention and on the investigation and prosecuting of offenders' role of the agencies. Very little attention, it is argued, was paid to the work of these agencies as that of development. Had this been the case, more attention would have been given to the aspects of the human rights approach to development. It must also be noted however that the development of the human rights based approach to development is a recent phenomenon, most notable the fact that it was in 2004 when the United Nations took the decision to mainstream human rights in all of its development work. Anti-corruption commissions had already been in existence for a long time. In addition to this, there had been no serious debate on the links between corruption and human rights, which is also a relatively new area and is fast developing.

CHAPTER FIVE

THE ROLE OF CIVIL SOCIETY

Introduction

109. In the Global Corruption Report 2003 released by Transparency International, Peter Eigen, the former Chairman of Transparency International, affirms that:

“Corruption will continue to thrive without the vigilance of the media and civil society, and the bravery of investigative journalists and whistleblowers in particular.”

110. This statement underlines the importance of civil society and the media in the fight against corruption. Charitable and community organisations that are separate from the state have existed in many historical settings. Non Governmental Organisations (NGOs) are however a modern phenomenon. The historical development of NGOs can be traced to the developments that took place in Europe and the Americas in the eighteenth and nineteenth centuries. Citizens of these continents founded an increasing number of NGOs as instruments to meet their needs which included community needs, the promotion of new policies and the defence of interests against arbitrary violation of these by states. Specifically, the French writer Alexis de Toqueville¹⁰⁹ described these organizations as “political associations” and he referred to these organisations as instruments of democracy, uniquely numerous and influential in the United States at the time of his famous visit in 1831. The development of NGOs resulted in the formation of a number of movements which have placed a very critical role in the shape of how our world looks today. The anti-slavery movement was founded in England in the late 18th century and this gave rise to many organisations leading to the eventual World Anti-Slavery Convention (1840), a milestone in the work of NGOs that led to this international event.
111. NGOs today address every conceivable issue that affect the human being and can be found in all countries in the world. Generally, NGOs operate within one particular country and are there to address a specific need. NGOs however can also be regional and international. These address issues that are similar and generic to their target groups and operate in many countries. NGOs play a very important role that produces unique “products”. These “products” are distinct from what government and private business produce. This has resulted in NGOs being referred to by economists as the “Third Sector” to distinguish it from government and private business. It is important that this recognition be made because NGOs in many countries around the world now accounts for millions of jobs and billions of dollars in economic activity. NGOs are often referred to as non-profit making organisations. This description is not entirely correct as it includes other organisations like museums, universities and hospitals that focus on services and rarely engage in advocacy. In contrast NGOs always have an important mission to play on the advocacy front. A rather more accurate description of these other organisation would be “civil society” organisations.
112. The term civil society developed in the 1980s and has proved to be too broad and rather imprecise as to what exactly does it refer to? According to the Centre for Civil Society based at the London School of Economics, civil society is a concept located strategically at the cross section of important strands of intellectual developments in the social sciences.¹¹⁰ The Centre

¹⁰⁹ James A. Paul, Executive Director, Global Policy Forum *NGOs and Global Policy-Making* <http://www.globalpolicy.org/ngos/analysis/ana100.htm> accessed on 29/06/2006.

¹¹⁰ *What is civil society?* LSE, Centre for Civil Society http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm accessed on 29/06/2006.

for Civil Society has adopted a definition for civil society.¹¹¹ This definition of civil society organisations is very clear and very broad. It shows that those organisations that can be described as falling within the third sector are civil society. The above definition though is by far, the most comprehensive and clear explanation of what civil society is. This paper distinguishes between civil society and NGOs. This is because of the broader definition of civil society which includes NGOs. NGOs are a segment of civil society and it is the role of NGOs in the promotion and protection of human rights as well as the fight against corruption that this paper will focus on.

Anti-Corruption Treaties and Civil Society

113. All the major anti-corruption instruments at regional and international levels recognise the fact that the civil society is an important player in the fight against corruption. To this end, the instruments call for the inclusion of civil society in the fight against corruption. Article 13 of the United Nations Convention Against Corruption provides for the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and fight against corruption. The article goes on to state that the effective participation of the civil society will be achieved through enhancing transparency, having effective access to information, taking on action that contributes to the non-tolerance of corruption and respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. These are inherent fundamental human rights of freedom of expression and information that are essential in the fight against corruption. Article III (11) of the Inter-American Convention Against Corruption provides for mechanisms to encourage participation by civil society and nongovernmental organisations in efforts to prevent corruption.” Article 12 of the African Union Convention On Preventing and Combating Corruption provides for full participation of the Media and Civil Society at large in the fight against corruption and related offences. Article 4 (1) (i) of the SADC Protocol Against Corruption provides that each state party will provide mechanisms to encourage participation by the media, civil society and non-governmental organisations in efforts to prevent corruption. The role of civil society is seen as vital and necessary for the fight against corruption. This explains why all the instruments on anti-corruption specifically provide for the role of civil society and encourage state parties to put measures in place for the participation of civil society in the fight against corruption.

The Role Of Non Governmental Organisations

114. Kofi Annan the Former Secretary General of the United Nations declared that *“if the global agenda is to be properly addressed a true partnership between civil society and the United Nations is not an option; it is a necessity.”* It is within the context of this statement that an analysis on the role of NGOs in the promotion and protection of human rights as well as the fight against corruption is going to be made. Firstly, one can do no more but to agree fully with the Secretary General’s statement on the necessity of the partnership between the United Nations and civil society, in this case NGOs. Indeed, one goes further to say that it is not only the United Nations that

¹¹¹ “Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between the state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women’s organisations, faith-based organisations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy groups.

benefits from this partnership but that this also extends to treaty bodies such as the European Court on Human Rights, the Human Rights Committee and the African Commission on Human and Peoples' Rights. NGOs have been described as the "eyes and ears" of treaty bodies. It is important at this juncture to look into how the term NGO was formalized within the UN structures. This was first done in 1945 with the inclusion of this term in article 71 of the UN Charter.¹¹² The relationship between ECOSOC and NGOs was further formalized in ECOSOC Resolution 1296 and ECOSOC Resolution 1996, which outline the criteria for NGO consultative status with ECOSOC. Since that time, NGOs have worked to advance human rights around the world through a number of ways which will be examined below.

Standards Setting

115. NGOs have been very instrumental in the setting up of international human rights standards. Standard setting can be defined as the establishment of international norms by which the conduct of states can be measured or judged. An important area in which NGOs have a role to play is the drafting of General Comments. General Comments provide important interpretations of particular rights in any international instrument on human rights. Once a right has been elucidated by a treaty body in a General Comment, this then becomes the standard that this particular right can be measured. This will apply equally to all state parties to the particular instrument irrespective of the size of the state party. An example of how General Comments work is the interpretation of Article 7 of the Convention Against Torture, Cruel and Other Degrading Treatment that was made by the treaty body in General Comment 20. Part of General Comment 20 reads as follows:

*The Prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim... The committee notes that prolonged solitary confinement may amount to acts prohibited by article 7.*¹¹³

116. Furthermore, General Comments also provide NGOs with information on the extent of the state's obligation under specific articles. This enables NGOs to critique a state that has failed to meet those obligations and has failed to provide the guarantees that are contained in the particular right.¹¹⁴
117. The role of NGOs and the impact that they have had on issues also applies with equal force in the area of anti-corruption. Transparency International, the leading international anti-corruption NGO developed the National Integrity System in the late 1990s. The National Integrity System has been discussed in detail in the preceding chapter. As was noted there, the National Integrity System has now become a basis for which measures of the effectiveness of state institutions are assessed. A National Integrity System seeks to facilitate the transition from a system of vertical, top-down responsibility to a system of horizontal, democratic accountability that shape and inform a configuration of agencies and rules designed to check abuses of public power. Although the prevention and control of corruption is the key objective, it is not seen as an end in itself. The prevention of corruption through the support of a National Integrity System is

¹¹² Article 72 of the UN Charter provides the Economic and Social Council (ECOSOC) of the United Nations with the power to "make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence".

¹¹³ HRI/GEN/1/Rev.2

¹¹⁴ An example of this is General Comment 18 on the principle of non-discrimination. The General Comment reads as follows: "...The committee also wishes to point out that the principle of equality sometimes requires states parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population..." (HRI/GEN/1/rev.2).

embedded in the pursuit of a fairer distribution of and access to public resources, including public services, infrastructure, jobs and political decision-making processes. The concept of a National Integrity System has been accepted and is now a standard and understood by anti-corruption actors.

118. Transparency International has also played a very critical role through its International Anti-Corruption Conferences (IACC). This international conference is held by-annually and has proved to be a place where major issues that affect the fight against corruption are discussed. These conferences have become an event not to be missed by human rights and anti-corruption actors alike as new and emerging issues are debated and are developed from them. The conferences have helped in developing and shaping the fight against corruption by asking participants to submit proposals of topics for discussion and then discussing these matters. The issue of the link between human rights and corruption was debated at a full workshop at the last conference which was the 12th International Anti-Corruption Conference that was held in Guatemala City in Guatemala. This matter was hotly debated and participants agreed that more work into it was necessary.
119. Related to standards setting, NGOs have been at the fore front in conducting researches into areas that need further development. The drafting of this paper and other that have been commissioned under a research project being run by the International Council for Human Rights Policy based in Geneva is one such example. The aim of this project is to persuade public officials and organisations working on corruption of the value of using the human rights framework in their work. As the research design states, this project will be successful if as a direct and indirect result of the research conducted, officials and organisations in some countries adopt human rights principles and techniques in their work. This will amount to setting new standards in the fight against corruption which is very desirable.

Pressure States

120. NGOs have played the vital role of pressurizing their national governments to sign and ratify human rights treaties that embody human rights norms. This pressure that has been applied to states goes beyond just mere ratification. It also includes ensuring that when states do in fact ratify, they do so without entering impermissible reservations. Applying pressure on states also includes lobbying state to ensure that in any upcoming elections or vacancies within treaty bodies, NGOs can put forward names of suitable candidates to be elected to these positions. Suitable candidates would be persons who meet the criteria set by treaty bodies and would also ensure that it is persons with the relevant human rights expertise and are independent of governments. NGOs had a significant impact at the 1993 World Conference on Human Rights that was held in Vienna¹¹⁵. The conference was attended by over eight hundred NGOs, two thirds of which were grassroots organisations.
121. In the area of anti-corruption, NGOs have also done similar work. In order to get the desired number of ratifications for the SADC Protocol Against Corruption for example, a lot of pressure was applied by the Human Rights Trust of Southern Africa (SAHRIT) between the period 2001 when the protocol was signed by the Heads of State and Government of SADC

¹¹⁵ The impact of NGOs at this conference was explained by the Office for the High Commissioner for Human Rights. The Office said that the search for common ground on agenda items was characterized by intense dialogue among governments, dozens of UN bodies, specialized agencies and other intergovernmental organisations and thousands of human rights and development NGOs from around the world. Women's NGOs were a particular prominent force at this conference and in pushing for the inclusion of groundbreaking language in the conference. Since this conference NGOs have continued to play critical roles in advancing the agenda at subsequent UN conferences.

and 2005 when the Protocol eventually came into force. The pressure that was applied was to send letters requesting governments to ratify the Protocol as well as embarking on what was referred to as Chairman's visits to the various SADC countries.¹¹⁶

Documenting Human Rights Violations and Statistics on Corruption

122. One of the main functions of NGOs is to monitor the performance of their national governments through the documentation of violations of human rights standards and the compilation of statistics on corruption. Investigation and documentation by NGOs has been vitally important in bringing human rights abuses to the attention of the UN and other treaty bodies like the African Commission on Human and Peoples' Rights, the international community and the public at large. Thomas and Beasley (1993)¹¹⁷ explain the process as follows:

Human rights practice is a method of reporting facts to promote change. The influence of nongovernmental organisations is intimately tied to the rigor of their research methodology. One typical method of reporting human rights violations in specific countries is to investigate individual cases of human rights violations through interviews with victims and witnesses, supported by information about the abuse from other credible sources.

123. The negative media publicity that comes from such work can work as a useful shaming method to get governments that are found to be violating human rights standards to address these issues. This has in some cases resulted in governments being forced to take corrective action to ensure that their actions are not continually reported in international media and to take corrective action.

124. Transparency International works throughout the entire globe through its network of country organisations. These country organisations are responsible for documenting what the particular government in which they are stationed is doing with respect to the fight against corruption. These chapters of Transparency International at country level are responsible for applying pressure locally and for understanding the local conditions in the particular country that they will be operating in so as to make the necessary conclusions. The compilation of statistics is also important from the point of view that this enables the organisations to monitor progress and to benchmark what action a particular government would have taken.

The Creation and Support of Enforcement Mechanisms

125. Enforcement mechanisms are those methods through which international treaty bodies use to ensure that member states comply and implement human rights standards in their countries. We noted in the introduction that treaties impose obligations for states to meet upon signing and ratifying an international or regional human rights instrument. Treaty bodies have developed mechanisms that follow up states to ensure that states parties to the international treaties are in fact complying with the obligations that they would have signed onto. NGOs have a vital role to play in the creation and in the support of such enforcement mechanisms. Historically, a

¹¹⁶ Chairman's visits referred to visits that were made to SADC countries that are part of a network of anti-corruption institutions known as the Southern African Forum Against Corruption (SAFAC). SAFAC is a network of anti-corruption institutions in SADC whose aim is to encourage cooperation in the area of fighting corruption in the region. SAFAC also aims at assisting each member country in developing best practices of fighting corruption and information sharing aimed at making SADC a corruption free zone.

¹¹⁷ Dorothy Q. Thomas and Michele E. Beasley (1993) *Domestic Violence as a Human Rights Violation* in Human Rights Quarterly, Volume 15, 36, 57.

international human rights standards gained prominence, NGOs began lobbying for the creation of special UN mechanisms to enforce the standards so created while at the same time providing those UN treaty bodies with the assembled documentation to make their investigations easier. This development has also taken place at the African Commission on Human and Peoples' Rights level. Mechanisms that have developed as a direct result of the lobby efforts of NGOs include the thematic and country mandates under the Office of the High Commissioner for Human Rights. These include Working Groups on issues such as disappearance and detention, Special Rapporteurs on topics such as torture, arbitrary and extrajudicial killing, violence against women and racism. Additional mechanisms that have been created and supported through the work of NGOs include those on countries such as Cuba, Sudan, Burma (Myanmar), Burundi and Rwanda and Special Rapporteurs or Representatives on groups of countries such as the UN Special Rapporteur for Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (later the Special Representative of the Commission on Human Rights on the Situation of Human rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia). NGOs were also the impetus behind the creation of the UN High Commissioner for Human Rights.

International Human Rights Litigation

126. A number of international human rights treaties allow for NGOs to bring before treaty bodies individual complaints that a state party has violated the rights of that individual.¹¹⁸ In view of the complexity as well as the expense to individuals for them to bring their cases before the treaty bodies, most of these complaints are brought before the treaty bodies by NGOs. NGOs have a number of roles to play when it comes to international litigation of human rights. In addition to the actual submission of cases on behalf of individuals, NGOs can engage in educational campaigns to increase awareness of the existence of these procedures. NGOs can and do in fact educate the public on the possibility of submitting individual complaints to the various treaty bodies and on the requirements to be fulfilled. NGOs also play the critical role of following up the recommendations¹¹⁹ made by treaty bodies. Under the Un system, there is the Special Rapporteur on Follow Up who can be contacted should the recommendations not be followed up. International human rights litigation is very critical and important in that it allows NGOs and individuals to seek remedies for specific violations of human rights but also allows dialogue and discussion of more general problems at the international level. International human rights litigation also ensures that state parties to international human rights treaties are subjected to scrutiny. The overall goal of litigation is to make sure that states respect human rights and where there are violations; individuals receive the necessary remedies for such violations. Both the Un system and the African system of human rights has laid down procedures of how to bring a complaint before the treaty bodies which is easy to follow. Cases that have been brought before treaty bodies have also assisted in the clarification of human rights principles and in the clarification of the right itself. This is because as treaty bodies sit to consider communications brought before them, they engage in a process of interpreting that particular right or groups of rights that will be litigated or alleged by a complainant as having been violated. The result of this is that a body of precedents is created which human rights practitioners, academics and state parties themselves will rely on in future. This also becomes an important source of law and can

¹¹⁸ The International Covenant on Civil and Political Rights allows for individuals to bring cases before the treaty body in cases where the offending state party has ratified the First Optional Protocol that recognises the competence of the committee to receive such complaints. The African Charter on Human and Peoples' rights as well as the International covenant on the Elimination of all Forms of racial Discrimination allow for the filing of individual complaints.

¹¹⁹ In view of the fact that most of the decisions of treaty bodies are not enforceable when they are handed down, they are referred to as recommendations in the sense that the state party concerned will be requested by the treaty body to take into account its decision and to try as far as is possible to implement that decision by taking and giving effect to whatever the treaty body would have said.

be quoted in subsequent cases, state reports and academic pursuits. This is something that is also a direct result of the work of NGOs with human rights treaty bodies in litigating internationally.

Following the Work of Treaty Bodies

127. This is an activity that has become important in recent times. Its importance is in the form that whatever happens at treaty bodies meetings, should ultimately reach the attention of the general public. After all, the work of treaty bodies is to benefit the general public who are the ones who have the rights and need protection from the states. It is also essential to follow the work of treaty bodies to find out what new things would have been adopted or agreed to at that level. In this instance, it is important to know whether or not if an issue that concerns a particular country has been concluded. An example of this is the Fact Finding Mission that the African Commission on Human and Peoples' Rights carried out on Zimbabwe. This mission was to verify reports that had been sent to the African Commission by various NGOs in Zimbabwe regarding the violence that surrounded the 2000 and 2002 elections. The Government of Zimbabwe in an effort to prove that it had not violated any rights, invited the African Commission to carry out this fact finding mission as is required by the necessary protocols of the African Commission. The mission was carried out by the African Commission but the report was not made public until early 2004. It was the follow up that was played by a number of NGOs in Zimbabwe and the subsequent pressure applied to both the African Commission and the Government of Zimbabwe that saw the eventual release of the report.¹²⁰ Following up the work of treaty bodies is also important in view of the number of "new" issues that continue to emerge and the recommendations made as to how these are to be dealt with by member states.¹²¹ The changes in the trends in human rights necessitate that NGOs working in human rights area should adjust their programming to meet the new issues emerging and to ensure that whatever activities that an NGO will be engaging in will meet international standards.
128. At the first Conference of States Parties under the United Nations Convention Against Corruption that was held in Jordan in 2006, there was heavy presence by NGOs in the anti-corruption movement. A network of organisations working in the area of anti-corruption was formed. The aim of this global network is to support the work of the United Nations Office on Drugs and Crime as the implementing body of the United Nations Convention Against Corruption.

Contributions to State Party Reporting¹²²

129. NGOs play a very critical role in state party reporting. The information provided by NGOs is considered crucial for a critical dialogue to take place between a treaty body and a reporting state. As treaty bodies are made up of a small number of people, it is impossible for these treaty

¹²⁰ Even after the release of the report, it was still necessary to follow up on the implementation by the Government of Zimbabwe the recommendations that had been made by the African Commission. To date, the Government of Zimbabwe has not implemented a single recommendation of the African Commission.

¹²¹ A good example of this is the development of human rights and terrorism after the events of September 11 in the United States of America. A number of countries put in place laws meant to counter the threats of terrorism which in some instances were violations of human rights but exceptions were allowed in order to allow for states to offer better and more robust security for its nationals and territories. Changes in these laws has sparked heated debate which is still raging as to what can a state do and what can it not do.

¹²² The reporting procedure is mainly non-contentious in nature and is based on the method of constructive dialogue. Committees of Independent Experts established under the respective international human rights treaties (treaty bodies) function as control mechanisms in order to review and assess progress made and difficulties encountered with respect to the implementation of these treaties.

bodies to be experts for all member states of a particular convention when it comes to their legal systems nor would it be possible for the treaty bodies to have a comprehensive and intimate knowledge of the human rights practices in each state. The reports that state parties often submit to treaty bodies overemphasize the legal regime and the fact that such rights are protected by the constitution or other legislation in force in the country. There is usually very little reference to the actual enjoyment of these rights and how the citizens of a country can enforce them within the domestic legal framework in the event of violation. The role that NGOs play in this instance is to present the other side of things and how the implementation of these rights is being done by the government concerned. This information is extremely valuable for the committee members and greatly assists them in their preparation of questions to put to the government. Treaty bodies have stated that they are particularly interested in receiving information on actual country conditions from national and international NGOs who have intimate knowledge of the country under review. NGOs can do the following specific activities in the reviewing of state reports:

a. *Ensuring that States Submit Their reports When Due*

NGOs through their tracking of the work of treaty bodies can find out which reports are due to which treaty body and put pressure on the government concerned to submit its reports on time. This ensures that the particular state appears regularly before the committee. NGOs can also alert the committee to an emergency situation in their country in the event that serious human rights violations which justify the committee asking for a special report from that country have occurred. This will ensure that the rights of the citizens of that country are protected.

b. *Consultation*

In the process of drafting state reports, both the UN and the African Commission has recommended that state parties should consult with NGOs. This consultation process will allow the state to have a critical view of its report before it is submitted to a treaty body. It also gives NGOs and the state to exchange specific information regarding the state of human rights in a particular country. This is because there are some NGOs that specialize in the collection of human rights information. This input from NGOs allows a state to submit more meaningful reports that include the challenges that the state meets in the implementation of human rights standards in its jurisdiction. This honest and open reporting is highly appreciated by treaty bodies as this enables the treaty bodies to have a full picture of what is going on in a country from a human rights perspective. Treaty bodies have also encouraged governments to circulate widely, these reports in their countries to allow for debate before and after the treaty body would have considered the report. Where states have complied with these requirements, the result has been that important dialogue has taken place at national level which in some cases has resulted in policy changes for the greater good of the public at large.

c. *Shadow Reporting*¹²³

A very critical way in which NGOs contribute to a more critical review of a particular state is by providing treaty bodies with written comments to state reports. This is done through the drafting of a shadow report which gives an article by article comment on state reports. This report should highlight accuracies and inaccuracies as well as describing the actual human rights situation on the ground in that particular country. The shadow report should in addition to giving an article by article comment on a

¹²³ Shadow reports have sometimes been referred to as counter reports or alternative reporting. This refers to a report that is prepared by NGOs and its objective is to present the human rights situation of a country from the eyes of the NGOs. More often than not, these shadow reports contain information which states either deliberately or through negligence leave out in their own reports to treaty bodies.

particular convention, should provide general information on a country. The information provided should be clear to allow the treaty body to be able to follow what the shadow report is on about.

d. *Suggested Questions*

After a state has presented its report to a treaty body, the treaty body puts questions to the state under review through a process of constructive dialogue between such treaty body and the state. To ensure that this dialogue is effective, NGOs can assist treaty bodies and suggest questions that the treaty body will put to the state. This is a recent development where UN treaty bodies have now allowed NGOs to suggest questions that the treaty body should put. It must be noted though that the treaty bodies are in no way obliged to use any of the NGO questions but they are useful in that they serve as a guide as to what areas and issues to concentrate on.

e. *Attending the Sessions*

NGOs with observer status with the African Commission can attend sessions of the African Commission to observe the consideration of state reports. State reports are considered during public sessions and this gives an opportunity for NGOs to follow up on the observations and concluding remarks made by such treaty body. NGOs can take this opportunity to lobby members of the African Commission before and after the consideration of the report. This is because after the reports are considered, the African Commission has to prepare its concluding observations. NGOs can lobby and influence the content of these concluding observations.

f. *NGO Briefings*

NGOs can arrange side meetings at sessions of treaty bodies. At these side meetings, NGOs can raise awareness and further lobby members of treaty bodies to deal with certain issues that are critical. These briefings are an useful way through which treaty bodies can get up to date information on the situation in any particular country.

g. *Follow-Up*

While each state party has a legal obligation to guarantee and respect the rights contained in international human rights treaties that they would have signed and ratified, treaty bodies do not have the means to enforce its concluding observations. By monitoring and pressuring the government to take measures in accordance with observations, NGOs will ensure that the discussions held at treaty bodies do not just remain discussions. NGOs have successfully published the concluding observations at the national level and have initiated discussions on human rights problems as recognised by the committee, and referred to concluding observations in contacts with government, members of parliament and the media.

Capacity Development and Training of Officials

130. NGOs also play a crucial role in the development of the capacity of states, other NGOs, law enforcement agencies and treaty bodies. This function is a critical role that NGOs play. This is especially important in southern Africa where a number of people work in the human rights field but do not have formal training in this area. This is true even for officials employed by governments. A number of governments train personnel in the drafting of human rights state reports but as soon as these officials have the experience, they leave government employment to work in a more lucrative area. The trend therefore has been that the relevant ministries that have the responsibility of preparing state reports do not have adequate capacity to meet the requirements of the reports as set out by the treaty bodies. This problem is not unique to

governments. Even NGOs working in human rights areas have limited capacity. Persons qualified in human rights tend to be very expensive to employ and their skills are easily transferable from one country to another given the international nature of their skills. There is need therefore to train and build the capacity of officials from NGOs. The other trend is that persons who work for NGOs are activists and are driven with a passion to do certain things. The promotion and protection of human rights is not the work of lawyers alone. It is a multi-disciplinary process which involves persons with a diverse background and experience. This is because human rights issues are not just legal issues. As a result of this, there is need to build the capacity of all these persons to be able to fully engage treaty bodies and to understand how these treaty bodies are relevant in the work that the people are doing. This role has been fulfilled very well by a number of NGOs.

131. This is an area where NGOs have played a very vital role. A number of NGOs are involved in the training of staff from both the human rights fields and the anti-corruption fields. In the area of anti-corruption, SAHRIT has developed programmes specifically for training officials from SAFAC members. SAHRIT has in the past six years been working as the secretariat to SAFAC. One of the main functions of SAHRIT as secretariat to SAFAC has been to train officials from anti-corruption agencies from the SADC region. The training includes training in human rights, corruption, investigation techniques and public campaigns on corruption. These trainings have enhanced the work of anti-corruption officials and has enhanced their knowledge of human rights.

The Role of the Media

132. In the broadest sense, the media embraces the television and film entertainment industries, a vast array of regularly published printed material and even public relations and advertising. The “press” is a serious member of that family, focusing on real life instead of fantasy and serving the widest possible audience. A good generic term for the press in the electronic age is “news media”.¹²⁴ Media includes every form of communication or broadcasting to the general public or a specifically targeted group. Examples include electronic/ manual and visual and audio methods (internet, television, radio, newspapers and any other informative information put on paper for distribution). These have been categorized into three branches namely: public media, private media and community media.

133. It is the media that makes the exercise of freedom of expression a reality. It is incumbent on the media to impart information and ideas of public interest. Not only does it have the task of imparting such ideas, the public also has the right to receive them. Where it is otherwise, the press would be unable to play its vital role of being a public watchdog. This is substantially contained in Article 19 of the Universal Declaration of Human Rights and many other international conventions.¹²⁵ According to this, there are two roles of the media in a democratic country:

1. To inform the public, and
2. To act as a watchdog of government.

134. The media has played a very important role in the fight against corruption. Numerous cases of corruption have been unearthed as a result of investigative journalism. The media can also play a

¹²⁴ Krimsky G. A. MEDIA AND DEMOCRACY <http://newdelhi.usembassy.gov/wwwhspmapmed.html> accessed on 7 October 2004.

¹²⁵ Article 19 of the Universal Declaration of Human Rights provides as follows: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”

role in ensuring that the fight against corruption respects human rights. This necessitates the need to build the capacity of the media to be sensitive to human rights matters. Experiences in Africa are that many journalists do not have access to human rights information and are not aware of human rights standards. Journalists most of the time are not aware of the human rights protection that is contained in their country constitutions let alone what the international human rights standards as contained in the various instruments entail. To this end, SAHRIT worked with journalists in the SADC region and in Zimbabwe in an effort to build their capacity to be able to mainstream human rights in their work.¹²⁶ Without the necessary capacity within the media to fully appreciate the linkages between human rights and corruption, the media will not be effective in its watch dog role. This probably explains why there are hardly any articles in the media that specifically deal with how human rights issues are treated in the fight against corruption. This is an area where development and capacity of the media can be built. The media is not reporting instances of where corruption is being combated with no regard at all to the human rights implications that arise from the action of law enforcement authorities and other agencies involved in the fight against corruption.

Conclusion

135. It is clear that NGOs play a very critical role in the monitoring and enforcement of human rights as well as in the promotion of the fight against corruption. NGOs can continue in this very vital role as has been seen. It is also clear that the role of NGOs continues to evolve. Most states are now accepting that NGOs have this role to play and that NGOs are not necessarily enemies of the state. The former Secretary General of the UN, Mr. Kofi Annan has frequently affirmed the importance of NGOs to the UN. Mr. Annan has referred to NGOs as “indispensable partners” of the UN whose role is more important than ever in helping the organisation to reach its goals. He has affirmed that NGOs are partners in the process of deliberation and policy formulation as well as in the execution of policies of states. A similar role will develop naturally with respect to the relationship between NGOs and the United Nations Convention Against Corruption. After the first Conference of States Parties, developments around exactly how NGOs can contribute to the work of the UNODC have started. It is hoped that at the next Conference of States Parties this will have been further developed and that a proper and clear framework would have been achieved.

¹²⁶ The two projects that SAHRIT carried out were for the journalists in SADC countries. This project focused on the governance conditionalities in the New Partnership for Africa’s Development (NEPAD) and the human rights implications of these conditions. The project aimed at building the capacity of journalists in these countries to identify human rights and good governance issue in NEPAD. The journalists were then to popularize these in their home countries through newspaper articles that they would write on the issues of NEPAD. The second project was run in Zimbabwe and this was aimed at illustrating the link between democracy, good governance and human rights. In both these projects, it became clear that journalists need capacity development in the area of human rights.

CHAPTER SIX

CONCLUDING REMARKS

136. Corruption is a human rights issue. Consensus on this issue has been reached and it has been agreed by most players that corruption is indeed a human rights issue in that it undermines the principles of non-discrimination through discretion, favouritism, nepotism and it undermines the rule of law when judges are bribed to rule in certain ways. When corruption is not dealt with effectively, the result is that a state will fail to fulfil its obligations of promoting and protecting the rights of the individuals who are resident in these states. C. Raj Kumar (2002)¹²⁷ argues that the struggle to promote human rights and the campaign against corruption share a great deal of common ground. This is because a government that rejects transparency and accountability is not likely to respect human rights and therefore the campaign to contain corruption and the movement to protect human rights are not disparate processes. Kumar (2002) further argues that the right to a society free of corruption is inherently a basic right because the right to life, dignity, equality and other important human rights depend on this right. Matsheza (2006)¹²⁸ argues as follows:

“Most of the concerns on the negative effects of fighting corruption do not indicate that human rights abuses occur, because of flaws or weaknesses in the anti-corruption norms and standards, but rather they occur due to either misinterpretation of the standards or through abuse of power and structural weaknesses at implementation level.”

137. One agrees with the two points that are raised by the writers. Fighting corruption in effect promotes human rights. By putting in place transparent ways of conducting business and by ensuring that the judiciary is corruption free, this ensures that society becomes more transparent and the beneficiaries of this good society are the citizens of the country.

138. Going back to the definition of human rights, it is clear that there is a strong link between corruption and human rights. This paper sought to deal with how corruption can be combated whilst respecting human rights. From the foregoing discussion, this is the only way to effectively fight corruption. There is simply no other way. Rules and procedures have been developed that safeguard the fundamental rights of individuals and these rules ensure that these rights are not flouted. Successful prosecutions have been achieved in many jurisdictions of the world where human rights principles have been met. Examples of this include the *Enron* case in the United States of America, the *Shabir Sheik* case in South Africa, the *Tony Yengeni* case in South Africa, and the *Lesotho Water Highlands* case to name but a few. All these cases involved high levels of corruption at very senior levels in governments and the private sector. The authorities in those countries were able to investigate, prosecute and secure convictions of the people who were charged with the various crimes. Arguing that there is need to violate human rights in order to effectively deal with the corruption problem is fundamentally flawed and is untenable in a democratic and free society. Human rights are sacrosanct and they are important because they are derived from the very nature of a human being. The very notion of human rights has been developed over many centuries and if an attitude that they can be violated in cases of corruption or other similar serious cases is allowed to hold, then this will have very serious consequences for the individuals. This will mean that no one will be safe and the atrocities that happened leading to the Second World War will be repeated. The argument on the fight against corruption must be taken in its correct context. Not all rights are absolute.

¹²⁷ C. Raj Kumar (2002) *Corruption and Human Rights* Volume 19 – Issue 19, September 14 – 27 2002 <http://www.hinduonnet.com/fline/fl1919/19190780.htm> accessed 23 May 2007.

¹²⁸ Matsheza P (2006) *Fighting Corruption While Safeguarding Human Rights* A paper presented at the United Nations Conference on Anti-Corruption Measures, good Governance and Human Rights, Warsaw, Republic of Poland, 8 – 9 November 2006.

There are rights that can be limited as long as this limitation meets international standards. The limitation of rights does not apply to anti-corruption cases alone. It also applies to other cases where statutes have been used to limit rights in order that proper mechanisms for the fight against corruption can be put in place.

139. It is important to quote extensively from the concluding remarks of de Speville's paper where he had this to say:

"The heavy responsibility on policy-makers and legislators to strike the right balance between the interests of the individual and the interests of the community in the fight against corruption, as in other fields, is reflected in all international human rights declarations. It is perhaps the 1948 American Declaration of the Rights and Duties of Man that puts it most clearly:

The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

In present times, when the evil of corruption threatens to undermine, even engulf our societies, our leaders need the level-headed vision to see that political determination and community support to fight this menace must be armed with effective weaponry. The role of our judges is to ensure that legislators, in striking the balance, keep within the limits established by the international and regional declarations of the rights of the individual."¹²⁹

140. The only way to fight corruption is to do it through a solid foundation based on the law. Peter Eigen a former president of Transparency International has said that corruption can only be fought through legal means. To this end, Saba (2006) had this to say:

"Disregard of human rights in combating corruption is not only morally wrong, but it is also strategically mistaken, since it undermines the foundations of the anti-corruption policy in itself. If we defeat corruption, it must be without giving up our ideals and values. If we give them up, corruption would have defeated us."

141. Corruption can therefore be fought respecting human rights. This is what has been happening all along although this can be improved and more effective ways of respecting human rights can be implemented.

¹²⁹ de Speville, B. op cit at page 9.