

STAKEHOLDER'S CONFERENCE ON CORRUPTION AND HUMAN RIGHTS

AT THE GABORONE SUN HOTEL

**GABORONE, BOTSWANA
29TH – 30TH MARCH, 2011**

CONFERENCE REPORT



ORGANIZED BY:

- a) Konrad Adenauer Stiftung – Rule of Law Program for Sub Saharan Africa; and**
- b) Network of African National Human Rights Institutions (NANHRI);**



SUMMARY

This report covers the proceedings of the international stakeholders' conference on 'Corruption and Human Rights' that took place in Gaborone, in the Republic of Botswana between 29th and 30th March 2011. The conference was co-organized by Konrad Adenauer Stiftung (KAS) under the aegis of its Rule of Law Program for Sub Saharan Africa and the Network of African National Human Rights Institutions (NANHRI).

Corruption has always oiled the wheels of exploitation, violent ethnic conflicts, institutionalized tribalism, cronyism and injustice which to a large extent typify Africa. The fight against corruption is therefore central to the realization and full enjoyment of human rights for all. There exists a need to address the destructive relationship between corruption and human rights and find ways to mitigate its negative impacts, which can be both direct and indirect. In the long run, it is the vulnerable and marginalized – women, children and minority groups – who often suffer corruption's harshest consequences.

When accountability mechanisms are weak or non-existent, it becomes too easy for violations to occur. Similar clear linkages can be established between corruption and economic, social and cultural rights, as well the inter-dependence of violations among them. Ultimately, the ability for National Human Rights Institutions (NHRIs) to engage in both the human rights and anti-corruption fields is determined by governments respecting, protecting and fulfilling their obligations to create such a space. The parallel and uncoordinated initiatives by different players including the anti-corruption and human rights institutions in the fight against corruption have not helped the cause.

States that are party to the United Nations Convention Against Corruption (UNCAC) have an obligation to promote the active participation of NHRI, civil society, requiring that countries seek, publish and disseminate information on corruption. UNCAC also calls for establishing channels to report violations, and governments are required to provide protection to whistleblowers and witnesses.

The stakeholders' conference in Gaborone, Botswana sought to promote and strengthen collaborative measures by state and non-state actors geared towards the attainment of effective engagement in the prevention and fight against corruption. The conference's specific objectives were to share experiences, challenges and good practices on the work of the African Human Rights Institutions and the various anti-corruption agencies in fighting corruption; to explore areas and strategies for greater involvement and engagement of NHRIs in popularizing the fight against corruption; to promote, facilitate and

support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; to promote integrity, accountability and proper management of public affairs and public property; to promote collaboration and cooperation between NHRIs, Anti-Corruption Agencies and their respective governments for effective complementary approaches to lobbying governments to fight corruption. The participants included representatives from African NHRIs, government institutions, heads of Anti Corruption Agencies, the Civil Society among others drawn from Botswana, Namibia, Kenya, South Africa, Malawi, Swaziland, Tanzania, Uganda, Burundi, Zambia, Mozambique as well as invited guests from Germany and USA.

Annexed to this report are the following;

- Conference Synopsis - Annex A
- Conference Programme - Annex B
- Abstracts of the presentations and speeches - Annex C
- The List of Participants - Annex D

1.0 INTRODUCTION

The programme commenced with the introduction of guests, resource persons and other participants.

The chief guest at the official opening of the conference was His Honour the Acting Vice President and Minister for Minerals, Energy and Water Resources of the Republic of Botswana, Dr. Ponatshengo Kedikilwe

1.1 Summary of Opening Statements:

1.1.1 Prof. Christian Roschmann, Director, KAS Rule of Law Programme

He gave brief background information on the work of the Foundation and noted that the realization of economic rights is important for development in Africa. As a result, Konrad's programmes have endeavoured to focus on the protection and promotion of these rights. He noted that corruption is a scourge in Africa that must be fought by all if the aspirations of the people of Africa are to be realised. He pointed out that the choice of Botswana as the host country of this conference was symbolic due to her good record in the fight against corruption.

1.1.2 H.E. Annett Günther, German Ambassador to Botswana



She pointed out that the topic of the conference was important, timely and relevant and observed that the connection between the fight against corruption and human rights endows the citizenship of a nation with the opportunity to seek the protection of their rights. She noted that a human rights based approach to the fight against corruption strengthens public support for anti-corruption measures; strengthens the role of the public and enhances its perception of the fight against corruption. She observed that the extensive consultation between the government of Botswana, the various stakeholders and the public at large had diminished the level of corruption in the country.

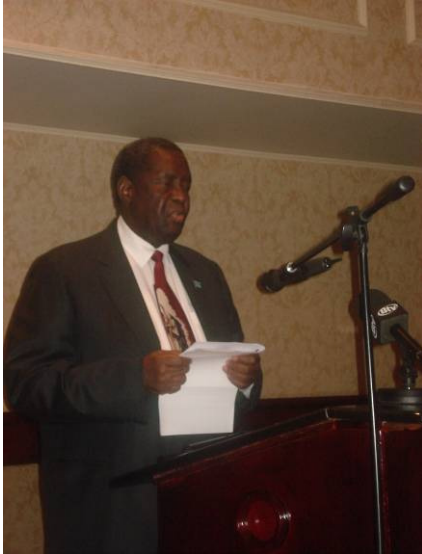
1.1.3 Adv. Lawrence Mushwana, Vice Chairman NANHRI & Chairman, South African Human Rights Commission

He noted that corruption in Africa had destroyed most public institutions thereby negatively affecting efficient delivery of service to the public. He underscored that corruption is a crime, as is a violation of human rights hence the inevitable link between human rights and corruption. He noted that the choice of the venue was very significant since Botswana ranks high within the African community of Nations as a country with the most impressive democratic governance record on the continent.

1.1.4 Dr. Athaliah Molokomme, Attorney General of the Republic of Botswana

She pointed out the centrality and uniqueness of the topic of the conference to the development in Africa. She thanked Konrad and NANHRI for the meeting that drew participants from the academia, anti-corruption agencies, government and private institutions as well as heads of Africa NHRIs. She pointed out that this mix would expose the participants to a rich array of experiences in the fight against corruption thereby making each one better equipped to fight against corruption.

1.1.5 His Honour the Acting Vice President and Minister for Minerals, Energy and Water Resources of the Republic of Botswana, Dr. Ponatshengo Kedikilwe



In his keynote address the Acting Vice President thanked the organisers for convening such an important conference and noted that the fight against corruption is central to the fight against human rights violations. He lamented that those who involve themselves in corruption use the same ill gotten wealth to stay in power by manipulating the weak and the marginalised. He challenged anti-Corruption agencies and all key players to develop a well coordinated and multi-pronged approach to effectively fight corruption. In spite of the widespread perception that corruption is rampant in Africa, he noted that a good number of African nations had done a lot in the fight against corruption. He challenged the continent to explore productive, effective, sustainable and complementary approach in the fight against corruption to guarantee respect for fundamental human rights principles.

Responding to a couple of issues raised by the participants, the Vice President explained that Botswana did not have one human rights institution as is the practice else where because there were several institutions with a similar mandate to that of NHRI which were serving the interests of the people as would the NHRI. He further said that as a government, their intention is to expand the mandate of the existing institutions to uphold the values and principles of human rights.

While referring to the issue of the International Criminal Court and the position of Botswana as far as Kenya's application for a deferral of the cases at the ICC in relation to the post election violence of 2007/2008, he explained that the government of Botswana holds a fundamental belief in the protection of human rights, the rule of law and the recognition of the responsibility bestowed on persons in leadership. He stated that in principle the government of the Republic of Botswana supports the values and principles of the International Criminal Court and that any attempts to defeat the judicial process that guarantees justice to the victims any where in Africa, including the post election violence in Kenya cannot gain their support.

2.0 PLENARY SESSIONS

2.1.1 Session ONE: Corruption as an impediment to the full enjoyment of human rights in Africa: Effective Fight against the menace by Prof. P.L.O Lumumba, Director Kenya Anti-Corruption Commission



The first session was chaired by Justice Key Dingake who introduced the session speaker Prof. P.L.O Lumumba, the Director of Kenya Anti-Corruption Commission. Prof. P.L.O spoke on 'Corruption as an impediment to the full enjoyment of human rights in Africa'. In his thrilling, incisive and pace setting presentation, he sought to dissect the relationship between human rights and corruption particularly in Africa in the knowledge that corruption must be dealt with sustainably in order to develop. He noted that there are a number of conventions and protocols which most African states are a signatory to, which if followed to the letter would appropriately address human rights violations through proper governance in Africa. Sadly, Africa has earned the reputation as a graveyard of very beautiful constitutions and legislations, protocols and conventions.

He lamented that there is an anti-corruption agency in almost every African country today, yet corruption is still alive and well. He noted that corruption is not necessarily won by mere presence of good laws and agencies but in the presence of unwavering political goodwill to fight the menace. He observed that it is sound leadership that has led Botswana and Mauritius to achieve surplus budgets which is rare occurrence in many Africa countries.

He noted that misuse of public funds undermines human rights and it is about time that Africa realises that corruption stands in her way to economic prosperity and should therefore spare no effort in fighting this cancer.

As far as the Kenyan experience is concerned, Prof. Lumumba informed the participants that there are integrity fora every month where all the key institutions in the fight against corruption give a brief on specific steps they were undertaking. He stated that there existed cordial working relationship between Kenya Anti Corruption Commission and the Kenya National Commission on Human Rights as well as the other non state actors. Prof. Lumumba called for a strong regional

mechanisms and alliances to aid national ones especially corruption fights back.

During the plenary session, the participants observed that corruption is not and can never be beneficial to the society and the continent as a whole and must therefore be fought by all. They also underscored the importance of creating strong and independent anti corruption units.

2.1.2 Session TWO: Integrity in the German Public Service by Prof. Herbert Landau, Judge of the Federal Constitutional Court of Germany

In his presentation, Prof. Landau informed the participants that the public service in German is based on the rule of law and is enshrined in the constitution to institutionalise the principles of public service law. In its functions, the public service is independent from state influences, politics and politicians. To curb against corruption and the temptation of bribery in the public service as well as to minimise the tendency of public servants engaging in part-time business initiatives that negatively affect service delivery, public servants in Germany enjoy relatively good remuneration compared to those in the private sector.

While appreciating that good remuneration *per se* may not result into corrupt-free public service, Prof. Landau noted that it was up to every nation to find its own best path based on their national values, principles and culture. However, he noted that regardless of path chosen, the need for strong and independent institutions was paramount so as to withstand political manipulation. .

He explained that Germany has penalties for public servants who violate the principles of public service, including the reduction of salaries, dismissals and all this is within the framework of the constitution.

Prof. Landau underscored the need for strong structures and systems of governance to guarantee the rule of law. He noted that Germany too was once a very poor country but the citizenship and the leaders worked very hard to turn things around and learnt a great deal from the fascist regime to build strong structures and institutions all subject to the rule of law. In a nutshell, every public undertaking must be controlled by the courts to avoid the politicisation of any act of the government. The independence of public service he emphasised is critical to administration of justice and the rule of law.

2.1.3 Session THREE : Key legislative ingredients in the effective fight against corruption in Africa by Mr. Tousy Namiseb, Secretary, Law Reform Commission of Namibia

Mr. Tousy listed UN instruments such as the United Nations Convention Against Corruption (UNCAC) which sets a broad framework to promote and strengthen measures to combat corruption. Under the convention states undertake to establish and promote practices that fight corruption and they are also obligated to take legislative measures to fight corruption. He mentioned AU instruments such as African Union Convention on Preventing and Combating Corruption which obligates state parties to adopt legislative measures to criminalise corruption activities as well as establish, maintain and strengthen independent national anti-corruption agencies.

On legislative framework of establishing anti-corruption agencies, he talked about commission's independence, transparent appointments to the commission, public accessibility to the commission; and a clear mandate. Namibian scenario is such that the Office of the Ombudsman is an independent body that has a function to investigate all instances of alleged corruption. However, he noted that functionality and efficiency may be compromised when such an office has many other mandates including Human Rights, maladministration and environment, therefore there is a need for a specialized body.

On a way forward he challenged all players in the fight against corruption to consider the following exchange experiences; develop model laws on anti-corruption; build strong systems of administrative justice; strengthen separation of Powers i.e. a clear distinction between Executive and Legislature; and mutual cooperation between stakeholders.

2.1.4 Session FOUR: The role of NHRIs in the fight against Corruption in Africa by Ms Florence Simbiri-Jaoko, Chairperson, Kenya National Commission on Human Rights.

In her presentation Mrs. Florence gave a background of NHRIs as constitutional or statutory bodies with broad mandates to promote and protect human rights within the frame work of the Paris Principles. Noting that corruption often leads to violations of human rights and leads to poverty, perpetuates inequality and infringement on economic, social and cultural rights that mostly affect the poor and the vulnerable groups in the society, she observed that it is very difficult to promote human rights in a corrupt society hence the need for NHRIs to give considerable attention to this problem. She noted that in promoting and protecting economic, social and cultural rights, NHRIs had a role to

hold the government accountable as relates to corruption, wastage and misuse of public funds because it impacts negatively on the enjoyment and realisation of these rights. She underscored the need for Anti Corruption agencies and NHRIs to collaborate on these issues. Ideally, the anti-corruption agencies should focus on the criminal aspect of corruption and the NHRIs should delve into the consequences of corruption vis-à-vis the full enjoyment of human rights by the people. In Kenya's case, KNCHR has no specific mandate to deal with corruption but the commission has looked at corruption as an issue that has a great impact on its mandate of promoting and protecting human rights and has thus factored it in its activities.

2.1.5 Session FIVE: The Role of State Institutions in the fight against Corruption by Justice Tujilane Chizumila (Rtd) Ombudsperson, Republic of Malawi

In her presentation, she focused mainly on the Malawian experience. She informed the participants that the former President Bakili Muluzi is in court facing corruption-related charges. She stated that there is a national anti-corruption strategy which emanated from a baseline survey that revealed that corruption is a big problem in Malawi. The objectives of the strategy is to promote ethics and integrity; public accountability; and service delivery.

There is a national integrity committee that is the anti corruption think-tank which guides implementation of anti corruption endeavours. There is also an institutional integrity committee that coordinates institutional fight against corruption whose main task is to develop and review anti-corruption action plans.

There is the Anti corruption bureau which enforces anti-corruption mechanisms by receiving complaints on corruption, prosecuting corruption offences. Other state institutions fighting corruption includes Malawi law commission, Office of the director of public prosecution, Financial intelligence unit, National audit office, Judicial system, Office of the President, Ministry of Justice and Constitutional Affairs, Malawi Police service among others.

Conclusion

At the end of the conference deliberations, the participants pledged to undertake practical steps in addressing some of the issues that had been raised. In order to achieve this objective, a draft action plan was discussed which is to be adopted and implemented after comprehensive input from the participants. Mr. John Kapito the Chairperson of Malawi Human Rights Commission and a member of the Steering Committee of NANHRI gave a vote of thanks.

Annex A: CONFERENCE SYNOPSIS

1. Background

The term “corruption” comes from the Latin word *corruptio* which means “moral decay, wicked behaviour, putridity or rottenness”. This definition is however representative of two common inadequacies i.e. it looks at corruption only in terms of bribery, or in a term that is very general. As a result, corruption definitions may tend to be either too restrictive or excessively broad. Be that as it may, corruption has its broad causes and consequences.

However, to link corruption with human rights, a definition of corruption based on law is necessary. Legally the term corruption is usually used to group certain criminal acts which correspond to the general notion of an abuse of entrusted power. International conventions against corruption reflect this, since they do not define and criminalize corruption but instead enumerate criminal acts that amount to corruption.

Corruption has always oiled the wheels of exploitation, violent ethnic conflicts, institutionalized tribalism, cronyism and injustice which typify Africa. The fight against corruption is therefore central to the struggle for human rights. The parallel fight on corruption by the anti-corruption and human rights movements hasn't helped matters either. Therefore, there exists a need to address the destructive relationship between corruption and human rights and find ways to mitigate its negative impacts, which can be both direct and indirect. In the long run, it is the vulnerable and marginalized – women, children and minority groups – who often suffer corruption's harshest consequences.

The daily realities of corrupt activities are a direct contravention of many human rights conventions, undermining basic principles such as non-discrimination that are enshrined in the UN Declaration of Human Rights (UDHR)¹ and which have been expanded through the International Covenant on Civil and Political Rights (ICCPR)² as well as subsequent international laws. Human rights conventions set out the legal obligations of a government to guarantee absolute access to equity, equality, and a fair justice system. A government's ability to respect, protect and fulfill these rights – social, cultural, political, economic and civil – is ultimately defined by the levels and systemic nature of corruption in those states.

When accountability mechanisms are weak or non-existent, it becomes too easy for violations to occur. Similar clear linkages can be established between corruption and economic, social and cultural rights, as well as the inter-dependence of violations among them. Ultimately, the ability for National Human Rights Institutions (NHRIs) to engage in both the human rights and anti-corruption fields is determined by governments respecting, protecting and fulfilling their obligations to create such a space. Without this condition for a safe forum, the work – and lives – of anti-corruption and human rights activists is endangered. States that are party to the United Nations Convention Against Corruption (UNCAC) have an obligation to promote the active participation of NHRIs, civil society, requiring that countries seek, publish and disseminate information on corruption. UNCAC also calls for establishing channels to report violations, and governments are required to provide protection to whistleblowers and witnesses. Equally, the UN Declaration on Human Rights Defenders (1999)³ includes anti-corruption activists within this list of individuals that the UN must protect.

¹ www.un.org/en/documents/udhr/index.shtml

² www2.ohchr.org/english/law/ccpr.htm

³ www2.ohchr.org/english/issues/defenders/declaration.htm

2. Situation Analysis and Justification

If corruption is shown to violate human rights, this will influence public attitudes. When people become more aware of the damage corruption does to public and individual interests, and the harm that even minor corruption can cause, they are more likely to support campaigns and programmes to prevent it. This is important because, despite strong rhetoric, the political impact of most anticorruption programmes has been very low. Identifying the specific links between corruption and human rights may persuade key actors such as NHRIs, the Civil Society Organizations (CSOs), judicial officers, parliamentarians, the media and the general public– to take a stronger position against corruption.

A clear understanding of the practical connections between acts of corruption and human rights may empower those who have legitimate claims to demand their rights in relation to corruption, and may assist states and other public authorities to respect, protect and fulfill their human rights responsibilities at every level.

In addition to judicial accountability, parliamentary reporting plays an important role in many countries, while monitoring by NHRIs and the CSOs has become more extensive.

While they do not replace traditional anti-corruption mechanisms – primarily the criminal law – they can give cases prominence, may force a state to take preventive action, or may deter corrupt officials from misusing their powers.

Analyzing anti-corruption programmes from a human rights perspective may assist states to comply with human rights standards when they draft and implement laws and procedures to detect, investigate and adjudicate corruption cases.

It is on this basis and in line with the Action Plan 2010-2011 of NANHRI that NANHRI and KONRAD Adenauer Stiftung under the aegis of its Rule of Law Program for Sub Saharan Africa have organized a conference to be held in Gaborone, Botswana between 29th and 30th March 2010 to examine when and how the use of human rights might improve performance in specific areas; it also identifies the limits of a human rights approach in this field. The goal is to provide an operational framework that will make it possible to apply human rights principles and methods usefully in anti-corruption programmes.

The conference also seeks to encourage and assist individuals and institutions which work to promote and protect human rights to engage with corruption issues and collaborate more closely with anti-corruption organizations. It will also assist those who combat corruption to recognize the value of human rights to their work and the advantages of closer collaboration with human rights organizations. In addition, the workshop will also help to raise awareness among key stakeholders the links between corruption and human rights, thereby diminishing public tolerance of corruption and strengthening public support for anticorruption measures.

3. Objectives

i. Overall Objective:

- To promote and strengthen effective measures by state and non-state actors engagement of to prevent and combat corruption.

ii. Specific Objectives:

- To share experiences, challenges and good practice on the work of African human rights institutions in fighting corruption;
- To explore areas and strategies for greater involvement and engagement of NHRIs in popularizing the fight against corruption;

- To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- To promote integrity, accountability and proper management of public affairs and public property;
- Promote collaboration and cooperation between NHRIs, Anti-Corruption Agencies and their respective governments for effective complementary approaches to lobbying governments to fight corruption.

4. Expected Outputs

- i) Consensus and commitment from the leadership of African NHRIs to develop a strategy for effective engagement with state and non-state actors to fight corruption;
- ii) Identified gaps within NHRIs for capacity development in relation to increasing their participation and engagement with state and non-state actors in fighting corruption.

5. Participants

The Conference will bring together the leadership of African NHRIs, African governments' representatives, CSOs and Anti-corruption agencies. NANHRI and Konrad Adenauer Stiftung will primarily be responsible for the actual implementation of the activity in terms of logistical, technical backstopping and programme support for the activity.

Annex B: CONFERENCE PROGRAM

March 28th, 2011

Arrival of Delegates

Dinner

March 29th, 2011 Director of Ceremonies Mr. Peter Wendoh, KAS

08:30–09:00	Registration
09:00–09:10	Welcoming Remarks by Prof. Christian Roschmann , Director, Rule of Law Program for Sub Saharan Africa
09:10–09:15	Remarks by H.E. Annett Günther , German Ambassador to Botswana
09:15-09:25	Introductory Remarks by Adv. Lourence Mushwana , Vice Chairman of NANHRI & Chairman SAHRC
09:25–09:50	Introductions
09:50–10:00	Remarks by Hon. Dr. Athaliah Molokomme , the Attorney General of the Republic of Botswana
10:00–10:30	Keynote address and Official Opening of the Conference by His Honour the Acting Vice President and Minister of Minerals, Energy and Water Resources of the Republic of Botswana, Dr. Ponatshego Kedikilwe

10:30-11:00 Health Break & Photo session

- 11:00–12:45 **Session 1 – Presentation and Plenary Discussion**
Session Chair:
Justice Key Dingake, High Court Judge,
Republic of Botswana
- Corruption as an impediment to the full enjoyment of human rights in Africa: Effective Fight against the menace by **Prof. P.L.O Lumumba**, Director Kenya Anti-Corruption Commission
- 12:45–14:15 Lunch break**
- 14:15-16:00 **Session 2 – Presentation and Plenary Discussion**
Session Chair:
Prof. Christian Roschmann, Director, Rule of
Law Program of KAS
- Integrity in the German Public Service by **Prof. Herbert Landau, Judge, Federal Constitutional Court of Germany**
- 16:00–16:30 Health Break**
- 16:30-18:15 **Session 3 – Presentation and Plenary Discussion**
Session Chair:
Adv. Thuli Madonsela, Public Protector, RSA
- Key legislative ingredients in the effective fight against corruption in Africa by **Mr. Tousy Namiseb**, Secretary, Law Reform Commission of Namibia
- Dinner
- March 30th, 2011 Director of Ceremonies Mr. Peter Wendoh, KAS**
- 08:30–10:15 **Session 4 – Presentation and Plenary Discussion**
Session Chair:
Mr. Gilbert Sebihogo, Executive Director, NANHRI
- The role of NHRIs in the fight against Corruption in Africa by **Ms Florence Simbiri-Jaoko**, Chairperson, Kenya National Commission on Human Rights Commission
- 10:15–10:45 Health Break**
- 10:45–12:30 **Session 5 – Presentation and Plenary Discussion**
Session Chair:
Mr. Med Kaggwa, Chairman, Uganda Human Rights
Commission
- The role of state institutions in the fight against corruption by **Justice Tujilane Chizumila (Rtd)**, Ombudsperson, Republic of Malawi
- 12:30–13:30 Conference Wrap-up and Adoption of an Action plan by **Mr. Dancan Ochieng'** of NANHRI

13:30–13:40	Votes Of Thanks by, Mr. John Kapito Member of the Steering Committee of NANHRI
13:40–15:00	Lunch break
15:00–18:00	Excursions (Optional)
19h00	Gala Dinner

March 31st, 2011

Breakfast

Departure

Annex C: PRESENTATIONS



Republic of Botswana

SPEECH BY

**HIS HONOUR THE ACTING VICE PRESIDENT, MP
HON MINISTER OF MINERALS, ENERGY AND WATER RESOURCES OF THE
REPUBLIC OF BOTSWANA, DR PONATSHEGO KEDIKILWE**

**DURING THE OFFICIAL OPENING OF THE CONFERENCE ON CORRUPTION AND
HUMAN RIGHTS**

GABORONE SUN, MARCH 29TH 2011

Distinguished Guests, Ladies and Gentlemen,
A very good morning to you all!

1. I am pleased to be with you this morning, and indeed honoured to address such a distinguished audience on a subject that is without doubt as important as it is challenging. Allow me to therefore take this opportunity to express my sincere appreciation to the organizers of the conference for their kind invitation to me to deliver a keynote address and officially open this conference.
2. Most importantly, I would like to extend a warm welcome to all visitors to Botswana, and hope that you will find the modest facilities we have put at your disposal to be adequate. Please feel free to take time off after the conference to visit the many tourist attractions we have to offer, and get to know more about our rich flora, fauna, diverse people and way of life.
3. Let me commend both organizations for organizing such an important and relevant conference, and for their continued efforts towards the promotion and protection of the rule of law, human rights and democracy in Africa.
4. There is no doubt that there is significant link between corruption and human rights, and that the fight against corruption is central to the realization and full enjoyment of human rights. As has been captured in this conference's

synopsis, '**corruption has often greased the wheels of exploitation and injustice**' which unfortunately typifies the African continent to a greater extent compared to the rest of the world. From violent ethnic conflicts to institutionalized discrimination particularly of vulnerable and marginal groups such as women and children, political actors have often abused their entrusted powers to focus on gains for the few at the expense of the many.

5. Sadly, those who engage in corruption always attempt to protect themselves from detection and maintain their positions of power and influence using the same ill-gotten wealth. In doing so, they often oppress and exploit the weak in the society who in most cases are powerless. The net-effect of corruption and impunity is exclusion, inequality and discrimination against certain sections of our society, which in itself undermines fundamental human rights.
6. In trying to access basic and essential public services that guarantee the right to life, equality and human dignity such as medical care, education, fair justice system and security, vulnerable and marginal groups tend to suffer more violations than the rich. This also leads to perceptions on the part of the marginalized that a larger share of their resources is being eaten away by the rich and mighty in society. Such perceptions, though not always reality, can lead to protests and instability that undermines the progress of our societies.

Ladies and Gentlemen,

7. Any government's ability to respect, protect and guarantee human rights is no doubt affected by the levels and systemic nature of corruption in those states and this is where some of us fail the ultimate test. The lack of transparency and access to information and the culture of secrecy in many African states undermine the peoples' power to make informed decisions ranging from how they exercise their voting rights to how they participate and monitor state budgets and expenditures. When accountability mechanisms are weak or non-existent, it breeds fertile ground for corruption to thrive thereby making it too easy for human rights violations to occur.
8. Having painted this undesirable picture, the critical question then becomes, what can we do to change this scenario? I will attempt to point out a few things that I hope this conference will explore and briefly share with you the Botswana experience.
9. It has been observed that for far too long, the anti-corruption and human rights movements have been working in parallel rather than tackling these problems together. The truth of the matter is that, for corruption to be effectively combated, it requires strong collective efforts by different players from different sectors in society who must act in coordinated manner. Thus, effective anti-corruption strategies require the creation of national and international alliances involving actors from government, public and private sectors.

Ladies and Gentlemen,

10. It is particularly encouraging to note that this particular forum has brought together stakeholders from diverse sectors drawn from both public and private sectors from various African countries.
11. I therefore hope that each one of us and the institutions that are represented here today will recognize the value of human rights to our work, and the dangers that corruption poses to our work and the society in general. I implore you to forge closer collaboration in eliminating this vice and work towards promoting human rights for the greater enjoyment of all citizens of Africa and the world at large.
12. Turning to the situation in Botswana, our Directorate on Corruption and Economic Crime (DCEC) is the main Institution which has been mandated by

statute to combat corruption. The Directorate employs a three pronged approach to achieve its mandate. This is done through detection, prevention and public education. Corruption Prevention is one of the three elements that are universally recognized as being essential to any successful anti-corruption strategy. This is envisaged under Section 6 of the Corruption and Economic Crime Act, which provides that the functions of the DCEC include:

- "To examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures, which in the opinion of the Director may be conducive to corrupt practices;
 - To instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;
 - To advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;"
 - to educate the public against the evils of corruption; and
 - to enlist and foster public support in combating corruption.
13. In order to execute its mandate, the DCEC has established a Corruption Prevention Division, which conducts assignment studies, in order to identify loopholes of corruption in management policies and operational areas in good time, so that they can be effectively addressed. This is also done to ensure that goods and services are accessible to all persons without discrimination, which is often occasioned as a result of corruption.
14. This has been a core function of the Corruption Prevention Division since the DCEC inception. The trend has however been changing over the past three years mainly because of changes in the approach to corruption prevention, formulation and implementation of new anti-corruption strategies and the need to refocus the use of limited resources to anticorruption initiatives that proved to be most effective in corruption prevention.

Ladies and Gentlemen

15. In its quest to eliminate corruption, the Government has decided that anti corruption units be set up in ministries, with assistance of the DCEC. This comes as result of concerns on the involvement of some public officers in fraud and corruption. The main purpose of these units will be to investigate all processes, procedures and transactions within ministries and report any unlawful activity to appropriate authorities such as the DCEC and the Police.
16. The DCEC besides having the statutory mandate of fighting corruption also has an additional responsibility of tackling issues of money laundering and related crimes. It is against this background that the Directorate took it upon itself to curb the crime of money laundering by employing other strategies besides investigations which includes among others dissemination of information and best practices against the crime of money laundering.
17. The DCEC does so in many ways, using different resources which I am sure they will share with you during this conference. Furthermore, the institutional and legal framework is being reviewed to ensure that we effectively curb the crime of money laundering.
18. The importance of good governance has been receiving increasing recognition all over the world, and actors include governments; private sector; non-governmental organisations and international organizations. The promotion of good governance by these structures has singled out corruption as a hindrance to the achievement of accountable decision making. In light of this, I am informed that the DCEC has embarked on activities to promote dialogue

on governance issues, which include **collaboration with oversight institutions**. Memoranda of Understanding on strategic partnerships and collaboration will be entered into to promote dialogue on governance issues. The areas of cooperation identified include joint public education campaigns, joint media appearances and public debates, information and resource sharing, constituting joint committees to monitor mega public projects.

19. These are only a few initiatives that I thought I should share from our experience here in Botswana, and express the hope that our participants will share others in detail during the conference.

Ladies and Gentlemen,

20. To return to the broader subject of this conference, there are a number of practical areas upon which human rights and anti-corruption organizations can collaborate to fight the scourge of corruption while at the same time promoting and protect human rights. For instance, they can work together towards the enactment of laws and development of policies that will reduce the secrecy of government decision-making processes and promote access to information and transparency; campaign for freedom of expression and plural media; and campaign to ratify anti-corruption treaties. On this note, I am pleased to inform you that our Cabinet a few weeks ago decided to accede to the UN Convention Against Corruption (UNCAC). The various agencies and stakeholders need to work together to develop firmer professional standards and codes of conduct, ideally in cooperation with law enforcement officials and members of the judiciary. In this regard, wider dissemination of the existing internationally recognized principles such as Bangalore Principles of Judicial Conduct could be a useful common objective. Both must also target other actors, such as bankers, accountants, real estate agents and other professionals, without whose assistance, corruption and its proceeds cannot be concealed; and work towards raising public awareness through the media.

Ladies and Gentlemen,

21. When people become more aware of the harm that corruption causes to public and individual interests regardless of their severity, they are more likely to support campaigns and programmes aimed at fighting this scourge. A clear understanding of the practical connections between acts of corruption and human rights may empower those who have legitimate claims to demand their rights in relation to corruption, and may assist states and other public authorities to respect, protect and fulfill their human rights responsibilities at every level.
22. Clear analysis of anti-corruption programmes from a human rights perspective may assist states to comply with human rights standards when they draft and implement laws and procedures to detect, investigate and adjudicate corruption cases.

Ladies and Gentlemen,

23. In spite of the widespread perception that Africa is a hub of corruption and human rights violations, I know for sure that there is much that African countries and institutions have done in these areas. It is therefore my prayer that this forum offers a platform for the various individuals and institutions from the countries represented here today to share experiences, challenges and good practices for the greater benefit of our people.
24. More importantly, I urge this forum to explore effective ways of promoting collaboration and cooperation between human rights institutions, Anti-Corruption agencies and their respective governments for effective and

sustainable complementary approaches towards the fight against corruption and protection of human rights.

Ladies and Gentlemen,

25. I now take this opportunity to declare this conference on Corruption and Human Rights officially open. I wish you fruitful deliberations and I look forward to hearing what recommendations you may have to assist us in eradicating corruption and ensure compliance with fundamental human rights.

THANK YOU FOR YOUR ATTENTION

CORRUPTION AS AN IMPEDIMENT TO THE FULL ENJOYMENT OF HUMAN RIGHTS IN AFRICA: EFFECTIVE FIGHT AGAINST THE MENACE BY PROF. P.L.O LUMUMBA, DIRECTOR/CEO KENYA ANTI-CORRUPTION COMMISSION

Brief Profile of the Speaker

Prof. PLO – Lumumba is the Director of the Kenya Anti-Corruption Commission, a position to which he was appointed in July 2010. He is an Advocate of the High Courts of Kenya and Tanzania. He has lectured law in the University of Nairobi. He is the former Secretary of the Constitution of Kenya Review Commission and is a holder of Bachelor of Laws and Masters of Laws degrees from the University of Nairobi and a Ph.D from University of Ghent, Belgium. He has been trained in Human Rights at the University of London, (Institute of Advanced Legal Studies in England) and Raoul Wallenberg Institute of the University of Lund in Sweden and on International Humanitarian Law in Geneva Switzerland under the aegis of the International Committee of the Red Cross (ICRC). He is a renowned legal practitioner. He has authored a number of Books in law and other areas of general interest and has published a number of articles in refereed journals. He was recognized by the Kenya-USA Association for the Martin Luther King Jnr., Leadership Award in 1996. He has also been recognized by the American Biographical Institute and included in the Marquis Who's Who in the World. In the 2008 he was appointed Peace Ambassador by the Universal Peace Federation.

1. INTRODUCTION

Corruption has no doubt posed a serious challenge to many countries, particularly in Africa. Although there is no universal definition of corruption, it is generally defined as abuse of public office for private gain. Public office is abused through various ways, including: -

- (i) rent seeking activities for private gain when an official accepts, solicits, or extorts a bribe;**
- (ii) private agents actively offering bribes to circumvent public policies and processes for competitive advantage and profit;**
- (iii) patronage and nepotism; and**
- (iv) theft of state assets or the diversion of state resources.⁴**

The African continent has for many years gone through a myriad of hardships inflicted on it by humankind. During the pre-colonial period, hapless Africans were forcefully taken to far off continents to begin a life of servitude as slaves. Subsequently, for many centuries foreign powers invaded Africa and occupied it whilst exploiting its enormous natural resources. At the end of the Second World War, Africa returned to

⁴ World Bank 1997

self-rule and political freedom. However, this did not help alleviate the people's suffering. Disease, famine, poverty, conflict and corruption continued to afflict society. Among these challenges, corruption dealt a major blow to the then fledgling African economies by depriving them of the much-needed resources. Meanwhile, exploitation by former colonial masters continued even after independence. Indeed, in terms of development policy and bilateral relations between the developed and developing countries, in the 1960's and 1970's corruption was a 'backburner' issue and was in some instances justified as a means of overcoming the bureaucratic red tape in the then newly independent states.

This changed with the emergence of good governance agenda initiated by the Bretton Woods institutions. Meanwhile, the state of affairs in the developing world raised concern from the international community 'who' unrelentingly advocated for the liberation of the continent from the shackles of poverty and violence. These developments brought corruption to the fore of development policy leading to the initiatives have seen the international community increase development aid to some African Countries, cancelling foreign debts and creating new markets as a means of alleviating poverty and ushering in a new era of socio-economic and political development.

That corruption is a major challenge to the entire world cannot be gainsaid. Its devastating effects are only comparable with those of drug trafficking and terrorism. Corruption is an insidious scourge which if not tamed has the potential of impoverishing a country not to mention its effects to the populace. It undermines economic development, weakens democratic institutions and the rule of law, disrupts social order, deprives people of their right to basic services besides destroying peoples trust in public officers and by extension the institutions they serve in, thereby undermining our collective ethical capital.

The Nature of Corruption

Distinction is at times made between petty corruption and grand corruption. Petty corruption entails demands by public servants for small payments or "speed money" in return for public services. Grand corruption on the other hand involves receipt of benefits by senior public officials so as to influence government decisions.

All forms corruption, whether petty or grand are undesirable. In fact, what starts as petty corruption may have grave consequences, for instance a bribe given to a traffic police officer to look the other way could result in loss lives. At the same time, the magnitude of the cumulative effect of various acts of petty corruption is devastating.

Corruption is not a preserve of the public service; it is a two-way process and takes place with the involvement of both the public and private sectors, the latter being the supply side in many cases.

2. ORIGINS AND CAUSES OF CORRUPTION

2.1.1 Origins

Corruption is not a new phenomenon. Its origins can be traced to the origin of humanity. Others say it is among the oldest vices. Similarly, concern about it dates back many centuries. Kautilya, the Chief Minister to the king in ancient India, in his writing **Arthasastra** wrote in the fourth century BC that: -

Just as it is impossible not to take the honey (or the poison) that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up at least a bit of the King's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the

government cannot be found out (while) taking money (for themselves).

In the recent past, corruption has attracted a lot of interest across the world. One would then ask why this renewed interest. Is it that there is more corruption now or that the world was less concerned about it in the past?

This renewed interest can be attributed to a number of factors, among them, the increased democratic space as most governments have since embraced democracy, which makes it possible to discuss corruption freely and highlight it especially where press freedom and a robust media exist. More attention is being given to governance the world over, while people are generally more enlightened on issues relating to corruption. In addition, scandals involving top officials across the world and the resultant suffering inflicted on the people have also to a large extent contributed to the renewed interest by the international community which now views corruption as no lesser threat to humanity than terrorism, drug trafficking and genocide.

2.1.2 Causes

Corruption is mainly defined in reference to conduct in public office. However, it takes the citizens' inclination to engage in corrupt activity or to offer bribes to 'grease' the wheels of a corrupt system. Why do people opt to be corrupt as opposed to being honest or why do public officials misuse public office for private gain while citizens are willing to give bribes or in any other way fan corruption?

Answers to these questions lie in greed and selfishness. Because of selfishness, people choose not to see the suffering inflicted on others by their corrupt conduct, mainly because they benefit from it. Since greed is insatiable, the more one amasses, the more he wants.

From an ordinary citizen's perspective, giving a bribe enables him to circumvent bureaucratic red tape, obtain a benefit he is otherwise not entitled to or avoid punishment for wrongdoing. Unfortunately, in some instances, giving a bribe might be the easiest or worse still, the only way to accessing a service one is otherwise entitled to as of right.

Corruption thrives and snowballs in an environment where opportunities abound and punishment for corrupt activity is inadequate or non-existent. The same applies in situations where the benefits of corruption outweigh the risk of being caught and the certainty of punishment if caught. The culture of giving a token of appreciation for service rendered is also one of the reasons why some people give bribes. Weak systems, impunity, inadequate legislative framework for detection and punishment of corruption also allow corruption to entrench itself in society to the point of being acceptable as a way of life.

In societies where personal integrity is rated as less important than other characteristics, corruption would most probably be rampant, than in societies such as 18th and 19th Century England, 20th Century Japan and post-war western Germany, where society showed almost obsessive regard for honour and personal integrity.

The causes of corruption across the world are vast and varied, with the list ever growing. These causes may be categorized into several broad categories such as economic, societal, political and institutional. This categorization is however not exhaustive.

Through research and various surveys carried out over time, the following have been found, amongst others, to be the main causes of corruption:

- **Political patronage and influence**

- **Disregard of merit in appointment to public office**
- **Failure to adhere to professional ethics and standards**
- **Lack of transparency and accountability**
- **Failure to implement recommendations of watchdog institutions**
- **Passive citizens who do not complain about corruption and corrupt practices**
- **Apathy towards public and corporate assets and properties**
- **The notion that corruption is a victimless crime**
- **Poor remuneration, lack of incentives or victimization of honest public officials thus making feel it does not pay to be honest**
- **Poor planning and leadership**
- **Weakness in institutional structures**
- **Greed and worship of material things**
- **Poor law enforcement and perceived impunity**
- **Poverty and unemployment**
- **Lack of public awareness on the evils and consequences of corruption**
- **Lack of checks and balances on discretionary power or authority**
- **Poor governance**
- **Weak civil society or lack of social empowerment**
- **The culture of giving tokens of appreciation**
- **Fear of competition for power, jobs, tenders etc**
- **Disregard of laws, rules and codes**
- **Bureaucratic structures and complexity of procedures**
- **Impunity and shamelessness**
- **Tolerance and acceptance of corrupt behaviour, particularly where the corrupt are viewed as heroes**
- **Lack of job security**
- **Inhibitive secrecy laws, poor detection of by law of enforcement agencies and fear of reprisal by potential whistleblowers and witnesses**
- **Weak judicial system where a conviction is not certain in clear cut cases**
- **Absence of self regulation in the private sector**
- **Family and clan-centered social structure where nepotism is acceptable**
- **Costly political campaigns where costs exceed funds legitimately available for such campaigns**

3. EFFECTS OF CORRUPTION

Corruption affects society negatively in a multiplicity of ways. Empirical studies and discourse on corruption and its consequences have focused more on the economic effects of corruption and have shown that corruption, besides other consequences retards development in a country.

In Kenyan, in the 1990's when corruption was unabated, economic growth came to a standstill and was only measurable in the negative. Inflation rose by double digits leading to currency devaluation. During this period, poverty and unemployment rose to unprecedented levels. The problem was further compounded by withdrawal of donor funding as protest against runaway corruption and the culture of impunity.

The Impact of corruption can be seen in the following areas; **economic growth**, **Revenue collection**, **investment**, **cost of business**, **quality of work** and resource allocation among others.

Economic growth: Economic growth and development is the yardstick by which the quality of governance in a country is measured. Research has shown that low levels of investment which inevitably lead to a decline in economic growth and increase in poverty are invariably associated with high levels of corruption.

Revenue collection: Corruption reduces revenue collection through tax evasion, non-payment of rates and other payments due to the Government thereby depriving it of the much needed revenue to provide essential goods and services. This happens

as a result of collusion between firms and corrupt tax administration officials who collect bribes instead of taxes or other revenue. Wide discretion vested on such officers provides fertile ground as the officers invariably abuse the discretion. Corruption also decreases tax revenue by driving businesses into the informal sector by excessive rent seeking thereby reducing the tax base.

Suspension of investments: Whereas investment decisions are influenced by a number of factors, among them, political certainty, tax levels and the business environment generally, high corruption-related costs has been cited as one of the reasons for suspension of investments.

Increased cost of doing business: Corruption increases the cost of contracts generally as suppliers factor monies paid as bribes to secure the contracts or kickbacks as part of the cost of servicing the contracts. Needless to say, this raises the cost of doing business within the private sector thereby lowering profitability of investment. This discourages investment. According to various surveys, a considerable number of firms doing business in Kenya regularly report having to make unofficial payments, which amount to a significant part of their revenue.

Poor quality of work: Corruption undermines the quality of work by lowering compliance with construction, environmental, or other regulations and reduces the quality of Government services and infrastructure. Consequently, this increases budgetary pressure on the Government.

Resource allocation: Corruption distorts distribution of resources across various sectors. Countries with high corruption levels invest relatively more resources in construction and less in education and social programs. A corrupt government would prefer to finance a big investment project with very uncertain costs where it is difficult to monitor expenditures like building a highway or an airport rather than fund educational programs that are more transparent and easier to control. This, in the Kenyan context has led to many unviable or incomplete projects, commonly referred to as "white elephants".

Governments have the responsibility of protecting the human rights of all people without discrimination. To effectively discharge this duty, governments ought to utilize resources at their disposal to improve the populations' total quality of life. Regrettably, many African countries have sizeable parts of their populations wallowing in abject poverty, preventable diseases, living on the brink of starvation and generally living in squalid conditions. Such people form the most vulnerable part of society and entirely depend on public services and goods for survival. Any form of corruption affects them adversely. As Adam Smith aptly put it many years ago, "*no society can surely be flourishing and happy of which by far the greater part of the number are poor and miserable*".

Loss of resources: Corruption diminishes resources available to the Government for public services. Excessive expenditure may be incurred, for example due to contractors being paid unreasonably high prices or the commissioning of "white elephant" projects. In addition, revenue is lost due to collusion between tax officials and taxpayers.

This reduces the resources available for the Governments priority areas of expenditure such as infrastructure development, education and health leading socio-economic and political malaise.

Other incidental consequences of corruption such as increase in crime, deteriorating transport and communication infrastructure also significantly increase the cost of doing business, thereby impairing development.

The foregoing indicates that reducing corruption will lead to increased revenue, improved performance of firms and increased investment thus leading to economic growth.

A study by International Monetary Fund in 1997 found that the level of corruption is negatively linked to the level of investment and economic growth i.e. the higher the

level of corruption, the less the level of investment and economic growth. The study further found that if the corruption index improves, the investment rate increases and the annual growth rate of per capita GDP also increases.

According to Transparency International, African countries rank among the most corrupt in the world. Kenya was placed 146 out of 180 countries with a corruption perception index of 2.1 in 2010 while its neighbours Rwanda was 66, Tanzania 118, Ethiopia 116, Eritrea 123, Uganda 127, Burundi 170 and Sudan 172. If the relationship between corruption and growth is applied, these countries would improve their standing on the corruption index. This would translate to increased investment, with consequent improvement in employment and economic growth.

Most of the African countries attained political independence more than four decades ago with promise of high growth rates, poverty reduction, high investment and high literacy rates. We may want to ask ourselves the following questions: Where are we now forty years down the line? Could the dreams of prosperity have been shattered by high corruption rates witnessed in the continent?

4. LINKAGES BETWEEN HUMAN RIGHTS AND CORRUPTION

Corruption is a critical factor that contributes to the violation of rights by facilitating, serving or creating an environment in which the violation takes place.⁵ The nexus between corruption and human rights has lately elicited serious research and examination. The thrust of such initiatives is that corruption deprives the state of capacity to meet its obligations to respect, protect and fulfil the human rights of its citizenry. Indeed corruption causes massive violation of human rights.⁶ In addition, there is a likelihood of human rights abuses in a country with higher levels of corruption. The rankings in the annual corruption index by Transparency international have shown that countries where respect for human rights is high are unlikely to experience high prevalence of corruption. On the contrary, in authoritarian regimes such as those of Idi Amin in Uganda, Sani Abacha in Nigeria and Suharto in Indonesia, large-scale human rights abuses invariably took place alongside endemic corruption.⁷ In such regimes, power was concentrated in the hands of a few who invariably lived up to Lord Acton's supposition that "**power tends to corrupt and absolute power corrupts absolutely**". Findings from research have established that human rights can be used to support the fight against corruption.⁸ Violation of human rights owing to corruption may occur in a number of ways. These include:

4.1.1 Socio-economic and cultural rights

Member states of the International Convention on Economic, Social and Cultural Rights are obligated, subject to their capacity to incrementally achieve the full realization of among others, the rights to education, health and work. Corruption impairs the realization of these rights in several ways. Fundamental rights are violated when people are constrained to pay bribes to get their children admitted to schools, to access medical services or to gain employment. Grand corruption on the other hand diverts resources which would otherwise have been used towards the realisation of these rights.

⁵ Kannokkan Anukansai, "Corruption: The Catalyst for Violation of Human Rights".

⁶ Nihal Jawawickrama, "Corruption – A Violation of Human Rights?"

⁷ Supra note 2.

⁸ Gathii James, 'Defining the Relationship between Corruption and Human Rights' (2009), available at http://works.bepress.com/james_gathii/4.

Besides creating income inequalities, the diversion of resources occasions massive human deprivations. Indeed poverty can be eradicated from the face of the continent if corruption in the management of public resources is eliminated.⁹

Corruption also results in sub-standard and overpriced goods and services. Projects characterised by corruption not only provide opportunities for unjust enrichment, but are also wasteful. In addition, negotiations giving rise to such projects are invariably undertaken behind closed doors. This denies people who are likely to be affected by such projects the opportunity to give their views on the projects. The projects may at times lead to displacement of people from their traditional habitats, thereby violating their rights to self determination and a means of subsistence.

Diversion of public resources runs counter to provision of services through pro-poor expenditure in critical sectors such as health, education and welfare services. A reduction in expenditure on health and education will inevitably lead to a decline in the quality of healthcare and attainment of education, thereby violating people's rights.

Poverty alleviation is dependent on economic growth. Uncertainties in the economic environment as a result of corruption discourage investment, thereby stifling economic growth which in turn inhibits poverty alleviation.

Although corruption affects everyone, its effects are particularly harmful to the poor as the bribes they pay constitute a big portion of their income. In addition, they are more dependent on public goods and services,¹⁰ the provision of which is characterised by rampant corruption. This exacerbates poverty and widens inequality.

Corruption, no doubt denies people the fundamental rights guaranteed under the international human rights instruments, among them the United Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR).

4.1.2 Discrimination

Every person has the right to be treated equally by public servants in the discharge of their official duties or exercise of official authority. This right is guaranteed at the international sphere by treaties and conventions such as the UDHR which recognises that all human beings are born free and are equal in terms of dignity and rights. The rights provided in the Declaration must be enjoyed by everyone irrespective of their race, gender, religion, social status etc. The ICPR in article 26 guarantees equality and equal protection by the law. At the national level domestic law, in most cases the constitutions provide for equality.

Corruption however negates these rights. When a person gives a bribe to a public servant and the bribe is accepted, such person acquires a privileged status *vis a vis* other persons similarly placed, but have not offered bribes.¹¹ Such person will receive preferential treatment which has no reasonable or objective justification. Such treatment is plainly discriminative and does not serve any legitimate purpose.

The judiciary being the nerve centre of the justice system and the custodian of justice, which includes protection of human rights, must be beyond reproach. When corruption pervades the courts, it tilts the scales of justice and denies people the right to legal redress when their rights are violated. This makes a mockery of the right to

⁹ Barney Pityana, in a speech made during the Eighth Assembly of the World Council of Churches.

¹⁰ Supra note 5.

¹¹ Supra note 2.

equal protection before the law and the right to a legal remedy. A corrupt judiciary does not inspire public confidence and trust and can lead to a break down of law and order. According to Global Corruption Barometer 2006 wherein people's attitude towards corruption was surveyed in 26 countries, it was found that one in ten households had to pay bribes in order to access justice.¹²

4.1.3 Corruption in politics

Political corruption provides opportunities for violation of human rights. When the outcome of elections is determined by vote buying, the electorate are then deprived of the right to political participation and their rights to vote by universal and equal suffrage is compromised. Corruption in politics results in weak leadership, sycophancy, patronage and undermines democratic ideals. Irregular political appointments and plunder of public resources to finance elections are some of the manifestations of corruption in politics. Low political participation creates conditions for impunity and corruption. The effective exercise of political rights on the other hand counterbalances the use of state power and abuse, including corruption. In Kenya the election held in 2007 which led to post election violence were marred by massive corruption from which the Country has not recovered.

4.1.4 Crime

Corruption causes lack of respect for human rights and the rule of law. According to Euro Barometer Survey of 2005, more than half of the citizens identify corruption as the driving force behind organised crime in their countries.¹³ This is particularly the case in organised crime, which accounts for serious violations of human rights like human trafficking where corruption has been identified as a major impediment to law enforcement.¹⁴

In some jurisdictions, corrupt police officers conduct swoops and arrest innocent people on flimsy grounds like loitering with intent to commit a felony and thereafter extort bribes by threatening to detain them and charge them in court.

4.1.5 Conflict and Violence

Endemic forms of corruption may result in mass victimisation by undermining the rule of law, threatening people's lives and causing incidents of violence. The conflict in Niger Delta where those in authority have corruptly diverted public resources from the local communities resulting in communal violence demonstrates how corruption brings about conflict and violence.¹⁵

5. HUMAN RIGHTS IN THE ANTI-CORRUPTION AGENDA

5.1.1 Freedom of Expression

Anti-corruption initiatives fall within the rubric of good governance. The good governance agenda is intertwined with and reinforces the values embodied in national and international human rights instruments, for instance anti-corruption measures aimed at achieving transparency and accountability to give individuals the right the right to expose wrongdoing simultaneously promote the realization of the right to freedom of expression.

Further, an atmosphere in which rights are generally respected is conducive for individuals to freely report incidents of corruption and therefore facilitate activism against corruption. On the contrary, corruption thrives where decision-making is shrouded in secrecy. Access to information held by public bodies is imperative in

¹² Transparency International Report (2007).

¹³ Transparency International, "What is Corruption", available at http://www.transparency.org/abuout_us.

¹⁴ Brian Iselin, "Barriers to Effective Human Trafficking Enforcement", a paper presented on 13 November 2002 in Honolulu, Hawaii.

¹⁵ "Conflict in the Niger Delta", available at <http://www.en.wikipedia.com>.

promoting transparency and accountability. Article 13 of the UNCAC requires the participation of society through effective access to information while article 10 requires adoption of procedures or regulations that allow the public to obtain information from public organizations.

The effectiveness of strategies for combating corruption is dependent on the ability to expose corruption in the first place. Freedom of expression is an important prerequisite for encouraging a culture that promotes, nurtures and reinforces exposure and punishment of corruption.¹⁶ Respect for freedom of expression also exposes the causes and consequences of corruption and provides an atmosphere within which anti-corruption activities can be undertaken.¹⁷

5.1.2 Investigation and Prosecution of Corruption Cases

Like other criminal cases, investigation and prosecution of corruption requires strict adherence to the due process. This helps in guarding against the infringement of the rights of persons under investigation or facing corruption charges. In some cases where corruption suspects have claimed violation of their rights, trial of corruption cases against them have had to be stayed pending determination of constitutional references on violation of such rights. While such constitutional references provide redress for violation of suspects' rights, they also delay the conclusion of corruption cases, thereby impairing the fight against corruption. In many cases accused persons seek refuge in human rights to defeat and/or delay justice.

Under international anti-corruption treaties like the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption, anti-corruption measures must be compatible with human rights principles and should not infringe the rights of those involved.

5.1.3. Socio-economic rights

Corruption undermines the ability of governments to meet the people's wants and needs and to protect their socio-economic rights. On the other hand protection of civil and political rights without simultaneous protection of the social and economic rights waters down the protection of the former. Fighting corruption effectively guarantees the capacity to deliver on its obligation to protect such rights.

6. EFFECTIVE ANTI-CORRUPTION INITIATIVES AND STRATEGIES

Although much of the concern voiced by international financial institutions, donor organizations, policy makers, and citizens has focused on the evils of impunity and corruption; and its debilitating impact on economic growth and poverty reduction, the strategies to combat it essentially boil down to improving governance systems. Many of the factors that fuel corruption and impunity are invariably caused by deficiencies and weaknesses in governance at the agency, sector, and country levels. Any sustained effort to reduce corruption significantly will thus require undertaking reforms of governance at all levels—project, agency, sector, and country.

6.1 Empowerment of Critical Institutions

Although all the institutions in a state are essential, some institutions play a more critical role in the governance system of the state, and their strength or otherwise may have spill over effects on overall governance. Such institutions include the judiciary, police, electoral bodies and in general those institutions playing an oversight

¹⁶ Anyang' Nyong'o (2007), A Leap Into the Future: A Vision for Kenya's Socio-Political and Economic Transformation at 91

¹⁷ Helen Darbshire, "The Rights of Access to Information in Fighting Corruption-A Human Rights Perspective," Paper prepared for the International Council on Human Rights Policy, Review meeting on Corruption and Human Rights, Geneva, 28-29 July, 2007 at page 23

role in matters of governance. Poor electoral laws (or weak enforcement of good laws) can make elections very expensive, inducing politicians to look for lucrative sources of campaign finance. In the absence of good laws and a well-functioning judicial and prosecutorial system, the rule of law remains weak, retarding investment and socioeconomic development. In the absence of a merit-based recruitment and promotion system, unqualified personnel can find their way into public office through political connections. Such personnel often become the “shepherds” of their political patrons within government and make it possible for bid-rigging and other corrupt schemes to thrive. Whether it is construction firms colluding on road contracts, public officials pilfering health supplies, tax collectors harassing taxpayers, politicians protecting illegal loggers, or banks overlooking suspicious transactions, individuals will continue to engage in corruption as long as the probability of prosecution and conviction is low. Strengthening of institutions must go hand in hand with administrative and process reforms.

6.2 Leadership

Many case studies on successful or failed governance in the developing countries, notably Africa, show that leadership is a critical factor. Strong and highly motivated leadership is essential if a country is to extricate itself from the shackles of impunity. It is important for leaders to have a strong motivation to do that which is right and acceptable at all times. Chinua Achebe, the famous Nigerian author, writes in his book;-

The trouble with [Africa] is simply and squarely a failure of leadership. There is nothing basically wrong with the [African] character. There is nothing wrong with the [African] land or climate or water or air or anything else. The [African] problem is the unwillingness or inability of its leaders to rise to the responsibility, to the challenges of personal example which are the hallmarks of true leadership.

It is not true that Africa has not had good leaders. The first years after independence in the 1960's saw the emergence of visionary leaders like Nyerere, Nasser, Senghor, Khama, Kaunda and others. They may have made mistakes but they had a roadmap for their people. Unfortunately, after the honeymoon period, Africa was victimized by monster leaders like Idi Amin, Mobutu Sese Seko, Jean Bedel Bokassa, Marcias Nguema and others who resorted to autocracy to remain in power. Subsequently, in a number of countries, multi-party democracy has thrown up 'tribal chieftains' masquerading as democrats in their quest to acquire power by any means necessary.

In the recent past, another crop of leaders who pose danger to Africa have emerged. These leaders, scattered evenly in Africa, speak the language of reform but mobilize on the basis of ethnicity. The Kenyan experience clearly demonstrates how they operate. First, they suffer from the 'prima donna syndrome' of never wanting to leave the political stage until they die or are otherwise removed. Secondly, they have perfected the art of “political shape shifting” by constantly forming or buying political parties and therefore repackaging themselves to hoodwink the populace through new Machiavellian tactics and corruption.

6.3 International cooperation

Corruption does not happen in isolation in individual countries. It transcends the boundaries of nations. In particular, transnational organized crimes such as narcotics, arms and human trafficking, smuggling in counterfeits, money laundering and piracy rely on corrupt government officials to thrive. In this era when the world has been reduced into a global village due to technological advancement, it is possible for corruption networks to perpetrate an offence in one country and within seconds transmit the proceeds thereof to another jurisdiction, as they take off in another direction from where they enjoy the loot. This underscores the need for states to

cooperate through mechanisms such as mutual legal assistance, embargos and freezing of accounts, so as to effectively deal with transnational crimes.

The provisions of the United Nations Convention against Transnational Organized Crime recognize the linkage between corruption and organized crime. Article 8 of the Convention brings corruption offences into the ambit of the Convention. This is premised on the fact that collusion between organized criminal groups and public officials at all levels of government facilitates the criminal activities of the transnational organized criminal groups.

6.4 Citizen Participation

Citizen participation is critical to an effective anti-corruption strategy. To tackle corruption, citizens need to participate in governance and hold government officials accountable for their actions. This participation can involve advocating anti-corruption policies, monitoring government actions, and mobilizing others to push for good governance. Clearly, these efforts are likely to be more effective where there are good channels for citizen participation.

Political rights, such as the freedom to vote and run for office, and civil liberties, such as the freedom of speech and the right to form groups, provide important channels for citizens to voice their concerns, needs, values, expectations and problems. In addition to these basic rights, public hearings, task forces, commissions, and action planning workshops can provide channels for citizens to participate in the development of government budgets, laws, and procedures. As well, access to information, e-government, open procurement and other transparency mechanisms can allow citizens to scrutinize what the government is doing.

Building **coalitions** between civil society and government can strengthen efforts to fight corruption. By coming together in coalitions, stakeholders from government and civil society can coordinate their efforts, pool their resources, establish priorities, speak with a more authoritative voice on the need for reform, and strengthen each other's commitment to the work. Working as part of a coalition also gives citizens improved access to government offices and so provides an excellent channel for citizen participation. Citizens have both rights and obligations towards their government. They have the right to an effective, responsive, and efficient government, but they also have a responsibility towards that government which includes their participation in governance. If citizens want their tax money to be spent according to their wishes and needs, they also have the responsibility to express their preferences and to hold leaders accountable. Citizens form the first and last line of defense against corruption and mis-governance

6.5 Exploiting windows of opportunity

Another phenomenon that often comes up in analyses of governance reforms is the so-called window of opportunity. Difficult reforms are often launched during times of crisis. A crisis is said to offer a window of opportunity that could close quickly and so must be exploited. In essence, this window reflects a realignment of incentives of different stakeholders that work in favour of envisioned reforms. It makes it possible for reformers to introduce institutional change that earlier would not have been feasible.

It can be argued that a window of opportunity has been opened in the North African Arabic countries that are undergoing a revolution. It has also opened up in South Sudan, which is now officially the 54th state in Africa. The new regimes expected in these countries can decide to "do it right" from the beginning. They have the resources and manpower. They have optimistic citizens who have the will for their countries to succeed. They have the advantage of historical lessons. They have the

support of the world community. Nothing can be impossible for them to go the way of development.

In Kenya, a window of opportunity has presented itself with the Promulgation of a new Constitution on the 27th day of August, 2010. Kenyans should to make sure that no effort is spared in the process of implementing the Constitution to ensure the nation is reborn by putting in place proper governance structures and mechanisms to serve as a bulwark against negative ethnicity and corruption.

6.6 Elimination of Safe Havens

The international community should ensure that there is no sanctuary for perpetrators of corruption to seek refuge in and enjoy their ill-gotten wealth. Claims of sovereignty or concerns for stability should never be an excuse against bringing perpetrators of crime to account for their misdeeds.

Today we are witnessing former Presidents being hauled before international courts and tribunals to answer to past atrocities. The so called safe havens where looted assets are stashed have started questioning the sources of the funds, and have taken steps towards repatriation of such assets to the rightful claimants. Today we hear a deposed leader claiming that "I shall die in this country". What they actually mean is that they have weighed up their opportunities and decided that it would be better to face their countrymen and account for their misdeeds, rather than face a life abroad in poverty, where the wealth they stashed away has been confiscated. This is a powerful message to the corrupt and a potent deterrent against corruption, impunity and official misconduct around the world. It should be abundantly clear to those in authority that there is nowhere in the world that they can run to after stealing from their countries.

7. CONCLUSION

There is a close nexus between corruption and violation of human rights. The relationship between corruption and human rights is complex. Acts of corruption violate human rights, yet recourse to human rights may provide an effective remedy for combating and controlling corruption. Fighting corruption has the collateral benefit of minimizing the likelihood of human rights violations. It is therefore necessary to incorporate relevant aspects of human rights like transparency, accountability and participation into anti-corruption policies and strategies. The war against corruption can only be won if the relevant anti-corruption institutional and legislative framework is strengthened.

The war against corruption and by extension human rights violations must therefore be multi-pronged and sustained because the children of darkness who pay homage to the altar of corruption and barbarism 'never say die'.

KEY LEGISLATIVE INGREDIENTS IN THE EFFECTIVE FIGHT AGAINST CORRUPTION IN AFRICA BY MR. TOUSY NAMISEB, SECRETARY, LAW REFORM COMMISSION OF NAMIBIA *(Slides from power point presentation)

Introduction

The African Union Convention on Preventing and Combating Corruption, among others aims to:-Promote socio-economic development by removing obstacles to the

enjoyment of economic, social and cultural rights as well as civil and political rights. (Art.2 (4))

UN instruments set a broad framework to:-Promote and strengthen measures to combat corruption; Promote, facilitate and support international cooperation to combat corruption.

State Parties undertake to:-Establish and promote practices to fight corruption; Take legislative measures to combat corruption; establish effective and independent anti-corruption bodies

AU instrument promote and strengthen development of mechanisms required to prevent, detect, punish and eradicate corruption; Promote, facilitate and regulate cooperation among African State Parties to ensure effectiveness of anti-corruption measures; Coordinate and harmonise policies and legislation.

State Parties undertake to:- Adopt legislative and other measures to criminalise corrupt activities; Establish, maintain and strengthen independent national anti-corruption bodies; Adopt measures that ensure citizens report instances of corruption without fear of reprisals

Is it desirable to define corruption?

UNCAC defines various terms used in the Convention but not 'corruption'.

AU Convention describes corruption as "... *the acts and practices including related offences proscribed in this Convention*"

Namibian domestic law provides a similar broad definition. "Corrupt practice" means any conduct contemplated in chapter 4. Chapter 4 consists of 18 sections with very broad provisions. Key elements of Namibian definition are 'corruptly' and 'gratification'.

Corruptly: contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practices, directive, order or any other term or pertaining to (a) any employment relationship; (b) any agreement; or (c) the performance of any function in whatever capacity

Gratification: covers gifts, loans, fees, rewards, commissions, rights, privileges, influences, promises, etc which may influence decision-making processes.

Challenges:

Accused persons charged in a high profile corruption case have approached the High Court to declare parts of the Ant-Corruption Act,2003 and Prevention of Organised Crime Act, 2004 as unconstitutional. Specific challenge is that the definition is unreasonable, vague and too wide.

The Namibian Experience

The Constitution

- ⊙ The Office of the Ombudsman is established as an independent body. (Art 89). Inter alia, the Ombudsman had the function to vigorously investigate all instances of alleged or suspected corruption...
- ⊙ Functionality and efficiency may be compromised when such an office has many other mandates including Human Rights, Maladministration and Environment.
- ⊙ A need for a specialised body

The Anti-Corruption Act

- ⊙ Establishes an independent body to combat corruption. Independent? Agency/ Budgets/ tenure... The Anti-Corruption Commission is a Constitutional body after the relevant amendments were made to the Constitution.
- ⊙ Essential to have a body subject only to the Constitution to ensure independence.
- ⊙ Appointment of key functionaries must be transparent. The Role of Parliament is important. Director and Deputy Director are appointed by the National Assembly upon nomination of head of State.
- ⊙ Accessibility of the Anti-corruption body is important and must be dealt with by law. The ways in which complaints are received!
- ⊙ To what extent do we have protection for those who report. Whistle blower protection!
- ⊙ Provisions relating to anonymous complaints need to be clarified. The common standard is to have viva voce evidence in Court.
- ⊙ To what extent are people encouraged to report instances of corruption. Should we give rewards?

Corruption some times occurs because of institutional weaknesses. Give power to agency to strengthen systems

Legislation must provide for minimum standards for public officials on

- Declaration of interests etc
- Requirements for Asset registers
- Cross cutting requirements on the hierarchy of public officials

Corruption is not only for the Public sector, but an anti-corruption body must also have private jurisdiction. Extra-territorial jurisdiction. Citizens, permanent residents and domicile holders committing acts of corruption outside the country are subject to the Act

UNCAC, Art 4 Focus on protection of State Sovereignty and the AU Instrument Art 13 provides for broader territorial jurisdiction

Conclusion- key ingredients

- ⊙ Independence. Financial/ Personal Integrity
- ⊙ Appointment. Tenure of Office
- ⊙ Access to information. Specific legislation
- ⊙ Clear mandate. Powers and duties
- ⊙ Relevant appropriate definitions
- ⊙ Whistleblower protection. Specific legislation
- ⊙ Responsible reward system. Discourage malicious reports
- ⊙ Money laundering. Specific legislation
- ⊙ Financial Intelligence. Specific legislation
- ⊙ Jurisdiction. Other bodies. Outside Country
- ⊙ Decision to prosecute. Relationship with Prosecutor-General /Attorney-General
- ⊙ Appropriate deterrent penalties
- ⊙ Forfeiture of assets (proceeds) obtained corruptly

What needs to be done,

- ⊙ Exchange experiences.
- ⊙ Development of Model laws
- ⊙ Strong systems of Administrative Justice
- ⊙ Strengthened operation of separation of Powers. A clear distinction between Executive and Legislature
- ⊙ Mutual cooperation
- ⊙ Extradition treatise

THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE FIGHT AGAINST CORRUPTION IN AFRICA BY MS FLORENCE SIMBIRI-JAOKO

Introduction:

National Human rights institutions are bodies that are created by statute or under the constitution, with the broad mandates as the chief state agents for the promotion and protection of human rights. Historically the creation of NHRIs have been linked to the Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (commonly known as the "Paris Principles") adopted in October 1991,¹⁸ and reaffirmed in the World Conference on Human Rights held in Vienna, Austria in June 1993 at which the Vienna Declaration and Plan of Action encouraged the establishment and strengthening of NHRIs if they were to become effective State agents of delivering on their mandates. The Paris Principles provide that the NHRIs shall be vested with competence to promote and protect human rights, and proceed to outline the broad areas of engagement of National Human Rights Institution in the delivery of their mandates. It is noteworthy that the Paris Principles are based on the understanding that states bear the primary responsibility for the promotion and protection of the rights of citizens hence the requirement that institutions are set up by the state funded by taxpayers monies to ensure that the states are in compliance with their human rights obligations.

The ideal situation is for NHRIs to be constituted under the constitution; but the fact that they are created under statute should not in general be a limitation to the scope of their mandate as well ensuring that they are independent in the operations and delivery of their mandate. A number of African NHRIs are constitutional such as South Africa, Uganda, Rwanda, and recently Kenya and Zimbabwe to name a few. However the critical factors must be in terms of the widest mandate possible including the ability to investigate upon report or on their motion the violation of human rights, capacity to offer remedial measures for victims of human rights violations. In other words the ability to perform both the promotional and protection roles must be guaranteed by the constituting instrument. Key to the independence of these institutions is the appointment of commissioners in a transparent manner by ensuring not only competitive sources but also the skills competence and diversity. It must be emphasised that these provisions relating to independence of the commissions are absolutely critical to the credibility and confidence that they must enjoy with the citizens and capacity to operate as public watchdogs. These instruments must ensure that recommendations of NHRIs are given effect and that the existence of these institutions translates into realisation of rights by citizens particularly the most vulnerable whose are often at the greatest risk of violation in terms of discrimination and marginalization.

They deliver on their respective mandates through mechanisms such as public education on human rights, advising government on its international human rights obligations, receiving complaints and providing avenues for appropriate redress, and conducting research on human rights issues. In a number of instances NHRIs have also been granted the mandates of the Ombudsman and the anti-corruption body. Most, if not all NHRIs have interacted with corruption matters at one point or the

¹⁸ I have noted the contribution by Prof Hansugule during the workshop which pointed out correctly that the African Charter on Human and People's Rights under *Article 26 provides that: States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter. As was noted during the meeting there has been a gap in the engagement by NHRIs in the Region with the AU mechanisms that are intended to enhance the enjoyment of human rights with the capacity to monitor state compliance with the regional conventions.*

other. As indicated above, some NHRIs actually have a specific anti-corruption mandate. Most of them, however, have mandates that are only specific to human rights. In the light of the increasing consensus that human rights and corruption are inextricably intertwined, NHRIs have now joined the fight against corruption with emphasis on the need to address it from a human rights perspective. This paper then contributes to this discussion by highlighting the relationship between corruption and human rights, and explores the role of NHRIs in the fight against corruption.

What is corruption?

Corruption can be assigned as many meanings as the sources one is willing to consult. It has become a generic term for a variety of negative phenomena both in the public and private sector. Like beauty, corruption is elusive to define, but incredibly easy to recognise. The term corruption is derived from the Latin word *corruptus*, which literally means 'to destroy'.¹⁹ It has been variously defined as 'an illegal act that involves the abuse of a public trust or office for some private benefit',²⁰ or 'the misuse of public office for private gain'.²¹ Transparency International defines corruption as 'misuse of entrusted power for private gain'²² while the World Bank considers it 'an abuse of public authority for the purpose of acquiring personal gain'. The United Nations Convention against Corruption (UNCAC)²³ and the African Union Convention on Preventing and Combating Corruption (AU Anti-Corruption Convention) do not provide specific definition of corruption. They instead adopt a descriptive definition by outlining acts that constitute corruption which include the solicitation or acceptance by a public official, or the offering or granting to a public official or any other person a gift, favour, promise or advantage in exchange for the performance of public functions²⁴

Forms of Corruption

Corruption assumes many diverse forms which vary from one society to the next. Nonetheless, the most conspicuous, and perhaps most familiar type of corruption in Africa is the so called 'petty corruption', where a public official demands, or expects, 'speed money' for doing an act which he or she is ordinarily required by law to do, or when a bribe is paid to obtain services which the official is prohibited from providing.²⁵ 'Grand corruption' occurs when a high-level bureaucrat who formulates government policy or is able to influence government decision-making, seeks, as a *quid pro quo*, payment, for exercising the extensive arbitrary powers vested in him or her.²⁶ Another form of corruption worth mentioning is what is referred to as systemic corruption. Also called entrenched corruption, this phenomenon occurs where

19 See Ringera, A., Speech delivered at the Commonwealth Lawyers Conference, Nairobi. Available at: <<http://www.kacc.go.ke/archives/speeches/COMMONWEALTH-CONFERENCE.pdf>>.

20 Fantaye, D K 'Fighting Corruption and Embezzlement in Third World Countries'(2004) 68 *Journal of Criminal Law* 171.

21 Rose-Ackerman, S 'Corruption and Democracy' (1996) 90 *American Society of International Legal Proceedings* 83.

22 See Transparency International (TI) at <http://www.transparency.org/news_room/faq/corruption_faq> .

23 United Nations Convention Against Corruption adopted December 2003 in Mexico. This treaty entered into force on 15 December 2005 available at <http://www.unodc.org/unodc/en/crime_convention_corruption.html>

24 For instance article 1 of the AU Convention defines corruption as 'the acts and practices including related offences proscribed in this Convention'.

25 Sandgren, C 'Combating Corruption: The Misunderstood Role of Law' (2005) 13 *International Lawyer* 717.

26 An example would be a minister receiving a large bribe to assign the construction contract of a prestigious government project to a particular building company. A special category of grand corruption, known as state capture, implies that a company/individ influences the legislation of a state, institution, or the governmental policy in an entire area, for instance the environment, taxation or mining. State capture is common in small countries where a financially strong business group could influence state policy and favour its interest or stakeholders, for instance political parties. See Maria, C & Haarhuis, K 'Promoting anti-corruption reforms: Evaluating the implementation of a World Bank anti-corruption program in seven African countries 1999-2001.' (2005) available at <<http://ics.uda.ub.rug.nl/root/Dissertations/2005/KleinHaarhuis-Promot/>>

corruption permeates the entire society to the point of being accepted as a means of conducting everyday transactions.²⁷

What Causes Corruption?

The causes of corruption may be economic, institutional, political or societal. The economic causes of corruption are related to pecuniary considerations, representing corruption that is need-driven as opposed to greed driven.²⁸ Institutional causes of corruption include monopoly and wide discretionary powers for public officers, poor accountability, lack of effective and efficient enforcement of the law, absence of institutional mechanisms to deal with corruption, existence of a weak civil society, and the absence of press freedom. Political corruption arises from the structure and functions of political institutions, and the acquisition and exercise of political power. Societal causes refer to the attitudes and practices of the community. When people are primarily motivated by personal, clan or other parochial loyalties rather than the rule of law, then conflicts of interest, cronyism and patronage reign supreme.

One common thread that runs through all attempts at identifying the causes of and factors that sustain corruption is that, they are often related to deficiencies in the structure of public administration, associated with a lack of control over, and accountability of administrative or political officials.²⁹

Linkages between Corruption and Human Rights

It goes without saying that corruption is a serious problem in Africa today. Bribery, embezzlement, nepotism and other scandals both at the political and bureaucratic level, have not only adversely contributed to the sorry state of Africa's economies, but also exacerbated the poverty that afflicts Africa's people. Corruption affects the poor disproportionately due to their powerlessness to change the status quo, and inability to pay bribes, creating inequalities that violate their human rights. It perpetuates discrimination, and contributes immensely to the violation of both civil and political rights,³⁰ and economic, social and cultural rights.³¹ Corruption spins a complex web in which the state quickly loses its authority and ability to govern for the common good, making it possible for critics to be silenced, for justice to be subverted, and for human rights abuses to go unpunished.³²

As noted above all forms of corruption are apt to directly or indirectly violate human rights. Furthermore, where there is rampant corruption it is difficult to promote human rights; in a place where human rights are not protected and promoted, there is a high likelihood that corruption will thrive. The suppression of human rights like freedom of expression and assembly, the right to access information and education makes it extremely difficult to hold government officials to account, thus giving them room to perpetuate corruption freely. Promotion and protection of human rights and efforts to end corruption are therefore mutually reinforcing.

It is clear that the international human rights regime obliges states to respect, protect, promote and fulfil the human rights of their people. When the government of

27 Heymans, C & Lipietz, B 'Corruption and Development: Some perspectives' (1999) 40 *Institute of Security Studies Monograph Series* 8.

28 Whereas need driven corruption is intended to satisfy basic requirements for survival, corruption that is greed driven satisfies the desire for status and comfort which salaries cannot match.

29 Corruption, like other forms of crime, has three essential ingredients: motivation, opportunity, and the absence of a capable guardian. See Australian Institute of Criminology 'Trends and Issues in Crime and Criminal Justice' available at <<http://www.aic.gov.au>>

30 For example the right to a fair trial may be violated when the judge and prosecutor are bribed in order to 'secure' a favourable outcome of a particular criminal case.

31 For instance, due to corrupt conduct by its officials, the government may purchase cheap and expired drugs, thereby undermining the realisation of the right to health.

32 See Cockcroft, L 'Corruption and Human Rights- A Crucial Link' (1998) *Transparency International Working Paper*. Available at <http://www1.transparency.org/working_papers/cockcroft/cockcroft.html>

a country fails or neglects to curb or contain corruption, it also fails to fulfil its obligation to promote and protect the fundamental human rights of its inhabitants. There is therefore a fundamental right to a government that is free of corruption, which essentially flows from the right of a people to economic self determination as provided in article 1 of both the ICCPR and the ICESCR respectively.³³ The right to exercise sovereignty over a nation's wealth and resources includes the right of all peoples within the state to freely use, exploit and dispose of their natural wealth and resources in the supreme interest of their national development. Under the African human rights system, this collective right is protected by articles 20-22 of the African Charter on Human and Peoples' Rights (ACHPR).³⁴ Therefore, a government that tolerates or actively engages in the corrupt transfer of ownership of national wealth to the benefit of select nationals, who occupy positions of power or influence in the society operates to deny the people, individually and collectively, their right to freely use, exploit and dispose of their natural wealth in a manner that advances their development. A further implication is that corruption violates a people's collective right to development, which has been recognised as an 'inalienable human right of every human being.'³⁵

The Role of NHRIs in the Fight against corruption:

Having made it clear that corruption affects the enjoyment of human rights, and that the promotion of human rights and the fight against corruption are mutually reinforcing, it therefore follows that the creation of NHRIs is one of the means that may be adopted in the fight against corruption.

Specifically, the Paris Principles outline in Paragraph 3, the powers of NHRIs to submit reports and make recommendations on pertinent human rights issues to parliament and government. Such reports could for instance focus on the impact of corruption on the enjoyment of human rights in a specific country, and make recommendations on legislative, administrative and other reforms that would combat corruption and enhance the enjoyment of human rights. NHRIs are additionally empowered to review existing and proposed legislation and advise government with a view of ensuring that they comply with human rights standards. This power of legislative review may also be used to infuse human rights principles that promote transparency, accountability and thus in turn provide an avenue for fighting corruption.

Additionally, cooperation with the United Nations bodies and with other NHRIs, ensures that there is a cross pollination of ideas and best practices between different NHRIs thus enhancing the protection of human rights and the fight against impunity and corruption. Lastly, NHRIs are empowered to undertake measures to educate the public on matters of human rights; this also presents an opportunity for NHRIs to enhance the public's perception of corruption as a human rights issue, and not merely as a matter of administrative, political or economic relevance.

Having made the point that there is a real connection between corruption and violation of human rights such as through incapacitating state's institutions from ensuring that services are delivered uniformly and that they are of quality. It follows that based on the Paris Principles which require that NHRIs be constituted with as wide mandates as possible. In instances where there are no specific institutions set up with an anti-corruption mandate NHRIs may elect to interpret their human rights mandate to include certain aspect of anti corruption work such as public awareness,

33 Of particular relevance is article 1(1) which provides that 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

34 See ACHPR article 20 (right to existence and self determination), article 21(rights of peoples to wealth and natural resources) and article 22(rights of peoples to economic, social and cultural development) respectively.

35 See United Nations General Assembly Declaration on the Right to Development, Adopted as resolution 41/128 of 4 December 1986, available at <<http://www.unhchr.ch/html/menu3/b/71.htm>>

research, making specific recommendations to government and in certain cases adopting a name and shame strategy. However, in cases where there is already an anti-corruption institution, the NHRIs could establish a working relationship with the Anti corruption commission such that the human rights work feeds into the anti corruption work and vice versa. It is indeed imperative that NHRIs and Anti-Corruption bodies work in close association where they exist independently.

There are instances such as the Ghanaian Commission for Human Rights and Administration of Justice (CHRAJ) which has three broad mandates i.e. the Anti-corruption mandate, the Ombudsman mandate and the Human Rights Commission mandate. The rationale behind putting these mandates under one institution is the interconnectivity between human rights violations, administrative justice and corruption. This also enhances effective collaboration and coordination between the different offices to minimize duplication of functions and resources and also to ensure the complainants are not confused as to which institution they should approach. Other Commissions such as the Uganda Human Rights Commission only have human rights mandates ostensibly because there are other institutions that have specific mandates to lead the fight against corruption.

The Kenya National Commission on Human Rights (KNCHR) is a classic NHRI in that it does not have a specific mandate to handle cases of corruption. These are handled by Kenya Anti-Corruption Commission (KACC). This distinction had been made in the constitutive Acts of these two institutions (and now entrenched in the new Constitution). Notwithstanding this clear delineation of mandates, the KNCHR does not view anti corruption as a strictly KACC affair. Indeed the Commission continues to speak out against corruption, but from its human rights standpoint. This is not meant to encroach into the anti corruption commission's work-on the contrary, it is a mechanism that reinforces the fight against corruption since both institutions will be reading from the same script when it comes to condemning acts of corruption and sensitising the public about the deleterious effects of corruption.

Specifically, KNCHR has published reports such as '**Behaving Badly**' which was a study undertaken on the misuse of public resources by Cabinet Ministers on political campaigns, and '**Unjust Enrichment**', which detailed the massive grabbing of public land by politically connected individuals. Indeed this report, the Commission revealed that tracts of land belonging to state corporations such as the Agricultural Development Corporation, the Kenya Railways Corporation, Kenya Industrial Estates, National Social Security Fund, The Kenya Industrial Estates, the Kenya Agricultural Research Institute, the Kenya Food and Chemical Corporation Limited as well as land belonging to the State House and even the Military, all valued at approximately Ksh 53Billion(USD 662.5 Million) were illegally allocated to prominent individuals in the Government. The real connection was the demonstration of how these amounts could have been used to enhance the economic and social rights or to improve the infrastructure of the civil and political rights.

In terms of handling specific complaints there are cases that will be handled by the Human Rights institution that will have emanated from corrupt practices and vice versa. The challenge comes in finding an answer as to what stage of the case should the matter be referred to KACC by KNCHR or by KACC to KNCHR? There are numerous instances where citizens make reports and complaints to any of the bodies as well as other institutions as a result KNHCR and KACC have an understanding and operate a referral system. Other measures that the two bodies have undertaken together with ICD (South Africa), the South African Human Rights Commission, the Tanzanian Commission and APCOF (Association of Police Civilian Oversight Forum) and Regional Civil Society based in South African have developed an investigation manual that is aimed at capacitating oversight authorities to conduct professional and quality investigations into violations which are covered by their mandates.

Accordingly, in countries where these oversight bodies have not been fused into one institution, there needs to be smooth coordination between them. A clear referral system for cases that are better handled by one institution as opposed to the other, should be in place.

There should be adequate information channelled towards the public to enable the people to distinguish these institutions and their different mandates. This will enable the people to direct their complaints to the appropriate institution to prevent delays in solving their complaints that comes as a result of being referred from one institution to another.

Parliament should assist in strengthening the coordination of these institutions by formulating legislation that harmonizes their operations. The courts have a role to play and may enhance the interrelationship between these institutions by seeking their opinion while making decisions that touch on human rights and good governance. The courts should also make decisions that promote and protect human rights and enhance good governance.

Lastly as bodies that have such enormous tasks of holding the mighty accountable to standards which are more honoured in breach than in compliance; those of us entrusted with the political leadership of these institutions must not rely only on independence as captured by constitutions or statutes but must exercise independence at the individual and personal level. We must practice these principles in our own institutions by building strong and transparent institutional structures manned by empowered secretariat staff. We must remain true to the constitution and the citizens, indeed pressures are inevitable and sometimes faithful adherence and fearlessness and relentlessness to our mandate may lead to a very bleak future post service in a commission; but maybe that is the price that we must be willing to pay.

THE ROLE OF STATE INSTITUTIONS IN THE FIGHT AGAINST CORRUPTION BY JUSTICE MRS TUJILANE CHIZUMILA (RTD) OMBUDSPERSON, MALAWI

1. INTRODUCTION

Malawi became a democracy in 1994, and this resulted in the adoption of a new Democratic Republican Constitution in 1995. Since the advent of multiparty democracy in Malawi in 1994, the fight against corruption has taken centre-stage. Malawi has declared total war on corruption, and a number of mechanisms and institutions have been established to address issues relating to it. Government's willingness to decisively combat corruption has been manifested in the State President's speeches.

The purpose of this article is to look at the role state institutions are playing in fighting corruption in Malawi. However, specific attention is placed on the operations of the Anti-Corruption Bureau (ACB) and the Office of the Ombudsman.

2. THE NATIONAL ANTI-CORRUPTION STRATEGY

Background

The Government is mainstreaming anti-corruption programmes in the public sector through the National Anti-Corruption Strategy (NACS). At the core of the Strategy is the creation of an ethical culture that is intolerant to corrupt practices.

The National Anti-Corruption Strategy is a policy document that has been developed to assist in implementing standard procedures in both public and private sectors. It is aimed at improving service delivery, and eradicating corrupt practices in order to achieve sustainable social, economic and political development. The Strategy is an effort to translate theme five (Good Governance) of the Malawi Growth and Development Strategy (MGDS) and Millennium Development Goals (MDGs) into action.

The National Anti-Corruption Strategy emanated from the Governance and Corruption Baseline Survey which was conducted in 2005. The survey revealed that corruption is a serious problem in Malawi which has to be dealt with holistically and comprehensively.

The results of the Survey were disseminated to the public in 2007 through workshops to solicit views of the public on how best corruption could be tackled. Participants to the workshops recommended the development of a National Anti-Corruption Strategy to guide the fight against corruption.

The National Anti-Corruption Strategy will be implemented in 8 sectors/pillars and these are:

- | | |
|-------------------|------------------------------|
| i. The Executive | v. Private sector |
| ii. Legislature | vi. Faith Based Organization |
| iii. Judiciary | vii. Traditional leaders |
| iv. Civil society | viii. Media |

Objectives of the National Anti-Corruption Strategy

The Strategy is intended to provide a framework for achieving the following objectives:

- To promote integrity, transparency, accountability as well as improve service delivery in the Sectors.
- To promote public involvement in the fight against corruption.
- To intensify prevention of corruption and promotion of integrity in the Sectors.

The National Integrity System

The Strategy is intended to assist in putting up a National Integrity System (NIS) in all sectors, that is, the Judiciary, the Legislature, the Executive, the Civil Society, the Business Community, Private Sector and the Media will adhere to transparency, accountability and rule of law.

The National Integrity System will instil and promote confidence in all sectors and ensure a corrupt free Malawi that is able to use its resources efficiently and effectively for sustainable and equitable development.

National Integrity Committee

At the top of the National Integrity System is the National Integrity Committee (NIC) that comprises heads of sectors. The members of NIC form a National Anti-Corruption Forum, a think-tank for articulating anti-corruption programmes in the country.

Members of the National Integrity Committee are supposed to guide the implementing of anti-corruption programmes by initiating the formation of Institutional Integrity Committees (IIC) and monitoring their performance in their respective sectors.

Members of the National Integrity Committee are:

- The Chief Secretary
- The Speaker
- The Chief Justice
- Council for Non Governmental Organisations (CONGOMA)
- Business Association Against Corruption

- Malawi Council of Churches comprising of membership from both the Churches and the Muslim Association of Malawi
- Ministry of Local Governance through one Local leader- a senior Chief
- Media Council of Malawi

Institutional Integrity Committees

The National Anti-Corruption Strategy has provided for the establishment of Institutional Integrity Committees to coordinate anti-corruption efforts within institutions in all the sectors.

A typical Institutional Integrity Committees comprises at least five officers appointed by the Controlling Officer.

Mandate of the Institutional Integrity Committee

The Institutional Integrity Committees is required to:

- develop institutional Corruption Prevention Policies
- develop, implement and review Anti-Corruption Action Plan for the institution
- liaise with the ACB in reviewing work procedures or systems
- organize integrity or ethics training for the Institutional Integrity Committee, and other members of staff
- develop Clients Service Charters for their institutions and ensure publicity of the same
- receive, consider and provide redress on all complaints emanating from within and outside organizations relating to ethical issues and maladministration, and
- Recommend administrative action to management on issues of maladministration and unethical conduct.

The Role of the Chief Secretary in the Office of President and Cabinet

By virtue of office, the Chief Secretary is a member of the National Integrity Committee responsible for guiding the implementation of the National Anti-Corruption Strategy in the public service (State Institutions).

The National Anti-Corruption Strategy stipulates that the Chief Secretary shall through a circular letter to all controlling offices in public institutions facilitate the formation of Institutional Integrity Committees in the public service. He has also recently issued another circular on making a public officer personally liable for delaying a service or decision which causes Government to pay sums of money. Penalties include the officer's salary being deducted.

Instruments for corruption prevention

There are several instruments outlined in the National Anti-Corruption Strategy for corruption prevention in all the public sector and amongst other stake holders. Some of the notable instruments are as follows:

- Corruption Prevention Policies
- Client Service Charters
- Code of Ethical Conduct
- Whistle blower policies

The Role of the Anti-Corruption Bureau in Mainstreaming Anti-Corruption Programs

The Anti-Corruption Bureau, because of its legal mandate and technical expertise on issues of corruption, is the Secretariat responsible for implementation of the National Anti-Corruption Strategy in all the sectors of Malawi.

In accordance with the provisions of the National Anti-Corruption Strategy, the Anti-Corruption Bureau will receive reports from all the Institutional Integrity Committees and submit the same to the National Integrity Committee for review. The National

Integrity Committee will finally submit a report to His Excellency the State President, who will in turn address the Nation on the issue.

Mandate

The Anti-Corruption Bureau is mandated to enforce the Corrupt Practices Act by doing the following:

1. To take necessary measures for the prevention of corruption
2. To receive any complaint, report or other information of any alleged or suspected corrupt practice or offence under the Corrupt Practices Act
3. To investigate complaints of alleged or suspected corrupt practices and all other offences under any law discovered in the course of such investigation
4. To prosecute offences under the Corrupt Practices Act
5. To investigate and report on the conduct of any public officer which is connected or conducive to corrupt practices

The Constitution gives power to the Legislature to enact laws for the administration of justice to Malawians in order to "*guarantee accountability, transparency, personal integrity and financial probity*" - to ensure fast social, political and economic development of the country. It was out of the desire to fulfill this provision, that the Anti- Corruption Bureau was established in 1998, under the Corrupt Practices Act, a law on corruption that was enacted by Parliament in 1995.

Functions

Section 10 (1) of the Corrupt Practices Act mandates the Bureau to perform three functions namely (1) corruption prevention & education, (2) investigations and (3) prosecutions. In line with the approach, the Bureau has the following three operational departments:

1. Corruption Prevention Department

The Bureau implements programmes designed to proactively prevent corruption before it occurs. The Corrupt Practices Act under Section 10 (1) a (i) (ii) mandates the Bureau to:

"Examine procedures and practices of public bodies and private bodies in order to help the discovery of corrupt practices, and to revise work methods that in the Bureau's opinion are prone or conducive to corrupt practices."

"Advise public and private bodies on ways of preventing corrupt practices and on changes in methods of work procedures which the Bureau considers necessary to reduce the likelihood of the occurrence of corrupt practices."

This mandate is fulfilled through:

- Review of legislation and policy to prevent fraud and corruption
- Teaching client institutions basic investigation skills
- Development of codes of ethical conduct for client institutions
- Facilitating fraud and corruption prevention sessions
- Review of work systems and procedures for client institutions
- Development of corruption prevention policies and whistle blower guides
- Examinations spot checking exercise

Public Education

The Bureau is mandated under Section 10 (1) (a) (iii) and (iv) of the Corrupt Practices Act to undertake the following functions:

"Disseminate information on the dangers and evils of corruption."

"Enlist and foster public support in the fight against corruption."

This function is fulfilled through:

- Public sensitization rallies
- Production and distribution of the Bureau's newsletter
- Press conferences

- Production and distribution of Information, Education and Communication (IEC) materials
- Postings on the Bureau's website
- Maintenance of information resource centre
- Coalition with clients and other role players such as National Initiative for Civic Education
- Establishment of anti-corruption clubs across the country
- Participation in trade fairs
- Public debates
- The National Anti-Corruption day
- Production of electronic media programmes
- Production of print media materials such as newspaper adverts, cartoons, brochures, and pamphlets
- Production and distribution of promotional materials like calendars, key holders, hats, T-shirts, pens etc.

2. Investigations Department

Section 11 (1) (a) of the Corrupt Practices Act mandates the Director to authorize investigation to complaints that are reported to the ACB before an investigation is instituted.

The Director takes action after receiving recommendations from the Complaints Review Committee (CRC) comprising heads of departments and other officers. The Director only authorizes in writing an investigation on complaints that have some elements of corruption.

Under the Corrupt Practices Act the Bureau has, among others, powers to:

- Require any public officer or any person to answer questions concerning the duties of another public officer or person and order the production for inspection of any information or materials relating to the duties of the public officer or other person.
- Require any person in charge of any office or establishment of the government, or the head, chairman, manager or chief executive officer of any public body or private body to produce or furnish any document or certified true copy of any document which is in his or her possession or under his or her control considered necessary by the Bureau's investigations.
- Require any person including any public officer to provide information or answer any question in connection with an inquiry or investigation by the Bureau

3. Prosecution Department

The Bureau is mandated to prosecute all cases of corruption and any case discovered in the course of conducting an investigation. Before any prosecution commences for offences under Part IV of the Corrupt Practices Act, the Bureau must get consent from the Director of Public Prosecutions (DPP) which under Section 42 of the Corrupt Practices Act should be granted within thirty (30) days. Failure to give consent is construed consent given. If the DPP withholds such consent she shall:

- provide to the ACB Director reasons in writing, and
- inform the Legal Affairs Committee of Parliament of her decision within thirty days of the decision.

Code of conduct and ethical behaviour

A Code of Conduct and Ethical Behaviour is part of the Bureau Standing Orders. It sets ethical standards for all persons employed in the Bureau and will form part of the employees' Conditions of Service. The Code demonstrates the Bureau's commitment to high standards and professional conduct within its ranks. The Bureau intends to fight corruption in the most practicable way, by being in the forefront of all efforts in this regard. The Code has been made bearing in mind that it would not be right nor proper for the Bureau to expect high standards from others without setting for itself

demanding standards of behaviour. The Code of Conduct covers areas such as personal and professional conduct, use of information, bribes, financial and private interests, discipline, and complaints against the Bureau staff and outside employment.

The Role of other State Institutions in the Fight against Corruption

There are a number of state institutions that are playing a crucial role in the fight against corruption by virtue of their mandates. These institutions include:

1. The Malawi Law Commission
2. The Office of the Director of Public Procurement
3. Financial Intelligence Unit
4. The National Audit Office
5. The Judiciary
6. Office of the President and Cabinet
7. Ministry of Justice and Constitutional Affairs
8. The Malawi Electoral Commission
9. Ministry of Finance – Through Electronic Payment System
10. Malawi Human Rights Commission
11. The Malawi Police Service
12. Ministry of Education
13. Office of the Ombudsman
14. The Media

Their Mandates in brief

1. Malawi Law Commission

As a country, in order to be successful in this fight, it is important to have the Malawi Law Commission which legislates laws, e.g. Amendment of the Corruption Practices Act in April 2004 which has given the ACB more powers in the fight against corruption.

2. Office of the Director of Public Procurement

It regulates procurement process of government. Internal Procurement Committees in State Institutions have been established. It conducts training for Public Institutions.

3. Financial Intelligence Unit

It enforces the Anti Monitoring Act. It is an Institution housed under the Reserve Bank of Malawi. It is working hand in hand with the Anti Corruption Bureau and Banks and they all do joint investigations on corruption.

4. The National Audit Office

It checks if Public Institutions are following procedures and make sure that Government funds are according to plans. It is an important mechanism for checking corruption and enhancing accountability. It is an independent institution that operates free from influence of any person or political authority. Therefore, it enjoys a degree of independence in carrying out its responsibilities. It has a mandate to carry out surprise audits, investigations in local government institutions or sub-contract services to private firms when the office does not have the capacity. It **is** required to reveal the strengths and weaknesses of the financial and management operations of government institutions.

5. Judiciary

For Malawi to succeed in the fight against corruption there is need for a vibrant judicial system which we claim we have. Although it is an independent arm of government, it is very crucial in the fight against, since it adjudicates on cases of corruption and thus serves as an important deterrent in corruption. Section 9 of the Constitution vests the judicial authority in the court.

6. Office of the President

Has a Public Management Reform Programme enforced through facilitating Client Service Charters. Corruption has been rampant in Malawi due to a gap of these Charters. Government has embarked on this programme for each institution to

enforce these minimum standards. The aim is to reduce corruption as people will understand the role and expectation of the programme and demand accountability from a public officer.

7. Ministry of Justice and Constitutional Affairs

Works very closely with Judiciary as cases are handled through the office of the Director of Public Prosecution.

8. Malawi Electoral Commission

To enforce laws against electoral corruption and ensure it is minimized

9. The Ministry of Finance- Electronic Payment System

Apart from coordinating national budget it has the mandate to reduce corruption by the introduction of Electronic Payment System aimed at reducing ghost workers. It also cooperates with ACB. Already Millions of Kwacha have been saved in February alone.

10. Malawi Human Rights Commission

Corruption is a violation of human rights. With an effective Malawi Human Rights Commission in place and if people respect human rights, corruption can be minimized since such people who respect human rights will not indulge in human rights abuses as these are violated by people when they indulge in corruption. Hence there will be fewer cases in corruption.

11. Malawi Police Service

They can take/try any crime and enforce the law on corruption especially petty corruption.

12. Ministry of Education

It has introduced corruption modules in primary and secondary schools in the country and have started teaching and examining them. The Ministry has also started working with Universities. If the curriculum is strengthened the youth of Malawi, who are the future of the Nation, will end up being intolerable to corruption.

13. The Office of Ombudsman

Introduction

The Ombudsman is an independent public institution mandated by the Constitution and Act of Parliament to investigate and redress acts which would properly be regarded as oppressive, unjust or unfair in an open society. The advent of democracy brought Ombudsman in the country and the office started operating in 1995.

Other Constitutional Bodies

In order to maintain and consolidate democracy in Malawi, several constitutional bodies were created as watchdogs to curb any excess or abuse of power which would otherwise threaten the foundation of democracy, rule of law and good governance. This was in order to avoid repetition of the suffering Malawians went through in the past.

Creation

The Office of the Ombudsman was created by Section 120 of the Constitution, whose powers and functions are spelt out in Sections 15(2), 46(2) (b) and 123(1) of the Constitution. It has three offices in Blantyre, Lilongwe- the Headquarters- and Mzuzu. It is a Government Institution and is funded by Parliament through the Treasury.

Functions

The Office carries out the following main functions:

- Receiving complaints
- Investigating cases
- Recommending and determining remedies.

Powers

The ombudsman has the following powers under section 124(a) of the Constitution which she exercises in the performance of her functions:

- Determine nature and extent of an investigation

- Summon and question any person connected to an investigation
- Powers of investigation
- Require immediate disclosure of information and production of documents of any kind
- Administer an oath or affirmation from all persons appearing before her
- Institute contempt proceedings before a Court against non compliance
- At the conclusion of the matter recommend corrective action and issue reports to the speaker of National Assembly which are in turn laid before cabinet and other public institutions.

Jurisdiction

The Ombudsman has a wide jurisdiction. All areas of Government administration are subject to investigation by the Ombudsman, unless there is a compelling argument, in a particular case, which can be made for exclusion. Section 5 of the Ombudsman Act gives the Ombudsman in Malawi powers to investigate the entire government machinery.

Section 2 of the Ombudsman Act defines what an organ of government is. It includes: ***“The State and any local authority, board, commission, committee, corporation, body or institution established or instituted by or under any written law”***.

Matters the Ombudsman can investigate

The Ombudsman investigates matters of alleged injustice occasioned by organs of government or public officials in their official capacity. These include:

- Delay in discharging duties by public authorities
- Misapplication or misinterpretation of the law
- Improper use of power and abuses of human rights

These acts are reflected as maladministration.

Matters the Ombudsman does not Investigate

- Complaints against private entities or individuals
- Matters already determined by a Court or currently before a Court of law
- Cases with other competent tribunals e.g. Industrial relations Court
- Matters which have reasonable and applicable remedies by way of Court proceedings or appeal.

Outcome of an Investigation

Depending on the outcome of an investigation, the Ombudsman may decide to:

- Reverse a decision made by a body or an institution
- Uphold a decision made by a body or an institution
- Uphold a decision. i.e. dismiss the complaint altogether
- Determine or recommend a new course of action.
- Advise the complainant or the respondent a proper course of action
- Refer the matter to the Director of Public Prosecution or any other relevant and competent tribunal
- Seek a compromise and agreement between parties involved
- Any dissatisfied party is entitled to apply for review of the Ombudsman’s determination in the High Court pursuant to Section 123 (2) of the Constitution within 3 months from the date of the determination.

Offences

An officer may commit several offences before the Ombudsman

- Failure to attend public inquiry or hearing
- Refusal to take oath
- Refusal to cooperate i.e. failure to furnish particulars or information

- Obstructing the Ombudsman or a member of staff of Ombudsman office in the performance of duties
- Threaten any person who has complained or any other person connected to an investigation being undertaken
- Interrupt the proceedings by the Ombudsman.

Penalties

Any person who commits any of the above offences may be either fined K10,000.00 or imprisoned for five years or both the fine and imprisonment.

Administration of Justice, Impartiality and Independence, Improvement of delivery of Public Service, Fairness and Justice

Following thorough investigations, the Ombudsman is both under Section 126 and Section 8 of the Constitution and the Ombudsman Act (1996) respectively, conferred powers to administer justice by redressing complaints.

Both investigations and the redressing of the complaints by the Ombudsman and staff are to be conducted impartially and independently with a view of correcting bureaucratic errors that occasion injustice to any person.

The functions of the Ombudsman also serve to improve the delivery of public services and ensure fairness and justice in decision making.

Code of Conduct and Ethics

In discharging their duties, all members of staff shall be bound by a Code of Conduct and Ethics. This demand is a component of a democratic culture which would ensure good governance and the respect for and protection of human rights.

Other Roles

Chair of Democratic Accountability Sub-Sector

The government of Malawi has embarked on the process of setting up a SWAp for the democratic Governance Sector which is broadly defined to include all institutions responsible for administration of justice and democratic accountability. This reaffirms the principle that accountability and justice mutually contribute to democratic governance and should be addressed in an integrated ease in managing the broadly defined DG Sector. Thus, it has been further broken down into two subsectors: the Justice subsector and the Democratic Accountability Sub Sector.

The Democratic Accountability sub sector has within its purview the entire apparatus of horizontal accountability that is undertaken by public oversight institutions in the areas of corruption, mal-administration, money laundering, human rights and good governance. Its focus is also on strengthening and democratizing the political process and deepening its roots in society, while also helping pro democracy and good governance civil society organizations to widen domestic constituencies to strengthen democracy.

The office has taken on a new role to coordinate the Democratic Accountability sub-sector in the context of the institutionalisation of the Sector working Groups (SWG) in Malawi in line with the MGDS and Malawi Development Assistance Strategy. A number of key democratic institutions with different but complimentary mandates are categorized within this sub-sector and they include:

- | | |
|---|---|
| 1. The Ministry of Justice and Constitutional Affairs | 7. The Malawi Electoral Commission |
| 2. The Office of the Ombudsman | 8. The Democracy Consolidation Programme |
| 3. The Anti Corruption Bureau | 9. Umbrella CSOs |
| 4. The Malawi Human Rights Commission | 10. Malawi Local Government Association (MALGA) |
| 5. The Financial Intelligence Unit | |
| 6. The National Assembly | |

11. The Ministry of Local Government
 12. Political and Administration Studies Departments (PAS) at Chancellor College, University of Malawi

13. Malawi Electoral Support Network
 14. Directorate of Public Procurement.

Human Rights Commissioner

The Ombudsman is by virtue of her office and the Constitution, a Commissioner of the Malawi Human Rights Commission.

Police Service Commissioner

The Ombudsman is also a Commissioner of the Police Service Commission where Human rights abuses and corruption are some of the issues that the Commission comes across.

14. The Media

The mass media act as a watchdog, publicise acts of corruption, enhance democratic values such as accountability, and influence the ethics of public life by monitoring the conduct of government officials and politicians. For example, the media were the first to expose the case of the former Minister of Education, Yusuf Mwawa, which involved paying for a wedding reception with government money. He is still serving his sentence. The basic freedoms, including freedom of expression, freedom of the press and freedom of access to information, are covered in Chapter IV of the Constitution.

3. CHALLENGES

The good intentions mentioned above have not gone without challenges. The then Minister of Local Government and Rural Development, George Chabonda, stated that "indigenous Malawians find difficulties to acquire land even in rural areas while rich foreigners easily acquire land anywhere in the country because of corrupt local government officials and traditional leaders who accept bribes". Of late several Traditional leaders have been arrested and even imprisoned for several offences of corruption e.g. illegal selling of fertilizer coupons. Other challenges include:

- **Lack of transparency** whereby people end up thinking they have to seek favours in order to be assisted yet it is their right to this service.
- **Lack of Oversight mechanisms** within the institutions e.g. Institutional Integrity Committees, procurement committees.
- **Complex and long procedures.** For example, if it takes more than 5 years before a claimant sees light at the end of the tunnel, if at all, it is during this period that processing officer's source out applicants seeking bribes to favourably the applications. If the period were to be shortened, such instances would be at a minimal.
- **Cost and Obstacles of "Legality".** In most circumstances, the cost of getting a service illegally is cheaper for people than meeting the high cost of staying legal. But this means that they have to continuously bribe inspecting officials to continue the business. It therefore remains the responsibility of State Institutions to make the cost of such services as reasonable as possible so that room for corruption practices is minimized.
- **Lack of knowledge of processes and rights.** This is related to the above two bullets.
- **Inadequate and inappropriately trained personnel/Lack of competent staff.** Most Public Institutions have lost able and professional staff for greener pastures e.g. ACB, Ministry of Justice, and Office of Ombudsman. These offices have lost lawyers, prosecutors and investigators creating a problem in terms of the availability of legal advice to other officers and the local people. Other Institutions are operating with staff without professional qualifications for the posts they are holding.

- **Shortage of finances** limits the effectiveness of preventive measures and civic education, which require frequent travelling outside the duty station due to inadequate vehicles for country-wide operations. Consequently, most often investigators travel by bus. This limits the destinations and affects the caseload which is so heavy that it takes months before issues are investigated.
- **Lack of offices** at the local (district) level constrains the operation, since it limits accessibility by the public to its offices. Consequently, accessibility to and communication with the local people tend to be limited owing to the unavailability of structures at local level.
- **High levels of Illiteracy and widespread ignorance** hampers effectiveness of different programmes and messages at local Therefore, the impact of e.g. the Office of the Ombudsman is not felt in the rural areas.
- **Lack of understanding** of the different roles and mandates of state institutions especially the Constitutional bodies: Law Commission, Human Rights and Office of Ombudsman.
- **Weak laws.** E.g. the law does not adequately cover whistle-blowers, and as a result, people do not readily reveal corrupt acts in their organizations. Also even although the office of the Ombudsman makes investigations and reports the findings publicly, it does not have adjudicative powers and statutory authority to enforce its findings. Thus enforcement and compliance with its recommendations through its Determinations are limited
- **Lack of commitment** by stakeholders.

4. CONCLUSION

Malawi has made strides in the fight against corruption within the country. However, the responsibility for fighting corruption cannot be left to the Anti-Corruption Bureau alone and to the Government. Corrupt practices always have a destabilizing effect not only on the economy but directly on individual lives. No one is immune from these effects. Everyone from all walks of life therefore needs to take a firm stand against corruption. It is in this way that the lives of all the people of Malawi can be made better.

The development and launch of the National Anti-Corruption Strategy by the State President is an indication of the unwavering political will to ensure that the zero tolerance stand against corruption is manifested in the country. Since it is difficult to expose corruption, efficient and effective performance by established institutions is required. Thus government should strengthen the capacity of these institutions. Successful performance will raise public awareness of the dangers of indulging in corruption. Emphasis should be placed on corruption prevention through civic education and creation of an environment that protects whistle blowers who expose corrupt practices

Through the other statues like the Public Procurement Act, Public Finance Management Act Anti-Money Laundering Act etc, Malawi has shown Political will to fight corruption from all angles. There is, however, need to raise awareness of the evils of corruption and to encourage local people to report, resist and reject corruption.

Finally, the fight against corruption will succeed only if the recognition that as public servants they are indeed servants of the people and they have to serve the people honestly and diligently. Corruption will not breed where transparency is adopted in all dealings as a cardinal principle.

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