Integrating Human Rights in the Anti-Corruption Agenda

**Challenges, Possibilities
and Opportunities**

International Council on Human Rights Policy

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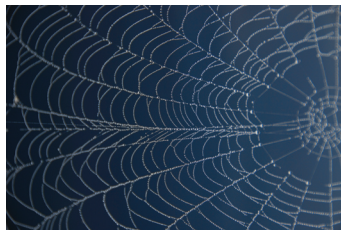
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CONTENTS

TEXTBOXES

TABLES

FIGURES

ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AIL	Access to Information Law
ALAC	Advocacy and Legal Advice Centre (Transparency International)
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CCTP	Conditional Cash Transfer Programme
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EITI	Extractive Industries Transparency Initiative
EU	European Union
GA	United Nations General Assembly
GRI	Global Reporting Initiative
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICHRP	International Council on Human Rights Policy
IDEA	International Institute for Democracy and Electoral Assistance
IFAI	Federal Institute for Access to Public Information (Mexico)
ILO	International Labor Organization
IP	Integrity Pact (Transparency International)
MDG	Millennium Development Goal
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
PDS	Public Distribution System
RTI	Right to Information Act
SFO	Serious Fraud Office
TI	Transparency International
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNAFEI	United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNICRI	United Nations Interregional Crime and Justice Research
UNODC	United Nations Office of Drugs and Crime
WAJU	Women and Juvenile Unit

ACKNOWLEDGEMENTS

FOREWORD

Corruption seriously distorts efforts made to respect, protect and fulfil human rights, whether civil and political or economic, social and cultural rights. Yet when both human rights and anti-corruption work hand-in-hand for an integrated agenda, then the achievements of both movements to tackle human rights violations and pervasive corruption will be strengthened. This new, pioneering report by the International Council on Human Rights Policy (ICHRP) brings us closer to that vision by identifying the abuse of power and the exercise of arbitrary discrimination as common factors at the heart of the struggle for social justice.

Achieving a seamless integrated agenda between both movements will be shaped by the shared principles of participation, transparency and accountability, as well as the recognition of the pivotal role of the right to information. These are areas where anti-corruption activists have been active: monitoring budgets in areas such as education, health and aid, promoting participation of society in local and national policy-making and campaigning to have access to information laws (and monitoring them where they already exist).

Addressing corruption can act as a catalyst to the realisation of rights, such as by ensuring access to education, health and water. New Transparency International (TI) research on the Millennium Development Goals (MDGs) across 50 countries shows there is a clear, positive correlation between increased corruption and the reduced quality and quantity of education in a country. Damaging effects on healthcare provision have also been documented. TI's findings reflect the sad reality faced by countless numbers of people deprived of their right to education and health when valuable resources are misspent or embezzled by the few or when bribery becomes the collateral for accessing basic services.

Integrating a human rights dimension into anti-corruption advocacy efforts can only strengthen initiatives that target increasing access to and the quality of education, health and water provision in a country, among other public services.

An area where both movements have found joint agendas is in the protection of human rights defenders doing anti-corruption work. These individuals are increasingly under pressure, under threat and under attack on all continents. This is a worrying trend where civil society space is severely limited or eliminated in several countries. Co-operation and joint work between anti-corruption and human rights organisations have proven essential and beneficial to activists needing support.

Since the publication of the last ICHRP report on the linkages between corruption and human rights, a decisive shift has taken place in global anti-corruption work. In November 2009, governments adopted a mechanism to monitor progress in implementing the UN Convention against Corruption (UNCAC) and

inform the world about it. Shaping the development of this oversight process is a real chance for human rights and anti-corruption activists to achieve an integrated agenda, where progress to counter corruption can also be seen through the lens of progress to respect, protect and fulfil human rights. Tackling abuse of power and the discriminatory effects of corruption at the national and local level will go far to begin rooting out the obstacles that it poses for human rights and the fulfilment of promises made under relevant frameworks, including the Universal Declaration on Human Rights. Under the UNCAC, in the next 10 years, ratifying countries will report on their progress to fight corruption. But they also will report on how their governments are promoting the participation of society, improved transparency and accountability in the process.

The ICHRP report is a call for action for those involved in anti-corruption and human rights work to use the common ground to build new or strengthen existing coalitions and partnerships. The upcoming process triggered by the UNCAC offers a timely and unique opportunity to make such co-operation a reality among national-level civil society and other stakeholders. At the same time, the process around implementing and monitoring the UNCAC brings to light how comprehensive anti-corruption policies can help to realise human rights.

Cobus de Swardt
Managing Director
Transparency International

BACKGROUND

In 2007, the ICHRP set out to explore where the application of human rights standards and principles could strengthen anti-corruption strategies and make anti-corruption methods and approaches more accessible to human rights advocates.

The research had two elements. In a first report, the ICHRP developed a conceptual framework that enables users to link particular acts of corruption to specific violations of rights.[1] It showed why those working on corruption and those working on human rights have reasons to co-operate and indicated how they can work together.

Developing a clear description of the conceptual links between human rights and corruption was important and had not been done. However, a conceptual model alone will not suffice because, to become an effective tool against corruption, human rights need to be applied in context. The anti-corruption movement has its own history and its own international standards, and anti-corruption professionals have developed a distinct body of practice and a range of methodologies. This second report, therefore, examines issues of implementation.

This report looks at where and how the use of a human rights framework might strengthen national and local anti-corruption programmes and at how key human rights principles can be operationalised in anti-corruption work. Having explained the different approaches that the human rights and anti-corruption disciplines respectively take to regulation and core policy issues, it identifies opportunities for synergy and cross-fertilisation. The report seeks to be a practical guide for public officials and other anti-corruption practitioners. It includes cases and policy recommendations and addresses the obstacles and challenges that are likely to arise when anti-corruption programmes integrate human rights.

Readers may find it useful to know the ICHRP research methodology. ICHRP research is independent and takes an international, interdisciplinary and consultative approach. Because the aim of this project was to encourage those working in the area of anti-corruption and those working on human rights to enhance collaboration, the project involved professionals from both disciplines and a range of institutions. International organisations, governments, the legal profession, national and international non-governmental organisations (NGOs) and scholars participated in the research that underpins this report.

In addition to several workshops convened by the ICHRP to discuss the project's progress, a draft of the report was circulated for comments to experts

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1   See *Corruption and Human Rights: Making the Connection*, ICHRP, 2009. The report is available in English, Spanish, Serbian and Armenian at www.ichrp.org.

and organisations that are active in the field. This enabled a wider circle of professionals and practitioners to engage with the content of the research, to improve it and to acquire a sense of ownership over the findings. On the basis of widening consultation, the ICHRP aims to build support and consent for its findings – leading to practical action based on research.

The main challenge this report faced was to incorporate the wide variety of geographical, disciplinary and institutional perspectives that shape anti-corruption work and advocacy. As the ICHRP seeks to be inclusive, there has been significant effort to embrace the many experiences and perspectives illuminated in the course of the research while upholding a coherent human rights approach. These differences should be taken into account and valued when considering the report's findings.

The ICHRP strives to make its research reports accessible. The report seeks to communicate in non-technical language and without jargon so people from various disciplines can understand and engage with the subject matter.

INTRODUCTION

POWER, CORRUPTION AND VIOLENCE: A STRUCTURAL PERSPECTIVE

Corruption has been given increased attention in recent years. A taboo subject until the early 1990s, it is recognised today to be one of the biggest obstacles to development. The adoption of the United Nations Convention against Corruption (UNCAC),[2] which came into force in 2005, reflects this emerging consensus. Corruption is now being addressed by a very broad range of institutions, including governments, international financial institutions, multilateral and bilateral development agencies, businesses and business networks, international and local civil society organisations and academic bodies. The causes of corruption have been analysed, and numerous methods have been developed to measure its forms and levels. The impacts of corruption have been studied extensively. Anti-corruption laws have been enacted, new anti-corruption bodies have been created, and existing institutions and administrative procedures have been overhauled. Many countries have negotiated and ratified regional and international anti-corruption conventions. Citizens across the world protest against corruption on the street. Corrupt acts are sometimes detected and prosecuted, and sometimes those responsible are punished.

These are tangible achievements. Nevertheless, anti-corruption organisations are still challenged to show results and demonstrate that they can significantly reduce or root out persistent corruption. Against this background, many organisations are critically analysing and revising their strategies and approaches in a search for effective solutions.

This report contributes to that quest, starting from the assumption that promotion and protection of human rights and efforts to end corruption are mutually reinforcing. As shown in the first report, corruption is an abuse of entrusted power that tends to benefit a narrow elite at the expense of those who are less able to defend their rights and interests. As a result, all forms of corruption tend either directly, indirectly or remotely to violate human rights. Conversely, wherever human rights are not protected, corruption is likely to flourish. In the absence of human rights like freedom of expression and assembly – or where access to information and education is restricted – it is extremely difficult to hold government officials to account, which allows corruption more room to spread freely. Also, where corruption is prevalent, it is hard to promote human rights. Anti-corruption and human rights organisations, therefore, have a common interest in working together and sharing methods, standards and tools that will make their work more effective and mutually reinforcing.

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2   Adopted by the General Assembly resolution 58/4 on 31 October 2003, entered into force on 14 December 2005.

This report examines how the use of a human rights framework can strengthen and enhance anti-corruption strategies. It sets out this case in four sections. The first section discusses the principles of participation, transparency and access to information, and accountability. These values are important to human rights and anti-corruption advocates, and the report examines how a human rights understanding of these principles can enhance anti-corruption strategies.

The second section focuses on four areas in which human rights can have a specific impact on the global anti-corruption agenda: (1) measurement of corruption, (2) public procurement, (3) political finance and (4) social service provision. In doing so, the report explores how the use of human rights standards and tools can increase the impact of traditional anti-corruption approaches.

The third section discusses the impact of corruption on women and the value of adopting a gender strategy, recognising that corruption disproportionately affects vulnerable and disadvantaged women.

The fourth section discusses the alleged tensions between anti-corruption and human rights and concludes that problems are confined to certain anti-corruption investigation and prosecution procedures and that these are absent from anti-corruption law enforcement in most states.

A final section sums up the main arguments and conclusions.

Throughout, the report gives particular attention to the impact of corruption on disadvantaged and disempowered groups such as indigenous peoples, afro-descendent peoples, migrant workers, persons with disabilities, those with HIV/AIDS, refugees, and (in broader terms) all those who are poor. Often, these groups are excluded from full participation in public debates and discussions and from access to social policies and services.

In many cases, the same groups of people also suffer discrimination against them, by reason of their race, gender, class, or sexuality or on other grounds.[3] As noted, the report pays particular attention to women, because they are often victims of multiple and interconnected forms of discrimination.

Human rights norms and principles can contribute to anti-corruption strategies principally because human rights address abuses of power, and corruption is essentially an abuse of power. To design effective anti-corruption policies, therefore, it is necessary to understand how power is socially organised. Corruption is a profoundly social activity, shaped by cultural notions of power, privilege and social status. For this reason, anti-corruption policies should not treat corruption as if it were composed of isolated and opportunistic acts of selfishness. It is, rather, a social expression of power that permits certain people

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3   For a better and deeper understanding of marginalisation, see Young, 2000.

(primarily government officials and business leaders) to control and oppress others economically, politically and culturally. In such social environments, structural corruption is closely associated with structural violence, a notion that describes forms of oppression that deny disadvantaged groups equal access to land, jobs, education, medical facilities, family planning and housing.[4]

In settings where unequal social relationships are entrenched, corrupt private interests can capture the state, using their influence to shape regulations, laws, decrees and judicial rulings and consolidating it further via pervasive clientelistic networks that make access to career opportunities, social benefits and employment contingent on complicity and obedient service.[5] Capture of the state allows a restricted group of insiders to control political processes of election and appointment and to regulate state–market relations in ways that advance their own economic and personal interests by distributing public resources and services in a discriminatory manner. Viewed from this perspective, corruption tends to sustain and reproduce the exploitation and social exclusion of people and to impede the exercise of their human rights.[6]

A human rights analysis throws light on the power relations in a society because it pays particular attention to discrimination, equity and the removal of economic, legal and political obstacles that prevent marginalised groups from enjoying their rights. As a result, a human rights analysis can contribute directly to the design and implementation of anti-corruption policies.

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4   For the link between corruption and structural violence, see Iadicola and Shupe, 2003.

5   See Kaufmann *et al.*, 2000.

6   Much of the analysis of structural corruption in this report is based on Johan Galtung's concept of structural violence. On this view, corruption is almost always invisible, embedded in ubiquitous social structures and normalised by stable institutions and regular experience. Thus, corrupt practices are part of the routine behaviour of society. See Galtung, 1969; and Winter and Leighton, 2001.

Box 1. The Birth of a Diverse Anti-Corruption Movement

Several factors influenced the emergence of an anti-corruption movement during the 1990s. Changes in geopolitical conditions after the cold war redirected the lending policies of international financial institutions, American companies pressed for global action on corruption following adoption of the US Foreign Corrupt Practices Act and leading international aid organisations turned their attention to institutional governance and integrated anti-corruption programmes in their new "good governance" agendas.

Today, the international anti-corruption movement includes the UN and other multilateral agencies, bilateral development agencies, independent foundations, NGOs, private sector associations, think tanks and academic institutions. Official and non-governmental anti-corruption organisations have also appeared in many countries – ranging from the Independent Commission Against Corruption in Hong Kong (a precursor of many newer institutions) and the National Anti-Corruption Council in Honduras to Yemeni Journalists Against Corruption and the Ocasa Youth against Corruption organisation in Colombia, among hundreds of others. In civil society, Transparency International (TI) is one of the most influential global anti-corruption actors. Founded in 1993 by former executives of the World Bank and prominent figures from across the political spectrum, TI raises awareness of the social, economic, political and environmental harm that corruption causes and looks beyond state institutions for the main causes and solutions of the problem. TI promotes an international framework against corruption while its national chapter network in more than 90 countries engages in bottom-up action sustained by wide-ranging coalitions that include governments, the private sector and civil society. Since TI was formed, a number of major NGOs have emerged dedicated to fighting corruption. Global Integrity, for example, which has experts based in more than 92 countries, provides information on corruption and governance trends at country level; Global Witness investigates and campaigns to prevent natural resource-related conflict and corruption; and Oxfam America campaigns to persuade oil, gas, and mining companies to operate transparently and respect the rights of communities who live in resource-rich areas.

This self-defined anti-corruption movement employs many different concepts and approaches. Some organisations address the issue from a technical perspective; others look at underlying power relations or systematically incorporate vulnerability and discrimination into their strategies.

I. RENEWING ANTI-CORRUPTION PRINCIPLES VIA HUMAN RIGHTS

This chapter looks at three principles that are central to both anti-corruption and human rights policies: (1) participation, (2) transparency and access to information and (3) accountability. Although these principles are common to both, anti-corruption and human rights disciplines conceptualise and operationalise them differently. In this chapter, the differences of approach are identified, and it is suggested that anti-corruption programmes would gain traction if they were to incorporate elements of human rights practice.

In addition to the three common principles discussed, non-discrimination also runs through this analysis. Fundamental to human rights (see Box 2), it does not play a prominent role in the anti-corruption agenda, although corruption is in fact closely associated with discrimination. Firstly, this is because corruption distorts the allocation of public resources, which causes the administration of public services to become discriminatory and arbitrary. Individuals or groups of people are left without access to a service, for example, because they cannot or refuse to pay a bribe or do not belong to a given client network. Second, corruption is often associated with discrimination based on race, colour, sex, language, religion, political opinion, national or social origin or sexual orientation. In Europe, for example, it appears that Roma people are disproportionately asked to pay bribes when they seek access to health and education services.[7] Corruption has a disproportionate impact on people who are victims of discrimination. Under a human rights framework, the principle of non-discrimination requires states to take affirmative action to ensure that disempowered groups and those suffering from structural discrimination such as indigenous peoples, migrant workers, persons with disabilities, persons with HIV/AIDS, refugees, prisoners, the poor, women and children have fair access to services and resources.

Finally, those who commit corrupt acts will attempt to protect themselves from detection and seek to maintain their positions of power. In doing so, they tend to destroy the integrity of institutions that are fundamental to the rule of law, including electoral and judicial processes and the objectivity of administrative decisions. So corrupt officials who extract money from migrant workers lacking a residence permit in the knowledge that they cannot complain, judges who take bribes, corrupt surveyors and planning officers not only disadvantage the individuals who suffer as a direct result of their decisions but also undermine the authority and credibility of the institutions they represent. At all these levels,

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

corruption reinforces exclusion and discrimination and tends to magnify and exacerbate pre-existing human rights problems.

The 2009 ICHRP report on corruption[8] suggested that integrating human rights principles and norms within anti-corruption strategies would help anti-corruption programmes to:

▪ Address economic, political and social factors that encourage and reproduce corruption;

▪ Recognise the claims of marginalised groups towards whom the state has obligations;

▪ Oppose impunity, abuse of power, discrimination and violence;

▪ Address gender violence and racism, and the human rights of women and other groups who suffer discrimination;

▪ Empower victims of corruption, through participation, accountability and access to information;

▪ Use the accountability mechanisms of the international human rights system.

PARTICIPATION

For most anti-corruption activists, citizen participation contributes in an essential way to political decision-making and the implementation of public policies. Where strong control mechanisms are lacking, the oversight that citizens and civil society organisations can exercise becomes particularly important to prevent abuse of power and to detect and denounce corruption.

Citizen participation additionally empowers vulnerable groups to demand and exercise their rights. Corruption reproduces itself when elites are able to perpetuate their privileges while disadvantaged groups have no means to defend their interests. Citizen participation breaks that circle and in the long run can help to redistribute power and resources while reducing opportunities for corruption. Citizen empowerment is therefore valuable in itself but also a vital component of effective anti-corruption strategies. It can help to prevent corruption at all points of decision-making.

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8   *Corruption and Human Rights. Making the Connection*, ICHRP, 2009.

Box 2. The Principle of Non-Discrimination in Human Rights Law

International Covenant on Economic, Social and Cultural Rights (ICESCR)

"States Parties... undertake to guarantee that... rights... will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.... The States Parties… undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." (ICESR, Arts. 2 and 3.)

These articles are further developed in General Comments adopted by the Committee on Economic, Social and Cultural Rights (CESCR), in particular General Comment No. 16 (2005) on The equal right of men and women to the enjoyment of economic, social and cultural rights (Art. 3); and General Comment No. 3 (1990) on The nature of the obligations of the States Parties (Art. 2(1)).

International Covenant on Civil and Political Rights (ICCPR)

"Each State Party... undertakes to respect and to ensure to all individuals... rights... without distinction of any kind... to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.... All persons shall be equal before the courts.... Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor.... All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.... The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground..... In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." (ICCPR, Arts. 2, 3, 14, 24, 26 and 27.)

See also General Comments adopted by the Human Rights Committee (HRC), in particular General Comment No. 28 (2000) on Equality of rights between men and women and General Comment No. 18 (1989) on Non-discrimination.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Since the entire Convention deals with discrimination, it is impractical to reproduce it entirely. However, Article 1 defines the term "discrimination against women" to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

This Convention also deals entirely with discrimination and cannot be reproduced in full here. However, Article 1 defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

The UNCAC underlines the importance of participation. It requires states to promote the active participation of individuals and groups outside the public sector, such as civil society, NGOs and community-based organisations, in the prevention of and fight against corruption (UNCAC, Art. 13). The UN's Technical Guide to the United Nations Convention against Corruption affirms that civil society participation is especially important in the development and implementation of anti-corruption strategies and that policies need to envisage specific ways by which to include representatives of society in all processes of their design, content, development, endorsement, implementation and review.[9] It states that citizen participation is strengthened by respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. These provisions of the UNCAC require the positive action of states and are costly. At the same time, citizen participation should be regarded as a valuable investment that strengthens not only anti-corruption procedures but public administration as a whole.

Unfortunately, even where its significance is recognised, participation is often *pro forma*: limited in scale, inaccessible to vulnerable groups and insensitive to power structures. More active mechanisms for citizen participation, such as public hearings or open sessions of parliamentary commissions, either do not exist or have little authority, and in many cases they are sidelined by informal forms of influence to which only powerful interest groups have access. Here, human rights principles and practice can help to give content to participatory processes, enabling them to fulfil their potential to prevent and control corruption. The rights that are implicated in participation are spelled out in international treaties, while the experience of implementation that human rights actors have acquired over the last 60 years should help anti-corruption organisations to make participation operational and effective for anti-corruption purposes.

Operationalising the Right to Participation: From Voiceless Participation to Resource Control

Participation is at the heart of human rights practice. Human rights strategies for confronting abuse of power and holding government institutions to account depend upon it, and it is a condition of claiming other rights. In effect, it is constructed out

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9   UNODC and UNICRI, 2009, pp. 4–5.

of several key rights. To participate effectively, people need to be able to organise themselves freely (freedom of association), to communicate their opinions frankly (freedom of expression) and to inform themselves (right to access to information).

With respect to operationalising participation, it is sensible to think in terms of the *breadth* (who is involved) and the *depth* of the process (the degree of influence).[10] In addition, a number of political risks (e.g., co-option, manipulation) need to be considered.

Box 3. The Right to Participation in Human Rights Standards

International Covenant on Civil and Political Rights (ICCPR)

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Article 21

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 (paragraph 1)

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Article 25

Every citizen shall have the right and the opportunity... without unreasonable restrictions:

a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

c) To have access, on general terms of equality, to public service in his country.

See also, Human Rights Committee, General Comment No. 25 (1996) on Participation in public affairs and the right to vote.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 15 (paragraph 1) recognises the right of everyone to "take part in cultural life."

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10   See Dahl, 1971.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Articles 7 and 8 on women's participation in politics and public life, including the formulation of government policy and representation at the international level.

Convention on the Rights of the Child (CRC)

Article 13, regarding the freedom to seek, receive and impart information; *Article 15* on the freedom of association and peaceful assembly; and *Article 31* guaranteeing the right to participate in cultural life and the arts.

Convention on the Rights of Persons with Disabilities (CRPD)

Articles 29 and 30 on participation in political and public life and in cultural life, recreation, leisure and sport.

Breadth of Participation

Breadth of participation refers to the range of parties involved, giving particular attention to the inclusion of vulnerable and disadvantaged groups. This notion has been recognised by the anti-corruption movement. For example the UNCAC Technical Guide adopts a broad view, understanding "society" to include NGOs, trade unions, the mass media, faith-based organisations and other bodies and individuals with whom governments may not have a close relationship.[11] The views and perspectives of those without some form of representation, particularly marginalised groups, may be reflected, for example, through household and other surveys.[12]

In the case of anti-corruption strategies, special attention would also need to be given to groups whom corruption particularly affects. Where anti-corruption officials seek to meet the needs of these groups, how can they identify them, especially when they are politically invisible or silent? There are no easy answers to this question. Corruption tends to particularly affect groups that suffer from exclusion and discrimination, who are often least likely to be consulted as a matter of course and who may be difficult for institutions and officials to access because of their distant location, language, poverty or their suspicion of authority.[13] Such groups are inherently less well-equipped to defend their rights and interests, thus multiplying the effects of discrimination. A genuinely inclusive process should therefore pay particular attention to the identification and involvement of disadvantaged groups. Governments must take pro-active steps to enable these groups to participate.

The first ICHRP report provides a point of departure, showing that acts of

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11   UNODC and UNICRI, 2009, p. 62.

12   Ibid.

13   See *Enhancing Access to Human Rights*, ICHRP, 2006.

corruption have direct, indirect or remote impacts on rights.[14] Much can also be learned from environmental impact assessments (see Box 4) and some processes developed to enable effective participation by indigenous groups.[15] The point to make is that the matter of who needs to be involved, as well as how they should be involved, is critical to the quality of any participatory process.

Once groups exposed to particular risk have been identified, the following principles provide the core elements of a genuinely inclusive approach:

- Groups affected by a decision (and the public at large) must be notified in advance, in good time to enable them to prepare and communicate their views.

- Groups must have access to information about the consultation process. This should be complete, up-to-date, truthful and understandable (avoiding technical language).

- They must be actively supported to participate. Steps should be taken to assist groups that have limited literacy, or face linguistic, cultural, geographic or economic barriers to participation. The process should be designed to enable groups to exercise their rights.

- They must have opportunities, freely and without interference, to convene their members or representatives, to evaluate the process and assess the advantages and disadvantages of the decision in question.

- They must have opportunities to make their concerns and opinions known. The process should ensure that their opinions are given proper consideration and weight.

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14   To illustrate, bribing a judge directly violates the right to a fair trial. When an official corruptly issues a permit that allows toxic waste to be dumped illegally, this may not violate a right, but if a local community is subsequently poisoned, the corrupt act indirectly causes a violation of their right to the highest attainable standard of health. A remote connection would occur where police violate rights when arresting demonstrators in the course of social unrest that has been triggered partly by electoral corruption: the electoral corruption directly violates the right to political participation, but it is only distantly linked to the violations that occur when the arrests are made. See *Corruption and Human Rights: Making the Connection*, ICHRP, 2009.

15   The UN Declaration on the Rights of Indigenous Peoples (adopted 2007) includes several articles regarding participation and consultation, as does ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries. See also the 2009 Anchorage Declaration of the Indigenous Peoples' Global Summit on Climate Change and the work of the UN Permanent Forum on Indigenous Issues, for example, the Report of the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance, 2006.

In the application of ILO Convention 169, several cases at national tribunals have considered the non-participation of indigenous groups in consultation or decision-making processes to invalidate government project approvals, especially in the mining, forestry and energy sectors. A recent example is the ruling of Peru's Constitutional Tribunal against the Ministry of Energy and Mines (case 05427-2009-PC/TC) that the executive branch is not fully complying with the Convention obligation to consult with indigenous peoples before approving projects.

Notwithstanding these points, it should be stressed that formal requirements are not sufficient. Taking into account the principles of equality and non-discrimination implies that all measures should be taken to ensure that groups who are exposed to particular risks (of exclusion, discrimination or other forms of oppression) are included. Table 1 provides some indicators for inclusion.

Table 1. Breadth of Participation

(Minimum) Institutional Legal Conditions of Inclusion	Indicators
Provide time to act	Affected groups and the public must be notified in advance, giving them enough time to organise their response. For example, interested groups could be informed through radio announcements and community bulletin boards two weeks before the meeting and subsequently follow-up reminders could be circulated through the same channels 5–7 days before the event.
Make the relevant information available	Affected groups and the public must be able to obtain information about the decision and the participatory process. This information must be: ✓ relevant (include the key issues for discussion and avoid unnecessary, trivial or secondary data); ✓ up-to-date; ✓ understandable (avoid jargon and specialist language).
Facilitate participation where required (adaptability, acceptability and accessibility)	Authorities must take positive steps to assist groups and the public to overcome economic, linguistic, cultural, educational or geographical obstacles that would prevent or inhibit their full participation.

Adapted from Gruenberg, 2009.

Depth of Participation

Depth of participation is measured in terms of the influence that interested parties can exert on decisions and the allocation of public resources. Superficial participation processes will aim merely to gather or exchange information, in order to assess opinion, identify interests and possibly take advantage of local expertise. They do not necessarily require decision-makers to respond to demands made or to respect majority opinion. At the other end of the spectrum are processes that allow participants to directly control the outcomes or decisions in question.

Criteria for evaluating the depth of participatory processes would include:

▪ Participants must know why they are asked to participate and how their opinions will be used and should clearly understand their influence (if any) on the final outcome.

▪ The decision-making body must take due account of the opinions voiced and the outcomes of the process.

▪ The decision-making body should promptly notify participants and the public of its decision. Both the text of the decision and the justifications for it must be made publicly accessible.

▪ Any approach to genuine participation must adequately address issues of power and control of information.

Although Table 2 is a simplified abstraction, it helps illustrate that there are significant gradations of citizen participation.

Table 2. Depth of Participation

	PARTICIPATION AS A CONTINUUM				
	(From the lowest to the highest level of influence on decisions and the allocation of public resources)				
	SUPERFICIAL →				→ DEEP
Types of participation based on impact and outcomes	Information gathering.	Non-binding consultation on specific matters.	Binding consultation on specific matters.	Partnership in planning and decision-making responsibilities.	Social control over decisions, managerial power and public service delivery.
Illustrative participatory processes and institutions	Beneficiary assessment; attitude surveys; report cards; complaint box.	Public hearings; neighbourhood meetings; popular consultation.	Plebiscites; referendums.	Participatory budgeting and development planning.	Governance councils in education and health sectors; electoral councils.
Good exchanged?	Information	Information	Power	Power	Power
Direction of exchange	One way flow of information: from citizens to officials.	One way flow of information: from officials to citizens.	Public officials subject to citizens' decision.	Public officials negotiate and share power with citizens.	Public officials share power with citizens.
Risks of co-option / manipulation	Officials manipulate process or information collected. Lack of feedback.	Affected groups excluded/demands not taken into account.	Forms of direct democracy may suffer electoral fraud and manipulation.	Group selection biased (in favour of official or special interests).	Dominant groups collude with government to control outcome.
Possible consequences of co-option / manipulation	Affected groups unaware of main objective of process/ uninformed of decisions. Government gains credibility, decisions already made gain legitimacy.	Citizens' interests ignored/dissent marginalised; powerful groups use process to "prove" involvement of affected groups. Asymmetrical power relations legitimised and reinforced.	Government takes advantage of process to carry out controversial and resisted decisions, retaining credibility and legitimacy.	Vulnerable groups excluded. Powerful groups reinforce and expand control over public resources. Clientelist networks strengthen their power.	Patronage networks and unequal power relations remain untouched. Corruption entrenched, excluded groups alienated.

Adapted from Gruenberg, 2009.

Power and Participation

In practice, formal rules regulating the breadth and depth of participatory processes combine with more informal practices, which are often hard to detect, prevent or monitor. To prevent dominant groups from co-opting participatory processes, officials and anti-corruption professionals need to equip themselves with methods for detecting and countering informal power arrangements that are discriminatory in their organisation or their effects.[16]

Visible power—In some cases, special interests distort the formal laws, processes and institutions that regulate participatory processes. Powerful groups may intervene directly to influence the formal rules in favour of their interests. Public officials and anti-corruption advocates should devise criteria that guard against this risk and should monitor compliance to make sure that participation is sufficiently broad and deep.

Hidden power—Participatory processes may be influenced even when they are formally broad and deep. Without having to modify the formal rules of the game, interest groups may privilege or exclude certain voices, set the agenda or control the provision of information. Public officials and anti-corruption advocates need, therefore, to ensure that participatory processes are transparent in practice as well as in design, enabling vulnerable groups to identify their interests, express their opinions clearly and be heard.

Invisible power—"Invisible power" is even more insidious.[17] It occurs when people fail to recognise their real interests because they have internalised values that in fact benefit others. This form of power is exemplified in gender relations, where the presence of men can inhibit women from speaking frankly or demanding their rights, even if the process includes them.[18] Such power can skew outcomes and the quality of participation without a clear sign of co-option. This form of power is difficult to detect objectively. When they design and conduct participatory processes, officials and anti-corruption advocates must, therefore, carefully analyse the interests and tensions in a community and, at the very least, should ensure that in their own actions and judgements they do not, themselves, reproduce or legitimise forms of invisible power that are discriminatory.

In sum, the application of these three variables (i.e., tests of breadth, of depth and of power relations) can help officials, politicians, civil society organisations and affected groups to design and implement effective participatory processes that will strengthen anti-corruption policies. Table 3 suggests some practical criteria for evaluating the integrity of participation.

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16   This analysis draws on the work of Lukes, 1974.

17   Ibid.

18   Cooke and Kothari, 2001.

Table 3. Co-Option Test

BREADTH AND DEPTH OF PARTICIPATION	FORM OF POWER	INDICATORS OF CO-OPTION
BREADTH ▪ Inclusive ▪ Pluralistic ▪ Diverse	**Visible**	Formal rules and procedures prioritise collection of information and non-binding consultation thus reducing the degree of influence by preventing any binding effect, partnership or direct control over resources.
	Hidden	The agenda does not reflect the interests, values or problems of relevant and marginalised groups.
	Invisible	Vulnerable and marginalised groups refuse to participate or restrict their participation (because they fear reprisals, lack self-confidence, self-censor for other reasons or are sceptical about the outcomes).
DEPTH (CONTINUUM) ▪ Information collection ▪ Non-binding consultation ▪ Co-management ▪ Control over public resources	**Visible**	Formal rules and procedures prioritise collection of information and non-binding consultation thus reducing the degree of influence by preventing any binding effect, partnership or direct control over resources.
	Hidden	The agenda does not represent the interests, the needs or the values of marginalised groups affected by corruption.
	Invisible	Vulnerable groups are present but without voice. Thus, they have no influence on any decision because of fear of reprisals, lack of self-confidence, self-censorship or scepticism about the final outcomes.

Based on Gruenberg, 2009.

Treating participation as a human right more than as an instrument for achieving greater administrative effectiveness would allow anti-corruption officials and advocates to focus more on the breadth, depth and legitimacy of the participatory processes. This is likely to produce outcomes that would better advance the anti-corruption agenda.

Recommendations

- When designing participatory processes to prevent corruption, politicians, officials and anti-corruption professionals and advocates should identify and notify all groups who have a direct interest in the issue concerned (breadth of participation). Vulnerable or disadvantaged groups may be identified by, for example, carrying out a stakeholder analysis or mapping.

- Particular attention should be paid to vulnerable and disempowered groups. To prevent dominant groups from co-opting or controlling participatory processes, officials and anti-corruption advocates should equip themselves with tools that will detect and mitigate the informal and discriminatory exercise of power. Taking account of different kinds of power relations (visible, hidden and invisible) and the particular needs of marginalised groups, officials and advocates should actively take steps to ensure that such groups can organise their views, express them frankly and be heard. For example, consultations can be segmented by groups and then brought together in a plenary.

- Politicians, officials and anti-corruption advocates should make sure that groups have timely access to relevant information regarding both the issue and the participatory process in which they have been invited to engage. Information should be complete, up-to-date, truthful and understandable (avoiding specialised language).

- Participatory processes should say clearly what degree of influence participants can expect to have on the decision or outcome and should normally allow participants to exercise an influence that is significant (depth of participation). At a minimum, the decision-making body should take due and fair account of the opinions expressed and should promptly and publicly notify those involved of the decisions made, providing the text of the decision and its justification.

- In addition to considering breadth, depth and power relations, public officials and anti-corruption advocates should evaluate discrimination when they design and implement participatory processes. They should equip themselves with tools that enable them to identify and mitigate discrimination and prevent indirect as well as direct manipulation. If participatory processes fail to address inequities caused by discrimination, they are likely to deepen rather than reduce the subordination and alienation of oppressed groups. In this regard, public officials and anti-corruption advocates should ensure that their own actions and judgements do not reproduce or legitimise forms of "invisible" powers that are discriminatory.

Transparency and Access to Information

Transparency is the cornerstone of most anti-corruption strategies – whether the subject is public procurement, budgeting, public expenditure, party finance, social programmes, the judicial system, or the conduct of private companies. Access to information is the key to transparency because opportunities to keep corrupt arrangements secret diminish to the extent that officials and private actors provide information about their actions. Information prevents and reveals corruption because it allows monitoring institutions and other actors to evaluate the public and private comportment of public and private officials. Judges, comptrollers, auditors, parliamentarians and representatives of similar institutions cannot fulfil their duties if they are unable to obtain timely and relevant information. Citizens and civil society organisations also require access to accurate, timely and comparable information if they are to participate in public life and monitor public affairs.

While there is no consensus on a definition of transparency, it is used most commonly to describe the degree to which governments, companies, organisations and individuals openly disclose information, rules, plans, processes and actions.[19] A distinction can also be made between active transparency (the obligation of officials or private representatives to publish information pro-actively) and passive transparency (the obligation to publish information on request).

The UNCAC requires states to adhere to the principle of transparency and establish mechanisms that will ensure access to information. Specifically, Article 10 requires states to adopt procedures or regulations that allow members of the general public to obtain, wherever appropriate, information on the state's administrative organisation, functioning and decision-making processes, and on decisions and legal acts that concern them. States are also required to simplify their administrative procedures to facilitate the public's access to decision-making authorities. The UNCAC further requires states to provide and disseminate information on matters that are vital to control of corruption, such as public procurement, public-sector employment, public finance, and conflict-of-interest regulation. These provisions are very important because they set standards that the majority of states have not yet met in practice or in law.

From a human rights perspective, effective access to public information is a pre-condition for exercising other civil, political, economic, social and cultural rights. As discussed above, exercise of the right to participation depends on access to complete, up-to-date and comprehensible information. Similarly, citizens can better exercise their right to health, adequate housing, water, and sanitation when they are well-informed, have the capacity and opportunity to use the information, understand their entitlements, and can evaluate the quality of services upon which they depend.

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19   Transparency International, *The Anti-Corruption Plain Language Guide*, 2009, p. 44.

Box 4. Useful Guidelines on Public Participation from the Aarhus Convention (1998)

Convention on Access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention, 1998)

Article 6: Public Participation in decisions on specific activities

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) The proposed activity and the application on which a decision will be taken;

(b) The nature of possible decisions or the draft decision;

(c) The public authority responsible for making the decision;

(d) The envisaged procedure, including, as and when this information can be provided:

  (i) The commencement of the procedure;

  (ii) The opportunities for the public to participate;

  (iii) The time and venue of any envisaged public hearing;

  (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

  (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

  (vi) An indication of what environmental information relevant to the proposed activity is available. […]

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public… and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure... The relevant information shall include at least,

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) A description of the significant effects of the proposed activity on the environment;

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

Transparency plus Rights

The term "transparency" does not appear in any of the international human rights treaties. Nevertheless, its importance is recognised implicitly, and its essential elements can be assembled by combining the content of the right to freedom of expression and the right to have access to public information (see Box 5).

Until recently, the right to freedom of expression was interpreted to mean that states should not obstruct the flow of information. Currently, it is understood as a right to seek and receive information. The African Human Rights Commission introduced this interpretation in 2002, and in 2006 the Inter-American Court of Human Rights (IACtHR) ruled unambiguously in favour of the right of access to public information, when it concluded that:

> [B]y expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes

a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.[20]

In addition to underlining the general obligation of states to respect the right to information, the decision is significant because, in line with human rights practice, it requires governments to provide mechanisms that will ensure the right to information can be exercised in practice. In this regard, it is important to highlight certain elements of this decision:

- The right to request information may not be hindered in any way and may not be refused on the grounds that the requesting party has no demonstrable interest in knowing the information in question.

- A corresponding right exists to receive the information (subject to limited exemptions).

- The state has an obligation to reply to every request, whether it provides the information requested or (in limited cases) refuses to do so.

- The right to freedom of expression cannot be considered fully respected where the right to obtain information from the government is not recognised.

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20 Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile,* Judgment of 19 September 2006, paragraph 77. This landmark case, a relatively simple one, concerned a request for information regarding a decision of the Chilean government to allow a United States company to conduct logging operations in an area of native forest. The company was known to have a poor environmental record, and there were suspicions that the government had failed to conduct proper background checks before issuing the permit. The case thus combined the right to information with the right to environmental protection and possible government wrongdoing. (The project was eventually stopped following actions by environmental activists, including a Supreme Court challenge.) The Chilean government had failed to answer a request, filed in 1998, for a copy of a report that should have been produced before the US company was granted a logging permit; even in court the government failed to clarify whether or not this document existed.

- Governments have an obligation to take positive steps to ensure that the right to information can be enjoyed, including (in another part of the judgment) an obligation to establish mechanisms for filing requests (in other words, to adopt an access to information law) and train public officials in how to process requests and respect the right.[21]

Box 5. Freedom of Expression in International Human Rights Treaties

International Covenant on Civil and Political Rights

Article 19 (section 2)

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

African Charter on Human and Peoples' Rights

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

American Convention on Human Rights

Article 13 (section 1)

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

European Convention on Human Rights and Fundamental Freedoms

Article 10

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...)

It is fair to say, with respect to transparency, that there has been fruitful cross-fertilisation between the work of anti-corruption and human rights organisations. Having pressed actively for states to open up public affairs, the anti-corruption and access to information movements can today take credit for the emergence of a legal right that is enforceable in national courts and can be addressed by international human rights monitoring bodies.

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21   Darbishire, ICHRP working paper, 2007.

Between 1946 and 2009, more than 80 national access to information laws (AILs) were enacted around the world.[22] From a human rights perspective and following the Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information,[23] the right of access to information should respect the following key principles:

▪ Access to information is the rule; secrecy is the exception.

▪ The right of access to information should apply to all branches of government (including executive, judicial and legislative bodies, as well as autonomous organs), at all levels (federal, central, regional and local) and to all divisions of international bodies.

▪ The right of access to information should extend to non-state actors that receive public funds or benefits (directly or indirectly); carry out public functions, including the provision of public services; and exploit public resources, including natural resources.

▪ The right of access to information should include a right to request and receive information and a positive obligation on public institutions to disseminate information related to their core function.

▪ The right to request information is independent of a personal interest in that information, and the provision of a justification or reason should never be required.

▪ The instrument or law should include procedures designed to ensure full implementation and ease of use, and an affirmative obligation to assist the requester, provide requested information within a specified and reasonable period of time, and impose no unnecessary obstacles (such as cost, language, form or manner of request).

▪ Exemptions to access to information should be narrowly drawn, specified in law and restricted to exemptions permitted by international law. All exemptions should be subject to a public interest override, which mandates release of otherwise exempt documents when the public benefit of release outweighs the potential public harm.

▪ The burden of proof to justify a denial should always fall on the holder of information.

▪ The instrument should mandate full disclosure, after a reasonable period of time, of any document that was classified as secret or confidential for exceptional reasons at the time of its creation.

▪ The instrument should include clear penalties and sanctions for non-compliance by public officials.

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22   For up-to date information visit: right2info.org/access-to-information-laws.

23   Carter Center, 2008.

▪ The requester should be guaranteed a right to appeal to an independent authority any decision, failure to provide information or any other infringement of the right of access to information. That authority should have power to make binding and enforceable decisions and should preferably be an intermediary body such as an Information Commission(er) or Specialist Ombudsman in the first instance, with a further right of appeal to a court of law.[24]

Fulfilment of the right of access to public information nevertheless requires much more than formal rules: trained and motivated public officials, citizens and civil society organisations that are aware of and exercise their rights; new administrative circuits; and an independent and autonomous implementing agency. Even when these changes have been made, effective monitoring is required from every government agency. For example, when the Mexican Congress enacted the Federal Law of Transparency and Access to Governmental Public Information in June 2002, it suspended the law's application for twelve months to allow the state to make the administrative reforms that were required.

Not only technical issues are involved. Information itself is a form of power, and transparency reforms can change power relations and the distribution of resources. When implementing transparency policies, it is therefore important to understand the incentives of the actors involved because, as they disseminate public information, these policies generate substantial costs that are borne by a limited number of state and private actors. Powerful groups whose reputation may be threatened or compromised have a strong interest in influencing information that is disseminated, blocking access to it or even paralysing the reform process; while the broad public, for whom the benefits are distant, has rather less reason to push for reform. This explains why transparency reforms sometimes proceed slowly, are not sustained or are simply paralysed.

In this context, the application of human rights principles can help promote transparency policies on three levels. First, human rights principles and norms provide additional levers for the enactment of constitutional provisions and domestic laws. Enforcement measures can be applied by national courts and, ultimately, through international human rights bodies. Second, human rights values can energise public demand for information. Since those in authority have little incentive to release sensitive information, pressure for reform must often come from below. For this to happen, people need to become more conscious of their rights and learn to exercise them.

Finally, human rights values, especially the principle of non-discrimination, can reduce the elitism of transparency policies by giving vulnerable and disadvantaged groups better access. Measures that help to achieve this objective might include the translation of more information into indigenous and minority languages, more

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24   Additionally, in June 2010 the OAS published a model access to information law, which can be found (in Spanish) at: www.oas.org/juridico/english/ley_modelo_acceso.pdf.

accessible provision of information (through radio broadcasts, decentralised offices etc.) and the organisation of public information campaigns.

While most countries that have passed access to information legislation have not evaluated its impact or provided detailed information about its performance, the data that have been published so far suggest that AILs are used mostly by those who are already in privileged positions. Perhaps unsurprisingly, disadvantaged groups make use of AILs far less. Forty years after the United States enacted its AIL, journalists and NGOs placed only 10% of requests; most were made by businesses or lawyers.[25] In Mexico, official data show that the information request system was used by a small number of citizens: 10% of requests were made by journalists, 20% by NGOs and 30% by businesses. The data showed that most users of the information request system were specialists, male and had high incomes.[26] This led some commissioners of the Federal Institute for Access to Public Information (IFAI)[27] to express concern about the narrow social constituency of the official information request system and take action to expand access (see Box 6).[28]

A study of AIL use in 14 countries by the Justice Initiative showed that disadvantaged groups were also less successful in using the system. Whereas NGOs received a positive response to 32% of their requests, the rate for representatives of disadvantaged groups was only 11%.[29] These results merely confirm that in most democracies, the asymmetry of information between government and citizen is skewed even more in favour of government when marginalised groups demand information.[30] As stated by the Americas Regional Findings and Plan of Action for the Advancement of the Right of Access to Information, unless specific actions are taken to mitigate these and other structural disadvantages, many will not benefit from their right to access information.[31]

Evidence also suggests that citizens, and particularly disadvantaged groups, are often unaware of the existence of laws on the right of access to information. In India the Right to Information Act (RTI) was enacted in 2005, but knowledge of the law remains poor. A recent report found that only 13% of the rural

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25   Darbishire, ICHRP working paper, 2007.

26   See, for example, Fox *et al.*, 2007.

27   The Federal Institute is the central federal agency charged with ensuring compliance and ruling on citizen appeals to government denials of information requests.

28   The Federal Institute for Access to Information in Mexico and a Culture of Transparency, 2006.

29   Open Society Justice Initiative, 2006.

30   Within Justice Initiative's study, individuals who identified themselves as members of an excluded or vulnerable group were members of a racial, ethnic, religious or socio-economic group routinely subjected to discrimination.

31   The Carter Center, 2009.

population and 33% of the urban population were aware of its existence.[32] Most importantly, India's poor, those most vulnerable to corruption, are the ones who are least aware. According to a study by Transparency International India, less than 1% of people living below the poverty line in Bihar (one of India's most underdeveloped states) knew about the RTI.[33]

Such evidence may encourage a more energetic and progressive reform agenda to prevent discriminatory practices that would include two core human rights standards (availability and adaptability) in the design and implementation of access to information procedures. The application of these standards will highlight how important it is to develop channels that respect the cultural values and practices and are also adapted to the needs of vulnerable groups in order to enable them to seek and receive public information as a basic human right. Recent poverty reduction strategies, such as social cash transfer programmes, have incorporated flexible and inclusive access to information mechanisms that provide models to follow. Some Latin American programmes offer toll-free phone numbers and systems that seek and receive information to help overcome problems of poor literacy, low internet access and the cost of transport. The result is that access to information by disadvantaged users has improved. In Mexico, for example, the flagship conditional cash transfer programme *Oportunidades* incorporated a Citizen Attention Programme (*Sistema de Atención Ciudadana*) for receiving and dealing with complaints. In 2006, it received more than 87,000 requests for information in contrast to the 60,000 information requests directed to the entire executive branch via Mexico's Access to Public Information Law. Moreover, those who requested information under the *Oportunidades* programme are by definition citizens in extreme poverty.[34] This suggests that the adoption of appropriate communication tools can definitely assist marginalised and disempowered groups to access information they need.

Boxes 6 and 7 introduce two strategies for accessing information using a human rights perspective.

These examples show that in order to comply with the access to information requirements of both human rights and anti-corruption law, states need to do much more than simply enact an AIL.

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32   PriceWaterhouseCoopers, undated, p. 38.

33   Transparency International India and CMS, 2008, p. 20.

34   See, Fox *et al.*, 2007.

Box 6. Enhancing Upward Accountability by Democratising Access

Recognising that only a limited number of persons (a male elite) were requesting access to information through the Access to Information Law in Mexico (according to official data, 5% or just 6,000 of the 112,000 users accounted for 50% of all requests), in 2005 the Federal Institute for Access to Public Information (*Instituto Federal de Acceso a la Información Pública*, IFAI) decided to implement the *Proyecto Communidades* to make the right of access to public information more democratic. IFAI's main objective was to identify empowering public information mechanisms that marginalised communities would use. The project involved 116 marginalised communities in nine states of Mexico, which all had limited access to the internet and modern technologies.

An independent evaluation listed a number of positive outcomes:

1) Poor women in the state of Veracruz increased access to social benefits because they learned from information requests that their names were listed for health and housing benefits they had never received.

2) A poor community in the state of Mexico halted a federal construction project on its land after an information request revealed that no environmental impact study had been completed as required by law.

3) Federal prisoners (most of whom are too poor to have a lawyer and easily find themselves behind bars for petty offences) used the AIL to access their personal files. Initially denied access, they appealed and, in a precedent-setting ruling, won access to information rights for all prisoners. 36% of those who asked to see their files were subsequently released.

Source: www.ifai.org.mx/ProyectoComunidades; and Guerrero, 2008.

Box 7. Democratising Access to Public Information: A Gender Perspective

84% of Argentines living in households that benefited from a social programme between 2002 and 2007 agreed that such programmes are used for electoral purposes. 59% agreed that poor access to information inhibited access to social programmes.[1]

In this context, RAZONAR, a grassroots women's human rights organisation, established a system to provide information and receive complaints from social programme beneficiaries in the Municipality of Moreno. Moreno has a population of 380,500 inhabitants and an unemployment rate of 43%; 22% of its households cannot meet basic needs. RAZONAR took into account the greater social vulnerability that women usually face in Argentina because they often have lower incomes than men, experience higher unemployment and are over-represented in low-income occupations.

RAZONAR linked up with a local community radio station to provide information about the range of different social programmes, criteria of eligibility, sums available, frequency and methods of payment, registration procedures and complaints and appeals mechanisms. The programme invited people to contact RAZONAR for information, or to complain about corrupt practices or the quality of the service. RAZONAR compiled the complaints and gave them to the Social Security Fiscal Investigation Unit (UFISES), which is responsible for investigating and prosecuting crimes committed in social programmes. In parallel, the project monitored the complaint process through to judgment.

When RAZONAR won the first case, an order requiring the local government to reinstate a female beneficiary who was excluded on the basis of discriminatory requirements, the case was widely publicised by local radio. It provided a good example of what beneficiaries of social programmes can achieve if they are informed about their entitlements and complaint mechanisms.

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1   *Cruces et al*, 2007.

Source: Gruenberg, 2007.

RECOMMENDATIONS

- **Parliaments should legislate the right to access public information as a fundamental human right without prejudice to the right to privacy and as a precondition for controlling and preventing corruption. Laws should be based on clear principles (some of which are suggested in this report).**

- **Where access to information laws exist, governments should take steps to guarantee that people can effectively exercise their right by training officials, establishing new administrative procedures and creating an independent implementation agency.**

- **Official institutions and civil society and development organisations should focus on strengthening public awareness and support for transparency through advocacy, public awareness campaigns and other capacity-building efforts.**

- **Public officials and civil society and development organisations should give particular attention to the needs of disadvantaged groups and their right to access public information. Positive measures should be context specific. This implies adopting a range of measures, including the translation of information into indigenous and minority languages, decentralising offices and public campaigns that reach the poorest sectors of society.**

ACCOUNTABILITY

Accountability is essentially a relationship between those that are entrusted with and wield power and those affected by their actions.[35] Abstractly, it is a process in which A renders account for his actions to B, because A is under an obligation to explain and justify his actions to B, and/or A is liable to suffer sanctions if his behaviour or justifications do not meet certain standards or B's expectations. Accountability thus characterises a situation in which power is entrusted by a principal to an agent. It compensates for the asymmetry of information that arises when power and responsibilities are delegated. Corruption, by way of bribing or extorting judges, inspectors, legislators, policemen, customs officers and other public representatives, undermines these mechanisms, leaving those with little access to power unprotected.

The anti-corruption movement analyses accountability from three perspectives: diagonal, horizontal and vertical (see Box 8).

International human rights law does not refer directly to the concept of accountability. The international human rights system, however, rests on the idea of rendering account, and on the notion that individuals should be enabled (by the agency of states) to seek recourse if their rights are denied. In consequence, states have a positive obligation to construct institutional arrangements that allow *all* persons – including disadvantaged groups, whose inclusion is the litmus test of universality – access to accountability mechanisms. They have a similar negative obligation not to block any person's access to such mechanisms.

The human rights framework (as set out in human rights treaties that states have themselves agreed to) therefore asserts that states ("duty holders") have an obligation to protect the rights of individuals and provide recourse and justice if rights are violated and that states are answerable for any acts or omissions with respect to this duty. Those in power are thus obliged to explain and justify their actions and (in theory) are subject to sanctions if they fail to fulfil their obligations. This is essentially the notion of human rights accountability.

While all forms of accountability are important to the integrity and quality of decision-making, this section examines particularly the role that "bottom up" accountability (vertical accountability, broadly understood) can play in anti-corruption strategies. It argues that a human rights perspective can deepen the understanding of "vertical accountability" by emphasising the role that civil society and independent institutions can play in monitoring and influencing the behaviour of governments and government officials "from below". It also considers the relationship between

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35   Goetz and Jenkins, 2002.

human rights, resources and accountability[36] and the way rights address the claims of vulnerable and disadvantaged groups. We look below at different forms of accountability before discussing these issues in more detail.

Box 8. Definition of Accountability: The Anti-Corruption Perspective

The concept of accountability is that individuals and organisations (public, private and civil society) are held responsible for executing their powers properly. In theory, there are *diagonal*, *horizontal* and *vertical* forms of accountability.[1] The following examples apply to the public sector.

Diagonal accountability occurs when citizens use government institutions to elicit better oversight of the state's actions, and in the process engage in policy-making, budgeting, expenditure tracking and other activities.

Horizontal accountability subjects public officials to restraint and oversight, or "checks and balances" by other government agencies (courts, ombudsman's offices, auditing agencies, central banks) that can call into question, and eventually punish, an official for improper conduct.

Vertical accountability holds a public official accountable to the electorate or citizenry through elections, a free press, an active civil society and other similar channels.

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1   The concepts of horizontal and vertical accountability were originally established by O'Donnell, 1999.

Source: Transparency International, *The Anti-Corruption Plain Language Guide*, 2009.

Horizontal Accountability Systems: Necessary But Not Sufficient

When anti-corruption advocates speak of horizontal accountability, they are mainly referring to a state's internal controls. When they speak of vertical accountability, they are mainly referring to a state's internal controls, whereas vertical accountability usually refers to elections and the many forms of influence on government that independent social actors exert (e.g., citizens, civil society associations, the media). Horizontal accountability is implemented by institutions within the state that control each other by establishing checks and balances. In most countries, the system of checks and balances is complex. In the anti-corruption and good governance fields, a series of specialised anti-corruption institutions (notably anti-corruption offices, special anti-corruption prosecutors and General Auditor's offices) have been created. From a human rights perspective too, all these institutions can be considered accountability mechanisms because they safeguard, deliver or restore people's rights.

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36   We use the concept "resources" broadly, to refer to all the social services, goods and natural resources a person needs to lead a dignified life without sacrificing capacities. This section analyses the theory and practice of social accountability, adapting a framework developed by Newell and Wheeler, 2006.

The UNCAC requires states to create and maintain a body or bodies to prevent and combat corruption through law enforcement. However, specialised anti-corruption institutions have a mixed record in preventing and combating corruption. Factors that influence their performance include their institutional arrangements, their functional autonomy, the degree to which they enjoy political support, the sourcing of their finance, their rules for selecting and appointing officers and their enforcement powers.

Though undeniable progress has been made in establishing anti-corruption institutions, experience shows that their mere existence does not guarantee better horizontal accountability.[37] If they are to control abuse of power effectively without competing with or neutralising each other, they need to co-ordinate their efforts and operate like a network. More importantly, as indicated by the UNCAC in Articles 6 and 36, anti-corruption institutions need to be truly independent, free from undue influence, accountable themselves and have the necessary mandate and resources to exercise their duties adequately. States also have to ensure that anti-corruption bodies are known to the public and enable corruption to be reported, including anonymously (UNCAC, Art. 13). Their effectiveness depends on the effectiveness of institutions around them, notably enforcement agencies. If the latter are incompetent, the reports and rulings of anti-corruption offices will have limited effect.[38]

While it has been vital to establish horizontal accountability institutions, reform efforts to date have tended to focus too much on building their capacity and efficiency. Too little attention has been given to incentive structures and underlying power relations that drive and feed corruption in individual societies. These informal relations often undermine or subvert formal accountability functions. Indeed, the institutions responsible for developing, supervising and enforcing regulatory frameworks and rights are frequently captured by powerful groups precisely because they would otherwise represent a threat. In situations of structural corruption, horizontal accountability reforms alone are unlikely to reduce levels of corruption or address its deeper causes.

Considering this, anti-corruption NGOs have insisted for a long time on the importance of vertical accountability mechanisms. Civil society in general, and marginalised groups in particular, have a key role to play in influencing the design of anti-corruption institutions and corruption reforms, lobbying for them and monitoring and supporting their operation.

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37   See for example, UNDP Human Development Report 2002; O'Donnell, 2003; Grindle, 2004; Waldrauch, 1998.

38   O'Donnell, 1999.

Social Accountability: New Forms of Action against Corruption

As already indicated, vertical accountability is traditionally associated with free and regular elections by means of which citizens retain or replace those to whom they delegate political authority. At the same time, analysts seem to agree that voting does not control the behaviour of public officials.[39] Elections legitimise appointment to political office; they do not – and are not designed to – regulate the subsequent performance of that office. As we have seen, horizontal forms of accountability partly fulfil that function. However, vertical accountability, understood from a human rights perspective as "bottom up" social accountability, makes an indispensable complementary contribution.

Human rights organisations have developed numerous innovative social accountability mechanisms involving a wide range of social actors (civil society associations, NGOs, co-operatives, universities, social movements). Most are associated with public participation.[40] Indeed, in many of its expressions, social accountability practices are largely about promoting effective participation in public life. For the purposes of this report, however, social accountability refers to citizens' initiatives to combat or prevent acts of corruption that involve public officials and programmes (and non-state agents associated with them).

Many kinds of social accountability initiatives are practised. Professional associations lobby politicians on the basis of ethical principles that underpin their professional values. Individuals or professional bodies resort to litigation to clarify principles, to challenge fraud or to protect their rights. Editors debate public policy issues in newspapers or on television. Individuals air their views in letter pages of the same newspapers or write personally to their political representatives or protest in the streets. Journalists investigate and publish information about criminal or corrupt behaviour by politicians and other public figures. Religious leaders take up moral issues such as corruption and sometimes ask governments to take action to address them. Business leaders also lobby informally or publicly for improved standards on matters such as corruption because they harm the business environment.

All of these practices can have effect. In this report, however, we look more closely at forms of social accountability that involve popular action by or on behalf of vulnerable and disadvantaged groups. For human rights, the involvement of such groups is a key indicator of the inclusivity that underpins human rights claims to universality and compliance with the principles of equality and non-discrimination. Human rights practice seeks to reverse the norm in most societies, which is that vulnerable and disadvantaged groups by definition are excluded from or less engaged in decision-making and public affairs than citizens who are well-educated, well-connected or well-off.

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39   See, for example, Przeworski *et al.*, 1999.

40   See p. 4, above.

In addition, vulnerable and marginalised groups are sharply and disproportionately affected by corruption, which tends to deprive them of resources that they particularly need, including access to healthcare and education services, housing, jobs, basic income, water and sanitation, and land.

Social accountability initiatives mobilise the public, including disadvantaged groups, in support of human rights. They tend to put those directly affected by human rights violations in a leadership role. While these bottom-up mechanisms do not replace traditional anti-corruption institutions or other mechanisms of horizontal accountability, because they focus on the entitlements of groups who experience discrimination and poverty, they illuminate consequences of corruption that would not necessarily be highlighted by other forms of accountability mechanisms. As a result, they widen the field of action as well as bring new actors into play, which can force states to consider larger issues of inequity and social injustice and take action to tackle forms of corruption that specifically harm the well-being of people who are marginalised and poor.

The integration of human rights in anti-corruption programmes implies looking more closely at discrimination, the interests of vulnerable and disadvantaged groups and the development of accountability mechanisms that both focus on their protection and create opportunities for such groups to act themselves to claim rights to which they are entitled. Whereas the anti-corruption and good-governance agenda has traditionally concentrated on establishing lines of accountability between power-holders and the public, a human rights perspective would increasingly shift the focus of power-holder accountability to the content of public policy. Accountability systems would increasingly need to show not only that their processes had integrity but also that they responded to norms of social justice.[41]

Examples of Social Accountability Actions

Communities and civil society organisations have developed many ways to hold governments accountable beyond voting at elections. They include protests, civil disobedience, lobbying and advocacy, citizen advisory boards and budget analysis. Boxes 9 through 11 introduce three cases in which victims of corruption mobilised, either by themselves or in alliance with NGOs, to achieve transparency and accountability.

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41   "It is the question of what power-holders are being held accountable for that is the dimension along which accountability is being most dramatically reinvented": Goetz and Jenkins, 2005.

Box 9. Collective Action for the Right to Housing

Public housing programmes often generate corruption, when the number of households entitled to receive a subsidy exceeds the number of places in subsidised units, for example, or when public officials have discretion to determine who is eligible for support.[1] Bribes may be paid to gain access to housing by those who do not meet the housing policy requirements and those who do. In a context of fixed supply and lack of accountability, the most common practice is to operate two lists: one for honest applicants and another faster queue for those who make payoffs.

In Kenya, widespread land grabbing and corruption among bureaucrats and politicians in charge of particular programmes have characterised public housing programmes since the 1990s. Because procedures are opaque, fraud has been widespread. Public land already designated for other purposes was allocated; multiple allocations of the same piece of land have been made. In this context, tenants associations formed the Shelter Committee of *ILISHE Trust*, which brought together community based low-income groups to challenge and expose the illegal allocation of public land. (ILISHE is the Kiswahili equivalent of a Legal Awareness Programme.)

Council tenants in Kenya have adopted several strategies to secure legal recognition of their right to adequate housing. They have involved victims of corruption in tenants campaigns, formed an umbrella organisation, used the media and public forums to gain support, articulated criticisms and debated policy and taken direct action to block illegal construction.

This case shows how disadvantaged social groups can challenge corruption through the media, by gaining media attention and using formal and informal strategies. The campaign also made use of international human rights treaties in the absence of national legislation granting the right to adequate housing. Though the actions of the Shelter Committee have not yet changed the practices and procedures of the government's Housing Development Department, they have helped reduce some of the worst damage caused by corruption.

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1   Rose-Ackerman, 1999.

Source: Musembi, 2006.

Box 10. Fighting Clientelism and Realising Social Rights

In 2002, the Federal Government of Argentina implemented a conditional cash transfer programme (CCTP) called "the Heads of Households Programme" (*Programa Jefas y Jefes de Hogar Desocupados*). It targeted almost two million people who had been made unemployed following one of the worst institutional and economic crises in Argentina's history. Because of its scale and tight timeline, and clientelism, the Programme proved a huge institutional and political challenge.

The *piqueteros* (picketers) movement was a well co-ordinated social movement of unemployed people that campaigned for accountability, social inclusion and the right to an adequate standard of living. Called *piqueteros* because they organised road blockades, the movement used a variety of tactics to pressure the government to deliver the CCTP and other social programmes directly to beneficiaries instead of via political brokers.

The *piqueteros* also campaigned through Municipal Consultative Councils which were established to improve the Programme's transparency, monitoring and accountability.

By combining formal and informal campaigning tactics, the *piqueteros* improved the living conditions of their members, expanded their political influence and had a direct effect on the state's financial contribution to "the Heads of Households Programme".

Box 11. Using Information and Gandhian Tactics to Secure the Right to Food

In India, public service corruption is endemic, notably in the Public Distribution System (PDS). The PDS provides food rations distributed through "ration shops" at highly subsidised rates to poor people. Shopkeepers are granted licences to run the shops and receive a commission from the Government. Corruption occurs in records of inputs and outflows: shopkeepers frequently forge the signatures or thumbprints of individuals entitled to rations and subsequently siphon them off.

In response, *Parivartan*, a people's movement that promoted participatory democracy, launched a campaign to eradicate corruption from the PDS by socially auditing all the ration shops. It used various strategies, including public mobilisation and use of the right to public information. On 29 August 2003, for example, 300 people from New Delhi met to file applications under the Right to Information Act (2005). Additionally, Parivartan held public hearings and employed Gandhian passive resistance tactics when their demands were ignored. People would wait at government offices indefinitely, for example, until officials replied to their requests for information.

Despite support from the public and inventive campaigning, the food system continues to operate without transparency and some *Parivartan* volunteers have been threatened or physically assaulted by ration dealers. The fight against corruption in the PDS continues.

Source: Svampa and Pereyra, 2003, pp. 88–98.

Each of these cases combines formal and informal, collaborative and confrontational strategies applied in unstable social and political environments. It is important to note that such campaigns usually involve cycles of conflict and negotiation because this shows that social accountability initiatives recognise the role of institutional channels, even if they tend to think of themselves as "outside" such channels.

The three cases examined are associated with the struggle by marginalised groups to gain access to essential resources and the public services they need to ensure their right to an adequate standard of living, including food, housing, water and sanitation. These resources are managed by states and increasingly by private companies as well.

Accountability, Human Rights and Access to Resources

Corruption impacts the lives of vulnerable and disadvantaged people, and undermines their human rights, by distorting the rules (i.e., those regarding allocation, inclusion and accountability) that regulate access to distribution of public resources in favour of corrupt interests (see Figure 1). *Rules of allocation* define the criteria for distributing public resources. *Rules of inclusion* define who participates (how and when and in what processes). *Rules of accountability* determine the responsibilities of each actor involved and mechanisms for enforcing victims' rights. Corruption subverts all three, and the more this subversion diminishes these rules, the less space there is for human rights. Conversely, the more support that human rights principles provide between resource-distributing entities and the public resources they distribute, the more space there is for the strengthening of the rules of allocation, inclusion and accountability.

Figure 1. The Impact of Corruption on Human Rights with Respect to Distribution of Public Resources
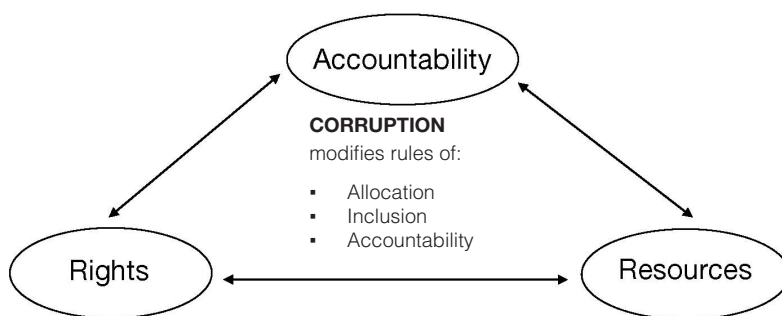
Adapted from Newell and Wheeler, 2006.

Corrupt practices particularly affect the distribution and allocation of public services (such as healthcare, housing, water and sanitation), whether managed by the state or devolved to private companies. The management of these resources involves different control institutions, which can differ in their levels of transparency, participation, bureaucratisation, etc. The history, characteristics and performance of each accountability institution will influence the effects of corruption on inclusion (who participates, how, when, and in which processes) and accountability (the responsibilities of different actors involved and mechanisms for enforcing victims' rights).

The consequences of this are practical. For a corporation, it is more difficult and expensive to influence the decisions of an Ombudsperson who is likely to be very prominent in the public eye than the decisions of an anonymous public official in a regulatory agency. From this same standpoint, marginalised groups are likely to extract sensitive information more easily from the Ombudsperson's office than from the bureaucracy of the regulatory agency. It follows that the regulatory agency is a better corruption target.

By this same logic, the mobilisation of groups affected by corruption in sectors associated with key resources for a country's economy will run up against greater government and private resistance. In other words, when larger interests are in play, anti-corruption protests may be criminalised, and those who protest may be physically threatened or even killed. Paradigmatic examples include the drilling of oil in Nigeria and soybean cultivation in Argentina.

In terms of developing effective strategies or calculating the risks of taking action against corruption, essential questions arise. How is power wielded? To what extent are those with decision-making power subject to legal and actual checks and balances? Who controls the resources? How strategic are the resources in question? (How much are they worth? Are they vital to the interests of those who corruptly control them?) The Extractive Industries Transparency Initiative (EITI) has developed an interesting accountability mechanism regarding access to natural resources, although it does not focus on the use of resources to deliver essential services, which is the most relevant issue for a human rights approach. (See Box 12.)

The above points suggest that a technocratic and apolitical approach to accountability has little chance of yielding results favourable to marginalised groups. Corruption entrenches itself on a foundation of deeply unequal power relations. An accountability strategy that integrates human rights must take this into account and identify who is entitled to a right and who has the obligation to ensure that right is respected, but also what levers of influence are available in reality to those who oppose corruption and what risk of repercussions or repression they face if they take action.

The human rights framework helps to identify more precisely who are the main parties responsible for acts of corruption that affect human rights and who has

responsibility to protect the rights of those affected and remedy the harms that have been done. From this viewpoint, governments have obligations both as public-service providers and market regulators, while private companies have responsibilities as public-service providers and a duty to avoid activities that, for example, put health or the environment at risk. The precise definition of who is entitled to claim rights and who bears obligations is a core element of a human rights–based anti-corruption policy.

The responsibility of private companies is an issue that must be approached with some care. Under international human rights law, states are primarily responsible for human rights because international human rights treaties address states and are adopted and ratified by states. Albeit slowly, this traditional focus is gradually changing. A great deal of work has been done in recent years to develop a clearer understanding, in law and in practice, of the degree to which companies should be subject (and should subject themselves), directly and indirectly, to international human rights law.[42]

In this context, human rights laws can be used to demand that companies render account of their activities indirectly through the state, which is obliged to regulate them. In a defined range of circumstances (which need to be described in more detail than we can provide here), companies can also sometimes be held directly accountable. Though the analysis of corruption within the private sector falls outside the scope of this report, it can be said that the evolution of human rights standards, in combination with the international anti-corruption legal framework, is likely to create new opportunities for holding companies directly to account when they act corruptly or abuse human rights, particularly where a direct connection can be established between acts of corruption and human rights violations. This is a new field of research and activism for both human rights advocates and anti-corruption professionals. It invites experimentation and creativity from both.[43]

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42   See, for example, the ICHRP report *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, 2002, and the work of John Ruggie, Special Representative of the UN Secretary General on human rights and transnational corporations and other business enterprises.

43   A number of NGOs around the world have used the OECD Guidelines for Multinational Enterprises to hold multinationals accountable for acts of corruption or human rights abuses. For more information, see www.oecdwatch.org.

Box 12. The Extractive Industries Transparency Initiative (EITI)

The EITI is a coalition of governments, companies, civil society groups, investors and international organisations that supports improved governance and transparency in the extractive sector by verifying and publishing company payments and government revenues from oil, gas and mining. The process is overseen by representatives of government, companies and national civil society organisations.

To become an EITI Candidate, a country must meet four sign-up indicators. These include the development of a work plan that documents how the country will achieve EITI Compliance. The plan must be discussed and agreed by key stakeholders. To achieve EITI Compliant status or extend Candidate status beyond two years a country must complete EITI Validation, a quality assurance process. This independently assesses progress and identifies what further measures are needed to strengthen the EITI process. Validation is carried out by an independent Validator selected by the Multi-stakeholder Group using a methodology set out in the EITI Rules Book.

If the EITI International Board considers a country to have met all the indicators in the Validation grid, the country will be recognised as EITI Compliant. If a country has made good progress but does not meet all EITI requirements, the country may apply to retain its Candidate status for a limited period. Where validation shows that no meaningful progress has been achieved, the Board will revoke the country's Candidate status. Azerbaijan, Liberia and Mongolia were the first countries to complete EITI Validation. Many other countries are currently preparing to complete it.

Around 50 of the world's largest oil, gas and mining companies support and actively participate in the EITI process. Civil society organisations participate in the EITI directly and through the Publish What You Pay campaign, which is supported by over 300 NGOs worldwide.

Source: www.eiti.org.

Documentation and Budget Analysis

One effective way to restrict corruption and protect human rights (and economic, social and cultural rights in particular) is to give the public and civil society organisations better tools for assessing social programmes in which they have an interest. Documentation and budget analysis are two areas in which anti-corruption and human rights organisations could usefully collaborate.

Human rights organisations have considerable experience documenting violations. Documentation implies a process of strategic and systematic gathering of quantitative and qualitative data for various purposes, including research (to understand root causes and consequences), advocacy, and the collection of facts about victims and violators of human rights. Documentation also includes work on indicators as well as investigations in support of strategic or public litigation. It can play a key role in efforts to strengthen accountability. Sharing experiences on how

to prepare and make effective use of documentation is a natural entry point for collaboration between human rights and anti-corruption organisations.

Budget analysis (a methodology for inquiring into government priorities by breaking down and comparing official expenditures on different items) and analysis of official statistical information are powerful tools for increasing transparency and compliance with human rights obligations. The UNCAC requires states to take measures to promote transparency and accountability in the management of public finances by implementing procedures for the adoption of the national budget and timely reporting on revenue and expenditure (UNCAC, Art. 9(2)). Human rights organisations are increasingly exploring these tools, but anti-corruption organisations have more experience of using them and can assist the former to develop their skills. The International Budget Partnership has launched the Open Budget Initiative to promote public access to budget information and the adoption of accountable budget systems. Its most recent survey has shown that in most countries the public does not have access to the information it needs to participate meaningfully in the budget process and hold government accountable.[44] Governments need to improve the transparency of their budgetary processes by making timely and comprehensive information available during all four of the main phases of a budget process: formulation, approval, execution, and evaluation and audit.[45]

Litigation and Accountability

Various human rights institutions and procedures exist that can hold states accountable for their policies and actions. Domestic mechanisms include those provided by National Human Rights Institutions (human rights commissions, ombudsmen, *defensores del pueblo*, procurators for human rights). International mechanisms include those provided by the United Nations Human Rights bodies and a range of regional bodies. These are generally non-adversarial and non-judicial mechanisms. Several judicial mechanisms for accountability and redress might also be used to make accountable those who commit acts of corruption. They include regional human rights courts such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights.

Domestic litigation can oblige states to take action against corruption; this approach is supported by the UNCAC. Article 35 requires states to ensure that entities or persons who have suffered damage as a result of corruption have the right to initiate legal proceedings against those responsible in order to obtain compensation. By connecting acts of corruption to violations of human rights,

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44   See the Open Budget Index 2008. 80% of countries scored poorly in assessments of the amount and kind of public information they provided in their budget documents. See: www.openbudgetindex.org.

45   International Budget Partnership, 2009, pp. 23–28.

new channels of action can be created, especially if corruption can be challenged through the many national, regional and international mechanisms that exist for monitoring compliance with human rights.[46] The effectiveness of litigation, however, is limited and will not always provide a solution. To be successful, cases require evidence of high quality and good co-operation between victims, lawyers and human rights advocates. Success also usually requires the services of a professional legal team, which can be expensive. On the other side of the equation, courts may be corrupt, laws may be poorly drafted, the judicial system may be weak. Success is not guaranteed in the best of circumstances, and those who most require protection are usually least able to launch expensive and time-consuming court cases. Mobilising and empowering grass roots organisations could address some of these challenges. Some human rights organisations have gained considerable experience of public (or strategic) litigation that could be shared and disseminated.

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

Due to the limitations of litigation, exacerbated by the difficulty of gathering evidence in corruption cases, this approach should be seen as one component of a broader strategy designed to encourage social accountability and public participation.

In sum, a human rights approach to accountability requires moving beyond the concept of "vertical accountability" to a broader concept of "social accountability". This requires different social actors to implement different forms of accountability throughout the entire political cycle: controlling the performance of public service providers through a report card system, organising street protests against an unfair law, bringing corrupt individuals to justice or raising corruption issues in the context of elections. In a range of ways, social accountability techniques can put pressure on politicians and bureaucrats to be accountable to their constituencies and not just on election day.

While a human rights understanding of social accountability mechanisms (understood as a "bottom up" approach) would diminish opportunities for corruption, this type of accountability mechanism requires compliance with human rights norms. Success depends on whether or not human rights – the right to political participation, freedom of expression, freedom of assembly,

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46   *Corruption and Human Rights: Making the Connection*, ICHRP, 2009.

freedom of association and the right to a free media – are guaranteed. All these rights are vital to efforts to combat corruption. For example, where governments permit information to flow freely (free media), it should become easier to identify and denounce cases of corruption. However, since reporters and editors can also be bribed or may not be independent of governmental or political power, protection of this right is not enough. Governments should also guarantee conditions in which a diversity of independent media can flourish and should protect the political independence of public service media.

Protection of the freedom to form and affiliate to formal and informal associations, such as human rights organisations, is also a vital element of anti-corruption efforts. Political rights and the fight against impunity are also at the core of the fight against corruption. Where political rights are not effectively protected, opportunities for corruption increase. The effective exercise of political rights counterbalances state power and its abuse, including corruption. In a repressive regime where political participation is curtailed and accountability is poor, for example, the rights to life, liberty, security of the person and freedom of expression and association are all less likely to be respected. In addition, the suppression of rights essential to political participation, such as freedom of expression and association, may increase opportunities for corruption. Promoting political freedoms and effective participation are likely to improve transparency and access to information. Here again are new opportunities for collaboration between those who work against corruption and those who advocate for human rights standards.

Horizontal accountability strategies have not become less important than they were, and reforms that will make public institutions more responsive to the demands of marginalised groups remain crucial. However, to dismantle well-entrenched corruption systems, it will be necessary to explore new complementary forms of accountability that modify unequal power relations and include the immediate victims of corruption. These new approaches can complement the initiatives taken by other organisations in the anti-corruption movement, like Transparency International, who give priority in their agendas to the implementation of vertical accountability strategies.

Recommendations

- **Given the limits of horizontal accountability, donors, anti-corruption advocates and other relevant actors should promote and support social accountability strategies. In this, they should acknowledge the potential of formal and informal, co-operative and adversarial approaches.**

- **Anti-corruption advocates should explore "bottom-up" accountability mechanisms, including human rights monitoring and efforts to link corruption with human rights violations. Such initiatives can mobilise a broader spectrum of people and put those directly affected by human rights violations in a leadership role.**

- **Donors and anti-corruption advocates should involve disadvantaged groups in vertical accountability strategies with the aim of empowering them to claim resources and rights to which they are entitled.**

- **Beyond formal lines of accountability, public officials, development agencies and anti-corruption advocates should focus on power-holders' accountability in relation to the content of public policy. Evaluation should take account of norms of social justice and the fulfilment of rights.**

- **Anti-corruption activists can benefit from using the different national, regional and international accountability mechanisms that exist to monitor and enforce compliance with human rights. Strategic litigation is one approach in this context.**

II.   HUMAN RIGHTS AND SPECIFIC ISSUES OF THE ANTI-CORRUPTION AGENDA

This chapter shows how the integration of a human rights perspective could strengthen anti-corruption work in specific areas. It concentrates on four areas in particular: measurement and indicators, public procurement, political financing and provision of essential services.

MEASUREMENT AND INDICATORS

Data are essential to the design of programmes that combat corruption: to understand its causes and processes, to disaggregate its forms and its incidence in different institutions. Since corruption is inherently secretive, effective action depends to an unusual extent on accuracy of understanding.

Rapid growth in computing power has triggered a data revolution in the social sciences, which numerous institutions have harnessed to analyse and track trends in poverty, violence, inequality, human rights, happiness and a myriad of different variables.[47] In the field of governance, anti-corruption organisations have actively contributed to this process and in the last fifteen years have developed an impressive battery of diagnostic and analytical tools. The measurement of corruption is often based on surveys aimed at capturing the experiences and/or perceptions of citizens, households, public officials and businesses. Transparency International's Corruption Perception Index is the paradigmatic example, yet there are many other corruption indices, such as the World Bank governance indicators and others.

More recently, the adoption of sophisticated qualitative and quantitative techniques has allowed organisations to generate more specific data and design more targeted strategies. A study of 17 countries in Latin America, published by Transparency International and UNDP in 2006, described over 100 tools in terms of their scope, methodology, purpose and impact.[48] The same report, however, showed that only 20% of these tools disaggregated their data by gender and poverty. It is in this respect that a human rights approach could usefully contribute to the quality of anti-corruption programmes.

Research undertaken with a human rights focus would examine corruption's connections to discrimination, poverty and gender bias. As shown in the first ICHRP report on corruption, a careful analysis of acts of corruption would enable anti-corruption professionals to identify violations of specific rights – and in many instances to take more effective action against those responsible, using the logic and legal tools that are available under the human rights system.[49]

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47   Carr Center, 2005; Landman and Carvalho, 2009. See also: Landman and Schudel, ICHRP Working Paper, 2007.

48   Transparency International and UNDP, 2006.

49   See *Corruption and Human Rights: Making the Connection*, ICHRP, 2009.

In recent years, measurements and indicators relating to corruption have evolved into measurements of anti-corruption or integrity. For example, the Global Integrity Index produced by Global Integrity does not measure corruption, but rather the incidence of principles and institutions that fight it: openness, accountability, and citizen oversight. These types of measurement and indicators are the most relevant for a combined anti-corruption and human rights approach.

UNDP and Global Integrity address the issue of measurement and indicators, listing good practices in the use and design of measurement mechanisms that may be adapted to take human rights into account (see Box 13).

Box 13. UNDP and Global Integrity's Guide to Measuring Corruption

Build your anti-corruption strategies and the indicators you need to measure progress in a modest, incremental fashion:

- Unpack what you are trying to measure into discrete concepts.

- Attempting to track the impact of corruption on the achievement of macro development goals such as the UN MDGs or implementation of the UNCAC is a dead end. The concepts are too broad and the linkages between "corruption" (without further definition) and those policy outcomes are nearly impossible to trace.

- Gravitate, instead, to measuring corruption in a particular sector, branch of government or portion of society with more distinct, but important, measures that feed into desired policy outcomes (i.e., a particular section of the UNCAC or component element of a specific MDG target). For example, measuring corruption in hospital procurement and its impact on health-related MDGs will be far more useful than tracking the impact of "corruption" on the achievement of all of the MDGs.

Consider using existing data sources to construct indicators that capture the specific experience of poorer groups and women:

- Many relevant data sources already exist for constructing pro-poor and gender sensitive indicators, though they may not be widely used.

- For instance, the indicator "level of trust in the police among the poor" could be easily measured using a household survey asking questions about both the level of trust and the economic status of respondents.

- External assessments generated by international "experts" are likely to exclude the experiences of those groups most impacted by corruption: the poorest and most marginalised.

- It is possible to unveil the distinct experience of marginalised communities by disaggregating survey data along poverty, ethnicity or gender lines.

Source: UNDP and Global Integrity, 2008, pp. 44–45.

Drawing on the description earlier in this report of upward accountability and the inclusion of disadvantaged groups, adding a human rights perspective would

lead anti-corruption organisations to actively involve such groups in their research and analysis. Where disadvantaged groups themselves help form and implement research agendas, they are far more likely to support the policy recommendations that result. Research and data collection can be an element in the empowerment of such groups and the emergence of new strategies of action.

PUBLIC PROCUREMENT

In general, governments spend roughly 15–20% of their national budgets on the contracting of goods and services.[50] Where resources are limited, each extra dollar paid above the lowest possible price reduces the service that can be provided. While the average surcharge paid by governments due to corruption is not precisely known, Transparency International estimates that systematic corruption can add at least 20–25% to the cost of government procurement.[51]

Corruption in public procurement distorts the efficient allocation of public resources. It depresses the volume of services available and channels public resources towards projects and services that do not meet people's needs but serve the private interests of officials and private companies. As a result, a number of organisations have developed instruments for promoting transparency in public procurement, including the World Bank, the OECD, and Transparency International. The OECD has developed a set of Principles for Enhancing Integrity in Public Procurement that uses a "Toolbox" of public procurement techniques to measure progress that member and non-member countries have made towards their implementation. The techniques include public procurement reviews and analyses.[52]

In addition to indicators for assessing the risk of corruption, some organisations have developed vertical accountability tools for monitoring individual contracting processes. Transparency International's Integrity Pact (IP) is one of the most important of these (see Box 15). Countries as disparate as Mexico, Germany, Pakistan and Indonesia have adopted IPs. Because it is so adaptable, the IP approach has been applied to numerous contracting processes, from airport construction to concessions for solid-waste collection.

Specifically, the adoption of a human rights perspective has potential to enhance anti-corruption work in the context of public procurement in four ways.

First, a human rights approach may lead to the involvement in monitoring activities of a broader range of actors, including those most likely to be affected by the outcomes of bidding processes. Their involvement would open new

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50   OECD, 2006.

51   Ibid.

52   See www.oecd.org/document/5/0,3343,en_2649_34135_41883909_1_1_1_1,00.html.

spaces for participation, such as public hearings, and would increase the legitimacy of public procurement decisions. The argument for involving such groups becomes especially compelling where public services have been privatised or when large public infrastructure projects (such as dams) are in question. In both instances, human rights tend to be at risk, and corruption tends to be a serious problem, increasing the likelihood of social conflict.

Experts disagree on how far it is realistic and necessary to expect ordinary citizens, and particularly disadvantaged groups, to participate in technically complex processes such as public procurement. The challenge is to create opportunities for participation while allowing communities to entrust technical oversight to specialised professional and civil society groups. The representation of interested or disadvantaged groups is a further challenge. In nascent or struggling democracies, there is also a danger that the elite may capture the process and collude with corrupt interests for personal gain at the expense of other group members.

Second, a human rights approach would emphasise *content* and *outcomes*, not just process.[53] If the current focus of IPs is on the transparency and integrity of public contracting decisions, adoption of a human rights approach would complement this by asking whether decisions met social needs and achieved essential social objectives. This would imply viewing the contracting process as one phase in a larger operation that begins with a political decision (e.g., to provide or improve a service, to build or repair public infrastructure) and ends with the execution of that decision. Monitoring would thus consider a wider range of issues, including the purpose of the project and its justification, the quality of feasibility and impact studies and the quality of the final product (including whether it meets availability and accessibility standards).[54] Because the entire project cycle would be scrutinised by a broader spectrum of social actors, opportunities for corruption could be significantly reduced.

The inclusion of vulnerable groups in monitoring services or projects that affect them would add further value in the ways already discussed.[55]

Third, in a range of cases, taking a human rights perspective would encourage authorities to empower disadvantaged groups to compete in procurement processes themselves. This would imply the removal of barriers that impede such groups from engaging in business activities and the adoption of affirmative action strategies (so called "pro-poor procurement" practices), for example. Beyond the direct social benefits, the increased participation of disadvantaged groups could diversify market structures and, in an ideal world, break up economic monopolies, sapping one of the underlying causes of corruption.

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53   See discussion of social accountability, p. 26, above.

54   For a definition of these standards see the discussion of provision of essential services, p. 49, below.

55   See discussion of social accountability, p. 26, above.

Fourth, adding human rights to the mix could broaden the range of criteria against which companies are assessed in procurement processes. Anti-corruption professionals have focused so far on promoting anti-corruption pledges and the adoption of anti-bribery policies and practices as conditions of participation in contracting processes. However, a company's record on and commitment to human rights should no doubt be considered an additional condition of eligibility. For this purpose, it is useful to take into account existing initiatives that monitor economic, environmental and social performance of companies, such as the *Global Reporting Initiative* (GRI).[56] Their reports could inform public contracting processes as to a company's level of commitment to human rights, anti-corruption and sustainability in general.

Box 14. Promoting Transparency in Public Procurement, UNCAC, Article 9(1)

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

    (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

    (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

    (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

    (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

    (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

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56   For more information, see www.globalreporting.org.

Box 15. Transparency International's Integrity Pacts

IPs are binding agreements between a government or government department and private companies that bid for public contracts. Under an IP, the government is responsible for ensuring that the process for awarding contracts, including bidding conditions, is transparent. It guarantees that no public official will demand or accept bribes. Companies undertake that they will not offer bribes or collude with competitors to obtain contracts and will denounce their own or competitors' employees if they violate these conditions. Bidders must disclose all commissions and similar expenses that they pay to anyone in connection with the contract; sanctions apply in cases of violations. Through this self-regulation strategy, IPs establish rules, agreed by both government and bidders, which modify the incentives and opportunities for bribery during public bidding processes. While reinforcing the law, IPs seek gradually to remove the influence of political and economic interests in public contracting in societies where corruption is a structural problem.

Civil society organisations play a crucial oversight role in relation to IPs. In most cases, civil society is represented either by the national chapter of Transparency International or by a "social witness" invited by Transparency International on the basis of two attributes: technical competence and ethical integrity. The civil society representative is present throughout implementation or during the most relevant stages and has access to all documents. Although the scope of civil society's role may vary, it has real powers in its oversight because it confirms that the tender does not favour some companies over others, confirms public access to all relevant documents and reviews the objectivity of the decision, etc. In many cases, the civil society representative increases the quality of public accountability by publishing a report on the contracting process. Some IPs have appointed institutions as witnesses: consumer associations, universities, or NGOs. A limited number of IPs have held public hearings in order to open up discussion of contracting terms and conditions.

Source: www.transparency.org/global_priorities/public_contracting/integrity_pacts.

POLITICAL FINANCING

Party and election financing is another concern of the international anti-corruption agenda; first identified by organisations such as the International Institute for Democracy and Electorate Assistance (IDEA), the National Institute for Democracy, and Transparency International; and subsequently taken up by the World Bank, the Inter-American Development Bank and other international institutions.

Corruption in political finance allows special interests to influence the results of elections, or subsequent political decisions. Such interests can be legal businesses, drug barons or the mafia. When corrupt interests take control of political decision-making, the effects may be far-reaching and, at the extreme end of the spectrum, may compromise the integrity of the state and the delivery of its most fundamental services and functions. This is what has been called "state capture" whereby the policy and legal environment of the state is shaped to the captor's advantage at the expense of the rest of the population.[57]

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57   Kaufmann *et al.*, 2000.

Seen from this perspective, corruption in political finance violates or undermines respect for human rights. When voters are forced to sell their votes, corruption violates the freedom of expression and the freedom to vote in free and fair elections. The fairness of the electoral process is further undermined when the electoral outcome is defined by access to resources rather than policies. When some voters influence the elections more than others because they can offer bribes, this directly violates the principle of one person one vote and discriminates against the poor.

In addition, political corruption has an indirect impact on social and economic rights because it distorts public policy-making. Laws are adjusted to favour certain groups, corrupt interests receive privileged treatment when they bid for contracts, pay taxes or violate labour laws. Politicians turn a blind eye to environmental harms. In consequence, on a different scale, public policies meet the needs of a secretly privileged elite.

Reform efforts in this area have so far focused on establishing rules that prevent political parties from accepting money that will compromise the integrity of policy-making. In many cases, the emphasis is on capping political contributions and expenditure. In some instances, countries publicly subsidise elections in order to diminish the influence of private money. Other reforms have supported and enhanced the monitoring and enforcement roles of electoral courts or agencies, or regulated access to the media. In recent years, reformers of political finance have also sought to enhance political accountability and transparency by strengthening citizen and state oversight.

In support of transparency, some anti-corruption organisations have implemented vertical accountability strategies to control party and candidate funding in election campaigns and to raise awareness about the need to regulate political financing. For example, the *Crinis Project*, a joint project of Transparency International and the Carter Center, compared the transparency of political financing in eight countries in Latin America using qualitative and quantitative indicators.[58]

While these efforts have certainly put the issue of electoral financing and reform of political finance law on the agenda, electoral corruption continues to be an obstinate problem in both developed and developing countries. Adding human rights considerations to anti-corruption approaches could address some of the challenges by providing development agencies, parliamentarians, activists and other actors with additional arguments and refocusing and expanding the scope of reform efforts.

A further challenge is that the focus on transparency and accountability has concentrated attention on the need for horizontal and vertical accountability, but has not successfully resolved the problem that in most societies access to political participation – whether as candidate or voter – is highly unequal. Adding a human rights focus to anti-corruption programmes in this area might cause organisations

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58   Transparency International and the Carter Center, 2007.

to promote rules and practices that would increase the participation in political life of marginalised and disadvantaged groups, from women to minorities.

Human rights standards reaffirm the right of all to participate in political life on equal terms (see Box 16), but the principle of equality and non-discrimination also imposes specific obligations on government to ensure that disadvantaged and marginalised groups have equal access to minimum levels of resources.

To address the barriers that prevent disadvantaged groups from participating in political processes, reforms must consider the access to resources of disadvantaged groups, political education and capacity-building and the effects of asymmetries of power on the opportunity costs of participation.

Political financing is an area in which anti-corruption and human rights organisations can mutually reinforce their work. While human rights standards lay out the criteria and obligations attached to running fair elections, unlike anti-corruption organisations they have generally not addressed the issue of electoral financing. The experience of human rights organisations with regard to political participation complements the technical expertise of anti-corruption groups. Pragmatic co-operation and an effort to share knowledge would move policy discussion forward and could lead to the development of strategies that would strengthen accountability and improve political participation.

Human rights organisations may also contribute to discussions of clientelism. This term is often defined by anti-corruption advocates as a form of political mobilisation that exchanges money for votes during electoral campaigns. From a human rights standpoint, however, patron–client relations are based on an asymmetric relationship of power, which permits one person to control the behaviour of another by deploying his or her greater status, influence or resources. This broader relational analysis extends beyond electoral processes and is relevant to the implementation of social programmes (see next section), and the behaviour of government institutions, labour unions and the private sector.

The practice of clientelism is quite widespread among companies, particularly where they are in conflict with marginalised groups because of their activities. Companies copy the state's patron–client model as a way of fragmenting social mobilisation. Imitating the state and often making use of the same state clientelistic networks, some companies design their own social programmes in order to create dependent relationships with local organisations and thereby deactivate collective action.[59]

In this context, consideration of human rights can widen the perspective of anti-corruption programmes that confine their anti-clientelism work to elections. Human rights advocates, acutely sensitive to inequity, could share strategies and tools that would assist anti-corruption programmes to develop a sharper and broader analysis of patron–client relations and social dependence.

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59   See Arellano-Yanguas, 2008; Newell *et al.*, 2006; Arjjumend, 2005.

Box 16. The Right to Political Participation

The right to participation affirms that all citizens should be entitled to engage in decision-making processes that affect them and, in particular, to take part in the conduct of public affairs, directly or through chosen representatives. The major political expressions of the right to participation are the freedom to vote and stand for elections, the right to equal access to public services and the freedoms of association and assembly. These rights are enshrined in several human rights treaties (including the ICCPR, Art. 25; CEDAW, Art. 7; ECHR, Art. 3 of the First Protocol; ACHR, Art. 23; and ACHPR, Art. 13).

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

With regard to the right to vote, the state has the duty to ensure that individuals who are eligible to vote can exercise this right freely. Regardless of the electoral system in place, persons entitled to vote must be free to vote for any candidate without undue influence or coercion of any kind that may distort or inhibit the free expression of their will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference. States must protect voters from any form of coercion or compulsion and from any unlawful or arbitrary interference with the voting process. (See HRC, General Comment No. 25.)

The right to equal access to public services affirms that everyone has the right to equal access to the public services in his or her country and that access should be based on objective and reasonable criteria (See HRC, General Comment No. 25, paragraph 23). Access to positions in the public service should be based on an objective and reasonable appointment process. All distinctions should be on the basis of objective and reasonable criteria, without discrimination. If individuals are refused employment or lose their jobs in the public service because they will not bribe, their right to equal access to public service and their right to equality and non-discrimination are both violated as a result of corruption.

The right to freedom of association affirms that individuals may join together to pursue collective interests in groups, such as sports clubs, political parties, NGOs and corporations. The freedom of association affirms the right to form and join associations freely; but, in order for the right to be enjoyed, associations themselves must be free from excessive interference by governments.

Provision of Essential Services

Corruption keeps millions of people in poverty because it deprives them of access to essential public services – such as health, education, or water and sanitation. Corruption is a cause of under-provision; it affects the quality of services, increases their cost, wastes materials, generates fictitious expenditures and projects or simply destroys the service and makes it unavailable. When corruption erodes the provision of clean water or regulation of medicines, or causes patients to be denied treatment because supplies have been siphoned off, several human rights are violated, from the right to life to the right to health.[60]

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60   See *Corruption and Human Rights: Making the Connection*, ICHRP, 2009.

Furthermore, in many parts of the world, social welfare programmes are used by politicians to maintain or develop their support networks. Through arbitrary allocation of resources, they can favour certain groups and discriminate against others. In such circumstances, characterised by dependency and illegitimate demands, the patron provides protection, services and favours to his "clients" in exchange for social, political and electoral support. In the absence of effective service provision by the state, people in need are trapped in dependency because it is the only way they have to obtain essential services.

In public service delivery, extortion can take many forms. For example, to be assigned to a social programme, potential beneficiaries may be expected to turn over part of the assistance they receive, which may drastically reduce their income. Sometimes beneficiaries are forced to perform humiliating or servile tasks in exchange for registration in a social programme. In the case of women, access to social programmes may be mediated by sex.

Gender is a crucial issue. Clientelism is not gender neutral. The incidence of (physical, psychological, emotional and sexual) violence in the context of clientelistic relations reveals the double burden (patriarchy and dependence) that women living in poverty face in their search to secure a living and meet their basic survival needs. For this reason, in many parts of the world women and girls tend to bear the burden of corruption most severely because they lack access to resources, are marginalised from decision-making, lack voice and participation and are ultimately the primary users of essential services.[61]

Anti-corruption organisations have given much attention to corruption in the context of clientelism because it prevents people from accessing essential services to which they are entitled. Some have developed programmes that establish complaints systems and citizen monitoring schemes. The *Water Integrity Network*, for example, convenes official and non-governmental stakeholders to support anti-corruption activities in the water sector by sharing best practice, capacity-building, joint advocacy, etc.[62]

Notwithstanding this wealth of experience, the inclusion of a human rights perspective could be particularly helpful to anti-corruption advocates working on the provision of services because human rights organisations have considerable experience in promoting state obligations and state accountability with regard to health, housing, education, water and sanitation and other economic and social rights. Under human rights law, states have accepted a wide range of obligations to provide or regulate public services that deliver social, economic and cultural rights.

Were human rights accountability mechanisms and state obligations to be applied in anti-corruption programmes, this would clearly enhance their potential impact. In addition, human rights law sets out a range of standards

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61   Transparency International, 2010.

62   See www.waterintegritynetwork.net.

that anti-corruption advocates could draw upon to determine the degree to which corruption has serious effects on the quality and delivery of services.

Under international human rights law specific standards have been developed in regard to the delivery of economic, social and cultural rights, including:

Availability—This implies that public services are sufficient in quantity and quality to meet the needs of the community in question.

Accessibility—A standard requiring that services are allocated and provided to the whole community without discrimination and are within reach (implying physical and economic access, but also access to information).

Acceptability—The principle requires that services must respect local values and cultures and should be acceptable in form and content to the community in question.

Adaptability—This implies that services should be adapted to the needs of communities or individuals in different social and cultural settings and to changing local and national contexts.

Corruption has an impact on each of these standards, but different kinds of corruption impact each standard differently, and the elements of each standard are also distinctive.[63]

Adding human rights tools to the techniques that anti-corruption organisations already use could, therefore, help to broaden and sharpen analyses of corruption in service provision. These tools would also assist anti-corruption advocates to manage certain risks (e.g., the risk that anti-corruption measures may inadvertently harm disadvantaged groups). This point has been acknowledged by Transparency International in a working paper on human rights and corruption, which states:

> *Breaking up informal water provision networks that use corruption and connections to exist may deprive poor communities from accessing water, violating their rights to health and an adequate standard of living. A similar problem may arise when informal settlements that have relied on bribes and government neglect to occupy land are forcibly evicted without a viable alternative that enables them to realise their right to adequate housing.*[64]

Were anti-corruption advocates to consider entitlements and human rights standards in their work on service provision, it is likely that they would give more attention to the need to establish complaint and other accountability mechanisms.

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63   For a fuller explanation, see *Corruption and Human Rights: Making the Connection*, ICHRP, 2009, p 48.

64   Transparency International, 2008b.

Institutions that deliver essential services should have procedures that allow citizens to present complaints, address operational failures or report alleged crimes (e.g., corruption, mistreatment, illegitimate demands for money or favours in return for registration). Such mechanisms should offer complainants a variety of options, including impersonal and anonymous channels (e.g., free phone lines and mail) and should guarantee the confidentiality of whistle-blowers. A complaint system should be adequately staffed and have the resources it needs to meet demand. It should be physically accessible, including to disadvantaged groups who may live at a distance from city centres, and should be culturally appropriate. Operators need, therefore, to be trained to receive, reassure and inform those who contact them. The service should be free or affordable for the poor, and speakers of minority languages and the illiterate should be made welcome. Services should also be gender-sensitive.

Box 17. Not Merely a Social Service: Health and Education as Human Rights

The **right to health** is included in several human rights treaties. Most notably, Article 12 of the ICESCR established the "right to the highest attainable standard of physical and mental health", defined as the "right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health" (CESCR, General Comment No. 14). While this right is broad, it does not imply that people have a right to be healthy. The right to health includes healthcare but also the underlying determinants of health, such as safe drinking water, adequate sanitation, adequate supply of safe food, nutrition, housing, occupational health, environmental health and access to health-related information. Another core component of the right, which the State must guarantee under all circumstances regardless of available resources, is access to maternal and child healthcare, including family planning, immunisation against major infectious diseases, appropriate treatment of common diseases and injuries, provision of essential drugs, adequate supply of safe water and basic sanitation and freedom from serious environmental health threats.

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

RECOMMENDATIONS

Measuring Corruption

- **When developing measurement methodologies, policy-makers and other anti-corruption advocates should involve groups whom corruption particularly affects. Their involvement would build public support for anti-corruption policies and would empower disadvantaged groups, creating space for new strategies of vertical accountability.**

- **Policy-makers, anti-corruption advocates, donors and researchers should identify the links between corruption and discrimination and violations of human rights. Human rights indicators would enrich anti-corruption baseline assessments and the monitoring and evaluation of anti-corruption programmes and shed light on the human rights impact of those programmes.**

Public Procurement

- **Officials, donors and anti-corruption activists should emphasise the content and outcomes of bidding processes, not just processes of approval, and ensure that decisions meet social needs and essential social objectives. Monitoring should consider a wider range of issues, including the purpose of the project and its justification; the quality of feasibility and impact studies; and the quality (including availability and accessibility) of the final product.**

- **When they monitor contracting processes, officials and other parties should encourage and facilitate public participation, not least by disadvantaged groups who are directly affected.**

- **Officials, donors and anti-corruption activists should assist disadvantaged groups to compete in contracting processes as entrepreneurs and remove barriers that exclude such groups from business activities or from participation in contracting processes.**

- **Officials and other parties should require companies to report on their human-rights performance when they apply for contracts, as well as their anti-bribery policies and practice. The reports prepared by companies under the GRI could constitute a relevant source of information for contracting processes.**

Political Financing

- **When monitoring election campaigns and political funding, anti-corruption advocates, journalists and donors should explain the threat political corruption poses to human rights, in order to build and mobilise support for reform among the public, including disadvantaged groups.**

- Civil society activists and donors should seek to diminish the corrupt influence of private money on elections and examine the merits of prohibiting corporate funding, establishing caps on individual contributions and expanding public electoral subsidies. Here, again, using a human rights discourse may assist in building political support.

- Policy-makers and other anti-corruption actors should establish horizontal and social accountability mechanisms that identify and act to prevent vote-buying practices.

Provision of Essential Services

- Anti-corruption activists should draw on human rights experience and practice regarding both the provision of economic, social and cultural rights such as the rights to health, housing, education, water and sanitation and accountability mechanisms and state duties. The human rights legal framework provides tools for enforcing social, economic and cultural rights and preventing corruption.

- Use of human rights standards with regard to service provision (availability, accessibility, acceptability, adaptability) can sharpen analysis of corruption and assist officials and anti-corruption professionals to establish essential services that meet public need, free of corruption.

- A focus on entitlements will draw the attention of anti-corruption programmes to accountability mechanisms, including effective complaint procedures.

III. THE GENDER PERSPECTIVE

Early anti-corruption programmes assumed that corruption was gender-neutral and affected men and women in the same way. On this assumption, policies concerning corruption applied equally to men and to women.

Over the last 30 years, however, new analyses have shown that women – and also other groups subject to discrimination, such as indigenous peoples and ethnic and sexual minorities – suffer distinctive forms of exclusion and oppression and that public institutions reproduce gender inequality if policies are not put in place to prevent this. Where women are not in a position to challenge corruption, clientelism or patriarchal practices, they tend to be marginalised (i.e., less involved than men in decision-making and less able than men to access resources) and are often subject to exploitation and sexual abuse or violence.[65]

Though it is now widely understood that corruption impacts women and men differently, at present very few anti-corruption programmes promote a gender perspective.[66] The inclusion of human rights criteria in the design and monitoring of such programmes would cause anti-corruption organisations to take account of gender and be aware more generally of minority concerns.

Box 18. What Does It Imply to Incorporate the Gender Perspective?

According to the ILO Gender Equality Tool, "Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal of mainstreaming is to achieve gender equality". From the foregoing, it is evident that mainstreaming is far from merely adding a "woman's component" or a "gender equality component" into a project, but encompasses the active involvement of women and men, bringing their unique experiences, knowledge and interests to a particular project. The ultimate goal for gender mainstreaming is to ensure the "transformation of unequal social and institutional structures into equal and just structures for both men and women".

Source: International Labour Organization (ILO), 2002, quoting ECOSOC.

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65   "Patriarchy" refers to systems of masculine dominance in the public or private spheres that perpetuate men's privileges and the subordination of women. Patriarchal values portray male power and privilege as normal and natural, rather than socially constructed.

66   See, for example, Schimmel and Pech, 2004.

MORE WOMEN, LESS CORRUPTION?

In the late 1990s, a new wave of studies examined the relation between corruption and gender and the contribution that women could make to the fight against corruption. Statistical and econometric analyses produced by the World Bank, among others, showed that public institutions that employed more women were less corrupt.[67] This conclusion seemed to be supported by studies that correlated rates of corruption with the proportion of women holding legislative or executive office in different countries[68] and research on public institutions that employed only women (as a strategy for combating corruption).[69] Both analyses presumed that women are less corrupt, more upright and more honest than men. But are they?

Though tempting, this argument presents several problems.[70] For one, the notion that women are more virtuous than men was used for centuries by philosophers and politicians from Ancient Greece to Modern Europe to keep women out of public life. It would be ironic if the struggle to include women in public institutions were to be justified in terms of a stereotype of women (as mothers, homemakers and caregivers) that excluded them from political power for centuries.

It also presents methodological difficulties. Although there is generally an inverse correlation between the number of women in public office and the incidence of corruption, this does not imply causality. The exclusion of women from political and economic power may account for their exclusion from corrupt networks as well, since access to political power and opportunities for corruption are managed via networks of men. It may be that gender relations prevent women from being as corrupt as men.

Opportunities for women to engage in acts of corruption are also limited by "sexual controls" (the danger of being discredited for inappropriate sexual behaviour). This was the experience of women traffic police in Peru, who refused to accept bribes for fear they would be perceived as prostitutes.[71] Whether this attitude will persist remains to be seen.

Another aspect of gender merits more attention. Does corruption have a different impact on women than on men? Do public officials impose different kinds of corrupt practices on women than on men? The following section briefly explores these questions.

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67   Dollar *et al.*, 1999. See also Sung, 2003.

68   Ibid.

69   Several governments have "feminised" notoriously corrupt agencies. In Peru, for example, the government created an entirely female traffic police force in 1998, while the Mexican Customs Service formed an all-female anti-corruption force in 2003.

70   On the dangers of trivialising gender in anti-corruption programmes, see Woodford-Berger, 2007. See also Alhassan-Alolo, 2010.

71   See Goetz, 2003.

Box 19. Gender Mainstreaming Framework

Below are seven elements of a framework, based on work by Pietronella Van den Oever for GENESYS.

(1) Be aware of gender issues

Organisations should make their staff aware of gender differences in society (e.g., divisions of labour, rights, responsibilities, access to resources), apply this knowledge in their policies and have reduction of gender imbalances as an objective.

(2) Address gender issues in the institution's activities

Mere understanding is insufficient. Organisations should take steps, through practical changes, to remedy gender imbalances they identify.

(3) Capacity to formulate gender-focused questions (e.g., on issues such as division of labour, rights, responsibilities) and link them with development objectives

Organisations should be able to assess the potential benefits and negative consequences that their projects, actions and policies will have on men and women.

(4) Be equipped to carry out gender and social analysis

Good gender analysis depends on asking the right questions. Organisations should acquire the expertise required to collect relevant data and use them to determine what factors cause specific groups of women and men to be advantaged or disadvantaged.

(5) Apply the findings of gender and social analysis

Organisations should equip themselves with the expertise to apply their gender analysis, translate findings into operational tasks and implement them.

(6) Monitor and evaluate

Monitoring and evaluation enable organisations to judge what difference their interventions have made to the lives of target groups. In the context of gender-awareness, they enable organisations to understand the extent to which their interventions have addressed the different needs of women and men.

(7) Report, learn, and adapt

The outcomes of interventions should be reported and their implications for future policy analysed. Gender-sensitive reporting can assist all decision-makers to understand how programmes and policies affect gender relations and affect women and men differently.

Source: Van den Oever, 1994; and Alhassan-Alolo, ICHRP Working Paper, 2007.

The Impact of Corruption on Women

Women are over-represented among the poor and under-represented in decision-making bodies. This is partly explained by the fact that women are paid lower salaries than men in both the formal and informal economy. In addition, they have fewer opportunities to access education, land, credit and other productive assets as a result of multiple forms of discrimination. Consequently, when corruption reduces state revenues and the resources available for public services, women are disproportionately affected because they depend more than men on the quality and provision of public services and because their access to certain services is inferior.

Due to structural discrimination and gender norms, women assume more domestic responsibilities than men and carry the main burden of caring for children and older adults. They also need special care and medical attention during pregnancy and when they give birth. For these more specific reasons, they use and depend more on public services. When corruption is widespread, and women are forced to pay bribes to obtain a hospital appointment, to enrol their children in school or to receive a prescription for an older adult in their care, they are not only exposed more often to corruption, but also the bribes disproportionately hurt their budgets. When there is corruption in the water and energy sectors, women are also hit hard as they are often burdened with the task of seeking water and fuel for their families.

The effects of corruption on women go beyond their limited access to social services and public goods. Considering that women suffer from multiple forms of discrimination, they face more repression in societies dominated by corruption. When societies are not run on merit but by corruption, women are less likely to make decisions or increase their representation in the executive and legislative branches of the government. Judicial corruption will reinforce gender discrimination; moreover, women have fewer resources to pay bribes to gain access to the justice system. Many non-formal or parallel decision-making processes have no checks on corruption, which compromises women's access to justice in other ways. Trafficking often involves the corruption of border officials, police and members of the judiciary. Undocumented women migrants, who may lack identification and are often subject to (sexual) violence, are obviously hindered in seeking protection from courts.[72]

Women are also exposed to corruption that involves forms of physical and sexual violence or coercion, in and outside the home. A study of sexual violence in Botswana's education system (2001) revealed that 67% of the women surveyed reported having been sexually harassed by their professors. 11% had considered dropping out of school for this reason, while 10% reported that they had agreed to have sexual relations because they feared their grades would be affected.[73]

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72   See *Irregular Migration, Smuggled Migrants and Human Rights: Towards a Coherent Policy*, ICHRP, 2010.

73   See Chr. Michelsen Institute, 2006.

The Need for Gender Sensitivity in Anti-Corruption Work

Despite the fact that corruption affects men and women differently, anti-corruption strategies rarely incorporate gender issues systematically. This can have a negative impact on the strategy, in particular when anti-corruption strategies are founded on particular assumptions of gender roles. For example, in some societies, cultural constructions of maleness and femaleness ascribe different forms of identity to men and women. Men are expected to be assertive, for example, while women are expected to be submissive, shy or quiet. Such stereotypes can undermine the effectiveness of universal (cross-gender) anti-corruption programmes: for instance, if women are expected to act submissively they may fail or refuse to report acts of corruption or condone corrupt practices of colleagues; and if men feel entitled and are expected to act assertively, this may increase the impunity of corrupt male officials. Anti-corruption programmes need to take account of gendered expectations and patterns of behaviour in order to ensure that their outcomes are both effective and do not reproduce patterns of gender bias themselves.

Similarly, because in many cultures women are expected to be "well-behaved" at all times, the denial of privacy or confidentiality to women who are involved in corruption cases can do great harm to their reputation. The procedures of anti-corruption organisations and prosecutions also need to take account of such consequences.

Box 20. Corruption and the Trafficking of Women

Trafficking relies on corrupt networks that cut across all branches of government, in countries of origin and transit as well as destination. It involves local acts of corruption (issuing travel, residency and work documents for kidnapped women, arranging houses of prostitution in destination countries) and high-level corruption that prevents the effective regulation and application of laws against the exploitation and trafficking of human beings. Judges, lawyers, police, diplomatic personnel, and many other kinds of officials have been involved in trafficking cases.

A study of the criminal justice system in Nepal conducted by the Centre for Legal Research and Resource Development and The Asia Foundation-Nepal showed that 21% of women who had been trafficked or raped reported that the suspected perpetrators had been released before investigation was complete and that, in most cases, the victim's testimony had been ignored. In 60% of cases, the victims had not been told when to attend court. If victims did appear to testify, 56% of those interviewed stated that they were subjected to offensive interviews and intimidating interrogation by the police and judicial personnel and that they received unfair treatment from the judges.

Source: Centre for Legal Research and Resource Development and The Asia Foundation-Nepal, 2000.

In this regard, following the GENESYS methodology (see Box 19), the gender sensitivity of anti-corruption operations can be evaluated by asking the following questions:

▪ Are agencies aware that gender differences (in the division of labour, rights, responsibilities and access to resources) may underlie attitudes to corruption? Do they incorporate gender differences in their policies?

▪ Do they have distinct advocacy programmes for men and women?

▪ Do they monitor differences in the way their programmes harm or benefit men and women and the rights of men and women?

▪ Do they apply the findings of gender research in their policies and operations?

▪ Do they monitor and evaluate their policies and operations in terms of gender, in order to understand the extent to which the organisation addresses the different needs of women and men?

Box 21. An Empirical Investigation of Gender Mainstreaming in Ghana

For this project, ICHRP conducted an empirical analysis in Accra. It revealed that the way national anti-corruption agencies/organisations were constituted in Ghana prevented them from mainstreaming gender concerns in their operations and policies.

For instance, the Serious Fraud Office (SFO) was established by an Enabling Act of Parliament (Act 466, 1993) "to prevent, investigate and prosecute any act leading to economic or financial loss to the State". In interpreting its mandate, the organisation is guided by the 1992 Constitution. The level of gender sensitivity in their work is quite limited. The SFO, for instance, has no gender desk, does not design gender-specific advocacy messages for men and women and does not design gender-specific programmes, approaches or policies to prevent, prosecute or investigate corruption.

The record of other national agencies visited – the Ghana Police Service, Commission on Human Rights and Administrative Justice, Auditor General's Department, National News Agency and the National Commission for Civic Education – was similar. None systematically incorporated gender issues in their corruption policies or addressed gender in their operations. None routinely undertook research into the impact of their programmes or operations on men and women or monitored and evaluated their anti-corruption work in terms of gender. The Ghana Police Service had established a Women and Juvenile Unit (WAJU) in all ten regional capitals, as well as some districts, to deal with violence against women and abuse of their human rights. Though its mandate would allow work on a range of abuses, including corruption, interviewees indicated that WAJUs mainly address cases of physical abuse.

Source: Alhassan-Alolo, ICHRP Working Paper, 2007.

RECOMMENDATIONS

▪ **When analysing corruption, policy-makers, anti-corruption advocates, donors and researchers should use gender-specific data in order to better understand the particular impact of corruption on women and its association with other crimes against women, such as trafficking. This would help those designing and implementing anti-corruption strategies to consider the rights of women and take account of the connections between different forms of organised crime and their impact on women.**

▪ **Policy-makers and other organisations working on corruption should combine their anti-corruption strategies with commitments to reduce discrimination against women and to empower women to effectively exercise their rights. To this end, anti-corruption organisations should seek to co-operate with women's organisations.**

▪ **Public officials and other anti-corruption organisations should create specialised accountability mechanisms, including complaint mechanisms, for women. These should guarantee and facilitate women's access to essential services and protect women who are at risk of extortion or abuse.**

▪ **When designing gender-sensitive anti-corruption strategies, policy-makers and other anti-corruption organisations should create participatory planning and monitoring processes focused on and involving women. Strategies and implementation processes should address asymmetries of power and enhance women's voices. Moreover, male policy-makers in particular should assess their own prejudices and privileges to avoid reinforcing unequal gender relations when designing and implementing social policies.**

IV. ON TENSIONS BETWEEN ANTI-CORRUPTION AND HUMAN RIGHTS PRACTICE

The first ICHRP report on corruption showed how acts of corruption affect the enjoyment of human rights and often violate rights. The current report argues that human rights principles can contribute usefully to anti-corruption programmes.

Why then, if they have complementary skills and interests, have human rights and anti-corruption organisations not collaborated more regularly? To an extent, it is because anti-corruption organisations were perceived to work with governments and to be more "official", whereas human rights organisations have a reputation for being adversarial. It is also because many anti-corruption specialists find the language and concepts of human rights alien and abstract and feel that "human rights approaches" do not necessarily provide practical solutions. There are good reasons to bring the two movements closer together; however, collaboration will require both sides to overcome differences of vocabulary and practice.

A particular issue is that on occasion anti-corruption practitioners have argued that human rights principles impede effective anti-corruption law enforcement, while human rights advocates sometimes claim that certain anti-corruption practices violate human rights principles. These "tensions" reflect the constant unease that characterises relations between law enforcement and human rights. In fact, a quite narrow range of concerns arise that are specific to corruption; most involve procedures of investigation and prosecution.

At the root of these claims is a law enforcement argument. As corruption has become more entrenched or more sophisticated, some anti-corruption advocates have argued that more robust and more intrusive law enforcement procedures are required, not least because acts of corruption are harder than most offences to prosecute successfully since they occur in secret, usually involve many accomplices, often have no direct victims and rarely leave a clear trail of evidence. The consequence is that corruption is extremely difficult to prove and prosecute.

Infringements of human rights have been identified predominantly in three situations:

(i) When the formulation of the offence of illicit enrichment violates the human rights principles of presumption of innocence and burden of proof and the guarantee against self-incrimination;

(ii) When special investigative techniques violate the rights to privacy and a fair trial;

(iii) When asset recovery procedures clash with property rights and with presumption of innocence.

Although this chapter examines these three issues in some detail, it should be emphasised that conflicts occur only in extreme circumstances. In most cases and in the majority of states, it is possible to reconcile the offence of illicit enrichment and the principle of the presumption of innocence, use special investigative techniques in a manner that respects privacy rights and apply asset recovery and confiscation procedures in accordance with property rights. In broad terms, it can be said, therefore, that the tensions between anti-corruption and human rights have been exaggerated. While it is true that some anti-corruption practices could violate human rights, in most actual cases anti-corruption practices are carried out in conformity with the law while respecting human rights.

Box 22. Relevant Human Rights Principles

Right to a fair trial.

Every individual is entitled to equality before courts and tribunals and to a fair and public hearing by a competent, independent and impartial tribunal established by law. The right to fair trial, also called the right to procedural guarantees in trials, or right of due process, is composed of a broad range of rights which provide for a fair, effective and efficient justice system. (UDHR, Art. 10; ICCPR, Art. 14.)

Presumption of innocence.

Any person charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he or she has had all the guarantees necessary for his or her defence. (UDHR, Art. 11; ICCPR, Art. 14(2).)

Guarantee against self-incrimination.

Every person is entitled to remain silent and not to be compelled to testify against himself or to confess guilt. (ICCPR, Art. 14(3)(g).)

Right to privacy.

Family, home, correspondence, honour and reputation are the main aspects of private life but by no means the only ones. Other specific aspects of privacy include personal data protection, control over one's name, sexual privacy and searches and surveillance. All persons have the right to be protected against arbitrary or unlawful interference with their privacy and family life, whether this interference comes from state authorities, individuals or companies. (UDHR, Art. 12; ICCPR, Art. 17.)

Right to Property.

Everyone has the right to own property; no one shall be deprived of his or her property arbitrarily or deprived of it except for reasons of public utility or social interest and according to the forms established by law, and then on payment of compensation (UDHR, Art. 17).

Illicit Enrichment and the Principle of Presumption of Innocence, Burden of Proof and the Guarantee against Self-Incrimination

Illicit enrichment (also called unexplained or excessive wealth) may be defined as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.[74] This offence directly addresses a difficulty of anti-corruption law enforcement: that the prosecution is required to prove participation although physical or other evidence is very difficult to provide in corruption cases, which are by definition secret and leave no clear paper trail. The notion is that a *prima facie* case of corruption can be established when a person's enrichment is disproportionate to his lawful income.

For these reasons, a number of states, particularly in Latin America and Asia, have included the crime of illicit enrichment in their criminal law. Other states, including the United States, the United Kingdom, and South Africa, reject this offence on the grounds that it conflicts with constitutional rights. The concern rests on the fact that the offence does not require the prosecution to prove the actual commission of a corrupt act but presumes the act based on an unexplained and disproportionate increase of wealth in relation to the accused person's declared or lawful income. The accused is then asked to justify the increase. The procedure, it is argued, reverses the burden of proof (generally placed on the prosecuting party), presumes guilt, and violates the guarantee against self-incrimination.

Described in these terms, the offence of illicit enrichment seems clearly to contravene human rights standards. In fact, the way this offence is applied in practice shows this is not necessarily so.

Illicit enrichment does rely on presumption of fact and law; yet presumption of this sort has been accepted by every legal system. The European Court of Human Rights (ECtHR) had the opportunity to address this issue in the case of *Salabiaku v. France*[75] and accepted presumption on two conditions (provided it has reasonable limits and is supported by other corroborative evidence):

(i) Presumption should not be automatic;

(ii) The defence must have opportunity to rebut it.

In the case of illicit enrichment, the presumed facts are that the accused's income or property are disproportionate to his or her salary and other lawfully earned income and that the additional income originated in acts of corruption committed while in public office. Because presumption is not automatic, it is therefore for

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74   See also *Corruption and Human Rights: Making the Connection*, ICHRP, 2009.

75   ECtHR, *Salabiaku v. France*, Application no. 10519/83, Judgment of 7 October 1988.

the prosecution to prove the facts are well-founded. In other words, it must show that the property of the accused does exceed his or her salary level and other lawfully earned income and must apply traditional law enforcement methods to prove criminal activity by gathering evidence, records or documents; identifying witnesses and tracing property or funds. The threshold of proof is that required to prosecute any other crime. If these standards are met, it can be said that the elements of the offence are proved by the prosecution and that the offence does not violate principles of human rights.

In addition, the accused must have the opportunity to rebut the presumption. With respect to his or her unexplained wealth, the accused may provide a reasonable explanation and only needs to raise a reasonable doubt as to his or her guilt.

Furthermore, in many countries public officials are under a contractual obligation to declare and justify sources of income that do not derive from their employment. Under disclosure rules, they are required to declare outside activities, employment, investments, assets and any substantial gifts or benefits that might create a conflict of interest. If accused of illicit enrichment, therefore, officials are only being asked to comply with their disclosure obligations, albeit in the context of a criminal proceeding.

A second argument is that illicit enrichment undermines the guarantee against self-incrimination because the accused is asked to provide oral or written evidence to exculpate his or herself. However, this guarantee is not absolute, and it has been argued that courts are entitled to draw inferences from the silence of a defendant. The European Court of Human Rights has stated that a court may draw common sense inferences from the silence of the accused when it evaluates the evidence, provided the prosecution has made out a *prima facie* case.[76] If the prosecution's evidence is sufficiently strong that it is reasonable to ask an official to explain how he or she acquired disproportionate assets, failure to speak "may as a matter of common sense allow the drawing of an inference that there is no explanation and the accused is guilty".[77]

Of course, if an accused is prosecuted for illicit enrichment on weak evidence and the court's judgment depends mostly on the (in)capacity of the accused to explain his or her wealth, it may be said that the burden of proof has shifted and that the accused has not been considered innocent as required by law. Illicit enrichment may include acceptable presumptions but these must be shown to be reasonable by the prosecution and may subsequently be rebutted by the accused by means of reasonable explanation.

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76   ECtHR, *John Murray v. U.K.*, Application no. 18731/91, Judgment of 8 February 2006, paras. 47 and 51.

77   Ibid., para. 51.

SPECIAL INVESTIGATIVE TECHNIQUES, THE RIGHTS TO PRIVACY AND FAIR TRIAL, AND THE PROHIBITION OF ARBITRARY ARREST

It is commonly assumed that in corruption cases normal investigative techniques are simply not effective and special investigative techniques, such as undercover operations and electronic surveillance, are required.[78] Electronic surveillance is often preferred where operations involve risks for the investigation or investigators.

States must ensure that sanctioned investigative techniques do not encroach upon human rights. Special investigative techniques must not break the law and, in particular, must respect the right to a fair trial and the right to property. Electronic surveillance (such as wire tapping, interception of telecommunications and access to computer systems) must normally be approved by a court. Under no circumstance can electronic surveillance be ordered solely on the authority of the police, the prosecution service or an anti-corruption law organisation.

When conducting undercover operations, law enforcement officials must be careful not to open themselves to charges of incitement (entrapment); that is, they must avoid influencing a person to commit an offence that he or she would not otherwise have committed. In many jurisdictions, entrapment is a valid defence against criminal guilt. The European Court of Human Rights, for example, overturned one bribery judgment because it accepted that a defendant had been incited by undercover agents to accept a bribe, thus violating his right to a fair trial.[79] The court concluded that, to avoid claims of entrapment, it should be shown that:

> *(i) The investigators have reasonable grounds to suspect the target or targets of involvement in a certain kind of offence, or at least the investigators have reasonable grounds to suspect people frequenting a particular location to be thus involved; and*
>
> *(ii) The investigators are duly authorised to carry out the operation in compliance with appropriate Codes of Practice etc.; and*
>
> *(iii) The undercover agent/s do no more than provide the target or targets with an unexceptional opportunity to commit the offence.*[80]

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78 Undercover operations may be defined as investigations that involve use of an assumed name or cover identity to penetrate a criminal organisation or gather evidence. See UNAFEI 2001, p. 232 citing US Attorney General Guidelines on FBI Undercover Operations Revised 11/13/92.

79 ECtHR, *Ramanauskas v. Lithuania*, Application no. 74420/01, Judgment of 5 February 2008.

80 Ibid., 152.

Special investigative techniques are particularly useful when dealing with sophisticated organised criminal groups because it is dangerous and difficult to gain access to their operations and gather evidence for use in prosecutions. For these reasons, states are permitted to use special techniques to investigate corruption in their territories and to allow such evidence to be admissible. Such techniques do not automatically violate the rights to a fair trial and to property, but adequate and sufficient safeguards against abuse must be in place.

ASSET RECOVERY AND PROPERTY RIGHTS AND THE PRINCIPLE OF PRESUMPTION OF INNOCENCE

A standard asset recovery process involves locating, freezing or seizing, and confiscating assets that have been wrongfully taken, stolen, fraudulently or corruptly misappropriated or otherwise disposed of. Asset recovery is an important anti-corruption tool. In certain cases, however, the procedures may not respect human rights standards, particularly the right to property and the principle of presumption of innocence. What is termed "non-conviction based confiscation" is an example.

Though most jurisdictions require a conviction as a condition of confiscation, more states are adopting *in rem* confiscations (or non-conviction based confiscations), which permit assets to be confiscated following civil rather than criminal proceedings that employ a lower standard of proof. These confiscations, which target property and do not require someone to be convicted of an offence, may violate the rights to property and to a fair trial (notably, the presumption of innocence) and place the burden of proof on the defendant. They do so even if they are civil proceedings that do not formally consider the guilt of the property owner because the punitive character of confiscation makes it necessary to consider the procedural guarantees afforded to every person who faces a criminal charge.

The owner may forfeit his property, suffering punishment even though never convicted of a crime. *In rem* confiscations require the owner, in addition, to demonstrate that he lawfully owns the property in question. To respect the human rights of the owner, the state as plaintiff must establish a strong presumption that the property in question has been criminally acquired. Only after the presumption is established does it fall to the defence to rebut it. As with the offence of illicit enrichment, in defined circumstances (reasonable limits, other corroborative evidence, case by case assessment, opportunity for rebuttal), presumption may be compatible with human rights.

In rem confiscations are a response to the fact that many alleged perpetrators are dead when prosecution occurs or cannot be brought to trial because of their status or power. Indeed, the UNCAC (Art. 54(c)) clearly specifies the situations in which prosecutors should have recourse to this method: death, flight, absence or other appropriate circumstances. The assumption is that *in rem* confiscation proceedings should be used only in such limited situations.

Recommendations

- **The offence of illicit enrichment may contravene human rights principles unless its use conforms to conditions set out in law. In particular, the prosecution must show that grounds for presumption of guilt are well founded in fact (against standards of evidence suitable for criminal cases), and the accused must subsequently have an opportunity to rebut the charges made.**

- **It may be appropriate to use special investigative techniques in order to enforce anti-corruption laws and to admit in court evidence obtained as a result, but the use of such techniques should be regulated and approved by appropriate authorities, robust safeguards against abuse must be in place, and the rights of accused persons must be respected throughout investigation and trial.**

- **The punitive character of *in rem* confiscations means that (even if they are civil proceedings) those subject to asset recovery claims should be afforded the procedural guarantees appropriate in cases of criminal prosecution. States must show evidence to support the presumption that property was criminally acquired, and the accused must subsequently have an opportunity to rebut that evidence. In addition, *in rem* confiscation proceedings should only be used in cases where the owner is dead, has fled or is beyond the reach of criminal jurisdiction.**

CONCLUSIONS

The report has included recommendations in each of its sections; therefore, at this juncture key findings are merely reiterated.

While their traditions and language may differ, the human rights and anti-corruption movements have similar concerns, and their skills can be complementary. Although this report has primarily examined some of the ways in which anti-corruption organisations might do their work more effectively if they adopted elements of human rights practice, the human rights movement can certainly learn much from the anti-corruption movement.

In general, the report has shown that, by spelling out the **rights and entitlements** that different forms of corruption undermine and referring to **state obligations** in relation to these rights, the anti-corruption message would gain moral weight and leverage.

In a similar way, the integration of human rights **standards and principles** in anti-corruption programmes would enhance their effectiveness.

The additional content that human rights law and practice attaches to the notion of **participation** could strengthen anti-corruption initiatives that aim to empower citizens and hold governments accountable to them.

Given the tendency of corrupt systems to reproduce the abusive privileges of elites, the empowerment of vulnerable groups needs to be a key component of anti-corruption strategies, and here the human rights principle of **non-discrimination** is a powerful instrument.

Standards developed for assessing the quality of service provision **(availability, accessibility, acceptability and adaptability)** can help to operationalise programmes that seek to remove corruption from public services.

At a regional and international level, the **accountability and enforcement mechanisms** that the human rights framework has evolved can be used to strengthen and sharpen anti-corruption strategies. Moreover, **the experience that human rights organisations have gathered** in mobilising people to defend human rights and challenge human rights violators could be employed to broaden the range of anti-corruption strategies (use of "social accountability" approaches).

The report has paid particular attention to **women** because they often suffer multiple forms of discrimination. It suggests that corruption has a distinctive impact on women because they use public services more than men, are on average poorer and are more exposed to sexual abuse and other forms of coercion associated with clientelism and other types of inequitable social

relationship. In addition, women are under-represented in decision-making bodies (and, therefore, in corrupt networks) and are less able to advocate for and defend their interests. The report suggests several ways in which anti-corruption strategies could borrow from human rights experience to make their work more sensitive to gender.

While some anti-corruption practices could potentially violate human rights, **with proper safeguards it is possible to carry out anti-corruption practices in conformity with the law while respecting human rights**. In most cases and in the majority of states, it is possible to reconcile the offence of illicit enrichment and the principle of the presumption of innocence, to use special investigative techniques in a manner that respects privacy rights and to apply asset recovery and confiscation procedures in accordance with property rights.

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Convention on the Rights of the Child, adopted by GA resolution 44/25, 20 November 1989, entered into force 2 September 1990.

Convention on the Rights of Persons with Disabilities, adopted by GA resolution 61/106, 13 December 2006, entered into force 3 May 2008.

European Convention on Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953.

Inter-American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978.

International Covenant on Economic, Social and Cultural Rights, adopted by GA Resolution 2200A (XXI), 16 September 1966, entered into force 3 January 1976.

International Covenant on Civil and Political Rights, adopted by GA resolution 2200A (XXI), 16 September 1966, entered into force 23 March 1976.

International Labour Organization (ILO) C169, Convention concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989, entered into force 5 September 1991.

United Nations Convention against Corruption, adopted by GA resolution 58/4, 31 October 2003, entered into force 14 December 2005.

ABOUT THE COUNCIL

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

The ICHRP starts from the principle that successful policy approaches will accommodate the diversity of human experience. It co-operates with all that share its human rights objectives, including voluntary and private bodies, national governments and international agencies.

The ICHRP research agenda is set by the Executive Board. Members of the International Council meet annually to advise on that agenda. Members help to make sure that the ICHRP programme reflects the diversity of disciplines, regional perspectives, country expertise and specialisations that are essential to maintain the quality of its research.

To implement the programme, the Council employs a staffed Secretariat based in Geneva. Its task is to ensure that projects are well-designed and well-managed and that research findings are brought to the attention of relevant authorities and those who have a direct interest in the policy areas concerned.

The ICHRP is independent, international in its membership and participatory in its approach. It is registered as a non-profit foundation under Swiss law.

A taboo subject until the early 1990s, corruption is now under the spotlight and recognised as one of the biggest obstacles to development. Anti-corruption laws have been enacted, treaties like the United Nations Convention against Corruption have been negotiated and ratified and new anti-corruption bodies are springing up. Citizens across the world publicly protest against corruption. Corrupt acts are sometimes brought out of the shadows and prosecuted, and on occasion, those responsible are punished.

These are tangible achievements. Nevertheless, persistent corruption continues to flourish in many environments to the severe detriment of many millions of people. Against this background, many anti-corruption organisations are examining and revising their strategies in a search for more effective solutions.

This report contributes to that quest, outlining how the use of a human rights framework can strengthen anti-corruption work at the national and local level. Which human rights principles and tools could most improve the impact of anti-corruption programmes? How can we harness the power of human rights to protect those most vulnerable to corruption? Where might human rights and anti-corruption programmes be in conflict? This report shows how human rights and anti-corruption practitioners can unite efforts and effectively collaborate in the struggle to root out entrenched corruption.