

HUMAN RIGHTS AND COUNTERING CORRUPTION

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TABLE OF CONTENTS

- Chapter I:** Introduction
- Chapter II:** Corruption as a threat to the enjoyment of human rights
- Chapter III:** Integrating international human rights standards and mechanisms into anti-corruption efforts
- Chapter IV:** Domestic human rights protection systems and combatting corruption
- Chapter V:** Fighting corruption while safeguarding human rights
- Chapter VI:** Protecting the human rights of individuals involved in the fight against corruption

[Note: A future practitioner's guide should include a detailed table of contents, a list of abbreviations; a glossary of terms; a selected bibliography; a table of cases and a table of treaties and other instruments.]

CHAPTER I: INTRODUCTION

A. About this draft

Corruption has been recognized throughout the United Nations system as one of the main challenges to sustainable development and the realization of human rights.

The Human Rights Council recognized that “transparent, responsible, accountable, open and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is one of the indispensable conditions for the full realization of human rights”.²

The objectives of the present draft are to:

- Clarify the conceptual relationship between human rights, good governance and anti-corruption;
- Demonstrate the negative impact of corruption on human rights;
- Provide guidance and make practical recommendations for effectively integrating human rights into anti-corruption efforts.

The purpose of this draft is to serve as a basis for a practical and user-friendly guide for anti-corruption practitioners which explores how a human rights approach, with its focus on the victims of corruption and State responsibility, can be used to complement and strengthen anti-corruption efforts.

B. Key concepts and relationships: corruption – governance – human rights

1. Corruption

Although there is no universally accepted definition of corruption, it is most frequently defined as the abuse of entrusted power for private gain.³ As observed at the Warsaw Conference, corruption “drains resources needed for services and infrastructure, perverts the rule of law, discourages external investment and aid, undercuts public confidence, feeds inequality and disenfranchises large segments of the population.”⁴ Corruption is also a major obstacle to the observance and implementation of human rights, both as objective standards and as subjective rights. Corruption undermines the basic values of human dignity, equality, and freedom of all, but in particular those whose rights are already wrongfully curtailed such as the poor, disadvantaged, and otherwise marginalized. It destabilizes democracy, good governance, and the administration of justice, and demoralizes and demotivates all.

Corruption can affect all branches and all levels of the government across developing and developed countries. It can take place within the state structure or the private sector, nationally or transnationally. These different forms of corruption are often interlinked.

² See for example Human Rights Council resolution 31/14.

³ See, e.g., Transparency International, *The Anti-Corruption Plain Language Guide* (Berlin, 2009), p. 14; World Bank Group, *Helping Countries Combat Corruption: Poverty Reduction and Economic Management*, Washington DC, September 1997, p. 8 - this definition uses the words “public office” instead of “entrusted power”. UNCAC itself does not define “corruption” but speaks about various forms of corruption.

⁴ Report on the UN Conference on Anti-Corruption, Fn 4.

Enablers of corruption include weaknesses in the rule of law, lack of transparency and accountability, a weak civil society and social inequalities.

2. Corruption harms human rights and governance – human rights and good governance counter corruption

Corruption negatively impacts the enjoyment of human rights and can constitute a violation of human rights in concrete cases. Conversely, the protection of human rights and good governance should serve as an integral part of the essential foundations for any anti-corruption campaign.

Good governance and human rights are mutually reinforcing as both are based on the core principles of participation, accountability, transparency and responsibility. Good governance provides a conducive and enabling institutional and procedural environment for the just implementation and monitoring of human rights. Hence, policies that support good governance empower individuals to live in dignity and freedom. Concurrently, the implementation of human rights provides for a set of performance standards against which the accountability of public and private actors can be measured. In line with the human rights-based approach, corruption can be prevented by effectively addressing the structural and systemic causes of corruption, while simultaneously providing a rationale for suppressing corruption.

The nexus between human rights and corruption is threefold:

- 1.** The negative impact of corruption on the enjoyment of human rights;
- 2.** The positive impact of applying human rights principles in the fight against corruption;
- 3.** The need to respect human rights while fighting corruption.

3. Aligning and mainstreaming anti-corruption and human rights approaches

Moving from an economic and political perspective on corruption towards a human rights approach involves a shift in perception whereby corruption is viewed not as being solely a misappropriation of wealth and distortion of expenditure (which harms the economic and political stability of a country), but rather as a breach of human rights.

The human rights and anti-corruption approaches differ. While the human rights approach revolves around the victim – State relationship and bestows rights on individuals, groups and peoples, from which concrete State obligations derive, the anti-corruption framework does not create rights for individuals. It focuses instead on the measures a State shall take, or consider taking, with a view to curbing corruption, through prevention, criminalization, international cooperation and the recovery of stolen assets.

Although the international anti-corruption instruments also deal with measures to prevent corruption and to some extent with the consequences of corruption in private law, they focus largely on the suppression of corruption through criminalization and therefore place emphasis on the perpetrator.⁵ The criminal law approach does not offer ways of addressing the structural problems caused by corruption, as it is concentrated, by its very nature, on a single offence, and

⁵ See for example Leonie Hensgen, “Corruption and human rights – making the connection at the United Nations”, in the Max Planck Yearbook of United Nations Law, Armin von Bogdandy and Rüdiger Wolfrum, eds., vol. 17, pp. 197–219 (200) (Brill and Nijhoff, 2013), and the final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73.

typically cannot address the collective and general effects of corruption.⁶ There are also many evidentiary challenges associated with criminal trials including the secrecy surrounding the transactions and agreements around which such cases revolve; and the unwillingness of parties involved to provide assistance to the investigators or prosecution. Additionally, strict rules relating to admissibility of evidence under various jurisdictions including, *inter alia*, the rules relating to the inadmissibility of hearsay evidence prevalent in most Commonwealth jurisdictions, only serve to exacerbate the evidentiary difficulties associated with such trials, and consequently complicate the establishment of causality. Using human rights mechanisms can therefore complement the criminal justice system.

By focusing on the victim, the human rights perspective makes the impact on individuals, groups and society more visible. Furthermore, the human rights perspective places emphasis on State responsibility. This responsibility means that the State must abstain from engaging in any form of corruption and must adopt effective measures to protect individuals from human rights violations caused by corruption. States are required not only to prosecute corruption, but also to take measures to address the negative effects of corruption. By integrating a human rights perspective into anti-corruption strategies, the implementation of preventive policies becomes an obligation.⁷

Promoting human rights, in particular human rights education fosters a well-informed and emancipated civil society that rejects corruption and calls for integrity and accountability as a human rights obligation.⁸

Moreover, the realization of human rights creates an environment in which corruption can be effectively prevented and remedied. Of particular importance are the right to information, to freedom of expression and opinion, to freedom of assembly and association, the right to take part in the conduct of public affairs, the independence of the judiciary and a free press.

The linkage between anti-corruption measures and human rights can also promote access to human rights mechanisms to combat corruption. A wide range of mechanisms exists for monitoring compliance with human rights at the national, regional and international levels, including human rights courts at the regional level, which can receive individual complaints of alleged human rights violations. Apart from a peer review mechanism to assess the implementation of human rights obligations, States are also under an obligation to submit themselves to periodic review by expert bodies under human rights treaties they have ratified. Furthermore a system of thematic and country-specific special rapporteurs undertakes country visits, if accepted. Unlike the anti-corruption mechanisms such as the UNCAC implementation review mechanism for instance, the human rights mechanisms/procedures generally allow for substantial civil society engagement. By drawing a link between acts of corruption and violations of human rights, new opportunities for litigation or monitoring can be identified.⁹

⁶ Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73.

⁷ Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73.

⁸ Ibid.

⁹ Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73.

4. Ensuring accountability for corruption - Rights-holders vs. duty-bearers

In addition to recognizing natural persons (human beings) as rights holders, international, regional and domestic law in many countries also recognizes legal persons (e.g. civil society organizations, corporations, etc.) as rights holders, according to their nature, as appropriate (*mutatis mutandis*). For example, legal persons can claim their right to privacy, to the protection of their reputation and to access the courts. This means that a company which has suffered because of corruption may seek compensation before a civil court but if such protection is denied for any reason, it may bring a case before competent domestic, regional or international human rights fora.

The main duty bearers are:

- a) the State – the promotion and protection of human rights “is the first responsibility of Governments”;¹⁰ and
- b) non-state actors in the position of power vis-à-vis rights holders.

Human rights impose obligations on States at three levels: respect, protection and fulfilment.

The obligation to respect requires States to avoid measures that hinder, interfere with or prevent the enjoyment of human rights. This implies that the State should criminalize and prosecute specific acts of corruption and also take measures to prevent corruption.

The obligation to protect requires States to take measures that prevent third parties from interfering with the enjoyment of human rights and when such interference has nevertheless taken place to ensure that perpetrators will be held accountable and the victims will have access to appropriate remedies. For example, it would mean that the State should protect rights holders against corrupt practices by non-state actors, in particular those in a position of power like business corporations.

The obligation to fulfil requires States to take positive measures that enable individuals and communities to enjoy human rights.¹¹ In the context of corruption, the State complying with the obligation to fulfil is, in particular, responsible for empowering people to enjoy their rights, developing capacities necessary for the enjoyment of rights (e.g. granting access to education, health care), establishing procedures enabling individuals and groups to claim their rights against the adverse impact of corruption and demand remedy and compensation, and finally to counter corruption as a systemic obstacle to human rights.

Persons, natural or legal, directly engaged in corrupt practices as organizers, receivers or providers of undue benefits, accomplices, assistants or instigators, as well as those involved in concealment or obstruction of justice should be liable in terms of criminal, civil, and administrative responsibility under domestic law.¹²

¹⁰ Vienna Declaration and Programme of Action, part I, para. 1.

¹¹ Cf. e.g., General Comment No. 13 “The right to education (article 13 of the Covenant)”, Twenty-first session, 1999, paras. 46-47.

¹² See art. 24, 25 and 27 of the UNCAC.

CHAPTER II: CORRUPTION AS A THREAT TO THE ENJOYMENT OF HUMAN RIGHTS

Acts of corruption affect people and communities in different ways.¹³ They may amount to prohibited forms of discrimination or directly violate individual rights. Pervasive corruption weakens the very accountability structures that protect human rights, contributing to impunity and impeding law enforcement. Corruption also impacts negatively on collective rights.¹⁴ Combatting corruption is particularly important for ensuring the empowerment, participation and protection of people who are members of vulnerable or marginalized groups.

[Note: The procedural steps for analysing whether a corrupt act constitutes a threat to human rights may be included in the future manual in the form of a text box]

A. Corruption, non-discrimination and equality

The rights to equality and non-discrimination are at risk from corruption as it creates discrimination in access to public services in favour of those who are able to influence the authorities to act in their personal interest. The economically and politically disadvantaged suffer disproportionately from the consequences of corruption because they are particularly dependent on public goods.

Corruption is also an indirect barrier to equality. By slowing down economic growth and decreasing government revenues, corruption limits the ability of the state to provide essential goods and services and thus **disproportionately impacts the poor**. Since poverty is often greatest amongst people in marginalized social groups, corruption indirectly **aggravates the effects of discrimination**. Poverty and discrimination may expose marginalized people to **bribe solicitation**. Corruption also compounds social inequalities by increasing the power of elites and giving them more incentives to hold onto power.¹⁵

[Note: Practical examples of how the marginalised and vulnerable sections of society are the worst affected by corruption can be included in the future manual.]

B. Corruption as a threat to civil and political rights

Some civil and political rights are more often than others exposed to the negative impact of corrupt practices. Rights to due process, to political participation, to information, and to property are at heightened risk from corrupt acts.

1. Corruption as a threat to the right to life, liberty and security of person

The right to life, liberty and security of a person is directly and indirectly at risk from corruption. For example, victims, witnesses or whistleblowers of corruption may be exposed to unlawful killings, acts of torture, arbitrary arrests, detentions or other forms of deprivation of liberty which would prevent disclosures regarding corruption or its consequences. Large-scale diversion and misallocation of government resources through embezzlement and bribery may

¹³ A/HRC/23/26, para. 5.

¹⁴ ICHRP and TI, Corruption and Human Rights: Making the Connection (Geneva, International Council on Human Rights Policy, 2009). Available from www.ichrp.org/files/reports/40/131_web.pdf, pp. 27–28.

¹⁵ ICHRP and TI, Making the Connection, pp. 7–10.

diminish the State's ability to deliver goods and services that are essential to individual survival and well-being. The payment of bribes to avoid the enforcement of government regulatory standards may likewise expose people to physical risks, whether from unsafe buildings, unsafe consumables or environmental hazards.¹⁶ Finally, the bribery of law enforcement officials and members of the judiciary may directly subvert an individual's right to liberty, particularly the right to challenge the grounds for arrest and detention, in court; and/or to obtain compensation for wrongful detention.

2. Corruption as a threat to due process and the right to a remedy

Procedural human rights guarantees - due process rights and rights to a remedy - are jeopardized in several ways when people who administer justice engage in corruption. Judicial corruption can be defined as "acts or omissions that constitute the use of public authority for the private benefit of court personnel, and result in the improper and unfair delivery of judicial decisions".¹⁷ This broad definition covers "bribery, extortion, intimidation, influence peddling and the abuse of court procedures for personal gain" by judges and court support staff.

The bribery of judges directly violates the human right to a hearing before an independent and impartial tribunal. A judge who solicits or accepts a bribe is dependent because he or she is subject to external interference and partial by conducting unfair hearings. For example, a decision to withhold documents from the defence is likely to violate the fair trial requirement, the principle of equality of arms, and the right to be informed promptly and in detail of the charge. In all these ways, corruption violates the right to equality before the law.

Finally, corruption in a judicial proceeding is likely to give rise to a separate violation of the right to a remedy. This right includes an entitlement to effective and equal access to justice, which is properly administered. Therefore, corruption of a court or tribunal may deny a person a fair opportunity to vindicate his or her rights. Judges should follow protocols for reporting and responding to any attempt to influence their handling of a case.

3. Corruption as a violation of the right to political participation

By undermining the accountability of decision-makers to the public, corruption weakens governance. When corruption is prevalent, those in public positions are less likely to act in the interest of society. As a result, corruption damages the legitimacy of democratic regimes and leads to a loss of public support for democratic institutions. Corruption also threatens particular human rights to political participation. For example, the manipulation of elections, referenda, or plebiscites through the bribery of voters directly violates Art. 21(1) and (3) UDHR and Art. 25(a) and (b) ICCPR, as does the corruption of political party officials through campaign contributions.¹⁸

4. Corruption as a threat to the freedom of expression

¹⁶ See also Bacio Terracino, *Corruption as a Violation*, pp. 20–21.

¹⁷ Mary Noel Pepys, "Corruption within the Judiciary: Causes and Remedies", in *Global Corruption Report 2007: Corruption in Judicial Systems*, Transparency International (ed.) (Cambridge, Cambridge University Press, 2007), pp. 3–14 at 3. See also ICHRP and TI, *Making the Connection*, p. 35.

¹⁸ Bacio Terracino, *Corruption as a Violation*, p. 18; Kenya National Commission on Human Rights, *The Human Rights Dimensions of Corruption* (Nairobi, 2006). Available at <http://www.knchr.org/ReportsPublications/ThematicReports/EconomicSocialandCultural.aspx>, p. 21

Efforts to combat corruption may be enhanced by measures to promote the freedom of expression; conversely, human rights to information are at risk from corruption. Acts of corruption may be used to obtain valuable governmental permissions to broadcast information via (traditional) media, as well as to influence the people who work within or control media outlets. Public or private actors may additionally be motivated to prevent the exposure of corrupt acts by preventing or discouraging other people from exchanging information about corruption. They may be tempted to take action to retaliate against specific whistleblowers and/or to suppress wider expressions of discontent about the problem of corruption. Alternatively, they may prevent access to information held by public bodies that would or could be indicative of corruption.

[Note: Further discussion on the limits to the freedom of expression as set out in Art 19(3) of the ICCPR and mirrored in Art. 13(1)(d) UNCAC for e.g. to protect national security or public order etc. can be included in the future manual.]

The Human Rights Committee has clarified that, “To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. (...)”¹⁹

5. Corruption as a threat to right to property

Corruption may be an obstacle to the enjoyment of property rights. A public official who removes a person’s ownership title as the quid pro quo for a bribe or restricts the enjoyment of possession violates that person’s right to property under article 17(2) UDHR and under regional property guarantees. An interference that was motivated by bribery is per se arbitrary and not in the public interest. Corruption in the decision-making process may also mean that the measure is disproportionate to its ostensible purpose. Since “property” is a broad and autonomous concept in human rights law, it covers some relationships to things that are not proprietary under local law. Thus, practitioners should in this context consider rights to property as well as economic and social rights, like the right to housing, that frequently relate to the use and enjoyment of things.

C. Corruption as a threat to economic, social and cultural rights

The harm caused by corruption is not limited to the civil and political sphere. Corruption also violates or leads to violations of specific economic, social and cultural rights and amounts to a deliberately retrogressive measure.

1. Corruption as a threat to the right to an adequate standard of living and to an education

The right to an adequate standard of living is enshrined in Art. 25 UDHR and elaborated in Arts. 11 and 12 ICECSR. Together they entitle everyone to adequate food, water, housing and health. The right to education appears in Art.26 UDHR and Art. 13 ICESCR.

¹⁹ General Comment 34 (2011), para. 19.

[*Note: Reference can be made in the future manual to the CESCR's General Comments which explain these rights and stipulate States' duties to respect, protect and fulfil them.*]

2. Corruption as a threat to general legal obligations under economic, social and cultural rights

Corruption, in its various forms, can cause the State to violate economic, social and cultural rights in the following manner:

First, since corruption can slow down economic growth and decrease government revenue, it can also **limit the State's ability to provide** essential goods and services.²⁰

Second, corrupt transactions result in people being **arbitrarily denied access** to socio-economic rights in several ways.²¹ Bribes may be paid, influence traded, or offices misused to obtain access to government services, such as medical care, school places, or connections to town water lines. Corruption may constitute a condition for obtaining these services at all or within a reasonable time. Alternatively, these forms of corruption may be used to gain access to things, such as real property rights, that are already held by others. The State whose officials deny access to essential goods and services through bribery breaches its duties to respect and to fulfil (facilitate) those economic, social and cultural rights. The State that fails to prevent, investigate, and punish such corrupt acts by officials or third parties breaches its duty to protect those economic, social and cultural rights.

Third, firms and individuals may also use corruption to **avoid regulatory standards**.²² In exchange for bribes or under pressure from corrupt third parties, inspectors may ignore unsafe work practices; regulators may prematurely authorize the sale of drugs or medical devices; or environmental officers may fail to enforce standards that protect water catchments or farmlands from contamination. In all these cases, corruption is likely to result in a breach of the State's duty to respect economic, social and cultural rights, and to provide goods and services capable of fulfilling those rights.

Fourth, public officials may **misappropriate funds** intended for food, water, health, housing, and education programmes or they may **divert materials** bought for those programmes to sell or use themselves. Consequently, they render the State less able to provide essential goods and services of adequate quality and quantity to the community.²³ Thus, schools and hospitals have fewer supplies; teachers and doctors are less well paid (and hence more likely to seek bribes); and food or financial assistance programmes have less to buy or distribute. In these ways, misappropriation can lead to violations of the duty to respect and to fulfil human rights and indirectly discriminate against those who are unable to obtain access to food, water, health, housing, and education by their own means.

Fifth, corruption in government and in the provision of government goods and services is likely to impair the economic, social and cultural rights of **specific sectors of the population**.²⁴ Some

²⁰ See, e.g., ICHRP and TI, Making the Connection, pp. 46, 50 also citing E/CN.4/2001/53, paras. 69, 75.

²¹ Detailing these connections, see Bacio Terracino, Corruption as a Violation, pp. 31–22; ICHRP and TI, Making the Connection, pp. 50–51, 56.

²² ICHRP and TI, Making the Connection, pp. 50–51, 53–55. See further, Bacio Terracino, Corruption as a Violation, pp. 16, 20–21, 24.

²³ ICHRP and TI, Making the Connection, p. 56.

²⁴ See further Bacio Terracino, Corruption as a Violation, pp. 14–15.

people also have special entitlements to social services that are at risk from corruption. The right of children to free elementary education under Art. 26(2) UDHR, for example, will be compromised when teachers or school officials demand bribes in exchange for enrolment.²⁵

CHAPTER III: INTEGRATING INTERNATIONAL HUMAN RIGHTS STANDARDS AND MECHANISMS INTO ANTI-CORRUPTION EFFORT

A. Using human rights standards to prevent corruption

An efficient anti-corruption strategy can benefit from and be informed by key human rights standards and principles. Progress in the area of human rights concerning an independent judiciary, freedom of the press, freedom of expression, transparency in the political system and accountability are essential for a successful anti-corruption strategy.

1. Access to information

The most effective systemic check on corruption is to enable citizens to take the initiative to seek information from the state, and thereby to enforce transparency and accountability. This right empowers individual and groups “to question, examine, audit, review and assess governments acts and decisions, to ensure that they are consistent with the principles of public interest, probity and justice.” By exercising the right to “seek and receive information,” individuals can make informed decisions and express their opinions freely and participate actively in a democratic system.²⁶

If the concept of “state secrets” historically protected public authorities from scrutiny, over the last decades, transparency has come to be recognized as a constitutive element of good governance. Access to information empowers individuals and groups to claim their rights. It is also necessary for the participation of people in public affairs and the control of those in power.

While the right of access to information is not explicitly stated in core human rights treaties, it can be interpreted from several rights protected by international law.²⁷

The UNCAC encourages State Parties to enhance transparency in their public administration, organization, functioning and decision-making processes. State Parties should promote society’s participation in preventing and combatting corruption, including through public participation in

²⁵ ICHRP and TI, *Making the Connection*, pp. 54, 58–60. See further, Bacio Terracino, *Corruption as a Violation*, pp. 27–30; UNDP, *Fighting Corruption in the Education Sector: Methods, Tools and Good Practices* (New York, 2011). Available from www.undp.org/poverty, pp. 17–19.

²⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HR/20/17, para. 3.

²⁷ For example, the right to seek receive and impart information and ideas through any media and regardless of frontiers – Art. 19 UDHR and Art. 19 ICCPR; the right to freedom of thought and expression – Art. 18 and 19 UDHR and Art. 18 and 19 ICCPR; the right to participation in the conduct of public affairs – Art. 21 UDHR and Art. 25 ICCPR; the right to liberty and security of persons – Art. 9 UDHR and Art. 9 ICCPR.

decision-making processes; and by enhancing transparency, access to information and the freedom to seek, receive, publish and disseminate information concerning corruption.²⁸

Government authorities must also ensure that fees for obtaining information do not constitute an obstacle for rights-holders and when refusing access to information, they must indicate the reasons for their decision, which in turn must be subject to review by means of appeal.²⁹

2. The independence of judges, lawyers and prosecutors

Impartial administration of justice has been universally recognized as the basic guarantee of human rights and a shield against irregularities in the functioning of public institutions. It is before judicial bodies that individuals can claim their rights against public authorities or those acting on their behalf; alleged perpetrators of human rights violations and corruption are tried and may claim their innocence; and victims of human rights violations and corruption can ultimately seek remedy and compensation. Courts and the legal profession are central to efforts to protect human rights and counter corruption.

However, the judiciary can be impartial and perform its protective functions only when it is independent and meets the requisite standards of competence and integrity. The independence of the judiciary has two dimensions: **firstly**, the institutional independence of the court system from other state powers, in particular the executive; and **secondly**, the independence of judges from any interference in the adjudication of cases before them.

[Note: The future manual may include reference to the HRC's General Comment No 32, para. 18 regarding the State's duty to guarantee the judiciary's independence as well as the Bangalore Principles of Judicial Conduct.]

The judiciary's role in guaranteeing human rights and integrity of governance may be repudiated by corruption within its ranks. Corruption within the court system may adversely affect administration of justice in two ways. Firstly, judicial corruption undermines the impartiality and fairness of judicial proceedings and, if it directly affects judges, destroys objectivity of court's rulings. Secondly, corruption in the courts undercuts their role as an institutional guarantee of both human rights and the fight against corruption.³⁰ "Until corruption within the judicial sector is severely curtailed or eradicated, most legal and programmatic mechanisms put forth to reduce corruption in other sectors of society will be significantly undermined".³¹

Combatting corruption in the judiciary requires its elimination not only among judges but also other legal professions related to the administration of justice since their conduct may also have a major impact. Corrupt lawyers, prosecutors and administrative staff frequently instigate corruption in the court.³²

²⁸ Compare Article 10 and 13 UNCAC respectively.

²⁹ General comment No. 34 "Article 19: Freedoms of opinion and expression", UN Doc. CCPR/C/GC/34, paras. 18–19; cf. also General Comment No. 16 on The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, (Article 17).

³⁰ OHCHR 1996-2007, <http://www2.ohchr.org/english/law/indjudiciary.htm>

³¹ Mary Noel Pepys, Justice System, in: *Fighting Corruption in Developing Countries: Strategies and Analysis*. (ed. Bertram I. Spector), Kumarian Press, West Hartford 2005, p. 14.

³² Mary Noel Pepys, Fn. 38, p. 14.

3. The human rights responsibilities of business enterprises

The relationships between business and politics, at central and local level, bear a potential risk of corruption, especially in situations where political concessions may grant disproportional profits. Corruption between private companies is also common. Even where it does not directly affect public governance, it can contribute to a “culture of corruption” and thus have a negative impact on society. The widespread nature and political acceptance of this type of bribery is indicated by the fact that until recently, bribes paid by companies investing abroad to local influential people were tax-deductible in many countries. In some contexts, bribes were treated as operational costs. Traditional perception according to which companies’ responsibility was limited to the achievement of economic goals supported this approach.

An emerging change in the perception of corporate involvement in bribery and corruption was evidenced by the addition of a 10th principle to the United Nations Global Compact which states that “Businesses should work against corruption in all its forms, including extortion and bribery.”³³ Subsequently, the Guiding Principles on business and human rights affirmed that business enterprises have a responsibility to respect human rights.³⁴ This constitutes a change from traditional notions of corporate social responsibility by clearly stipulating the responsibilities of both business and governments in preventing and addressing human rights harm linked to business. Given the adverse impacts of corruption on human rights, this new global standard can be applied in tackling corruption. The Guiding Principles comprise 31 principles grouped in three pillars: a) the State duty to protect human rights, b) the corporate responsibility to respect human rights, c) access to remedy.³⁵

[Note: This section focuses on the responsibility of businesses and hence discusses the 2nd pillar i.e. corporate responsibility to respect human rights. However, in the future manual there is scope to also elaborate upon the other 2 pillars namely State duty to protect and access to remedy. Additionally, the UN Global Compact may be discussed in greater detail especially Principle 10 and the commentary thereto.]

The corporate responsibility to respect human rights means that business enterprises should avoid infringing on the human rights of others; and address adverse human rights impacts in which they are involved, directly or indirectly through associates.³⁶ This means that a business enterprise is responsible for any adverse human rights impacts arising from its representatives bribing state officials; and tolerating bribing by a third party to its benefit. In order to comply with this responsibility, business enterprises should not only make appropriate policy

³³ http://www.unglobalcompact.org/Issues/transparency_anticorruption/index.html. See further below.

³⁴ HRC res. 17/4 on human rights and transnational corporations and other business enterprises; the Framework was presented in the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31.

³⁵ For more specific information on various tools concerning this and other relevant tools consult the OHCHR website: <http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx>.

³⁶ Principle 11; in this context, internationally recognized human rights means, at a minimum, standards enshrined in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. However, also other instruments bind the corporate sector if circumstances this require, e.g. if the situation involves the rights of indigenous peoples or members of national minorities, also the 2007 UN Declaration on the Rights of Indigenous Peoples and the 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities should be respectively taken into account - Principle 12.

commitments to respect human rights, but also establish a human rights due-diligence process “to identify, prevent, mitigate and account for how they address their impacts on human rights.”³⁷ Such a process “should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.”³⁸ Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.³⁹

The Guiding Principles also stipulate that business enterprises should establish or participate in effective, equitable, transparent, and rights-compatible operational-level grievance mechanisms for individuals and communities that may be adversely impacted by their activities.⁴⁰

4. Human rights education

The purpose of human rights education is twofold: **first** - to provide knowledge and skills needed to enjoy, apply, promote and defend human rights, and **second** - to foster the attitudes and behaviours marked by respect for human rights and needed to uphold them.⁴¹ Human rights education is an important tool in preventing and combatting corruption. It may sensitize people to the destructive impact of corruption on their and others’ rights. It may help to understand sources of corruption and related challenges and violations. While empowering people, human rights education also helps them to oppose corruption and claim their rights using human rights mechanisms at the domestic and international levels.

Human rights education includes both general and specialised programmes. In general programmes, training is provided at different levels of the educational system as part of their curricula. However, specialised human rights educational programmes usually focus on relevant professional groups and/or specific challenges and implementation gaps, such as teachers, law enforcement officers, judges and lawyers, prosecutors, general civil servants, journalists, trade unions, minorities or non-governmental organizations. These professional and social groups are crucial for combating corruption.

The underlying linkages between human rights and anti-corruption should also be reflected in synergies between anti-corruption trainings and human rights education curricula and methodologies. There is a need for greater coordination between policy-makers and practitioners with regards to projects carried out within anti-corruption and human rights campaigns respectively.

³⁷ Principle 15.

³⁸ Commentary to Principle 17.

³⁹ Principle 22.

⁴⁰ Principle 29.

⁴¹ Compare W. Benedek (ed.), *Understanding Human Rights. Manual on Human Rights Education*, European Training and research Centre for Human Rights and Democracy (ETC), 3rd ed. Wien-Graz 2012 - this manual contains numerous references to corruption; it has been translated in several languages; compare also United Nations Declaration on Human Rights Education and Training adopted by the General Assembly on 16 February 2012 - A/RES/66/137.

5. Using human rights mechanisms to prevent and combat corruption

Practitioners should also consider taking action against corruption using the human rights machinery that enable policy and standard development; monitoring and reporting; intervening; and technical assistance. Human rights mechanisms can be used to tackle corruption as an obstacle to human rights, as well as a specific violation of human rights. These mechanisms can be divided broadly into 1) UN mechanisms and 2) Non-UN mechanisms.

I. UN Mechanisms

- (a) **Charter-based mechanisms:** These mechanisms are created by General Assembly resolutions and hold broad human rights mandates, address an unlimited audience and take action based on majority voting. The current charter-based mechanisms consist of the Human Rights Council and its subsidiaries, including the Universal Periodic Review Working Group and the Advisory Committee. The **Human Rights Council** accepts communications from individuals, groups, or non-governmental organizations that claim to have been victims of or have direct knowledge of human rights violations. Complaints may be submitted regardless of whether the State in question has ratified any particular human rights treaty. Complaints are initially confidential, but depending on their evaluation of the complaint, the Council may decide to take it up for public consideration, or to refer the matter to the Office of the High Commissioner for Human Rights in order to provide technical assistance in resolving the situation. Additionally, the Special Procedures form part of the charter-based mechanisms.
- (i) **Universal Periodic Review:** The UPR is a procedure of the Human Rights Council, which offers a powerful framework for a periodical review of the human rights situation of all UN member states over four and a half year intervals. The UPR is an inter-state mechanism, whereby States report about their human rights situation to other States, which have the opportunity to ask questions and make comments and recommendations to the State under review. It covers all human rights and related problems and is based on comprehensive information from the Government concerned and other sources, including national human rights institutions, treaty bodies, special procedures, UN agencies and programs, and non-governmental organizations. The proceedings culminate with an outcome report which summarises the dialogue (including the questions posed to the State under review as well as its responses) and also includes the comments and recommendations. In the UPR sessions conducted thus far, recommendations and voluntary pledges regarding the issue of corruption have appeared in numerous instances.⁴²
- (ii) The **Advisory Committee** has recommended that examination of the issue of corruption as a possible cause for human rights violations should be integrated into the UPR. The Advisory Committee went on to recommend that in the framework of the Council's complaints procedure, specific attention should be paid to possible violations of human rights caused by corruption, particularly by the Working Group

⁴² www.upr-info.org (as on June 2015).

on Communications and the Working Group on Situations, which are the competent bodies to examine communications.⁴³

(iii) **Special procedures:** These mechanisms, which include the Special Rapporteurs, Independent Experts and Working Groups of the Human Rights Council, are empowered to monitor the human rights developments in specific substantive areas (thematic procedures) or in countries placed on the Human Rights Council's agenda because of their human rights situation (country procedures). Their reports are one of the most important sources of analytical information about the condition of human rights, along with their dialogues with the Human Rights Council and, in some cases, the General Assembly. Relatively frequent country missions allow mandate holders to gather first-hand information from public authorities and civil society.

In their reports, the mandate holders recognize corruption as both a structural obstacle to human rights and an important source of specific human rights violations. They have identified widespread corruption across the public authorities and more specific problems in different government structures, from those that administer justice, to those that provide social services. For example, the Special Rapporteur on independence of judges in one of his reports noted that the judicial system in the visited country was in an alarming state, especially because *inter alia* of corruption.⁴⁴ The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography stressed that the testimonies gathered in a visited country overwhelmingly point to corruption and police negligence as one of the main causes of exploitation and trafficking.⁴⁵ Such examples highlight the significance of meaningful cooperation between those engaged in the struggle against corruption at the country and international levels on the one hand and special procedures on the other.

(b) **Treaty-based mechanisms:** These mechanisms consist of committees created under various international human rights treaties to supervise and monitor compliance with those treaties, including, *inter alia*, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child.

Treaty-based mechanisms bind only those countries that have ratified the specific legal instrument from which they derive their existence. Treaty bodies make their decisions by consensus. The treaty bodies are composed of independent experts and meet to consider

⁴³ Human Rights Council Advisory Committee "Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights" (A/HRC/28/73), distr. 5 January 2015. Available at:

http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_73_ENG.doc

⁴⁴ See, e.g., Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy - A/HRC/4/25/Add.3; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston - A/HRC/8/3/Add.4.

⁴⁵ Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - A/HRC/7/8/Add.2.

State parties' reports as well as individual complaints or communications. They may also publish general comments on human rights topics related to the treaties they oversee.⁴⁶

There are four kinds of treaty-based mechanisms namely:

- (i) a reporting procedure;
- (ii) an inter-state procedure;
- (iii) an inquiry procedure; and
- (iv) a complaints procedure

[Note: These procedures can be elaborated upon in the future manual]

Corruption figures as an important obstacle to, and as a violation of, human rights in the considerations of treaty bodies. In their dialogue with State Parties, treaty bodies raise corruption as a specific matter of concern and as an illustration of wider problems, e.g. bribery related to forced evictions and foreign investments, access to education, treatment of prisoners, etc. As a consequence, treaty bodies make both general assessments of the impact of corruption on the enjoyment of human rights, as well as more specific recommendations. For example, the Committee on Economic, Social and Cultural Rights has stated that, “despite the state party’s ‘zero tolerance’ policy, corruption and patronage still adversely affect the realization of economic, social and cultural rights”, and that “there have been few prosecutions for corruption in the state party.” As a consequence, the Committee recommended that “the State party intensify its efforts to prosecute cases of corruption and review its sentencing policy for corruption-related offences.”⁴⁷

II. Non-UN Mechanisms

- (a) **Non-governmental organizations:** NGOs play an essential role in articulating human rights concerns and providing the competent bodies with information. Those with a consultative status under the Economic and Social Council⁴⁸ enjoy a privileged position. In their submissions, including to human rights treaty bodies, NGOs often highlight the adverse impact of corruption on human rights and report on human rights violations resulting from corruption.

[Note: Anti-corruption initiatives of leading non-governmental organisations like Transparency International may be elaborated upon in the future manual.]

- (b) **National Human Rights Institutions:** NHRIs are generally established in the national constitution with the specific mandate of providing for the promotion and protection of constitutional rights. Some NHRIs may also be granted a specific anti-corruption mandate. NHRIs have various benefits including flexibility with regards to lodging complaints; their power to initiate investigations, broad investigative and remedial powers etc.

⁴⁶ <http://research.un.org/en/docs/humanrights/>

⁴⁷ E/C.12/KEN/CO/1.

⁴⁸ ECOSOC resolution 1996/31 “Consultative relationship between the United Nations and Non-Governmental Organizations.”

[Note: Practical examples of NHRIs with an anti-corruption mandate e.g. in Ghana may be included; and the benefits of NHRIs can be elaborated upon in the future manual. Reference may also be made in this regard to the Principles relating to the Status of National Institutions (The Paris Principles).]

- (c) **Regional mechanisms:** It is worth reiterating here that after having exhausted domestic remedies, victims of human rights violations may benefit not only from international but also regional mechanisms.

[Note: This draft focuses on the international framework but the future manual can discuss regional mechanisms in greater detail and examine the interplay between the international and regional mechanisms in greater depth.]

While it is not always possible to make a *prima facie* link between an act of corruption and a violation of a specific person's rights, when such a causal link exists, human rights law not only strengthens the position of victims but also offers its own mechanisms to protect their interests, thus empowering them to seek remedies where their rights have been violated by corruption.

6. Using human rights and the human rights-based approaches to combat corruption

1. What is a human rights-based approach

The human rights based approach (HRBA) is a methodology of programming, complementary to other methodologies used in development cooperation. It may also be useful in countering corruption by focusing action on the situation of actual or potential victims (particularly those stemming from disadvantaged or marginalized sectors of the society); and on structural causes and manifestations of corruption.

In 2003, in the context of mainstreaming human rights within the UN system, UN agencies and programs adopted the Stamford Statement on the common understanding of HRBA.⁴⁹ It was agreed that all development cooperation should further the realization of human rights and contribute to the development of the capacities of “duty-bearers” to meet their obligations and of “rights-holders” to claim their rights. Such cooperation is to be guided by human rights standards and human rights principles as laid down in the Universal Declaration and other international instrument. The latter are: universality and inalienability; indivisibility; interdependence and interrelatedness; equality and non-discrimination; participation and inclusion; and accountability and the rule of law.

[Note: The elements in the Stamford Statement that are specific to HRBA may be included in the future manual.]

HRBAs lead to better and more sustainable development outcomes by analysing and addressing the inequalities, discriminatory practices and unjust power relations, which are often at the heart of development problems. It puts the international human rights entitlements and claims of the

⁴⁹ The presentation of human rights principles is quoted from the Stamford Statement, see Human Rights-Based Reviews of UNDP Programmes. Working Guidelines, UNDP June 2003. Available from http://hdr.undp.org/en/media/HRBA_Guidelines.pdf.

people (the 'right-holders') and the corresponding obligations of the State (the 'duty-bearer') in the centre of the national development debate, and it clarifies the purpose of capacity development.”

The HRBA has advantages for a variety of stake holders, which include:

- support from an established body of global human rights standards;
- better identification of the rights and rights holders at risk;
- greater attention to the situation of people who are typically excluded and marginalized and more comprehensive analysis of a given situation;
- more participatory processes and a greater likelihood of agreement between rights and duty-holder;
- greater transparency and accountability; and
- more sustainable programming and more effective monitoring.

2. How a human rights-based approach enhances anti-corruption work

The HRBA may be a powerful tool for: achieving sustainable results in addressing structural causes and manifestations of corruption; holding the perpetrators to account; and assisting victims of corruption, particularly those who are socially disadvantaged or marginalized.⁵⁰

The HRBA may be helpful in addressing the structural causes of corruption in several ways.

First, human rights impact assessment of policies, laws and development programmes can illuminate structural causes of corruption and thus, help in the design of preventive anti-corruption strategies. Human rights standards, which are firmly anchored in law, are legally agreed criteria for assessing access to various goods and services. Large-scale shortages in the delivery of social services in such areas as housing, health care, and education may well be indicators of corruption. Conversely, non-observance of basic human rights principles may be a sign of systemic corruption.

Second, in drawing attention to human rights problems, the HRBA may identify areas actually or potentially prone to corruption. For example, the violation of the right to education as a consequence of insufficient educational capacities may be cause to consider whether teachers and school administrators are underpaid and whether they are supplementing their incomes by extracting illicit benefits for preferential treatment from parents.

Third, in a HRBA, the relationships between individuals and public authorities are legally established as relationships between the rights-holders and duty-bearers. Arbitrariness and uncertainty in these relationships may also point to corruption.

Fourth, and on a positive note, empowering victims of corruption as rights-holders may help counter corruption. The existence of a functional protection framework available to victims may effectively discourage corruptive practices.

[Note: Practical examples of the relevance of a HRBA may be included in the future manual.]

7. The 2030 Agenda for Sustainable Development and Corruption:

⁵⁰ Office of the United Nations High Commissioner for Human Rights Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, United Nations, New York And Geneva, 2006 P. 16

Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. Recognising the development dividend from governance, Goal 16 places governance issues in general and anti-corruption initiatives in particular at the forefront of global governance reform initiatives. This goal is an acknowledgment by global leaders of corruption's corrosive effect on the lives of the world's most vulnerable. The level of bribery has been suggested as an indicator for measuring the progress delivered not only on Goal 16 but the other SDGs as well.⁵¹

While both petty corruption and grand corruption hinder sustainable development, the impact of grand corruption on sustainable development deserves special mention. It is estimated that nearly \$1 trillion in illicit finance leaves developing countries each year.⁵² Grand corruption deprives the State of crucial resources by directly misappropriating funds from the government budget. This occurs for instance in the case of excessive infrastructure projects, or when buildings, roads, airports, etc., of an inferior quality are developed thus allowing funds intended for construction materials to be easily diverted by high-ranking government officials. Grand corruption results in a violation of article 2(1) of the International Covenant on Economic Social and Cultural Rights, which requires State parties to this Covenant "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by all appropriate means, including particularly the adoption of legislative measures."

The State's obligations under this article can be divided into the following 4 elements:

- the core obligation "to take steps", which according to the CESCR, must be "deliberate, concrete and targeted"⁵³ and must include the elimination of obstacles to the realization of economic, social, and cultural rights. Since corruption constitutes such an obstacle, States are in principle required by the ICESCR to take anti-corruption measures.⁵⁴
- such steps must be taken "with a view to achieving progressively the full realization of the rights recognized in the present Covenant". Accordingly, States are obligated to grant a certain priority in their resource allocation to the realization of human rights. In cases of grand corruption, involving misappropriation of public funds at the highest levels, this obligation is contravened as the profit maximization and personal gains of high-ranking public officials is privileged over the realization of the public's social rights.
- the State must use the "maximum of its available resources." It is primarily the State itself, which determines which resources are available and what the maximum is.⁵⁵ However, the CESCR may consider the "equitable and effective use of [...] the available

⁵¹ Transparency International, 'Ending Corruption for a better future for all', 24 September, 2015. http://www.transparency.org/news/feature/ending_corruption_for_a_better_future_for_all

⁵² Thomas Reuters Foundation (Astrid Zweynert), 'Grand corruption is big stumbling block for new development goals-campaigners', 4 September 2015 <http://news.trust.org/item/20150904141920-758t7/?source=gep>

⁵³ CESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, Para. 1) (1990), para. 2.

⁵⁴ Martine Boersma, Corruption: A Violation of Human Rights and a Crime Under International Law? (Cambridge: Intersentia 2012), p.229-230.

⁵⁵ Ben Saul/David Kinley/Jacqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials (Oxford: OUP 2014), 143.

resources” when determining whether the State party has taken appropriate measures.⁵⁶ This element thus prohibits States from diverting resources that were originally dedicated to social purposes.⁵⁷ Regular references have been made by various human rights treaty bodies, in their concluding observations on individual States, on the importance of anti-corruption measures in precisely this context.⁵⁸

- the State must utilise “all appropriate means including particularly the adoption of legislative measures”. The term “all appropriate means” includes legislative, administrative, judicial, economic, social and educational measures, that are adopted by the State and are consistent with the nature of the rights in order to fulfil their obligations under the Covenant.⁵⁹ It should be noted that although legislative measures alone are insufficient to fulfil the obligations of the Covenant, article 2(1) would often require legislative action to be taken in cases where existing legislation violates obligations under the Covenant. Further, the State should provide for effective remedies including, where appropriate, judicial remedies.⁶⁰ It is yet again the State that determines the appropriateness of the means to be applied by it, but such determination is subject to review by the United Nations Economic and Social Council, with the assistance of the Committee.⁶¹

Accordingly, where a State fails to comply with any of the aforementioned elements of Article 2(1), it would be in contravention of the Covenant. The Economic, Social and Cultural Rights Committee, tasked with monitoring State parties’ compliance with the Covenant, would be open to make an authoritative determination that such a State, in which rampant corruption exists is violating its fundamental obligation arising from the Covenant by pursuing an evidently deficient anti-corruption policy.⁶²

⁵⁶ Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (1986). (Limburg Principles) para 27.

⁵⁷ Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia 2003), p.315.

⁵⁸ For e.g. Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Morocco, CRC/C/MAR/CO/3-4 of 14 October 2014, para. 17, wherein the Committee recommended *inter alia*, that the State: “...(b) conduct a comprehensive assessment of budget needs and establish transparent allocations to progressively address the disparities in indicators related to children’s rights; (c) Ensure transparent and participatory budgeting through public dialogue, especially with children and for proper accountability of local authorities;...(e) Take immediate measures to combat corruption and strengthen institutional capacities to effectively detect, investigate and prosecute corruption.”

⁵⁹ Limburg Principles, para 17.

⁶⁰ Limburg Principles, paras 18 and 19.

⁶¹ Limburg Principles, para 20

⁶² Prof. Anne Peters, *Corruption and Human Rights*, Basel Institute of Governance, Working Paper Series: 20, September, 2015, p.18.

CHAPTER IV: DOMESTIC HUMAN RIGHTS PROTECTION SYSTEMS AND COMBATING CORRUPTION

A. Domestic and international remedies

Institutions, mechanisms and procedures for the promotion and protection of human rights at the domestic level can be highly instrumental in countering corruption. In fact, international mechanisms and procedures come into play primarily when domestic systems of protection are non-functional, inaccessible or ineffective and thus unable to provide a remedy.

While the national human rights protection systems vary between countries, they share certain core components such as legislation guaranteeing the implementation of international human rights standards; effective institutions for the administration of justice and law enforcement, national human rights institutions and other institutional arrangements devoted to upholding human rights; procedures enabling rights-holders to effectively claim their rights; institutions and programmes of human rights formation to ensure an adequate level of human rights awareness among public officials and the general public; and an active civil society determined to defend human rights.

Domestic human rights protection systems are supported by democratic systems. Both include institutions and procedures which are competent mainly or additionally in spheres other than human rights (e.g. courts, parliaments, etc.).

Further, just as the fight against corruption has a positive effect on the implementation of human rights, anti-corruption institutions, mechanisms and procedures contribute to the realization of human rights.

B. Using constitutional principles and procedures to combat corruption

Human rights usually have constitutional status which means that they cannot be altered or displaced by ordinary legislation thus granting them special protection. From the anti-corruption perspective, the analysis of the impact of the domestic institutional and procedural guarantees of human rights should focus on their ability to contribute to effective control over the public authorities, accountability of perpetrators and the protection of victims of corruption.

Public interest litigation, where possible, can play an important role in efforts to protect human rights and to counter corruption.

Certain countries also grant anti-corruption provisions a constitutional status, thus providing the courts and tribunals with further tools to tackle corruption.

1. Constitutional right of access to the courts and the right of appeal

The *right of access to the court* ensures that the individual can bring a case involving his or her rights before a judicial body. Access to the courts may be provided in situations for which courts are exclusively competent or to review the legality and, sometimes, the rationality or merits of administrative decisions. Certain constitutions establish this right explicitly since judicial review

is recognized as the most advanced form of institutional human rights protection; and further specify its elements related to the status of courts and judges and procedural due process.

The right of access to courts requires that judges are fully independent in their decisions, not only from parties to the proceedings but also from any other external influence. The principle of due process in the context of the judiciary means that the proceedings meet the requirements of a fair and impartial adjudication of cases.

In the context of corruption, the right of access to courts may play an essential role in the following types of situations:

- protection against unlawful, biased and or otherwise unjust decisions influenced by corruption;
- protection against discrimination, bullying, threats by corrupt officials and their affiliates;
- compensation for damages caused by corruption; and
- protection against accusations of corruption and safeguarding the rights of the accused in criminal or disciplinary proceedings.

Access to the courts significantly contributes to legal security, which is one of the fundamental premises of the protection against corrupt action by public officials or powerful private actors.

The ***right to appeal*** is an important guarantee against arbitrariness. It requires that decisions at first instance be subject to review by a higher instance. This right relates to both administrative and judicial proceedings. The review of decisions by a higher instance is an important control mechanism that serves to defend rights; and prevent and expose corruption. The right to appeal may play an essential role if there is a need to rectify an unsatisfactory administrative decision or court verdict which deals with a corruption case; the rights of victims of corruption; or with a situation giving rise to allegations that the proceeding leading up to an administrative decision or court verdict itself involved corruption.

2. Constitutional complaint procedures and amparo⁶³

The constitutional complaint (amparo) is a special remedy (not a motion of appeal) that enables an individual or a group to claim his or her constitutional rights before a competent higher court after the exhaustion of all the opportunities provided by the law for the review of the case in the framework of the appeal procedure. Such complaints are lodged against the application of law violating constitutional rights. In some countries, they can also question the merits of final verdicts that infringe upon constitutional rights. Countries that use the common law system usually do not have such a procedure since each judge is principally competent to consider and adjudicate upon the applicable law's consistency with the constitution.

In the context of corruption, the constitutional complaint may play an essential role in enabling people to challenge final decisions, which resulted from a corrupt act or insufficient protection against corruption, thus violating their constitutionally guaranteed rights.

3. Public interest litigation

This remedy enables issues of public rather than individual interest to be brought to the court for judicial review. The plaintiff, whether an individual, a group or an organization, does not need

⁶³ Amparo – a constitutional remedy established in Spain and various States of Latin America.

to show a personal connection with (or interest in) the subject matter. It is essential that the litigation concerns an important public interest that requires action by the court. The purpose of public interest litigation is to find an optimal solution to a public problem in accordance with the requirements of justice and other legal principles. As a consequence, this procedure is accessible to a wider range of actors and goes beyond the usual limits of deciding cases and controversies. Concerns of judicial activism and the overburdening of supreme instances of the judiciary, with which public interest litigations are lodged, should not be underestimated but they are best addressed through admissibility procedures and the promotion of a culture of self-restraint among judges.

It is to be stressed that public interest litigation is gaining ground in international procedures as evidenced for instance by the jurisprudence of the Community Court of Justice of ECOWAS.⁶⁴

4. The right to petition

In many countries the right of citizens to address requests, proposals or demands to adopt or change laws or policies addressed to State authorities, in particular to the parliament and organs of central or local administration, is called the right to petition. Petitions are usually not subject to a detailed procedure. Further the petitioner's standing is weaker than the right-holder's standing unlike in procedures before courts, where the petitioner is placed on an equal footing with the State entity whose actions are at issue. Nevertheless, in many countries, addressees of a petition are legally obliged to respond to the petitioner in a prescribed time and provide information about action taken or planned to be taken.

The right to petition could be an important tool in denouncing cases of corruption, indicating sources of systemic corruption, and calling for redress for victims of corruption. In States that provide this right, everybody who possesses reliable information of corruption is entitled to submit a petition drawing the attention of the relevant authorities to the case. Due to the reduced formal rigidity of the submission of petitions, this may be a very handy procedure for non-governmental organizations, human rights defenders and other actors of the wider civil society.

C. Using democratic institutions to combat corruption

Institutions of democracy and the rule of law play a fundamental role in creating a system of government that is conducive to the realization of human rights. Human rights cannot be effectively protected when State action is not meaningfully subjected to control by legislative, administrative or judicial institutions. Outlined below are the institutional guarantees for democracy and the rule of law that are imperative for countering corruption.

1. The democratic system of government based on the separation of powers

⁶⁴ Preliminary Ruling of 27 October 2009, Suit No: ECW/CCJ/APP/08/08: the Socio-Economic Rights and Accountability Project (SERAP) against the Federal Government of Nigeria and the Universal Basic Education Commission, www.eccj.net - "Public international law in general is in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime."

The separation of powers means that the executive, legislative and judicial branches of government confine themselves to their constitutional mandates. It prevents a concentration of power that can lead to unchecked and arbitrary State action and fosters political and/or legal responsibility and accountability. It also ensures the parliament's centrality in representing the people and enacting legislation, and of the judiciary as the forum for the settlement of legal disputes, including in constitutional and administrative matters. Thus, the separation of powers provides the foundations within the constitutional order for countering corruption.

2. The role of the parliament and its human rights committees

As representative bodies, parliaments are the main mechanisms for public participation in human rights and anti-corruption policy. They adopt laws to promote these ends and, in a growing number of countries, give consent to the ratification of the important international agreements, such as human rights treaties and conventions against corruption. In many countries, parliaments provide central platforms for the elaboration of policies for implementing rights and freedoms, and eliminating corruption; and make a crucial contribution to setting up relevant structures, including NHRIs whose success largely depends on parliamentary support.

Parliaments also have control functions which enable them to contribute to enforcing constitutional rights and combating corruption. Specialized parliamentary committees may be created to deal with human rights questions and empowered to take submissions from rights-holders.⁶⁵ Various parliamentary committees may consider corruption-related issues but those focusing on budgetary issues, administration, and the rule of law will usually take the lead. It is essential that parliamentary committees focusing on human rights and corruption closely cooperate with each other.

However, for parliaments to effectively counter corruption, conflicts of interest, nepotism, and cronyism among parliamentarians must be eradicated.⁶⁶ Corruption among parliamentarians may be countered, by *inter alia*, holding them constitutionally accountable for specific breaches of law, such as violating the prohibition to perform any business activity involving any benefit derived from the State Treasury or local government's property or acquiring such property benefit while holding the mandate.

[Note: The role of organisations such as the Global Organization of Parliamentarians against Corruption can be touched upon in the future manual.]

3. The accountability of the government

Holding the government accountable to the parliament, which represents the people, is vital for a democratic order. However, there is no single method for shaping the relationship between the executive and the parliament. In parliamentary democracies, the executive is politically responsible to the parliament and may be recalled by the latter. In presidential democracies, it may be that the executive cannot be dismissed by the legislative. However, in both these democracies, members of the executive may be brought to justice by the parliament for breaches of the constitution or laws of the land (impeachment). The government and its members are

⁶⁵ Helpful information and advice one can find in "Human Rights. Handbook for Parliamentarians", Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, 2005.

⁶⁶ Cf. WBI Development Studies, *The Role of Parliament in Curbing Corruption*, p. 55 et subseq.

collectively and individually accountable both for perpetrating and tolerating corruption. The gravity of this responsibility requires it to be subject to constitutional guarantees.

In many countries, control is imposed over the government by special accountability bodies which vary in structure, composition, standing, and powers, such as courts of auditors, courts of exchequer, auditor general's or comptroller general's office and account or control chambers. They usually enjoy a high degree of independence from the government and are empowered to conduct financial, legislative and managerial audits of public institutions and certain private institutions, which act on the Government's behalf or use public funds. By ensuring oversight over public expenditure and contributing to transparency in the management of public funds, such institutions help to prevent, disclose and/or institute the prosecution of corruption.

4. Judicial review

Administrative decisions must be subject to review to ensure the effective protection of the rights of individuals or groups. Typically, the first step in the administrative review process is an appeal to a higher instance of the administration itself. Then, to protect against ineffective or even biased administrative decision-making, an external and independent power of control is usually vested with the judicial branch. Ordinary courts or special administrative courts may have the power to examine the legality of decisions and sometimes even their substantive elements.

As corruption (and associated human rights violations) frequently arises in the use of administrative discretion, the importance of both forms of control i.e. administrative and judicial review, cannot be underestimated in ensuring that such administrative decisions are subject to some procedure for independent challenge and control. Ultimately, judicial review is widely recognized as the strongest guarantee.

5. Decentralization and local self-government

Decentralization of state power in the form of local self-government or territorial autonomy is seen as a vehicle for democracy and freedom. By preventing the concentration of power at the central government level, it serves as an important bulwark against autocratic government. Decentralization may also counter centralized and systemic corruption. However, local self-government or territorial autonomy may also facilitate corruption by creating more territorial entities with discretionary power. Therefore, vigilance against corruption is needed in both centralized and decentralized states.

D. Using other domestic institutions to protect human rights and suppress corruption

1. Criminal and civil remedies: accountability and compensation

Just treatment of human rights-holders and an effective prevention of the abuse of power require perpetrators of human rights violations to be called to account by criminal and/or civil means. Therefore, accountability has been integrated as a fundamental principle into human rights law and human rights-based approaches.

In 2005, the Commission on Human Rights adopted the Set of principles for the protection and promotion of human rights through action to combat impunity.⁶⁷ The Human Rights Committee also emphasized the duty of State parties to bring perpetrators to justice, including through criminal law. A State Party's failure to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.⁶⁸

The implementation of the principle of accountability would be incomplete without the victims' right to remedy and compensation. This linkage has been symbolically highlighted by the General Assembly that endorsed Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005. Victims of corruption should be able to use domestic criminal and civil law to obtain redress.

[Note: Reference may be made in the future manual to Art 35 of the UNCAC, which recalls Art.3 of the Council of Europe's Civil Law Convention on Corruption.]

Thus, the human rights legal standards, institutions and procedures mutually reinforce the anti-corruption legal framework and mechanisms. Consequently, victims of corruption as a violation of human rights may seek justice, remedy and compensation from; and benefit from the protection extended by, both anti-corruption bodies and NHRIs.

2. NHRIs and anti-corruption agencies

The international human rights and anti-corruption regimes both foresee the creation of specialized and independent bodies such as NHRIs (discussed in the previous chapter) and anti-corruption agencies.

Many countries have established **anti-corruption agencies** (ACAs). Some, like Poland's Anti-Corruption Office, are primarily investigative bodies; others, like the Philippines Office of the Ombudsman, have complaints handling, prevention, prosecution, and awareness-raising mandates. Regardless of the scope of their powers, it is essential that these bodies have the necessary independence (Art. 6 (2) UNCAC) to function effectively as affirmed by the Jakarta Statement on Principles for Anti-Corruption Agencies (2012).⁶⁹ Many such agencies have created direct links to the parliament, though sometimes they are perceived as instruments of the executive branch.

As independent bodies with a wide range of complaints handling, policy-making, and advisory functions, both NHRI and ACAs have an important role to play in preventing and tackling corruption; and enhancing the enjoyment of human rights.

There is also potential for greater cooperation between NHRIs and ACAs. Their work in diagnosing, preventing and remediating human rights violations and corruption should be mutually reinforcing. Cooperation between them may also be helpful in denouncing specific

⁶⁷ See Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005.

⁶⁸ General Comment 31 (2004) of the Human Rights Committee, para. 15, 18.

⁶⁹ The Jakarta Statement Indonesia on 26-27 November 2012, affirms the "vital importance of ensuring the independence and effectiveness" of ACAs and recommends, *inter alia*, broad mandates, proper and stable legal frameworks, clear internal and external accountability provisions, clear standards of conduct for ACA staff, autonomy in human resources and financial decisions, adequate funding, and effective public communication and engagement. See <http://www.acc.org.bt/?q=node/465>.

cases. Efforts to undermine the independence of either institution may indicate arbitrariness in state power and a potential threat to the other. Therefore, while respecting their mandates and autonomies, NHRIs and ACAs have a mutual interest in cooperation, which government and civil society should encourage. They may also benefit from public financial intelligence centres that collect, analyse and disseminate information regarding potential money laundering, which would be helpful in tackling corruption.

Finally, the efforts of NHRIs and ACAs to uphold human rights and combat corruption are almost always supported by the work of NGOs. NGOs could thus benefit from collaborating with NHRIs and ACAs on specific cases and programmes, as well as on the strategic level.

E. Human rights-based methods that help prevent corruption

1. The use of human rights indicators

Human rights indicators enrich attempts to measure the scale and social impact of corruption by highlighting the discriminatory burden of corruption. Furthermore, in capturing deficits in the implementation and protection of human rights in areas such as access to justice, education, housing, and health care, they may reveal actual or potential corruption. For example, long waiting time for a hip replacement surgery or heart coronagraphy may indicate that patients or their families may be willing in urgent cases to resort to bribing medical personal to obtain a preferential treatment.

The use of **structural** (commitment), **process** (efforts) and **outcome** (results) indicators provides a structured and consistent approach to the development of corruption-related indicators. For instance, one could consider the adoption of international treaty or domestic law against corruption (**structural**), the corresponding resources actually allocated to anti-corruption mechanisms and statistics on the handling and results of corruption complaints (**process**), and the result thereof in terms of the actual prevalence of corruption on the population, measured by the proportion of people who have to pay to bribe in order to access a public service (**outcome**). Therefore, whilst acknowledging the limitation of any measurement system, those who are involved in combatting corruption also stand to benefit from the aforesaid methodology. The development and anti-corruption sector movement, which has a much longer history in using indicators for their work; and the human rights community, can and should draw on the synergy between their respective methodologies.

2. Budget monitoring

The allocation of sufficient resources is a fundamental condition for the implementation of all human rights, economic, social, cultural, civil and political. Therefore, developing budget proposals and monitoring their implementation should involve human rights assessments. This means that these processes should be based on the human rights principles of transparency, participation, accountability, and non-discrimination and be guided by human rights standards.⁷⁰

A human rights-based approach to budget development, implementation and monitoring may help to counter corruption in several situations. As discussed above, deficits of resources needed to ensure the necessary capacities for the implementation of human rights may both signal the

⁷⁰ For more detail on budget monitoring and human rights consult OHCHR, Human Rights in Budget Monitoring, Analysis and Advocacy. Training Guide, March 2010, p. 4.

possibility of corruption or even become the indirect source or consequence of corruption. For example, shortfalls of basic services in various areas of social life may prompt people to use illicit methods to obtain access to scarce goods on the one hand and, on the other hand, may incite those in the position to grant such access to abuse their powers. Therefore, ensuring allocation of appropriate resources for the implementation of human rights when the state budget is being elaborated, adopted and implemented may be an important preventive factor in combatting corruption.

There are different institutional solutions and methods that can be used for monitoring budgetary allocations. Many countries have a Supreme Audit Institution empowered to analyse the State budget and its implementation and report to the parliament, government agencies and the general public.

When combined with a human rights-based approach, budget monitoring tools may help to identify and prevent corruption. They may trigger investigation and even provide evidence for later administrative or criminal proceedings. Social audit methodologies, for instance, which help to determine whether funds for social services are actually being used efficiently and effectively for their intended purposes, have been described as “a valuable tool in uncovering fraud and corruption, and in creating or increasing awareness about government budgets and documentation”.⁷¹

[Note: The future manual can elaborate upon other budget monitoring tools including the social accountability tools developed by the World Bank such as Public Expenditure Tracking Surveys; Quantitative Service Delivery Surveys; Community Score Cards etc. and discuss how they can be utilised to prevent and combat corruption.]

CHAPTER V: FIGHTING CORRUPTION WHILE SAFEGUARDING HUMAN RIGHTS

The success of anti-corruption efforts hinge, *inter alia*, on ensuring respect for, and protection of, the human rights of perpetrators while undertaking measures to prevent and suppress corruption.

This is important as there are potential tensions between human rights and anti-corruption work.

Firstly, States have attempted to address the special problems of detecting, investigating, prosecuting, and punishing corruption by creating new anti-corruption standards, procedures and bodies, which sometimes seem to conflict with human rights particularly civil and political rights. **Second**, anti-corruption prosecutions may be misused to silence political opponents and sometimes, those who report corruption fall victim to such manipulations.⁷² **Third**, the UNCAC itself does not sufficiently emphasize the human rights aspects of anti-corruption measures. While the Convention refers to the content of some human rights norms and principles, neither

⁷¹ *Supra*, p. 61-62.

⁷² Carlos Castresana, “Prosecution of Corruption Cases and Respect of Human Rights”, (Geneva, ICHRP, 2007). Available from http://www.ichrp.org/files/papers/123/131_-_Carlos_Castresana_-_2007.pdf, p. 12; ICHRP and TI, Making the Connection, p. 63; Robert Klitgaard, *Controlling Corruption* (Berkeley, University of California Press, 1988).

does it make any direct reference to human rights nor does it commit State parties to implementing its provisions in accordance with global and regional human rights standards. Moreover the description of the relevant corruption offences; principles of legal defence; and of control of the lawfulness of conduct, is reserved to the domestic law of State Parties, and, consequently, such offences shall be prosecuted and punished in accordance with that law (without reference to international standards of human rights). **Fourth**, the UNCAC allows States parties to adopt stricter or more severe measures for preventing and combatting corruption than those it provides. Public condemnation of corruption may indeed sway legislators, prosecutors, and judges to deal with corruption more harshly than “ordinary” crimes thus putting particular human rights at risk.

A. Human rights in the criminalization, investigation and prosecution of corruption

As suppression conventions, the anti-corruption treaties neither establish and define international crimes nor provide precise principles and criteria for criminalizing specific conduct under domestic law. To criminalize corruption in accordance with human rights, the State Party must ensure that domestic law defines it as an offense and that the respective provisions have a clear and precise legal meaning, are not retroactive and respect the presumption of innocence.

Moreover, to ensure that the human rights of the accused are respected while investigating and prosecuting corruption, it is imperative that the State adheres to and upholds the principles of legality; the prohibition of retrospectivity and double jeopardy; the presumption of innocence; and fair trial rights. Further, human rights must also be respected in relation to extradition and asset recovery proceedings in corruption cases.

[Note: The future manual can elaborate upon the various legal principles including the presumption of innocence, fair trial rights, prohibition of double jeopardy and retrospectivity etc. (and may include the relevant jurisprudence) discussed above in connection with ensuring that human rights are respected in the investigation, extradition and prosecution of those accused of corruption.]

CHAPTER VI: PROTECTING THE HUMAN RIGHTS OF THOSE INVOLVED IN THE FIGHT AGAINST CORRUPTION

Anti-corruption campaigns require multifaceted efforts and the involvement of various actors. Media, civil society, and non-governmental organizations have been instrumental in uncovering and reporting particular acts of corruption. Their vigilance and voice are crucial in motivating governments and other actors to act with integrity. Individuals who are determined on account of personal experience or the social consequences of corruption to denounce specific crimes and identify perpetrators may play a decisive role in some situations. Ensuring the involvement of different actors requires both a suitable policy climate and the appropriate legal safeguards.

Human rights norms, principles and approaches are indispensable in establishing both, and thus may encourage journalists, activists, victims and witnesses to come forward.

1. Journalistic freedom and corruption

Free media provides a key platform for both highlighting incidents of corruption and informing state agencies, non-government actors, and the public about the sources, manifestations and consequences of systemic corruption. **Firstly**, the media tangibly contributes to anti-corruption efforts. Both incidental and systematic reporting across a variety of channels have prompted investigations, law reforms, and personnel changes – including at the highest levels of government. **Secondly**, the media helps to prevent corruption by publicising the results of anti-corruption campaigns and contributing to the stigmatisation of corruption. Its intangible benefit is “the broader social climate of enhanced political pluralism, enlivened public debate and a heightened sense of accountability among politicians, public bodies and institutions.”⁷³ When law enforcement efforts are known and the harms of corruption understood, public tolerance towards corruption is more likely to be replaced by public insistence on openness, transparency and accountability.

Moreover, the media often sets social standards concerning approaches to corruption. It is largely up to them whether the public opinion is watchful against, and critical of, any form of fraud – or whether it passively accepts corruption, at least in its petty forms, as a part of normal community life. The media’s impact is not limited to its outreach but also extends to the value of its investigative journalism. By exposing public officials and politicians, investigative reporting captures public attention and is hence attractive to publishers. Thus, in many instances, the media becomes a natural ally of anti-corruption campaigners and victims of corruption.

Yet again, the media and journalists may act as watchdogs against corruption only if they enjoy professional freedom and independence. Although no automatic relation can be observed, it is clear that media censorship helps to conceal corruption and thus prevent its disclosure, criticism and investigation.

[Note: The elements of Art 19 of the UDHR and ICCPR and other relevant legislation may be elaborated upon in the future manual.]

Journalistic and media freedom are frequently under attack in order to prevent the disclosure of facts of corruption, the existence of corrupt state policies and mechanisms, and networks of corrupt officials. As the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression pointed out, in many instances, “restrictions on the freedom of opinion and expression limit to a significant extent the possibility of violations becoming known and investigated. [...] such trends perpetuate patterns of government corruption and impunity.”⁷⁴

2. Exposure of journalists and journalistic safeguards

⁷³ R. Staphenurst, *The Media’s Role in Curbing Corruption*, World Bank 2000, p. 3; E. Byrne, A.-K. Arnold and F. Nagano, *Building Public Support for Anti-Corruption Efforts. Why Anti-Corruption Agencies Need to Communicate and How*, World Bank 2010, p. 9.

⁷⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, E/CN.4/2001/64, para. 98.

The human rights mechanisms discussed above are also engaged in the protection of journalists and are empowered to scrutinize the compliance of States with their obligations in this respect. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression found a significant number of cases in which individuals were subjected to various forms of intimidation and harassment.⁷⁵ The Special Rapporteur on the situation of human rights defenders produced shocking estimates of the number of journalists who were targeted, often fatally, for their involvement in the fight against corruption.⁷⁶

[Note: Practical examples of how journalists have been targeted for their anti-corruption efforts, may be included in the future manual.]

It is not enough for the State to enact laws prohibiting interference with journalistic freedom and criminalising physical attacks or threats against journalists. Under international human rights law, the State is obliged to promptly and effectively hold perpetrators accountable. Investigative journalists, in particular, are likely to require special protection as they are confronted, not only with various forms of censorship, harassment and intimidation, but also arbitrary arrests, torture, enforced disappearances, and unlawful killings. This, in turn, creates a climate of fear in society and inevitably chills efforts to challenge corruption.

3. Social media fighting corruption

If understood just as the dissemination of information via the Internet, social media may be covered by standards and mechanisms of protection that have been developed in the context of traditional media. However, social media is different in that it is freely accessible to all those linked to internet, including through mobile devices, thus making linkage and participation possible on an unprecedented scale with an incomparable outreach. Its accessibility and the opportunity for sharing information in real time, greatly contribute to transparency in public life. The paradigm of a vibrant civil society is increasingly shifting towards social media which has become an important vehicle for empowering people.

Despite the level of anonymity offered by the Internet, social media users are also exposed to similar security risks as journalists of traditional media and thus human rights safeguards for the protection of journalists, as well as human rights in general must also be used to protect contributors to social media, including whistleblowers.

4. Anti-corruption activists and human rights defenders

Human Rights Defenders are “individuals, groups and associations ... contributing to ... the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals.”⁷⁷ “What is most important in characterizing a person as a human rights defender is not the person’s title or the name of the organization he or she works for, but rather the human rights character of the work undertaken. It is not essential for a person to be known as a “human

⁷⁵ Report of the Special Rapporteur, E/CN.4/2001/64, paras. 29 – 31.

⁷⁶ Report of the Special Rapporteur, A/HRC/19/55, paras. 37, 40– 41, 55–59.

⁷⁷ Para. 4 of the Preamble of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), A/63/288 Annex.

rights activist” or to work for an organization that includes “human rights” in its name in order to be a human rights defender.”⁷⁸

Anti-corruption activists and whistleblowers may therefore be recognized as human rights defenders, especially if they ultimately contribute to the protection of human rights or resort to human rights standards and/or mechanisms in their work. This would give them access to protection established under international human rights instruments.

[Note: Practical examples involving HR defenders may be provided for in the future manual e.g. from the Asian Human Rights Commission and national human rights institutions.]

The 1998 **United Nations Declaration on Human Rights Defenders** occupies a central place among the human rights instruments in this context. The Declaration specifies the rights of human rights defenders and related principles concerning (a) participation, (b) collection and dissemination of information on human rights, their implementation and violations, (c) networking with other defenders and campaigning for human rights, and (d) the remedial measures to protect the rights of defenders. Although the Declaration is supported by the entire human rights machinery, it also has its own monitoring and implementation mechanisms, acting under the Human Rights Council’s mandate, i.e. Special Rapporteur on Human Rights Defenders. Thus, anti-corruption activists whose work has a human rights dimension, which is generally the case, may benefit not only from the standards laid down in the Declaration but also from the protection provided by the relevant Special Rapporteur(s) and – as appropriate – other human rights bodies and procedures including by way of remedies which encompass the right to make complaints about official policies and acts relating to human rights; the right to have such complaints promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law; and the right to obtain from such an authority a formal decision, providing redress, as well as compensation, if appropriate.⁷⁹

[Note: The future manual may elaborate on the specific provisions of the UN Declaration on Human Rights Defenders particularly those relating to participation; collection and dissemination of information on human rights; networking and campaigning; and remedies]

5. Victim and witness protection

The protection of victims and witnesses of corruption is crucial to anti-corruption efforts. Any gaps in their protection may not only expose those involved to serious additional harm and risks but also undermine the broader struggle against corruption. Impunity of perpetrators is widespread because of fears of victims and witnesses to denounce corruption and to testify. The fear and/or risk of self-incrimination perpetuates corrupt practices. Therefore, the participation of victims is essential for developing effective anti-corruption strategies and projects. It is worth noting that “Victims are often socially marginalized individuals and groups who are harder to reach, but have an important role to play, particularly in areas such as establishing and demonstrating the true nature and extent of the harm caused by corruption.”⁸⁰ The UNCAC lays down a legal framework for the protection of victims and witnesses. Human rights law also contains complex and highly important standards of protection for these categories of persons and offers mechanisms which could apply in this context.

⁷⁸ <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>.

⁷⁹ Art. 12 and 9 of the Declaration on Human Rights Defenders respectively.

⁸⁰ Ibid., para 19.

The UNCAC imposes on all State Parties the duty to provide effective protection from potential retaliation or intimidation of witnesses and experts who testify or provide other evidence in corruption cases.⁸¹ This protection should also embrace their relatives and other persons close to them, as appropriate. There is no one-size-fits-all model for such measures given differences in domestic legal systems of States. Many countries have developed comprehensive witness protection programmes which may also be applied in the case of corruption.⁸²

The protective measures should focus on:

- physical protection that may include relocating witnesses and experts, as well as limitations on the disclosure of information concerning their identity and whereabouts;
- evidentiary protection consisting in rules and methods of hearing which guarantees the safety of witnesses and experts while giving testimony, including through the use of transmission and other communications technologies.⁸³

Victims should have some special guarantees, including the right to have their views “be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.” State Parties should also take measures to address consequences of corruption and ensure that victims of corruption have the right to initiate legal proceedings against those responsible in order to obtain compensation.⁸⁴

Since acts of corruption are secretive and therefore highly difficult to unveil,⁸⁵ **reporting persons (whistleblowers)** have been recognized as a particular category of **witnesses**. They usually do not provide “court-ready” evidence although they may possess relevant information, often as insiders of public or private offices. The UNCAC explicitly recommends that State Parties establish protection against any unjustified treatment of any person who reports in good faith and on reasonable grounds, any facts concerning alleged corruption, to the competent authorities. Protective measures in this case may include, guarantees of anonymity, criminalizing threats, intimidation or retaliation, protection against discrimination in public and professional life, lifting accountability on the basis of confidentiality laws, legal protection against the loss of job, and stigmatisation.

According to the UNCAC, State Parties shall also “encourage persons who participate or who have participated in the commission of [corruption] to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.”⁸⁶ Measures to that end should include, *inter alia*, mitigating punishment of the accused; granting immunity from prosecution; and similar protection as provided to witnesses, experts and victims.

⁸¹ Art. 32 (1) UNCAC.

⁸² For more details, see United Nations Office on Drugs and Crime, Technical Guide to the United Nations Convention against Corruption, United Nations, New York, 2009, p. 103; see also “Good practices for the protection of witnesses in criminal proceedings involving organized crime”, prepared by the same organization and available on its website.

⁸³ Art. 32 UNCAC.

⁸⁴ Art. 35 UNCAC.

⁸⁵ OECD Glossaries, Corruption. A Glossary of International Standards in Criminal Law, OECD 2008, p. 52

⁸⁶ Art. 37 UNCAC.

From a human rights perspective, the human being – be it as a victim; or a witness; or in a mixed capacity, occupies a central role. His/her rights are perceived as valuable in and of themselves, rather than solely as part of an anti-corruption campaign's overall framework. Victims of human rights violations are also entitled to an effective remedy, which includes equal and effective access to justice; to procedural guarantees (due process) in criminal court proceedings; and to adequate, effective and prompt reparation for harm suffered. This means that the status and rights of the individual implicated in a corruption case should be examined in view of all the specific circumstances of the case. The entire criminal proceeding must be based *inter alia* on the presumption of innocence of the person(s) concerned as provided under international and domestic law. While planning and implementing anti-corruption measures, those responsible or otherwise involved should recognize the human rights standards concerning victims and witnesses as one of the basic parameters. They should consider the core human rights instruments as well as soft laws, such as, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the General Assembly.⁸⁷ Before the relevant bodies (e.g. anti-corruption commissions, police, investigation bodies and courts) victims and witnesses should be treated with dignity and compassion; and protected from intimidation and harm. They should also be fully informed about the normative framework and facts of the criminal justice process.

Victims and witnesses of corruption also have access to the human rights mechanisms for protecting their rights. At the domestic level, these are primarily courts and national human rights institutions; at the international level, in particular, the communication procedures before the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, as well as the special procedures, especially the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the independence of judges and lawyers; and the Working Group on Arbitrary Detention.

[Note: The future manual can elaborate further on the role of the relevant Special Rapporteurs notably the Special Rapporteur on the situation of human rights defenders.]

CONCLUSIONS AND RECOMMENDATIONS

- ➔ **The international legal frameworks for the protection of human rights and the combat against corruption are complementary and mutually reinforcing.**

- ➔ **The human rights approach to anti-corruption means putting the international human rights entitlements and claims of the people (the 'right-holders') and the corresponding obligations of the State (the 'duty-bearer') in the centre of the anti-corruption debate and efforts at all levels, and integrating international human rights principles including non-discrimination and equality, participation and inclusion, accountability, transparency, and the rule of law.**

⁸⁷ A/RES/60/147, Annex.

- The human rights approach to anti-corruption identifies corruption as a human rights issue, not just a crime or an economic factor. It looks at systemic and structural causes of corruption. It promotes a coherent system that targets all stages of the anti-corruption process, from prevention to suppression, from detection to freezing of assets and their return to the rightful owners. It engages with the State and non-state actors, including business enterprises, civil society and international organizations.
- The human rights approach is victim-centric and makes corruption's negative impact on individuals, groups and society more visible. It reinforces the legal basis of anti-corruption laws, policies and actions, makes the implementation of preventive policies an obligation and elevates anti-corruption efforts to a constitutional matter and to a legitimate concern of the international community.⁸⁸
- The realization of human rights creates a conducive environment for effectively preventing and remedying corruption including through an active civil society that rejects corruption and calls for integrity and accountability as a human rights obligation.⁸⁹
- Evidentiary challenges associated with criminal trials owing may in part be eased in human rights proceedings.
- International, regional and national human rights mechanisms, including national human rights institutions have an important role to play in the fight against corruption, through complaints-handling, investigating human rights violations caused by corruption, exposing the impact of corruption on human rights and making recommendations to strengthen anti-corruption efforts.
- The complementarity between anti-corruption efforts and human rights promotion can be capitalised upon through mutual mainstreaming. This entails, among other things, a human rights-compatible interpretation of all corruption-related criminal offences. Conversely, anti-corruption concerns should be addressed more vigorously by human rights mechanisms.⁹⁰ Possible measures include:
 - (a) Including corruption as a specific item in the guidelines for reporting to treaty bodies;
 - (b) addressing corruption in country-specific concluding observations of the treaty bodies and special rapporteurs;
 - (c) soliciting information from and engaging with anti-corruption NGOs in human rights monitoring procedures;
 - (d) enhancing collaboration and cooperation between NHRIs and ACAs

⁸⁸ Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73.

⁸⁹ Ibid.

⁹⁰ Martine Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (Cambridge: Intersentia 2012) pp. 376-379.