

Fighting Corruption While Safeguarding Human Rights.

Paper presented by Phil Matsheza¹ at the United Nations, Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, Republic of Poland, 8-9 November 2006.

The Chairperson, distinguished guests, ladies and gentleman, I would like to thank OHCHR for organizing this seminar, the UNDP for the logistical support, the Government of Australia for financial support and the government of Poland for hosting this conference.

I am participating in this conference as a representative of the United Nations Office on Drugs and Crime (UNODC), which as you know has the primary mandate to implement the United Nations Convention against Corruption (UNCAC) and to support Member States in their anti-corruption efforts through the Global Programme against Corruption and other technical assistance programmes.

The UNODC appreciates the close liaison and consultations that took place between the OHCHR and UNODC in preparation for this conference. The UNODC welcomes this initiative, which aims at advancing the fight against corruption within the context of human rights protection.

The theme of this session is “fighting corruption while safeguarding human rights.” Therefore, the first questions, which come to mind is whether fighting Corruption is complementary to human rights protection or not, and are there any inherent contradictions in the United Nation mandates to fight corruption and protection of human rights?

This seminar has discussed extensively the impact of corruption on human rights. There is a consensus that corruption undermines the principles of non-discrimination through discretion, favoritisms and nepotism, and it undermines the rule of law when judges are bribed to issue judgments in favour of the highest bidders. Observations have been made, which indicate

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that where there is weak rule of law, low crime detection and high impunity levels for officials, corruption is rife and vice versa.

The impact of corruption on the economy has also been discussed at this forum and organizations like UNDP and the World Bank have on a number of occasions released estimates of the cost of corruption to society. For example the World Bank estimates that over one trillion dollars is spent on bribes alone each year,² which is more than ten times the amount of money spent on development aid. The IMF estimates that money laundering is the third world largest business, estimated at over US\$500 billion a year. In a number of countries the looting of state resources by heads of state and their cronies exceed national debts.

The United Nations Secretary General Koffi A. Annan had this to say in relation to corruption, "*Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*"³

I do not want to return to yesterday's presentations and discussions, but I want us to pause and think. If there is consensus that corruption has a negative impact on human rights, we should also have consensus that fighting corruption enhances human rights. For example, the following common principles underpin human rights, good governance and anti-corruption: *transparency, accountability, citizen participation, rule of law, freedom of expression, right to information, separation of powers, equality and non discrimination, equity and fairness.*⁴ Therefore, one could assume that, because there are common principles between human rights, good governance and anti-corruption, that anti-corruption and human rights were mutually self-reinforcing.

It is, among other issues, and on the basis of this linkage that today we are advancing the argument that corruption is a human rights violation, because we are satisfied that the linkage and nexus exists.

² Nguyen, Poor. (2005). Victimized by extortion, large and small. IPS. September 20, 2005

³ UNODC. (2004). Forward to the United Nations Convention against Corruption. iii.

⁴ Matsheza, P. & Kututwa, N. (2005) The role of the Media in Promoting Democracy and Good Governance. SAHRIT. 8-9.

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

This should not be surprising as fighting corruption is a crime prevention issue and history has taught us that governments sometimes settle political scores in the name of fighting crime and maintaining law and order. Human rights abuses by law enforcement agents are common in many countries and these agents have been known to use unorthodox methods such as torture to apprehend criminals, obtain confessions and convictions. Corruption is no exception. In fact it is more complex than ordinary crimes, because both parties may be beneficiaries and therefore, no complainant and the paper trail difficult to trace. To overcome this common challenge, law enforcement agents then seek special investigation powers to gather information, secure confessions and trap suspects. This is sometimes done at the expense of human rights observation and protection.

The issue of corruption and fighting corruption has of late become a popular political campaign issue worldwide. But, unfortunately, the same officials or leaders that campaign on fighting corruption often become corrupt themselves when in power. We have also witnessed a number of incumbent Heads of governments pursuing their predecessors and on corruption when they themselves are corrupt. Such situations weaken the fight against corruption and create skepticism and fear among the public, and raise concern that anti-corruption initiatives may be used as a tool for human rights abuses.

We should also examine the UN Convention itself to check for normative weaknesses that may create potential areas for human rights abuses. The UNCAC is designed differently from most human rights treaties. It is programmatic in approach and is not generally declaratory of rights. The Convention has mandatory sections, recommendations and guidelines. This makes the Convention fairly complex as compared to most human rights treaties. Many states, therefore, may not have the capacity to understand their obligations and that anti-corruption and human rights are not mutually exclusive.

The Convention consists of a number of articles that call upon States Parties to maintain and strengthen systems that promote transparency, prevent conflict of interest (article 7(4)), and access to information by the public on government contracts and tendering systems (article 10). UNCAC calls upon States Parties to, “*take measures that promote participation of individuals and groups of people outside the public sector such as civil society, non governmental organizations and community based-organizations in the prevention of and fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.*” Such participation may be strengthened by such measures as:

- (a) *Enhancing the transparency of and promoting the contribution of the public to decision- making processes;*
- (b) *Ensuring that the public has access to information;*
- (c) *Undertaking public information activities that contribute to non-tolerance of corruption;*
- (d) *Respecting, promoting and protecting the freedom to seek, receive and publish information concerning corruption. That Freedom may be subject to restrictions, but these shall only be such as are provided for by law and are necessary;*
- (e) *For the respect of the rights or reputations of others (article 13);*

This example demonstrates how the Convention provides for human rights protection through enhancing the democratic process such as citizen participation and access to information, which can help to reduce abuse.

Further, article 19 mandates States Parties to criminalize abuse of power by officials as a way of combating corruption and protecting the population from human rights violations.

Many Member States, human rights activists and citizens want proceeds of corruption returned by the countries where it is stashed away, so that it can be used for development and poverty reduction.

While the issue remains contentious, there has been improvement in cooperation between the requesting and the requested governments. A problem that remains is that many requesting states do not have laws and procedures that facilitate the requests and return of proceeds of corruption. UNODC recommends to Member States to adopt UNCAC recommendations

on the procedures that may be taken by both the requesting and requested states.

A number of practitioners are also not very comfortable with the principles of non-conviction based forfeiture mechanisms. They think that it is liable to abuse.

We hope that the increasing number of institutions specializing in asset recovery which are being established, will improve expertise in this area, so that billions of dollars can be traced and recovered or sent back to the countries where they were looted from.

Citizens are also concerned about lifting of bank secrecy laws, which cannot be used as a basis for refusing to cooperate with law enforcement authorities when investigating issues such as money laundering (article 31 (7)). The Convention requires that any information sought from a bank shall only be used for the sole purposes for, which it was sought, as a way of safeguarding the privacy of the individuals. Article 10 of the Convention requires that mechanisms to report on corruption should be done *with due regard to the protection of privacy*. The Convention also provides for remedies where an individual has been wronged in the process of fighting corruption.

The preamble to the Universal Declaration of Human Rights states that, *“Where as it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”*

The right to a fair trial is a cornerstone of human rights protection and the Convention calls upon strengthening of Judiciary independence and judicial integrity. This issue was adequately discussed yesterday and I have no intention to repeat the discussion except to emphasize its importance in fighting corruption and observing human rights.

Anti- Corruption agencies established pursuant to (article 6) are also required to have operational independence, so that the institution is not used for political witch hunting. Article 36 calls for specialized bodies to be created to address corruption issues. Such bodies need to be given autonomy and operational independence from the executive, and to have adequate training and resources, so that the institution can carry out its functions without any undue influence

A number of reservations have been raised that Article 20 could be abused by some states. Article 20 makes it an offence to *have a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income*. The concern is based on the established legal tradition that the state has to prove its case beyond reasonable doubt and that article 20 seems to place the burden of proof on the suspect instead of the State. Concern has also be raised that this article could be misinterpreted by some states to mean that the suspect must prove his or her innocence, instead of the state establishing a *prima facie* case thereby reversing the longstanding principle that the suspect is innocent until proven guilty. This issue was hotly debated at the 9th International Conference against Corruption, held in Durban, South Africa, in 1999.

Article 44 (14-15) provides protection to people who are subject to extradition requests from being extradited to places where their rights are in danger. In extradition cases, where dual criminality has been established, the suspect who is subject to extradition proceedings, these articles state that any person subject to extradition proceedings, *“shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present*. The requested Party has no obligation to extradite a person if it believes that, *“the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, or ethnic origin or political opinion that compliance with the request would cause prejudice to that person’s position for any one of these reasons.”*

States Parties must ensure that investigative techniques, such as electronic and other forms of surveillance and undercover operations, are consistent with human rights protection and in compliance with national laws.

The UNCAC came into force on the 14 December 2005, so it is only one year old and the first Conference of State Parties will be held in December 2006 in Jordan. Given the nascent Convention, there has not been much development and interpretation of its clauses. Unlike human rights jurisprudence which is well-developed, anti-corruption jurisprudence is just unfolding and seminars like this one help in this effort.

Since the Convention came into force, UNODC has been inundated with request for technical support, by Member States and other institutions

addressing issues of corruption, to assist with the country assessments, and the development of national strategies, legislation, proposals and anti-corruption institutions, extradition of those accused of corruption and asset recovery. When one examines these requests, there is no doubt that some Member States are seeking quick fixes and want to be seen as fighting corruption. Other Member States are too eager and are proceeding with introducing too many activities within a short period of time without developing necessary and prerequisite oversight and supervisory mechanisms, and allocating mandates to specific institutions. The approval and implementation of hastily developed legislation and national strategies have the potential to provide loopholes that could lead to some human rights violations rather than fundamental errors in the norms themselves.

The UNODC is aware of these potential weaknesses and is, therefore, developing a legislative and technical guide to assist Member States to unpack UNCAC's complex requirements and provisions. In the course of providing technical assistance, the UNODC advises Member States to ensure that statutes do not give too much discretionary powers to law enforcement agents and the executive, in general and that the strategies must be realistic, and ensure that checks and balances are in place. We also provide specialized training for anti-corruption agencies and departments to enable them to implement anti-corruption measures, while observing human rights.

As I stated earlier, the conference of State Parties to be held this December will determine the future implementation modalities of the Convention and I am confident that the linkages between human rights and anti-corruption will be further reinforced.

Ladies and gentleman, I have shared with you examples of the human rights issues that are likely to arise during the implementation of UNCAC. The list is obviously not exhaustive and I welcome the conference to help expand the list based on your experiences.

The number of ratifications of UNCAC is also increasing especially from the developed countries that were initially lagging behind. It is forums such as this that have contributed to the growing awareness about the serious issue of corruption and the need to rally around UNCAC as the leading international framework to fight corruption. As a result more and more governments are seriously tackling the problem of corruption and we are

learning best practices as we go. These are all positive developments. I would like to reiterate that the issue of human rights abuses in the course of fighting corruption does not appear to originate from inherent weakness in the norms and standards of UNCAC, but from state practice and misinterpretation of anti-corruption procedures.

I would like to confirm that UNODC will continue to support the implementation of the Convention by States Parties in a way that human rights are not infringed upon. And, I thank you for this opportunity to advance this topic of discussion with you today, and I look forward to continued deliberations and collaboration.