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**ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**Corruption and its impact on the full enjoyment of human rights,  
in particular, economic, social and cultural rights\***

**Preliminary report of the Special Rapporteur, Ms. Christy Mbonu\*\***

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\* The document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208 B, by which the Assembly decided that, if a report is submitted late, the reason should be included in a footnote to the document.

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## Summary

This is a preliminary report submitted in accordance with Sub-Commission resolution 2003/2 on the issue of corruption and its impact on the full enjoyment of human rights, in particular economic, social and cultural rights, building upon the working paper (E/CN.4/Sub.2/2003/18), submitted to the Sub-Commission at its fifty-fifth session and taking into account the discussions during that session.

Starting from the universality of the phenomenon of the scourge of corruption, the preliminary report explores some general and specific manifestations of corruption, including cases of corruption in the corporate sector. The report continues with an identification of victims of corruption, the poor being the most vulnerable to corruption, and elaborates on the socio-economic and civil and political consequences of corruption in human rights terms, making the link to the undermining effects of corruption to developmental efforts of developing countries. The report also analyses corruption in the private sector and looks at the roles of multinational companies.

Following the analysis of the manifestations and consequences of corruption the report looks into national and international mechanisms against corruption.

In its conclusions and recommendations the report underlines the importance of political leadership in the fight against corruption; the importance of ratifying and incorporating the United Nations Convention against Corruption into domestic laws, highlighting the role of the asset-recovery provisions; the importance of establishing national anti-corruption mechanisms and legislation; the importance of cooperation among countries in fighting corruption, including prevention, investigation and the prosecution of offenders; the need for built-in safety net mechanisms for the protection of citizens from corporate corruption; the importance of companies' adhering strictly to their codes of conduct; the need for effective law enforcement; and the importance of civil society and the media. Underlining that lack of basic needs engenders corruption, the report also points to the role of debt in that context and recommends debt forgiveness for poor States.

Given the devastating impact of corruption on the society, the Special Rapporteur also suggests the holding of periodic high-level meetings to stimulate discussion of the question of corruption.

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## **Introduction**

### **Background to the study**

1. By decision 2002/106, the Sub-Commission on the Promotion and Protection of Human Rights decided to entrust Ms. Christy Mbonu with the task of preparing a working paper on the impact of corruption on the realization and enjoyment of all human rights.
2. The working paper (E/CN.4/Sub.2/2003/18), submitted to the Sub-Commission at its fifty-fifth session, took into consideration the discussion held on this issue at the fifty-fourth session which, *inter alia*, noted that corruption should be condemned and that those guilty of corruption should face international justice if they escaped national jurisdiction. The paper also took note that the Economic and Social Council, having been concerned with the serious problems posed by corruption, which might endanger the stability of societies, undermine the values of democracy and morality and jeopardize social, economic and political development, had adopted resolution 2001/13.
3. In resolution 2003/2, the Sub-Commission recommended that the Commission on Human Rights endorse the decision to appoint Ms. Mbonu as Special Rapporteur with the task of preparing a comprehensive study on corruption and its impact on the full enjoyment of human rights, in particular, economic, social and cultural rights. At its sixtieth session, the Commission in its decision 2004/106 endorsed the Sub-Commission's decision. The present report is therefore submitted in accordance with Sub-Commission resolution 2003/2.

### **Purpose of the study**

4. Corruption, according to some writers, is endemic in all Governments; it is not peculiar to any continent or ethnic group. The negative effects of corruption and impunity on the political, economic, social, civil and cultural stability of many countries, especially the developing ones, and its devastating effects on the economic and social development of the people have now been well documented. What makes the study of corruption more compelling is the "horrendous depletion of Africa's scarce capital and investible surplus through systemic and official looting of the treasury for corrupt enrichment abroad".<sup>1</sup> Another compelling reason for the study of this topic has been to find answers to a number of issues that have undermined the confidence of investors, shareholders, etc. in company management in recent years.

## **I. PRELIMINARY CONSIDERATIONS**

5. A fact that was established as the Sub-Commission decided to discuss the scourge called corruption was its universality. "It cuts across faiths, religious denominations and political systems and affects both young man and woman alike. Corruption is found in democratic and dictatorial politics; feudal, capitalist and socialist economies."<sup>2</sup> During the sanitization of the judiciary in Kenya, corruption was described as "an evil without mitigation undermining the delivery of services to the people of Kenya and contributing in no small measure to the country's economic decline and subsequent poverty".<sup>3</sup>
6. Corruption undermines the rule of law and the administration of justice; it is completely subversive of any country's electoral system and participatory democracy. While it is

instrumental in undermining foreign and local investors' confidence in any country, it is largely responsible for the dilapidation of that country's infrastructure. No wonder corruption was aptly described as a "cancer festering within society, enriching a few and impoverishing many".<sup>4</sup>

## II. GENERAL AND SPECIFIC MANIFESTATIONS OF CORRUPTION

7. The enjoyment of all regimes of rights is seriously affected by corruption. Corruption has received extensive attention in the international community with many writers trying to come up with various definitions of it. Some writers have even tried to explain the endemic nature of corruption in a cultural context. Writing of corruption, United States Attorney-General John Ashcroft<sup>5</sup> stated: "... no society has ever been totally free from corruption. Even the most successful and longest-established market societies experience corruption. For example, in 2002, the US Justice Department dealt with more than 1,000 federal prosecutions of corrupt officials on the federal, State and local levels". He therefore observed that "corruption saps the legitimacy of democratic government, and in its extreme forms even threatens democracy itself, because democracy lives on trust, and corruption destroys trust". It has been shown through World Bank studies that negative effects of corruption can reduce a country's growth rate tremendously. The World Bank estimates that the cost of corruption represents about 7 per cent of the annual world economy, roughly 2.3 trillion dollars. The corruption in the business community is bone-chilling! Commenting on the collapse of Enron, America's largest energy trader, the culpable executives were compared to the "robber barons of yore"<sup>6</sup> while Attorney Joe Cotchett characterized them as "economic terrorists".<sup>7</sup>

8. The corruption perpetrated by the company included "a successful attempt to hide their large debts, establishing a series of limited partnerships, which could be treated as separate entities". These accounting "tricks" had the desired effect of showing the company's profits to be much higher than they actually were, pushing up stock prices, deceiving investors and lying to Enron's employees, encouraging them to sink their savings and retirement funds into the company stock.<sup>8</sup> It is more worrisome to note that "these practices were 'approved' by prestigious accounting firm Arthur Andersen, retained by Enron as auditors as well as highly paid consultants".<sup>9</sup> More will be discussed on this issue under "Victims of corruption" below.

9. A Milan lawyer, Marco Deluca, describing the collapse of the Parmalat dairy empire in Italy as worse than corruption, noted, "It is only the kind of crimes that have changed: We used to speak of corruption, now it's *financial collapse* (emphasis added).<sup>10</sup> The Parmalat affair has affected companies and jobs in 30 countries on 6 continents, including Australia. "From Brazil and New York to the Netherlands and Milan, investigators are searching for about 10 billion euros (\$16.51 billion) in missing funds."<sup>11</sup>

10. According to Jane Ellis,<sup>12</sup> "It has been argued that corruption, in its most negative portrayal, is a western construct and that what constitutes corruption and bribery in a developed country, is no more than a traditional and cultural practice in another, non-western and developing, countries. The corollary to this view is that where they existed traditional practices such as gift giving to chiefs and important people, ... was done openly and with the expectation that the gifts would be passed on or shared (some see this as an early taxation system). The modern day practice of secret and personal gifts is a perversion of such traditions, and in many

cases is a modern construct quite unrelated to traditional practice”.<sup>13</sup> Ms. Ellis’s argument has brought to the fore the fact that bribe giving and taking, and by extension corruption, is a universal problem not limited to the developing countries or to regulated economies.

11. Evidence abounds that most public officials from the developing countries are frequently induced to take bribes by companies from the developed countries, often at economic and social costs to those poor countries. In one of the high-profile corruption cases, France’s electronic giant, SAGEM SA, has been accused of bribing some Nigerian officials to secure a \$214 million contract with the Nigerian national identity card programme in 2001.<sup>14</sup> The concerned officials, irrespective of their social status, are being tried in court and under the many national instruments established by Nigeria to fight corruption. Halliburton, a United States oilfield services giant, has also been involved in many scandals in Nigeria ranging from tax evasion to bribery of public officials.<sup>15</sup> It is to stem this unbridled corruption that the Organization for Economic Cooperation and Development (OECD), comprising 30 countries, approved a revised version of its Principles of Corporate Governance, adding new recommendations for good practice in corporate behaviour with a view to rebuilding and maintaining public trust in companies and stock market.

12. The revised Principles respond to a number of issues that have undermined the confidence of investors in company management in recent years. Among other things, they call on Governments to ensure genuinely effective regulatory frameworks and on companies themselves to be truly accountable. They also advocate increased awareness among institutional investors and an effective role for shareholders in determining executive compensation. They further urge strengthened transparency and disclosure to counter conflicts of interest.

13. Corruption has also been graded as “petty corruption”, “grand corruption” (organized crime), “systemic or endemic corruption”, etc. Whatever its “grade” or “level”, corruption has debilitating effects on developing countries which cannot be overemphasized. Dictatorship and lack of democracy, leading to centralization, concentration and personalization of power, have led in some countries to a culture of unbridled corruption. In an article on former President Abacha of Nigeria,<sup>16</sup> it was reported that funds traced to the late military dictator which had been frozen in a Swiss bank, totalled about \$666 million. Further search revealed that Abacha and his family had funds in a number of banks. Interestingly, Luxembourg officials had announced the freezing of \$630 million belonging to the family in the Luxembourg subsidiary of a German bank. After several months of strenuous negotiations, the Swiss authorities agreed to hand over about \$50 million of the looted funds to the Nigerian Government.<sup>17</sup>

14. Article 23, paragraph 1, of the Universal Declaration of Human Rights specifies that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against employment”, article 25, paragraph 1, specifies that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. It is against the background of the denial of the foregoing rights by dictatorial and corrupt leaders that the stolen public funds siphoned off from the developing countries to the developed countries, with the connivance of their financial institutions, constitute corruption.

15. Think of the jobs, the infrastructure, the improved educational system and the enhanced democratic institutions the looted funds could provide if they were redirected from the personal enrichment of the corrupt to the public service of the people. It is widely acknowledged that as a result of the siphoning off of these huge sums from the coffers of the developing countries to developed nations, most of the States have become failed States, unable to perform even ordinary State functions, including providing water, electricity and adequate housing for their populations.

16. A State whose law enforcement agents are infected by corrupt practices lacks the necessary capacity for effective criminal investigation, judicial proceedings and physical enforcement of sanctions. A State bedevilled by poor law enforcement mechanisms is prone to manipulation and corruption. The General Assembly, in resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials which states in article 1: "Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession." On corruption, article 7 states: "Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat such acts."

### III. IDENTIFICATION OF VICTIMS OF CORRUPTION

17. The global cost of corruption cannot easily be estimated. It has, however, been calculated, according to the Association of Certified Fraud Examiners, that all organizations worldwide lose around 6 per cent of their annual revenue to fraud and corruption.<sup>18</sup> Any individual in a given society, especially societies unfortunate enough to be headed by a corrupt military dictatorship, can be a victim of corruption, as can entire communities. The following table contains a list of the world's 10 most corrupt leaders and the estimated amounts they have been accused of looting from the coffers of their respective treasuries.

#### The world's 10 most corrupt leaders

| Name                    | Position                                   | Estimates of funds allegedly embezzled (in US\$) |
|-------------------------|--|--|
| 1. Mohamed Suharto      | President of Indonesia (1967-1998)         | \$15 to \$35 billion                             |
| 2. Ferdinand Marcos     | President of the Philippines (1972-1986)   | \$5 to \$10 billion                              |
| 3. Mobutu Sese Seko     | President of Zaire (1965-1997)             | \$5 billion                                      |
| 4. Sani Abacha          | President of Nigeria (1993-1998)           | \$2 to \$5 billion                               |
| 5. Slobodan Milosevic   | President of Serbia/Yugoslavia (1989-2000) | \$1 billion                                      |
| 6. Jean-Claude Duvalier | President of Haiti (1971-1986)             | \$300 to \$800 million                           |
| 7. Alberto Fujimori     | President of Peru (1990-2000)              | \$600 million                                    |
| 8. Pavlo Lazarenko      | Prime Minister of Ukraine (1996-1997)      | \$114 to \$200 million                           |
| 9. Amoldo Aleman        | President of Nicaragua (1997-2002)         | \$100 million                                    |
| 10. Joseph Estrada      | President of the Philippines (1998-2001)   | \$78 to \$80 million                             |

Source: Infoplease, but with credit to Transparency International, *Global Corruption Report 2004*.

18. Many developing countries are carrying a heavy burden of debt, which, ironically, had been entered into by many of their discredited and corrupt leaders. Debts and debt servicing are steadily impoverishing the peoples concerned every day, systematically preventing them from enjoying the basic rights contained in the human rights instruments. It is estimated that debt servicing, i.e. annual repayment of principal and payment of interest, would alone exceed the gross amount of new lending by 20 per cent in Africa and 30 per cent in Latin America. This illustrates the fact that a new loan that a developing country needed to take for development purposes (this country might have been fortunate to have a democratically elected leader) could end up not being used for that purpose, as it might not even be enough to cover the servicing of the debt already owed.

19. The result of this unfortunate scenario is that developing countries will be forced to take loans regularly, not for investment or for development purposes, but to service their debts. In its resolution 1992/50 on the fraudulent enrichment of top State officials, the Commission on Human Rights stated that developed countries had a special responsibility to contribute to the restitution to despoiled peoples of the funds which their leaders had extorted from them, with a view to contributing to their economic, social and cultural development.

20. This sentiment was reiterated by President Olusegun Obasanjo, Nigeria's democratically elected President, who assumed office after many years of military and dictatorial rule in the country, usually referred to as the "years of the locust". Addressing the country on 29 May 2004, during the celebration of what has come to be called Democracy Day, in commemoration of the return of the country to democratic rule, he once again called on foreign creditors and the Paris Club to write off the debts of all African countries, arguing that most debtor nations had paid their debts twice over. He said, "debt relief and debt cancellation is a political issue and not an economic issue. No country, for example, the United States, France, the United Kingdom and other developed countries, can afford the luxury of diverting their revenues meant for development for payment". He was of the view that the whole issue had become another means of intimidation, harassment and control of the developing countries.

21. With the filing in December 2001 of the largest corporate bankruptcy in United States history, the collapse of Enron left in its wake many victims whose rights were violated. By means of illegal financial manipulations designed to boost earnings reports, investors, shareholders, employees, retirees, etc. were misled into believing that the company was viable and healthy. "It was reported that irregularities related to a few off-balance sheet partnerships, perpetrated by a few individuals, triggered the collapse of an otherwise healthy company."<sup>19</sup> Two large banks in the United States, Citigroup Inc. and JP Morgan Chase & Co., were reported to have reached an agreement with the Securities and Exchange Commission (SEC) to pay a combined \$255 million in fines in connection with their involvement in the fraud perpetrated by Enron.<sup>20</sup> This situation shows that the victims of corruption are spread across the developed as well as the developing world. Ironically, both the educated and the illiterate fall victim to corruption. It has been proven by empirical evidence and statistics that most of the victims of "corporate corruption" are the elites of society, i.e. shareholders, stockbrokers, investors, etc.



#### IV. THE CONSEQUENCES OF CORRUPTION

##### A. Socio-economic consequences

22. The consequences of corruption on a nation's socio-economic development can be monumental. Corruption affects all sectors of both public and private economic life. Many studies have shown evidence of the economic and social costs of corruption. It has been proven that corruption hinders investment, whether domestic or foreign, thereby reducing growth, restricts trade, and distorts the size and composition of government expenditure. Corruption weakens the financial system while strengthening the underground economy, encouraging drug trafficking and commodity smuggling. Of equal import is the strong linkage between corruption and increasing levels of poverty and income inequality. The fiscal distortions caused by corruption erode the quality of government services, with particularly serious consequences for the poor. The negative effects of corruption on investment and growth similarly exacerbate poverty and erode the tax base, further undermining the quality of public services.

23. When fraudulent actions cause serious damage to a nation's economy, they indirectly affect citizens' rights. While increasing the private revenues of corrupt public officials, corruption tends to have a negative impact on public revenues. It has been proven by studies that most administrative corruption is on the part of tax and customs officials, thereby resulting in lower taxes paid by firms, whether belonging to citizens or to foreigners. Tax evasion by companies or individuals also constitutes corruption. The evasion of taxes by Halliburton owed to the Nigerian Government was a form of corporate corruption. The company had to pay \$3.1 million of its tax liabilities to the country and was expected to pay additional taxes in excess of \$10 million, which included income taxes and value added taxes.

24. Corruption exacerbates poverty, affects service delivery by the Government and undermines the social safety net while eroding the pensions of retirees, the elderly, etc. The bankruptcy and collapse of Enron, occasioned by corruption, produced a surge in "psychiatric illness", especially amongst the laid-off employees.<sup>21</sup>

25. Though it can be argued that many factors contribute to inequality in a society, corruption has been known to be one of them. Privatization is one of the economic policies used by Government to divest itself of inefficient public enterprises. Unfortunately, privatization under corrupt leaders can be detrimental to the poor as these leaders can use illegitimate forms of influence to hijack the assets meant for privatization. Once again, the poor will be the ones to suffer as the redistribution of the assets will hardly benefit them.

26. The effect of capital flight brought about by corruption cannot be overemphasized. As highlighted above, the looting of government funds by corrupt leaders - funds that are always traceable to the financial institutions of developed countries - constitute serious violations of the human rights of the citizens of the affected countries. What is more worrisome is that these financial institutions, although aware of the sources of these illicit funds, offer safe havens to the looters by providing the looters with coded secret bank accounts. Happily, a few of these guilty countries have yielded to international pressure and are now cooperating, albeit reluctantly, with the rightful owners of the funds.

## B. Civil-political consequences

27. Article 21, paragraph 1, of the Universal Declaration of Human Rights states, “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives” while paragraph 3 states, “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” The importance of the right of every citizen to contribute to the governance of his nation and to choose to whom to entrust the running of State affairs that affect him and his family is further emphasized in the International Covenant on Civil and Political Rights, article 25 of which states, “Every citizen shall have the right and the opportunity, without any ... distinctions ... and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors ... .” Many other international human rights instruments have to various degrees unequivocally stressed this fundamental right to which every citizen is entitled.

28. The Vienna Declaration and Programme of Action stresses the interrelatedness and interdependence of all rights, economic, civil, political, social and cultural. The denial of any of the rights invariably has a tremendously negative impact on the enjoyment of the other rights. One of the root causes of corruption is the entrenchment of a dictatorial regime. Lack of transparency and public accountability and breakdown of the rule of law and order are some of the characteristics of a dictatorial regime. Little wonder that most of the 10 most corrupt leaders were known to have operated the most oppressive regimes in recent years. Unlike the more tangible effects of some of the outcomes of corruption, such as the administrative and fiscal effects, the political costs of corruption, argues Prof. Michael Johnston, are often intangible, widely shared and long-term in nature.<sup>22</sup>

29. “Corruption erodes the ability of a nation to reform itself and to build more open, responsive, credible, and legitimate political institutions.”<sup>23</sup> To achieve such institutions, according to Prof. Johnston,<sup>24</sup> requires, at a minimum, a significant amount of citizen trust in officials, in institutions and in each other, and corruption can undermine and destroy that trust. One cannot therefore overemphasize that trust and strong and credible political leadership are necessary to effectively fight and check corruption.

30. Article 26 of the Covenant stipulates equality of all persons before the law and their entitlement without discrimination to the equal protection of the law. Regrettably, one of the fallouts of corrupt practices in any society is the massive destruction of major institutions such as the judiciary, the armed forces, the police, the legislature, etc. One is alarmed at the increasing reports of corruption of judges. Many judges in different countries all over the world have been accused of serious misconduct in rendering judicial services to the people. Allegations of serious crimes, including bribery, corruption, sexual intimidation and favouritism, have been levelled against some judges. Happily, a few developing countries, in the highly commendable and bold steps taken to cleanse the polity and nurture their nascent democracies, stand out as nations that have embarked on purging the judiciary of its corrupt members.

31. In a case study carried out on the fearless and bold steps undertaken by the Government of Kenya, the following came to light. According to columnist Joel Obura, “When the Kibaki Government came to power 2002, the Kenyans expected some changes. However, nobody expected the proportion of change and boldness shown by the Government in its onslaught on corruption in the judiciary ... The Judiciary, though one of the three pillars of Government, is, in my view, the most important of the three. It is the only body that can declare Acts of Parliament unconstitutional, and the only one with the constitutional powers to question and even nullify certain acts of the Executive”.<sup>25</sup> It is in this context that one can easily agree with Mr. Obura’s sentiments that “a corrupt Judiciary is indeed a malignant cancer whose effect can be felt across the land”.<sup>26</sup>

32. Responding to the outcry of the citizens against the brazen corruption in the judiciary, Chief Justice Evan Gicheru, with the tacit support of President Kibaki, appointed the Integrity and Anti-Corruption Committee chaired by Mr. Justice Aaron Ringera, the former Head of the Kenya Anti-Corruption Authority, to investigate acts of corruption in the judiciary.<sup>27</sup> The report, known as the List of Shame, accused 5 out of 9 Appeal Court judges, 18 High Court judges and 82 magistrates.<sup>28</sup> Handing over the report to the Chief Justice, Mr. Ringera, acknowledged that follow-up would be difficult as “corruption always fights back”.<sup>29</sup>

33. The Chief Justice made a commitment to take the necessary action.<sup>30</sup> He gave an ultimatum to the judges whose names appeared on the List of Shame to quit or face trial within 10 days. At first resisting, when confronted with the evidence the accused judges were forced to leave. It is hoped that the remaining judges will maintain high degrees of rectitude and independence which will make justice the shield and defender of the citizens. A truly independent judiciary holds the key to an enduring democracy and the rule of law in any society.

### **Table of corrupt practices in the judiciary in Kenya**

#### **Figures of “the graft tariff” reported by the Ringera Integrity and Anti-Corruption Committee**

#### **CRIMINAL CASES**

To induce an acquittal or have a Conviction quashed

##### **Minor offences**

(like theft, burglary fraud or assault)

K Sh 2,000-K Sh 50,000

##### **Serious offences**

(like grievous bodily harm, having firearms, drug dealing, robbery, fraud or rape)

##### **Hanging offences**

(like murder and robbery with violence)

K Sh 40,000-K Sh 1 million

## **CIVIL CASES**

To find in your favour

**Court of Appeal judge** - More than K Sh 15 million

**High court judge** - K Sh 50,000-K Sh 2 million

**Magistrate** - K Sh 3,000-K Sh 60,000, plus 10-30 per cent of any personal injury award

## **BRIBES BY RANK**

Amount of bribe generally needed for assistance in any case, criminal or civil, according to seniority

**Court of Appeal judge** - more than K Sh 15 million

**High court judge** - K Sh 50,000-K Sh 1.6 million

**Magistrate** - K Sh 4,000-K Sh 150,000

**Legal clerk** - K Sh 50-K Sh 5,000

**Secretary** - K Sh 500-K Sh 1,500

## **OTHER ACTIVITIES**

To ensure an outcome in your favour

**Approval of surety/release on bail** - K Sh 2,000-K Sh 10,000

**Reinstatement of cancelled bond** - Up to K Sh 20,000

**Variation of bail terms** - K Sh 5,000-K Sh 13,000

**Certification of proceedings** - Up to K Sh 5,000

**Favourable exercise of discretion in sentencing** - K Sh 10,000-K Sh 50,000

**Inducing a wrongful conviction** - Up to K Sh 80,000

**Processing surety documents by clerks** - K Sh 200-K Sh 500

**Tracing lost/misplaced files** - K Sh 50-K Sh 1,500

**Drafting of pleadings by paralegal staff** - Up to K Sh 5,000

**Typing of proceedings - K Sh 500-K Sh 1,500**

**Employment as a paralegal - K Sh 40,000-K Sh 50,000**

*Source: Daily Nation (Nairobi), October 2003.*

### **C. Private sector consequences**

34. Spurred by structural adjustment programmes, privatization of State enterprises increased dramatically in the late 1980s and 1990s. In the developing countries, privatization, which was encouraged by the World Bank and others, puts lucrative contracts and concessions on offer, and so companies have more frequent opportunities and greater incentives to offer bribes. Moreover, privatization has meant putting into private hands certain public functions such as health, education, telecommunications, transport, etc. The transfer of these functions to the private sector often entails transfer of substantial budgetary allocations and of regulatory powers, with the attendant potential for corruption. Also, privatization and economic liberalization in some countries, especially countries without in-built mechanisms for checks and balances, have turned out to be an invitation to strip the assets of the State and transfer wealth abroad. This has, in turn, reduced incentives for transparency and probity on the part of officials and politicians and creates widespread social alienation from the political process, contributing to political decay.

35. Corruption in the private/corporate sector has recently reached a mammoth scale. It puts to shame the petty government bureaucrats who steal a few thousand dollars - or even a few million. The depth of corruption and the amount of money involved in the WorldCom, Enron, Parmalat, etc. collapses, which runs into the billions of dollars, is greater than the gross national product of many countries. The consequences of such high-scale corruption on both the developing and the developed countries are astronomical. Corporate bodies are failing in their duties to inculcate in their employees corporate conduct and values necessary for effective business. The failures by the management of these corporate bodies have left in their wake many collapsed businesses, with the attendant violations of rights.

36. According to Dr. Steve Salbu, "the contrast between Enron's moral mantra and the behaviour of some Enron executives is bone-chilling. Indeed, the Enron saga teaches us the limitations of corporate codes of ethics; how empty and ineffectual they can be".<sup>31</sup> He went on to say that corporate codes are useless when the words are hollow - when executives lack either dedication to espoused virtues or the ability to make defensible ethical decisions.<sup>32</sup> Enron's stated core values were "respect, integrity, communication, and excellence". Interestingly, according to Bradley K. Googins, writing in *Newsday*, "When the house of Enron came tumbling down, it exposed the worst corporate greed, misbehaviour and citizenship. Enron betrayed its employees, it betrayed its clients, and, by inflaming the public's widely perceived notion that corporations cannot be trusted to do anything other than to serve their own ends and line their own pockets, Enron betrayed all of corporate America."<sup>33</sup> Enron's greed came to light with the collapse of the energy giant. Numerous employees of corporate bodies, amongst them several banks, regularly engage in dealings that lend credence to the notion expressed by Bradley K. Googins.<sup>34</sup> Clients' expectations are routinely betrayed as corporate officials seek to serve their own ends and line their own pockets.

37. Whether in the developed or developing countries, the consequences of private sector corruption are devastating. It hurts the most vulnerable group, the poor, making them poorer. It is this group that are squeezed out of decision-making and pushed to the political margins in situations where money buys influence. It is they who lose out when money that could have been spent on improving services or basic standards is diverted to big expensive projects with lucrative “commission” potential. It is they who end up themselves having to pay bribes for basic services or who lose out because they cannot afford to. Corruption may permeate almost every area of the lives of poor people: it may determine how they get a school place for their children, whether the clinic nurse will find (and use) a clean needle, or whether they get a job. Clearly, it is the poor and the marginalized that are the worst affected by the daily grind of corruption, but who, unfortunately, are least able to do anything about it.

#### **D. Multinational corporations**

38. A simple programme intended to allow Iraq under Saddam Hussein to sell a certain amount of oil and use the proceeds to provide the vulnerable and innocent Iraqis with basic necessities such as food and medicine has turned into an “oil-for-scandal”.<sup>35</sup> It has been alleged that the programme instead “built scores of posh palaces for Hussein and lined the pockets of France, Russia, Syria, China and the United Nations, which alone raked in more than \$4 billion from its 2.2 per cent ‘commission’ on more than \$50 billion worth of oil [that] Iraq exported under the programme, allegedly to pay the cost of running [it]”.<sup>36</sup>

39. All over the world, countries, especially developing countries, that should be rich in most cases remain poor due to the corrupt practices of some multinational corporations operating in their midst. The bribing of public officials to influence the award of contracts, tax evasion and, in some extreme cases, propping up dictatorial and oppressive regimes are common among multinational companies that do not play by the rules. Evidence abounds that the citizens fare worst if they live under a dictatorial regime. There is always a correlation between corrupt and oppressive regimes and multinational companies that do not adhere to good conduct and ethics in international transactions.

### **V. CAMPAIGN AGAINST IMPUNITY FOR PERPETRATORS OF CORRUPTION**

#### **A. National/international mechanisms against corruption**

40. Having established that the enjoyment of all human rights, be they economic, social and cultural, or civil and political, is undermined by the phenomenon of corruption and that corruption makes it more difficult for Governments to formulate and carry out coherent policies to respond to the needs of their citizens, be they tangible or symbolic, and to use scarce resources effectively, efforts by the international community have been strengthened to combat corruption. At various levels, the “cancerous” effects of corruption are no longer treated lightly; they are known and widely discussed. The impunity hitherto enjoyed by perpetrators of corruption is being tackled, not only at the national level but at the international level as well.

41. In its resolution 55/61, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime, was desirable and decided to begin the elaboration of such an instrument. Those negotiations gave birth to the text of the United Nations Convention against Corruption, which was adopted by the Assembly by resolution 58/4.

42. With the signing of this important international instrument, which contains a major breakthrough on asset recovery that is explicitly stated to be as “a fundamental principle of the Convention”, States, especially in the developing world, have been armed with an effective instrument to fight for the recovery of stolen funds. These funds are required for the reconstruction and rehabilitation of societies under new democratic governments. According to the Secretary-General, in a statement made upon the adoption of the Convention, “Corruption hurts the poor disproportionately - by diverting funds intended for development, undermining a Government’s ability to provide basic services, feed inequality and injustice, and discouraging foreign investment and aid.”<sup>37</sup>

43. It is, however, important to underscore the point that reaching agreements on the issue of asset recovery entailed intensive negotiations, as the efforts of the countries seeking the return of assets removed illicitly were severally thwarted by the countries providing safe havens for these ill-gotten and widely known to be stolen funds. Ironically, the poor developing countries that are the victims of international corruption, i.e. by those countries that knowingly collaborate with corrupt leaders and public officials by making their financial institutions readily available, are obliged to reconcile with the legal and procedural safeguards of the colluding countries, whose assistance is being sought.

44. Several other provisions in the Convention further specify how cooperation and assistance will be rendered. Notably, in the case of embezzlement of public funds, the confiscated property would be returned to the State requesting it. It is envisioned that effective asset-recovery provision will support the efforts of countries to redress the worst effects of corruption while at the same time sending a serious message to corrupt officials that there will no longer be a safe haven for their illicit gains. To this end, chapter V of the Convention provides mechanisms for the return of stolen assets to countries of origin; chapter IV covers international cooperation in the investigation and prosecution of offences defined in the Convention.

45. To ensure the success of the campaign against impunity for perpetrators of corruption, the Convention also requires States to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under the States’ domestic laws. Another important aspect of the Convention is that it goes beyond previous instruments of its nature, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence as well as the concealment and the “laundering” of the proceeds of corruption. International cooperation is, however, needed to effectively prevent, investigate and prosecute perpetrators of all forms of corruption. To this end, States are obliged by the Convention to render specific mutual assistance in gathering and transferring evidence for use in court and also in extraditing offenders when necessary.

46. Various other national and interregional instruments and mechanisms have been established to fight corruption and guard against impunity for perpetrators of corruption. Notable amongst them are the African Union Convention on Preventing and Combating Corruption and the African Peer Review Mechanism (APRM) in the New Partnership for Africa's Development (NEPAD), the Inter-American Convention against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption of the Council of Europe.

47. The African Union Convention on Preventing and Combating Corruption, adopted in July 2003, in its preamble expresses its concern "about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of African peoples". It also acknowledges "that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent". It therefore recognizes "the need to address the root causes of corruption on the continent", "convinced of the need to formulate and pursue, as a matter of priority, a common penal policy aimed at protecting the society against corruption, including the adoption of appropriate legislative and adequate preventive measures".

48. To this end, one of the principle objectives of the Convention, stated in article 3, is the condemnation and rejection of acts of corruption and impunity. Under article 12 of the Convention, States parties undertake to "create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs".

49. The civil society's role in the fight against corruption is crucial. Transparency International has made an immense contribution by focusing on corrupt leaders (the list of the world's 10 most corrupt leaders attests to that). However, in some cases, the statistics gathered by Transparency International rely on perceptions rather than quantifiable incidences of corruption, attracting a great deal of criticism, especially from the countries accused of corruption. National NGOs must also be encouraged to play the role of watchdog in combating corruption. They should not succumb to intimidation and harassment by dictatorial or corrupt regimes.

50. The Convention acknowledges the role of bank secrecy in corruption by stating in its article 17 that "Each State Party shall adopt such measures necessary to endow its courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents with a view to implementing this Convention." Just as the fight against terrorism requires international cooperation, the fight against corruption requires international cohesion. In line with the cooperation expected from States parties to the United Nations Convention against Corruption, the AU Convention on Corruption, in its article 18 dealing with cooperation and mutual legal assistance, enjoins States parties "to provide each other with the greatest possible technical cooperation and assistance in dealing immediately with requests from authorities ... empowered ... to prevent, detect, investigate and punish acts of corruption".



51. For many years, African leaders have relied on the wealthy States outside the continent to solve the myriad problems facing the continent. The leaders, especially those supporting APRM, have recognized that for Africa to approach the twenty-first century with confidence, they will have to rebuild the continent by ensuring democratic principles and the rule of law and that transparency, accountability and probity are entrenched in the conduct of public affairs. APRM, as a component of NEPAD, is therefore a bold step taken by some African leaders to encourage States' commitment to good governance. It entails a systematic examination and assessment of the performance of a State by other States (peers), by designated institutions, or by a combination of States and designated institutions.

52. The desired goal of peer review is to improve a State's policy-making capacities and ensure that best practices and established standards and principles are adopted. Peer examination is non-adversarial, encouraging mutual trust and confidence among the concerned States. APRM is regarded in part as an attempt to inspire underperforming States to improve their governance programme.<sup>38</sup> It is envisaged that the mechanism, if effectively utilized, will assist in reducing, if not completely eradicating, corruption.

53. The Criminal Law Convention on Corruption, which entered into force in September 2002, was signed by most European States (Western and Eastern), plus Mexico and the United States. The Convention focuses on bribery of domestic public officials, members of domestic public assemblies, members of international parliamentary assemblies, judges, in the private sector and international organizations, and trading in influence and money-laundering.

54. The Convention on Combating Bribery of Foreign Public Officials in International Business Transaction was signed on 17 December 1997. The Convention provides a framework for criminalizing corruption in international business transactions. Parties to the Convention pledge to punish those found guilty of bribing officials of foreign countries, including officials in countries that are not parties to the Convention, for the purpose of obtaining or retaining international business.

55. As a result of the bankruptcy suffered by many companies occasioned by corporate corruption at top management level, the Governments of the 30 OECD countries have approved a revised version of the OECD Principles of Corporate Governance. The revised version is designed to rebuild and maintain public trust in companies and stock markets.

## **B. Jurisdictional measures against corruption**

56. Violations of human rights occasioned by corruption entitle the victims to a remedy for the damages caused. From the point of view of domestic legislation, taking into account that such violations are offences that should be addressed and, if found necessary, compensated for, States should provide the necessary legal framework to protect citizens from such violations. One of the most effective methods of achieving this is to incorporate the international legal standards into domestic law. The next report may look into the legal provisions put in place by States to safeguard the rights of the victims of corruption.

## VI. CONCLUSIONS AND RECOMMENDATIONS

### A. Conclusions

57. The first major step in solving this problem is not the proverbial hiding of heads in the sand, but realizing that the problem exists and that it poses serious threats to peaceful coexistence among nations. Until recently, the issue of corruption was viewed as a regional problem, beyond international discussion and cooperation. Fortunately, the issue has come to the fore in the international discourse, culminating in the adoption of an instrument to deal with what many describe as a cancer. Suffice it to say that corruption, whether systemic, endemic or petty, violates citizens' enjoyment of all the rights contained in all the international instruments. It is established fact that corruption hurts the economies of the societies where it operates, leading to the inefficient allocation of resources, raising the cost of investments, decreasing investors' confidence, etc. The adoption of the United Nations Convention against Corruption on 31 October 2003, with its major breakthrough on asset recovery, should be seen as an attempt to redress the devastating effects of corruption on the lives of citizens. The Convention will hopefully succeed in making corruption very unattractive; when corrupt leaders and officials know that there are no more safe havens for their illicit gains, the desire to engage in corruption will be reduced.

58. Corporate corruption, which ruins many lives, should also be adequately tackled. The recent collapse of many companies in developed countries should serve as a wake-up call for the international community to focus its attention on the systemic corruption in corporate bodies. According to United States Attorney-General Ashcroft, in some States bribes were actually allowed as tax write-offs; a cost to be deducted at home for doing business abroad.<sup>39</sup> He accused such States of deluding themselves into believing that they could subsidize bribe-paying abroad while expecting the same companies to behave morally at home. Dr. Salbu<sup>40</sup> aptly described as bone-chilling the contrast between Enron's core values, its codes of ethics and its officers' behaviour. For the proper functioning of law enforcement, the judiciary and the other institutions necessary to sustain democracy, trust and confidence must be maintained.

### B. Recommendations

59. Taking into consideration the problems posed by corruption and the efforts of the international community to reduce, if not completely eradicate, the problem, the following recommendations are formulated:

(a) Many national, regional and international instruments have been established to fight corruption; however, if the political will on the part of the leaders is absent, results will be minimal. In addition, it is important that the political leadership set an example of probity, integrity and self-esteem and encourage emulation by government at all levels. It is in this light that this study welcomes the bold initiative of the African Peer Review Mechanism and the transparency exhibited by some African leaders in permitting their countries to be scrutinized by their peers;

**(b) States should be encouraged to sign and ratify the United Nations Convention against Corruption and incorporate it into their domestic laws. As highlighted above, effective implementation of the asset-recovery provision of the Convention - one of its major breakthroughs - will send a message to corrupt officials that there will no longer be places to hide their illicit gains;**

**(c) In addition, States should establish their own specific anti-corruption mechanisms/legislation and enforce it. Some examples of national mechanisms are the Public Leadership Code of Ethics of the United Republic of Tanzania, the Independent Corrupt Practices and Other Related Offences Commission of Nigeria, the Anti-Corruption and Economic Crimes Bill of 2003 of Kenya, etc.;**

**(d) A successful fight against corruption, which would include prevention, investigation and the prosecution of offenders, requires cooperation between States, especially those known to have provided safe havens for funds of illicit origin. Such States are enjoined not to hide under the cloak of bank secrecy and to cooperate with States trying to repatriate their stolen funds;**

**(e) The role played by the International Criminal Police Organization (Interpol) in international cooperation against corruption should be underscored. It should be extended to banking, investment, money-laundering etc. International pressure must be brought to bear on fraudulent secret banking, which is still practised in some countries;**

**(f) There should be effective, built-in safety net mechanisms to protect citizens from corporate corruption that leads to the bankruptcy and collapse of otherwise healthy companies. The next report intends to discuss in more detail the role of board members in corporate corruption. According to one of the victims of the collapsed Enron, "The days of quick and simple board meetings are over. Enron's collapse is an alarm bell for board members to start earning their \$300,000 per year, instead of just sitting on their hands (sometimes in a blacked-out room), listening to 'reports' from management and agreeing to whatever recommendations that individual directors or executives make."<sup>41</sup> Corporate corruption can be eliminated if the necessary mechanisms are put in place;**

**(g) Corporate code of conducts (the core values) must be strictly adhered to while auditors must carry out their work with transparency, and be seen to do so. Those found wanting should be severely sanctioned and prosecuted where necessary;**

**(h) Existing laws, and new ones, against corruption should be enforced. The elimination of corruption in the judiciary and the law enforcement agencies must be vigorously pursued. The independence of the judiciary must be guaranteed and States must ensure that adequate and effective policing, with appropriate equipment and good pay for the law enforcement agencies, is put in place;**

**(i) The role of the civil society in the fight against corruption cannot be overemphasized. The civil society, i.e. NGOs, women, the media and students, must remain resolute in their crusade against corruption and must not be intimidated by repressive and corrupt leadership;**

**(j) Many developing countries weighed down by debt are usually not in a position to adequately provide basic needs for their citizens, including providing for job creation. Lack of the basic needs engenders corruption; debt forgiveness for the poor States is therefore recommended.**

60. **The negative impact of corruption on society is so devastating that the Special Rapporteur strongly suggests that periodic high-level meetings be organized to stimulate broad discussion of the question of corruption. The meeting would be held in association with specialized agencies such as the International Monetary Fund, the World Bank, the International Labour Organization and the World Health Organization, representatives of large corporations and the United Nations Office at Vienna. The focus of the meeting would be on the human rights dimension of corruption. It would assist in creating greater awareness on the part of the international community and States of the importance not only eliminating corruption, but of punishing those on both sides of the corruption equation: the bribe-givers and the bribe-takers.**

#### Notes

<sup>1</sup> *Fighting Corruption and Organized Crime in Nigeria: Challenges for the New Millennium*, Spectrum Books, January 2001, p. 31.

<sup>2</sup> Victor E. Dike, "Corruption in Nigeria: A new paradigm for effective control", at <http://www.nigeriavillagesquare1.com/Articles/VEDIKE.html>.

<sup>3</sup> *Saturday Nation*, 4 October 2000.

<sup>4</sup> E/CN.4/Sub.2/2003/18, para. 4.

<sup>5</sup> World Economic Forum, Davos, Switzerland, 22 January 2004.

<sup>6</sup> Mark Simon, *The San Francisco Chronicle*.

<sup>7</sup> Brian Cruver, *Enron, Anatomy of Greed*, Carroll and Graf publishers, 2002.

<sup>8</sup> Christy Sander, *Drillbits & Tailings*, vol. 7, No. 1, 31 January 2002, citing "The Spreading Enron Mess", *The Economist Global Agenda*, 21 January 2002.

<sup>9</sup> *Ibid.*

<sup>10</sup> Agence France Presse, 9 January 2004.

<sup>11</sup> *Ibid.*

<sup>12</sup> Ms. Ellis is a member of Transparency International, Australia.

<sup>13</sup> Jane Ellis, *Globalization, Corruption and Poverty Reduction*, at <http://www.transparency.org.au/documents/globalisation.html>.

<sup>14</sup> *The Guardian* (Nigeria), 17 February 2003.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> This day online, 19 April 2004.

<sup>18</sup> Ellis, op. cit.

<sup>19</sup> Michael Keaney, Enron: institutionalized corruption.

<sup>20</sup> Joseph Kay, Citigroup, Morgan Chase fined for Enron deals: corruption at the heights of American finance, 5 August 2003, at <http://www.wsws.org/articles/2003/aug2003/enrn-a05.shtml>.

<sup>21</sup> Cruver, op. cit.

<sup>22</sup> Michael Johnston, "The Political Costs of Corruption", Department of Political Science, Colgate University, Hamilton, New York.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Joel Obura, *Daily Nation* (Nairobi), 21 October 2003.

<sup>26</sup> Ibid.

<sup>27</sup> *Daily Nation*, 9 October 2003.

<sup>28</sup> *Daily Nation*, 1 October 2000.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Cruver, op. cit.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Andrew Mark, Director of the Human Security Center at the University of British Columbia.

<sup>36</sup> “UN Oil for Food, or Oil for Corruption?” *Al Jazeera*, 22 April 2004.

<sup>37</sup> Statement by the Secretary-General on the adoption by the General Assembly of the United Nations Convention against Corruption.

<sup>38</sup> Malachia Mathoho, “An African Peer Review Mechanism: a panacea for Africa’s governance challenges?”

<sup>39</sup> World Economic Forum, *op. cit.*

<sup>40</sup> Cruver, *op. cit.*

<sup>41</sup> *Ibid.*

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