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**RETHINKING INTERNATIONAL ANTI-CORRUPTION CONVENTIONS:
ADVANCING CORRUPTION-FREE SERVICE AS A HUMAN RIGHT**

By: BERIHUN ADUGNA GEBEYE

Addis Ababa

June, 2011

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**A Thesis Submitted in Partial Fulfillment of the Requirements of the Degree
of Master of Laws (LL.M in Human Rights Law) to the School of Law, Addis
Ababa University**

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(Approval Sheet)

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Declaration

I, Berihun Adugna Gebeye, hereby declare that this thesis is my original work and has never been presented to any other institution. I also declare that all secondary information used has been duly acknowledged in this thesis. It is hereby presented in partial fulfillment of the requirements for the award of LL.M in Human Rights Law.

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Dedication

To the Almighty God, for this far he has brought me and making me possible to complete this thesis. To victims of corruption, whose means of subsistence are taken away and in the hope that the time which sanctifies the holder of the office comes to an end.

Acknowledgments

Nothing could have been done without the help of God. He saw and helped me in those hard times. Everything happens for good. God continued to manifest His favor by sustaining me through it all.

I am heartily thankful to my advisor, Mr. Kalkidan Negash, for his speedy response to be my advisor despite his busy schedules. I thank you for your encouragement, guidance and support through the course of writing this thesis.

I am grateful to Mr. Tsegaye Regassa for his insightful comments and suggestions on my proposal. I also owe my deepest gratitude to Dr. Benyam Dawit for providing me reading materials which are the cornerstones of the thesis.

I am forever indebted to my family for their countless support, courage and outstanding commitment for my best. Without them, I would not have been a person as I am today. Their courage and commitment for me are kept in my mind to be never erased. I am also mindful to the unparalleled love of my sisters and brothers.

I wish to express my profound gratitude to my friends Shimels Sisay and Jejaw Ambie for their friendship, love, support and encouragement. I learned much from you guys. May God bless you.

And finally, all that we know is a sum total of what we have learned from all who thought us either directly or indirectly. I acknowledge them all.

Berihun Adugna Gebeye

Addis Ababa

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
APAP	Action Professionals' Association for the People
art.	Article
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
COE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
FCPA	Foreign Corrupt Practices Act
GRECO	Group of States against Corruption
HRC	Human Rights Committee
IACAC	Inter-American Convention Against Corruption
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
TI	Transparency International

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNCTOC	United Nations Convention Against Transnational Organized Crime
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNODC	United Nations Office on Drug and Crime
WB	World Bank
WTO	World Trade Organization

Abstract

Corruption is a global phenomenon which every society faces though its degree of severity varies from country to country. Despite its long history, there is no single universally agreed upon definition of corruption. Moreover, its causes, forms and impacts are diverse and multi-faceted. Understanding corruption by itself is a complex undertaking. However, it is agreed that corruption is inimical to public administration, undermines democracy, degrades the moral fabrics of the society and violates human rights. The pain of corruption touches all the human family but it disproportionately affects the vulnerable sections of the society. It reinforces discrimination, exclusion and arbitrariness. Corruption is a universal problem undermining universal value- human rights.

The international legal regime against corruption takes a political and economic view point in addressing corruption. The measures adopted are not sufficient to give response to victims of corruption. The anti-corruption conventions did not address the human rights impact of corruption while it violates different set of human rights. Moreover, the monitoring mechanisms of the anti-corruption conventions are weak even to implement the covenant provisions.

The thesis advocates for the elevation of the human right to corruption-free service as a panacea to the weaknesses of the anti-corruption conventions. Investigation of the existing literature on the relationship between corruption and human rights reveals that corruption per se is a violation of human rights and hampers the global movement for the enforcement of human rights on the one hand and a culture of human rights can be a preventive tool for corruption on the other hand. The problem of corruption and the violation of human rights need an integral approach. It is with this view that the human right to corruption-free service is put forward to give meaning to the integral approach. Besides, the right to corruption-free service is an end in itself rooted in human dignity and equality like the right to life, privacy and security.

Setting the fight against corruption within a human rights discourse by elevating corruption-free service as a human right, will open an additional avenue for the fight against corruption and opens a door for the realization of human rights. It is argued that the right to corruption-free service is both a means for reducing corruption and instrumental for the enforcement of other human rights. In addition, the existing human rights monitoring mechanisms such as international and regional human rights commissions and courts, UN complaint mechanisms or national human rights systems will be useful to remedy corrupt practices if corruption free service is recognized as a human right.

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Chapter One: Introduction

1.1 Background

Corruption is a universal problem which every society faces. It is as old as society itself; widely condemned but yet practiced. Due to differences in socio-economic, political and cultural contexts of nations, there is no single universally agreed upon definition of corruption.¹ But it is agreed that, it deepens poverty; it debases human rights; it degrades the environment; it derails development; it can produce conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments.² It also debases human dignity and is universally condemned by the world's major faiths.³ Usually, corruption is described as abusing public power or resource for private benefit and it is done with intent to give some advantage inconsistent with official duty and the right of others.

Due to its sever consequences to human beings in the world, institutional and legal solutions are devised to avert corruption. There are many national, regional and international laws which are designed to fight corruption. Besides, there are many actors in the fight against corruption as the issue of corruption is not only the task of governments but also institutions, policy makers, intellectuals and all individuals who consider themselves as members of the international community.⁴

Despite these efforts of the international community, corruption continues to consume the daily breads of the poor. It undermines the global movement for the realization of human rights on the

¹ D. Gould (1991), 'Administrative Corruption: Incidence, causes, and Remedial Strategies' in A. Farazmand (ed) *Hand book of Comparative Development and Public Administration*, P. 467 quoted in Z. Pearson 'Human Rights and Corruption' A Research Paper produced by the Centre for Democratic Institutions, Australian National University, available at, <http://www.cdi.anu.edu.au/research_publications/research_HumanRightsandCorruption.htm> (accessed 1 April 2011).

² The Durban Commitment to Effective Action Against Corruption, signed by 1600 delegates from 135 countries at the October 1999 Anti-Corruption Conference sponsored by Transparency International, available at, <http://9iacc.org/durban/durban_commitment.html> (accessed 4 April 2011).

³ *ibid.*

⁴ D. Kennedy (1999), 'The International Anti-Corruption Campaign', *Connecticut J. Int'L L.* Vol 14:455.

one hand and directly violates human rights and fundamental freedoms on the other hand. It is a plain fact that corruption has a serious economic, social, political and cultural adversity to a nation and its people and thereby violating the fundamental rights and freedoms recognized under national and international human rights law.

The measures adopted by the international anti-corruption laws are not adequate to remedy the human rights impact of corruption. Especially, most of the anti-corruption laws have no room for victims of corruption. They adopt a crime control approach to the problem of corruption. However, to effectively prevent and combat the problem of corruption, other measures which supplement the crime control approach must be adopted. This thesis aims to provide an approach which strengthens the effectiveness of the existing measures against corruption- a human rights approach, i.e., setting the fight against corruption at the center of human rights discourse by elevating corruption-free service as a human right.

Moreover, human beings have a fundamental human right to get a corruption-free service. The right to corruption-free service is put forward not only as an instrument to the fight against corruption but also as an end in itself rooted in human dignity and equality. Like the right to life, privacy and security, human beings individually and in group have a right to corruption-free service. The right to corruption-free service is a valid moral claim of human beings against their government and humanity though it is not recognized under the positive law. Hence, like any other human rights, the existence of the right to corruption-free service is independent from man made law.

Most of the regional and international anti-corruption conventions, which are the focuses of the study, on the one hand adopt a political and economic view point in addressing corruption. However, they ignore the human rights impact of corruption- the impact it has on victims. The existing human rights instruments on the other hand did not recognize the human rights of all the human family to be free from corruption. Due to these cumulative facts, corruption takes away the means of existence for human beings and ultimately compromises their quest of leading a minimally good life rooted in dignity and equality.

The thesis is based on the premises that human beings have an inherent right to be free from corruption and setting the fight against corruption within a human rights discourse by elevating corruption-free service as a human right will greatly reduce the incidents of corruption and opens a door for the realization of human rights. It held that the right to corruption-free service is an end in itself. Besides, it is both a means for reducing corruption and instrumental for the enforcement of other human rights.

The author advocates the rethinking of the approaches developed by regional and international anti-corruption laws and makes the fight against corruption at the heart of human rights. In the 21st century a human right to corruption-free service should be recognized if it is said those fundamental rights and freedoms be fulfilled in the world. In this era the fight against corruption will be successful if we recognize human beings are entitled to claim a corruption-free service as a human right inherent to humanity. Hence, elevating corruption-free service as a human right opens the door to existing human rights mechanisms on which to base further action against corruption. Human rights monitoring mechanisms such as international and regional human rights commissions and courts, UN complaint mechanisms or national human rights systems will be useful to remedy corrupt practices if corruption-free service is recognized as a human right.

1.2 Statement of the Problem

The problem of corruption leads to the existence of international and regional anti-corruption conventions. These conventions approach the problem of corruption from political and economic point of view. But corruption mostly affects the vulnerable sections of a society though its pain touches all. The legal space allotted to these groups of persons in these conventions is minimal. This is due to the fact that these conventions are not designed in a human rights approach. The absence of the right to corruption-free service from the international bill of human rights and the regional human rights systems aggravates on the situation of victims of corruption.

Above all, the implementation mechanisms of these conventions are weak by design. Besides, the substantive provisions are weak to prevent and combat corruption by their own as many of the provisions are optional and backed by claw-back clauses.

The international legal regime to prevent and combat corruption plays a great role in addressing some issues of corruption. But it is not sufficient by its own. It should be supported by other mechanisms due to the complexity of corruption. Elevating corruption-free service as a human right and making the fight against corruption at the heart of human rights discourse will enhance the effectiveness of measures to prevent and combat corruption.

1.3 Research Questions and Objectives

The objective of the thesis is to show the apparent lack of concern for victims of corruption by analyzing the measures adopted by the anti-corruption conventions. Elevating corruption-free service as a human right is the main objective of the thesis. In addition, it aims to show the weak monitoring mechanism established to follow up the implementation of the conventions on the ground on the one hand and how international cooperation (a measure adopted by anti-corruption conventions) for preventing and combating corruption is undermined by the substantive provisions of the conventions on the other hand.

The thesis tries to answer several questions. Setting the fight against corruption at the heart of human rights discourse by recognizing the right to corruption-free Service as a human right is at the center of all questions. With this objective, the thesis addressed the following research questions.

- Is corruption a violation of human rights?
- Are human rights preventive tools for corruption?
- What is the jurisprudence of the connection between corruption and human rights?
- Is an integral approach necessary for the problem of corruption and human rights?
- Are the existing international and regional anti-corruption laws sufficient to address the problem of corruption?
- Whether the measures adopted by these conventions emphasize further political and economic goals than protecting the victims? Or accommodating both?
- Whether there are remedies available for victims of corruption? If there is, how can they enjoy it? Is it sufficient?

- Do human beings have an inherent right to be free from corruption?
- Would there be any ground to elevate corruption-free service as a human right?
- Is it possible to precisely formulate the contents of the right to corruption-free service?
- If it is precisely formulated, how can its implementation be monitored?

1.4 Literature Review

Though there is some literature on the effects of corruption on human rights, there has been little academic exploration on transforming this understanding into anti-corruption measures. Nonetheless, the International Council on Human Rights Policy published two reports. The first report attempts to make a connection between corruption and human rights; and concluded that corruption is a violation of human rights while asserting that human rights are preventive tools for corruption.⁵ The second report on the other hand explored the challenges, possibilities and opportunities in integrating human rights in the anti-corruption agenda. It concludes that the anti-corruption campaign and the human rights movement have something to share in common.⁶ However, both reports did not address the issue of victims of corruption in a rights language. Instead, the reports lay down in general terms the relationship between corruption and human rights. Terracino,⁷ Ankansai,⁸ Rajagopal⁹ and Lajcakova¹⁰ tried to make a connection between corruption and human rights. They stated that whenever there is corruption, there will be a violation of human rights. However, their examination of the relationship between corruption and human rights ends either with stating that corruption is a violation of human rights or that

⁵ Transparency International (2009), *Corruption and Human Rights: Making the Connection*, International Council on Human Rights policy, available at, <http://www.ichrp.org/files/reports/40/131_web.pdf> (accessed 10 March 2011).

⁶ Transparency International (2010), *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*, International Council on Human Rights Policy, available at, <http://www.ichrp.org/files/reports/58/131b_report.pdf> (accessed on 4 April 2011).

⁷ J. Bacio Terracino (2008), '*Corruption and Human Rights-Corruption as a Violation of Human Rights*', working paper, International Council on Human Rights Policy, available at, <http://www.ichrp.org/files/papers/150/131_terracino_en_2008.pdf> (accessed 11 April 2011).

⁸ K. Anukansai, '*Corruption: The Catalyst for the Violation of Human Rights*', available at, <<http://www.nacc.go.th/images/journal/kanokkan.pdf>> (accessed 11 April 2011).

⁹ B. Rajagopal (1999), '*Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*' 14 *Connecticut Journal of International Law* 495.

¹⁰ J. Lajcakova (2003), 'Violation of Human Rights Through State Tolerance of Street-Level Bribery: Case Study, Slovakia, 9 *Buff. Hum. Rts. L. Rev.* 111.

human rights are preventive tools for corruption. They did not propose an integral approach for the problem of corruption and the violations of human rights.

Kale has also tried to raise the relationship between corruption and human rights by campaigning for a right to a corruption-free society.¹¹ According to him, the most effective way to combat corruption is by elevating it to the status of a crime of universal interest, i.e., a crime under international law that entails individual responsibility and punishment, and is subject to universal jurisdiction. Kumar has adopted this idea in many of his writings,¹² though with slight modifications. He advocates for a human rights approach to combating corruption in Asia by the development of the human right to freedom from corruption within the context of the states' constitutions. This would involve, in effect, the development of a human rights standard encapsulated as 'freedom from corruption'. According to Kumar, the freedom from corruption would mean the existence and development of a few rights for the citizenry. While others like, Ogundokun, shared the human rights aspect of fighting corruption but deviate in the mode of application. He deviates from elevating the right to the status of crime under international law but agrees with the human rights approach of fighting corruption.¹³ Though these scholars propose the right to corruption-free service as a human right as a means of minimizing the impacts of corruption on human lives, they failed to precisely formulate the contents of the right with its monitoring mechanisms. Rather, they argue that human beings are entitled to claim a corruption-free service individually and in group.

Moreover, the 11th International conference on corruption under-scored that large scale corruption should be designated as crime against humanity, and that all human beings have a basic human right to live in a corruption-free society and also condemned corruption as immoral,

¹¹ N. Kale (2000), 'The Right to a Corruption Free Society as an Individual and Group Human Right: Elevating Official Corruption to a Crime under International Law', J. Int'l L. 149-178.

¹² See for example CR. Kumar (2000), 'Human Rights Approaches of Corruption Control Mechanisms-Enhancing the Hong-Kong Experience of Corruption Control Strategies', 5 *San Diego Int'l L.J.* 323-351; CR. Kumar (2003-2004), 'Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India', 17 *Colum. J. Asian L.* 31; CR. Kumar (2007-2008), 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', 16 *Mich. St. J. Int'l L.* 475; and CR. Kumar (2005), 'Corruption, Human Rights and Development: Sovereignty and State Capacity to Promote Good Governance', 99 *Am. Soc'y Int'l L. Proc.* 416.

¹³ O. Ogundokun (2005), 'A Human Rights Approach to Combating Corruption in Africa: Appraising the AU convention using Nigeria and South Africa', LLM thesis, Center for Human Rights, Faculty of Law, University of Pretoria.

unjust and repugnant to the ideals of humanity enshrined in the universal declaration of human rights.¹⁴ It is held that the protection of human rights is inversely affected by the presence of corruption in a society.¹⁵ This means that high levels of corruption in a society are likely to disable a State from fulfilling its duties to respect, protect, and fulfill the human rights of its citizens.¹⁶ The assertion that corruption is a crime against humanity presupposes that it is a violation of universal values which deemed important for all societies, i.e., violation of human rights.¹⁷

However, a comprehensive study of the regional and international anti-corruption conventions from a human rights perspective is not made. Available literature focuses on the potentials of the existing anti-corruption conventions in overcoming the problems of corruption.¹⁸ Even such studies either focus on the weaknesses of one of the regional or international anti-corruption conventions or a comparative study. However, Indira Carr investigated whether the regional and international anti-corruption conventions are a satisfactory solution for the problems of corruption.¹⁹ He found that the lack of a unified approach and the weak enforcement mechanism are unlikely to further the fight against corruption in any meaningful way. To rectify these weaknesses he proposed the process of re-socialization; i.e., “educating the society about corruption and instilling an awareness of the social impact and consequences of one’s behavior

¹⁴ See the Findings of the 11th International Anti-Corruption Conference, Seoul, May 2003 ‘*The Seoul Findings*’ available at,

<<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019160.pdf>> (accessed 12 March 2011).

¹⁵ See United Nations Convention against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) (taking the view that corruption is adversely related to the realization of human rights).

¹⁶ *ibid.*

¹⁷ See for details of crime against humanity A. Cassese (2008), *International Criminal Law*, 2nd ed, Oxford University Press, New York, pp.98-126.

¹⁸ See for example W. Schroth (2003), ‘*National and International Constitutional Law Aspects of African Treaties and Laws against Corruption*’, 13 *Transnat’l L. & Contemp. Probs*; C. Hams (2000), ‘*Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*’, 33 *Cornell Int’l L.J.* 159; A. Argandona (2006), ‘*The United Nations Convention Against Corruption and its Impact on International Companies, Working Paper WP No. 656*, IESE Business School, University of Navarra, available at

<<http://www.iese.edu/research/pdfs/DI-0656-E.pdf>> (accessed 4 April 2011); P. Webb (2005), ‘*The United Nations Convention Against Corruption: Global Achievement or missed opportunity?*’ *Journal of International Economic Law* 8(1), 191–229; D. Altamirano (2007), ‘*The Impact of the Inter-American Convention Against Corruption*’, 38 *U. Miami Inter-Am. L. Rev.* 488; N. Kale (2006), ‘*Change or the Illusion of Change: The War against Official Corruption in Africa*’, 38 *Geo. Wash. Int’l L. Rev.* 697; R. Sinder and W. Kidane (2007), ‘*Combating Corruption through International Law in Africa: A Comparative Analysis*’, 40 *Cornell Int’l L.J.* 691 and A. Posadas (2000), ‘*Combating Corruption Under International Law*’, 10 *Duke J. Comp. & Int’l L.* 345.

¹⁹ I. Carr (2007), ‘*Fighting Corruption through Regional and International Conventions: A Satisfactory Solution?*’ 15 *Eur. J. Crime Crim. L. & Crim. Just.* 121, p. 129.

not only in relation to oneself, the near and the dear but on whole communities, on humanity and on generations, current and future.”²⁰ But I argue that sustained re-socialization of the society about the impacts of corruption will be made by formulating corruption-free service as a human right.

A critical evaluation of the anti-corruption conventions from a human rights lens (especially from the side of the victims of corruption) is very scant. However, there are some attempts of looking the anti-corruption conventions from the victim’s side though not in all anti-corruption conventions. Olaniyan²¹ and Ogundoku examined the African Union convention on preventing and combating corruption from a human rights perspective. Olaniyan especially proposes the African Union convention on preventing and combating corruption to be a protocol to the African Charter on Human and Peoples’ Rights. This proposal is based on his finding that the monitoring mechanism of the African Union convention on preventing and combating corruption is weak. Olaniyan proposes this as a panacea to the weak monitoring mechanism and to set the fight against corruption at the center of human rights discourse in Africa. However, I argue that in order to make the fight against corruption at the center of human rights discourse, the right to corruption-free service must be recognized and be a protocol to the main human rights instruments under the regional and international human rights instruments. But the proposal to make the whole convention a protocol to the African Charter on Human and Peoples Rights may not be appropriate on two counts. First, it is not appropriate to make a non-human rights instrument a human rights protocol. Second, it is not legitimate and efficient to give human rights monitoring mechanisms to monitor a non-human rights instrument.

1.5 Hypothesis

The thesis is based on the premises that human beings have an inherent right to be free from corruption. Besides, corruption will be effectively combated, if its combating strategies are part and parcel of human rights discourse. Especially giving recognition to corruption-free service as

²⁰ *ibid.*, p.37.

²¹ K. Olaniyan (2004), ‘*The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal*’, 4 *Afr. Hum. Rts. L.J.* 74.

a human right will have a great help in the fight against corruption and contribute its part for the realization of fundamental human rights and freedoms.

1.6 Significance of the study

The study is significant as it represents an effort in understanding corruption as a human rights issue. This understanding reproduces likewise in seeking a human rights perspective for the fight against corruption. It also contributes for the development of knowledge on the right to corruption-free service. Besides, the study gives perspective for the anti-corruption and human rights activists in looking their ways for the betterment of the society. Especially the study has a potential of making the fight against corruption within a human rights discourse and thereby integrate the anti-corruption campaign with the human rights movement. Above all, it confers human beings individually and in group the right to corruption-free service.

1.7 Limitations of the Study

A major limitation to this study is lack of literature on the relationship between corruption and human rights in general and on the right to corruption-free service in particular. Formulating the precise contents of the right to corruption-free service as a human right with its monitoring mechanisms was a challenge. Besides, it explores and evaluates only the main international and regional anti-corruption conventions, such as, the United Nations Convention Against Corruption, the Council of Europe Civil and Criminal Law Conventions, the Inter-American Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption with a view to elevate corruption-free service as a human right under international and regional human rights systems.

1.8 Methodology

The methodology of the study is doctrinal as it helps to critically analyze and research the hypothesis. To this end, the study was carried out through review of literature sourced from the

internet, books, articles, general comments of the treaty bodies and reports on corruption and human rights. Especially the core part of the study was undertaken by analysis of anti-corruption conventions and human rights instruments depending upon their appropriateness to achieve the objectives of the thesis.

1.9 Overview of Chapters

The thesis is constituted of five chapters. The first chapter introduces the study by providing background information, by identifying the problem, by framing research questions and objectives, by investigating the existing literature and by formulating hypothesis and methodology. The second chapter deals with corruption and human rights. It explores the relationship between corruption and human rights by making some conceptual notes about corruption and human rights as an introduction. The third chapter critically examines the international legal regime against corruption. It evaluates the measures adopted by these conventions and their potential in giving response to the human rights impact of corruption on the one hand and their monitoring mechanisms on the other hand. The fourth chapter provides the grounds for the elevation of corruption-free service as a human right. It put forward the right to corruption-free service as an end in itself and as a panacea to the problems discussed in chapter two and three. Finally, the fifth chapter concludes the findings of the study and makes some recommendations.

Chapter Two: Corruption and Human Rights

2.1 Introduction

*Power tends to corrupt, and absolute power corrupts absolutely. There is no worse heresy than that the office sanctifies the holder of it.*²²

Lord Acton (1834-1902)

Corruption has existed ever since antiquity as one of the worst and, at the same time, most widespread forms of behavior, which is inimical to the administration of public affairs.²³ Notwithstanding the long history and the apparent spread of the phenomenon of corruption in today's society, it seemed difficult to arrive at a common definition. However, it is a situation where money, arbitrariness and discrimination talks. People are judged not by what they are but what they have and from whom they belong. It is one of the greatest challenges of the contemporary world 'which undermines good government, fundamentally distorts public policy, leads to misallocation of resources, harms the private sector and private sector development, and particularly hurts the poor'.²⁴ It forces the private sector to engage in rent-seeking activities rather than competitive activities.²⁵ Above all, corruption hurts more the most vulnerable sections of the society, such as women, children, minorities, indigenous peoples, migrant workers, persons with disabilities, those with HIV/AIDS, refugees, prisoners and those who are poor.²⁶ Corruption is incompatible with the ideals of equality and justice. It diminishes human dignity and thereby prevents the realization of human rights and fundamental freedoms. Corruption is hampering the global movement for the realization of human rights.

This chapter first lays down the concept of corruption by discussing its definition, causes, forms and consequences. It then discusses the notion of human rights such as its definition, foundation (if any), nature and categories with a view to make a connection with corruption. The third

²² Microfost ® Encarta ® (2009), © 1993-2008 Microsoft corporation.

²³ Criminal law convention on corruption, *explanatory report*, available at, <<http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>> (accessed 1 April 2011).

²⁴ See Transparency International (1997), *The Fight Against Corruption: Is the Tide Now Turning?* Berlin: TI and R. Hope and C. Chikulo (eds) (2000), *Corruption and Development in Africa-Lessons From Country Case Studies*, Palgrave Macmillan.

²⁵ S. Becker (1994), 'To Root Out Corruption, Boot Out Big Government', *Business Week*, 31 January: 18.

²⁶ Transparency International, 'Corruption and Human Rights: Making the Connection', *op.cit.*

section explores the relationship between corruption and human rights. Finally, the fourth section concludes the discussion by asserting that an integral approach is essential to overcome the problems of corruption and human rights.

2.2 Corruption and its Complexities

*Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least a bit of the King's revenue. Just as fish under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out taking money.*²⁷

Kautilya, 300 B.C

Corruption is more readily condemned than defined and explained. It is a subject of research by many scholars from various disciplines.²⁸ Nevertheless, disagreements persist not only about how to curb it, but even about its definition, causes, forms and consequences. Such a lack of consensus reflects the complexity of the problem. Defeated by the problems of defining corruption, Justice Potter Stewart asserted that 'I know it when I see it'.²⁹ Scholars approach corruption from anthropological and sociological to moral and economic point of view. Depending upon their perspectives, they attribute different meanings, causes, forms and consequences for corruption.³⁰

But the paper is not attempting to resolve all these complexities of corruption. Instead, it tries to put some conceptual notes about corruption with the objective of making it at the center of human rights discourse in the thesis's framework.

²⁷ CR. Kumar, 'Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India', *op.cit.*, p.1.

²⁸ See for example A. Miller (2008), *The Erotics of Corruption: Law, Scandal, and political Perversion*, State University of New York Press, Albany; T. Andrei and A. Matei (2009), *The Corruption: An Economic and Social Analysis*, Editura Economica; K. Jain (ed) (2001), *The Political Economy of Corruption*, Routledge, London; and M. Nuijten and G. Anders (eds) (2007), *Corruption and the Secrete of law-A Legal Anthropological Perspective*, Ashgate, Hampshire, England.

²⁹ W. Robert (1991), *Political Corruption in Africa*, 2nd ed, Dartmouth publishing company, Hampshire, England, p. 11.

³⁰ R. Cuadrado and J. Arce, *The Complexity of Corruption: Nature and Ethical Suggestions*, Working Paper No. 05/06, available at, <www.unav.es/facultad/.../workingpapersmodule/.../1148381132_wp0506.pdf> (accessed 1 April 2011), p.1.

2.2.1 The Definition of Corruption

The term “corruption” comes from the Latin word *corruptio* which means “moral decay, wicked behavior, putridity or rottenness”.³¹ Defining the concept corruption is not as easy as one recognizes its occurrence. It varies from region to region and remains largely contextual.³² As the causes and effects of corruption are different depending on the context of the country, it is perhaps not surprising that it is difficult to formulate a single comprehensive definition that covers all the manifestations of corruption.

Literature unanimously recognizes that corruption is an ancient, wide and pervasive problem, that continues to be a factor in every-day live around the world, in both developed and underdeveloped countries.³³ It can be said that corruption is a universal problem without universal definition. Like human rights, the definition of corruption is culturally relative. For instance, one man’s bribe may be another man’s gift.³⁴

Even though there is no single universally agreed definition of corruption, it is defined in various ways. Usually corruption is defined as ‘an illegal act that involves the abuse of a public trust or office for some private benefit’, or ‘the misuse of public office for private gain.’³⁵ Such definition has two limitations in the current understanding of corruption. It only deals with corruption in the public sector while excluding corruption in the private sector and only covers the recipients of proceeds of corruption while it also covers the act of giving.³⁶ Transparency International (TI) defines corruption as ‘misuse of entrusted power for private gain’³⁷. The TI’s definition is similar with the usual definition except it includes private sector corruption. The

³¹ M. Milic (2001), ‘*Endogenous Corruption in Privatized Companies*’, Collegium, Budapest, available at, <http://www.cerge.cuni.cz/pdf/gdn/RRCI_17_paper_01.pdf> (accessed 1 April 2011).

³² D. Gould, *op.cit.*

³³ R. Cuadrado et al, *op.cit.*, p.3.

³⁴ S. Underkuffler (2009), ‘*Defining Corruption: Implication for Action*’, in I. Rotberg (ed), *Corruption, Global Security and World order*, World Peace Foundation and American Academy of Arts & Sciences, pp. 27-46, p. 27.

³⁵ D. Fantaye (2004), ‘*Fighting Corruption and Embezzlement in Third World Countries*’, 68 *Journals of Criminal Law*, p. 171.

³⁶ See the discussion of anti-corruption conventions in chapter three.

³⁷ Transparency International (2009), *The Anti-Corruption Plain Language Guide*, <http://www.transparency.org/content/download/45306/725785/file/TI_Plain_Language_Guide_280709.pdf> (accessed 1 April 2011).

World Bank (WB) defined corruption as ‘an abuse of public authority for the purpose of acquiring personal gain’.³⁸ Mc Mullan holds that a public official is corrupt:

*If he accepts money or money’s worth for doing something that he is under a duty to do anyway, that he is under a duty not to do, or to exercise a legitimate discretion for improper reasons.*³⁹

There is also a definition of corruption in the economics field; for example, Robert Klitgaard has defined corruption in terms of an equation: Corruption = Monopoly Power + Discretion – Accountability.⁴⁰ While United Nations Development Program (UNDP) equated as corruption= (Monopoly Power + Discretion) – (Accountability + Integrity + Transparency).⁴¹

In the legal field, the term corruption is usually used to group certain criminal acts which correspond to the general notion of an abuse of entrusted power. International conventions against corruption reflect this, since they do not define corruption but instead enumerate criminal acts that amount to corruption.⁴²

Defining corruption is notoriously difficult to do.⁴³ But for the purpose of this thesis, corruption is defined as a misuse of entrusted power for private gain against the rights of others and giving officials undeserved benefit or advantage. Besides, it includes those acts which are deemed corrupt by the United Nations Convention Against Corruption. It is within this definitional framework of corruption that the thesis operates.

³⁸ D. Kaufmann (2004/2005), ‘Corruption, Governance and Security: Challenges for the Rich Countries and the World’, World Bank Global Competitiveness Report, available at, <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf> (accessed 22 March 2011).

³⁹ See M. Mc Mullan (1961), ‘A Theory of Corruption: Based on a Consideration of Corruption in the Public Services and Governments of British Colonies and Ex Colonies in West Africa’, 9 (2) *Sociological Review*, pp. 181-201.

⁴⁰ R. Klitgaard (1988), *Controlling Corruption*, University of California Press, Berkeley as quoted by K. Anukansai, ‘Corruption: The Catalyst for the Violation of Human Rights’, available at, <<http://www.nacc.go.th/images/journal/kanokkan.pdf>> (accessed 27 March 2011), p.7.

⁴¹ United Nations Development Program (2004), *Anti-Corruption Practice Note*, UNDP, available at, <http://www.undp.org/governance/docs/AC_PN_English.pdf> (accessed 22 March 2011).

⁴² See the discussions dealing with definition of corruption in chapter three.

⁴³ S. Underkuffler, *op.cit.*, p. 41.

2.2.2 The Causes of Corruption

Available research reveals that the causes of corruption are diverse and depend on the different contextual environments. TI held that corruption is rearing its ugly head in more and more severe ways due to the weakening of social values, with the broader public interest and social responsibility being subordinated to the enhancement of material status in the personal ethics of many.⁴⁴ Besides, lack of transparency and accountability in the public integrity systems are contributing factors for corruption.⁴⁵ There is also a biblical explanation for the causes of corruption. After Adam broke the law and committed sin to his posterity, what follows upon this is, ‘the corruption of nature derived unto them from him’; by which is meant, ‘the general depravity of mankind, of all the individuals of human nature, and of all the powers and faculties of the soul, and members of the body’.⁴⁶ As Human nature is imperfect, corruption will exist in all human endeavors. Selfishness and greed are the constituting elements of human imperfection which leads to corruption.

As noted by Ringera in a speech delivered at the Commonwealth lawyer’s conference, the causes of corruption are economic, institutional, political or societal.⁴⁷ The economic causes of corruption are related to pecuniary considerations, representing corruption that is need-driven as opposed to greed driven. This assertion is further confirmed by TI in attributing poverty and low salary as causes of corruption.⁴⁸ Increase of wants and inability to maintain one’s family lives forces officials to compromise public trust and honesty for some fringe benefits. Institutional causes of corruption include monopoly and wide discretionary powers for public officers, poor accountability, lack of effective and efficient enforcement of the law, absence of institutional mechanisms to deal with corruption, existence of a weak civil society, and the absence of press freedom.⁴⁹ Klitgaard shares the same view with Ringera by holding that corruption is prevalent

⁴⁴ J. Pope (2000), *Confronting Corruption: The Elements of a National Integrity System*, TI Source Book, available at, < <http://www.transparency.org/content/download/2439/14493/file/sourcebook.pdf.zip>> (accessed on 3 March 2011), p.7.

⁴⁵ *ibid.*, p. 8.

⁴⁶ A Body of Doctrinal Divinity, Book 3 - chapter 11, *Of The Corruption of Human Nature*, available at, <http://www.pbministries.org/books/gill/Doctrinal_Divinity/Book_3/book3_11.htm> (accessed 3 March 2011).

⁴⁷ A. Ringera, Speech delivered at the Commonwealth Lawyers Conference, Nairobi, available at, <<http://www.kacc.go.ke/archives/speeches/COMMONWEALTH-CONFERENCE.pdf>> (accessed 3 March 2011).

⁴⁸ J. Pope, *op.cit.*, p.9.

⁴⁹ A. Ringera, *op.cit.*

when ‘someone has monopoly power over a good or service, has the discretion to decide whether you receive it and how much you get, and is not accountable.’⁵⁰ The political causes of corruption arise from the structure and functions of political institutions, and the acquisition and exercise of political power. While societal causes refer to the attitudes and practices of the community. As the problem of corruption is multi-faceted, its causes are also diverse.

2.2.3 The Forms of Corruption

Corruption manifests itself in different ways in different circumstances. But there are some forms of corruption which recur in every system. These are grand corruption, petty corruption, active corruption, passive corruption, political corruption and systematic corruption.

Grand corruption occurs when a high level government official committed acts that distort policies or the central functioning of the state, enabling him/her to benefit at the expense of the public good.⁵¹ It is a form of corruption which pervades the highest levels of a national government, leading to a broad erosion of confidence in good governance, rule of law and economic stability.⁵² It distorts the functioning of the central government.

Petty corruption is an everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.⁵³ It is a situation where a public official demands or expects money for doing an act which he or she is ordinarily required by law to do, or when a bribe is paid to obtain services which the official is prohibited from providing.⁵⁴

⁵⁰ K. Anukansai, *op.cit.*, p.7.

⁵¹ TI Plain Language Guide, *op.cit.*, p. 23.

⁵² See C. Maria and K. Haarhuis (2005), ‘*Promoting Anti-Corruption Reforms: Evaluating the Implementation of a World Bank Anti-Corruption Program in Seven African Countries 1999-2001*’, available at, <<http://ics.uda.ub.rug.nl/root/Dissertations/2005/KleinHaarhuis-Promot>> (accessed 3 March 2011).

⁵³ Global Integrity and UNDP Oslo Governance Centre (2008), ‘*A User’s Guide to Measuring Integrity*’ (Oslo: UNDP); U4 Corruption Glossary, available at, <<http://www.u4.no/document/glossary.cfm>> (accessed 3 March 2011).

⁵⁴ C. Sandgren (2005), ‘*Combating Corruption: The Misunderstood Role of Law*’, 13 *International Lawyer*, p. 717.

Bribery, embezzlement, theft, fraud, extortion, nepotism, favoritism, and Clientelism (classifications of corruption by the United Nations Office on Drug and Crime (UNODC))⁵⁵ can be grouped under either grand corruption or petty corruption depending upon the amount of money lost and the sector where it occurs.⁵⁶

In discussions of transactional offences such as bribery; ‘active bribery’ usually refers to the offering or paying of the bribe, while ‘passive bribery’ refers to the receiving of the bribe.⁵⁷ This form of corruption describes the demand and supply side of corruption. Political corruption on the other hand is the manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.⁵⁸

Systematic corruption occurs where corruption permeates the entire society to the point of being accepted as a means of conducting everyday transactions.⁵⁹ It is a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which many people have few practical alternatives to dealing with corrupt officials.⁶⁰ It affects institutions and influences individual behavior at all levels of a political and socio-economic system. Such form of corruption is embodied in specific socio-cultural environments, and tends to be monopolistic, organized and difficult to avoid.⁶¹

⁵⁵ See UNODC (2004), ‘*The Global Program against Corruption: UN Anti-Corruption Toolkit*’, available at, <http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf> (accessed 10 March 2011).

⁵⁶ TI Plain Language Guide, *op.cit.*

⁵⁷ UNODC, *The Global Program against Corruption: UN Anti-Corruption Toolkit*, *op.cit.*

⁵⁸ See R. Hodess (2004), ‘*Introduction*’, in TI, *Global Corruption Report 2004 - Political Corruption*, Berlin TI; and I. Amundsen (1999), ‘*Political Corruption: An Introduction to the Issues*’, CMI Working Paper 7, Bergen: CMI.

⁵⁹ C. Heymans and B. Lipietz (1999), ‘*Corruption and Development: Some perspectives*’, 40 *Institute of Security Studies Monograph Series* p.8.

⁶⁰ *ibid.*

⁶¹ *ibid.*

2.2.4 The Impacts of Corruption

*Corruption deepens poverty, it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths.*⁶²

The Durban Commitment to Effective Action Against Corruption, 1999

Corruption is damaging for the simple reason that important decisions are determined by ulterior motives, with no concern for the consequences for the wider community. As Balogun describes it, “depending on its *form* and *gravity*, corruption is capable of rewarding indolence and penalizing hard work, undermining morale and *esprit de corps*, compromising a nation’s external security, threatening internal order and stability, and generally slowing down the pace of economic growth and sustainable development”.⁶³ Kumar also notes that corruption affects economic growth, discourages foreign investment, diverts resources for infrastructure development, health and other public services, education, and anti-poverty programs.⁶⁴ He further adds that corruption poses serious challenges for governance, as States cannot achieve the goals of development without ensuring corruption-free governance.

Corruption lowers investment, which in turn adversely affects overall economic performance.⁶⁵ Perhaps more importantly, corruption undermines social welfare by redistributing a nation 'wealth in a manner that generates tensions or exasperates existing ones.⁶⁶ Keuleers notes that high levels of corruption significantly aggravate poverty.⁶⁷

⁶² The Durban Commitment to Effective Action Against Corruption, *op.cit.*

⁶³ M. Balgun (2003), ‘*Causative and Enabling Factors in public Integrity: A focus on Leadership, Institutions and character Formation*’, Public Integrity 5, No. 2 (spring), pp.127-147, as quoted by RA. Johnson and S. Sharma (2004), ‘*About Corruption*’, in RA. Johnson (ed), *The Struggle Against Corruption: A Comparative Study*, PALGRAVE MACMILLAN, P.10.

⁶⁴ CR. Kumar (2005), *op.cit.*

⁶⁵ S. Knack and P. Keefer (1995), ‘*Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*’, 7 *Econ. & Pol.* 207.

⁶⁶ R. Sinder et al, *op.cit.*

⁶⁷ P. Keuleers (2005), Speech on Corruption, development and human rights – *Fighting corruption as a means to achieve the Millennium Development Goals* on the 5th regional anti-corruption conference, 28-30 September 2005, Beijing, PR China.

Above all, corruption affects the integrity of the political system and neither allows for the protection of human rights and the promotion of human freedoms nor for the development of democracy.⁶⁸ It implies discrimination and injustice and disrespect for human dignity.⁶⁹

While corruption violates the rights of all those affected by it, it has a disproportionate impact on people that belong to groups that are exposed to particular risks; such as women, children, minorities, indigenous peoples, migrant workers, persons with disabilities, those with HIV/AIDS, refugees, prisoners and those who are poor.⁷⁰ In some cases, it is their vulnerability that makes certain groups easy victims of corruption. For instance, corrupt officials may extract money from migrant workers who lack a residence permit by threatening them with deportation in the knowledge that they cannot complain.⁷¹

Some would argue that corruption can have beneficial effects such as non-violent access to government affairs and administration, when political channels are clogged, or as a means of lessening the potentially crippling tension between the civil servant and the politician by linking them in an easily discerned network of self-interest.⁷² However, counter-arguments are more acceptable. They focus on the fact that corruption leads to economic inefficiency and waste, because of its effect on the allocation of funds, on production, and on consumption. Gains obtained through corruption are unlikely to be transferred to the investment sector as ill-gotten money is either used in conspicuous consumption or is transferred to foreign bank accounts.⁷³ Rose Ackerman further argues that corruption is able to feed on itself and thereby produce higher illegal payoffs that ultimately, outweigh economic growth.⁷⁴

⁶⁸ CR. Kumar, *'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia'*, *op.cit.*

⁶⁹ *ibid.*

⁷⁰ Transparency International, *'Corruption and Human Rights: Making the Connection'*, *op.cit.*, p.7.

⁷¹ *ibid.*

⁷² See C. Maria et al, *op.cit.*, and R. Ackerman (1996), *'Corruption and Democracy'*, 90 *American Society of International Legal Proceedings* 83.

⁷³ *ibid.*

⁷⁴ R. Ackerman, *op.cit.*

2.3 Human Rights

As a concept, human rights have been constantly evolving throughout human history. They have been intricately tied to laws, customs and religions throughout the ages. Their standards change with time according to human needs and interests.⁷⁵ Any discussion about human rights should distinguish the philosophical, political and legal accounts. The philosophy of human rights explains the *raison d'être* of human rights while the politics tells us that which set of human rights are in need of immediate consideration, which set of human rights should we recognize and how can we judge the human rights behavior of the other. However, the law of human rights deals with a detail account of internationally agreed values, standards or rules regulating the conduct of States towards their own citizens and towards non-citizens.⁷⁶

But a detail discussion of the philosophical, political and legal perspectives of human rights will not be made for the simple reason that it is out of the scope of the work. Instead, the most essential elements of the concept of human rights which give a bird's-eye view of the above perspectives will be made. By so doing the objective is to make a connection between human rights and corruption in the thesis's framework. With this view the following sections explores and discusses the definition (if any), the bases, nature and categories of human rights.

2.3.1 Definition of Human Rights

In the international sphere, where diverse cultures are involved, where positivist underpinnings are shaky, and where implementation mechanisms are fragile, definition of human rights is crucial.⁷⁷ Since one's understanding of the meaning of human rights will influence one's judgment on such issues as which rights are regarded as universal, which should be given

⁷⁵ Z. Ernada (2005), 'Challenges to the Modern Concept of Human Rights', *Jurnal Sosial Politika*, Vol. 6, p. 11, 1-12, p.2.

⁷⁶ R. Baehr (1999), *Human Rights Universality in Practice*, Macmillan press, p.1

⁷⁷ J. Shestack (1998), 'The Philosophic Foundation of Human Rights', *Human Rights Quarterly* 20.2, 201-234, p.202.

priority, which can be overruled by other interests, which call for international pressures, which can demand programs for implementation, and for which one will fight.⁷⁸

The question regarding what human rights are and how they should be defined has attracted a number of thinkers who advance a diverse array of theories on the nature of human rights.⁷⁹ However, Shestack notes that the definition of human rights is abstract and complex.⁸⁰ But the abstractness of human rights can arguably be seen as a virtue, signaling openness for further historic development of human rights discourse in light of future experiences and new demands.⁸¹ This assertion is in conformity with the thesis's objective of elevating corruption-free service as a human right as there is an urgent need as a result of the catastrophic impacts of corruption on human lives everywhere. The proposed right, corruption-free service, did not form the corpus of human rights law. If we had a constant and fixed meaning of human rights, proposing new human rights would have been difficult. Above all, the existing corpus of human rights law is established with half a century though humans existed for millenniums. The concepts of human rights will evolve to include the evolving moral fabric of the society. It is within this process of moral evolution that the right to corruption-free service is proposed.

Despite the abstractness of human rights, there are some common definitions provided for human rights. Internet Encyclopedia of Philosophy defines human rights as basic moral guarantees that people in all countries and cultures allegedly have simply because they are people.⁸² In other words, human rights are the rights a human being has simply because he is a human being. They are the basic entitlements or minimum standards to be met for humans to live with dignity. Amparo Tomas defined human rights as "universal legal guarantees that belong to all human beings and that protect individuals and/or groups from actions and omissions of the State and some non-State actors that affect fundamental human dignity".⁸³ But his definition is narrow in the sense that it is limited to those human rights recognized under international and regional human rights

⁷⁸ *ibid.*

⁷⁹T. Regassa (2009), 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia', *Mizan Law Review*, Vol.3 No.2, p.290.

⁸⁰ J. Shestack, *op.cit.*, p. 202.

⁸¹ Z. Ernada, *op.cit.*, p.2.

⁸² Internet Encyclopedia of Philosophy, *Human Rights*, available at, <<http://www.iep.utm.edu/>> (accessed 10 March 2011).

⁸³ Amparo Tomas (2005), *A Human Rights Based Approach to Development: Primer for Development Practitioners*. [NP, n. pub], P. 3 as quoted by T. Regassa, *op.cit.*, p. 291.

instruments. While moral claims which are necessary to lead a decent and minimally good life worthy of dignity also constitutes human rights.⁸⁴

Rosenbum Alan defined human rights as “the legitimate basis for a universal human community”.⁸⁵ By human community he refers that an ideal association of human persons conceived for the individual and collective benefit of its members. He further states that such association rooted in democracy is most befitting with humanity. This definition of human rights affirms the complementarity of democratic values and human rights.

When people today think or talk about human rights, they usually have in mind the sorts of rights found in the Universal Declaration of Human Rights (UDHR) and subsequent treaties. While they are right in holding this, however, human rights are also rights which automatically belong to a human person as a minimum guarantee for worthy human living though these rights are not recognized under positive law.

2.3.2 Basis of Human Rights

Many people tend to take the validity of human rights for granted. Certainly, for many non-philosophers human rights may all too obviously appear to rest upon self-evidential truth and universal valid moral principles.⁸⁶ However, philosophers did not enjoy such license for epistemological complacency. There are two major schools of thought regarding the philosophical foundations of human rights. These are the foundationalist and the anti-foundationalist schools of thought.⁸⁷

The foundationalist argues that there are philosophical foundations for human rights. They base their argument on moral philosophy, religion and natural law. For foundationalist, interest and

⁸⁴ For detail accounts on philosophical reflections on the meaning of human rights, see N. James (1987), *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, Berkeley, University of California press.

⁸⁵ R. Alan (ed) (1980), *The Philosophy of Human Rights: International Perspective*, West Port, Connecticut, Green Wood press, p. 4

⁸⁶ Internet Encyclopedia of philosophy, *op.cit.*

⁸⁷ M. Freeman (1994), ‘*The Philosophical Foundations of Human Rights*’, *Human Rights Quarterly* 16, 491-514, p.496.

will theory are the grounds which give rise to a moral basis for human rights. Advocates of interest theory argue that the principal function of human rights is to protect and promote certain essential human interests.⁸⁸ According to this approach, human rights are based on the conception of human nature as human nature is expressed in human needs. But this conception is criticized in the sense that human needs are diverse. The will theory on the other hand attempts to establish the philosophical foundations of human rights upon a single human attribute: the capacity for freedom.⁸⁹ For the will theorists every human has a will and freedom to execute his will no matter how his/her will is bad or good. They argue that what is distinctive about human agency is the capacity for freedom and that this ought to constitute the core of any account of rights. Will theorists view human rights as originating in, or reducible to a single constitute right. But natural law theorists held that the theory of natural law led to natural rights which are most closely related to modern human rights.⁹⁰ While others held that the bases for human rights is religion.⁹¹ Especially the concept of human dignity and equality which is enshrined in the world's major religions is used as bases for human rights.⁹² The aspiration to protect the human dignity of all human beings is at the core of the concept of human rights.⁹³ The idea that humans are free and equal is also used as a ground for the conception of human rights.

The anti-foundationalists argue that human rights are contingent historical facts without philosophical foundation.⁹⁴ Contemporary ideas like democracy and justice gives rise to the bases for human rights. They argue that human rights are responses to the gross atrocities happened to mankind.

But despite these philosophical battles in search of foundation for human rights, we have a corpus of human rights law regime. The existing international human rights law regime basis it's

⁸⁸ Internet Encyclopedia of Philosophy, *op.cit.*

⁸⁹ *ibid.*, see also CH. Perelman, 'Can the Rights of Man Be Founded?' in R. Alan, *op.cit.*, pp. 45-51.

⁹⁰ J. Shestack, *op.cit.*, p.207.

⁹¹ *ibid.*, p.204.

⁹² For a detail account of human dignity as a bases for human rights see M. Penninga (2008), 'A Judeo-Christian Account of Human Dignity in Canadian Law and Public Policy', MA thesis, Political Science, University of Lethbridge, LETHBRIDGE, ALBERTA, CANADA; J. Ramus (2007), 'Human Dignity in Indian Secularism and in Christianity', PHD thesis, Radbound University Nijmegen, Indea, clariten publications; MI. Goolam (2001), 'Human Dignity - Our Supreme Constitutional Value', 4 *Potchefstroom Elec. L.J.* 1; A. Gewirth (1996), *Human Dignity as the Basis of Rights*, Chicago university press.

⁹³ W. Benedek (ed) (2006), *Understanding human rights, manual on human rights education, European Training and research center for human rights and democracy (ETC)*, Graz, p.23.

⁹⁴ M. Freeman, *op.cit.*, p.499. See also J. Raz (2010), 'Human Rights without Foundation', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law*, oxford University press, New York, pp. 321-337.

foundation on human dignity and equality.⁹⁵ Mention is also made to the effect that disregards of dignity and equality resulted in barbarous acts which outraged the conscience of mankind.⁹⁶ It can be argued that the existing international human rights law regime seems to accommodate both schools of thought by recognizing human dignity and equality as foundations for human rights and also by referring to the impacts of gross human atrocities on the conscience of mankind.

2.2.3 Nature of Human Rights

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*⁹⁷

Vienna Declaration and Program of Action, 1993

Human rights do not have to be given, bought, earned, or inherited; they belong to humans simply because they are human.⁹⁸ They are inherent to each individual. They exist in spite of the fact that one has the will or capacity to exercise them. Besides, human rights exist independently of the will of either an individual human being or a group of people.⁹⁹

Human rights are applicable to all people everywhere at all times regardless of race, sex, religion, ethnicity, political or other opinion, national or social origin.¹⁰⁰ They are the birth rights

⁹⁵ See for example, *Universal Declaration of Human Rights*, adopted and proclaimed by the General Assembly Resolution 217 A (III) of 10 December 1948, Preamble Para 1; *International Covenant on Civil and Political Rights*, adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976, Preamble Para 2; and *International Covenant on Economic, Social and Cultural Rights*, adopted by the General Assembly on 16 December and entered into force on 3 January 1976, Preamble Para 2.

⁹⁶ See UDHR, preamble Para 2.

⁹⁷ *Vienna Declaration and Program of Action*, adopted by the World Conference on Human Rights held in Vienna on 25 June 1993, available at, <<http://www2.ohchr.org/english/law/pdf/vienna.pdf>> (accessed 4 April 2011), I(5).

⁹⁸ Action Professionals' for the People (APAP) (2001), '*Baseline survey report on APAP's Intervention in Areas of Human Rights*', Addis Ababa, available at, <<http://www.apapeth.org/Docs/Baseline%20Survey.pdf>> (accessed on 4 April 2011).

⁹⁹ M. Piechowiak (1999), 'What are Human Rights? The Concept of Human Rights and their Extra-legal Justification,' in R. Hanski and S. Markku (eds), *An Introduction to the International Protection of Human Rights: A Text Book*. (2nd Rev ed). Turku/Abo: Institute of Human Rights, Abo Akademi University, P.3, as quoted by T. Regassa, *op.cit.*, p.290.

¹⁰⁰ *ibid.*

of all human beings and thereby universal. However, there are arguments against the universality of human rights. Opponents of universality argue that human rights are culturally relative.¹⁰¹

Human rights are inalienable in the sense that they cannot be taken away; no one has the right to deprive another person of them for any reason.¹⁰² People still have human rights even when the laws of their countries do not recognize them.

Human rights are indivisible, interdependent and interrelated that they are equal in importance and equally essential for the respect and dignity of each person. Human beings need them all to live a minimal good life. In other words, the violation or lack of a single human right affects the whole set of rights and thereby undermine the human quest of living a dignified life.

2.2.4 Categories of Human Rights

Human rights either for philosophical account or for simplicity categorized in different ways depending upon different parameters. One of such classifications is grouping rights in to negative, active and positive rights. A negative right is a right not to be subject to interference by others. These constitute the classical liberal rights as articulated in the philosophy of John Lock.¹⁰³ Active human rights imply the right to participate in the political process as outlined by Jean-Jacques Rousseau.¹⁰⁴ Positive rights on the other hand impose duties on the part of the duty bearer to do positive actions. These are economic, social and cultural rights for which one find basis in the philosophy of Karl Marx.¹⁰⁵ The classification of rights into negative, active and positive is based on the duty they impose on the duty bearer.

¹⁰¹ For universalism versus cultural relativism see for example E. Reichert (2006), '*Human Rights: An Examination of Universalism and Cultural Relativism*', *Journal of Comparative Social welfare*, Vol. 22, No. 1, pp. 23-36.

¹⁰² *What are human rights? The nature and sources of human rights*, available at, <<http://www.siiionline.org/?...human-rights-the-nature-sources-human-rights>> (accessed 10 March 2011).

¹⁰³ *Human Rights: Progress and Pitfalls, the European Evolution of Human Rights*, International Relations and Security Network (ISN), available at, <<http://www.isn.ethz.ch/isn/Current-Affairs/ISN-Insights/Detail?lng=en&ots627=fce62fe0-528d-4884-9cdf283c282cf0b2&id=123881&tabid=123885&contextid734=123881&contextid735=123885>> (accessed 25 April 2011).

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

Karel Vasak¹⁰⁶ on his part developed the notion of generation of rights. According to him there are three generation of human rights. The first generation includes civil and political rights; the second generation includes economic, social and cultural rights; and the third generation includes the right to development, peace and environment. The basis for such division is the time of evolution of human rights. The generational division of human rights by itself led to the emergence of the idea of another category;¹⁰⁷ i.e., liberty rights (civil and political rights), equality rights (economic, social and cultural rights), and solidarity rights (right to development, peace and environment). For the purpose of this thesis the category of civil and political rights; economic, social and cultural rights; and environmental and developmental rights is adopted in discussing the impacts of corruption on human rights for the sake of simplicity.

2.4 Corruption and Human Rights: Exploring the Relationship

There is a linkage between corruption and human rights. But a large part of the prevailing discourse on corruption tends to emphasize on its economic consequences, ignoring one of its most negative effects-the impact it has on human rights. Literature is scant that directly establishes the relationship between corruption and human rights. However, a number of authors mention the serious economic, social and political adversity it causes to a nation and its population, which directly results in violation of fundamental rights and freedoms.¹⁰⁸ International anti-corruption laws further emphasizes on the economic and political impact of corruption than the human rights impact.¹⁰⁹ It is the objective of this thesis to fill this gap by proposing solution for the human rights impact of corruption.

Under the human rights jurisprudence, it is States which are the principal duty bearers for human rights. Human rights obligations apply to all branches of government (executive, legislative and judicial) at all levels (national, regional and local). According to human rights jurisprudence, an

¹⁰⁶ K. Vasak (1977), *Human Rights: A Thirty Year Struggle- the Sustained Efforts to give force to the Universal Declaration of Human Rights*, UNSECO, Courier 30:11, Paris, UNSECO, as quoted by T. Regassa, *op.cit.*, p. 294.

¹⁰⁷ T. Regassa, *op.cit.*, p.294.

¹⁰⁸ J. Wei (1999), 'Policy Research Working Paper', in World Bank (ed), *Corruption in Economic Development: Beneficial grease, minor annoyance, or major obstacle*, pp. 1 – 30, quoted by Action Professionals' Association for the People (APAP) (2001), 'An Overview of Corruption in Relation to the Ethiopian Legal System', available at, <<http://www.telecom.net.et/~apap/pdf/An%20Overview%20of%20Corruption.pdf>> (accessed 11 March 2011).

¹⁰⁹ See the discussions in chapter three.

act (or omission) is attributable to the State when committed, instigated, incited, encouraged or acquiesced in by any public authority or any other person acting in an official capacity.¹¹⁰

It is now commonly understood that States have tripartite obligation in relation to human rights: the obligations “to respect”, “to protect” and “to fulfill”. The obligation to respect requires the State to refrain from any measure that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts.¹¹¹ The obligation to protect requires the State to prevent violations of human rights by third parties. The obligation to protect is normally taken to be a central function of States, which have to prevent irreparable harm from being inflicted upon members of society.¹¹² This requires States: (a) to prevent violations of rights by individuals or other non-State actors; (b) to avoid and eliminate incentives to violate rights by third parties; and (c) to provide access to legal remedies when violations have occurred, in order to prevent further deprivations.¹¹³ The obligation to fulfill requires the State to take measures to ensure that people under its jurisdiction can enjoy human rights that they cannot secure by their own efforts.

Corruption is committed by persons who work on either the public sector or the private sector. The existence of corruption in a State *per se* shows the failure of the State towards its human rights obligations. It means that the State is not willing or unable to enforce its human rights obligations to persons living in its jurisdiction. Both are violations of State obligations towards human rights.

Corruption affects the very nature of equality, human dignity and the quest for free personhood. It affects the very foundations of human rights. The violations of various human rights are the natural consequence of the attack of the foundation of human rights by the acts of corruption. The 11th International Conference on Corruption underscored this by not only declaring that large scale corruption should be designated as a crime against humanity, and that all human

¹¹⁰ Transparency International, ‘*Corruption and Human Rights: Making the Connection*’, *op.cit.*, p. 24.

¹¹¹ J. Bacio Terracino, *op.cit.*, p.8.

¹¹² *ibid.*, see also Transparency International, ‘*Corruption and Human Rights : Making the Connection*’, *op.cit.*, p.25.

¹¹³ *ibid.*

beings have a basic human right to live in a corruption-free society, but also condemned corruption as immoral, unjust and repugnant to the ideals of humanity enshrined in the UDHR.¹¹⁴

In addition to this, the African Union Convention on Preventing and Combating Corruption, the Council of Europe Criminal Law and Civil Law Conventions on Corruption makes a linkage between corruption and human rights by saying that ‘corruption represents a major threat to human rights’.¹¹⁵

Corruption has a negative impact on human dignity for the simple reason that it hinders the proper fulfillment of human rights.¹¹⁶ Strengthening the enforcement of the international human rights law regime will have a supportive role for reducing corruption. Whenever human rights are guaranteed, there will be social empowerment and social accountability.¹¹⁷ If weak human rights protection may create opportunities for corruption, policies that promote human rights may prevent corruption. The human rights discourse has something to do with the anti-corruption campaign by rectifying the weaknesses of the existing anti-corruption mechanisms especially international and regional anti-corruption conventions.

The discussion is based on the assumption that corruption is a universal problem which every society faces and human rights are universal values which every society pledges to protect. The objective here is to conceptually analyze the linkage between corruption and human rights with a view to search for an approach to solve the problem.

¹¹⁴ See the findings of the 11th International Anti-Corruption Conference, *op.cit.*

¹¹⁵ See the Preambles of the *African Union Convention on Preventing and Combating Corruption*; Adopted in Maputo, Mozambique on 11 July 2003, in United Nations Office in Drugs and Crime (2005), *Compendium of International Legal Instruments on Corruption*, 2nd ed, United Nations, New York, pp. 116-130; Council of Europe Criminal Law Convention on Corruption; Adopted at Strasbourg in 1999, in United Nations Office in Drugs and Crime, *op.cit.*, pp.139-154; and the Council of Europe Civil Law Convention on Corruption; Adopted at Strasbourg in 1999, in United Nations Office in Drugs and Crime, *op.cit.*, pp.131-138.

¹¹⁶ CR. Kumar (2003-2004), *op.cit.*, p. 52.

¹¹⁷ M. Johnston (1996), ‘*The Search for Definitions: The Vitality of Politics and the Issue of Corruption*’, 149 *International Social Science Journal*, pp. 321 – 325 quoted in M. Johnston (1998), ‘*Fighting Systemic Corruption: Social Foundations for Institutional Reform*’, in M. Robinson (ed), *Corruption and Development*, Frank Cass, London, p.89.

In examining the relationship between corruption and human rights, the thesis focuses only on the impacts of corruption on corruption victims. It neither deals with the human rights of those prosecuting and investigating corruption nor alleged corruption criminals.¹¹⁸

2.4.1 Corruption as a Violation of Human Rights

United Nations (UN) treaty bodies and special procedures have concluded that, where corruption is widespread, States cannot comply with their human rights obligations.¹¹⁹ Whenever there is widespread corruption, it can be said that, there will be a violation of human rights. There are three causal links between corruption and violation of human rights. These are, when corruption is a direct, indirect or remote cause for the violations of human rights.¹²⁰

Corruption may be directly linked to a violation of human rights when a corrupt act is deliberately used as a means to violate a right. For example, a bribe offered to a judge directly affects the independence and impartiality of that judge and hence violate the right to a fair trial. Corruption may also directly violate a human right when a State (or somebody acting in an official capacity) acts or fails to act in a way that prevents individuals from having access to that right.¹²¹ For instance, when an individual bribe a doctor to obtain a medical treatment or bribe a school master to obtain a place for his/her child at school, the right to health and education respectively are directly violated by the acts of corruption.

¹¹⁸ For such aspects See T. Gathii (2009-2010), '*Defining the Relationship Between Human Rights and Corruption*', 31 *U. Pa. J. Int'l L.* 125.

¹¹⁹ See, for example, Statements by the Committee on Economic, Social and Cultural Rights that "states face serious problems of corruption, which have negative effects on the full exercise of rights covered by the Covenant (ICESCR)" E/C.12/1/ADD.91 (CESCR, 2003, Para.12); and by the Committee on the Rights of the Child that it "remains concerned at the negative impact corruption may have on the allocation of already limited resources to effectively improve the promotion and protection of children's rights, including their right to education and health" CRC/C/COG/CO/1 Para.14. See also the statement by the UN Special Rapporteur on independence of judges and lawyers in E/CN.4/2006/52/Add.4. Para.96.

¹²⁰ K. Anukansai, *op.cit.*, see also Transparency International, '*Corruption and Human Rights: Making the Connection*', *op.cit.*, pp.27-28.

¹²¹ *ibid.*

Corruption can be an indirect cause for the violation of human rights when it is a necessary condition for the violation of the right.¹²² In this case, corruption will be an essential factor contributing to a chain of events that eventually leads to violation of human rights. Hence, the right is violated by an act that derives from a corrupt act and the act of corruption is a *sine qua non* for the violation. This situation will arise, for example, if public officials allow the illegal importation of toxic waste from other countries in return for a bribe, and that waste is placed, or close to, a residential area.¹²³ If the toxic waste affects the health of persons living in that area, the right to life and health of the residents would be violated indirectly as a result of the bribery. However, these rights are not directly violated by the bribe, but the bribe was an essential factor without which the violation would not have occurred.

There are times when corruption plays a remote role for the violation of human rights. It is a situation where corruption is one factor among others for the violation of human rights.¹²⁴ When corruption during an electoral process raises concerns about the accuracy of the final result, social unrest and protests may occur.¹²⁵ In such a case, the right to political participation may be violated directly, and repression of the social protests may also cause serious violation of human rights. Nonetheless, the electoral corruption would not necessarily be the only or determining causes of such riots or their repression. Many other factors might contribute and, to that extent, the corruption has a remote role to the violations after the social unrest and protests.

But the thesis is limited to those situations of human rights violations by the direct causes of corruption. That is corruption *per se* as a violation of human rights. The forth coming sections discuss corruption as a violation of different set of human rights as recognized by international and regional human rights instruments. The impacts of corruption on some rights will be discussed by taking into account the indivisibility and interdependence of human rights.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

2.4.1.1 Civil and Political Rights

In this section, corruption as a violation of human rights can be analyzed through the right to equality and non-discrimination, the right to fair trial, the right to effective remedy and the right to political participation.

The principle of equality and non-discrimination are fundamental principles in human rights. The principle that every individual is equal before the law and has the right to be protected by law on an equal basis is affirmed in all the main human rights treaties.¹²⁶ Every individual is entitled to be treated equally by public officials; and if a person bribes a public official, that person acquires a privileged status in relation to other similarly placed individuals who have not partaken in bribery.¹²⁷ Similarly, when a person is asked for a bribe in order to obtain a service to which that person is entitled without payment, that person suffers discrimination in relation to other

¹²⁶ See for example, the *United Nations Charter* signed on 26 June 1945 in San Francisco and came into force on 24 October 1945, art. 1(3), 13(1) (b), 55(c), and 76; the *Universal Declaration of Human Rights (UDHR)*, adopted by the General Assembly Resolution A/RES/217/ A (III) of 10 December 1948, in Council of Europe (2009), *Human Rights in International Law*, 3rd ed, Universal Law Publishing Co., pp.11-16, art. 2 and 7; the *International Covenant on Civil and Political Rights (ICCPR)*, adopted by the General Assembly Resolution A/RES/2200A (XXI) of 16 December 1966 and entered in to force on 23 March 1976, in Council of Europe, *op.cit.*, pp.33-50, art. 2(1) and 26; the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, adopted by General Assembly Resolution A/RES/2200A/ (XXI) of 16 December 1966 and entered in to force on 3 January 1976, in Council of Europe, *op.cit.*, pp. 59-67, art. 2(2), and the *Convention on the Rights of the Child (CRC)*, adopted by General Assembly resolution A/RES/44/25/ of 20 November 1989 and entered in to force on 2 September 1990, in Council of Europe, *op.cit.*, pp.117-136, art. 2. Some instruments prohibit discrimination on specific grounds; for example the *International Convention on the Elimination of all forms of Racial Discrimination (CERD)*, adopted by General Assembly Resolution A/RES/2106/ (XX) of 21 December 1965 and entered in to force on 4 January 1969, in Council of Europe, *op.cit.*, pp.21-32 and the *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)*, adopted by General Assembly Resolution A/RES/34/180 of 18 December 1979 and entered in to force on 3 September 1981, in Council of Europe, *op.cit.*, pp.69-80. Others prohibit discrimination in the exercise of various rights: for example the *International Labor Organization's Convention 111 on Discrimination (employment and occupation)*, adopted on 25 June 1958 in Geneva and entered in to force on 15 June 1960, in Council of Europe, *op.cit.*, pp.235-238, addresses the right to work, and a United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention addresses discrimination in education. See also regional instruments, including the *American Declaration on Human Rights*, adopted by the ninth international conference of American states, Bogota, Columbia in 1948, in Council of Europe, *op.cit.*, pp.633-640, art. 2; the *American Convention on Human Rights (ACHR)*, adopted on 22 November 1969 in San Jose, Costa Rica and entered in to force on 18 July 1978, in Council of Europe, *op.cit.*, pp.643-666, art. 24; the *African Charter on Human and Peoples' Rights (ACHPR)*, adopted on 27 June 1981 in Nairobi and entered in to force on 21 October 1986, in Council of Europe, *op.cit.*, pp.579-594, art. 2 and 3; and the *European Convention on Human Rights and Fundamental Freedoms (ECHR)*, adopted on 4 November 1950 in Rome and entered in to force on 3 September 1953, in Council of Europe, *op.cit.*, pp.309-334, which establish freestanding rights to equality.

¹²⁷ Transparency International (2009), *op.cit.*, p.33; see also P. Eigen (2004), 'Corruption is a Human Rights Issue', Business and Human Rights seminar, London, available at, <http://www.bhrseminar.org/2004%20Documents/Peter_Eigen_09.12.04.doc> (accessed 11 March 2011).

individuals in the same situation.¹²⁸ There is a violation of the right in both examples because similar cases are treated in a different manner and the difference in treatment results from corruption which is not an objective or reasonable justification for discrimination.¹²⁹ In general, corrupt practices commonly produce unequal and discriminatory outcomes with regard to human rights.

The right to fair trial is found in many human rights treaties.¹³⁰ It is composed of a broad range of standards that provide for the fair, effective and efficient administration of justice.¹³¹ In the context of the judicial system, corruption may 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. Such acts and omissions include bribery, extortion, intimidation, influence and the abuse of court procedures for personal gain.¹³² This covers a wide range of acts carried out by actors at different points in the judicial system (the judiciary, the police and prosecutors). For example a judge may be paid a bribe to exclude evidence that would otherwise lead to the conviction of a criminal. A court official may be paid a bribe to allocate a case to a sympathetic judge, to lose a case file, or to speed up the hearing of a case. Police can be bribed to tamper with criminal evidence. Prosecutors can be paid to avoid bringing a case forward or to assess the evidence in an unfair manner. All these acts violate the right to fair trial and the administration of justice.

The right to an effective remedy is guaranteed by most international human rights instruments.¹³³ It asserts that, when a human rights violation occurs, a State has a duty to provide victims with an effective remedy. Failure to do so can create a climate of impunity, particularly when States

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ See, for example, art. 14 of the ICCPR; art. 6 and 7 of the EHCR; art. 8 and 9 of ACHR and art. 7 of the ACHPR.

¹³¹ Besides the human rights treaties there are also standards though not binding which are essential for fair trial and the administration of justice like the Judicial Group on Strengthening Judicial Integrity and the Bangalore Principles of Judicial Conduct, available at, <<http://www.gtz.de/de/dokumente/gtz-en-bangalore-principles-indien-2007.pdf>> (accessed 11 March 2011).

¹³² See Transparency International (2007), *Global Corruption report 2007-Corruption in Judicial systems*, Cambridge University press, Cambridge.

¹³³ See, for example, ICCPR, art. 2(3); CEDAW, art. 2 and 3; CERD, art. 6; ICESCR, art. 2 and 3; CRC, art. 12, 13 and 37(d)).

intentionally or regularly deny remedies.¹³⁴ States are under an obligation to provide accessible, effective and enforceable remedies to uphold civil and political rights.¹³⁵ A person claiming a remedy is entitled to have his or her claim determined and enforced by a competent domestic authority, and States must ensure that this can occur. If there is corruption in the justice system, it is probable that some of these standards will not be respected. This may create the situation of impunity in addition to the violation of the right to an effective remedy.

The right to participation affirms that all citizens should be entitled to engage in decision-making processes that affect them. The major political expressions of the right to participation are the freedom to vote and stand for elections, the right to equal access to public services, and the freedoms of association and assembly. These rights are enshrined in several human rights treaties.¹³⁶ It is a plain fact that bribing voters to persuade them to vote or refrain from voting interferes with the integrity of an election and therefore violates the right to vote. In other cases, people may engage in acts, such as bribery, that are recognized to be corrupt, to obtain public service employment. This violates the right to equal access to public services which is one of the expressions of the right to participation. Above all, the right to participation presupposes the equality of participants; but corruption undermines equality and employs exclusion. All these are violations of the right of political participation by the incidents of corruption.

2.4.1.2 Economic, Social and Cultural Rights

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) States are obligated 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 the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*¹³⁷

¹³⁴ J. Bacio Terracino, *op.cit.*, pp. 10-11; see also Transparency International, ‘Corruption and Human rights: making the Connection’, *op.cit.*, pp. 35-42.

¹³⁵ *ibid.*

¹³⁶ See, for example, ICCPR, art. 25; CEDAW, art. 7; ECHR, art. 3 of the First Protocol; ACHR, art. 23; and ACHPR, art. 13.

¹³⁷ See, ICESCR, art. 2(1).

States are under obligation to allocate the ever increasing resource to the progressive realization of rights recognized under the covenant, prohibited from taking deliberately retrogressive measures and provide public service such as food, education, health, water and house by taking into account the principles of availability, accessibility, acceptability and adoptability.¹³⁸

Corruption implies that the State is not taking steps in the right direction. When funds are stolen by corrupt officials, or when access to healthcare, education and housing is dependent on bribes, a state's resources are clearly not being used maximally to realize economic, social and cultural rights.¹³⁹ In the paragraphs below, corruption as a violation of the right to food, housing and health will be discussed with a view to analyzing the impacts of corruption on the enjoyment of socio-economic and cultural rights.

The right to food also referred to as the right of every one to be free from hunger, is a component part of the more general right to an adequate standard of living.¹⁴⁰ The core contents of the right to food are explained by the Committee on Economic, Social and Cultural Rights in its General Comment No.12.¹⁴¹ Corruption can compromise the realization of this right. Corruption is identified as one of the seven major economic obstacles that hinder the realization of the right.¹⁴² In 1996, the Declaration of the World Food Summit expressly mentioned corruption as the causes of food insecurity as it diverts resources allocated for food to private uses.¹⁴³ Hence, when resources allocated for food are diverted to private uses, the right to food will be violated by the acts of corruption.

¹³⁸ See United Nations Committee on Economic, Social and Cultural Rights (CESCR) (1990), '*General Comment No. 3: The Nature of States Parties' Obligation, Article 2, Para. 1 of the ICESCR*'; Para.9, pp.15-18; United Nations Committee on Economic, Social and Cultural Rights (CESCR) (1991), '*General Comment No. 4: The Right to Adequate Housing, Article 11(1) of the ICESCR*'; Para. 8 and 11, pp.19-24, in United Nations International Human Rights Instruments (2004), *Compilations of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/Gen/1/Rev.7.

¹³⁹ See, for example, The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2006/48, Para. 40. And the notes of the UN Committee on the rights of the Child, CRC/C/15/Add.136, Para. 5; CRC/C/15/Add.160, Para. 9; and CRC/C/15/Add.124, Para's 18 and 19.

¹⁴⁰ See, ICESCR, art. 11(2).

¹⁴¹ See United Nations Committee on Economic, Social and Cultural Rights (CESCR) (1999), '*General Comment No. 12: The Right to Adequate Food, Article 11 of the ICESCR*', in United Nations Human Rights Instruments, *op.cit.*, pp.63-71.

¹⁴² See UN Special Rapporteur on the right to food, E/CN.4/2001/53, Para. 69.

¹⁴³ Transparency International, '*Corruption and Human Rights: Making the Connection*', *op.cit.*, p.50; see also J. Bacio Terracino, *op.cit.*, pp.18-19.

The right to adequate housing like that of the right to food is one of the component elements of the right to an adequate standard of living.¹⁴⁴ It focuses on the obligation to ensure that every one has housing that is safe, healthy and adequate.¹⁴⁵ In addition, the right forbids discrimination in the field of housing, as well as forced or arbitrary evictions or acts of unjust dispossession.¹⁴⁶ Corruption may violate this right by restricting one or more of its elements. Besides, as discrimination is inherent in acts of corruption, it will violate the right to adequate housing.

Article 12 of the ICESCR is allotted for the right to the highest attainable physical and mental health. It is explained as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.¹⁴⁷ Corruption affects the enjoyment of this right. Corruption in the health sector occurs in three main forms:¹⁴⁸ in management of financial resources (budget allocation); in the distribution of medical supplies (purchasing and marketing); and in the relationships of health workers with patients. In all its faces, corruption will violate the right to the highest attainable physical and mental health as it diverts the budget to individual accounts and discriminates between individuals.

2.4.1.3 Environmental and Developmental Rights

All peoples have the right of self-determination, the right to freely dispose of their natural wealth and resources and thereby freely pursue their economic, social and cultural development.¹⁴⁹ At the same time they have a right to live in a clean environment.¹⁵⁰ A government that tolerates or actively engages in the corrupt transfer of ownership of national wealth to the benefit of some

¹⁴⁴ See, ICESCR, art. 11(1).

¹⁴⁵ See United Nations Committee on Economic, Social and Cultural Rights, '*General Comment No. 4*', *op.cit.*; and United Nations Committee on Economic, Social and Cultural Rights (CESCR) (1997), '*General Comment No. 7: The Right to Adequate Housing, Article 11(1) of the ICESCR: Forced Evictions*'; in United Nations Human Rights Instruments, *op.cit.*, pp.46-51.

¹⁴⁶ *ibid.*

¹⁴⁷ See United Nations Committee on Economic, Social and Cultural Rights (CESCR) (2000), '*General Comment No. 14: The Right to the Highest Attainable Standard of Health, Article 12 of the ICESCR*', in United Nations Human Rights Instruments, *op.cit.*, pp.86-106.

¹⁴⁸ Transparency International (2009), *op.cit.*, p. 53; see also J. Bacio Terracino, *op.cit.*, pp.20-23.

¹⁴⁹ See, common article 1 of the ICCPR and ICECSR, article 20-22 of the ACHPR and the Declaration on the Right to Development adopted by the United Nations General Assembly Res. 41/128(1986).

¹⁵⁰ See for example, ACHPR, art. 24.

nationals, who occupy positions of power or influence in the society operates to deny the people, individually and collectively, their right to freely use, exploit and dispose of their natural wealth in a manner that advances their development. The facts and the decision in the Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria¹⁵¹ case are illustrative of how corruption by the Nigerian military government negatively impacted on the rights of the people of Ogoni land to inter alia, freely dispose of their wealth and natural resources, and to live in a satisfactory environment favorable to their development.¹⁵²

2.4.2 Human Rights as a Preventive Tool for Corruption

As argued above, all forms of corruption tend either directly, indirectly or remotely to violate human rights. Conversely, wherever human rights are not protected, corruption is likely to flourish. In the absence of human rights like freedom of expression and assembly – or where access to information and education is restricted – it is extremely difficult to hold government officials to account, which allows corruption more room to spread freely.¹⁵³ Besides, where corruption is prevalent, it is hard to promote human rights. The discussion is based on the assumption that protection and promotion of human rights will enhance the effectiveness of anti-corruption measures.

2.4.2.1 Guarantying Human Rights

Implementation of human rights can contribute for the prevention of corruption because human rights address abuses of power, and corruption is essentially an abuse of power.¹⁵⁴ A human rights analysis throws light on the power relations in a society because it pays particular attention to discrimination, equity and the removal of economic, legal and political obstacles that prevent

¹⁵¹ Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria (2001) AHRLR 60(ACHPR 2001); this complaint concerned the consequences of environmental degradation in Ogoni land caused by Shell Corporation in collusion with the Nigerian government.

¹⁵² O. Ogundoku, *op.cit.*, pp.14-15.

¹⁵³ Transparency International, *'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, opportunities and possibilities'*, *op.cit.*, p.2.

¹⁵⁴ *ibid.*, p.3.

marginalized groups from enjoying their rights.¹⁵⁵ As a result, a human rights analysis can contribute directly to the design and implementation of anti-corruption policies. If basic human rights are guaranteed, especially the rights to the basic necessities of life, then the incidence of corruption and related offences would be reduced.¹⁵⁶

As the problem of corruption is multi-faceted, there is no one size fit all principle to deal with it. There are preventive and curative approaches for combating corruption as stated by Ofofu-Amaah, Soopramanien and Uprety;

From a domestic point of view, there are two separate, but complementary, aspects of the fight against corruption. The first consists of upstream rules and norms of good behavior (codes of conduct, manifestos, and declarations) conducive to a corruption free society (preventive approach). The second aspect consists of anti-corruption laws proper (general or specific legislative enactments), whose purpose is to provide appropriate remedies, including criminal sanctions and penalties, procedural rules, and institutional mechanisms as needed, to combat acts of corruption that have already occurred (curative approach). The first aspect deals with corruption ex ante while the second aspect deals with corruption ex post.¹⁵⁷

Ensuring the effective enforcement of human rights as norms of good behavior will have a preventive role in fighting corruption. For example, the right to freedom of expression, assembly and association are vital to fight corruption.¹⁵⁸ Where governments permit information to flow freely, it should become easier to identify and denounce cases of corruption. Persons will not commit corruption at least with impunity due to fear of public scrutiny.

2.4.2.2 Ensuring Non-Discrimination and Participation

Giving due effect to the enforcement of human rights in general no doubt will reduce the problem of corruption. But there are also some norms and principles of human rights which the

¹⁵⁵ *ibid.*, p.5.

¹⁵⁶ *ibid.*, p.7.

¹⁵⁷ WP. Ofofu-Amaah, R. Soopramanien and K. Uprety (1999), 'Combating Corruption: A Comparative Review of Selected Legal Aspects of State and Major International Initiatives', in CN. Ojukwu, 'Legal and Institutional Mechanisms Combating Corruption in Nigeria', Paper presented at 15th International Conference of the International Society for the Reform of Criminal Law, Australia, 26-30 August 2001, available at <<http://www.isrcl.org/Papers/Ojukwu.pdf>> (accessed 11 March 2011).

¹⁵⁸ Transparency International, 'Corruption and Human Rights: Making the Connection', *op.cit.*, p. 11.

anti-corruption campaign shares.¹⁵⁹ Guarantying these norms and principles will prevent the incidence of corruption. These norms and principles are non-discrimination and participation.

The principle of non-discrimination is fundamental to human rights. Both the international human rights instruments and general comments of the treaty bodies affirmed that the principle of non-discrimination is the basic principle of human rights and thereby States parties are required to implement it without any condition.¹⁶⁰ Corruption is associated with discrimination for two simple reasons.¹⁶¹ Firstly, this is because corruption distorts the allocation of public resources, which causes the administration of public services to become discriminatory and arbitrary. Individuals or groups of people are left without access to a service, for example, because they cannot or refuse to pay a bribe or do not belong to a given client network. Second, corruption is often associated with discrimination based on race, color, sex, language, religion, political opinion, national or social origin or sexual orientation. In Europe, for example, it appears that Roma people are disproportionately asked to pay bribes when they seek access to health and education services.¹⁶² Corruption has a disproportionate impact on people who are victims of discrimination. Under a human rights framework, the principle of non-discrimination requires States to take affirmative action to ensure that disempowered groups and those suffering from structural discrimination such as indigenous peoples, migrant workers, persons with disabilities, persons with HIV/AIDS, refugees, prisoners, the poor, women and children have fair access to services and resources. However, corruption reinforces exclusion and discrimination and tends to magnify and exacerbate pre-existing human rights problems.

¹⁵⁹ *ibid.*, p.6.

¹⁶⁰ See art. 2 and 3 of the ICESCR; art. 2, 3, 14, 24, 26, and 27 of the ICCPR; CEDAW (the entire provisions), and CERD (the entire provisions) and see also United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 3*, *op.cit.*; United Nations Committee on Human Rights (HRC) (1989), '*General Comment No. 18: Non-Discrimination*', in United Nations Human Rights Instruments, *op.cit.*, pp.146-148; United Nations Committee on Human Rights (HRC) (2000), '*General Comment No. 28: The Equality of Rights Between Men and Women, Article 3 of the ICCPR*', in United Nations Human Rights Instruments, *op.cit.*, pp.178-184; United Nations Committee on Economic, Social and Cultural Rights (CESCR) (2005), '*General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of Economic, Social and Cultural Rights, Article 3 of the ICESCR*'.

¹⁶¹ Transparency International, '*Corruption and Human Rights: Making the Connection*', *op.cit.*

¹⁶² See the analysis of the UN Special Rapporteur on the sale of children, child prostitution and child pornography, U.N. Doc. E/CN.4/2006/67/Add.2, Para. 47.

Participation is also at the heart of human rights discourse. It is constructed out of several key rights.¹⁶³ To participate effectively, people need to organize themselves freely (freedom of association), to communicate their opinions frankly (freedom of expression) and to inform themselves (right to access to information). Citizen's participation contributes in an essential way to political decision-making and the implementation of public policies. Where strong control mechanisms are lacking, the oversight that citizens and civil society organizations can exercise becomes particularly important to prevent abuse of power and to detect and denounce corruption.¹⁶⁴ Citizen participation additionally empowers vulnerable groups to demand and exercise their rights. Corruption reproduces itself when elites are able to perpetuate their privileges while disadvantaged groups have no means to defend their interests.¹⁶⁵ Citizen participation breaks that circle and in the long run can help to redistribute power and resources while reducing opportunities for corruption.

2.4.2.3 Social Empowerment

Whenever human rights are guaranteed, the society will be empowered. This is because the ever increasing resources and alternatives are open to ordinary citizens.¹⁶⁶ In its classic postulation, social empowerment entails strengthening civil society in order to enhance its political and economic vitality, providing more orderly paths of access and rules of interaction between State and society, and balancing economic and political opportunities.¹⁶⁷ Where it is successful, social empowerment will not totally eradicate corruption. It can, however, provide necessary support for institutional reforms, weaken the combinations of monopoly, discretion, and lack of

¹⁶³ The right to participation in human rights standards is constructed of art. 19 (to hold opinions), art. 21 (peaceful assembly), art. 22 (freedom of association), art. 25 (the right to take part in the conduct of public affairs, the right to elect and be elected) of the ICCPR; art. 15 (the right to take part in cultural life) of the ICESCR, art. 7 and 8 (women participation in politics and public life) of CEDAW, art. 12 (the right to be heard), art. 13 (freedom to seek, receive and impart information), art. 15 (freedom of association and peaceful assembly), art. 31 (guarantying the right to participate in cultural life and the arts) of the CRC and art. 29 and 30 (participation in political, public life, cultural life, leisure, recreation and sports) of the CRPD.

¹⁶⁴ Transparency International, 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Opportunities and Possibilities', *op.cit.*

¹⁶⁵ *ibid.*

¹⁶⁶ M. Johnston, *op.cit.*

¹⁶⁷ *ibid.*

accountability that make for systemic corruption, and help institutionalize reform for the long term by linking it to lasting interests contending in active political and social processes.¹⁶⁸

2.5 Conclusion

Corruption is a universal problem offending a universal value -human rights. Corruption *per se* is a violation of human rights. Preventing corruption plays a great role for the realization of human rights. At the same time, guarantying human rights in general and ensuring non-discrimination and participation in particular will reduce the incidents of corruption. Whenever these are done, there will be social empowerment which creates social accountability. The anti-corruption campaign and the human rights movement have something to share in common. Both are struggling for the orderly and decent life of humans rooted in dignity and the moral fabrics of the society. Thus, it is important to note that an integrated approach is required if it is said the interests of the society are respected. This is made by acknowledging that human rights can play a preventive role for corruption; and reducing the incidents of corruption will be a great lip forward for the enforcement of human rights. Furthermore, elevating corruption free service as a human right will be a confluent point for the anti-corruption campaign and the human rights movement thereby giving meaning to the integral approach. Hence, elevating corruption free service as a human right opens the door to existing human rights mechanisms on which to base further action against corruption. Human rights monitoring mechanisms such as international and regional human rights commissions and courts, UN complaint mechanisms or national human rights systems will be useful to remedy corrupt practices if corruption free service is recognized as a human right.

¹⁶⁸ *ibid.*, p.85.

Chapter Three: The International Legal Regime to Prevent and Combat Corruption

3.1 Introduction

Talking about corruption in the international realm was a taboo before the end of the cold war.¹⁶⁹ But the end of the cold war has led to the consolidation of democracy, political stability, and respect for the rule of law, as well as effective development and expansion of open and competitive markets.¹⁷⁰ Besides, the compelling need to support corrupt regimes for national security reasons has removed partly.¹⁷¹ It is after this that the international community began to bring the issue of corruption on board as corruption seriously threatens the stability of international order, the creation of democratic regimes and the emergence of open markets.

Any discussion of international measures to prevent and combat corruption and bribery must begin with the United States.¹⁷² It is because the controversies surrounding President Richard Nixon's presidency relating to the Watergate incidents of 1972 could rightfully be characterized as the sine qua non of contemporary efforts to combat corruption by law.¹⁷³ The Watergate incident leads to the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977. From 1977 to 1996, the FCPA was the only law that targeted international corruption though it binds only those multilateral companies in the United States in their interaction with foreign officials.¹⁷⁴

It is after this national commitment of the United States to prevent and combat corruption and bribery that the regional and global commitment for corruption began to emerge. The Inter-American Convention Against Corruption was the first international convention aimed at combating corruption and thereby marked the beginning of an international legal regime to combat corruption.¹⁷⁵

¹⁶⁹ B. John and H. Fritz (1998), 'Tackling International Corruption No Longer Taboo', 77 *Foreign Aff.* 17.

¹⁷⁰ C. Hams, *op.cit.*

¹⁷¹ R. Ackerman (1999), *Corruption and Government: Causes, Consequences and Reform*, Cambridge University Press, Cambridge, p.177.

¹⁷² W. Schroth, *op.cit.*, P.83.

¹⁷³ For details of the Watergates incident see, R. Snider et al, *op.cit.*

¹⁷⁴ See A. Low et al (1998), 'The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act', 38 *Va. J. Int'l L.* 243, 244.

¹⁷⁵ *ibid.*

The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Corruption Convention) was the second international convention on corruption. This convention was adopted by the efforts of United States with her trading partners at the OECD. United States did this due to the absence of parallel legal obligation in Europe to abstain from certain business practices in foreign countries and placed its business community in a disadvantageous position.¹⁷⁶

In 1999, the Criminal Law and Civil Law Conventions on Corruption are adopted under the inter-governmental framework of the Council of Europe to deal with the problems of corruption by proposing criminal sanctions and civil remedies as solutions.

The increasing consciousness of the adverse global economic consequences of corruption brought previously regional efforts to combat corruption through international law to the global level.¹⁷⁷ As of November 15, 2000, corruption is criminalized internationally as a result of the coming into effect of the United Nations Convention Against Transnational Organized Crime (UNCTOC) and as of October 31, 2003, the UN adopted a convention fully dedicated for preventing and combating corruption, United Nations Convention Against Corruption. Africa like the other regions of the world adopted its convention on corruption named African Union Convention on Preventing and Combating Corruption in 2003.

These are not the only anti-corruption instruments in the world. There are other conventions, declarations, protocols, action plans and initiatives.¹⁷⁸ But the thesis did not address them all for the simple reason that either they are not binding or are very specific in addressing the issue of corruption and in their geographical application and thereby not worthy of discussion.

¹⁷⁶ R. Snider et al, *op.cit.*, p. 4.

¹⁷⁷ *ibid.*

¹⁷⁸ See for example, United Nations Declaration against Corruption and Bribery in International Commercial Transactions, Southern African Development Community Protocol against Corruption, Economic Community of West African States Protocol on the Fight against Corruption, Convention on the Protection of the European Communities' Financial Interests, Protocol to the Convention on the protection of the European Communities' financial interests, Convention on the Fight against Corruption involving Officials of the European Communities or officials of Member States of the European Union, Council of the European Union Framework decision on combating corruption in the private sector, the Anti-Corruption Action Plan for Asia and the Pacific and Good Governance for Development (GfD) Initiative of the Middle East.

Discussing the main regional and international anti-corruption conventions will suffice to achieve the objectives of the thesis.

The main anti-corruption conventions will be analyzed and discussed by taking into account the definition they give to corruption (if any), the measures they adopt (prevention, criminalization, international cooperation, asset recovery and remedies to victims (if any)) and the monitoring mechanisms they choose.

Having established the relationship between corruption and human rights in chapter two, this chapter tries to show whether this relationship is given due effect in these conventions. The objective of the chapter is not to discuss in detail the substantive and procedural measures adopted by these conventions, but to explore and examine whether these measures has a human rights face. Any discussion of the measures is intended to show the apparent lack of human rights strategies in preventing and combating corruption. It shows more specifically the lack of concern for victims of corruption.

Hence, the objective here is to show that though these conventions have an immense contribution in preventing and combating corruption by addressing the political and economic impacts of corruption, they are weak in addressing the human rights impact of corruption. Besides, it also shows that the monitoring mechanisms of these conventions are not strong like that of human rights monitoring mechanisms even to implement the covenant provisions which address the political and economic impacts of corruption. The following sections explore and assess the approaches taken by the United Nations Convention against Corruption, the Inter-American Convention against corruption, the African Union convention on preventing and combating corruption and the Council of Europe Criminal and Civil Law Conventions on Corruption to fight corruption.

3.2 United Nations Convention Against Corruption

The United Nations Convention Against Corruption (UNCAC) was adopted by the General Assembly in its resolution 58/4 of 31 October 2003 at United Nations Headquarters in New York. It was opened to all States for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at United Nations Headquarters in New York until 9 December 2005, in accordance with article 67 (1) of the Convention.¹⁷⁹ The UNCAC is also open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Convention in accordance with its article 67 (2). So far, there are 150 parties and 140 signatories to the UNCAC.¹⁸⁰

The UNCAC is the first genuinely global, legally binding instrument on corruption and related matters and developed with an extensive international participation.¹⁸¹ It is after this that corruption is no more the concern only of national and regional laws but also of international laws. It elevated anti-corruption actions at the international level in the form of legally binding obligations.

It obliges States parties to implement a wide and detailed range of anti-corruption measures affecting their laws, institutions and practices. It is unique when compared to other conventions, not only in its global coverage but also in the detail of its provisions.¹⁸² Preventive measures, criminalization, international cooperation, asset recovery and implementation mechanisms are the main substantive rules of the convention which the thesis focuses on to discuss. Against this background note, the sections below explore and analyze the approaches taken by the UNCAC to prevent and combat corruption.

¹⁷⁹ The Global Compact (2003), '*Background Information on the Fight against Corruption*', available at, <http://www.transparency.org/global_compact_2003_background_information_on_the_fight_against_corruption_pdf> (accessed 5 April 2011).

¹⁸⁰ UNCAC signature and ratifications status of 01 March 2011, available at, <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>> (accessed 4 April 2011).

¹⁸¹ See A. Argandona, *op.cit.*

¹⁸² Explanation of the UNCAC, available at, <http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/uncac> (accessed 5 April 2011).

3.2.1 Objectives and Coverage

The purposes of the UNCAC are¹⁸³:

- a. *To promote and strengthen measures to prevent and combat corruption more efficiently and effectively*
- b. *To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;*
- c. *To promote integrity, accountability and proper management of public affairs and public property.*

The substantive provisions are formulated to achieve this end. Unfortunately, there is no human rights reference in the objectives so that the UNCAC is going to achieve. It can be argued that the objective is set based on the assumption that there are measures to prevent and combat corruption either at national or regional level but they are either ineffective or insufficient. The UNCAC wants to strengthen measures against corruption through international cooperation and technical assistance among States. It further promotes measures against corruption by promoting values such as, integrity, accountability and proper management. UNCAC approach the problem of corruption from a political (i.e. international cooperation and technical assistance) and economic (asset recovery) point of view. Though these measures are important in addressing the political and economic impacts of corruption but its human rights impact (the situation of victims of corruption) is left unaddressed.

With these objectives, originally the convention was designed to cover corruption in the public sector, private sector and politics.¹⁸⁴ But due to the United States refusal to countenance any mandatory provision on transparency in political party funding, the provision on political party funding was tucked away in an article entitled ‘public sector’.¹⁸⁵ It is said that, if the UNCAC fails to deal adequately with this, ‘one third of the subject matter of the convention is missing’, a

¹⁸³ See, UNCAC, art. 1.

¹⁸⁴ Transparency International (2004), *Global Corruption report 2004- Political Corruption*, Pluto press, London, p. 112.

¹⁸⁵ *ibid.*

reference to the need to address equally corruption in the public sector, the private sector and politics.¹⁸⁶

3.2.2 Definition of Corruption

The UNCAC did not attempt to define corruption in clear terms though there were proposals for the definition of corruption.¹⁸⁷ The authors of the convention preferred to offer for a broad category of offences, rather than a definition of corruption. These are bribery (active and passive) both in the public and private sector;¹⁸⁸ embezzlement, misappropriation of funds and other diversions of property;¹⁸⁹ trading in influence,¹⁹⁰ abuse of functions,¹⁹¹ illicit enrichment,¹⁹² laundry of the proceeds of crime¹⁹³, concealment¹⁹⁴ and obstruction of justice¹⁹⁵. These are acts of corruption by which the UNCAC tries to prevent and combat by devising different measures.

3.2.3 Prevention

The UNCAC adopts an approach to prevent corruption from being occurred in both the public and the private sector in the first place. With regard to the public sector, States parties are at discretion to implement effective anti-corruption policies¹⁹⁶ and create organizations specifically to fight corruption¹⁹⁷. States parties must endeavor to ensure that their public services are subject to safeguards that promote integrity, transparency and accountability among civil servants and hiring based on efficiency and merit¹⁹⁸. Once hired, public officials must be subject to codes of conduct¹⁹⁹, including measures such as declarations of assets, and disciplinary measures. States must also promote transparency and accountability in public procurement and management of

¹⁸⁶ *ibid.*

¹⁸⁷ A. Argandona, *op.cit.*, p.5.

¹⁸⁸ See, UNCAC, art.15, 16 and 21.

¹⁸⁹ *ibid.*, art. 17 and 22.

¹⁹⁰ *ibid.*, art. 18.

¹⁹¹ *ibid.*, art. 19.

¹⁹² *ibid.*, art. 20.

¹⁹³ *ibid.*, art. 23.

¹⁹⁴ *ibid.*, art. 24.

¹⁹⁵ *ibid.*, art. 25.

¹⁹⁶ *ibid.*, art. 5.

¹⁹⁷ *ibid.*, art. 6.

¹⁹⁸ *ibid.*, art. 7.

¹⁹⁹ *ibid.*, art.8.

public finances²⁰⁰, and must take measures to preserve integrity in especially critical areas such as the judiciary and prosecution services²⁰¹, and to prevent money laundering²⁰².

With regard to the private sector, States parties are required to enhance accounting and auditing standards, develop codes of conduct, promoting transparency, keep the maintenance of books and records, and disallowing tax deductibility for bribes²⁰³. The Convention also advocates for the participation of society in the prevention of and fight against corruption including access to the appropriate administrative and judicial bodies²⁰⁴, reporting to the national investigating and prosecuting authorities²⁰⁵, and the protection of reporting persons²⁰⁶ and of witnesses, experts and victims.²⁰⁷

While most articles dealing with prevention of corruption commences with a mandatory obligation ‘shall’ but the manner in which they are implemented is subject to ‘the fundamental principles of the legal system of States parties’.²⁰⁸ This implies that States parties are not obligated to implement a specific measure to prevent corruption. It can be argued that, this leeway may create problems in the monitoring of the implementation of the convention as there is no uniform prevention measure which should be taken.²⁰⁹

3.2.4 Criminalization

Even though preventive measures are adopted, it may not always prevent the incidence of corruption. Due to this fact, States Parties must take legislative measures to establish as criminal

²⁰⁰ *ibid.*, art. 9.

²⁰¹ *ibid.*, art. 11.

²⁰² *ibid.*, art. 14.

²⁰³ *ibid.*, art. 12.

²⁰⁴ *ibid.*, art. 13.

²⁰⁵ *ibid.*, art. 39.

²⁰⁶ *ibid.*, art. 33.

²⁰⁷ *ibid.*, art. 32.

²⁰⁸ Transparency International, *Global Corruption report 2004- Political Corruption*, *op.cit.*, p. 112.

²⁰⁹ Even though socio-economic, cultural and political sensitive preventive measure of corruption is commendable to prevent the incidence of corruption, as the nature and gravity of corruption are different in different circumstances, but States parties may use this as a scapegoat when asked by a monitory organ by arguing that they are employing their own preventive strategy which is compatible with their legal system.

offences not only active and passive bribery of national public officials²¹⁰, but also active bribery of foreign public officials or officials of public international organizations²¹¹, embezzlement, misappropriation and other diversion of property by a public official²¹², money laundering²¹³, obstruction of justice²¹⁴, and participation as an accomplice, assistant or instigator in an offence of corruption.²¹⁵ States parties are also advised to take legislative measures to establish as criminal offences though not mandatory, the solicitation or acceptance by a foreign public official of an undue advantage²¹⁶, trading in influence²¹⁷, abuse of functions²¹⁸, illicit enrichment²¹⁹, concealment²²⁰, attempt and preparation for an offence of corruption²²¹, bribery and embezzlement in the private sector.²²² But the optional strategy to criminalize the taking of bribes by public officials though the responsibility of the official's home country, it will leave with impunity bribes taken by officials of international public organizations as there is no home government which takes responsibility.²²³

3.2.5 Remedies to Victims

Besides the punishment of offenders of corruption, the UNCAC imposes on States parties to ensure that victims of corruption have the right to initiate legal proceedings against those who are responsible in order to obtain compensation.²²⁴ But, corruption in general and the institutionalized form of corruption in particular causes or creates mass victimization.²²⁵ Victims of violations of human rights (as corruption is a violation of human rights) are often unable to bring their cases before judicial or quasi-judicial organs by themselves, partly as a result of their

²¹⁰ UNCAC, *op.cit.*, art. 15

²¹¹ *ibid.*, art. 16(1).

²¹² *ibid.*, art. 17.

²¹³ *ibid.*, art. 23.

²¹⁴ *ibid.*, art. 25.

²¹⁵ *ibid.*, art. 27(1).

²¹⁶ *ibid.*, art. 16(2).

²¹⁷ *ibid.*, art. 18.

²¹⁸ *ibid.*, art. 19.

²¹⁹ *ibid.*, art. 20.

²²⁰ *ibid.*, art. 24.

²²¹ *ibid.*, art. 27 (2 and 3).

²²² *ibid.*, art. 21 and 22.

²²³ Transparency International, *Global Corruption report 2004- Political Corruption, op.cit.*

²²⁴ UNCAC, *op.cit.*, art. 35.

²²⁵ See CR. Kumar (2003-2004), *op.cit.*

victimization.²²⁶ Though such remedial provision is important, but the most victimized and vulnerable sections of the society like, women, children, indigenous peoples and the poor are not in the position to go through the legal avenues by themselves.

Public interest litigation or *actio popularies* would have been important to address the issue of mass victimization. However, the UNCAC did not allow this since those who claim compensation for the acts of corruption must prove that they have a vested interest. That is, whether they suffer damage out of the acts of corruption. If it is a human rights issue one can avail of the procedural devices of public interest litigation to address mass claims which arise out of acts of corruption. Besides, the vulnerable sections of the society can have a voice through lawyers, civil society organizations and human rights activists; and they can get their compensation by availing public interest litigation.

The legal space allotted to human rights (the rights of victims of corruption in particular and the rights of all human beings in general) is minimal. Even if it is said victims of corruption can proceed with their legal rights to get compensation, what will be the remedy if they do not get effective, sufficient and timely remedy by the States parties concerned.²²⁷

3.2.6 International Cooperation

Chapter IV of the UNCAC is allotted for international cooperation as a measure to prevent and combat corruption. States Parties shall cooperate in criminal matters relating to corruption. However, States Parties cooperate in civil and administrative matters if and only if it is appropriate and consistent with their domestic legal system. What is appropriate and consistent with the domestic legal system of States will be determined by them. The UNCAC follows an optional strategy even in international cooperation.

²²⁶ See S. Yeshanew (2008), 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia', 8 *Afr. Hum. Rts. L.J* 273.

²²⁷ But if it is a human rights issue they can go to regional and international human rights courts after the exhaustion of local remedies by themselves or through NGOs or other persons by availing the mechanisms of public interest litigation.

But additional and more specific provisions of cooperation can also be found in chapters dealing with asset recovery²²⁸ and technical assistance.²²⁹ Extradition of offenders of corruption²³⁰; mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences of corruption²³¹; law enforcement cooperation²³² and joint investigation of corruption offences form the core content of international cooperation in chapter IV. Cooperation for asset recovery, technical assistance and information exchange among States parties to the convention is deemed essential as an international response for the fight against corruption.

3.2.7 Asset Recovery

Asset recovery is the fundamental principle of the convention²³³. It is especially vital for developing countries where cases of grand corruption have exported national wealth to international banking centers and financial havens, and where resources are badly needed for the reconstruction of societies under new governments.²³⁴ The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned.²³⁵ A further issue was the question of whether assets should be returned to requesting State Parties or directly to individual victims. The result was a series of provisions which favor return to the requesting State Party, depending on how closely the assets were linked to it in the first place.²³⁶ Thus, funds embezzled from the State are returned to it, even if subsequently laundered²³⁷ and proceeds of other offences covered by the Convention are to be returned to the requesting State Party if it establishes ownership or damages recognized by the requested State Party as a basis for return.²³⁸ In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for

²²⁸ See UNCAC, *op.cit.*, art. 54-56.

²²⁹ *ibid.*, art. 60-62.

²³⁰ *ibid.*, art. 44.

²³¹ *ibid.*, art. 46.

²³² *ibid.*, art. 48.

²³³ *ibid.*, art. 51.

²³⁴ See for details, P. Webb, *op.cit.*, p. 206.

²³⁵ See UNCAC, *op.cit.*, art. 51-59.

²³⁶ D. Vlassis, 'The United Nations Convention Against Corruption', Resource Material Serious No. 66, available at, <http://www.unafei.or.jp/english/pdf/RS_No66/No66_15VE_Vlassis1.pdf> (accessed 4 April 2011).

²³⁷ See UNCAC, *op.cit.*, art. 15.

²³⁸ *ibid.*, art. 57(3(b)).

compensating victims.²³⁹ This chapter of the convention is having an ample benefit in minimizing the economic impacts of corruption though its effectiveness is measured to the extent of cooperation among States parties.

3.2.8 Monitoring Mechanisms

The Conference of States parties with the assistance of the Secretariat is the monitoring organ of the UNCAC.²⁴⁰ Law, in the sense of a set of formal written documents, will be largely irrelevant if the rules are not embedded in an institutional and organizational structure that favors compliance.²⁴¹ The work by Thomas and Grindle puts forward an ‘interactive’ model of reform²⁴² that requires States parties to follow through on their decision to sign and ratify the Convention; so that the UNCAC must be translate into visible, meaningful, and sustainable changes on the ground once it is ratified. The Conference of States Parties is established to “improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this convention and to promote and review its implementation”.²⁴³ The duties of the Conference of States Parties include periodically reviewing the implementation of the UNCAC by States parties and making recommendations for the improvement of the convention and its implementation.²⁴⁴ As Argandona notes, there is no mechanism which makes States parties accountable for their failure to fulfill their obligations under the convention.²⁴⁵ States parties that do not fulfill their obligations under the convention will be left unpunished. Ackerman suggested that lessons can be taken from the monitoring mechanisms of human rights, international labor standards and nuclear energy.²⁴⁶ She further posits to use the leverage of the World Trade Organization (WTO) to give victims of corruption as a means of lodging a complaint.²⁴⁷ But the

²³⁹ *ibid.*, art. 57(3(C)).

²⁴⁰ *ibid.*, art. 63 and 64.

²⁴¹ R. Ackerman (2004), ‘*Establishing the Rule of Law*’, in R. Rotberg (ed), *When States Fail: Causes and Consequences*: Princeton University Press, Princeton, pp.182–221, p. 83.

²⁴² See W. Thomas (1990), ‘*After the Decision: Implementing Policy Reforms in Developing Countries*’18 *World Developments* 1163.

²⁴³ See UNCAC, *op.cit.*, art. 63.

²⁴⁴ *ibid.*, art. 63(4(e-f)).

²⁴⁵ A. Argandona, *op.cit.*

²⁴⁶ R. Ackerman (1999), *op.cit.*, p. 195.

²⁴⁷ *ibid.*

UNCAC monitoring mechanism gives States parties a large degree of leeway in implementing the convention.²⁴⁸

3.3 Inter-American Convention Against Corruption

The Inter-American Convention Against Corruption (IACAC) was adopted on 29 March 1996 at Caracas, Venezuela and entered in to force on 3 June 1997 under the inter-governmental framework of the Organization of American States (OAS).²⁴⁹ Currently it has 32 Parties and 27 signatories.²⁵⁰

The IACAC is the first international instrument dedicated for the fight against corruption. It is a manifestation of the spread of democratic government in Latin America which has publicly led to less patience for, and even rejection of, corruption.²⁵¹ It obliges States Parties to implement a series of measures related to their judicial systems and public policies. These measures aim to promote the development of the necessary mechanisms to prevent, detect, prosecute, and eradicate corruption as well as to promote, facilitate, and regulate cooperation between State Parties on these matters. It emphasizes on the need to protect democratic institutions because ‘representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions.’²⁵²

The IACAC mainly deals with the prevention, criminalization, assistance and cooperation among States parties. Unlike the UNCAC, the IACAC is silent about the monitoring mechanisms of the convention. Its enforcement largely depends upon the political will of States parties to enforce it

²⁴⁸ First, there are optional provisions in the convention which the States parties implement upon their discretion. Second, even to the implementation of mandatory provisions of the convention, the Conference of States Parties is weak by design.

²⁴⁹ IACAC, available at, <<http://www.oas.org/juridico/english/fightcur.html>> (accessed 4 April 2011).

²⁵⁰ Current status of ratifications of the IACAC, available at, <<http://www.oas.org/juridico/english/signs/b-58.html>> (accesses 28 April 2011).

²⁵¹ A. Gantz (1998), ‘*Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*’, 18 *NW. J. Int’l L. & Bus* 457, p. 477.

²⁵² Preamble, Para 2 of the IACAC, full text available at, <http://www.transparency.org/content/download/1288/6949/file/oas_convention_text_eng.pdf> (accessed 4 April 2011).

domestically. The following sections assess and examine the IACAC in terms of its approaches for the fight against corruption. It also explores whether the IACAC has a human rights approach for the fight against corruption or human rights object and purpose.

3.3.1 Objectives and Coverage

Consulting the aspirations in the preamble and the Statement of purpose, the IACAC lacks human rights aspirations and objectives. The IACAC is necessitated by the impacts of corruption on the legitimacy of public institutions, justice, moral fabric, developments of society, democracy and its contribution for organized crime.²⁵³ Even though corruption has an adverse impact on human rights, there is an apparent lack of reference to this effect. Promoting and strengthening the developments of mechanisms of detection, prevention, eradication and punishment of corruption by the States parties on the one hand and promoting, facilitating and regulating cooperation among the States parties to ensure the effectiveness of these measures on the other hand form the statement of purpose of the IACAC.²⁵⁴ Though combating corruption by itself has a positive contribution for the enforcement of human rights, the lack of human rights objective in the IACAC shows that the connection between corruption and human rights is not dealt with.

The IACAC neither covers corruption in the private sector nor political corruption.²⁵⁵ It only deals with corruption in the public sector. As Argandona notes that achieving high moral and legal standards in relations with government is impossible unless companies also adopt high standards, for themselves and for their dealings with one another.²⁵⁶ As noted above in the discussion of UNCAC, any effort of preventing and combating corruption should target equally corruption in the public sector, private sector and political corruption.

²⁵³ See the preambles of IACAC.

²⁵⁴ See IACAC, art. II.

²⁵⁵ See IACAC, art. III, VI, VIII, IX, and XI.

²⁵⁶ A. Argandona, *op.cit.*, p. 6.

3.3.2 Definition of Corruption

The IACAC did not attempt to define corruption but it does list a number of “corrupt acts”.²⁵⁷ It criminalizes active and passive bribery, transnational bribery, illicit enrichment, the improper use of classified or confidential information, the improper use of State property, using influence on public authorities for illicit personal gain, and the diversion of property or assets. It devised preventive mechanisms and criminal sanctions towards these “acts of corruption”.

3.3.3 Prevention

The IACAC obligates State Parties to establish "standards of conduct for the correct, honorable, and proper fulfillment of public functions" commensurate with a list of eleven detailed guidelines.²⁵⁸ The most important guidelines are registering incomes and liabilities of public officials, transparent procurement and hiring, revoking tax incentives for corrupt practices, encouraging anonymous reporting of corrupt practices, establishing oversight bodies, and maintaining proper records.²⁵⁹ Protecting persons who report corruption, encouraging civil society participation and ensuring proper understanding by government personnel of their responsibilities forms the preventive strategies designed by the IACAC.²⁶⁰

3.3.4 Criminalization

With respect to defining crimes, the IACAC assumes three broad categories: acts of corruption,²⁶¹ transnational bribery,²⁶² and illicit enrichment.²⁶³ As defined under the IACAC, acts of corruption have two dimensions: the solicitation-or-acceptance dimension and the offering-or-granting dimension. These are designed to combat corrupt practices from both the

²⁵⁷ See IACAC, art. VI, VII, IX, and XI.

²⁵⁸ See *ibid.*, art. III(1).

²⁵⁹ See *ibid.*, art. III(4-5), (7-10).

²⁶⁰ See *ibid.*, art. III(3,8 & 11).

²⁶¹ See *ibid.*, art. VI.

²⁶² See *ibid.*, art. VIII.

²⁶³ See *ibid.*, art. IX.

demand and supply ends.²⁶⁴ For both dimensions, the IACAC defines illegal conduct using identical language. It prohibits both the direct or indirect "solicitation or acceptance" by or "offering or granting" to "a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions."²⁶⁵ The IACAC also criminalizes "any act or omission in the discharge of . . . duties . . . for the purpose of illicitly obtaining benefit."²⁶⁶ In addition, it establishes inchoate offenses relating to the proscribed conduct, namely "participation as a principal, co principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article."²⁶⁷ The IACAC also makes "the fraudulent use or concealment of property" obtained as a result of corruption a criminal act in and of itself.²⁶⁸

The IACAC singles out transnational bribery and illicit enrichment for separate treatment.²⁶⁹ The transnational bribery provision has both substantive and procedural aspects. It defines the crime of transnational bribery in exactly the same way as it does corrupt practices.²⁷⁰ Principally, however, it obligates State Parties to proscribe the crime of transnational bribery in their domestic laws and sets forth the jurisdictional grounds for doing so.²⁷¹ The IACAC defines "illicit enrichment" as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."²⁷² It uniquely defines "illicit enrichment" as a criminal offense. For obvious constitutional and jurisprudential concerns, the provision that defines the crime of "illicit enrichment" is limited, applying "subject to its Constitution and the fundamental principles of the State Party's legal system."²⁷³

²⁶⁴ See for example *ibid.*, art. VI(a &b).

²⁶⁵ See *ibid.*

²⁶⁶ See *ibid.*, art. VI(1(c)).

²⁶⁷ See *ibid.*, art. VI(1(e)).

²⁶⁸ *ibid.*, art. VI(1(d)).

²⁶⁹ See *ibid.*, article VIII and IX.

²⁷⁰ See *ibid.*, art. VI "defining acts of corruption".

²⁷¹ See *ibid.*, art. VIII.

²⁷² *ibid.*, art. IX.

²⁷³ *ibid.*

3.3.5 Cooperation

States parties are required to assist and cooperate each other to enforce the convention provisions. Cooperation is especially essential in extradition of suspected offenders,²⁷⁴ investigation and prosecution of acts of corruption,²⁷⁵ technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption,²⁷⁶ and exchange of experiences²⁷⁷. Other areas of cooperation include tracing, freezing, and seizing proceeds of corrupt practices,²⁷⁸ forfeiting property involved in the corrupt practice,²⁷⁹ and revoking bank secrecy defenses.²⁸⁰ The IACAC also obligates State Parties to designate a central authority for assistance and cooperation.²⁸¹

3.3.6 Monitoring Mechanisms

The text of the convention is silent about the monitoring mechanism. The creation of the follow up mechanism is an afterthought.²⁸² It was not until four years after the Convention came into force that the Conference of States Parties met to establish a follow-up mechanism.²⁸³ The IACAC uses a peer review system whereby a government appointed Committee of Experts selects countries for review, obtains information using questionnaires, and prepares a preliminary report. The report is first reviewed by the country and then a final version is submitted to the Conference of States Parties and published.²⁸⁴ The Committee can recommend improvements but not sanctions.²⁸⁵ It can be argued that the enforcement of the measures adopted by the IACAC depends upon the political will of States parties. States parties are at liberty to decide which

²⁷⁴ *ibid.*, art. XIII.

²⁷⁵ *ibid.*, art. XIV(1).

²⁷⁶ *ibid.*, art. XIV (2).

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*, art. XV (1).

²⁷⁹ See *ibid.*, art. XV (1 & 2).

²⁸⁰ See *ibid.*, art. XVI.

²⁸¹ *ibid.*, art. XVIII (1).

²⁸² P. Webb, *op.cit.*, p. 194.

²⁸³ OAS General Assembly Resolution AG/RES.1784 (XXXI-O/01), 5 June 2001, and Summary of the Minutes of the Conference of States Parties, annexed, 2–4 May 2001, Buenos Aires as quoted by P. Webb, *op.cit.* See also D. Altamirano, *op.cit.*, p. 490.

²⁸⁴ P. Webb, *op.cit.*

²⁸⁵ *ibid.*, p. 195.

measures to enforce and to what extent. This creates problem in adopting a common standard against which States parties are required to follow. The follow up mechanism of the IACAC may undermine the overall enforcement of the measures adopted to fight corruption.

3.4 African Union Convention on Preventing and Combating Corruption

The African Union (AU) seeks a continental approach to the problem of corruption which is similar to human rights issues in the 1980s.²⁸⁶ It is due to the regional peculiarities that the AU adopts a regional sensitive anti-corruption convention. The African Union Convention on Preventing and Combating Corruption (AU anti-corruption convention) is the most recent regional anti-corruption convention. The AU anti-corruption convention was adopted on 11 July 2003 at the AU summit in Maputo, Mozambique and entered into force on 5 August 2005.²⁸⁷ As of the writing of this thesis, it has 31 ratifications and 45 signatories.²⁸⁸

The AU anti-corruption convention came into effect as one of the mechanisms within the AU framework with the goal of achieving the legitimate aspirations and better life for the peoples of Africa, promoting and protecting human and peoples' rights, consolidating democracy, and enhancing economic and political development in the region by preventing and combating corruption.²⁸⁹

It provides a compressive framework on measures of prevention, criminalization, cooperation, asset recovery and education about corruption as strategies to prevent and combat corruption in the region. It is unique in containing mandatory provisions with respect to private-to-private corruption and on transparency in political party funding. The AU anti-corruption convention makes a clear reference to the impacts of corruption on human rights both in its preamble and in

²⁸⁶ Transparency International, *Global Corruption report 2004- Political Corruption*, *op.cit.*, p. 117.

²⁸⁷ The AU anti-corruption convention, available at, <<http://www.africa-union.org/root/au/Documents/Treaties/Treaties.htm>> (accessed on 4 April 2011).

²⁸⁸ List of countries which have signed, ratified/accede to the AU anti-corruption convention, available at, <<http://www.africaunion.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf>> (accessed 4 April 2011).

²⁸⁹ See the preamble the AU anti-corruption convention.

its objective.²⁹⁰ It also gives emphasis to the human rights of offenders of corruption by guarantying them fair trial²⁹¹ and punishing those who make false and malicious reports.²⁹² But it ignores the human rights of victims of corruption. The AU anti-corruption convention also has a monitoring mechanisms modeled on the African Commission on Human and Peoples' Rights.²⁹³ The following sections explore and assess the contents of the AU anti-corruption convention especially its purpose and scope, its definition of corruption (if any), measures such as prevention, criminalization, remedies to victims (if any), cooperation, asset recovery and monitoring mechanisms.

3.4.1 Objectives, Coverage and principles

In its statement of objectives, the AU anti-corruption convention aims to achieve five objectives. These are, promote and strengthen the development of anti-corruption mechanisms in Africa,²⁹⁴ promote, facilitate and regulate cooperation among States parties,²⁹⁵ coordinate and harmonize policies and legislations between States parties,²⁹⁶ remove obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights,²⁹⁷ and establish necessary conditions to foster transparency and accountability in the management of public affairs²⁹⁸.

The AU anti-corruption convention has also a statement of principles which guide States parties in the implementation of the convention.

*The States parties to this convention undertake to abide by the following principles.*²⁹⁹

1. *Respect for democratic principles and institutions, popular participation, the rule of law and good governance.*
2. *Respect for human and peoples' rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments.*
3. *Transparency and accountability in the management of public affairs.*

²⁹⁰ See, *ibid.*, Para 4 of the preamble and art. 2(4).

²⁹¹ *ibid.*, art. 14.

²⁹² *ibid.*, art. 5(7).

²⁹³ Transparency International (2004), *op.cit.*, p. 119.

²⁹⁴ See AU anti-corruption convention, *op.cit.*, art. 2(1).

²⁹⁵ *ibid.*, art. 2(2).

²⁹⁶ *ibid.*, art. 2(3).

²⁹⁷ *ibid.*, art. 2(4).

²⁹⁸ *ibid.*, art. 2(5).

²⁹⁹ *ibid.*, art. 3.

4. *Promotion of social justice to ensure balanced socio-economic development.*
5. *Condemnation and rejection of acts of corruption, related offences and impunity.*

The AU anti-corruption convention covers corruption both in the public and private sectors.³⁰⁰ The covenant objectives and principles are equally applicable in public and private sector corruption. The AU anti-corruption convention also deals with political party funding.³⁰¹ It is one of the unique features of the convention in areas of coverage.

Taking into account the regional particularities of Africa, i.e., poverty, lack of good governance and democracy, and serious violations of human rights, the drafters of the AU anti-corruption convention took good governance and rights based approach in preventing and combating corruption.³⁰² The statement of objectives and principles of the AU anti-corruption convention reflects this assertion. Combating corruption without respect for fundamental principles of the convention will be futile.³⁰³ Without ensuring accountability and transparency in public affairs, without respect for democratic principles and institutions such as popular participation, rule of law and good governance, the anti-corruption campaign in Africa may not be effective. That is why the AU anti-corruption convention makes them fundamental principles in implementation of the convention.

The rights based approach is apparent in both the statement of objectives and principles and some other articles of the AU anti-corruption convention. Removing the obstacles to the enjoyment of human rights as an objective and respect for human rights in preventing and combating corruption as a principle especially guarantying offender's fair trial, malicious prosecution and prohibition of double jeopardy shows that the convention takes a human rights approach in its strategies.³⁰⁴ Conversely, the AU anti-corruption convention did not look from a human rights perspective the victims of corruption. Despite its clear reference to human rights, it adopts a crime control approach. It does not take a human rights approach to protect the victims of corruption.

³⁰⁰ See *ibid.*, art. 2 and 11.

³⁰¹ *ibid.*, art. 10.

³⁰² R. Snider et al, *op.cit.*, p. 25.

³⁰³ *ibid.*

³⁰⁴ See, *ibid.*, art. 2(4), 3(2), 5(7), 13(3) and 14.

3.4.2 Definition of Corruption

Like other conventions, the AU anti-corruption convention did not attempt to define corruption. Instead, it tries to list some acts and related offences which constitute corruption. For the AU anti-corruption convention, “corruption means the acts and practices including related offences proscribed in this convention”.³⁰⁵ Most of the acts of corruption and related offences are stated in article 4 of the convention which deals with the “scope of application”. These acts and related offences include, bribery (both active and passive) in both the public and private sector,³⁰⁶ any act or omission in the discharge of duties for the purpose of illicitly obtaining benefit,³⁰⁷ diversion of property,³⁰⁸ illicit enrichment,³⁰⁹ the use or concealment of proceeds derived from the acts enumerated in the convention,³¹⁰ and participation as a principal, co-principal, agent, instigator, accomplice, accessory after the fact, in a conspiracy to commit the enumerated acts,³¹¹ and laundering the proceeds of corruption.³¹² The convention can also be applicable for any other act or practice of corruption and related offences not described in the convention by the mutual agreement of two or more States parties.³¹³ By so doing, the AU anti-corruption convention covers a wide range of acts of corruption and related offences. In other words, it gives a wide definition for the term corruption.

3.4.3 Prevention

States parties undertake to adopt legislative and other measures to establish the acts stated in article 4 as offences;³¹⁴ strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State party shall be subject to the respect of national legislation;³¹⁵ establish, maintain and strengthen independent national anti-corruption

³⁰⁵ *ibid.*, art. 1.

³⁰⁶ *ibid.*, art. 4(1(a, b, e, and f).

³⁰⁷ *ibid.*, art. 4(1(c).

³⁰⁸ *ibid.*, art. 4(1(d).

³⁰⁹ *ibid.*, art. 4(1(g) and art. 8.

³¹⁰ *ibid.*, art. 4(1(h).

³¹¹ *ibid.*, art. 4(1(i).

³¹² *ibid.*, art. 6.

³¹³ *ibid.*, art.1(2).

³¹⁴ *ibid.*, art. 5(1).

³¹⁵ *ibid.*, art. 5(2).

authorities or agencies;³¹⁶ and adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest’ and awareness in the fight against corruption and related offences.³¹⁷ Besides, adopting “legislative and other measures to create, maintain, and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services” also form part of the preventive strategy.³¹⁸

There are also some specific preventive measures of corruption in the public sector. States parties should require public officials to declare their assets at the time of assumption of office during and after the term of office in the public service.³¹⁹ They are also required to establish an internal committee or a similar body which establishes a code of conduct and monitors its implementation.³²⁰ In addition, develop disciplinary measures and investigation procedures in corruption and related offences;³²¹ ensure transparency, equity and efficacy in the management of tendering and hiring procedures in the public service;³²² and revoking the immunity of public officials for the purpose of investigation and prosecution of corruption are measures taken by states parties to prevent corruption in the public sector.³²³

With regard to the private sector, States parties undertake to “adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector”.³²⁴ The establishment of mechanisms which encourage the participation of the private sector in the fight against unfair competition, respect for the tender procedures and property rights also form a preventive strategy of corruption in the private sector.³²⁵

³¹⁶ *ibid.*, art. 5(3).

³¹⁷ *ibid.*, art. 5(8).

³¹⁸ *ibid.*, art. 5(4).

³¹⁹ *ibid.*, art. 7(1).

³²⁰ *ibid.*, art. 7(2).

³²¹ *ibid.*, art. 7(3).

³²² *ibid.*, art. 7(4).

³²³ *ibid.*, art. 7(5).

³²⁴ *ibid.*, art. 11(1).

³²⁵ *ibid.*, art. 11(2).

The involvement of civil society and media by guarantying the right to access to information are also the preventive strategies of acts of corruption and related offences developed by the AU anti-corruption convention.³²⁶

3.4.4 Criminalization

The AU anti-corruption convention criminalizes acts of corruption and related offences.³²⁷ It criminalizes those offences established by the convention and by the mutual agreement of States parties. Those acts explained in section 3.4.3 are criminalized. To this effect the AU anti-corruption convention establishes jurisdiction for States parties to adjudicate acts of corruption and related offences.³²⁸

3.4.5 Remedies to Victims

Despite the apparent reference to the impacts of corruption to human rights in the preamble, statement of objectives and principles; the AU anti-corruption convention did not stipulate a substantive provision to this effect. The AU anti-corruption convention though takes a rights based approach in preventing and combating corruption, it did not take rights formulation from the perspectives of victims of corruption. It neither provides for the compensation of victims of corruption nor provides any means by which the victims of corruption claim remedy for the violation of their rights. Though the AU anti-corruption convention brings some striking novelties to international efforts against corruption specifically by linking corruption and human rights, it does not spell out the precise content of this relationship or reflect a coherent framework of remedies for individuals or groups whose human rights are violated as a result of corruption.³²⁹ Rather, it focuses on criminal sanctions, and leaves out victims, especially vulnerable and excluded individuals or groups, thus denying them direct access to remedies, such as compensation and restitution.³³⁰

³²⁶ See, *ibid.*, art. 9 and 12.

³²⁷ See, *ibid.*, art. 4, 5 (1), 6, and 8.

³²⁸ *ibid.*, art. 13.

³²⁹ K. Olaniyan, *op.cit.*, p. 75.

³³⁰ *ibid.*

3.4.6 Cooperation

The cooperation provisions of the AU anti-corruption convention are constituted of article 15-20. These include, Extradition;³³¹ tracing, seizure, and confiscation of proceeds of corruption;³³² and mutual legal assistance.³³³ The international cooperation also extends to collaboration with non-parties so that corrupt officials may not be able to enjoy "ill-acquired assets" in countries that are not party to the Convention.³³⁴ Most importantly, the AU anti-corruption convention notes the importance, although in non-mandatory language, of eradicating corruption in development aid.³³⁵ Like that of the IACAC, the AU anti-corruption convention also obliges the States parties for the creation or designation of a national authority for purposes of mutual legal assistance and cooperation.³³⁶

3.4.7 Asset Recovery

Asset recovery plays a significant role in Africa especially in combating transnational corruption. In 2001, the TI-sponsored Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth found that an estimated \$20 to \$40 billion worth of assets have been corruptly misappropriated in Africa and shipped to foreign countries.³³⁷ The AU anti-corruption convention requires States parties to adopt legislative measures for the search, seizure, freeze, confiscation, and repatriation of corruption.³³⁸ States parties are required to cooperate in asset recovery and assets derived from corruption should be returned to the requesting State even if extradition is not possible.³³⁹ The AU anti-corruption convention makes asset recovery not a mere criminal punishment but also a tool to further development objectives.³⁴⁰

³³¹ AU anti-corruption convention, *op.cit.*, art. 15.

³³² *ibid.*, art. 16.

³³³ *ibid.*, art. 18.

³³⁴ *ibid.*, art. 19(3).

³³⁵ *ibid.*, art. 19(4).

³³⁶ *ibid.*, art. 20.

³³⁷ Press Release, Transparency International (2001), '*The Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth Illegally Appropriated and Banked or Invested Abroad*', available at, <<http://www.ipocafrika.org/cases/assetsrecovery/officialdocuments/NyangaDeclaration.pdf>> as cited by R. Snider et al, *op.cit.*

³³⁸ AU anti-corruption convention, *op.cit.*, art. 16(1).

³³⁹ *ibid.*, art. 16 (2 and 3).

³⁴⁰ R. Snider et al, *op.cit.*, p. 24.

3.4.8 Monitoring Mechanisms

The AU anti-corruption convention established an Advisory Board on Corruption (the Board) constituted of 11 members elected by the Executive Council of the AU among a list of experts of the highest integrity, impartiality, and recognized competence in matters relating to preventing and combating corruption and related offences.³⁴¹ The Board shall serve in their personal capacity.³⁴² The Board members are required to have competence in matters relating to preventing and combating corruption not in the field of human rights. Olaniyan notes that the Board cannot be assumed to deal with the human rights concern of corruption as there is no human rights competence of the Board.³⁴³ Even though it is difficult to conclude that they could not deal with the human rights concern of corruption, but it is safe to hold that the connection between corruption and human rights is not dealt with. Lack of human rights formulation in the substantive provisions of the AU anti-corruption convention is repeated in the monitoring mechanisms.

The functions of the Board shall be:³⁴⁴

- a. to promote and encourage the adoption and application of anti-corruption measures on the continent;*
- b. collect and document information on the nature, scope, and extent of corruption;*
- c. develop methodologies for analyzing the problem of corruption in Africa; and disseminate information and sensitize the public on the negative effects of corruption;*
- d. advise governments on how to deal with corruption in their domestic jurisdictions;*
- e. collect information and analyze the conduct and behavior of multi-national corporations operating in Africa, and disseminate such information to national authorities;*
- f. develop and promote the adoption of harmonized codes of conduct of public officials;*
- g. build partnerships with the African Commission, African intergovernmental organizations and NGOs in order to facilitate dialogue on corruption;*
- h. submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of this Convention; and*
- i. perform any other task relating to corruption and related offences that may be assigned to it by the policy organs of the AU.*

³⁴¹ AU anti-corruption convention, *op.cit.*, art. 22(1) (2).

³⁴² *ibid.*, art. 22(3).

³⁴³ K. Olaniyan, *op.cit.*, p. 86.

³⁴⁴ AU anti-corruption convention, *op.cit.*, art. 22(5).

The Board shall adopt its own rules of procedure.³⁴⁵ States parties are required to submit a report on the implementation of the convention on annual basis to the Board and it then will report to the Executive Council.³⁴⁶

But there is no means of sanctioning States parties for their failure to report to the Board, unlike in the reporting process for the African Charter on human and Peoples' Rights.³⁴⁷ Besides, the Board has no power of investigation and cannot denounce acts of corruption.³⁴⁸ The AU anti-corruption convention lacks serious and effective mechanism for holding States parties accountable for the obligations they assume under the convention.³⁴⁹ There is no mechanism by which the dispute between States parties settled especially when one State party claims that another state party failed to implement the provisions of the convention.³⁵⁰ This is essential in areas of the convention dealing with cooperation such as, extradition, asset recovery, mutual legal assistance and bank secrecy.

3.5 Council of Europe Anti-Corruption Conventions

The Council of Europe (COE) reacted vigorously against corruption because it considered corruption as a threat to all the basic principles which the organization stands for.³⁵¹ For the COE, fighting corruption is a means of defending the stability of democratic institutions, the rule of law, human rights and social progress.³⁵²

The Criminal Law Convention against Corruption (Criminal Law Convention) and the Civil Law Convention against Corruption (Civil Law Convention) are the two main anti-corruption conventions which are enacted under the inter-governmental framework of the COE. These

³⁴⁵ *ibid.*, art. 22(6).

³⁴⁶ *ibid.*, art. 22(7).

³⁴⁷ Transparency International, *Global Corruption report 2004- Political Corruption*, *op.cit.*, p. 119.

³⁴⁸ *ibid.*

³⁴⁹ K. Olaniyan, *op.cit.*

³⁵⁰ *ibid.*

³⁵¹ V. Beken (2003), 'The Council of Europe's Criminal Law Convention on Corruption', Seminar on the anti-corruption Conventions and GRECO, available at, <<http://www.ircp.org/uploaded/coe-corruption-kiev.doc>> (accessed on 4 April 2011).

³⁵² *ibid.*

conventions adopt criminal, civil and international cooperation as measures to fight corruption. They also established a monitoring mechanism by which these measures are implemented by parties to these conventions. Even though these conventions adopt different measures against corruption, but they provide the same monitoring mechanism called the Group of States against Corruption (GRECO). The approach of the COE to fight corruption is different from other conventions on two grounds. First, it provides for two separate conventions each deal with different matters. The Criminal Law Convention only deals with criminal aspects of corruption and thereby adopts crime control approach while the Civil Law Convention deals with civil measures including compensation to victims, i.e., remedial approach. Second, preventive strategies are not adequately well taken. It seems as if the crime control approach and the remedial approach will suffice for the fight against corruption.

In spite of the fact that the impact of corruption on human rights is mentioned in the preambles of both conventions, there is no substantive provision with a human rights lens. The following sections explore and assess the conventions substantive provisions constituted of criminal, civil and international cooperation as a means of fighting corruption. It also discusses the monitoring mechanisms of the conventions.

3.5.1 Criminal Law Convention on Corruption

The Criminal law Convention was the third multinational anti-corruption convention adopted and negotiated by the member States of the COE, along with the participation of a number of observers, including Canada, Japan, Mexico and the United States.³⁵³ It represents the European regional consensus on what States should do in the areas of criminalization and international cooperation with respect to corruption. The Criminal Law Convention was adopted on 4 November 1998, opened for signature on 27 January 1999 in Strasbourg, France and entered in to force on 1 July 2002.³⁵⁴ It also has an additional protocol.³⁵⁵ Currently the convention has 43

³⁵³ Convention Overview, *Council of Europe Criminal Law Convention*, available at, <<http://www.U4.no/themes/conventions/intro.cfm>> (accessed 22 March 2011).

³⁵⁴ *ibid.*

³⁵⁵ *Council of Europe Criminal law convention and additional protocol on corruption*, the additional protocol was adopted and opened for signature on 15 May 2003 in Strasbourg, France and entered into force on 1 February 2005;

ratifications and 7 signatories.³⁵⁶ While the additional protocol to the Criminal Law Convention has 26 ratifications and 10 signatories.³⁵⁷

The Criminal Law Convention mainly deals with various forms bribery, trading in influence, laundering the proceeds of corruption, and account offences. It also deals with issues of international cooperation in the prosecution of corruption offences. The coming sections explore the criminal policy and the international cooperation framework of the convention to fight corruption.

3.5.1.1 Criminal Measures

The Criminal Law Convention did not attempt to define the term corruption. Moreover, the word corruption is mentioned twice; first, in the title of the convention and second, in article 13. Throughout the whole body of the convention, it refers to bribery.³⁵⁸ The Criminal Law Convention has a broad scope as it applies to public and private sectors and also transnational cases concerning acts of bribery. However, the range of conducts which the States are required to criminalize are fairly narrow.³⁵⁹ States are required to criminalize active and passive bribery,³⁶⁰ trading in influence,³⁶¹ money laundering of the proceeds of corruption³⁶² and account offences.³⁶³ Compared to the other anti-corruption conventions, its list of acts which constitute corruption is low. It can be said that the meaning which the Criminal Law Convention gives to

available at, http://www.transparency.org/Global_priorities/international_conventions/conventions_instruments/coe_criminal_law (accessed 22 March 2011).

³⁵⁶ Status of ratifications of the Criminal Law Convention, CETS, No.: 173, available at, <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=25/04/2011&CL=ENG> (accessed 28 April 2011).

³⁵⁷ Status of ratifications of the Additional Protocol to the Criminal Law Convention, CETS, No.: 191, available at, <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=191&CM=8&DF=25/04/2011&CL=ENG> (accessed 28 April 2011).

³⁵⁸ N. Kale (2000), *op.cit.*, p.155.

³⁵⁹ P. Webb, *op.cit.*, p. 199.

³⁶⁰ See Criminal Law Convention on Corruption and its additional protocol, available at, <http://www.coe.int/Treaty/EN/Treaties/Html/173.htm> (accessed 22 March 2011), art. 2-11.

³⁶¹ *ibid.*, art. 12.

³⁶² *ibid.*, art. 13.

³⁶³ *ibid.*, art. 14.

corruption is very narrow. This leads to the assertion that many acts of corruption like extortion, embezzlement, nepotism, illicit enrichment and insider trading are left unpunished.³⁶⁴

However with regard to bribery, the Criminal Law Convention extensively deals with it. The Convention criminalizes active bribery of domestic public officials;

*Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.*³⁶⁵

It is intended to ensure in particular that public administration functions properly, i.e. in a transparent, fair and impartial manner and in pursuance of public interests, and to protect the confidence of citizens in public administration and the officials themselves from possible maneuvers against them.³⁶⁶ It also criminalizes passive bribery of domestic public officials;

*Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.*³⁶⁷

Active and passive bribery are two sides of the same phenomena.³⁶⁸ The briber's act offering, promising or giving the undue advantage and the bribee's act of accepting the offer, promise or gift are made independent criminal offences. However, the briber and the bribee will not be punished for complicity in the other one's offence.³⁶⁹

The definition provided in article 2 and 3 is referred to in subsequent provisions of the Criminal Law Convention. For example, the definition of active and passive bribery of article 2 and 3 is

³⁶⁴ P. Webb, *op.cit.*

³⁶⁵ Criminal Law Convention, *op.cit.*, art. 2.

³⁶⁶ Explanatory report on the Criminal Law Convention on Corruption, *op.cit.*

³⁶⁷ Criminal Law Convention, *op.cit.*, art. 3.

³⁶⁸ Explanatory Report on the Criminal Law Convention on Corruption, *op.cit.*

³⁶⁹ *ibid.*

applicable in the bribery of members of domestic public assemblies,³⁷⁰ foreign public officials,³⁷¹ members of foreign public assemblies,³⁷² officials of international organizations,³⁷³ members of international parliamentary assemblies,³⁷⁴ judges and officials of international courts.³⁷⁵ The Criminal Law Convention further criminalizes active and passive bribery in the private sector.³⁷⁶ The additional protocol to the Criminal Law Convention adds some categories of persons. It criminalizes active and passive bribery by domestic arbitrators and jurors;³⁷⁷ and also active and passive bribery of foreign arbitrators and jurors.³⁷⁸

States parties are required to adopt legislative and other measures to criminalize the act of aiding or abetting the commission of any of the criminal offences established in accordance with the convention in their domestic laws.³⁷⁹ They are also required to adopt legislative and other measures to hold legal persons liable for the criminal offences of active bribery, trading in influence and money laundering when committed for their benefit by any natural persons either individually or as part of an organ of the legal person based on appropriate power.³⁸⁰ But such liability of the legal person will not exclude the criminal responsibilities of those natural persons who commit those offences.³⁸¹

The Criminal Law Convention provides for some support mechanisms such as requiring States parties to protect informants and to have specialized authorities dedicated to the fight against corruption.³⁸²

³⁷⁰ Criminal Law Convention, *op.cit.*, art. 4.

³⁷¹ *ibid.*, art. 5.

³⁷² *ibid.*, art. 6.

³⁷³ *ibid.*, art. 9.

³⁷⁴ *ibid.*, art. 10.

³⁷⁵ *ibid.*, art. 11.

³⁷⁶ *ibid.*, art. 7 and 8.

³⁷⁷ See Additional protocol to the Criminal Law Convention, *op.cit.*, art. 2, 3 and 5.

³⁷⁸ *ibid.*, art. 4 and 6.

³⁷⁹ Criminal Law Convention, *op.cit.*, art. 15.

³⁸⁰ *ibid.*, art. 18.

³⁸¹ *ibid.*

³⁸² *ibid.*, art. 20 and 22.

Unlike the other anti-corruption conventions, the issue of asset recovery is not given adequate consideration. It is evident from the heading of the article which says ‘measures to facilitate the confiscation of proceeds’ though the tracing, seizure and freezing of property is provided.³⁸³

3.5.1.2 International Cooperation

The guiding principles for the fight against corruption contain an undertaking to develop to the widest extent possible international cooperation in all areas of the fight against corruption.³⁸⁴ The Criminal Law Convention approaches international cooperation from two perspectives. First, States parties shall cooperate with each other by availing relevant international instruments on international cooperation in criminal matters, or arrangements agreed on the basis of uniform or reciprocal legislation and in accordance with their national law for the purposes of investigation and proceedings concerning criminal offences established by the convention.³⁸⁵ It makes a clear reference to other international instruments and arrangements as a basis for international cooperation. Second, the provisions dealing with international cooperation of the Criminal Law Convention will be applicable whenever there is no international instrument or arrangement or when the provisions of the Criminal Law Convention are more favorable than the provisions of international instruments and arrangements.³⁸⁶ The Criminal Law Convention on international cooperation has a default application save in situations when it is more favorable for the fight against corruption.

States parties should provide each other mutual legal assistance in the investigation and prosecution of criminal offences established by the convention.³⁸⁷ But this mutual legal assistance may be refused if compliance with the request undermines fundamental interests, national security and sovereignty or *ordre public* of the requested State.³⁸⁸ But this limitation for mutual legal assistance has its own pros and cons. For example, as Beken notes, the

³⁸³ *ibid.*, art. 23.

³⁸⁴ United Nations Office on Drugs and Crime (2005), *Compendium of International Legal Instruments on Corruption*, 2nd ed, United Nations, New York, pp. 174-176, principle 20.

³⁸⁵ Criminal Law Convention, *op.cit.*, art. 25(1).

³⁸⁶ *ibid.*, art. 25 (2) (3).

³⁸⁷ *ibid.*, art. 26(1).

³⁸⁸ *ibid.*, art. 26(2).

‘fundamental interests of the country’ may be interpreted as allowing the requested State to refuse mutual legal assistance in cases where the fundamental principles of its legal system are at stake, where human rights’ considerations should prevail.³⁸⁹ It can also be refused in cases where the requested state has reasonable grounds to believe that the criminal proceedings instituted in the requesting State have been distorted or misused for purposes other than combating corruption.³⁹⁰ But there may be times when States use this provision as a scapegoat for their denial to cooperate for investigation and prosecutions of corruption.

States parties are also required to cooperate in extradition³⁹¹ and forward spontaneous information³⁹². Besides, States parties are required to designate and establish a central authority which facilitates and performs tasks in the course of international cooperation among States parties.³⁹³

3.5.2 Civil Law Convention on Corruption

The Civil Law Convention is the first attempt to define common international rules in the field of civil law and corruption.³⁹⁴ It was adopted in Strasbourg, France on 4 November 1999 and entered into force on 1 November 2003.³⁹⁵ Now it has 8 signatories and 34 ratifications.³⁹⁶

The provisions of the Civil Law Convention are mandatory and reservations to any of the provisions are not allowed.³⁹⁷ It adopted civil law remedies to fight corruption such as, compensation for damage from corruption, invalidity of corrupt contracts, accounts and audits

³⁸⁹ V. Beken, *op.cit.*, p. 22.

³⁹⁰ *ibid.*

³⁹¹ Criminal Law Convention, *op.cit.*, art. 27

³⁹² *ibid.*, art. 28.

³⁹³ *ibid.*, art. 29.

³⁹⁴ Open society justice initiative (2005), ‘*Legal Remedies for the Resource Curse, A Digest of Experiences in using Law to Combat Natural Resource Corruption*’, New York, p.45.

³⁹⁵ See Council of Europe Civil Law Convention, available at, <http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/coe_civil_law> (accessed 22 March 2011).

³⁹⁶ Status of ratifications of the Civil Law Convention, CETS, No.: 174, available at, <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=25/04/2011&CL=ENG>> (accessed 28 April 2011).

³⁹⁷ Civil Law Convention, full text available at, <<http://www.conventions.coe.int/treaty/en/Treaties/Html/174.htm>> (accessed 22 March 2011), art. 17.

whistleblower protections and international cooperation. The Civil Law Convention covers corruption both in the public and private sector. The following sections discuss the civil law measures to fight corruption and the issue of international cooperation towards civil measures.

3.5.2.1 Civil Measures

*Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.*³⁹⁸

The quest for effective remedy is the driving force behind the Civil Law Convention. It was partly based on the feasibility study on civil remedies for acts of corruption and on the belief that civil law can positively contribute for the fight against corruption especially by enabling persons who have suffered damage to receive fair compensation.³⁹⁹ The advantage of the civil law approach is that it makes corruption controls partly ‘self-enforcing by empowering victims to take action on their own initiative’.⁴⁰⁰ However, it also reduces the control of government agencies over the overall anti-corruption strategy, excludes potential litigants who do not have sufficient resources or access to the courts, and could lead to conflicting civil and criminal proceedings.⁴⁰¹ Besides, as Webb notes the businesses that are concerned about a flood of civil suits may also use methods of settling or avoiding cases that undermine the anti-corruption goals of the Convention.⁴⁰² Despite this merits and demerits of the Civil Law Convention, its merits outweigh its demerits. As there are other measures to fight corruption like the crime control approach, the civil law approach adds value to the regional legal regime of fighting corruption in the COE. But its effectiveness should be tested. Empirical research may be required to what extent the civil law remedy empower victims of corruption.

Unlike the other anti-corruption conventions, the Civil Law Convention defines the term corruption. For the Civil Law Convention, “corruption means requesting, offering, giving or

³⁹⁸ *ibid.*, art. 1.

³⁹⁹ See *ibid.*, preamble Para 6 and 9.

⁴⁰⁰ Global Program Against Corruption (2002), ‘United nations Manual on Anti-Corruption Policy’ as quoted by P. Webb, *op.cit.*, P. 100.

⁴⁰¹ *ibid.*

⁴⁰² P. Webb, *op.cit.*, p. 200.

accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behavior required of the recipient of the bribe, the undue advantage or the prospect thereof”.⁴⁰³ But the definition is only covering the bribery aspect of corruption. Other corrupt acts and offences recognized under the UNCAC, IACAC and the AU anti-corruption convention are not covered by the Civil Law Convention. It is also narrower than the Criminal Law Convention as the later includes trading in influence, account offences and laundering the proceeds of corruption offences in addition to bribery. In order to claim a remedy by using the Civil Law Convention, the act should be bribery. For the other acts of corruption and related offences there is no civil remedy.

States parties are required to provide in their internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation.⁴⁰⁴ But in order for the compensation be paid to the victim, the victim should prove that the defendant has committed or authorized the act of corruption or failed to take reasonable steps to prevent the act of corruption; he/she has suffered damage; and must prove that there is a causal link between the act of corruption and the damage.⁴⁰⁵ The Civil Law Convention also incorporates the principle of vicarious liability. The victims may claim compensation either from a State if the defendant is a public official or from any appropriate authorities if he is not a public official.⁴⁰⁶ Such arrangement gives victims a wide range of possibilities to get their compensation in due time.

States parties are also required to provide in their internal laws for any contract or clause of a contract providing for corruption to be null and void.⁴⁰⁷ In addition to this, a party to a contract whose consent has been undermined by any acts of corruption has a right to apply to the court for the contract to be declared void, notwithstanding his/her right to claim for damages.⁴⁰⁸

⁴⁰³ Civil Law Convention, *op.cit.*, art. 2.

⁴⁰⁴ *ibid.*, art. 3(1).

⁴⁰⁵ *ibid.*, art. 4 (1).

⁴⁰⁶ *ibid.*, art. 5.

⁴⁰⁷ *ibid.*, art. 8(1).

⁴⁰⁸ *ibid.*, art. 8(2).

The Civil Law Convention also provides provisions for the protection of employees who report in good faith the acts of corruption,⁴⁰⁹ and provision on ensuring the validity of companies accounting and auditing systems.⁴¹⁰ It also requires States to provide in their internal laws effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption.⁴¹¹

3.5.2.2 International Cooperation

Unlike the other anti-corruption conventions, the Civil Law Convention did not stipulate specific areas of international cooperation. It notes that States parties should cooperate effectively in matters relating to civil proceedings of corruption cases, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments and litigation costs.⁴¹² But such international cooperation is based upon relevant international instruments on international cooperation in civil and commercial matters to which States parties are a party and their internal laws.⁴¹³ The international cooperation framework of the Civil Law Convention is weak when compared to other conventions as it merely refers the matter to relevant international instruments and internal laws of States parties.

3.5.3 Monitoring Mechanisms

GRECO is the monitoring body for both the Criminal Law Convention and the Civil Law Convention.⁴¹⁴ It was established by resolution (99)5 of the Committee of Ministers of the COE with the aim of improving the capacity of its members to fight corruption by following up through a dynamic process of mutual evaluation and peer pressure the compliance of States with their undertaking in the field of corruption.⁴¹⁵ The GRECO monitors the implementation of these

⁴⁰⁹ *ibid.*, art. 9.

⁴¹⁰ *ibid.*, art. 10

⁴¹¹ *ibid.*, art. 11.

⁴¹² *ibid.*, art. 13.

⁴¹³ *ibid.*

⁴¹⁴ See, art. 24 of the Criminal Law Convention, and art. 14 of the Civil Law Convention.

⁴¹⁵ See Resolution (99) 5 of the Committee of Ministers of the Council of Europe: Agreement Establishing the Group of States against Corruption, adopted on 1 May 1999, pp. 163-173, art. 1, in United Nations Office on Drug and Crime, *op.cit.*

conventions through evaluation procedures and country visits.⁴¹⁶ For the evaluation procedures, the GRECO adopts questionnaires and establishes evaluation teams to examine the replies given to the questionnaires and to request additional information as may be necessary.⁴¹⁷ Compared to the monitoring mechanisms of other anti-corruption conventions, GRECO is the most sophisticated.⁴¹⁸ But, compared to the monitoring mechanisms of international human rights regime it is weak. The monitoring mechanisms of the international human rights law regime are composed of judicial and quasi-judicial organs at regional and international level which can pass a decision about a rights violation against a State party and provide for remedies for such violations. However, the GRECO did not have such powers.

3.6 A Critical Examination of the International Legal Regime against Corruption

A close examination of the regional and international anti-corruption conventions reveals that prevention, criminalization, international cooperation and asset recovery are the measures adopted to prevent and combat corruption. But there is no human rights measure for the fight against corruption. Moreover, the anti-corruption conventions are not uniform in their conception of corruption. Many of their provisions are optional and subject to claw-back clauses. The monitoring mechanisms of these anti-corruption conventions are weak by design even to implement the existing measures against corruption. The coming sections critically examine the uniformity of standards and the adequacy of measures in the anti-corruption conventions.

3.6.1 Uniformity of Standards

It is evident from the conventions that a definition for the term corruption in clear terms is not provided save the Civil Law Convention which defines corruption in terms of bribery only. Coming up with a definition for corruption may be quite difficult for these conventions as it is a complex concept due to its multi-dimensional character. But it is expected that they prescribe for

⁴¹⁶ *ibid.*, art. 10 and 13.

⁴¹⁷ *ibid.*, art. 11 and 12.

⁴¹⁸ P. Webb, *op.cit.*, p.200.

some acts and practices which are deemed corrupt. While these conventions did this, coherence and uniformity apparently lacks. The IACAC and the AU anti-corruption convention provides for a relatively wide understanding of corruption with some differences,⁴¹⁹ the Criminal law and Civil Law Conventions provides for a narrow understanding of corruption. However, the UNCAC provides for a comprehensive and detail list of acts which constitute corruption. International cooperation through mutual legal assistance and extradition are the most essential measures for the fight against corruption especially in punishing the offender and recovering the proceeds of corruption. But diverse regional consensus on acts of corruption may undermine international cooperation. For example, the AU anti-corruption convention did not include bribery of a foreign public official within the lists of corruption offences unlike the other conventions. Likewise, the Criminal and Civil Law Conventions did not consider acts of extortion, embezzlement and nepotism as acts of corruption. So, how States parties to the IACAC, AU anti-corruption convention, and the COE anti-corruption conventions cooperate each other to fight corruption while having a different list. As the regional conventions show regional consensus, these conventions can be a ground for cooperation and mutual legal assistance among States parties in the region. Conversely, the UNCAC shows international consensus though it differs from the regional conventions. Lack of conformity between the conventions means that the contracting parties are likely to tackle the issue of corruption in different ways thus leaving the door wide open to uncertainties.⁴²⁰ This is because, it is upon the acceptance of a certain act as corrupt that States will devise preventive mechanisms, if committed punishes, seeks international cooperation and mutual legal assistance if necessary and recovers assets if any.

In addition to this, these conventions are full of optional provisions and suffer much from claw-back clauses. For example, States parties to the AU anti-corruption convention adopts some of preventive and criminal measures subject to their domestic laws; States parties to the IACAC adopts measures subject to their constitution and the fundamental principles of their legal system; States parties to the UNCAC adopts measures in accordance with their fundamental principles of their legal system. International cooperation and mutual legal assistance under the

⁴¹⁹ See sections dealing with definitions of corruption.

⁴²⁰ I. Carr, *op.cit.*, p. 129.

COE anti-corruption conventions is based on the fundamental interest, national sovereignty, national security and *ordre public* of States parties.

Even though taking into account the legal, social, cultural, economic and political differences among countries is essential, but the wide discretion given to States parties will undermine the uniform implementation of these conventions. It is applying a double standard for the fight against corruption. Above all, the *raison d'être* of these conventions is taking a uniform measure against corruption in a supranational arena by enhancing and facilitating international cooperation among States as it has an international element.⁴²¹ Historically national legal systems have a means to fight and repress corruption though its effectiveness depends on the political condition and the degree of social development of the State at issue.⁴²²

Besides, multiple anti-corruption conventions impose on States parties different obligations. This may lead to expert fatigue in some countries.⁴²³ For example, the United States participates in and is subject to review process in OECD, IACAC, COE in the GRECO and the UNCAC. The various loopholes in these conventions on the one hand and the impact it creates on States parties on the other hand will pose problem for States parties to fulfill their commitments under these conventions. Lack of political will especially in emerging democracies and developing countries may fuel fire on the commitments of these countries to fulfill any of their obligations. Since it leave States wondering which convention to ratify and implement or alternatively which model to base their own legislation on.⁴²⁴

3.6.2 Adequacy of Measures

The global anti-corruption agenda tends to represent itself as a grass root movement, giving a voice to ordinary peoples around the world who are victims of corruption.⁴²⁵ TI, self consciously

⁴²¹ See for details U. Draetta (1995), 'The European Union and the fight against Corruption in International Trade', 1995 *Int'l Bus. L.J.* 699 and Windsor and Getz (2000), 'Multilateral Cooperation to Combat Corruption: Normative Regimes despite Mixed Motives and Diverse Values', 33 *Cornell Int'l L.J.* 731.

⁴²² *ibid.*

⁴²³ *ibid.*

⁴²⁴ I. Carr, *op.cit.*, p. 141.

⁴²⁵ S. Ivanov (2007), 'The Limits of the Global Campaign against Corruption', in S. Bracking (ed), *Corruption and Development, The Anti-Corruption Campaigns*, PALGRAVE MACMILLAN, New York, p. 29.

styled after the international human rights movement, long featured on its website images of protestors carrying banners against corruption.⁴²⁶ But, the emergence of the global anti-corruption agenda was not the works of banner having protests. Its origin lies in the interest of the United States government, multinational companies and multilateral donors.⁴²⁷ The 1990s after math anti-corruption movement in the form of enactment of conventions was influenced by the United States anti-corruption standards.⁴²⁸

The existing international and regional anti-corruption conventions in one or another way were a result of such political influence. The measures adopted by these conventions are designed to deter corrupt practices by way of a criminal sanction and avoid circumstances which opens door to such practices by prescribing preventive mechanisms. Cooperation among national authorities within the States realm and international cooperation are within the measures adopted by these conventions. Especially the criminal measure is essential in regulating human behavior. Given the human propensity towards a degree of unpredictability and an inclination towards rule ignoring, sanctions play an important role in guiding human choice.⁴²⁹ However, punishing the offenders of corruption is not the end of the story. The situation of victims of corruption should be adequately addressed. Corruption makes them pay a bitter cost, they are victimized, their inherent human dignity is compromised and their quest to be free is in question. Despite these facts, the existing anti-corruption conventions did not deal with victims of corruption. It can be partly attributed to the political landscape and the needs of the negotiators surrounding the drafting of these conventions.⁴³⁰

Olaniyan notes that the approach adopted by the AU anti-corruption convention appears to presume the adequacy and effectiveness of the accountability of institutions and the systems designed to protect human rights.⁴³¹ He further states that the convention is based on the premise

⁴²⁶ *ibid.*

⁴²⁷ *ibid.*

⁴²⁸ A. Boeckmann (2004), 'Taking a Corporate Stand against Public Corruption', Vital Speeches of the Day 70, 20, 630–34 as quoted by S. Ivanov, *op.cit.*

⁴²⁹ I. Carr, *op.cit.*, p. 128.

⁴³⁰ Protestors carrying the banners against corruption handed over their role to other entities like states, multilateral donors and multinational companies. This incident contributed much for the current status quo, as the interest of states and non-state actors are not necessary similar with individuals. Had those protestors heard, these conventions would have a human rights face.

⁴³¹ K. Olaniyan, *op.cit.*, p. 76.

that State interest and individual interest are the same and will always coincide though it is rarely the case. This assertion can also be extended to the other anti-corruption conventions as there is no substantial difference in the measures adopted. But the assumption is not true. The existence of corruption *per se* proves the weaknesses of the institutional framework designed to protect and defend human rights.

It is a plain fact that corruption attacks the fundamental values of human dignity and political equality of the people. A strategy intended to address it must, therefore, go beyond rehashing criminal sanctions. The strategy must pronounce corruption as an evil totally averse to the inherent dignity of man such that engaging in it is not just a crime but also an act contrary to virtues inalienable to every person. Dworkin in his rights discourse provides that:

The institution of rights against government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. The second is the more familiar idea of political equality.⁴³²

So, the measures adopted by States to prevent and combat corruption should ensure and protect human dignity and political equality. In other words, a human rights approach is required to fight corruption especially to protect the inherent dignity and free personhood of vulnerable sections of the society who are highly exposed to corruption. Preventive and criminal measures though having a role in fighting corruption but they are not sufficient by their own.

The human rights approach of fighting corruption will enhance the effectiveness of preventive measures adopted by these conventions. Lasting progress against corruption will not be made only by detecting, deterring and punishing corrupt behavior but also requires the long-term construction of a system of public order.⁴³³ Strong and stable public order is constructed in a

⁴³² R Dworkin (1978), *Taking Rights Seriously*, Harvard University Press, as quoted in CR. Kumar (2003-2004), *op.cit.*, p.39.

⁴³³ M. Johnston (1993), 'Social Development as an Anti-Corruption Strategy', Paper presented at VI International Anti-

culture of human rights. Adopting a human rights measure against corruption is essential if the existing anti-corruption measure is to be successful. A measure which answers the calls of victims of corruption is urgent. It is a human rights call in need of a human rights answer.

3.7 Conclusion

The discussion of the international legal regime against corruption reveals that the relationship between corruption and human rights is not given due consideration. The UNCAC and the IACAC did not even make a reference to the impacts of corruption on human rights while the COE and the AU anti-corruption conventions make a clear reference to the human rights impact of corruption. Despite of their reference to human rights, they did not make a substantive provision which gives effect to their reference.

The measures adopted by these conventions, i.e. prevention, criminalization, asset recovery and international cooperation, though essential in the fight against corruption but weak in giving response to victims of corruption. The UNCAC allotted a single provision for the compensation of victims. However, victims of corruption may not reach the appropriate legal avenues due to their victimization. The Civil Law Convention though innovative in adopting a remedial approach but its narrow scope undermines its overall purpose of remedying victims of corruption. But the IACAC and the AU anti-corruption conventions have no room for victims of corruption. A human rights approach of fighting corruption lacks from these conventions and thereby the measures adopted are weak in rectifying the human rights impact of corruption. Rather, the measures take a political and economic view.

In addition, these conventions are not uniform in their understanding of “acts of corruption” and full of optional provisions with lots of claw-back clauses. This creates problem in international cooperation and uniform implementation. Besides, the weak design of their monitoring mechanisms fuels fire on the implementation of the conventions on the ground.

Corruption Conference, Mexico, November 1993, available at, <<http://www1.oecd.org/daf/nocorruptionweb/pdf/johnston4.pdf>> (accessed 21 April 2011).

Chapter Four: Elevating Corruption-Free Service as a Human Right

4.1 Introduction

After established the link between corruption and human rights; and have found that this link is not given due consideration in the anti-corruption conventions, this chapter elevates corruption-free service as a human right as a panacea for the defects of the anti-corruption conventions. The right to corruption-free service would mean the existence and development a few rights for the citizenry which can be enforced by the judiciary.⁴³⁴ For instance, it is possible that corruption-free service can be framed as a human right to which every human being is entitled. But it does not mean that the mere existence of such a right will ensure that corruption will not exist in administration or that the people will experience good governance policies that promote sound public administration.⁴³⁵ However, the importance of such a right to corruption-free service would be vastly enhanced by the commitment of all institutions to ensure the protection and promotion of this right.⁴³⁶

There are basis on which the right to corruption-free service can be established. It is a plain fact that every human being is free and equal in dignity and rights. Human beings can claim a right to corruption-free service as it is inherent in them. Besides, the right to corruption-free service can be grounded on the existing corpus of human rights law. For example, the right to equality and non-discrimination can give rise to a right to corruption-free service. Above all, elevating corruption-free service as a human right is a means for the realization of other rights on the one hand and integrating the anti-corruption campaign with the human rights movement for the better interest of the society on the other hand. Depending upon these bases, the chapter formulates the contents of the right to corruption-free service with its monitoring mechanism under the international and regional human rights systems.

⁴³⁴ CR. Kumar, '*Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*', *op.cit.*, p.35.

⁴³⁵ *ibid.*

⁴³⁶ *ibid.*

4.2 Basis for the Elevation

The government has a duty to provide a corruption-free service and let others do the same. This duty of the government emanates from democratic principles, the ideals of justice and good governance. Moreover, the right to corruption-free service is inherent in every human person. It is a right which is inalienable and inviolable. Human beings individually and in group need a corruption-free service to lead a minimally good life rooted in dignity and equality. Hence, there is an imminent need to change the government's duty of providing a corruption-free service to a human rights duty by framing it as a human right. For so doing, there are basis against which corruption-free service is elevated as a human right. The forth coming sections explore and provide the grounds for such elevation.

4.2.1 The Right to Corruption-Free Service as an End

*There is a critical right missing from the Universal Declaration of Human Rights and the two international covenants that make up the International Bill of Rights. That missing right is the right of all members of the human family to be free from the evil of corruption.*⁴³⁷

One of the basic premises on which the human rights movement has expanded over the years is the concept of human dignity. The notion of human rights is derived from the belief that all human beings are born equal in dignity and rights and that these moral claims are inalienable and inherent in all human individuals by virtue of their humanity.⁴³⁸

Dworkin argues that a person has a fundamental right against the government, only if that right is necessary to protect his/her dignity, or equal entitlement to concern and respect.⁴³⁹ Corruption undermines the fundamental values of human dignity and the political equality of individuals. Besides, it hinders the proper fulfillment of other basic rights. The right to a society free of

⁴³⁷ EP. Mendes (2003), 'The Cancer of the International Bill of Rights- Democracy and Freedom of Expression, the Main Treatments?' in *Bridging the Global Divide on Human Rights: A Canada-China Dialogue*, p. 287, in O. Ogundoku, *op.cit.*, p. 36.

⁴³⁸ N. Kale, 'The Right to a Corruption Free Society as an Individual and Group Human Right: Elevating Official Corruption to a Crime under International Law', *op.cit.*, p.163.

⁴³⁹ R. Dworkin, *op.cit.*, in CR. Kumar, 'Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India', *op.cit.*, p.39.

corruption is an inherent human right because life, dignity, equality, and other important human rights and values significantly depend upon this right.⁴⁴⁰ That is, it is a right without which these essential values lose their meaning.

As a fundamental right, the right to corruption-free society cannot be easily discarded “even for the good of the greatest number, even for the greatest good of all”.⁴⁴¹ As the right to corruption-free service is an inherent right rooted in dignity and equality, there is an imminent need to formulate it as a fundamental human right. Like the right to life, privacy and security, human beings have an inherent right to claim a corruption-free service. Thus, the right to corruption-free service is an end in itself which can be consumed by every human being. It can be even argued that the right to corruption-free service is the mother of all human rights. Since, the realization of other human rights largely depends upon this right.

4.2.2 The Right to Corruption-Free Service as a Synthesis

The right to corruption-free service can be constructed out of the existing corpus of human rights law. For instance, the right to corruption-free service flows from the right of the people to exercise permanent sovereignty over their natural resources and wealth, that is, their right to economic self-determination⁴⁴² recognized in common article 1 of the ICCPR and ICESCR, which reads;

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation,*

⁴⁴⁰ See CR. Kumar (2002), ‘*Corruption and Human Rights*’, Frontline, September 14-27, 2002, available at, <<http://www.flonnet.com/fl1919/19190780.htm>> (accessed 4 April 2011). See also CR. Kumar (2002), ‘*Corruption and Human Rights- II*’, Frontline, September 28-October 11, 2002, available at, <<http://www.frontline.com/fl1920/stories/20021011008607500.htm>> (accessed 4 April 2011).

⁴⁴¹ L. Henkin (1990), *The Age of Rights*, pp.1-5, as quoted by N. Kale, ‘*The Right to a Corruption Free Society as an Individual and Group Human Right: Elevating Official Corruption to a Crime under International Law*’, *op.cit.*, p.163.

⁴⁴² N. Kale, ‘*The Right to a Corruption Free Society as an Individual and Group Human Right: Elevating Official Corruption to a Crime under International Law*’, *op.cit.*, p.164.

based upon the principles of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

Thus, a State will be in violation of this right, if it alienates the people's patrimony in its resources by corruption to foreign companies, if it engages in the corrupt transfer of ownership of national wealth to those select nationals who occupy positions of power or influence in the society.⁴⁴³ These ultimately deny the people individually and collectively their right to freely use, exploit and dispose of their national wealth in a manner that advances their development. So, corruption-free service is inherent in the right to economic self-determination.

As corruption perpetuates discrimination and undermines the equality of persons, it can be argued that the right to corruption-free service is inferred or implied from these rights too. The right to access to public property and services in an equal manner is undermined by the incidents of corruption. If it is said the right to equality and non-discrimination is guaranteed, the right to corruption-free service must be recognized for stronger reason; because corruption is incompatible with the ideals of equality and non-discrimination.

The right to corruption-free service can also be implicated from the right to development. As described by Bedjaoui,

*The right to development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and the last human right, the beginning and the end, the means and the goals of human rights. It is the core right from which all others stem.*⁴⁴⁴

As Henkin sees it, the importance of development in the human rights context rests on the predicate that without development it would not be possible to respect and ensure individual rights.⁴⁴⁵ It can be argued that socio-economic and political development which ultimately empowers the individual to claim and enjoy his/her rights will not be achieved if there is corruption. Corruption compromises the quest for development and thereby hampers the realization of different set of rights. It is safe to hold that corruption-free service is inherent in the

⁴⁴³ *ibid.*, p.165.

⁴⁴⁴ M. Bedjaoui (1991), 'The Right to Development', in M. Bedjaoui (ed), *International Law: Achievements and Prospects*, p.1182 in H. Steiner and P. Alston (2002), *International Human Rights Law in Context: Law, Politics, Morals*, Oxford University Press, New York, p.1447.

⁴⁴⁵ L. Henkin, *op.cit.*, as quoted by N. Kale, *op.cit.*, p.165.

right to development. It can be said that corruption-free service is the umbrella of all human rights.

In addition to these conceptual analyses, there is a practice developed by the African Commission on Human and Peoples Rights (the Commission) called the doctrine of implied rights. It is a situation when the Commission read into some rights which are not expressly recognized under the African charter with a view to give meaning to the rights recognized under the African charter. In the Ogoni land case⁴⁴⁶, the Commission held that the right to shelter or housing and the right to food are implicit in the charter. It found that the combined effect of 'corollary rights' (the right to property, to health, and to the protection of the family) is to constitute the right to shelter or housing. When these rights are in combination 'adversely affected', the right to shelter or housing is violated.

In the case at hand, it can be argued that, the right to corruption-free service can be implied from the right to equality and non-discrimination, the right to development, the right to self-determination, the right to dispose natural wealth and resources. To enjoy these rights, the society should be free from corruption. In other words, corruption-free service is inherent in these rights. Thus, it can be elevated as a human right by the synthesis of the existing human rights recognized under international and regional human rights instruments.

However, in the *Korvah V Liberia* case⁴⁴⁷, the Commission decided that the communication is inadmissible. For such decision, the Commission held that the communication on the situation in Liberia including corruption and immorality is incompatible with the ACHPR. It is stated that the communication do not amount to violations of human rights under the provisions of the ACHPR. Though the right to corruption-free service is not expressly provided in the ACHPR, but it can be inferred from the list of rights recognized under the ACHPR. The Commission can avail of its doctrine of implied rights to address communications regarding corruption in the future. But its past experience shows that the commission did not consider corruption as a human rights violation.

⁴⁴⁶ F. Viljeon (2007), *International Human Rights Law in Africa*, Oxford University Press, New York, p.346.

⁴⁴⁷ *Korvah V Liberia* (2000) AHRLR 140 (ACHPR 1988).

4.2.3 The Right to Corruption-Free Service as a Confluent Point

For too long the anti-corruption and human rights movements have been working in parallel rather than tackling the problems of human rights violations and corruption together.⁴⁴⁸ The recognition of the right to corruption-free service as a human right can be a confluent point for both and thereby be a means of integrating the corruption discourse with human rights.

As discussed in chapter two, taking a human rights approach is about empowering groups/individuals that are exposed to particular risks. The human rights framework emphasizes explicitly that vulnerable and disadvantage groups/individuals must be protected from abuse.⁴⁴⁹ It does so by applying cross-cutting principles in particular principles that focus on non-discrimination, participation and accountability that have the effect of empowering people who are disadvantageous. At the same time, the anti-corruption campaign fights corruption as it erodes the moral fabric of the society, violates human rights, retards development and denies societies, particularly the poor, the benefits of free and open competition.⁴⁵⁰

The principle of participation, transparency and accountability as well as the recognition of the pivotal role of the right to information are areas where anti-corruption activists and human rights activists share in common.⁴⁵¹ It has been argued that the struggle to promote human rights and the campaign against corruption share a great deal of common ground. A corrupt government that rejects both transparency and accountability is not likely to respect human rights. Therefore, the campaign to contain corruption and the movement to protect and promote human rights are not disparate processes. They are inextricably linked and interdependent and both the elimination of corruption and the strengthening of human rights require a strong integrity system.⁴⁵²

⁴⁴⁸ Transparency International, *Corruption and Human Rights: Making the Connection*, *op.cit.*, foreword by Cobus de Swardt.

⁴⁴⁹ *ibid.*, p.6.

⁴⁵⁰ See *The Lima Declaration Against Corruption* (1997), adopted on the 8th International Anti-Corruption Conference, held in Lima, Peru, 7-11 September 1997, available at, <<http://www1.transparecy.org/iacc/lima/elimadec1.html>> (accessed 10 March 2011).

⁴⁵¹ Transparency International, *Integrating Human Rights with the Anti-Corruption Agenda: Challenges, Opportunities and Possibilities*, *op.cit.*, foreword by Cobus de Swardt.

⁴⁵² L. Cockcroft, *Corruption and Human Rights: A crucial Link*, Transparency International, available at, <<http://www.transparecy.de/documents/work-papers/index.html>> (accessed 10 March 2011).

Despite these common grounds for the battle, the human rights movement and the anti-corruption campaign did not work in an integral way. When both the human rights movement and the anti-corruption campaign work hand in hand for an integral agenda, the achievements of both movements to tackle human rights violations and pervasive corruption will be strengthened.⁴⁵³ The right to corruption-free service plays a great role in combing the human rights movement with the anti-corruption campaign thereby enhancing the effectiveness of both movements for the common good.

4.2.4 The Right to Corruption-Free Service as a Means

As discussed in chapter two, all forms of corrupt practices in the long run have an impact on human rights. The occurrence of corruption in one or another way violates different set of human rights. Recognizing corruption-free service as a human right besides its speedy response to victims of corruption will be a means for the realization of other rights which can be violated by the acts of corruption. As corruption violates all categories of human rights, it can be argued that the right to corruption-free service is a means for the enforcement of all human rights. Once it is recognized as a human right and once the fight against corruption is set at the center for human rights discourse, it can be argued at least in principle that the right to corruption-free service is instrumental in making other human rights consumable commodities for human beings.

Rights are important political tools that are meant to empower people.⁴⁵⁴ Especially, the right to corruption-free service empowers the vulnerable sections of the society to know, claim, realize and enjoy their human rights rooted in dignity. When an illegal act (corruption) is understood to be a human rights violation, there will be a valuable judicial space for remedying such illegal act. If corruption-free service is recognized as a human right, it will influence public attitudes and there will be more support to campaigns and programs to prevent corruption.⁴⁵⁵ Whenever there

⁴⁵³Transparency International, *'Integrating Human Rights with the Anti-Corruption Agenda: Challenges, Opportunities and Possibilities'*, *op.cit.*, foreword by Cobus de Swardt.

⁴⁵⁴ CR. Kumar, *'Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India'*, *op.cit.*, p. 65.

⁴⁵⁵ Transparency International, *'Integrating Human Rights with the Anti-Corruption Agenda: Challenges, Opportunities and Possibilities'*, *op.cit.*, p.5.

is a public support to the anti-corruption campaign, there will be a likely decrease in the incidents of corruption and thereby open a door for the realization of human rights.

Above all, the most important benefit of recognizing a certain moral claim as a human right is it opens door for civil society organizations and media to protect and promote the right through naming and shaming.⁴⁵⁶ Besides, it would open up several avenues for lawyers, judges, Non Governmental Organizations and parliamentarians to mobilize public opinion.⁴⁵⁷

Even if victims of corruption have a right to claim remedy for the acts of corruption, they may not have a capacity to go through the legal avenues. But the recognition of corruption-free service as a human right can mark a significant change in the position of victims as the principle of public interest litigation is inherent in human rights litigation. Public interest litigation is an important tool to assist the disadvantaged and the marginalized mass.⁴⁵⁸ As corruption causes mass victimization of the people, public interest litigation will be important to bring the claims of the mass to the available legal avenues. So, recognizing the right to corruption-free service as a human right sets the procedural devices of public interest litigation in motion. This in turn has a potential in bringing the rights of victims of corruption to national, regional and international judicial and/or quasi-judicial bodies for the victims quest of effective remedy.⁴⁵⁹ This will ultimately realize the human rights to get effective remedy of all other rights. Besides, as human rights are indivisible and interdependent; the realization of a single right will lead to the realization of others and the violation of a single right will affect the enjoyment of other rights.

Hence, it can be argued that the right to corruption-free service has a potential of reducing the incidents of corruption and empowering the general public. As discussed in chapter two, preventing the incidents of corruption will open a door for the realization of human rights and at the same time guarantying human rights will reduce the incidents of corruption. So, it can be

⁴⁵⁶ For details of the role of civil society and the media for the promotion and protection of human rights see T. Risse and K. Sikkink (eds) (1999), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge University Press, Cambridge.

⁴⁵⁷ O. Ogundoku, *op.cit.*, p.39.

⁴⁵⁸ Forster, M. Christine and J. Vedna (2008), 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience', *Asian Journal of Comparative Law*: Vol. 3: Iss. 1, Article 6.

⁴⁵⁹ For details of the potentials of public interest litigation for human rights litigation see Y. Badwaza (2005), 'Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?', LLM Thesis, Center for Human Rights, Faculty of Law, University of Pretoria.

asserted that the right to corruption-free service is a means for both the realization of human rights and reducing the incidents of corruption.

4.3 Formulation of the Right to Corruption-Free Service

The main proponents for the development of a right to corruption-free service, Kofele-kale and Kumar, though contribute much for the development of the right by examining the corruption discourse with human rights and sometimes with the notion of international crime, but they did not give content to the right to corruption-free service. It is the objective of this thesis to fill the gap by proposing the contents of the right. By so doing, questions like who the beneficiaries are, who the duty bearers are, and what really the contents of the right to corruption-free service are will be addressed.

Like any other human right, the right holders of the right to corruption-free service are human beings. Individual human persons and peoples have an inherent human right to corruption-free service. It is difficult to categorize the right as an individual, group or solidarity right. It is a cross-cutting right- it will be an individual right if the victim of corruption is an individual human person; it will be a group right if the victims are peoples as a collective, for instance if a particular people suffers corruption like the Ogoni people in Nigeria; it will be a solidarity right if the victims are the peoples of the whole nation in the case of grand corruption. So, all human beings individually and collectively are subjects or beneficiaries of the right to corruption-free service.

The right to corruption-free service imposes duties on every one of us. But the anus rests on States as they are duty bound to ensure that this right is respected and protected by others. However, individuals, institutions and States are the principal addressees of the right to corruption-free service.

With regard to its content, the right to corruption-free service confers all human persons and peoples to receive a service free of corruption. Beside, it entitles them a fundamental right to get adequate compensation if they are victims of corruption. Having explained the contents of the right to corruption-free service, the proposal of the right follows.

Proposal on the Right to Corruption-Free Service

Considering that under the provisions of the Universal Declaration of Human Rights every one is free and equal in dignity and rights,

Recalling the provisions of human rights instruments especially the International Covenant on Civil and Political Rights, the International Covenant on economic, Social and Cultural rights, the African Charter on Human and Peoples Rights, the American Convention on Human Rights and of the European Convention on Human Rights,

Recalling further that the United Nations and regional conventions especially the United Nations Convention Against Corruption, the Inter-American Convention Against Corruption, the African Union Convention on Preventing and Combating Corruption and the Council of Europe Civil and Criminal law Conventions on Corruption,

Mindful of the obligations of states under these conventions to promote universal respect and observance of human rights and fundamental freedoms for all with out distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, birth, or other status; and at the same time to prevent and combat corruption which is incompatible with the ideals of human dignity and equality in all its forms,

Emphasizing that corruption represents a major treat to human rights, rule of law and democracy, fairness and social justice, development and the moral fabric of the society,

Recognizing that corruption is a violation of human rights, hinders the proper enforcement and realization of human rights and fundamental freedoms,

Believing that guarantying human rights will reduce the incidents of corruption,

Believing further that there is an imminent need to formulate corruption-free service as a human right,

Confirming that the right to corruption-free service is an inalienable human right rooted in human dignity and equality,

Propose the following:

1. *The right to corruption-free service is an inalienable human right by virtue of which every human person and all peoples are entitled to receive a service free of corruption in which all human rights and fundamental freedoms can be fully realized.*
2. *The right to corruption-free service implies the full realization of the right to economic self-determination, the right to development, the right to equality and non-discrimination; and the exercise of full sovereignty over natural wealth and resources.*
3. *Every human person and all peoples have the right to compensation for the damage they suffer out of corruption.*
4. *All human beings have a responsibility individually and collectively to fight corruption taking in to account the need for respect for their human rights and fundamental freedoms.*
5. *States have the primary responsibility for creating conditions which are necessary for the realization of the right to corruption-free service by eliminating situations which opens door for corruption.*
6. *States shall educate its people that corruption is a violation of human rights, undermines the moral fabric of the society, rule of law and democracy.*
7. *The human person is the subject of the right to corruption-free service and should be active participant in the fight against corruption.*
8. *Individuals, institutions and States shall have a duty to provide a service free of corruption.*
9. *States shall undertake all necessary measures for the realization of the right to corruption-free service and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and others.*
10. *States shall undertake effective measures to empower vulnerable sections of the society such as, women, children, minorities, indigenous persons, persons with disabilities, persons with HIV/AIDS and others.*

4.4 The Monitoring Mechanisms

One needs to be mindful of the inherent weaknesses of any law or legal response if the enforcement mechanism is weak- that would only amount to paying lip service to law.⁴⁶⁰ It is, therefore, not enough to provide for the right to corruption-free service. Its enforcement mechanism must be established and guaranteed.

The proposal here is not creating a new monitoring mechanism but utilize the existing systems by making the proposal on right to corruption-free service a protocol to human rights instruments. Under the international level, the proposal on the right to corruption-free service can be a protocol to the ICCPR. Though it is difficult to categorize the right as civil and political or economic, social and cultural right, but the nature of obligation it imposes and the freedom element it manifests makes it closer to civil and political rights. So, the Human Rights Committee which monitors the implementation of civil and political rights will monitor the right to corruption-free service.

But it is not mandatory to make the proposal on the right to corruption-free service a protocol to the regional human rights systems. If the international implementation of the right is ensured by States parties to the protocol (right to corruption-free service), there may not be a need for a regional protocol. But practice⁴⁶¹ shows that a regional sensitive convention or protocol is essential. If it is the case, this proposal for the right to corruption-free service can be a spring board for adopting a regional sensitive protocol.

However, if a regional sensitive protocol is required, the proposal on the right to corruption-free service can be a protocol to the American Convention on Human Rights under the Inter-American human rights system; and the Inter-American Court of Human Rights and the Inter-American Commission of human Rights will monitor its implementation. Under the African human rights system, it can be a protocol to the African Charter on Human and Peoples Rights; and the African Court on Human and peoples Rights and the African Commission on Human and peoples Rights will monitor it. While under the European human rights system, it can be a

⁴⁶⁰ CR. Kumar (2002), '*Corruption and Human Rights*', Frontline, September 14-27, 2002, available at, <<http://www.flonnet.com/fl1919/19190780.htm>> (accessed 4 April 2011).

⁴⁶¹ Most of the international conventions on human rights such as the ICCPR, ICESCR, CRC, CEDAW and the like have regional counter parts in the Inter-American, European and African human rights systems.

protocol to the European Convention on Human Rights and the European Court of Human Rights will monitor its implementation.

4.5 Conclusion

There are sufficient grounds for the elevation of corruption-free service as a human right. The proposal to the right to corruption-free service rectifies the weaknesses of the anti-corruption conventions for their apparent lack of concern for victims of corruption. It is not only a right in itself but also instrumental for other human rights. The right to corruption-free service has a potential of bringing the anti-corruption campaign with the human rights movement and thereby enhance their effectiveness. It is a right which sets the fight against corruption at the center of human rights discourse. Besides, it is a right without which other important human values and rights lose meaning. What is required is a vibrant civil society which lobbies States, international and regional organizations for the adoption of the proposal on the right to corruption-free service.

Chapter Five: Conclusion and Recommendations

5.1 Conclusion

Corruption has existed over millennia as one of the worst and the most widespread forms of behavior which is incompatible with the ideals of justice, democracy, the moral fabric of the society and human rights. It is widely condemned but yet practiced. Notwithstanding the long history and the apparent spread of the phenomena of corruption in today's society, it is difficult to arrive at a single universally agreed upon definition of corruption. However, it can be described as abusing power or resource for private benefit and it is done with intent to give some advantage inconsistent with official duty and the rights of others. It is a situation where money, arbitrariness and discrimination talks. Understanding the concept of corruption by itself is a complex undertaking as its meaning, causes, forms and consequences are diverse and multi-faceted.

Moreover, corruption is a universal problem offending universal value- human rights. The close examination of the relationship between corruption and human rights reveals that corruption directly, indirectly and remotely violates human rights. It directly violates civil and political rights; economic, social and cultural rights; and environmental and developmental rights. Corruption violates the whole set of human rights and fundamental freedoms of all human beings recognized under various regional and international human rights instruments and thereby hampers the global movement for the realization of human rights. Even though corruption affects all the human family, it hurts more the most vulnerable sections of the society, such as women, children, minorities, indigenous peoples, migrant workers, persons with disabilities, those with HIV/AIDS, refugees, prisoners and those who are poor. However, on the contrary, guarantying human rights in general and ensuring non-discrimination and participation in particular are useful preventive tools for corruption. This is because whenever human rights are respected and guaranteed; there will be social empowerment which creates social accountability. This in turn leads to easily identify and denounce cases of corruption and persons will not commit corruption at least with impunity for fear of public scrutiny.

In spite of the fact that these relationship exists between corruption and human rights, the existing regional and international anti-corruption conventions did not give due consideration for their relationship. The UNCAC and the IACAC did not even make a reference to the impacts of corruption on human rights. But the COE and AU anti-corruption conventions make a clear reference to the human rights impact of corruption. Despite of their reference to human rights, they did not make a substantive provision which gives effect to their reference. The approach adopted by these anti-corruption conventions appear to presume the adequacy and effectiveness of the accountability of institutions and the systems designed to protect human rights on the one hand and on the coincidence of State interest and individual interest in all times on the other hand. However, the assumption is not true for the simple reason that the existence of corruption *per se* shows the weaknesses of the institutional framework designed to protect and defend human rights. Besides, State interest and individual interest may not always coincide. For instance, punishing the offender of corruption and recovering the assets there from may satisfy the interest of the State. But the victims of corruption need to be compensated at the same time.

The measures adopted by these anti-corruption conventions, i.e., prevention, criminalization, asset recovery and international cooperation are essential for the fight against corruption. But, they are weak in giving response to victims of corruption. The UNCAC allotted a single provision for the compensation of victims. However, victims of corruption may not reach the available legal avenues due to their victimization. The Civil Law Convention though innovative in adopting a remedial approach but its narrow scope undermines the overall purpose of remedying victims of corruption. It only covers the acts of bribery. For other acts of corruption, victims can not claim compensation for the damage they suffered. The IACAC and the AU anti-corruption conventions on the other hand have no room for victims of corruption. A human rights approach of fighting corruption apparently lacks from these anti-corruption conventions and thereby the measures adopted are weak in rectifying the human rights impact of corruption. Rather, they adopt a political and economic view point of preventing and combating corruption.

In addition to the common lack of concern for victims of corruption, these anti-corruption conventions are not uniform in their understanding of “acts of corruption”. Besides, many of their substantive and procedural provisions are optional and backed by claw-back clauses. These

creates problem in international cooperation and uniform implementation of these anti-corruption conventions. The UNCAC, IACAC and COE Civil and Criminal Law Conventions did not cover corruption in politics. Above all, the weak design of monitoring mechanism they opted for aggravates the implementation of the conventions on the ground.

Having explored the relationship between corruption and human rights; having also examined the anti-corruption conventions and have found that they did not have a human rights lens of preventing and combating corruption; the study posits corruption-free service as a human right. There are sufficient grounds for the elevation of corruption-free service as a human right. Like the right to life, security and privacy, the right to corruption-free service is rooted in human dignity and equality and thereby an end in itself. The proposal to the right to corruption-free service rectifies the weaknesses of the anti-corruption conventions for their apparent lack of concern for victims of corruption. It is not only a right in itself but also instrumental for other human rights. The right to corruption-free service has a potential of bringing the anti-corruption campaign with the human rights movement and thereby enhance their effectiveness. It is a right which sets the fight against corruption at the center of human rights discourse. Besides, it is a right without which other important human values and rights lose meaning. It is also possible to precisely formulate the contents of the right and its monitoring mechanisms.

Hence, elevating corruption free service as a human right opens the door to existing human rights mechanisms on which to base further action against corruption. Human rights monitoring mechanisms such as international and regional human rights commissions and courts, UN complaint mechanisms or national human rights systems will be useful to remedy corrupt practices if corruption free service is recognized as a human right. Like wise, it opens door for civil society organizations and media to mobilize public opinion on corruption as a violation of human rights and to protect and promote the right to corruption-free service through naming and shaming.

5.2 Recommendations

As the problem of corruption is complex and multi-faceted, its means of preventing and combating strategies should also be diverse. To this effect it is recommended that the fight against corruption should be set at the center of human rights discourse by elevating corruption-free service as a human right as one of the measures against corruption. To this end, the right to corruption-free service must be recognized and be a protocol to the main human rights instruments under regional and international human rights systems where the existing human rights monitoring mechanisms monitor its implementation. The proposal to the right to corruption-free service can be a spring board for the adoption of the right.

In effectively preventing the incidents of corruption, States are recommended to build a human rights culture. To this end, they are required to guarantee human rights and fundamental freedoms, ensure non-discrimination and participation, educate their population about human rights and the negative impact of corruption on human rights, empower the society and create social accountability.

As there is no uniformity in the list of “acts of corruption” by the regional and international anti-corruption conventions, it is recommended that the UNCAC be a mother instrument for the fight against corruption for all States as it has a compressive list of acts of corruption. To this end, all States should ratify the UNCAC. Besides, the approach developed by the AU anti-corruption convention to consider any other acts or practices of corruption and related offences not described in the convention as acts of corruption if it is agreed to this effect by two or more States parties should be internationalized. Hence, it gives a wide scope for acts of corruption and thereby opens a door for the application of anti-corruption conventions for such acts.

The optional clauses of the anti-corruption conventions should be changed to mandatory provisions. In addition, the claw-back clauses should be avoided. Reservations suffice to protect the interests of States Parties. To this end, the anti-corruption conventions must be revisited to include such changes.

The UNCAC, IACAC and COE Civil and Criminal Law Conventions did not cover corruption in politics especially in political party funding. To effectively prevent and combat corruption, it is recommended that these conventions equally deal with corruption in public sector, private sector and politics. To this end, these conventions should be revisited to cover corruption in politics.

The monitoring mechanisms of the anti-corruption conventions should be enhanced and strengthened. To this effect, States Parties should be held accountable for their failure to fulfill their obligations under the conventions. To this end, the monitoring organs should be empowered to find a State party in violation of the conventions and pass sanctions accordingly. Besides, the monitoring organs should be empowered to investigate and denounce acts of corruption.

All these require the rethinking of anti-corruption conventions on the one hand and the elevation of corruption-free service as a human right on the other hand to effectively prevent and combat corruption. To this end, the effective intervention of civil society organizations, international and regional institutions, and the international community is having a paramount importance.

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American Declaration on Human Rights adopted by the ninth international conference of American states, Bogota, Columbia in 1948.

Convention on the Elimination of all forms of Discrimination against Women adopted by General Assembly Resolution A/RES/34/180 of 18 December 1979 and entered in to force on 3 September 1981.

Convention on the Rights of the Child adopted by General Assembly resolution A/RES/44/25/ of 20 November 1989 and entered in to force on 2 September 1990.

European Convention on Human Rights and Fundamental Freedoms adopted on 4 November 1950 in Rome and entered in to force on 3 September 1953.

International Convention on the Elimination of all forms of Racial Discrimination adopted by General Assembly Resolution A/RES/2106/ (XX) of 21 December 1965 and entered in to force on 4 January 1969.

International Covenant on Civil and Political Rights adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976.

International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly on 16 December and entered into force on 3 January 1976.

International Labor Organization's Convention 111 on Discrimination (employment and occupation) adopted on 25 June 1958 in Geneva and entered in to force on 15 June 1960.

United Nations Charter signed on 26 June 1945 in San Francisco and Came into force on 24 October 1945.

Universal Declaration of Human Rights adopted and proclaimed by the General Assembly Resolution 217 A (III) of 10 December 1948.

Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights held in Vienna on 25 June 1993.

B) Anti-Corruption Instruments

Additional Protocol to the Criminal Law Convention on Corruption opened for signature on 15 May 2003 and entered in to force on 1 February 2005.

African Union Convention on preventing and Combating Corruption adopted on 11 July 2003 at the African Union summit in Maputo, Mozambique and entered into force on 5 August 2005.

Council of Europe Civil Law Convention on Corruption adopted at Strasbourg in 1999.

Council of Europe Criminal Law Convention on Corruption adopted at Strasbourg in 1999.

Inter-American Convention against Corruption adopted on 29 March 1996 at Caracas, Venezuela and entered in to force on 3 June 1997 under the framework of Organization of American states.

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