Ndiva Kofele-Kale: Reliance on Article 66 to Combat Corruption by High-ranking Officials is Misplaced

Interviewed by Dibussi Tande

Ndiva Kofele-Kale, Professor of Public International Law at Southern Methodist University in Dallas, Texas, is a leading scholar on the impact of corruption in developing countries. He is also at the forefront of the growing movement to make corruption a human rights violation punishable under international law.

In this interview with Dibussi Tande, Professor Kofele-Kale talks about the anti-corruption drive in Cameroon, and the need to establish international mechanisms for dealing with corruption by high-ranking government officials.

What is your preliminary assessment of the ongoing anti-corruption campaign in Cameroon?

I think the jury is still out and any predictions on the final outcome would be premature. In the end, it may just turn out that the arrests of few top officials will amount to nothing more than a smokescreen or "wool pulled over our eyes," to borrow your phraseology. I hope that I am wrong on this one and pray that subsequent events will prove me wrong given the awfully high stakes involved!

In a recent article in *The Post* newspaper, you proposed a debt-franc swap program as a means of recovering funds embezzled by Cameroonian officials. Can you explain this proposal in lay man's terms?

I will try. Your typical debt-equity swap operates this way: (1) Let's suppose that a US commercial bank loans $200 million to the Cameroon Government, say, in 1982 when the economy was robust, but is now unsure that Government will be able to continue servicing the loan and to eventually repay the principal. Anxious to avoid a possible

default or tedious periodical rescheduling negotiations, the bank decides to sell the debt that it holds at a discount of, say, 50 cents for each dollar to a US investor wishing to make a new investment or expand existing operations in the debtor-country (Cameroon). The $200 million debt is discounted to $100 million; (2) the US investor then purchases the $200 million debt for $100 million ***in cash***; (3) the Cameroon Government then redeems the debt notes by paying the investor an amount, usually less than the face value of the purchased debt, say, $170 million instead of $200 million, but on condition that the funds are invested in Cameroon. (4) if the investor accepts, Government will then pay him in local currency (francs CFA), bonds, assets or state-owned shares in a local enterprise such as SOTUC or CAMAIR. In my proposal, debt owed to the members of the Paris Club, for example, is discounted along the lines just described. On the basis of a *limited amnesty program*, the Odong Ndongs and Siyam Siewes with significant assets stashed abroad will be allowed to purchase the discounted debt notes with the embezzled funds. They can then redeem the debt notes from BEAC or the Ministry of Economy and Finance in CFA francs for investment in local enterprises.

Some have criticized this proposal because it apparently rewards bad behavior …

I take their point. Legal purists will find the use of amnesty in corruption cases offensive because it goes against the goals of deterrence, criminal responsibility, and the removal of guilty officials from positions where they are likely to continue engaging in corrupt practices. I do not believe, however, that criminal prosecutions ***alone*** will resolve the full range of problems spawned by official corruption. Some form of limited or general amnesty will have to be used alongside criminal prosecutions as part of negotiations for the return of embezzled funds. The lessons learnt from 40 years of recovery efforts demonstrate the limitation of conventional legal methods in the war against grand corruption. Given the staggering amounts of national wealth lost annually through corruption, there is urgent need to come up with creative and innovative solutions for recovering and repatriating some, if not all, of these illicit assets. Victim states should not hesitate in exploring non-traditional approaches such as the debt-local currency swap program I have proposed in their recovery efforts. Trade-offs will have to be made

between using scarce resources on prosecutions and punishment which hold out no promise of recapturing embezzled wealth or focusing these limited resources to recover and repatriate the peoples' money. In the final analysis, Cameroonians will have to make this call.

In his January 19th 2006 declaration, the US ambassador to Cameroon was of the opinion that the implementation of Article 66 of the Cameroon constitution (which requires that high-ranking state officials declare their assets at the beginning and end of their tenure) might very well be the solution to endemic corruption in Cameroon. Do you share his optimism?

I have quite a different take on these disclosure obligations. Article 66 is a toothless bull-dog and sooner or later Cameroonians will come to realize that reliance on it is misplaced for several reasons. In the first place, the Article is silent on the scope of disclosure expected: is it only assets owned by the public official directly, or indirectly as well? Does the scope of disclosure require the official to divulge information about assets, including investments, bank accounts, pensions and other intangibles, as well as real property and major items of personal property in Cameroon and in other countries? Who or which agency should these declarations be directed and will an oral deposition suffice? Arguably a new member of government can discharge his public disclosure burden by declaring his assets to a few journalists summoned to his parlor for a 'press conference'!

Article 66 also fails to spell out the penalties, if any, for false or misleading disclosures. The intent behind this type of disclosure requirements is to deter official corruption and to identify and exclude corrupt officials. This objective cannot be attained when provision is not made for penalties for failure to disclose as required, or for making false or misleading disclosure, that are severe enough to act as a significant deterrent. An example of a disclosure requirement with teeth can be found in the 1992 Constitution of Ghana which requires an identified class of public servants to submit to the *Auditor-General* a *written* declaration of all property or assets owned by, or liabilities owed by, him whether directly or indirectly, before taking office, at the end of every four years;

and at the end of his term of office. The provision makes failure to declare or knowingly making false declaration a punishable offence.

Finally, Article 66 provides no mechanisms for verifying these disclosures. Nothing prevents a newly-appointed government minister from declaring assets of 800 million francs CFA that he clearly does not have but which he hopes to fleece from his ministerial budget while in office and then to declare that amount when he is "called to other duties"!

A cursory look at ongoing international attempts at stemming state corruption gives the impression that there is too much focus on the recovery and repatriation of embezzled funds, and very little on establishing national mechanisms for tackling embezzlement before it happens. Shouldn't national preventive mechanisms take precedence over international recovery efforts?

On the contrary. Take a look at the 1996 Inter-American Convention Against Corruption, the 2002 African Union Convention for Preventing and Combating Corruption and the 2004 U.N. Convention Against Corruption; they all contain elaborate provisions for tackling official corruption both at the front-end (prevention and punishment) and at the back-end (assets recovery). Many municipal penal statutes also proscribe the offense of illicit enrichment and some, like the Brazilian statute, go as far back as the 1950's. Prevention and punishment do not have to take priority over recovery and repatriation because they go hand-in-hand. With few qualified exceptions (Singapore, Hong Kong, Mauritius, Botswana, post-Abacha Nigeria) national preventive legislation has not succeeded in stemming the tide of capital flight, especially capital of illicit origin. Therefore, recovery efforts must be engaged to recapture this wealth.

Back to Cameroon's anti-corruption campaign; what in your opinion will constitute a clear indication, if not irrefutable evidence, that this umpteenth anti-corruption drive is for real, and that the Biya regime is finally willing to bring down Cameroon's culture of corruption?

Government needs to take a number of concrete steps to convince a public that has become jaded with so many unfulfilled promises that this it means business. First, there should be more arrests of current and former government ministers who have engaged in the systematic pillaging of national wealth going as far back as the mid-1980's when Mr. Biya announced his policy of rigor and moralization. This should be followed by criminal prosecutions followed by punishment where guilt is established. Second, Government must ratify without further delay the AU and UN anti-corruption instruments and invoke their mutual legal assistance and technical cooperation provisions to secure international assistance to recapture embezzled funds that have been transferred to foreign banks. Here Government should take note that recovery efforts are elusive and time consuming. It has taken 15 years, with the judicial cooperation of several foreign governments, for successive Philippine governments to recover $600 million from the estate of Ferdinand Marcos, and this amount is merely interest earned on the $5 billion which lies in escrow in the Philippines National Bank. An estimated $30 billion in a Swiss bank is still collecting interest beyond the reach of the Philippines authorities. The same is true for the Obasanjo government, whose efforts to recover the estimated $3 billion allegedly stolen by Gen. Sani Abacha succeeded only in bringing in $700 million. And the matter is far from being over as Abacha's family has appealed the August 2004 Swiss decision and has blocked the release of any funds pending the outcome of their appeal.

Finally**,** Government must confront the most difficult of all its problems, that is, the root causes of corruption in our country. Here the President needs to articulate a national strategy to prevent and combat this pestilence. Lessons learned from similar efforts in other corruption-prone countries suggest that this war is a sustained and protracted affair and likely to span successive governments. Winning it requires time, patience and determination; a domain our Government has shown little mastery of.

A common thread in your writings is that corruption by high-ranking government officials is a violation of the fundamental human rights of citizens in developing

countries. What is your response to those who argue that this is pushing the concept of human rights too far because corruption is essentially a non-violent crime?

One could say the same for the right to freedom of thought which is also a non-violent crime. In the event, I do not accept the characterization of grand corruption as a non-violent crime because the violence it wrecks on the economies of victim states as well as their populations is undeniable. When you live in a country where your Government spends less than 2 percent, or a miserly $106 per capita, of the national budget for health service; where 30% of the population is unemployed, 4 of every 10 children under age 5 suffer from malnutrition; where for every 1,000 babies born 101 die at birth, few ever get to visit a doctor since your country can only boast 125 physicians, only 44 percent of the population has access to potable water; and your President criss-crosses the globe in a $30 million state-of-the-art airplane and maintains $700 million in several foreign bank accounts for that rainy day while his ***unemployed*** wife has access to a bank credit card with a $10,000 *daily* spending limit and their adult sons own multimillion mansions in the Cote d'Azur, it would be hard to convince this person that official corruption is a non-violent crime!

Finally, most Cameroonians know you for your groundbreaking analyses of the Cameroon political system, and are totally unfamiliar with the frontline role you've played in the movement to establish international legislation to deal with state corruption. Can you briefly tell us about your work in this area?

We have devoted the last 16 years in trying to make the case a) that the conventional definition of corruption contained in a number of multilateral anti-corruption instruments fails to capture the acts of fraudulent enrichment engaged in by high-ranking constitutionally responsible officials nor does it convey in graphic terms the devastating effects of this conduct on the victim states and their populations, b) that the right to a corruption-free society is a fundamental human right, and c) therefore a breach of this right is should be treated as a crime under the law of nations that entails individual

responsibility and punishment and subject to universal jurisdiction. International and national policy-makers are beginning to pay attention and this has kept me quite busy!

Finally, what do you think the future holds for Cameroon, given the country's current socio-political situation and the "balance of power" between the Biya regime and the divided and weakened opposition? Any reason to be optimistic?

Optimism is fast becoming a rare commodity in our political marketplace. What President Biya is trying to do now is exactly what many Cameroonians had hoped a *successor SDF-led government* would do *when* it accedes to power. Unfortunately, the SDF is itself now mired in its own manure of corruption to make it an unlikely champion of moral probity, incorruptibility, accountability and transparency, now or in the immediate future. So, if the present exercise is simply a ploy to get the IMF, the World Bank and other external partners off the Government's back then we are in for some very rough days ahead!

Ndiva Kofele-Kale, Esq.
Mokunda, Buea

Ndiva Kofele-Kale: Sample Publications on Corruption

Ndiva Kofele-Kale, "Patrimonicide: The International Economic Crime of Spoliation," in *Vanderlbilt Journal of Transnational Law*, 28(1), 1995:45-118.

Ndiva Kofele-Kale, "The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law," 34 *International Lawyer* 149 (2000).

Ndiva Kofele-Kale, "The Outing of Grand Corruption: A Decade of International Law-making to Combat a Threat to Economic and Social Progress," *The Quad*, 56-60 (2004).

Ndiva Kofele-Kale, "The right to a corruption-free society as an individual and collective human right: Elevating official corruption to a crime under international law," in Attanasio, J.B. & J.J.Norton. (Eds). *A new international financial architecture: A viable approach.* British Institute of International and Comparative Law, 2001.

Ndiva Kofele-Kale, 'Good Governance as Political Conditionality: An African Perspective," in Julia Faundez, Mary Footer and Joseph Norton (eds.) *Governance, Development and Globalization* Blackstone Press London 2000.