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# Corruption as a Violation of International Human Rights

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## Abstract

*States perceived to be highly corrupt are at the same time those with a poor human rights record. International institutions have therefore assumed a negative feedback loop between both social harms. They deplore that corruption undermines the enjoyment of human rights and, concomitantly, employ human rights as a normative framework to denounce and combat corruption. But the human rights-based approach has been criticized as vague and over-reaching. Addressing this controversy, this article seeks to examine the legal quality of the assumed 'link' between corruption and human rights more closely. It specifically asks the dual question whether and under what conditions corrupt acts or omissions can technically be qualified as an actual violation of international human rights (doctrinal analysis of the positive law) and whether corruption should be conceptualized as a human rights violation (normative assessment). The answer is that such a reconceptualization is legally sound as a matter of positive analysis, although very difficult doctrinal problems arise. The normative assessment is ambivalent, but the practical benefits of the conceptualization seem to outweigh the risks of reinforcing the anti-Western scepticism towards the fight against corruption and of overblowing human rights. The framing of corruption not only as a human rights issue but even as a potential human rights violation can contribute to closing the implementation gap of the international anti-corruption instruments and can usefully complement the predominant criminal law-based approach.*

## 1 Statement of the Problem

Corruption is high on the human rights and development docket. The UN General Assembly's Agenda 2030 for sustainable development of 2015 asks all states to 'substantially reduce corruption and bribery in all their forms' and to return all stolen assets by 2030.<sup>1</sup> In their official contributions to this Agenda, the Human

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<sup>1</sup> Transforming Our World: The 2030 Agenda for Sustainable Development, GA Res. 70/1, 25 September 2015, Points 16.4, 16.5.

Rights Treaty Bodies have ‘identified mismanagement of resources and corruption as obstacles to the allocation of resources to promote equal rights’.<sup>2</sup> In fact, countries with high rates of corruption are the ones with a poor human rights record.<sup>3</sup> For instance, the states ranked lowest on Transparency International’s Corruption Perceptions Index of 2017 are Syria, South Sudan and Somalia, all of which have massive human rights problems.<sup>4</sup>

Against this background, both practice and scholarship have pursued a ‘human rights-based’ approach to corruption.<sup>5</sup> The key documents of the United Nations (UN) ground this approach on the assertion that corruption has a ‘negative impact’ on the enjoyment of human rights,<sup>6</sup> that corruption ‘undermines’ human rights,<sup>7</sup> that it has a ‘grave and devastating effect’ on the enjoyment of human rights,<sup>8</sup> that ‘[c]orruption in government, institutions and society at large is a significant obstacle to the enjoyment’ of human rights<sup>9</sup> and that violations of human rights covenant rights are ‘facilitated where insufficient safeguards exist to address corruption of public officials

<sup>2</sup> Human Rights Treaty Bodies, Contributions to the 2030 Agenda for Sustainable Development, May 2016, at 7.

<sup>3</sup> For a statistical analysis, see T. Landman and C.J.W. Schudel, Corruption and Human Rights, Empirical Relationships and Policy Advice, Working Paper (2007), controlling for other explanatory variables (democratic level, prosperity, population size, and government spending ratio). There are of course numerous human rights violations that have little or nothing to do with corruption, such as discrimination against women. Conversely, there are forms of corruption that have few, if any, direct links to human rights, such as illegal funding of political parties.

<sup>4</sup> For the human rights situation, see Amnesty International Report 2016/17 (2017).

<sup>5</sup> Pearson, ‘An International Human Rights Approach to Corruption’, in P. Larmour and N. Wolanin (eds), *Corruption and Anti-Corruption* (2001) 30. See also, fundamentally, International Council on Human Rights Policy and Transparency International (prepared by Magdalena Sepúlveda Carmona), *Corruption and Human Rights: Making the Connection* (2009); M. Boersma and H. Nelen (eds), *Corruption and Human Rights: Interdisciplinary Perspectives* (2010); M. Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (2012); K. Olaniyan, *Corruption and Human Rights Law in Africa* (2014).

<sup>6</sup> United Nations General Assembly (UNGA), Preventing and Combating Corrupt Practices and the Transfer of Proceeds of Corruption, Facilitating Asset Recovery and Returning Such Assets to Legitimate Owners, in Particular to Countries of Origin, in Accordance with the United Nations Convention against Corruption, Doc. A/RES/69/199, 5 February 2015, preamble; Human Rights Council, Best Practices to Counter the Negative Impact of Corruption on the Enjoyment of All Human Rights, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/32/22, 15 April 2016; Human Rights Council, The Negative Impact of Corruption on the Enjoyment of Human Rights, Res. 29/11, 2 July 2015; Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights, UN Doc. A/HRC/28/73, 5 January 2015, especially para. 21; Navi Pillay, High Commissioner for Human Rights, Opening Statement of the Panel on the Negative Impact of Corruption on Human Rights, 13 March 2013, at 8–10.

<sup>7</sup> UN Human Rights Commission, Sub-Commission on the Promotion and Protection of Human Rights, Resolution E/CN.4/Sub.2/2005/L.24/Rev.1, 5 August 2005, second preambular paragraph: ‘Deeply concerned that the enjoyment of human rights, be they economic, social and cultural or civil and political, is seriously undermined by the phenomenon of corruption’ (emphasis added).

<sup>8</sup> UN Human Rights Commission, Progress Report Submitted by the Special Rapporteur, UN Doc. E/CN.4/Sub.2/2005/18, 22 June 2005, para. 41.

<sup>9</sup> Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Report on Health), UN Doc. GA 72/137, 14 July 2017, para. 2 and summary.

or private-to-private corruption'.<sup>10</sup> Concomitantly, it is asserted that the human rights lens 'provides a valuable normative framework' to address corruption.<sup>11</sup> This assertion by the UN human rights institutions has been questioned, and the human rights-based approach has been criticized for its 'lack of conceptual clarity'.<sup>12</sup>

Addressing this controversy, this article seeks to examine the legal quality of the assumed 'link' between corruption and human rights, the exact legal consequences of a human rights-based approach, its added value and its drawbacks. Importantly, we need to distinguish the vague idea of a 'link' between corruption and human rights from the sharper legal claim that under certain conditions a corrupt act (or the toleration of corruption) itself may constitute an actual violation of human rights.<sup>13</sup> I will investigate this latter claim through a positive and a normative analysis.<sup>14</sup> The doctrinal question of positive law is: Can corrupt conduct be properly conceptualized as a violation of international human rights (part 2)? The normative question is: Should corrupt acts be conceptualized as human rights violations? My answer is that such a reconceptualization is legally sound as a matter of positive analysis, although very difficult doctrinal problems arise. The normative assessment is ambivalent, but, with all caution, I would say that practical benefits of the conceptualization outweigh the risk of reinforcing the anti-Western scepticism towards the fight against corruption (part 3). Part 4 examines the remedies against corruption-based human rights violations in the form of monitoring and enforcement. Part 5 concludes that the re-conceptualization of corruption not only as a human right issue but also as a potential human rights violation can contribute to closing the implementation gap of the international anti-corruption instruments but that expectations should not be overdrawn.

The proposal to infuse corruption with human rights aspects responds to the moderate success of the existing international anti-corruption instruments – at least 10

<sup>10</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment no. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, 23 June 2017, para. 18.

<sup>11</sup> Report on Health, *supra* note 9, para. 4 (with regard to the right to health).

<sup>12</sup> Rose, 'The Limitations of a Human Rights Approach to Corruption', 65 *International and Comparative Law Quarterly* (2016) 405, at 417.

<sup>13</sup> On this distinction, section 2.D below.

<sup>14</sup> Two other links between corruption and human rights are not dealt with in this article. First, the effective protection of (some) human rights (especially freedom of access to information and freedom of the press) is indispensable for combating corruption. Numerous human rights complaints concern the murder, forced disappearance and lack of governmental protection of journalists who have investigated and publicly denounced corruption (see, e.g., Inter-American Human Rights Commission, *Irma Flaquer v. Guatemala*, Friendly Settlement, Petition 11.766, Report no. 67/03, 10 October 2003; see also the Special Rapporteur Michel Forst, Report on the Situation of Human Rights Defenders, Doc. A/70/217, 30 July 2015, paras 69–70 (on 'defenders combating corruption and impunity'); Special Rapporteur Mr. David Kaye, Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Doc. A/70/361, 8 September 2015, s. A on legal protection of whistle-blowers. Another link is that anti-corruption measures may themselves violate human rights – namely, the violation of the presumption of innocence, especially in the implementation of Art. 20 of the UNCAC, *infra* note 17; violation of the right to a private life through the use of liaisons and surveillance; damage to reputation through disclosures in the media and violations of property through seizures and asset recovery. See R. Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law* (2014).

international and regional treaties with various additional protocols as well as soft law.<sup>15</sup> Their emergence in the 1990s, in turn, was a reaction to the globalization of corruption itself, to the insight that instances of grand corruption, in particular, had inevitably acquired transboundary elements. The USA championed a treaty to criminalize foreign bribery and succeeded in persuading a large number of states within the Organisation for Economic Co-operation and Development (OECD) to adopt an Anti-Bribery Convention in 1997.<sup>16</sup> The primary goal at the time was to eliminate the unfair competitive advantages of companies paying bribes in the new markets, especially of Eastern Europe. In 2003, the UN Convention against Corruption (UNCAC) was adopted, and, in September 2018, it counted 186 state parties.<sup>17</sup>

A leading authority on corruption mentions the following goals of international anti-corruption policy: first, to improve the functioning of the global markets; second, to promote economic growth; third, to reduce poverty and, fourth, to safeguard the legitimacy of the state.<sup>18</sup> Anti-corruption has largely been merged with the good governance agenda<sup>19</sup> and the development discourse. And because good governance, as well as development, is in turn nowadays often analysed through a human rights lens, this type of analysis suggests itself for anti-corruption too.

## 2 Can Corruption Be Conceptualized as a Human Rights Violation?

### A Defining Corruption

Corruption is not a technical term; it is typically not considered a criminal offence in criminal codes around the world, and it also does not have a legal definition in international treaties. The most common definition is the one by the non-governmental organization (NGO) Transparency International, according to which corruption is the abuse of entrusted power for private gain. Such abuse may happen on the level of day-to-day administration and public service (petty corruption) or on the high level

<sup>15</sup> See J.B. Terracino, *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (2012); J. Wouters, C. Ryngaert and A.S. Cloots, 'The International Legal Framework against Corruption: Achievements and Challenges', 14 *Melbourne Journal of International Law* (2013) 209; C. Rose, *International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems* (2015).

<sup>16</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, 2802 UNTS 225 (entered into force 15 February 1999; 44 parties as of September 2018).

<sup>17</sup> United Nations Convention against Corruption (UNCAC) 2003, 2349 UNTS 41.

<sup>18</sup> See Rose-Ackerman, 'Introduction: The Role of International Actors in Fighting Corruption', in S. Rose-Ackerman and P. Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (2013) 3, at 5. See also the preamble of UNCAC, *supra* note 17, first preambular paragraph.

<sup>19</sup> See, e.g., Human Rights Council, The Role of Good Governance in the Promotion and Protection of Human Rights, UN Doc. A/HRC/RES/7/11, 27 March 2008, para. 4: 'Decides to continue its consideration of the question of the role of good governance, including the issue of the fight against corruption in the promotion and protection of human rights.' See also UN Development Programme, Oslo Governance Centre, *The Impact of Corruption on the Human Rights Based Approach to Development* (2004).

of political office (grand corruption). These terms do not mark a legal distinction but merely describe variations of the same theme. Often, a particular scheme of corruption permeates the various levels of public administration and thus links both forms of corruption. Because of the growing power of large corporations and non-state actors such as the Fédération Internationale de Football Association (FIFA), the abuse of obligations arising from private law, in a private law-based principal–agent relationship, is also increasingly qualified as corruption. The relevant criminal offences are active and passive bribery, criminal breach of trust, graft, illicit enrichment, and so on. In the private sector, offences are called ‘private-to-private bribery’ or ‘commercial bribery’ and may include anti-competitive practices and regulatory offences.

## B Whose Human Rights?

Traditionally, bribery – the prototypical form of corruption – has been considered a ‘victimless crime’.<sup>20</sup> According to legal doctrine, the injured party is first of all the public. Can the bribe giver be considered a victim too? This does not seem to be the case where the victim takes the initiative to bribe and/or then blackmails the receiver. However, the briber may be victimized in many constellations of corruption. If the graduate of a public school has to pay the secretary a bribe to receive her diploma, or if she has to pay for additional private lessons from a teacher who indicates that she will not pass the examination otherwise, then she is a victim – not a perpetrator – at least in terms of human rights. Her consent to the illegal *quid pro quo* is the result of a desperate situation; the consent of the student (or of her parents) is not ‘free’ but, rather, is coerced.

In public procurement, the unsuccessful competitors are the potential victims if they are not awarded the contract due to extraneous criteria, at least if they have a concrete expectancy to the contract and not merely abstract prospects. Clients and end users are often also adversely affected by corruption in public procurement if they have to pay higher prices or if they receive a product that is not worth the money because funds have been diverted during the production process. From the perspective of social human rights whose proper fulfilment comprises the element of ‘affordability’ (such as the affordability of essential medicine as a component of the human right to health), the fact that bribery in procurement processes may make medicine more expensive could be seen as a human rights violation.<sup>21</sup> Related questions are how corruption may affect the property and investor rights of the successful bidders. The assessment will differ depending on whether the bidder has won the tender through corruption or whether his investment has been tampered with later by corrupt acts of the host state. These questions will be discussed in section 3.C below.

In the political process, voters are adversely affected by candidates’ financial dependence on major donors if the candidates are politically indebted to the donors

<sup>20</sup> Korte, ‘Commentary on § 331’, in W. Joecks and K. Miebach (eds), *Münchener Kommentar zum StGB* (2nd edn, 2014) § 331, para. 12.

<sup>21</sup> Cf. Report on Health, *supra* note 9, para. 33.

after the election and if voters are unaware of those vested interests. Overall, the examples show that human rights of various types of persons in manifold social settings might be concerned by corruption. The key question then is whether persons who are affected directly or indirectly are sufficiently individualized to be qualified as 'victims', and that question must be examined in each scenario and cannot be answered in the abstract.

### C Which Human Rights?

The next question is which human rights are involved. This question is important because the idea here is not to propagate any (new) human right to a corruption-free society.<sup>22</sup> Such a right is neither acknowledged by legal practice nor is there a need for it. Rather, corruption affects the recognized international human rights as they have been codified by the UN human rights covenants. In practice, social rights are most affected, especially by petty corruption. For example, corruption in the health sector affects the right of everyone to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights [ICESCR]); in the education sector, the right to education (Article 13 of the ICESCR) is at issue.<sup>23</sup>

Liberal human rights may also be undermined by corruption; if a prisoner has to give the guard something in return for a blanket or better food, then the prisoner's basic right to humane conditions of detention (Article 10 of the International Covenant on Civil and Political Rights [ICCPR]) is affected.<sup>24</sup> If, as most observers tend to think, the current surge in human trafficking is made possible and facilitated primarily by corruption that induces police and border guards to look the other way, then this affects the human right to protection from slavery and servitude (Article 8 of the ICCPR).<sup>25</sup> Obviously, corruption in the administration of justice endangers the basic rights to judicial protection, including the right to a fair trial without undue delay (Article 14

<sup>22</sup> But see 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* (2000) 149; Spalding, 'Corruption, Corporations and the New Human Right', 91 *Washington University Law Review* (WULR) (2014) 1365.

<sup>23</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, 993 UNTS 3.

<sup>24</sup> For a recommendation on corruption in prisons affecting prisoners' rights, see Human Rights Committee, Concluding Observations on the Second Periodic Report of Cambodia, Doc. CCPR/C/KHM/CO/2, 27 April 2015, para. 14. International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.

<sup>25</sup> See ECtHR, *Rantsev v. Cyprus and Russia*, Appl. no. 25965/04, Judgment of 7 January 2010. The complainant's daughter had moved from Russia to Cyprus to work in a cabaret as an 'artiste' and then died there in mysterious circumstances. The Court found a violation of the right to life (Art. 2 of the ECHR), in its procedural limb. The Court explicitly stated that 'the authorities were under an obligation to investigate whether there was any indication of corruption within the police force in respect of the events leading to Ms. Rantseva's death' (para. 238; emphasis added).

of the ICCPR).<sup>26</sup> Or the human right of association and the (labour) right to organize (Article 22 of the ICCPR and relevant International Labour Organization [ILO] conventions) may be affected by bribes offered by industry to the officials of a ministry of labour in order to facilitate the resignation of a union leader, as a labour complaint in Indonesia alleged.<sup>27</sup> In other cases of grand corruption and foreign bribery, however, the implications for human rights – such as the effect of nepotism on the right to equal access to public offices (Article 25(c) of the ICCPR) – are less clear.

## D Violations?

The next question is whether it makes sense to speak of human rights violations. Only a few reports and governmental statements do so.<sup>28</sup> In the predominant practice of the UN, only weaker vocabulary is used to make the connection, both in the strategic documents – such as the new reports of the Human Rights Council – and in the country-, issue-, or individual case-specific monitoring practice of the Treaty Bodies and the UN Charter-based Human Rights Council.<sup>29</sup>

Typical for the prevailing approach is a 2010 judgment by the Economic Community of West African States (ECOWAS) Court of Justice in a proceeding instituted by a NGO on

<sup>26</sup> On corruption in the judiciary, see G. Knaul, Special Rapporteur on the Independence of Judges and Lawyers, Report of the Judicial Accountability, UN Doc. A/HRC/26/32, 28 April 2014; International Commission of Jurists, *Judicial Accountability: International Standards on Accountability Mechanisms for Judicial Corruption and Judicial Involvement in Human Rights Violations*, Practitioners Guide no. 13 (2016). For recent pertinent concluding observations of the treaty bodies, see Human Rights Committee, Benin, Doc. CCPR/C/BEN/CO/2, 23 November 2015, paras 28–29; Human Rights Committee, Côte d'Ivoire, Doc. CCPR/C/CIV/CO/1, 28 April 2015, para. 20; Committee on Economic, Social and Cultural Rights, Italy, Doc. E/C.12/ITA/CO/5, 28 October 2015, paras 10–11; Committee on the Elimination of Discrimination against Women, Liberia, Doc. CEDAW/C/CO/17–8, 24 November 2015, paras 15–16; Committee on the Elimination of Discrimination against Women, Madagascar, Doc. CEDAW/C/MDG/CO/6–7, 24 November 2015, paras 8–10.

<sup>27</sup> The International Labour Organization's (ILO) Committee on Freedom of Association requested both the complainant and the government to provide further clarifications on the allegation of bribery. ILO Committee on Freedom of Association, Case no. 2116: *International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations v. Indonesia*, interim report, 23 February 2001, paras 359, 362, lit. d.

<sup>28</sup> For a determination of 'violations', see UN Secretary-General Kofi Annan, Foreword to the UNCAC, *supra* note 17: 'Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish' (emphasis added); UN Human Rights Commission, *Corruption and Its Impact on the Full Enjoyment of Human Rights*, in particular, Economic, Social and Cultural Rights, Preliminary Report of the Special Rapporteur, Ms. Christy Mbonu, UN Doc. E/CN.4/Sub.2/2004/23, 7 July 2004, para. 57: '[C]orruption, whether systemic, endemic or petty, violates citizens' enjoyment of all the rights contained in all the international instruments' (emphasis added); UN Human Rights Commission, Progress Report Submitted by the Special Rapporteur, UN Doc. E/CN.4/Sub.2/2005/18, 22 June 2005, para. 24: 'A fundamental right is violated if, due to poverty, vote-buying by political parties denies the electorate from voting for the best candidates' (emphasis added). Human Rights Council, Best Practices, *supra* note 6, statement of Bahrain, para. 15; statement of Estonia, para. 25; statement of Georgia, para. 31; statement of Mauritius, para. 50; statement of Romania, para. 66.

<sup>29</sup> See notes 6–11 above with accompanying text.

corruption in the education sector of Nigeria. The Court stated that corruption in the education sector has a ‘negative impact’ on the human right to quality education, as guaranteed by Article 17 of the African Charter of Human and People’s Rights but does not *per se* constitute a violation of that right.<sup>30</sup> The Court viewed corruption, first of all, as a matter of domestic criminal and civil law, but not of international human rights law, and with which the domestic courts should deal. Corruption does not (or not in the first place) fall within the jurisdiction of the regional human rights court of ECOWAS, the Court said.<sup>31</sup>

In contrast, those domestic courts that have significantly shaped the legal contours of social human rights – namely, the Indian and South African constitutional courts – tend to assert, rather than explain properly, that and how corruption violates human rights. For instance, the Constitutional Court of South Africa held that ‘[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms’.<sup>32</sup> In a 2012 judgment, the Supreme Court of India held that ‘[c]orruption ... undermines human rights, indirectly violating them’ and that ‘systematic corruption is a human rights’ violation in itself’.<sup>33</sup> From a legal standpoint, it is crucial whether a situation is qualified as merely ‘undermining’ human rights – for example, in a general monitoring report – or whether it constitutes a true rights violation that could be declared unlawful in individualized enforcement proceedings (see section 4 below).

## E Which State Obligations?

In order to determine whether there is a violation of human rights through corrupt state action, we have to examine the three kinds of obligations – namely, the obligations to respect, protect, and fulfil human rights. The obligation to respect is essentially a negative obligation to refrain from infringements. The obligation to protect primarily refers to protection from dangers emanating from third parties. The obligation to fulfil requires positive action by the state. The UN Committee on Economic, Social and Cultural Rights divides the latter obligation into the three subcategories of facilitate, provide, and promote.<sup>34</sup>

<sup>30</sup> ECOWAS Community Court, *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, Doc. ECW/CCJ/JUD/07/10, 30 November 2010, paras 19, 28. African Charter on Human and Peoples’ Rights 1981, 1520 UNTS 217.

<sup>31</sup> *SERAP*, *supra* note 30, paras 20–21, 24.

<sup>32</sup> Constitutional Court of South Africa CCT 27/00, *South African Association of Personal Injury Lawyers v. Health and Others*, [2000] ZACC 22, 28 November 2000, para. 4; see also Constitutional Court of South Africa, *Hugh Glenister v. President of the Republic of South Africa and Others* CCT 48/10, [2011] ZACC 6, 17 March 2011, para. 176: ‘Endemic corruption threatens the injunction that government must be accountable, responsive and open’ and ‘It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy’ (para. 177).

<sup>33</sup> Criminal Appeal no. 1648, *State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar*, 15 October 2012, [2012] 9 SCR 601, at 602, para. 14.

<sup>34</sup> This threefold division was introduced for the first time in CESCR, General Comment no. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (2000), para. 37.

Next, we have to clarify exactly to which actor the obligations are attached. We must distinguish two points of contact in this regard: first, the specific corrupt conduct of an individual official that is attributed to the state due to the official's status and, second, the general anti-corruption policy of the state as a whole as an international legal person. A corrupt act by an individual official may, depending on the context and the human right in question, potentially violate each of the mentioned dimensions of obligation. If, in the context of the implementation of a land-use plan, an official forcibly evacuates people who do not pay a bribe, then this may violate the right to housing (Article 11 of the ICESCR) in the negative dimension of the obligation to respect. If, for instance, the employee of a registration office refuses to hand over a passport without an additional bribe, then the right to leave the country (Article 12(2) of the ICCPR) may be violated in the positive dimension of the state obligation to facilitate.

### 1 *Obligations of the State to Protect*

In the following discussion, I will focus on the macro-level – on the state as a whole (not on individual officials). How must the lack of effective anti-corruption measures be qualified? The deficient implementation, application, and enforcement of effective anti-corruption measures essentially constitute an omission by the state. Because human rights give rise to the above-mentioned obligations to become active, omissions may violate human rights.<sup>35</sup> Concomitantly, effective anti-corruption measures may be considered a way to comply with one of the three facets of the positive obligation to fulfil (facilitate, provide, promote).

More relevant than the obligations to fulfil, however, are the facets of the obligation to protect human rights. In principle, these protective obligations are addressed to all three branches of government. They obligate the legislative power to enact effective laws, the executive power to undertake effective administrative measures, and the judicial power to engage in effective legal prosecution. The case law of the international bodies is not entirely clear in answering the question of whether obligations to protect – especially, the obligations to amend laws for closing legal gaps or to prosecute – are mirrored by individual rights of the victims.<sup>36</sup> The obligation to protect was developed in regard to dangers emanating from third parties, such as economic operators. The obligation to protect is thus suitable to provide additional human rights support for the criminalization of foreign bribery demanded by the OECD's Anti-Bribery

<sup>35</sup> For social human rights, see Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights (1997), reprinted in 20 *Human Rights Quarterly (HRQ)* (1998) 691, para. 11. For the right to education, see, e.g., CESCR, General Comment no. 13: The Right to Education (Art. 13) (1999), para. 58. See also the first communication under the individual complaints procedure. Social Committee of the ICESCR, *I.D.G. v. Spain*, Communication 2/2014, 17 June 2015, para. 12.4 (the inadequate notification by the state of the imminent execution of a mortgage (hence, an omission) implies a violation of the right to housing, as guaranteed by Art. 11(1) of the ICESCR).

<sup>36</sup> See A. Peters, *Beyond Human Rights* (2016), at 267–269. In the area of social rights, it has not been necessary to distinguish 'objective' state duties from 'subjective' rights to state action until entry into force of the Optional Protocol of the ICESCR, *infra* note 105, providing for individual communications, because social rights were until then not (quasi-)justiciable (on an individual basis).

Convention.<sup>37</sup> State obligations to protect in regard to the activities of transnational corporations, grounded in human rights, are set out in the soft law of the 2011 UN Guiding Principles of Business and Human Rights.<sup>38</sup>

The obligation to protect under human rights law not only requires the state to protect individuals from the acts of other private persons but also reduces structural human rights risks in which the state's own officials are involved. For instance, in the case of police violence contrary to human rights, the European Court of Human Rights (ECtHR) demands that the state investigate and prosecute after such incidents.<sup>39</sup> Rampant corruption constitutes a permanent structural danger to numerous human rights of persons subject to the power of officials. Therefore, in cases involving the complete inaction of the state or evidently deficient anti-corruption measures, the state is responsible under international law for its failure to discharge its human rights obligations to prevent and protect.<sup>40</sup>

The acknowledgement of the human rights obligations would significantly strengthen the specific preventive obligations under anti-corruption law. Chapter 2 of the UNCAC requires the states parties to adopt a series of preventive measures, ranging from the establishment of an anti-corruption body and the reorganization of public service to the enactment of codes of conduct for public officials, the reorganization of public procurement and the prevention of money laundering. From the perspective of general international law, these are obligations to prevent. Because the formulation of the UNCAC obligations is rather soft, it is hardly possible to hold a state party internationally responsible if it fails to fulfil its obligations or does so only poorly. But if we interpret the UNCAC obligations in conformity with human rights law (Article 31(3)(c) of the Vienna Convention on the Law of Treaties),<sup>41</sup> it becomes apparent that the measures mentioned here must in fact be taken in an effective way in order to fulfil the obligations to protect and to fulfil (including to prevent) grounded in human rights law.<sup>42</sup>

<sup>37</sup> Foreign bribery is the bribery of foreign public officials by a company subject to the jurisdiction of a state party. Anti-Bribery Convention, *supra* note 16, Arts 1, 4.

<sup>38</sup> UN Guiding Principles on Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31, 21 March 2011, which were adopted by the UN Human Rights Council, UN Doc. A/HRC/RES/17/4, 6 July 2011.

<sup>39</sup> ECtHR, *McCann and Others v. United Kingdom*, Appl. no. 18984/91, Judgment of 27 September 1995, paras 157ff; ECtHR, *Silih v. Slovenia*, Appl. no. 71463/01, Judgment of 9 April 2009, paras 192ff. For the obligation to institute criminal proceedings, see ECtHR, *Maiorano and Others v. Italy*, Appl. no. 28634/06, Judgment of 15 December 2009, para. 128.

<sup>40</sup> *Glenister*, *supra* note 32, para. 177: 'The state's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms.' In the literature, see Sepúlveda Carmona and Bacio Terracino, 'Corruption and Human Rights: Making the Connection', in Boersma and Nelen, *supra* note 5, 25, at 27.

<sup>41</sup> Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

<sup>42</sup> See ECOWAS Court, *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*, Judgment of 14 December 2012, para. 32: '[T]he ... obligation required from the State to satisfy such rights is the exercise of its authority to prevent powerful entities from precluding the most vulnerable from enjoying the right granted to them' (emphasis added). At issue in this judgment was the violation of social human rights by oil prospecting companies.

## 2 Procedural and Result-Independent Obligations

Cutting across the three dimensions of human rights obligations, procedural obligations arise from all the types of human rights. In the case law of the ECtHR, these constitute the 'procedural limb' of the rights under the ECHR. Within the scope of social human rights, they are referred to as 'process requirements'.<sup>43</sup> Here, one of their functions is to serve as an indicator for the fulfilment of the progressive obligation to implement, which is very difficult to measure. Procedural elements are also central to combating corruption. The human rights process requirements that are most relevant here most likely include planning obligations<sup>44</sup> and monitoring obligations.<sup>45</sup> Transparency obligations are especially important. Not coincidentally, the best-known anti-corruption NGO in the world is called Transparency International. Transparency is also a fundamental principle of the UNCAC.<sup>46</sup> Accordingly, the procedural obligations under the UNCAC, especially the disclosure and publication requirements, which can be an effective way to curtail corruption, are equally grounded in human rights.<sup>47</sup> Viewed in this light, failure to satisfy these obligations simultaneously constitutes a violation of the relevant human rights. A follow-up question is whether a corrupt state violates its obligations of protection and its procedural obligations only when and if individual acts of corruption are (or continue to be) in fact committed. In the context of the international obligations to prevent, it depends in principle on the specific primary obligation whether 'prevent' means that a state must in fact avert the undesirable result or whether the state is merely obligated to employ all reasonable and appropriate means in the sense of a due diligence obligation that is independent of the result.<sup>48</sup>

The anti-corruption obligations under human rights law mentioned above are best understood as result-independent due diligence obligations. This both corresponds to general human rights law<sup>49</sup> and establishes a parallelism to criminal law. Bribery and other offences that we summarize under the umbrella of corruption are, generally

<sup>43</sup> See Alston and Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *HRQ* (1987) 156, at 180 (regarding the determination of whether 'the maximum of available resources' was used).

<sup>44</sup> See CESCR, General Comment no. 1: Reporting by States Parties (1989), para. 4; Constitutional Court of South Africa CCT11/00, *Government of the Republic of South Africa and Others v. Grootboom and Others*, [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (4 October 2000), paras 39ff (on a 'co-ordinated state housing programme').

<sup>45</sup> See CESCR, General Comment no. 3: The Nature of States Parties' Obligations (Art. 2, Para.1) (1990), para. 11; Maastricht Guidelines, *supra* note 35, para. 15(f).

<sup>46</sup> See, e.g., UNCAC, *supra* note 17, Arts 5, 7, 9, 10, 12, 13. See also OECD Guidelines for Multinational Enterprises (2011), s. VII: Combating Bribery, Bribe Solicitation and Extortion, para. 5: 'Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion.'

<sup>47</sup> See, e.g., CESCR, General Comment no. 12: The Right to Adequate Food (Art. 11) (1999), para. 23 (on transparency as a guiding principle for the formulation and implementation of national strategies for the right to food).

<sup>48</sup> See J. Crawford, *State Responsibility: The General Part* (2013), at 227.

<sup>49</sup> See seminal on due diligence obligations of the state as part of the state's overall obligation to protect human rights. IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Ser. C, No. 4), 29 July 1988, para. 172.

speaking, ‘endangerment offences’. This means that they criminalize conduct that endangers legally protected interests even if that conduct does not produce a specific harmful consequence. This is appropriate to the legal good that was traditionally the only one protected by the criminalization of corruption – namely, the integrity of the public service, because it is usually impossible to determine whether a tangible harm has in fact occurred. If the bribing of a public official does not entail that the briber is granted a doctor’s appointment faster than without the bribe, or if a briber does not receive a building permit exceeding the official’s normal discretion, then the bribes would, in a non-technical sense, be ‘unsuccessful’. Nevertheless, the trust in the public service has been undermined, and, for this reason, the unlawful agreement should be punished as bribery. In the courts, this rationale is referred to as follows: ‘Justice should not only be done, but should manifestly and undoubtedly be seen to be done.’<sup>50</sup> The situation here is different than for the obligation to prevent genocide, for example. In that case, the International Court of Justice (ICJ) held that ‘a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed’.<sup>51</sup> This difference in assessment is justified because genocide is a result offence in terms of criminal law, as opposed to an endangerment offence.

Conversely, the obligation (also under human rights law) to combat corruption, as follows, for instance, from the UNCAC, does not require states to stop corruption entirely. The satisfaction of such a ‘negative’ obligation of result (and the measurement of such a result) would be impossible, given that the realization of a low level of systematic corruption is not a one-time success. It is, in contrast, easy to determine that a genocide, for instance, has not been committed. Consequently, this means that a state already violates its preventive and other procedural obligations under both anti-corruption law and human rights law if it fails to act, even if the level of corruption is low despite the laxity of the state. Conversely, a state is released from international responsibility if it takes reasonable protective measures, even if the state is not entirely ‘clean’.

### ***F Corruption as a Violation of the Fundamental Obligations Set Out in Article 2(1) of the ICESCR***

Under certain circumstances, corruption (both petty and grand) must notably be considered a violation of the ICESCR. As mentioned above, corruption – for example, in the police force and the judiciary – also affects human rights enshrined in the ICCPR. But this section concentrates on the ICESCR because the legal determination of a violation of this covenant is particularly challenging. Article 2(1) of the ICESCR, which sets out the fundamental obligations of the states parties, contains four components that are subject to monitoring by the treaty body, the Committee on Economic, Social and

<sup>50</sup> *The King v. Sussex Justices, ex parte McCarthy*, 1 KB 256–260, at 259 (9 November 1923), Lord Hewart CJ; cited without source in ECtHR, *Delcourt v. Belgium*, Appl. no. 2689/65, Judgment of 17 January 1970, para. 31.

<sup>51</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Bosnian Genocide)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, para. 431.

Cultural Rights (CESCR). Each component is a starting point for specific state obligations, including in the field of anti-corruption. Each of these obligations may become difficult or impossible to fulfil in the circumstances of grand or petty corruption.

The first element – the core obligation – is ‘to take steps’. These steps, according to the CESCR, must be ‘deliberate, concrete and targeted’.<sup>52</sup> It is easy to see that the steps to be taken must include the elimination of obstacles to the realization of economic, social and cultural rights. Because corruption constitutes such an obstacle, states are in principle required by the ICESCR to take anti-corruption measures.<sup>53</sup> The Inter-American Commission on Human Rights, for instance, in its guidelines for national reporting, considers ratification of the Inter-American Convention against Corruption and the existence, powers and budget of a domestic anti-corruption authority to be structural indicators for national progress reports.<sup>54</sup>

The second component of the implementation obligation set out in Article 2 of the ICESCR is that the state party must take these steps ‘with a view to achieving progressively the full realization of the rights recognized in the present Covenant’. This component obligates parties to grant a certain priority in the allocation of resources to the realization of human rights.<sup>55</sup> The misappropriation of public funds at the highest level violates this obligation because in such cases the financing of the standard of living of high-level public officials is given priority over the realization of social human rights.<sup>56</sup>

The third element is to exhaust all possibilities the state has at its disposal (‘to the maximum of its available resources’). Primarily, the state party itself defines which resources are available and what the maximum is. However, according to the Limburg Principles, the CESCR may consider the ‘equitable and effective use of ... the available resources’ when determining whether the state party has taken appropriate measures.<sup>57</sup> The component likewise gives rise to a prohibition against the diversion of resources that were originally dedicated to social purposes.<sup>58</sup> Indeed, embezzlement and insufficient measures against embezzlement divert funds from social budgets and, thus, breaches this state obligation.<sup>59</sup> Corruption further reduces the ability

<sup>52</sup> CESCR, General Comment no. 3, *supra* note 45, para. 2.

<sup>53</sup> See Boersma, *supra* note 5, at 229–230.

<sup>54</sup> Inter-American Commission on Human Rights, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights, Doc. OEA/Ser.L/V/II.132, 19 July 2008, at 24. Inter-American Convention against Corruption 1996, 35 ILM 724 (1996).

<sup>55</sup> See Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (1986), reprinted in 9 *HRQ* (1987) 122, para. 28; CESCR, General Comment no. 12, *supra* note 47, para. 17; CESCR, General Comment no. 14, *supra* note 34, para. 47. In the literature, see M. Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), at 332–335.

<sup>56</sup> See Boersma, *supra* note 5, at 233.

<sup>57</sup> See Limburg Principles, *supra* note 55, para. 27.

<sup>58</sup> See Sepúlveda Carmona, *supra* note 55, at 315.

<sup>59</sup> Cf. Report on Health, *supra* note 9, para. 25; CESCR, General Comment no. 24, *supra* note 10, para. 20.

of governments to generate maximum resources, including through international cooperation, by making countries less attractive to donors and investment.<sup>60</sup> In their concluding observations on individual states, the various human rights treaty bodies regularly refer to the feedback loop between combatting corruption and devoting sufficient resources to the protection of human rights.<sup>61</sup>

In fact, grand corruption deprives the state of resources in an ‘inequitable’ way. This is evident when funds are directly misappropriated from the government budget. This also occurs in the case of excessive infrastructure projects or ‘white elephants’ and the exaggerated purchase of military equipment. When developing buildings, roads, airports, and so on of an inferior quality, the funds intended for construction materials can easily be diverted by high-level employees of the government purchasers. Petty corruption likewise indirectly deprives the state of resources by discouraging tax compliance.<sup>62</sup> The affected persons do not see why they should have to pay the government twice – once through taxes and once directly to corrupt public officials. Even an extremely inflated budget appropriation for the government’s public relations work may already be inequitable if the members of parliament approving the budget know that the budget item is being used to divert funds, typically by way of accepting inflated invoices from consulting companies paid by government agencies, whereupon the consultants transfer the money back to the private accounts of the ministry officials (kickbacks). It must be decided from case to case when the obligation to use all available resources as set out in Article 2(1) of the ICESCR has been violated.

The fourth component of the fundamental obligation set out in the ICESCR is to employ ‘all appropriate means’, to which I will come back in section 2.J below. Whenever the state party fails to comply with any of these obligations,<sup>63</sup> it is in non-compliance with the covenant. In the final analysis, the CESCR could, *lege artis* and as a way of continuing its own practice and that of the state parties, use the existing monitoring procedures to make the authoritative determination that a state that pursues an evidently deficient anti-corruption policy in the face of rampant corruption is violating its fundamental obligation arising from the ICESCR.

<sup>60</sup> Report on Health, *supra* note 9, para. 25.

<sup>61</sup> See, e.g., Committee on the Rights of Children, Concluding Observations on the Third to Fifth Periodic Reports of Nepal, Doc. CRC/C/NPL/CO/3–5, 3 June 2016, paras 12, 13(b); Human Rights Committee, Concluding Observations on the Second Periodic Report of Benin, Doc. CCPR/C/BEN/CO/2, 23 November 2015, para. 29: ‘Lastly, it should provide sufficient means for the judiciary to function at an optimal level, while at the same time firmly combating corruption.’

<sup>62</sup> Report on Health, *supra* note 9, para. 25.

<sup>63</sup> The difficult question of how precisely the CESCR makes this determination cannot be discussed here in detail.

## G Corruption as Discrimination under Article 2(2) of the ICESCR and Article 2(1) of the ICCPR

Some types of corruption may amount to discrimination.<sup>64</sup> Discrimination in the proper sense is distinct from unequal treatment in the sense of Article 26 of the ICCPR. The latter provision basically only prohibits arbitrariness, and its effects are stymied by numerous reservations of state parties. Overall, the autonomous equal treatment guarantee of Article 26 does not seem to offer a legal weapon against corruption. The prohibitions against discrimination (for example, under Article 2(2) of the ICESCR and Article 2(1) of the ICCPR) and under various European rules stipulate ‘that those individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular “protected” characteristic that they possess (“direct” discrimination). Second, in some situations treatment based on a seemingly neutral rule can also amount to discrimination, if it disadvantages a person or a group of persons as a result of their particular characteristic (“indirect” discrimination)’.<sup>65</sup> In the context of corruption, indirect discrimination is particularly relevant, and such discrimination is prohibited by the universal human rights instruments.<sup>66</sup> Finally, discrimination may also arise from an omission,<sup>67</sup> which is sometimes referred to as ‘passive discrimination’. This type of discrimination likewise seems to be especially relevant in the context of corruption.

Importantly, the UN covenants’ ancillary prohibitions against discrimination apply only in connection with the exercise or enjoyment of a right under the covenants (Article 2(1) of the ICESCR and Article 2(1) of the ICCPR). For this reason, corruption affecting social rights and corruption with regard to rights of competitors in public procurement can never be captured under the ancillary non-discrimination clause of the ICCPR because these rights are not guaranteed by the ICCPR itself, so that the covenant’s ancillary anti-discrimination guarantee (Article 2(2)) is not applicable in these contexts.<sup>68</sup>

Discrimination under Article 2(2) of the ICESCR and Article 2(1) of the ICCPR comes into play only if it involves unequal treatment on the basis of a particular

<sup>64</sup> CESCR, General Comment no. 24, *supra* note 10, para. 20: ‘Corruption ... leads to *discriminatory access* to public services in favor of those able to influence authorities, including by offering bribes or resorting to political pressures’ (emphasis added). Also, the Human Rights Council summarized the statements of participating states as emphasizing that ‘corruption could lead to discrimination and violated the principle of equality’. Human Rights Council, Best Practices, *supra* note 6, para. 129. For explicit governmental statements in this sense, see *ibid.*, statement of Bahrain, para. 15; statement of Turkmenistan, para. 88. In scholarship, see C.R. Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (2011), at 36, 46–47.

<sup>65</sup> European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (2018), at 42.

<sup>66</sup> See for the ICESCR, CESCR, General Comment no. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (2009), para. 8; see also CESCR, General Comment no. 13, *supra* note 35, para. 59; CESCR, General Comment no. 14, *supra* note 34, para. 50.

<sup>67</sup> For the prohibition of discrimination set out in the ICESCR, see CESCR, General Comment no. 20, *supra* note 66, para. 14.

<sup>68</sup> And the general guarantee of equal treatment does not protect competitors against corruption either, as mentioned.

‘protected’ characteristic. Both human rights covenants prohibit discrimination on the basis of ‘other status’. The inability or unwillingness to pay a bribe might be considered an ‘other status’. Although poverty has traditionally not been considered to be as suspect a classification as race or gender, the CESCR has in General Comment no. 20 on non-discrimination held that individuals and groups must not be ‘arbitrarily treated on account of belonging to a certain economic or social group’.<sup>69</sup> Thus, the committee has recognized the inability of a person to pay as a criterion especially worthy of protection, even if the scrutiny warranted in this context should be less demanding than in cases of racial or gender discrimination.

Distinctions based on the unwillingness or inability to pay, or negative impacts on poor people, do not automatically constitute a direct or indirect discrimination, but only if the state policy lacks a legitimate objective and/or is disproportionate to reach that objective.

For example, in campaigns for democratic elections, the economic affluence of political candidates might play an undue role if a state’s legislation does not regulate campaigning properly. In Tanzania, an electoral law allowed for ‘*takrima*’ or the giving of certain refreshments and gifts to voters by candidates for political office. The Tanzanian High Court found that the legal provisions allowing ‘*takrima*’ were ‘discriminatory as between high-income earner candidate and low income earner candidate’.<sup>70</sup> The High Court concluded that the law violated the rights to equal treatment and non-discrimination regarding political participation (Articles 7 and 21 of the Universal Declaration of Human Rights) as incorporated in the Tanzanian Constitution.<sup>71</sup>

The solicitation or acceptance of petty bribes may be discriminatory as well. A would-be bribe taker in the public service is likely to assess the victim’s ability and willingness to pay the bribe and will adjust his request and the sum requested accordingly. The distinction he operates here – the target’s willingness and ability to pay – is in itself unlawful and arbitrary. Moreover, the officer’s assessment is often determined by the targeted person’s property status or his or her membership in social groups. Persons belonging to some groups may be judged by the bribe requester as being better able to meet a (larger) request for a bribe. Persons are thus treated differently without a reasonable justification. Thus, if an individual is unable or unwilling to pay a bribe – for example, in order to pass a police checkpoint or to receive a passport – and is thus unable to continue a journey or exit the country, and if the state does not take any measures to combat the corrupt conduct of individual officers, it is both the bribe taker’s action and the state’s passivity that has a disproportionate negative impact on individuals without means. It is then not only the affected persons’ civil liberties that are curtailed. For lack of a legal basis and a legitimate purpose of the request for payment, these persons are also being discriminated against in conjunction with their right to move freely or to exit the country. I submit that this legal assessment does

<sup>69</sup> CESCR, General Comment no. 20, *supra* note 66, para. 35.

<sup>70</sup> High Court of Tanzania Civil Case no. 77, *Legal and Human Rights Centre and Others v. Attorney General*, [2006] TZHC 1 (24 April 2006), at 28, 29, available at [www.saflii.org/tz/cases/TZHC/2006/1.html](http://www.saflii.org/tz/cases/TZHC/2006/1.html).

<sup>71</sup> *Ibid.*, at 39. Universal Declaration of Human Rights, GA Res. 217, 10 December 1948.

capture the social meaning of corruption, as expressed by then UN Secretary-General Kofi Annan in the foreword to the UNCAC – namely, that corruption ‘hurts the poor disproportionately’ and promotes ‘inequality’.<sup>72</sup>

## H Causation

A key problem for determining a human rights violation through corrupt conduct is causation.<sup>73</sup> This is true both for omissions by the state as a whole as well as for the corrupt acts of individual public officials that occur concomitantly. So far, international and regional human rights courts or bodies seized with specific corruption cases did not deal with the question of causation in a systematic way. For example, the ECOWAS Community Court only asked for a ‘clear linkage between the acts of corruption and a denial of the right’ (in that case, the right to education) without describing this ‘linkage’ any further.<sup>74</sup>

### 1 International Legal Principles on Causation

In the context of state corruption, the determination of legal causation must be based on the principles of the law of state responsibility.<sup>75</sup> Unless special rules exist, these principles apply to state responsibility arising from violations of human rights.<sup>76</sup> However, there are no fully settled rules of causation under international law.<sup>77</sup> The International Law Commission’s (ILC) Articles on State Responsibility are silent in regard to the causal link between the conduct and the legal breach (‘cause in fact’).<sup>78</sup> But the provision in Article 31 of the ILC Articles on State Responsibility governs the causal link between the legal breach and the damage (the ‘scope of responsibility’).<sup>79</sup> In the area of human rights, the damage lies in the violation of the right itself and is thus mainly immaterial. Any additional material damage (such as loss of income, costs for medical treatment, and so on) is rather the exception.

<sup>72</sup> Annan, *supra* note 17.

<sup>73</sup> Nadakavukaren Schefer, ‘Causation in the Corruption – Human Rights Relationship’, 1 *Rechtswissenschaft* (2010) 397.

<sup>74</sup> *SERAP*, *supra* note 30, para. 19.

<sup>75</sup> See L. Castellanos-Jankiewicz, ‘Causation and International State Responsibility’, SHARES Research Paper 07 (2012); Crawford, *supra* note 48, at 492–503.

<sup>76</sup> See ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/83, 3 August 2001, Arts 33(2), 55.

<sup>77</sup> See Eritrea–Ethiopia Claims Commission (EECC), Decision no. 7: Guidance Regarding *Jus ad Bellum Liability*, 27 July 2007, paras 8–9; Public Decision Establishing the Principles and Procedures to Be Applied to Reparations, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 7 August 2012, § 248.

<sup>78</sup> In international legal terminology, this concerns the ‘breach of an international obligation of the state’. ARSIWA, *supra* note 76, Art. 2(b).

<sup>79</sup> Plakokefalos notes the frequent lack of distinction between the two aspects of causality in international case law. Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’, 26 *European Journal of International Law* (2015) 471, especially at 475.

State practice exists in regard to the causal link between the legal breach and the damage (scope of responsibility) in the area of human rights violations and for war damages.<sup>80</sup> It is recognized that causation (in the sense of a *conditio sine qua non* or ‘necessity’ or in terms of a ‘“but-for” test’) must be supplemented by an evaluative element that ‘in legal contemplation’ cuts off chains of causation that are excessively long.<sup>81</sup> There must be ‘proximity’ between the legal breach and the damage.<sup>82</sup> Only for damage/losses that are ‘not too remote’<sup>83</sup> is reparation owed.<sup>84</sup> ‘Proximity’ is determined on the basis of the objective criterion of ‘natural and normal consequence’<sup>85</sup> and of the subjective criterion of ‘foreseeability’.<sup>86</sup>

Applied to our effort to determine the causal link between a corrupt state action and the legal breach (cause in fact), these terms convey the idea that corrupt acts (or omissions) cause human rights violations in the legal sense only if the violations – such as of the right to food, housing or education – are foreseeable and not too far removed from the corrupt public officials (or the otherwise passive apparatus of the state). In some cases, these requirements are likely to be met. For instance, an arrangement for a court official to receive a small sum of money to summon a witness is causally related to the violation of the right to a fair trial. Similarly, bribes paid to the employee of an environmental supervisory authority, intended to induce the employee to ‘overlook’ the creation of an illegal toxic waste dump, must – according to these principles – be qualified as a cause of the subsequent adverse health effects of the local residents. In such cases, the approval of the toxic waste dump and the damage to health were foreseeable for the public official and were in the usual course of things. The corrupt

<sup>80</sup> On the causal link between the legal breach and the damage (scope of responsibility) in regard to the award of ‘just satisfaction’ under Art. 41 of the ECHR, see ECtHR, *Case of Chevrol v. France*, Appl. no. 49636/99, Judgment of 13 February 2003, paras 86–89; ECtHR, *Case of Sylvester v. Austria*, Appl. nos 36812/97 and 40104/98, Judgment of 24 April 2003, paras 79–92, especially 81–84, 91; ECtHR, *Case of Nowicka v. Poland*, Appl. no. 30218/96, Judgment of 3 December 2002, paras 79–83, especially 82. In these cases, the ECtHR denied a sufficient causal link between the identified human rights violations and the claimed pecuniary loss – e.g., loss of income due to non-recognition of a diploma (*Chevrol*), loss of job due to travel undertaken to visit a child that had been kidnapped in violation of the right to family life (*Sylvester*) or compensation of excessively long imprisonment in violation of Art. 4 of the ECHR (*Nowicka*). However, the requirements for such causation were not examined in any detail.

<sup>81</sup> US-German Mixed Claims Commission, Administrative Decision no. II, 1 November 1923, reprinted in (1956) 7 UNRIAA 23, at 29–30; see also Arbitral Tribunal, *Provident Mutual Life Insurance Company and Others (United States) v. Germany*, 18 September 1924, reprinted in (1956) 7 UNRIAA 91, at 112–113.

<sup>82</sup> EECC Decision no. 7, *supra* note 77, para. 13; *Lubanga Dujilo*, *supra* note 77, para. 250 (‘proximate cause’).

<sup>83</sup> ‘State Responsibility, General Commentary’ (ARSIWA Commentary) 2(2) *ILC Yearbook* (2001) 31, Art. 31, para. 10, Part E: Draft Articles on Responsibility of States for Internationally Wrongful Acts, at 93.

<sup>84</sup> See Arbitral Tribunal, *Trail Smelter Case, United States v. Canada*, reprinted in (1931–1941) 3 UNRIAA 1905, at 1931 (damage that is ‘too indirect, remote, and uncertain’ is not liable for compensation).

<sup>85</sup> *Provident Mutual Life Insurance*, *supra* note 81, at 113.

<sup>86</sup> EECC Decision no. 7, *supra* note 77, para. 13. See *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (sentence sur le principe de la responsabilité) (Portugal v. Germany)*, 31 July 1928, reprinted in (1949) 2 UNRIAA 1011, at 1031. Cour permanente d’ Arbitrage Decision 24, *Affaire relative à la concession des phares de l’Empire Ottoman (Grèce v. France)*, 27 July 1955, reprinted in (1963) 12 UNRIAA 155, at 218: ‘[P]révisible.’ EECC Decision no. 7, *supra* note 77, para. 14, points out that the choice of a verbal formula to describe the necessary degree of connection does not necessarily result in a difference in outcomes.

toleration of the toxic waste dump is thus in the eyes of the law a cause of the violation of the human rights of the local residents in terms of respect for their private life and physical integrity.<sup>87</sup>

Conversely, a legal causal link should not be affirmed where any subsequent human rights violation is not in the usual course of things and is not foreseeable. As an example, assume that election bribery leads to riots after the announcement of the election results – protests that in turn are struck down by excessive force by the police. The violation of the freedom of assembly and bodily integrity of the demonstrators has then – in legal terms – not been caused by the electoral corruption.<sup>88</sup>

## 2 Special Problems of Causation

In addition to the situation where the ‘distance’ between the cause and the human rights violation is too great – which is frequent in the context of grand corruption – other special problems of causation arise. A common situation occurs when the human rights violation has several causes, only one of which is corruption, while both causes in combination have brought about the human rights violation (‘cumulative causation’). As an example, assume that school children are killed by the falling debris of a collapsing school during an earthquake. After the incident, it is determined that the school was built with deficient materials because construction materials had been diverted by municipal officials for their own use and the building inspector had been bribed. Although the corruption was only a necessary, but not a sufficient, condition (not sufficient because it still needed the earthquake) for the school breaking down and killing the children, corruption was still a *conditio sine qua non* and, therefore, a cause for the human rights violation in the sense of the law.

A different and widespread scenario is called ‘concurrent’, ‘dual’, ‘competing’ or ‘alternative’ causality. This is the situation that both factors, taken for themselves, would have sufficed to bring about the effect. For instance, violations of social human rights frequently stem from an allocation of resources without the proper prioritization of social human rights. If corruption comes on top, both factors concur. Or, in our example, the construction material used due to the corruption could have been so faulty that the school would have broken down without an earthquake. And, concurrently, the earthquake could have been so bad that it would have torn down the school even if built with perfect material and care. In such a scenario, both facts were no ‘necessary condition’ – no *conditio sine qua non* – because the bad result would have come about anyway. However, this would lead to the absurd assessment that there is no cause at all. Therefore, causality in the legal sense should nevertheless be affirmed,

<sup>87</sup> International Council on Human Rights Policy and Transparency International, *supra* note 5, at 27, refers to this constellation as an ‘indirect link’ between corruption and human rights violations.

<sup>88</sup> See Sepúlveda Carmona and Bacio Terracino, *supra* note 40, at 30.

and this is indeed what international legal practice does.<sup>89</sup> Transferred to our problem, ‘competing’/‘concurring’ other causes (besides corruption) do not mean that the bribery may not be considered to be the legal cause of a human rights violation.

One variant, when looking at the situation over a period of time, is referred to as ‘overtaking’, ‘pre-emptive’ or ‘overriding’ causation. As an example, assume that a judge is bribed by a party to a civil trial in order to prolong the proceedings. But because the courts have insufficient human and financial resources, the trial would have been delayed substantially even without this corrupt act, and this delay in itself would have violated the right of a party to a hearing within a reasonable time. Typically, it can no longer be determined after the fact whether the factors were (i) cumulative (both needed), (ii) concurrent (‘dual’, ‘competing’ or ‘alternative’ – that is, each sufficient on its own) or (iii) ‘overriding’. The most frequent situation seems to be that the dysfunctionality of a given governmental sector has multiple causes, only one that is corruption, and that it is impossible to determine for sure that corruption was a necessary factor in the strict sense. Using our example, it typically remains unresolvable whether the school would have collapsed in the earthquake even if it had been constructed properly (without corruption). The important point is that, in such a case, corruption might still be qualified as a legal cause. This is what general legal principles, such as the European Tort Law Principles, foresee.<sup>90</sup> The further question then becomes whether the causal link is close enough to attribute the deaths to the corrupt building supervisor. This must be examined in detail and may be denied in some cases.

An affair that was decided on the basis of a probably ‘overriding’ causation, which was against the background of factual indeterminacy, dealt with child labour in Portugal in the 1990s. A NGO filing a complaint with the European Committee for Social Rights (ECSR) had asserted, *inter alia*, that the Labour Inspectorate was corrupt. However, the committee opined that the inspectorate was (anyway) not working efficiently enough to monitor and remedy the situation (its malfunctioning was thus a *conditio sine qua non*), whether induced by corruption or not. On this basis, the ECSR found that the situation in Portugal on child labour was indeed not in conformity with Article 7(1) of the European Social Charter (which states that the minimum age of employment is 15 years) because several thousand children under the age of 15

<sup>89</sup> However, case law exists only in regard to the second causal link needed to identify damage (‘scope of responsibility’), not in regard to the first causal link between behaviour and legal breach (‘cause in fact’). See ECCC, *Final Award: Ethiopia’s Damages Claims*, 17 August 2009, reprinted in (2009) 26 UNRIAA 631, at 733, para. 330. People left their places of residence in part because of the drought and in part because of the war, although the war was the main cause. The Claims Commission entirely disregarded the potential additional cause (the drought) for determining the number of internally displaced persons, which in turn was used to calculate compensation. See also the *Tehran Hostage* case, an exemplary situation where it could not be determined which factor led when and how precisely to the breach of international law. A private attack against the embassy took place, but, at the same time, Iran failed to protect the embassy. The International Court of Justice (ICJ) held Iran fully responsible and did not reduce the liability of the state on account of any non-attributable contribution to the breach of international law by the private students. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, paras 76–77, 90.

<sup>90</sup> See European Group on Tort Law, Text and Commentary, Principles of European Tort Law (2005), Art. 3:103 (alternative causes), Art. 3:101–106 (causation).

actually performed work, but it did not base this finding on corruption.<sup>91</sup> This example shows how, in practice, decision-making bodies tend to leave open the question of how important, and how 'causal', corruption is for a human rights violation if they have sufficient other reasons for finding a violation. However, it is important to insist on the established principles on causality so as not to miss those constellations where other factors (besides corruption) are absent or cannot be proven.

### 3 Causation in the Case of Omission

The relevant human rights violations linked to corruption often consist in the non-performance of obligations of protection and of procedural obligations. This gives rise to the question of causation in the case of omission. Normally, legal causation in the case of omission is affirmed if the legally required positive action would, with near certainty, have eliminated the (undesirable) result. This is a softened 'but-for' test. When it comes to omitting mere obligations of conduct, however, this 'but-for' test does not make any sense and cannot be applied because these obligations do not require the state to reach a particular result (see section 2.E.2 above).

In the *Bosnian Genocide* case, the ICJ found that an obligation to prevent genocide exists even if the state cannot be certain whether the preventive measures will be successful or not.<sup>92</sup> This means that the state cannot avoid responsibility simply by showing that genocide (or, in our case, corruption) would have taken place despite all of its efforts to prevent it. Thus, although proper preventive action would not have eliminated the problem, the omission to act properly still counts as a legal cause. If causation were denied here, the state would be able to avoid responsibility too easily. Even if the failure to act thus did not cause the undesirable result in a scientific sense (because the result would have occurred anyway), causality is nevertheless affirmed in a legal sense.<sup>93</sup> According to this analysis – which is common in the law of torts and in criminal law – a state can be held legally responsible for a high level of corruption in the realm of its administration even if victims cannot prove that a particular corruption scandal would not have occurred had the state pursued particular policies (for example, the establishment of an anti-corruption authority with extensive powers and generous financial resources). A further question is whether a mere statistical correlation of corruption indicators and human rights non-compliance indicators might be sufficient to affirm a violation of these human rights 'by' the omission of anti-corruption efforts of the state – analogously referring to the statistical evidence

<sup>91</sup> European Committee of Social Rights, *International Commission of Jurists v. Portugal*, Complaint no. 1/1998, 9 September 1999, especially para. 42, available at [https://hudoc.esc.coe.int/eng/#{"ESCDcIdentifier":\["cc-01-1998-dmerits-en"\]}](https://hudoc.esc.coe.int/eng/#{). European Social Charter 1961, 529 UNTS 89.

<sup>92</sup> In that case, success would have been the prevention of genocide. See *Bosnian Genocide*, *supra* note 51, para. 461.

<sup>93</sup> In the *Bosnian Genocide* case, *supra* note 51, however, the ICJ considered in regard to the causal nexus between the breach and the content of the state responsibility ('scope of responsibility' – that is, in order to determine whether Serbia owed reparations) whether genocide would have occurred even despite efforts to prevent it (para. 462). Because this could not be shown, the ICJ did not believe financial compensation by Serbia to be appropriate.

that is commonly used to show indirect discrimination. Such statistical evidence would seem difficult as long as the measurement of corruption in most states is based only on perceptions and not on legal facts such as prosecutions.

## I Attribution

The next problem is how to attribute corrupt conduct to the state. According to Article 4 of the ILC Articles on State Responsibility, the conduct of any state organ is attributable to the state itself. This is unproblematic in regard to the omissions primarily discussed above, which violate obligations of prevention and protection under human rights law. Such omissions are committed by the legislative, executive and judicial organs of the state that fail to fulfil the obligations addressed directly to them.

### 1 *Ultra Vires Action*

The analysis is different in the case of particular individual acts of public officials, especially in the area of petty corruption. Can these be attributed to the state as a whole, so that they trigger state responsibility for the resulting human rights violations? Corrupt public officials obviously exceed their formal authority. Under the norms of state responsibility, however, *ultra vires* acts are in principle also attributed to the state. The precondition is that an organ of the state or a person empowered to exercise governmental authority acts ‘in that capacity’ (Article 7 of the ILC Articles on State Responsibility). Such conduct in an official capacity must be distinguished from private conduct.<sup>94</sup> The landmark cases in international law that examine this distinction do in fact concern corrupt acts of public officials. According to this case law, it matters whether the official acted ‘under cover’ of public office and also made use of the special (coercive) powers of the office (such as the power to search or arrest individuals).<sup>95</sup> According to the ILC commentary, the crucial question is whether the

<sup>94</sup> See Crawford, *supra* note 48, at 136–140.

<sup>95</sup> The *locus classicus* is French–Mexican Claims Commission, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, 7 June 1929, reprinted in (1952) 5 UNRIIA 516. Caire, a French citizen, ran a boarding house in Mexico. A Mexican major of the troops stationed there and two soldiers tried to extort money from Caire under threat of force. When Caire refused, the major and a captain of the same brigade arrested Caire, searched him, drove him to another village, and shot him dead. The arbitral tribunal considered this conduct to be an official act attributable to the state. Responsibility was justified ‘lorsque ces organes agissent en dehors de leur compétence, en se couvrant de leur qualité d’organes de l’Etat, et en se servant des moyens mis, à ce titre, à leur disposition’ (at 530). See also Iran–US Claims Tribunal Case no. 10199, *Yeager v. Iran*, Award no. 324-10199-1, 2 November 1987, reprinted in (1987) 17 Claims Tribunal Reports 92. At issue here was a claim against Iran alleging a corrupt act by an employee of the state airline Iran Air. The claimant was forced by the airline in an unlawful way to make an ‘extra payment’ for a plane ticket. The tribunal did not attribute this corrupt act of the state employee to Iran: ‘Acts which an organ commits in a purely private capacity, even if it has used the means placed at its disposal by the state for the exercise of its functions, are not attributable to the state. ... There is no indication in this case that the Iran Air agent was acting for any other reason than personal profit, or that he had passed on the payment to Iran Air. He evidently did not act on behalf or in the interests of Iran Air. The Tribunal finds, therefore, that this agent acted in a private capacity and not in his official capacity as an organ for Iran Air’ (at 111, para. 65). This finding is defensible, but the reasoning is not persuasive. Rather, it was significant that the employee did not pretend to be demanding the extra payment on behalf of the state (see also Crawford, *supra* note 48, at 138).

corrupt persons ‘were purportedly carrying out their official functions’ and ‘were acting with apparent authority’.<sup>96</sup> Applying these principles to our question, we see that, as a rule, the corrupt official acts under cover of, and with apparent, public authority. The official uses his or her position to perform or omit a measure that the official would be unable to do as a private person, such as granting an authorization or licence, refraining from public prosecution, or imposing a fine.

Some further specific questions arise. ‘Freely consummated corruption’ might arguably deserve to be considered as falling outside both the real and apparent authority of the public official, so that he could not be considered to have acted ‘in that [governmental] capacity’.<sup>97</sup> Another question is whether, in the case of bribery, the qualifying feature of the crime – namely, the existence of an unlawful agreement (*quid pro quo*) between the briber and public official (cash against some form of government action or inaction) would have to be taken into account for the determination of attribution of the action or inaction of the public official to the state. One might ask whether the knowledge of the briber about the unlawfulness of the public official’s behaviour, or his participation in it, should preclude any attribution of that behaviour to the state. But such non-attribution is fair only if the official was basically passive and lured into the corruption by the ‘bad’ briber – a situation that is impossible to reconstruct and that might also be unrealistic.<sup>98</sup> In any case, attribution to the state cannot be ruled out in the relationship between the state and other actors who seek to invoke state responsibility and who had not participated in the corruption themselves.<sup>99</sup> To conclude, the fact that an official’s behaviour is performed as a *quid pro quo* in bribery normally does not rule out the attribution of that behaviour to the state.<sup>100</sup> All the more, other types of corrupt conduct by public officials can and should be attributed to the state in accordance with the principles of state responsibility.

## 2 The Rationale of Outlawing Corruption

But, from a normative perspective, should attribution not be further limited in light of the rationale of outlawing corruption? Does the proscription against corrupt official acts (or the legal obligation to improve anti-corruption measures) correspond at all to the object and purpose of human rights? Only then would it be legally appropriate to classify corrupt state conduct not only as a governance deficit and, under certain circumstances, as a criminal offence under domestic law, but simultaneously and additionally as a human rights violation.

<sup>96</sup> ARSIWA Commentary, *supra* note 83, Art. 7, at 46, para. 8.

<sup>97</sup> A.P. Llamzon, *Corruption in International Investment Arbitration* (2014), at 261.

<sup>98</sup> *Ibid.*, at 262.

<sup>99</sup> *Ibid.*, at 264, with reference to the ARSIWA Commentary, *supra* note 83.

<sup>100</sup> But see ICSID, *World Duty Free Company Limited v. Republic of Kenya – Award*, 4 October 2006, ICSID Case no. ARB/00/7, para. 185. The tribunal did not attribute the extortion and acceptance of the investor’s bribe by the Kenyan president to Kenya but treated the state ‘as the otherwise innocent principal’ of the president engaged as its agent in bribery. But this reasoning was in application of English and Kenyan law, not under international law.

At first glance, the criminal law on corruption and human rights law serve different objectives. The objective of the criminalization of bribery in German criminal law, for instance, is to ‘protect the functioning of the public administration and public trust in the objectiveness and independence of administrative conduct’.<sup>101</sup> The goal is therefore ‘to protect the institution of public service and thus a fundamentally important public good’.<sup>102</sup> In this light, can corruption be considered an attack against human rights – the individual legally protected good *par excellence*? My answer is yes because, of course, the interests of the individual are what underlie the state and the public service protected by the criminalization of bribery. The criminal law on corruption is about ‘protecting trust in the interest of the individual citizen’.<sup>103</sup> Protection of ‘the public’ and protection of the human rights of all persons in a given state are therefore not opposites or different categories. Although obviously the individual interests of citizens and the common good may clash (which is why human rights require a balancing against the public interest), the modern liberal state is, by and large, justified only in that, and to the extent that, it protects human rights.

The remaining difference is that corruption is a conduct offence, while human rights violations can be found only if a concrete injury actually occurs.<sup>104</sup> But this important structural difference does not prevent attribution *a priori*; it only means that not every corrupt act also constitutes a human rights violation. If, for example, gifts presented by a pharmaceutical company to a minister of health do not ultimately succeed in modifying the ministry’s patterns of purchase and of the distribution of vaccines in urban slums, this may very well be considered bribery, but the rights of the slum residents to physical integrity or health care have not been violated because the bribery did not have an impact on their standard of care. In the final analysis, the prescription against corruption fits the protective purpose of human rights; on the basis of these considerations, the attributive relationship between corrupt acts or omissions and human rights violations does not have to be denied.

### J *Margin of Appreciation*

Even if we regard a particular corrupt act or the general failure to implement anti-corruption measures as a cause of interference with particular human rights and attribute it to a state, this does not in any way mean that everything affecting human rights also constitutes a violation thereof. Civil/political rights can be lawfully restricted. But the concept of lawful restriction fits ill to social human rights. Can a lack of progression or an under-fulfilment of the obligation to implement those rights progressively be meaningfully called a ‘restriction’ of rights? In order to answer this question, we need

<sup>101</sup> Korte, *supra* note 20, at 331, para. 8 (author’s translation).

<sup>102</sup> *Ibid.*, para. 12.

<sup>103</sup> G. Heine and J. Eisele, *Strafgesetzbuch: Kommentar* (29th edn, 2014), at 331, para. 9.

<sup>104</sup> This difference is eroded in that according to the case law of the ECtHR, a concrete future rights violation may under certain circumstances already establish standing as a victim and make an individual claim admissible. See, e.g., ECtHR, *Open Door and Dublin Well Woman v. Ireland*, Appl. no. 14234/88, Judgment of 29 October 1992, para. 44 (on women of childbearing age as ‘victims’ of a prohibition of abortion).

to look at one component of the fundamental treaty obligation set out in Article 2(1) of the ICESCR (see section 2.F above) – namely, the use of ‘all appropriate means’. The obligation to use all appropriate means is further specified by the Optional Protocol to the ICESCR in terms of ‘reasonableness’ (Article 8(4) of the Optional Protocol).<sup>105</sup>

On the one hand, these qualifications constitute a built-in limitation on state obligations. They must be fulfilled only in a ‘reasonable’ way. Social rights do not impose any ‘absolute or unqualified’ obligations upon states, according to the Constitutional Court of South Africa in the landmark *Grootboom* case.<sup>106</sup> In the formulation of the Federal Constitutional Court of Germany in regard to social participation rights, social rights are, *a priori*, only ‘subject to what is possible’.<sup>107</sup> On the other hand, the terms ‘appropriate’ and ‘reasonable’ also represent an opening for defining the bottom-line of positive state action (which, in German constitutional rights doctrine, is called ‘*Untermäßverbot*’). State measures are not allowed to fall short of a minimum level in order to be considered ‘appropriate’ or ‘reasonable’. One can therefore argue that, in certain situations, in the case of empirically demonstrated corruption in a state, the prohibition of insufficient action requires the state not only to ratify the international anti-corruption instruments but also to launch a national anti-corruption campaign and to formulate a preventive policy.<sup>108</sup> The concepts of ‘appropriateness’ and ‘reasonableness’ thus play a dual role; they serve not only as the cap but also as the floor.<sup>109</sup> States must take ‘appropriate’ measures – not more but not less either.

The questions now are at what point a state fails to meet that minimum level and which institution is empowered to make an authoritative determination thereof. Once again, the primary responsibility for assessing which means are appropriate and reasonable for realizing social rights lies with the state parties of the ICESCR itself. A state must, as a first approach, decide what anti-corruption strategy it wants to formulate, what legislative measures it wants to take, what authorities it wants to establish and what powers and financial resources it wants to grant that authority. In its settled case law, the CESCR emphasizes that the states parties have a substantial ‘margin of appreciation’ in this regard.<sup>110</sup> The Optional Protocol expressly provides that a state

<sup>105</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol) 1966, 999 UNTS 302, Art. 8(4): ‘When examining communications under the present Protocol, the Committee shall consider the *reasonableness of the steps taken* by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the *State Party may adopt a range of possible policy measures* for the implementation of the rights set forth in the Covenant’ (emphasis added).

<sup>106</sup> *Grootboom*, *supra* note 44, para. 38 (on the right to have access to adequate housing according to Art. 26 of the South African Constitution).

<sup>107</sup> BVerfGE 33, at 303–358, para. 63, Judgment of 18 July 1972 – 1 BvL 32/70 and 25/71 – *Numerus clausus* (on the right to university education) (author’s translation).

<sup>108</sup> See Boersma, *supra* note 5, at 233.

<sup>109</sup> Cf. the note prepared by the Secretariat of the Human Rights Council, The Use of the ‘Reasonableness’ Test in Assessing Compliance with International Human Rights Obligations, Doc. A/HRC/8/WG.4/CRP.1, 1 February 2008.

<sup>110</sup> CESCR, An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant: Statement, UN Doc. E/C.12/2007/1, 10 May 2007, paras 11–12.

party ‘may adopt a range of possible measures for the implementation of the rights set forth in the Covenant’ (Article 8(4) of the Optional Protocol). In the final instance, however, the CESCR reserves for itself the right to review the ‘appropriateness’ of the means, and, thus, of the financial resources, in an authoritative way – albeit without the power to enforce this determination.<sup>111</sup>

In summary, both particular corrupt acts by individual public officials as well as a completely insufficient or entirely lacking anti-corruption policy of a state on the whole may, in certain constellations, be conceptualized as a violation of concrete human rights – for example, a particular client’s human right to the enjoyment of the highest attainable standard of health or a particular business competitor’s right to equal treatment. The greatest doctrinal obstacle in this regard is not causation or attribution but, especially in the field of social rights, the ‘margin of appreciation’ or ‘reasonableness’.

### 3 Should Corruption Be Conceptualized as a Human Rights Violation?

A different question is whether the change in perspective – away from combatting corruption primarily with the means of criminal law towards a complementary human rights-based approach – has an added value in practical and policy terms.

#### A *The Opportunity to Strengthen Anti-Corruption*

Proponents of imbuing the anti-corruption instruments with a human rights content believe that this will upgrade these instruments in political and moral terms and thus ensure improved implementation of anti-corruption measures.<sup>112</sup> The classical argument is ‘empowerment’. The human rights approach can highlight the rights of persons affected by corruption, such as the rights to safe drinking water and free primary education, and show these persons how, for instance, the misappropriation of public funds in those areas interferes with their enjoyment of the goods to which they are entitled. In that way, affected persons would be empowered to denounce corruption to which they otherwise would be helplessly exposed.<sup>113</sup> The UN Human Rights Council sees a two-fold advantage. First, the focus is shifted away from the typical object of criminal law – namely, the individual perpetrators – towards the systemic duties of the state. Second, the status of victims is improved.<sup>114</sup> This expectation of the Human

<sup>111</sup> See CESCR, General Comment no. 3, *supra* note 45, para. 4; CESCR, statement 2007 *supra* note 110, paras 8, 12.

<sup>112</sup> See Pearson, *supra* note 5, at 46: ‘It is proposed here that, by examining the human rights cost of corruption, added weight is given to anti-corruption efforts, as well as to human rights protection.’ Kumar, *supra* note 64, at 43: ‘Human rights approaches help in exposing violations, and empower victims ... the moment corruption is recognized as a human rights violation, it creates a type of social, political and moral response that is not generated by crime.’

<sup>113</sup> See Sepúlveda Carmona and Bacio Terracino, *supra* note 40, at 48.

<sup>114</sup> Along these lines, see Human Rights Council, Best Practices, *supra* note 6, para. 130; Human Rights Council Advisory Committee, Final Report on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights, UN Doc. A/HRC/28/73, 5 January 2015, paras 25, 28.

Rights Council needs to be qualified in the sense that the human rights perspective does not preclude the employment of criminal law instruments by the state. The crucial point is that the entity responsible for human rights is the state as a whole, which cannot escape by getting rid of individual culprits.

A weakness of the purely criminal law approach to anti-corruption is becoming apparent especially in repressive states, where the broad and indeterminate criminal offences can easily be abused to eliminate or at least discredit political opponents.<sup>115</sup> The human rights perspective moves attention away from repression towards prevention<sup>116</sup> and is thus less favourable to the possibility of abusive initiations of criminal proceedings. Finally, the shift from criminal law to human rights changes the intensity and burden of demonstration and proof. While a public servant accused of bribery or criminal breach of trust enjoys the presumption of innocence, the human rights approach requires states to exonerate themselves before the treaty bodies when accused of deficient anti-corruption measures. The case law in the area of social human rights requires a state to demonstrate that while it is willing to allot sufficient means to an authority that is in charge of securing social rights, it is unable to do so due to a lack of resources.<sup>117</sup> This general rule must be applied to anti-corruption measures. Hence, when 'credible allegations of corruption are linked with human rights violations, the state would be under a duty to demonstrate that it has taken all appropriate measures to ensure the realization of the right in question. ... The absence of any steps taken or blatantly inadequate measures to investigate or tackle alleged acts of corruption would constitute a prima facie case of a human rights violation.'<sup>118</sup>

The follow-up question would be whether statistical evidence or the mere observation of the luxurious lifestyle of high-ranking politicians would be sufficient to corroborate a reproach of a misappropriation of public funds. Article 20 of the UNCAC calls upon states parties to 'consider' establishing 'illicit enrichment' as a criminal offence. Under such a criminal law provision, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income could be punished. However, this implicit presumption of guilt is problematic in terms of the rule of law. The mentioned structural weaknesses of the criminal law approach

<sup>115</sup> This risk inheres the Chinese anti-corruption campaign as formally adopted by the third Plenary Session of the 18th National Congress of the Communist Party in November 2013. Guo, 'Controlling Corruption in the Party: China's Central Discipline Inspection Commission', 219 *China Quarterly* (2014) 597. In North Korea, General Ri Yong Gil, chief of the army's general staff and ranked third in its hierarchy, was executed in February 2016 on charges of 'factionalism, abuse of power and corruption'. *New York Times* (11 February 2016) at A10; In Russia, the liberal and reformist governor of Kirow who had criticized the government, Nikita Belych, was arrested for corruption in June 2016. *Neue Zürcher Zeitung* (29 June 2016).

<sup>116</sup> Prevention is also – independently of human rights considerations – one of the four pillars of the UNCAC, *supra* note 17, ch. 2.

<sup>117</sup> See CESCR, General Comment no. 3, *supra* note 45, para. 10; CESCR, *supra* note 110, para. 9. In regard to health protection, see CESCR, General Comment no. 14, *supra* note 34, para. 47.

<sup>118</sup> Lapper, '1.3. Understanding Corruption in Education as a Human Rights Issue', in Transparency International *et al.* (eds), *Global Corruption Report: Education* (2013) 16, at 18.

are accompanied by the fact that the number of criminal convictions for domestic and foreign bribery is notoriously low worldwide. Only seven of the currently 44 states parties to the OECD's Anti-Bribery Convention are truly 'active' in their implementation.<sup>119</sup> Both the systemic problems and the historic experience thus warn against expecting too much from a 'more robust' criminal law approach.<sup>120</sup> Rather, the human rights arguments and instruments might come in as a useful complement to criminal law.

Overall, the novel, but increasingly practised, human rights-based approach to corruption exemplifies a general recent trend – namely, the infusion of various sub-fields of international law with human rights considerations, which is sometimes called the 'righting' of a regime. A human rights-based approach has been pursued, *inter alia*, in the law of development, in environmental law, in the law of natural disasters, in international labour law and in refugee law. This approach encompasses, first, a principle of interpretation; the specific rules of the regime must be interpreted in the light of human rights. Second, procedural consequences are to allow for, or even require, the information and participation of affected groups and to mandate planning and impact assessment. Both mentioned legal consequences (the harmonizing interpretation and a proceduralization) also play for anti-corruption and ultimately refine the international anti-corruption regime.<sup>121</sup> Finally, the human rights perspective could also inform the application of domestic law, which must be interpreted in the light of international human rights in many states. Overall, the infusion of international human rights law into efforts to combat corruption seems apt to complement or bolster the criminalization of corruption and, to that extent, has benign effects.

## B *The Risk of Weakening Anti-Corruption*

The strength of a human rights-based approach to anti-corruption instruments is simultaneously its weakness. This is because of the ambivalent attitude of the global South towards human rights. The critique against human rights overlaps with fundamental objections to the international anti-corruption agenda.<sup>122</sup> The overlap results from scepticism towards two distinctively modern and European institutions – namely, the rule-of-law-based 'liberal' state and rights.

<sup>119</sup> Transparency International, *Exporting Corruption: Progress Report 2018: Assessing Enforcement of the OECD Anti-Bribery Convention* (2018), at 6; see also the table (at 10), which is also available at [www.transparency.org/whatwedo/publication/exporting\\_corruption\\_2018](http://www.transparency.org/whatwedo/publication/exporting_corruption_2018). The seven 'active' countries are the USA, the United Kingdom, Germany, Italy, Switzerland, Norway and Israel.

<sup>120</sup> But see, in favour of the criminal law approach, Rose, *supra* note 12, at 438.

<sup>121</sup> In fields such as trade and investment law, human rights serve as counterweights to the overall thrust of the regimes that must be taken into account wherever there is space for balancing. This legal consequence is less pertinent for anti-corruption.

<sup>122</sup> See, e.g., Kennedy, 'The International Anti-Corruption Campaign', 14 *Connecticut Journal of International Law (CJIL)* (1999) 455; Rajagopal, 'Corruption, Legitimacy and Human Rights: The Dialectics of a Relationship', 14 *CJIL* (1999) 5; Lys Kulamadayil, 'When International Law Distracts: Reconsidering Anti-Corruption Law', 7(3) *ESIL Reflections* (2018) 1.

### 1 *A Western Model of Statehood and of Rights?*

According to the critique, the global fight against corruption in which corruption is being denounced as a 'cancer' (to use the former World Bank president's term) is tied to an illegitimate imposition of a particular model of the state.<sup>123</sup> This model is not only Western but also fairly recent. Until well into the 19th century, patronage and the purchase of public offices were largely considered legal and legitimate components of governance everywhere in the world, including in Europe.<sup>124</sup> The evaluation of these forms of exercising and influencing political power and administration as being illegitimate could only emerge with the development of the modern state in Europe – a state in which an impartial bureaucracy is called upon to apply the law evenly and in which all public officials are required to act in the public interest, not in the interest of their family or ethnic group. Put differently, anti-corruption is based on the picture of a state that performs public duties through public officials who are hired on the basis of merit and who act according to legal rules that formally apply to all.

In a patrimonial state in which the political and administrative positions are primarily intended to generate income ('rent seeking'), the idea of corruption has no place because bribes are rents. In this sense, the contemporary concept of corruption is inextricably linked to the modern state governed by the rule of law. This explains why anti-corruption is difficult in regions of the world where this understanding of the state is not firmly established or is experienced as alien. The critique is that the ideal of a meritocratic state on the basis of the rule of law disqualifies communities based on family and clan relationships which are sustained by exchanging gifts and providing group members with official posts. The values of reciprocity and loyalty underlying these communities are not acknowledged but, rather, are replaced with Western meritocratic thinking and formal equal treatment.

In addition, critics uncover the economic implications of the model by asserting that the liberal state governed by the rule of law is mainly used as a regulatory framework for a free market. This would mean that anti-corruption is ultimately wedded to a neo-liberal agenda that wants to push back an interventionist, heavily bureaucratized model of the state. The critique thus accuses the 'rule of law' of serving primarily the economic interests of property owners and of capital, besides being in cultural terms hegemonic. The point is that the allegation of legal and cultural imperialism, and of the dictate of Western capital that I have summarized, is further nourished by the human rights approach to anti-corruption strategies. From the perspective of the critics, both sets of international instruments are merely two variants of imperialism.

Indeed, the human rights-based approach to corruption does contain a subtle Western bias that suggests caution. We have seen that the determination of a concrete

<sup>123</sup> World Bank President James D. Wolfensohn, Speech on People and Development, 1 October 1996.

<sup>124</sup> See Bridenthal, 'Introduction', in R. Bridenthal (ed.), *The Hidden History of Crime, Corruption, and States* (2013) 1, at 4; van Klaveren, 'Corruption as a Historical Phenomenon', in A.J. Heidenheimer and M. Johnston (eds), *Political Corruption: Concepts and Contexts* (2002) 83. The situation is different for bribery than for patronage and the purchase of public offices. Proscriptions against bribery can already be found in antique legal cultures.

violation of human rights through corruption is easier in the domain of petty corruption. Now Western democracies suffer less from petty corruption than from grand corruption. Grand corruption notably includes what is provocatively termed ‘legal corruption’: non-transparent election financing and the resulting vested interests of politics and a toleration of the smooth transition of public officials to lucrative jobs in the private sector, in which the insider knowledge gained in office can be put to use in the new company (the ‘revolving door’ phenomenon).<sup>125</sup> The connection between corrupt conduct and human rights violations of specific and individualized victims is much harder to make. It means that, because the human rights lens works best for petty corruption, it casts a spotlight on the global South. For example, the measurement of corruption in Kenya by organizations such as Transparency International seems to have less credibility because it is regarded as not counting systemic grand corruption among elites but, rather, as focusing on petty bribes by the population in everyday lives.<sup>126</sup> To conclude, the accumulation of two strands of ideas perceived as ‘Western’ might lead to resistance rather than to compliance.

## 2 *Universalizability*

The dual critique of anti-corruption and of human rights needs to be put in perspective. Let us look at an example. Is it true, as the critique implies, that, from the perspective of a motorist, it comes out to the same thing whether the sum of money he or she has to pay at a road block in order to pursue his or her course represents a bribe to a traffic police officer, as in many African states, or a motorway toll, as in France? Is it true that therefore both modes of governance – the stereotypically ‘Western’ one and the stereotypically ‘African’ one – should be accepted, rather than denouncing the latter one as ‘corruption’? In both cases, the motorist’s freedom of movement is limited by him being forced to pay. A bribe might even be benevolently compared to a tip for an employee in a social context where clients know that the tip will beef up the employee’s low salary. This view would express the market-based logic in which the price for the service results from the meeting of offer and demand.

This example illustrates how the notion of corruption is tied to the conception of a state. An official motorway toll is a public law-based institution designed to serve the public interest – namely, the maintenance of the motorway network. It follows a fee schedule defined in a political or administrative procedure and is therefore transparent and foreseeable. It applies equally to everyone (with reasonable differences based on the type of vehicle, the number of persons or other relevant criteria). These features of legality are missing in the case of a bribe or a tip. All depends on whether one accepts the legality and the legitimacy of the institutions and procedures in which the toll (or any other fee) is defined, collected and spent – in short, whether one accepts the idea

<sup>125</sup> See Kaufmann and Vicente, ‘Legal Corruption’, 23 *Economics and Politics* (2011) 195.

<sup>126</sup> Davis, Kingsbury and Engle Merry, ‘Introduction: The Local-Global Life of Indicators: Law Power, and Resistance’, in S. Engle Merry, K.E. Davis and B. Kingsbury (eds), *The Quiet Power of Indicators: Measuring Governance, Corruption and Rule of Law* (2015) 1, at 16, referring to a case study in the book.

of a modern rule-of-law-based state. I submit that the human rights-based approach to corruption – based on the claim that corruption interferes with the rights of each individual citizen – contributes to, rather than undermines, the global acceptance of the model of a non-patrimonial and non-criminal state under the rule of law because it renders this model more concrete and brings it closer to human needs.

Furthermore, the allegation that both anti-corruption and human rights are hegemonic or US-dominated strategies and/or strategies driven by global capital are often a pretext of elites whose power and sinecures are threatened both by anti-corruption and by the demand for respect of human rights. Notably, the invocation of traditional practices – for example, the exchange of gifts and offering hospitality in African societies – can and is being abused by the wealthy and powerful for cloaking corruption, especially when the bribes far exceed all proportion. For example, a Tanzanian law allowed political candidates to offer presents to their voters and called these by their traditional name ‘*takrima*’, presumably to solicit legitimacy and acceptance. The Tanzanian High Court found that the provisions violated the human rights of the candidates<sup>127</sup> and of the voters: ‘[T]heir right to vote for a proper candidate of their choice cannot be freely exercised because they will lose that freedom because of being influenced by “*takrima*”. Their right to vote will be subjected to “*takrima*”’.<sup>128</sup> The High Court did ‘not see any lawful object which was intended to be achieved by the “*takrima*” provisions apart from legalizing corruption in election campaigns’.<sup>129</sup> Another example is the traditional Kenyan system of ‘*harambees*’, which require individuals to contribute to the financing of community projects. However, according to a Kenyan report to the Ministry of Justice, ‘the spirit of Harambee has undergone a metamorphosis which has resulted in gross abuses. It has been linked to the emergence of oppressive and extortionist practices and entrenchment of corruption and abuse of office.’<sup>130</sup> Against the background of such forms of corruption that, in fact, pervert traditional customs, it is understandable that individuals affected in different regions of the world and cultures have demonstrated on Tahrir Square or the Maidan, in Caracas or in Mexico City, not only for freedom and fair prices of bread but also against the corruption of the elites.

### C *The Special Case of the Right to Property*

Corruption affecting the right to private property warrants a separate assessment. When state officials enrich themselves by stripping big business, their measures constitute various crimes that we might gather under the umbrella of corruption. From a rights perspective, their actions, if imputable to the state, may amount to violations of the right to property (de facto expropriations or other types of infringements). The right to property is protected, for example, under Article 1 of Protocol 1 to the

<sup>127</sup> See notes 70–71 above and accompanying text.

<sup>128</sup> *Legal and Human Rights Centre*, *supra* note 70, at 37.

<sup>129</sup> *Ibid.*, at 34.

<sup>130</sup> Report of the Task Force on Public Collections or ‘Harambees’ presented to the Minister of Justice of Kenya, December 2003, quoted in *World Duty Free*, *supra* note 100, para. 134.

European Convention on Human Rights (ECHR), under bilateral or regional investment protection treaties and under Article 13 of the Energy Charter Treaty (ECT).<sup>131</sup> Two known investor–state arbitral proceedings prominently deal with corruption. In *World Duty Free*, a payment of 2 million US dollars in cash as a personal donation to President Daniel Moi was made by a foreign investor in exchange for the allowance to establish and operate duty free shops in Kenyan airports.<sup>132</sup> *World Duty Free* later claimed that it had been unlawfully expropriated in Kenya. The arbitral tribunal qualified the donation as a bribe, contrary ‘to transnationalized public policy’. Therefore, the contract could not be upheld,<sup>133</sup> and *World Duty Free*’s claim was rejected.

In contrast, the claim by the firm Yukos against Russia was upheld. The 2014 *Yukos* arbitral award,<sup>134</sup> rendered by a tribunal constituted under the ECT, has been praised as demonstrating the potential of ‘investment arbitration to bring corruption to light and act as an outside check on corrupt states’.<sup>135</sup> In *Yukos*, an arbitral tribunal held Russia responsible for breaching its obligation under Article 13 of the ECT by taking a measure ‘equivalent to nationalization or expropriation’.<sup>136</sup> This de facto expropriation had been effected by the Russian Federation through the deliberate bankrupting and liquidation of Yukos for political and financial reasons in order to appropriate its valuable assets.<sup>137</sup> The arbitral tribunal described in detail the corrupt actions taken by the government against Yukos, including ‘harassment, intimidation, and arrests’.<sup>138</sup> The legal consequence of the Russian breach of the ECT is the international responsibility of the Russian Federation, which includes the obligation to make reparations for the injury in form of monetary compensation (the principles of Articles 31 and 36 of the ILC Articles on State Responsibility and specified in Article 13 of the ECT). In

<sup>131</sup> Energy Charter Treaty 1994, 2080 UNTS 95.

<sup>132</sup> *World Duty Free*, *supra* note 100, para. 133. The investor first acted under the name ‘House of Perfume’ (located in Dubai), then under the name ‘World Duty Free Ltd.’ (incorporated under the laws of the Isle of Man).

<sup>133</sup> *Ibid.*, para. 157.

<sup>134</sup> Permanent Court of Arbitration Case no. AA 227, *In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Art. 26 of the ECT and the 1976 UNCITRAL Arbitration Rules between Yukos Universal Limited (Isle of Man) and the Russian Federation*, Final Award, 18 July 2014, available at <https://pcacases.com/web/view/61>. The award was quashed by the Hague District Court, Decision of 20 April 2016, but the quashing decision is not final, appeal filed at the Hague Court of Appeal on 28 July 2016, pending as of September 2018.

<sup>135</sup> A. Jouravleva, ‘Investment Arbitration as a Check on Corruption: The Yukos Award’, *Global Anti-Corruption Blog*, 12 November 2014, available at <https://globalanticorruptionblog.com/2014/11/12/investment-arbitration-as-a-check-on-corruption-the-yukos-award/>.

<sup>136</sup> See *Yukos Universal*, *supra* note 134, tribunal’s summary, paras 1580–1585.

<sup>137</sup> *Ibid.*, paras 756, 1579. In parallel to the arbitral proceedings, the ECtHR found a violation of Yukos’ rights to fair hearing and property and awarded €1.9 billion just satisfaction to Yukos. ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Appl. no. 14902/04, Judgment on the Merits of 8 March 2012; Judgment on Just Satisfaction of 15 December 2014.

<sup>138</sup> *Yukos Universal*, *supra* note 134, paras 761–812. The tribunal deemed credible the witness of the claimant who had described in detail how a 50-person special unit within the General Prosecutor’s Office was set up for ‘working exclusively on fabricating evidence against Mr. Khodorkovsky and Yukos’ (paras 767, 798–799).

application of these principles, the tribunal ordered the Russian Federation to pay 50 billion US dollars of damages to Yukos.

In such cases of grand corruption, the human rights approach does not seem to have an added value, due to the specific features of this constellation. First, in inter- or transnational proceedings, most holders of this right – foreign investors – are moral, as opposed to natural, persons, and, thus, they are not human beings with human interests and needs. Linked to this, private property is sometimes qualified as not being an ‘essential’ or ‘fundamental’ human right.<sup>139</sup> Finally, unlike the international protection of the typical human rights affected by corruption (notably, social rights), the transnational protection of the right to property, at least in the prominent two corruption cases so far decided by arbitral tribunals, have directly or indirectly benefited very few extremely wealthy individuals behind the investment, such as Michael Khodorkovsky (the founder of Yukos). Second, in investment arbitration, financial compensation is a primary remedy (as opposed to restitution in kind). Therefore, the establishment of a state obligation to pay compensation amounting to billions of US dollars or Euros will ultimately harm the broad population of the condemned state whose budget will be affected. In contrast, a purely criminal law approach would focus on the personal responsibility of the corrupt officials and would therefore not end up burdening the taxpayer to the same extent. Therefore, infringements of the right to private property through corruption are a specific constellation for which the human rights approach fits less than with regard to social and political human rights.

## 4 Remedies

Complementing the traditional criminal law-based anti-corruption efforts with human rights-based strategies bears risks, has its costs and also opens up opportunities for new international remedies. The link between corruption and human rights as currently acknowledged in practice allows for corruption to be made a topic in the general monitoring schemes (Universal Periodic Review and treaty-based state reporting). Importantly, the acknowledgement of the link effectively shields the human rights institutions from the reproach of acting *ultra vires*.<sup>140</sup> It is submitted that current practices could and should be reinforced in the direction of mutual mainstreaming.<sup>141</sup> Human rights mainstreaming of anti-corruption efforts would mean that the realization of human rights would be one of the anti-corruption goals from the outset.

<sup>139</sup> Van Boven, ‘Distinguishing Criteria of Human Rights’, in K. Vasak and P. Alston (eds), *The International Dimension of Human Rights* (1982) 43, at 43; see also G. Arangio-Ruiz, Fourth Report on State Responsibility, Doc. A/CN.4 Ser. A/1992/Add.1 (Part 1) 2(1) *ILC Yearbook* (1992) 32, para. 83: [T]he human rights which should be considered inviolable by countermeasures – the “more essential” human rights – are not understood to include property rights.’

<sup>140</sup> But see Rose, *supra* note 12, at 418.

<sup>141</sup> See especially International Council on Human Rights Policy and Transparency International (prepared by M. Sepúlveda Carmona), *Integrating Human Rights into the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities* (2010).

In legal practice, this would imply an interpretation of all criminal offences relating to corruption in a way that takes into account the human rights of victims.

On a complementary basis, the international human rights procedures could and should pay attention to corruption in the following way.<sup>142</sup> In the work of the Human Rights Treaty Bodies, the guidelines for all country reports and for all country-specific concluding observations of the committees should include corruption as a checkpoint that must be addressed. The recent practice of the Treaty Bodies,<sup>143</sup> first of all the CESCR,<sup>144</sup> to elaborate on the need for anti-corruption in more detail is welcome and should be expanded. Along the same line, the mandates of the human rights special rapporteurs and of independent experts should include the topic of corruption. Again, the emerging practice in this regard should be strengthened.<sup>145</sup> The extension of this mandate would entail fairly low costs in terms of personal and financial resources.

Not only human rights NGOs but also specialized anti-corruption NGOs should be allowed to participate in the Universal Periodic Review as well as in treaty-specific monitoring. Specialized NGOs could bring in the information and expertise on corruption, which is so far lacking in the human rights institutions. One might also conceive of a new general comment on corruption and human rights that would apply to all treaties. Finally, an anti-corruption mandate could be included in the international standards that would model the competences of national human rights institutions.<sup>146</sup> The possibility of finding actual human violations as examined in this article would allow for more specific, individualized legal strategies than the ones just

<sup>142</sup> See Boersma, *supra* note 5, at 376–379.

<sup>143</sup> For examples of concluding observations, see Human Rights Committee, Concluding Observations on Madagascar, Doc. CCPR/C/MDG/CO/4, 22 August 2017, paras 11–12; Human Rights Committee, Concluding Observations on Cameroon, Doc. CCPR/C/CMR/CO/5, 30 November 2017, paras 9–10, 37–38; Human Rights Committee, Concluding Observations on Romania, Doc. CCPR/C/ROU/CO/5, 11 December 2017, paras 7–8. See further examples in notes 24 and 26 above.

<sup>144</sup> See among the concluding observations, CESCR, Concluding Observations on Pakistan, Doc. E/C.12/PAK/CO/1, 20 July 2017, paras 17–18; CESCR, Concluding Observations on Russian Federation, Doc. E/C.12/RUS/CO/6, 16 October 2017, paras 18–19; CESCR, Concluding Observations on Colombia, Doc. E/C.12/COL/CO/6, 19 October 2017, paras 21–22; CESCR, Concluding Observations on Moldova, Doc. E/C.12/MDA/CO/3, 19 October 2017, paras 16–17; CESCR, Concluding Observations on Republic of Korea, Doc. E/C.12/KOR/CO/4, 19 October 2017, paras 13–14.

<sup>145</sup> See notably the 2017 report of the special rapporteur on the right to health, Dainius Puras, focusing exclusively on corruption in the health sector, Report on Health, *supra* note 9. See further, e.g., Special Rapporteur Léo Heller, Report on the Human Right to Safe Drinking Water and Sanitation, Affordability of Water and Sanitation Services, Doc. A/HRC/30/39, 5 August 2015, paras 19–20, 55 (on ‘costs of corruption’); Special Rapporteur Urmila Bhoola, Report on Contemporary Forms of Slavery, including Its Causes and Consequences, Thematic Report on Eradicating Contemporary Forms of Slavery from Supply Chains, Doc. A/HRC/30/35, 8 July 2015, paras 23, 43, 46, 62; Special Rapporteur Kishore Singh, Report on the Right to Education: Protecting the Right to Education against Commercialization, Doc. A/HRC/29/30, 10 June 2015, paras 93, 119, 121; Final Study on Illicit Financial Flows, Human Rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, Doc. A/HRC/31/61, 15 January 2016, paras 5, 75.

<sup>146</sup> A number of national human rights institutions are already entrusted with such a mandate. See Human Rights Council, Best Practices, *supra* note 6, statement of Azerbaijan, para. 99; statement of Peru, para. 104.

mentioned. In order to substantiate an individual complaint or communication to the human rights committees, to regional human rights courts and in arbitral procedures, the victim needs to make the argument that corrupt behaviour has in fact violated specific human rights in concrete cases. We have seen that this more exacting establishment of a violation faces numerous doctrinal problems. In the end, the existing human rights courts and committees can, and in fact already do, build corruption into their processes, and they may acknowledge corruption as an aggravating factor of human rights violations, without needing to conceptualize corruption as a human rights violation *tout court*.

However, the reflection seems valuable for elucidating the structure of social rights, the set of rights most affected by corruption. So far, the question at what point a social human right is actually violated in an individual case in the sense of constituting a breach of international law triggering state responsibility has not been fully resolved. For example, it is so far unclear which facts can be meaningfully qualified as a 'restriction of', or as an 'interference with', a social right, as we do with regard to civil and political rights. Due to the paucity of international individual complaints mechanisms in the area of social rights, monitoring bodies examining state reports and performing general assessments have not been forced to make explicit statements about these matters. This has changed with the entry into force of the Optional Protocol to the ICESCR, which allows for individual communications. The CESCR will be confronted with the problems of a threshold of encroachment, of causality and of attribution. The study of these elements in the field of corruption has highlighted how exceedingly difficult it is to apply them in the area of social human rights.

Overall, the benefit of the human rights perspective is diminished in that the international mechanisms are themselves weak when it comes to implementing human rights. Of course, the domestic institutions are the primary enforcers of international human rights.<sup>147</sup> If a domestic court were to condemn organs of the state for a violation of human rights through corruption, this would be a strong sanction. In many states, however, this is not to be expected due to corruption in the justice system.<sup>148</sup> This means that the human rights lens does not necessarily empower individual

<sup>147</sup> E.g., a Spanish non-governmental organization filed a communication to the African Commission of Human Rights and Peoples' Rights (ACHPR), alleging that the family of the president of Equatorial Guinea (Obiang family) had diverted the natural resources of Equatorial Guineans to their private benefit and established and maintained a corrupt system within the state and, thus, violated a number of rights guaranteed by the African Charter of Human and Peoples' Rights: the rights to natural resources (Art. 21), the right to development (Art. 22), the right to health (Art. 16), the right to education (Art. 17(1)) and the right to lawfully acquire private property (Art. 14). The ACHPR declared the communication inadmissible for lack of exhaustion of local remedies. ACHPR, *Asociación Pro Derechos Humanos de España (APDHE) v. Equatorial Guinea*, Communication 347/07, Decision on Inadmissibility, 12–16 December 2011, available at [www.opensocietyfoundations.org/sites/default/files/a\\_communication\\_20071012.pdf](http://www.opensocietyfoundations.org/sites/default/files/a_communication_20071012.pdf). Arguably, the requirement of local remedies should be handled flexibly. In constellations of prima facie extreme corruption of the judiciary, the resort to the domestic courts should not be demanded by the international monitoring bodies.

<sup>148</sup> See note 26 above. See UNCAC, *supra* note 17, Art. 11(1) (on the independence and integrity of the judiciary as a crucial element for combating corruption).

victims of corruption in the practical sense of opening up new pathways of access to justice for them. However, within regional human rights systems, individual complaints could be based on allegations of corruption, and related findings could lead to judicial pronouncements on systemic remedies, to the award of higher sums of just satisfaction and to tighter compliance monitoring. In contrast, on the universal level, the empowering effect of the human rights-based approach is, first of all, symbolic.

## 5 Conclusion

In terms of communication theory, a human rights ‘framing’ of anti-corruption is associated with a new prerogative of interpretation. Importantly, the prerogative shifts in institutional terms as well, away from the World Bank and towards the UN Human Rights Council. Potentially, this new discursive power entails a new power to act. In legal theory terms, the connection between anti-corruption law and human rights protection is an example for the systemic integration of two sub-areas of international law. Or the human rights approach to anti-corruption instruments can be seen as the constitutionalization of the latter. By elevating corruption to a constitutional matter, the new framing makes anti-corruption an all-the-more legitimate concern of the international community. Some international lawyers might complain that this smacks of ‘human rightism’<sup>149</sup> or of a ‘hubris’ of international human rights.<sup>150</sup> Indeed, there is a risk of overusing the human rights language. Therefore, the human rights-based approach to corruption should not be employed as a panacea.

The language of law generally (and of rights, more particularly) is a limited one, as the critique of the human rights-based approach to corruption points out.<sup>151</sup> Notably, a legal analysis cannot answer the questions of ‘why’ and ‘how’ corruption stubbornly persists. But this is not its purpose. A legal approach (unlike, for example, development economics) does not seek to identify political, economic or psychological causes and patterns of corruption or of any other social harm. Rather, the function of a legal, and, especially, of a rights-based, inquiry is three-fold: a rights-based scrutiny seeks to establish a distinction between lawful and unlawful behaviour, allows justice claims to be articulated and may render possible the use of the legal apparatus to rectify and eliminate situations of illegality. Of course, the law and the institution of rights are only one mode of governance besides others, with maybe modest effects. As with all modes of governance, the costs of employing them have to be properly assessed, notably in comparison to the alternatives. With regard to corruption, the purely criminal law approach has so far not worked all too well, and this suggests trying out complementary strategies.

<sup>149</sup> See Pellet, ‘“Human Rightism” and International Law’, 10 *Italian Yearbook of International Law* (2003) 3.

<sup>150</sup> See E. Posner, *The Twilight of Human Rights Law* (2014), at 148.

<sup>151</sup> Rose, *supra* note 12, at 430. This critique overlaps with objections against an over-legalization of societies and doubts about the rights-based approach to various other governance issues (ranging from development over democracy to environmental protection).

Speaking practically, the global anti-corruption effort does not need new rules but, rather, better implementation. The human rights approach can contribute to closing the implementation gap. The full recognition that corruption undermines the enjoyment of human rights allows the universal, non-adversarial human rights monitoring bodies to legitimately address corruption in detail without overstepping their mandate. But whether corruption can in itself constitute a human rights violation that can be invoked in an individual complaint procedure is a different question. The demonstration of an actual violation is difficult in terms of both legal argument and proof – but it is not impossible, as this article has sought to show. By contributing to a change of the frame of reference and by opening up new options for monitoring and litigation, the human rights perspective can usefully complement the criminal law approach to corruption and thereby contribute to the fulfilment of the development goals of Agenda 2030.