MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES | No. 2016-18

CORRUPTION AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS

Anne Peters

MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES
No. 2016-18

CORRUPTION AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS

AUTHOR
Anne Peters

ABSTRACT

It is a fact that states with a high corruption rate (or a high corruption perception) are at the same time those with a poor human rights record. Beyond this coincidence, the paper seeks to identify a concrete legal relationship between corruption and deficient human rights protection. This is in practical terms relevant, because the extant international norms against corruption have so far yielded only modest success; their implementation could be improved with the help of human rights arguments and instruments.

This paper therefore discusses a dual question: Can corrupt behaviour be conceptualised as a human rights violation? Should it be categorised and sanctioned as a human rights violation? My answer is that such a reconceptualization is legally sound, and that its normative and practical benefits outweigh the risk of reinforcing the anti-Western skepticism towards the fight against corruption. This assessment leads to the practice recommendation of a mutual mainstreaming of the international anti-corruption and human rights procedures. I conclude that the re-framing of corruption not only as a human right issue but as a potential human rights violation can contribute to closing the implementation gap of the international anti-corruption instruments.

KEYWORDS:

anti-corruption, grand corruption, petty corruption, bribery, human rights violation, criminal law, state, social rights, right to health, right to education, causality, ultra vires, omission, human rights mainstreaming

Corruption as a Violation of International Human Rights

Anne Peters*

1. Statement of the Problem

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.[1] In their official contributions to this Agenda, the Human Rights Treaty Bodies have "identified mismanagement of resources and corruption as obstacles to the allocation of resources to promote equal rights."[2] In fact, countries with high rates of corruption are the ones with a poor human rights record.[3] For instance, the States ranked lowest on Transparency International's Corruption Perceptions Index of 2015 are Afghanistan, North Korea, and Somalia, all of which have massive human rights problems.[4] Apparently, corruption and human rights violations thrive in the same environments and probably have the same root causes, such as poverty and weak institutions.[5]

---

* Director at the Max-Planck-Institute for Comparative Public Law and Public International Law, Heidelberg (Germany), professor at the universities of Heidelberg, *Freie Universität* Berlin, and Basel (Switzerland); vice-president of the board of the Basel Institute on Governance (BIG). I would like to thank Mark Pieth and Gretta Fenner of the BIG (https://www.baselgovernance.org/) and the participants in my research seminar at the Max Planck Institute for valuable discussions on the topic, and Benedict Kingsbury for useful feedback. I thank my student research assistants for their support, Richard Lapper (OHCHR) for information on case-law, and Zdislaw Kedzia for advice. This paper builds on my very short German article "Korruption und Menschenrechte", *JuristenZeitung* 71 (2016), 217-296. A prior version which still contains (more) weaknesses and lacks examples has been published as "Corruption and Human Rights", *Basel Institute on Governance Working paper series* No. 20 (2015), 1-34.

[1] Points 16.5. and 16.4. of UN GA Res. 70/1: "Transforming our World: the 2030 Agenda for Sustainable Development" of 25 Sept. 2015.

[2] Human Rights Treaty Bodies, Contributions to the 2030 Agenda for Sustainable Development (May 2016), p. 7.

[3] For a statistical analysis, see Todd Landman/Carl Jan Willem Schudel, Corruption and Human Rights, Empirical Relationships and Policy Advice, Working Paper (International Council on Human Rights Policy: Geneva 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.

[4] See for corruption: https://www.transparency.org/cpi2015/; for the human rights situation: Amnesty International Report 2015/16 (London: Amnesty International Ltd 2016).

[5] See generally Zoe Pearson, An International Human Rights Approach to Corruption, in: Peter Larmour and Nick Wolanin (eds.), Corruption and Anti-Corruption (Canberra: Asia Pacific Press 2001), 30-61. See also, fundamentally, International Council on Human Rights Policy and Transparency International (prepared by Magdalena Sepúlveda Carmona), Corruption and Human Rights: Making the Connection (Geneva: International Council on Human Rights Policy 2009); Martine Boersma/Hans Nelen (eds.), Corruption and Human Rights: Interdisciplinary Perspectives (Cambridge: Intersentia 2010); Martine Boersma, Corruption: A Violation of Human Rights and a Crime Under International Law? (Cambridge: Intersentia 2012); Kolale Olaniyan, Corruption and Human Rights Law in Africa (Oxford: Hart 2014).

Corruption, which follows the unofficial laws of the market, upsets the legal framework. Conceptually, corruption therefore constitutes the negation of the rule of law and thus also of the idea of human rights. Furthermore, corruption is often an aggravating factor in a human rights violation. It is an entirely different question, however, whether corruption may constitute a human rights violation in itself. Only if corrupt behaviour may in fact violate specific human rights in concrete cases, then corruption could not only be a topic in the general monitoring schemes (UPR and treaty-based state reporting), but moreover play a part in individual complaints before the extant human rights committees, regional human rights courts, and in arbitral procedures.[6]

I will investigate the problem in the form of a double question:[7] *Can* corrupt conduct be properly conceptualized as a violation of international human rights? (part 2) And secondly: *Should* corrupt acts be classified and sanctioned as human rights violations? My answer is that such a reconceptualization is legally sound, and that its normative and practical benefits outweigh the risk of reinforcing the anti-Western skepticism towards the fight against corruption (part 3). This assessment leads to the practice recommendation of a mutual mainstreaming of the international anti-corruption and human rights procedures (part 4). Part 5 concludes that the re-framing of corruption not only as a human right issue but as a potential human rights *violation* can contribute to closing the implementation gap of the international anti-corruption instruments.

The proposal to infuse corruption with human rights aspects responds to the moderate success of the existing international anti-corruption instruments – at least ten international and regional treaties with various additional protocols as well as soft law.[8] Their emergence in the

[6] While the primary forums for dealing with human rights complaints (including those based on corruption allegations are the domestic forums (courts, National Human Rights Institutions, and others), this paper leaves aside the domestic remedies.

[7] Two other links between corruption and human rights are not dealt with in this paper: 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 had investigated and publicly denounced corruption (see, e.g. the Inter-American Human Rights Commission (IAHRC), *Irma Flaquer v. Guatemala*, Friendly Settlement, Petition 11.766, Report No. 67/03 of 10 October 10, 2003. See also the report of the Special Rapporteur Michel Forst, Situation of human rights defenders (A/70/217 of 30 July 2015), paras 69-70 (on "defenders combating corruption and impunity"); report of the Special Rapporteur Mr. David Kaye, Promotion and protection of the right to freedom of opinion and expression (A/70/361 of 8 September 2015), Sec. A on „legal protection of whistle-blowers". Another link is that anti-corruption measures may themselves violate human rights: violation of the presumption of innocence, especially in the implementation of Article 20 UNCAC; violation of the right to a private life through the use of liaisons and surveillance; damage to reputation through disclosures in the media; violations of property through seizures and asset recovery (see Radha Ivory, Corruption, Asset Recovery, and the Protection of Property in Public International Law (Cambridge University Press 2014)).

[8] Inter-American Convention against Corruption of 29 March 1996, in force since 3 June 1997; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of

1990s had in turn reacted to the globalization of corruption itself, to the insight that especially instances of grand corruption had inevitably acquired transboundary elements. The United States championed a treaty to criminalize foreign bribery, and succeeded in persuading a large number of OECD States to adopt an Anti-Bribery Convention in 1997.[9] 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.[10] In 2003, the UN Convention against Corruption (UNCAC)[11] was adopted and now counts 178 State parties.

The international leading authority on corruption mentions the following goal of international anti-corruption policy: firstly, to improve the functioning of the global markets; secondly, to promote economic growth; thirdly, to reduce poverty; and fourthly, to safeguard the legitimacy of the State.[12] Anti-corruption has largely been merged with the good governance agenda[13] and the development discourse. And because good governance – as well as

---

17 December 1997, in force since 15 February 1999 (41 parties as of February 2016). Council of Europe: Criminal Law Convention on Corruption of 27 January 1999 (ETS No. 173); Additional Protocol of 15 May 2003 (ETS No. 191), in force since 1 February 2005; Civil Law Convention on Corruption of 4 November 1999 (ETS No. 174); Group of States against Corruption (GRECO), since 1999 (49 member States as of February 2016). Committee of Ministers: Recommendation No. R (2000)10 on Codes of Conduct for Public Officials of 11 May 2000; Recommendation Rec. (2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns of 8 April 2003; United Nations Convention against Corruption of 31 October 2003 (UNCAC), in force since 14 December 2005, UNTS vol. 2349, p. 41 (UN Doc. A/58/422), 178 States parties (as of February 2016). In the EU: Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (CFPI Convention) of 26 July 1995, No. C 316/49, 27/11/1995, in force since 17 October 2002; Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union No. C 313/12, 23/10/1996, in force since 17 October 2002; Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union of 26 May 1997, No. C 195/2 25/06/1997, in force since 17 October 2002; European Commission, Communication on Fighting Corruption of 6 June 2011 (COM (2011)308 final). Africa: African Union Convention on Preventing and Combating Corruption of 11 July 2003, in force since 4 August 2006; Southern African Development Community (SADC) Protocol against Corruption of 14 August 2001, in force since 6 July 2005. In the literature, see Julio Bacio Terracino, The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption (Antwerp: Intersentia 2012); Jan Wouters, Cedric Ryngaert, Ann Sofie Cloots, The International Legal Framework against Corruption: Achievements and Challenges, Melbourne Journal of International Law 14 (2013), 209-280; Cecily Rose, International Anti-corruption Norms: Their Creation and Influence on Domestic Legal Systems (Oxford: OUP 2015).

[9] Note 8.

[10] See Mark Pieth, Strafzweck: Warum bestrafen wir Auslandsbestechung?, in: Elisa Hoven/Michael Kubiciel (eds), Das Verbot der Auslandsbestechung (Baden-Baden: Nomos 2016), 19-23.

[11] Note 8.

[12] See Susan Rose-Ackerman, Introduction: The Role of International Actors in Fighting Corruption, in: Rose-Ackerman/Paul Carrington (eds.), Anti-Corruption Policy: Can International Actors Play a Constructive Role? (Durham: Carolina Academic Press 2013), 3-38, 5. See also the preamble of UNCAC 2003 (n. 8), first preambular paragraph.

[13] See, e.g., Human Rights Council, "The role of good governance in the promotion and protection of human rights" of 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, […]" (UN Doc. A/HRC/RES/7/11). See also UN Development Programme – Oslo

development – is in turn nowadays often analysed through a human rights lens, this type of analysis suggests itself for anti-corruption, too.

The problem is that corruption still largely goes unsanctioned. The number of criminal convictions for domestic and foreign bribery is notoriously low worldwide. Only four of the currently 41 States parties to the OECD Anti-Bribery Convention are truly "active" in their implementation.[14] Hence, the enforcement of the international anti-corruption norms needs to be improved. This could be done with the help of human rights arguments and instruments.

2. Can corruption be conceptualized as a human rights violation?

2.1. Defining corruption

Corruption[15] is not a technical term; it is not considered a criminal offence in most criminal codes around the world and it also does not have a legal definition in most international treaties. The most common definition is the one by the 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 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 FIFA (Fédération Internationale de Football Association),[16] 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.

Governance Centre, The Impact of Corruption on the Human Rights Based Approach to Development (2004).

[14] Transparency International, Exporting Corruption: Progress Report 2015: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery, pp. 7 and 12 (http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd (last visited 21 June 2016). The four "active" countries are the United States, the United Kingdom, Germany, and Switzerland.

[15] See Mark Pieth, Chapter 2: A Very Short Introduction to Corruption, in: Fritz Heimann/Mark Pieth, Confronting Corruption (New York: Oxford UP 2016).

[16] See generally Cecily Rose, The FIFA Corruption Scandal from the Perspective of Public International Law, ASIL Insights 19 (23) (2015).

2.2. Whose human rights?

Traditionally, bribery, the prototypical form of corruption, has been considered a "victimless crime".[17] According to legal doctrine, the injured party is first of all the public. Moreover, the core of bribery is a "wrongful agreement".[18] 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 coerced.

Public procurement is the economic sector most susceptible to corruption; the EU estimates that approximately 13% of all budget spending for public procurement is lost.[19] Here 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 of course 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. Related questions are how corruption may affect the property and investor rights of the successful bidders. Of course the assessment will differ depending on whether the bidder had 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 3.3.

In the political process, voters are adversely affected by candidates' financial dependence on major donors if the candidates are politically indebted to the donors after the election and if voters are unaware of those vested interests. The question is now whether those persons who are affected directly or indirectly are sufficiently individualised, and whether human rights are actually at stake in these scenarios.

---

[17] Matthias Korte in Wolfgang Joecks/Klaus Miebach (eds), Münchener Kommentar zum StGB, 2nd ed. Munich 2014, § 331, para. 12.

[18] In German criminal law since German Federal Court of Justice, BGH St. 15, 88-103, 97 of 25 July 1960; more recently, see, e.g., BGH, 3 StR 212/07 of 28 August 2007, para. 29.

[19] PricewaterhouseCoopers, Study prepared for the European Anti-Fraud Office (OLAF), Public Procurement: costs we pay for corruption. Identifying and Reducing Corruption in Public Procurement in the EU (2013).

2.3. Which human rights?

The idea is not to propagate any (new) human right to a corruption-free society.[20] 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 ICESCR); in the education sector, the right to education (Article 13 ICESCR) is at issue.

But also the classical liberal human rights may 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 ICCPR) is affected.[21] 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 ICCPR).[22] 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 ICCPR).[23] Or, the human right of association and the (labour) right to organize (Art. 22 ICCPR and relevant 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

[20] But see Ndiva Kofele-Kale, The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law, International Lawyer 34 (2000) 149-178; Andrew Brady Spalding, Corruption, Corporations and the New Human Right, Washington University Law Review 91 (2014), 1365-1428.

[21] See for a recommendation on corruption in prisons affecting prisoners' rights Human Rights Committee, Concluding observations on the second periodic report of Cambodia, CCPR/C/KHM/CO/2 of 27 April 2015, para. 14.

[22] See ECtHR, *Rantsev v. Cyprus and Russia*, 25965/04, 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 violated to life (Art. 2 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).

[23] See on corruption in the judiciary the report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Judicial Accountability (UN Doc. A/HRC/26/32 of 28 April 2014); International Commission of Jurists, Judicial Accountability: International Standards on Accountability Mechanisms for Judicial Corruption and Judicial Involvement in Human Rights Violations − Practioners Guide No. 13 (Geneva: International Commission of Jurists 2016). See for recent pertinent concluding observations of the treaty bodies: Human Rights Committee on Benin (CCPR/C/BEN/CO/2 of 23 November 2015), paras 28-29; Côte d'Ivoire (CCPR/C/CIV/CO/1) of 28 April 2015, para. 20; Committee on Economic, Social and Cultural Rights on Italy (E/C.12/ITA/CO/5 of 28 October 2015), paras 10-11; Committee on the Elimination of Discrimination against Women on Liberia (CEDAW/C/CO/17-8 of 24 November 2015), paras 15-16; on Madagascar (CEDAW/C/MDG/CO/6-7 of 24 November 2015), paras 8-10.

in Indonesia alleged.[24] 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) ICCPR) – are less clear.

2.4. Violations?

The third question is whether it even makes sense to speak of human rights violations. In the predominant practice of the United Nations, 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 Charter-based Human Rights Council. Only a few reports and governmental statements speak of actual violations.[25] Most texts refer only to a "negative impact" on the enjoyment of human rights,[26] state that corruption "undermines" human rights,[27] or emphasize the "grave and devastating effect" of corruption on the enjoyment of human rights.[28]

Typical for this approach is a 2010 judgment by the ECOWAS Court in a proceeding instituted by an NGO on 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

[24] The 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 of 23 February 2001, paras. 359 and 362 lit. d).

[25] See for a determination of "violations" the foreword to UNCAC (2003) by UN Secretary-General Kofi Annan: "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" (italics mine); 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 of 7 July 2004 (UN Doc. E/CN.4/Sub.2/2004/23), para. 57: "corruption, whether systemic, endemic or petty, *violates* citizens' enjoyment of all the rights contained in all the international instruments" (italics mine); ibid., Progress report submitted by the Special Rapporteur, 22 June 2005 (UN Doc. E/CN.4/Sub.2/2005/18), 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" (italics mine). 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 of 15 April 2016 (UN Doc. A/HRC/32/22), statements of Bahrain (para. 15); Estonia (para. 25); Georgia (para. 31); Mauritius (para. 50); Romania (para. 66).

[26] Human Rights Council, Best practices, 2016 (note 25); Human Rights Council, Res. 29/11 "The negative impact of corruption on the enjoyment of human rights" of 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) of 5 January 2015, especially para. 21; Opening statement by Navi Pillay, High Commissioner for Human Rights, Panel on "the negative impact of corruption on human rights" of 13 March 2013, in: United Nations Human Rights: Office of the High Commissioner, 8-10 (8).

[27] UN Human Rights Commission, Sub-Commission: "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" (Sub-Commission on the Promotion and Protection of Human Rights, Resolution of 5 August 2005, E/CN.4/Sub.2/2005/L.24/Rev.1, second preambular paragraph, italics mine).

[28] UN Human Rights Commission, Progress report 2005 (n. 25), para. 41.

education, as guaranteed by Art. 17 of the African Charter of Human and People's Rights, but does not per se constitute a violation of that right.[29] The Court viewed corruption first of all a matter of domestic criminal and civil law, but not of international human rights law, and for the domestic courts to deal with. Corruption does not (or not in the first place) fall within the jurisdiction of the regional human rights court of ECOWAS, the Court said.[30]

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."[31] 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".[32] From a legal standpoint, it is crucial whether we qualify a situation as merely undermining human rights, or whether we qualify it as a true rights violation that must be deemed unlawful and may be addressed with the usual sanctions.

---

[29] ECOWAS Community Court, *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. the Federal Republic of Nigeria and Universal Basic Education Commission*, Judgment of 30 Nov. 2010 (ECW/CCJ/JUD/07/10), para. 19: "granting that the ICPC report has made conclusive findings of corruption that per se will not amount to a denial of the right of education. Admittedly, embezzling, stealing or even mismanagement of funds meant for the education sector will have a *negative impact* on education since it reduces the amount of money made available to provide education to the people. Yet it does not amount to a denial of the right to education, without more. (…) There must be a *clear linkage* between the acts of corruption and a denial of the right to education. In a vast country like Nigeria, with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, education, even though as earlier pointed out it has a negative impact on education." (emphasis added). See also ibid., para. 28.

[30] Ibid., paras. 20-21. Para. 21: "This Court will only hold a State accountable if it denies the right to education to its people. Funds stolen by officers charged with the responsibility of providing basic education to the people should be treated as crime, pure and simple or the culprits may be dealt with in accordance with the applicable civil laws of the country to recover the funds. Unless this is done, every case of theft or embezzlement of public funds will be treated as a denial of human rights of the people (…) That is not the object of human rights violation in this Court where every breach or violation must be specifically alleged and proved by evidence." See also ibid., para. 24: "[T]his Court will not have the power to order the defendants to arrest and prosecute anybody to recover state money."

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

[32] [2012] 9 S.C.R. 601 602 *State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar* (Criminal Appeal No. 1648 of 2012), 15 October 2012, para. 14.

2.5. Which State obligations?

In order to determine whether there is a violation, we have to examine what kinds of obligations are generated by the human rights in question in order to determine which of them can be violated by corrupt State action.

Three dimensions of obligations

All types of human rights give rise to 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 this obligation in turn into the three subcategories of facilitate, provide, and promote ("*fulfil (facilitate)* [...] *fulfil (provide)* [...] *fulfil (promote)*").[33]

Obligations of officials and of the State

We have to distinguish two points of contact in this regard: firstly, the specific corrupt conduct of an individual official that is attributed to the State due to the official's status; and secondly, 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 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) ICCPR) may be violated in the positive dimension of the State obligation to facilitate.

Obligations of the State to protect

In the following discussion, I will focus on the macro level, namely the question of how to qualify – from the perspective of these three dimensions of obligation – the lack of effective anti-corruption measures in a State where corruption is rampant. The deficient

[33] This threefold division was introduced for the first time in Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12) (2000), para. 37.

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.[34] 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).[35]

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,[36] 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[37] – are mirrored by *individual* rights of the victims of corruption.[38]

The obligation to protect was developed in regard to dangers emanating from third parties, such as economic operators.[39] The obligation to protect is thus suitable to provide additional human rights support for the criminalization of foreign bribery demanded by the OECD Anti-

[34] For social human rights, see Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights (1997), Human Rights Quarterly 20 (1998), 691-704, para. 11. See, e.g., for the right to education, CESCR, General Comment No. 13, The Right to Education (Art. 13) (1999), para. 58. See also the first communication under the individual complaints procedure: ICESCR, Social Committee, *I.D.G. v. Spain* (Communication 2/2014 of 17 June 2015), para. 12.4: the inadequate notification by the State of the imminent execution of a mortgage implies a violation of the right to housing, as guaranteed by Art. 11(1) ICECSR.

[35] See, e.g., Boersma 2012 (n. 5), 244 in regard to the right to housing.

[36] Legislative omissions thus in principle also fall under the heading of human rights violations through omission: Para. 15(d) of the Maastricht Guidelines (n. 34) mentions the "*failure to regulate* activities of individuals or groups so as to prevent them from violating economic, social and cultural rights" (italics mine).

[37] See Anne Peters, Jenseits der Menschenrechte (Tübingen: Mohr 2014), 234-245.

[38] 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 providing for individual communications, because social rights were until then not (quasi-)justiciable (on an individual basis). Under German constitutional law, a right to have laws enacted or amended arises from basic rights only in extreme cases, "when it is evident that an originally lawful rule has become unsustainable under constitutional law in the interim due to changes to the circumstances, and if the legislative power has nonetheless failed to act or has enacted evidently deficient corrective measures" (Federal Constitutional Court of Germany, BVerfGE 56, 54 et seq., 81 (Ruling of 14 January 1981) – *Fluglärm*, para. 66, translation mine). See also BVerfGE 88, 203 et seq. – *Schwangerschaftsabbruch II*; BVerfGE 46, 160 et seq. – *Schleyer*. The same reasoning seems warranted at the international level.

[39] For access to health care, see, e.g., CESCR, General Comment No. 14 (n. 33), para. 51: "Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction *from infringements* of the right to health *by third parties*. This category includes such omissions as the *failure to regulate* the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; […]" (italics mine).

Bribery Convention.[40] 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 United Nations Guiding Principles of Business and Human Rights of 2011 (Ruggie Principles).[41]

The obligation to protect under human rights law does not only require the State to protect from the acts of private persons, but also to reduce structural human rights risks in which the State's own officials are involved.[42] 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.[43]

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 in any event responsible under international law for its failure to discharge its human rights obligations to prevent and protect.[44]

These human rights obligations would significantly strengthen the specific preventive obligations under anti-corruption law. Chapter II of the UN Convention against Corruption 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), it becomes apparent that the measures mentioned here must in fact be taken in an *effective* way

[40] Foreign bribery is the bribery of foreign public officials by a company subject to the jurisdiction of a State party (Articles 1 and 4 of the OECD Anti-Bribery Convention of 1997, n. 8).

[41] UN Guiding Principles on Human Rights and Transnational Corporations and Other Business Enterprises (UN Doc. A/HRC/17/31), 21 March 2011; adopted by the UN Human Rights Council on 6 July 2011 (UN Doc. A/HRC/RES/17/4).

[42] See Franz Christian Ebert/Romina I Sijniensky, Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention? Human Rights Law Review (2015), 343-368.

[43] ECtHR, 27 September 1995, *McCann and Others v. UK*, No. 18984/91, paras. 157 et seq.; ECtHR, 9 April 2009, *Silih v. Slovenia*, No. 71463/01, paras. 192 et seq. Obligation to institute criminal proceedings: ECtHR, 15 December 2009, *Maiorano and Others v. Italy*, No. 28634/06, para. 128.

[44] Constitutional Court of South Africa, *Glenister* (n. 31), 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 Magdalena Sepúlveda Carmona/Julio Bacio Terracino, Corruption and Human Rights: Making the Connection, in: Martine Boersma/Hans Nelen (eds.), Corruption and Human Rights: Interdisciplinary Perspectives (Antwerp: Intersentia 2010), 27.

in order to fulfil the obligations to protect and to fulfil (including to prevent) grounded in human rights law.[45]

Procedural 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".[46] 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 relevant here most likely include planning obligations[47] and monitoring obligations.[48] 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 (2003).[49]

Accordingly, the procedural obligations under UNCAC, especially the disclosure and publication requirements, which can be an effective way to curtail corruption, are equally grounded in human rights.[50] Viewed in that light, failure to satisfy these obligations simultaneously constitutes a violation of the relevant human rights.

Result-independent obligations

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

[45] See ECOWAS Court, Judgement of 14 December 2012, *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*, para. 32: "the […] 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" (italics mine). At issue in this judgment was the violation of social human rights by oil prospecting companies.

[46] See Philipp Alston/Gerard Quinn, The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly 9 (1987), 156-229, 180 (regarding the determination of whether "the maximum of available resources" was used).

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

[48] See CESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, Para.1) (1990), para. 11; Maastricht Guidelines (n. 34), para. 15(f).

[49] See, e.g., Articles 5, 7, 9, 10, 12, 13 UNCAC (n. 8). See also OECD Guidelines for Multinational Enterprises (2011), Section VII: Combating Bribery, Bribe Solicitation and Extortion, para. 5: "Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion".

[50] 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.

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.[51]

The anti-corruption obligations under human rights law mentioned above should be interpreted in a result-independent manner. This establishes a parallelism to criminal law. Bribery and other offences that we summarize under the umbrella of corruption are, generally speaking, "endangerment offences". This means that they criminalize conduct which endanger legally protected interests even if that conduct does not produce a specific harmful consequence. This is appropriate to the legally protected interest which is 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 that 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."[52] The situation here is different than in the case of the obligation to prevent genocide, for example. In that case, the ICJ held that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed".[53] 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 commited.

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

[51] See James Crawford, State Responsibility: The General Part (Cambridge 2013), 227.

[52] Lord Hewart CJ, *The King v. Sussex Justices, ex parte McCarthy*, 9 November 1923, 1 King's Bench Division, 256–260 (259); cited without source in ECtHR, 17 January 1970, *Delcourt v. Belgium*, No. 2689/65, para. 31.

[53] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, para. 431.

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".

2.6. Corruption as a violation of the fundamental obligations set out in Article 2(1) ICESCR

Under certain circumstances, corruption (both petty and grand) must notably be considered a violation of the International Covenant on Economic, Social and Cultural Rights (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) ICESCR, which sets out the fundamental obligations of the States parties, contains four components that are subject to monitoring by the treaty body, the CESCR.[54] 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".[55] 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.[56] 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.[57]

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

[54] On the operationalization of these elements, see Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (1986), Human Rights Quarterly 9 (1987), 122-135; Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights (1997), Human Rights Quarterly 20 (1998), 691-704; CESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, para. 1) (1990).

[55] CESCR, General Comment No. 3 (n. 54), para. 2.

[56] See Boersma 2012 (n. 5), 229-230.

[57] Inter-American Commission on Human Rights, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights (OEA/Ser.L/V/II.132, Doc. 14 of 19 July 2008), 24.

rights.[58] 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.[59]

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.[60] 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.[61] The component likewise gives rise to a prohibition against the diversion of resources that were originally dedicated to social purposes.[62] In their concluding observations on individual States, the various human rights treaty bodies regularly refer to the feed-back loop between combatting corruption and devoting sufficient resources to the protection of human rights.[63]

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, etc., 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, in that it reduces tax compliance. 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

[58] See Limburg Principles (n. 54), para. 28; CESCR, General Comment No. 12 (n. 50), paras. 17 and 14 (n. 39), para. 47. In the literature, see Magdalena Sepúlveda Carmona, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (Antwerp: Intersentia 2003), 332-335.

[59] See Boersma 2012 (n. 5), 233.

[60] See Ben Saul/David Kinley/Jacqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials (Oxford: OUP 2014), 143.

[61] See Limburg Principles 1986 (n. 54), para. 27.

[62] See Sepúlveda Carmona (n. 58), 315.

[63] See, e.g., Committee on the Rights of Children, Concluding observations on the third to fifth periodic reports of Nepal, CRC/C/NPL/CO/3-5 of 3 June 2016, paras 12 and 13 b); Human Rights Committee, Concluding observations on the second periodic report of Benin, CCPR/C/BEN/CO/2 of 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."

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) ICESCR has been violated.

The fourth component of the fundamental obligation set out in the ICESCR is to employ "all appropriate means", which I will come back to in Section 2.10. Whenever the State party fails to comply with any of these obligations,[64] it is in non-compliance with the Covenant. In the final analysis, the Social Rights Committee could, *lege artis* and as a way of continuing its own practice and that of the States parties, use the existing monitoring procedures to make the authoritative determination that a State which pursues an evidently deficient anti-corruption policy in the face of rampant corruption is violating its fundamental obligation arising from the ICESCR.

2.7. Corruption as discrimination under Art. 2(2) ICESCR and Art. 2(1) ICCPR

Some types of corruption may amount to discrimination.[65] An outright violation of one of the prohibitions against discriminations of the universal and regional human rights conventions is present only when a number of preconditions are met. First of all, the law does not require that all individuals be treated identically. However, differential treatment must have a legal basis, pursue a legitimate aim, and be proportionate.[66] Discrimination can be present even without targeted unequal treatment of individuals and groups of individuals. Intent by the State to discriminate is not required. In particular, all human rights conventions also protect from indirect discrimination. Indirect discrimination may arise from a State policy that appears neutral, but in reality disproportionately affects certain population groups in a negative way.[67] Finally, discrimination may also arise from an omission,[68] which is sometimes referred to as "passive discrimination".

---

[64] The difficult question of how precisely the CESCR makes this determination cannot be discussed here in detail.

[65] The recent Human Rights Council report summarised the statements of participating states as emphasizing that "corruption could lead to discrimination and violated the principle of equality" (Human Rights Council, *Best practices*, 2016 (note 25), para. 129). See for explicit governmental statements in this sense: Bahrain (para. 15); Turkmenistan (para. 88). In scholarship C. Raj Kumar, Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance (Oxford OUP 2011), 36, 46-47.

[66] See ibid., para. 13.

[67] In regard to the ICESCR, which is especially relevant to our discussion, see CESCR, General Comment No. 20 (n. 69), para. 8: "guarantee" means that "discrimination must be eliminated both formally and substantively. […] States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination". See also CESCR, General Comment No. 13, The Right to Education (Art. 13) (1999), para. 59: The failure to take measures which address *de facto* educational discrimination violates Article 13; CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12) (2000), para. 50: Denial of access to health services as a result of *de facto* discrimination of particular groups violates the right to health.

[68] For the prohibition of discrimination set out in the ICESCR, see CESCR, General Comment No. 20 (n. 69), para. 14.

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(2) ICESCR and Article 2(1) ICCPR). 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 (Art. 2(2)), is not applicable in these contexts.

One could think of activating the autonomous equal treatment guarantee set out in Article 26 ICCPR, but this provision basically only prohibits arbitrariness, and its effects are stymied by numerous reservations of State Parties. Overall, the autonomous equal treatment guarantee (Art. 26) does not seem to offer a legal weapon against corruption.

Discrimination in the proper sense (under Art. 2(2) ICESCR and Art. 2(1) ICCPR) comes into play only if it involves unequal treatment on the basis of a suspect classification. 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 as suspect a classification as race or gender, the CECSR has its general comment on non-discrimination held that individuals and groups must not be "arbitrarily treated on account of belonging to a certain economic or social group".[69] The committee thus 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.

For example, in campaigns for democratic elections, the economic affluency 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."[70] The High Court concluded that

[69] 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. 35: "Individuals and groups of individuals must not be *arbitrarily treated on account of belonging to a certain economic or social group or strata within society*. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places" (italics mine).

[70] The High Court of Tanzania, *Legal and Human Rights Centre and Others v. Attorney General*, (Miscellaneous Civil Case No. 77 of 2005) [2006] TZHC 1 (24 April 2006), p. 28; see also p. 29 (available at http://www.saflii.org/tz/cases/TZHC/2006/1.html).

the law violated the rights to equal treatment and non-discrimination regarding political participation (Arts. 7 and 21 UDHR) as incorporated in the Tanzanian Constitution.[71]

Especially the solicitation or acceptance of petty bribes may be discriminatory, too. 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 better able to meet a (larger) request for a bribe. Persons are thus treated differently without a reasonable justification.

So if an individual is unable or unwilling to pay a bribe, e.g., 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 which has a disproportionate negative impact on individuals without means. Then not only the affected persons' civil liberties 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 capture the social meaning of corruption, as expressed by then UN Secretary-General Kofi Annan in the foreword to the UN Convention against Corruption, namely that corruption "hurts the poor disproportionately" and promotes "inequality".[72]

2.8. Causation

A key problem for determining a human rights violation through corrupt conduct is causation.[73] 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

[71] Ibid., p. 39.

[72] UN Secretary-General Kofi Annan, Foreword UNCAC (2003).

[73] Krista Nadakavukaren Schefer, Causation in the Corruption – Human Rights Relationship, Rechtswissenschaft 1 (2010), 397-425 distinguishes between general and specific causation analysis. The general causation analysis looks at groups of factors rather than between a particular event and an individual (p. 407). The paper by Nadakavukaren Schefer concentrates on general causation analysis which servers predictive and explanatory purposes, rather than individual causation analysis for the purposes of attributing legal responsibility (cf. ibid., note 35). In contrast, this contribution concentrates on the latter.

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 that "linkage" any further.[74]

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.[75] Unless special rules exist, these principles apply to State responsibility arising from violations of human rights.[76] There are no uniform rules of causation under international law.[77] The Articles on State Responsibility of the International Law Commission are silent in regard to the causal link between the conduct and the legal breach ("cause in fact").[78] But the provision in Article 31 of the ILC Articles governs the causal link between the legal breach and the damage (the "scope of responsibility").[79] 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, etc.) is rather the exception. In other areas of the law, damage may be mentioned in the primary norm itself (e.g. Art. 139(8) UNCLOS). Then, the norm is only breached if damage is caused. With regard to such a norm, the distinction between cause in fact and scope of responsbility is erased.[80]

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[81] and for war damages. It is

[74] ECOWAS Community Court 2010 (ECW/CCJ/JUD/07/10) (note 29), para. 19.

[75] See Léon Castellanos-Jankiewicz, Causation and International State Responsibility, SHARES Research paper 07 (2012) ACIL 2012-07; Crawford (n. 51), 492-503.

[76] See Article 33(2) and Article 55 of the ILC Articles on State Responsibility (UNGA res. 56/83 of 12 December 2000).

[77] See Eritrea−Ethiopia Claims Commission (EECC), Decision No. 7: Guidance Regarding *Jus ad Bellum Liability*, 27 July 2007, paras. 8-9.

[78] In international legal terminology, this concerns the "breach of an international obligation of the State"; Article 2(b) of the ILC Articles (n. 76).

[79] Plakokefalos notes the frequent lack of distinction between the two aspects of causality in international case law: Ilias Plakokefalos, Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity, EJIL 26 (2015), 471-492, esp. at 475. In German law, for example, the two aspects are called "*haftungsbegründende Kausalität*" and "*haftungsausfüllende Kausalität*".

[80] *Cf.* ITLOS (Seabed Disputes Chamber), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion No. 17 of 1 February 2011, paras 181-184: "Causal link between failure and damage".

[81] On the causal link between the legal breach and the damage (scope of responsibility) in regard to the award of "just satisfaction" under Article 41 of the European Convention on Human Rights (ECHR), see ECtHR, *Case of Chevrol v. France*, No. 49636/99, 13 February 2003, paras. 86-89; *Case of Sylvester v. Austria*, No. 36812/97 and 40104/98, 24 April 2003, paras. 79-92 (especially 81-84, 91); *Case of Nowicka v. Poland*, No. 30218/96, 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

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.[82] There must be "proximity"[83] between the legal breach and the damage. Only for damage/losses that are "not too remote"[84] reparation is owed.[85] "Proximity" is determined on the basis of the objective criterion of "natural and normal consequence"[86] and the subjective criterion of "foreseeability".[87]

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 many 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

---

excessively long imprisonment in violation of Article 4 ECHR (*Nowicka*). However, the requirements for such causation were not examined in any detail.

[82] US-German Mixed Claims Commission, Administrative decision No. II, 1 November 1923, RIAA vol. VII, 23-32, 29. The arbitral tribunal continued: "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. […] All indirect losses are covered, provided only that *in legal contemplation* Germany's act was the *efficient* and *proximate cause* and source from which they flowed" (ibid. 29-30, italics mine). See also Arbitral Tribunal, *Provident Mutual Life Insurance Company and others (United States) v. Germany*, 18 September 1924, RIAA vol. VII (1924), 91-116, 112-113.

[83] EECC Dec. No. 7 (n. 77), para. 13.

[84] ILC Commentary, Article 31, para. 10 (ILC YB 2001/II vol. 2, Doc. A/56/10, Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), Part E: Draft Articles on Responsibility of States for Internationally Wrongful Acts, 93).

[85] See Arbitral Tribunal, *Trail Smelter Case, United States v. Canada* RIAA 3 (16 April 1938 and 11 March 1941), p. 1905 et seq. (p. 1931): Damage that is "too indirect, remote, and uncertain" is not liable for compensation.

[86] *Provident Mutual Life Insurance Company* (n. 82), 113.

[87] EECC decision No. 7 (n. 77), para. 13. See already the *Naulilaa* case: *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, RIAA vol. II, 1011-1033 (1031). Cour permamente d' Arbitrage, *Afffaire relative à la concession des phares de l'Empire Ottoman* (Grèce v. France), decision of 24/27 July 1955, UNRIAA vol. 12, 155-269, at 218 : « Les dégats étaient ni une conséquence *prévisible* ou *normale* de l' évacuation, ni attribuables à un manque de précaution de la part de la Grèce. Tout lien adéquat de causalité fait défaut … . » (emphasis added). Para. 14 of EECC decision No. 7 (n. 77) 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.

health were foreseeable for the public official and were in the usual course of things. The corrupt 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.[88]

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 announcement of the election results, i.e., 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.[89]

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 especially 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 only 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 that various factors are concurrent. We call this "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

[88] Sepúlveda Carmona, in: International Council on Human Rights Policy (n. 5), 27 refers to this constellation as an "indirect link" between corruption and human rights violations.

[89] See Sepúlveda Carmona/Bacio Terracino, in: Boersma/Nelen (n. 44), 30.

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, and this is indeed what international legal practice does.[90] 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" or "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 anyway, the trial would have been delayed substantially even without this corrupt act, and that 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 (1) cumulative (both needed), or (2) concurrent ("dual", "competing", or "alternative", i.e. each sufficient on its own), or (3) "overriding". The most frequent situation seems to be that the dysfunctionality of a given governmental sector has multiple causes, only one which 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 now 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.[91] 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 in some cases be denied.

---

[90] 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 EECC, *Final Award: Ethiopia's Damages Claims,* 17 August 2009, RIAA XXVI, 631-770, 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, which at the same time illustrates the situation where it cannot be determined after the fact which cause 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 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 (ICJ, *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, 3 et seq., paras. 76-77 and 90).

[91] See Art. 3:103, Alternative causes, in Chapter 3, Causation (Art. 3:101-106), of the Principles of European Tort Law, European Group on Tort Law, Text and Commentary (Vienna and New York: Springer 2005).

A case which was decided on the basis of a probably "overriding" causation, but against the background of factual indeterminacy, dealt with child labour in Portugal in the 1990s. An NGO filing a complaint with the European Social Committee 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 that basis, the Committee found that the situation in Portugal on child labour was indeed not in conformity with Art. 7(1) of the European Social Charter (minimum age of employment of 15 years), because several thousand children under the age of 15 actually performed work – but did not base this finding on corruption.[92]

This example shows how, in practice, the decision-making bodies tend to leave open the question of how important, and how "causal" corruption was 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 out those constellations where other factors (besides corruption) are absent or cannot be proven.

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 from the state to reach a particular result (see Section 2.4. above).

In the Bosnian Genocide case, the International Court of Justice found that an obligation to prevent genocide exists even if the State cannot be certain whether the preventive measures will be successful or not.[93] This means that the State cannot avoid responsibility simply by showing that genocide (or in our case, corruption) would have taken place despite all its efforts to prevent it. So although proper preventive action would *not* have eliminated the

[92] European Committee of Social Rights, *International Commission of Jurists v. Portugal*, Complaint No. 1/1998, decision of 9 September 1999, esp. para. 42; *available at* https://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC1Merits_en.pdf.)

[93] In that case, success would have been the prevention of genocide. See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement of 26 February 2007, para. 461.

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.[94] 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 (e.g., establishment of an anti-corruption authority with extensive powers and generous financial resources). An important 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 to the purely statistical evidence that is commonly used to show indirect discrimination.

2.9. 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.

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"

[94] In the Genocide case, however, the ICJ considered in regard to the causal nexus between the breach and the content of the state responsibility ("scope of responsibility", i.e. in order to determine whether Serbia owed reparations) whether genocide would have occurred even *despite* efforts to prevent it (ibid., para. 462). Because this could not be shown, the ICJ did not believe financial compensation by Serbia to be appropriate.

(Article 7 of the ILC Articles). Such conduct in an official capacity must be distinguished from private conduct.[95]

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).[96] According to the ILC commentary, it matters whether the corrupt person was purportedly acting in an official capacity and with "apparent authority".[97]

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, or refraining from public prosecution, or for 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".[98]

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

---

[95] See Crawford (n. 51), 136-140.

[96] The *locus classicus* is French-Mexican Claims Commission, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, RIAA 5 (7 June 1929), 516-534: 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" (530). See also Iran-US Claims Tribunal, *Yeager v. Iran*, Case No. 10199, Award No. 324-10199-1, 2 November 1987, Claims Tribunal Reports (CTR) 17 (1987), 92-113. 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" (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 2013 (n. 51), 138).

[97] ILC Commentary on Article 7, para. 8: "[…] purportedly carrying out their official functions […] the question is whether [the individuals] were acting with apparent authority" (ILC YB 2001/II vol. 2, Doc. A/56/10, Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), Part E: Draft Articles on Responsibility of States for Internationally Wrongful Acts, 46).

[98] Llamzon, Corruption in Investment (note 129), 261.

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 were fair only if the official had been basically passive, and lured into the corruption by the "bad" briber – a situation which is impossible to reconstruct and maybe also unrealistic.[99] In any case, attribution to the State could not 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 themelves.[100] 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.[101] 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.

The rationale of outlawing corruption

But should not, from a normative perspective, attribution be further limited in light of the rationale of outlawing corruption? Does the proscription against corrupt official acts (or the improvement of State 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.

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".[102] The goal is therefore "to protect the institution of public service and thus a fundamentally important public good".[103] 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

[99] Ibid., at 262.
[100] Ibid., at 264, with reference to the ILC commentaries.
[101] But see ICSID, *World Duty Free Company Limited v. The Republic Of Kenya,* ICSID Case No. ARB/00/7, 4 October 2006, 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 "as the otherwise innocent principal" of the President engaged as its agent in bribery. But this reasoning was in application of English and Kenyian law, not under international law.
[102] Matthias Korte, § 331, para. 8, in: Wolfgang Joecks/Klaus Miebach (eds.), Münchener Kommentar zum StGB, 2nd ed. Munich 2014 (translation mine).
[103] Ibid., para. 12.

of bribery. The criminal law on corruption is about "protecting trust in the interest of the individual citizen".[104] Protection of "the public" and protection of the human rights of all persons in a given State are therefore not opposites or different categories. The public interest in the legitimacy of the State is also what underlies human rights protection. The modern liberal State is legitimate 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.[105] 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 proscription 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.

2.10. 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. Both legal and political rights and social human rights can be lawfully restricted.

In regard to social human rights, it may even make more sense not to view lesser fulfilment of the progressive implementation obligation as a "restriction" of rights, but rather to view it as an inherent limit to the scope of positive rights. A component of the fundamental treaty obligation set out in Article 2(1) ICESCR (see Section 2.6. above) is 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).[106]

---

[104] Günter Heine and Jörg Eisele in Strafgesetzbuch: Kommentar (29th ed. Munich: Beck 2014), § 331, para. 9.

[105] This difference is narrowed 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, 29 October 1992, *Open Door and Dublin Well Woman v. Ireland,* No. 14234/88 and others, para. 44 on women of childbearing age as "victims" of a prohibition of abortion.

[106] Article 8(4) of the Optional Protocol to the ICESCR reads: "When examining communications under the present Protocol, the Committee shall consider the *reasonableness of the steps taken* by the State Party in

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.[107] 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".[108]

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 "*Untermaßverbot*"). 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 party, 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.[109] The concepts of "appropriateness" and "reasonableness" thus play a dual role: They serve as the cap, but also as the floor.[110] States must take "appropriate" measures – not more, but also not less.

The question now is when a State fails to meet that minimum level and what 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 ICECSR 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

---

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" (italics mine). In the treaty negotiations on the Optional Protocol, there was an important controversy on the level of detail of the CESCR's review and the scope of discretion of the States parties. The proposed terms "margin of appreciation" and "discretion" were ultimately rejected and were not included in the text of the Optional Protocol (see Brian Griffey, The Reasonableness Test: Assessing Violations of State Obligations under the Optional Protocol to the ICESCR, Human Rights Law Review 11 (2011), 275-327, at 295 and 298-300). In the terminology of fundamental rights scrutiny which has been developed for liberal negative rights in domestic constitutional law, notably in Germany, this "built-in" limit to the State's obligation to perform can be qualified as the outer boundary of a right's ambit or as a limit to the allowance of the State to interfere with those rights. This scheme only awkwardly fits to the examination of a violation of the positive dimension of rights.

[107] *Grootboom* (n. 47), para. 38 (on the right to have access to adequate housing according to Article 26 of the South African Constitution).

[108] BVerfGE 33, 303-358, para. 63, Judgment of 18 July 1972 − 1 BvL 32/70 and 25/71 − *Numerus clausus* (on the right to university education; my translation).

[109] See Boersma 2012 (n. 5), 233.

[110] 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", 1 February 2008, A/HRC/8/WG.4/CRP.1.

grant that authority. In its settled case law, the CESCR emphasizes that the States parties have a substantial "margin of appreciation" in this regard.[111] The Optional Protocol expressly provides that a State party "may adopt a range of possible measures for the implementation of the rights set forth in the Covenant" (Article 8(4) OP). In the final instance, however, the CESCR reserves the right to review the "appropriateness" of the means and thus of the financial resources in an authoritative way[112] – albeit without the power to enforce this determination.

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, e.g., the right to health of concrete patients or the right to equal treatment of concrete business competitors. 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?

An entirely different set of questions concerns the proceedings in which such a human rights violation might be claimed and whether the change in perspective – away from combatting corruption primarily with the means of criminal law toward a human rights-based approach – is practical in terms of legal policy and valuable in terms of legal ethics.

3.1. 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.[113] 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.[114]

---

[111] 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 of 10 May 2007, paras. 11-12.

[112] See CESCR, General Comment No. 3 (n. 54), para. 4; CESCR Statement 2007 (n. 111), paras. 8 and 12.

[113] See Pearson (n. 5), 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 (n. 65), 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 […]".

[114] See Sepúlveda Carmona/Bacio Terracino, in: Boersma/Nelen (n. 44), 25-49, 48.

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, toward the systemic responsibility of the State. Secondly, the status of victims is improved.[115]

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.[116] The human rights perspective moves attention away from repression toward prevention[117] 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 which is in charge of securing social rights, it is unable to do so due to a lack of resources.[118] 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 is has taken all appropriate measures to ensure the realisation 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."[119]

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 the

---

[115] Along these lines, see Human Rights Council, *Best practices*, 2016 (note 25), para. 130; 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) of 5 January 2015, paras. 25 and 28.

[116] The Chinese anti-corruption campaign was formally adopted by the 3rd Plenary Session of the 18th National Congress of the Communist Party in November 2013. The implementing institution is the Central Discipline Inspection Commission (Xuezhi Guo, Controlling Corruption in the Party: China's Central Discipline Inspection Commission, The China Quarterly 219 (2014), 597-624); http://thediplomat.com/tag/china-anti-corruption-campaign/; http://www.scmp.com/topics/xi-jinpings-anti-graft-campaign. 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" (NY Times, 11 February, 2016, p. A10; Neue Zürcher Zeitung, 12 February 2016); 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).

[117] Prevention is also – independently of human rights considerations – one of the four pillars of UNCAC (Chapter II).

[118] See CESCR, General Comment No. 3 (n. 54), para. 10; CESCR Statement 2007 (n. 111), para. 9. In regard to health protection, see CESCR, General Comment No. 14 (n. 67), para. 47.

[119] Richard Lapper, "1.3. Understanding Corruption in Education as a Human Rights Issue", in: Transparency International (Gareth Sweeney, Krina Despota and Samira Lindner (eds), Global Corruption Report: Education (Abdington: Routledge 2013), 16-20 (18).

misappropriation of public funds that is presumed by the practice of the CESCR and also by the UN Convention against Corruption. Article 20 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, such an implicit presumption of guilt is problematic in terms of the rule of law.

3.2. 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 toward human rights. The critique against human rights overlaps with fundamental objections to the international anti-corruption agenda.[120] The overlap results from scepticism towards two distinctively modern and European institutions, namely the State and rights.

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)[121] is tied to an illegitimate imposition of a particular model of the State. 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.[122] The evaluation of these forms of exercising and influencing political power and administration as 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 by way of public officials who are hired on the basis of merit and who act according to legal rules that formally apply to all.

---

[120] See, e.g., David Kennedy, The International Anti-Corruption Campaign, Connecticut Journal of International Law 14 (1999), 455-465; Balakrishnan Rajagopal, Corruption, Legitimacy and Human Rights: The Dialectics of a Relationship, Connecticut Journal of International Law 14 (1999), 5-507.

[121] Speech on "People and Development" by World Bank President James D. Wolfensohn, Annual Meetings Address of 1 October 1996.

[122] See Renate Bridenthal, Introduction, in: Bridenthal (ed.), The Hidden History of Crime, Corruption, and States (New York: Berghahn Publishers 2013), 1-22, 4; Jacob van Klaveren, Corruption as a Historical Phenomenon, in: Arnold J. Heidenheimer and Michael Johnston (eds.), Political Corruption: Concepts and Contexts (New Brunswick: NJ: Transaction Publishers 2002), 83-94. 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.

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. In that 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 neoliberal 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 now that the allegation of legal and cultural imperialism and of the dictate of Western capital which I 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 which suggests caution. We have seen that the determination of a concrete violation of human rights through corruption is easier in the domain of petty corruption. In the domain of grand corruption, such as bribery of government ministers by foreign investors or the diversion of funds from the public budget, the connection between corrupt conduct and human rights violations of concrete victims is much harder to make. Now Western democracies suffer less from petty corruption than from grand corruption, including what is provocatively termed "legal corruption"[123] in the form of non-transparent election financing and the resulting vested interests of politics, or in the form of 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 ("revolving door" phenomenon). This means that, because the human rights-lens works best for petty corruption, it casts a spotlight on the Global South.

[123] See Daniel Kaufmann/Pedro C. Vincente, Legal Corruption, Economics and Politics 23 (2011), 195-219.

The potential of universalizability

The dual critique of anti-corruption and of human rights needs to be put in perspective. The mentioned spotlight does not inevitably represent a paternalistic, civilizing mission of the West against the rest of the world. The change in perspective does not excuse grand corruption, including "legal" corruption in the Western world. It is merely less able to capture it, because grand corruption has a different, less individualized structure of wrongfulness.

With regard to the image of the State, 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 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 for example, and that therefore both modes of governance, the Western one and the African one should be accepted, not denouncing the latter one as "corruption." In both cases, the motorist's freedom of movement is limited by him being forced to pay.

But there is a relevant difference: The motorway toll is based on a law that serves the public interest, namely maintenance of the motorway network, and at the same time applies equally to everyone (with reasonable differences based on type of vehicle, number of persons, or other relevant criteria). In contrast, the bribe is not based on a fee schedule defined in a political or at least orderly administrative procedure – but it may under certain circumstances help feed the police officer's family. The distinction between a bribe and a State fee is thus based solely on the legitimacy and legality of the institutions and procedures in which the payment is defined, collected, and spent. This analysis confirms Augustine's 1000 year old insight that States not governed by law and justice are nothing but large bands of thieves.[124]

Only if this insight proves to be universally applicable can a global anti-corruption strategy be successful. 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 the global acceptance of the model of a non-patrimonial and non-criminal State under the rule of law. With all due caution, this model and its local variations appear fairly well suited to satisfy 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

[124] See Aurelius Augustinus, De Civitate Dei (Leipzig: Teubner 1872, original c. 413), Book IV, p. 4, 1: "Remota itaque iustitia quid sunt regna nisi magna latrocinia?"

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 human rights of the candidates[125] 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'".[126] 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."[127]

Another example is the traditional Kenyan system of "harambees" which required individuals to contribute to the financing of community projects. However, according to a Kenyian 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".[128]

Against the background of such forms of corruption which 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 Mexico City, not only for freedom and fair prices of bread but also against the corruption of the elites.

3.3. The special case of the right to property

Corruption affecting the right to private property might warrant a separate assessment.[129] Private property is sometimes qualified as not being an "essential" or "fundamental" human right.[130] The reasons for separate analysis are on the one hand ideological (the rejection of a

[125] See above text with notes 70-71.

[126] High Court of Tanzania 2006 (note 70), 37.

[127] *Ibid*., 34.

[128] Report of the Task Force on Public Collections or "Harambees" presented in December 2003 to the Minister of Justice of Kenya, quoted in ICSID, *World Duty Free Company Limited v. The Republic of Kenya,* ICSID Case No. ARB/00/7, 4 October 2006, para. 134.

[129] See Aloysius P. Llamzon, Corruption in International Investment Arbitration (Oxford: OUP 2014). Even in cases where the host State (or public officials) participated in corruption, have solicited bribes from investors, and the like, States have so far been rarely held responsible for violation of international norms on investment protection. The author demonstrates that the princples of State responsibility apply, and that States could be held internationally responsible (ibid., Chapter 10).

[130] Theo van Boven, Distinguishing Criteria of Human Rights, in: Karel Vasak/Philip Alston (eds), The International Dimension of Human Rights (Westport Conn: Greenwood Press and UNESCO: Paris 1982), 43-59, 43. See also Gaetano Arangio-Ruiz, Fourth Report on State Responsibility, Yearbook ILC 1992, Vol. II(1) A/CN 4 Ser. A/1992/Add.1 (Part 1), 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."

need for private property by socialism), and on the other hand the insight that – in inter- or transnational proceedings − most holders of this right, foreign investors, are moral as opposed to natural persons and thus no human beings with human interests and needs.

The right to property is not included in the UN covenants, so that the universal monitoring mechanisms, notably State reporting, do not come into play. But property is – on a universal level − protected not less, but better than most other human rights, namely through the availability of investor − State arbitration. When State officials enrich themselves by stripping big business, their measures constitute various crimes which we might gather under the umbrella of corruption. From a human 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, e.g. under Article 1 of Protocol 1 to the ECHR, under bilateral or regional investment protection treaties, and under Article 13 of the Energy Charter Treaty (ECT).

Two known investor − State arbitral proceedings prominently deal with corruption. In *World Duty Free,* a payment of 2 Million US dollar in cash as a personal donation to President Moi was made by the foreign investor in exchange for the allowance to establish and operate duty free shops in Kenyan Airports.[131] 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,[132] 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, 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."[133] In *Yukos*, an Arbitral Tribunal held Russia responsible for breaching its obligation under Article 13 of the Energy Charter Treaty (ECT) by taking a measure "equivalent to nationalization or expropriation".[134] This de facto expropriation had been effected by the Russian Federation through the deliberate bancrupting and liquidation of

[131] ICSID, *World Duty Free* (note 101), 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).

[132] *Ibid*., para. 157.

[133] Anna Jouravleva, "Investment Arbitration as a Check on Corruption: The Yukos Award", The Global Anti-Corruption Blog, November 12, 2014; https://globalanticorruptionblog.com/2014/11/12/investment-arbitration-as-a-check-on-corruption-the-yukos-award/).

[134] Permanent Court of Arbitration, PCA case No. AA 227, In the matter of an arbitration before a tribunal constituted in accordance with article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration rules between Yukos Universal Limited (Isle of Man) and the Russian Federation, Final award of 18 July 2014 (https://pcacases.com/web/view/61). See the tribunal's summary in paras 1580-1585.

Yukos for political and financial reasons, in order to appropriate its valuable assets.[135] In parallel to the arbitral proceedings, the ECtHR found a violation of Yukos' rights to fair hearing and property and awarded 1.9 Billion Euro just satisfaction to Yukos.[136]

The arbitral tribunal described in detail the corrupt actions taken by the government against Yukos, including "harassment, intimidation, and arrests".[137] 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'".[138]

The legal consequence of the Russian breach of the treaty is the international responsibility of the Russian Federation which includes the obligation to make reparation for the injury in form of monetary compensation (principles of Articles 31 and 36 ILC Articles on State responsibility, and specified in Article 13 ECT). In application of these principles, the tribunal ordered the Russian Federation to pay 50 Billion US Dollars of damages to Yukos.[139]

The question is now whether the human rights approach generates fair outcomes in these cases. 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, benefits very few extremely wealthy individuals, such as Michael Khodorkovsky (the owner of Yukos). Arguably, the focus on State responsibility, and the ensuing establishment of a State obligation to pay compensation or just satisfaction 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 officials only and would therefore not end up in burdening the tax payer.

However, the financial consequences of a finding of State's responsibility for that State's citizens should remain outside the purview of the international law of State responsibility. Ultimately, any State which is ordered to pay damages (for whatever reason) will to some

---

[135] Ibid., paras 756 and 1579.

[136] ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia* (appl. no. 14902/04), final judgment on the merits of 8 March 2012; judgment on just satisfaction of 15 Dec. 2014.

[137] PCA Tribunal, *Yukos* (n. 134), paras 761-812.

[138] *Ibid*., paras 767; 798-799.

[139] Importantly, the tribunal rejected the Russian "unclean hands" argument. It held that no clean hands principle or legality requirement can be read into the ECT so as to operate as a bar to jurisdiction or render otherwise inadmissible the claims (PCA Tribunal, *Yukos* (n. 134), paras 1353 and 1373). Also, no general principle of law bars a claim by an investor, even if the investor might indeed have committed illegal acts and thus may have "unclean hands" (para. 1363). Rather, the tribunal examined the issue of Yukos' possibly unlawful behaviour in the context of the assessment of the host Sate's liability and damages under the heading of "contributory fault" (cf. Article 39 ILC Articles), found some fault on the side of Yukos, and therefore reduced the compensation sum owed by Russia by 25 percent.

extent pass the brunt onto its citizens, simply because their taxes constitute the financial basis of the State. To allow this consideration to preclude State responsibility would mean to give up the idea of a separate juridical entity called State and would sit ill with the structure of international law.

As a general matter, the specific constellation involving the right to property does not seem to call into question the merits of a human rights-based approach. In normative terms, the primary reparation of infringements on human rights would be restitution in kind. Monetary compensation or "just satisfaction" (to use the term of the ECHR) comes into play only in a subsidiary fashion (cf. Art. 36(1) ILC Articles on State responsibility). In investor − State arbitration, the immediate availability of financial compensation over restitution has to do with the rule that any expropriation, in order to be lawful, requires compensation in the first place. If, for example in the *Yukos* case, had the remedy been the restitution of the firm from the competing Russian oligarchs to its previous owner Michael Khodorkovsky, the Russia tax payer would probably have been less affected. But in the end, it remains the case that infringements of the right to private property are a specific constellation for which the human rights approach fits less than with regard to social and political human rights.

4. Practice recommendations

The preceding analysis motivates some recommendations for legal practice. I suggest to complement traditional criminal-law based anti-corruption efforts by human rights-based strategies. The result could be described as mutual mainstreaming.[140] 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. In legal practice, this would imply an interpretation of all criminal offences relating to corruption in a way that takes into account human rights of victims.

On a complementary basis, the international human rights procedures should be corruption-mainstreamed as following.[141] 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,[142] first of all the Committee on Economic, Social and Cultural Rights,[143] to

[140] See, especially, International Council on Human Rights Policy and Transparency International (prepared by Magdalena Sepúlveda Carmona), Integrating Human Rights into the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities (Geneva: International Council on Human Rights Policy 2010).

[141] See Boersma 2012 (n. 5), 376-379.

[142] See the recent examples of concluding observations of the Human Rights Committee on New Zealand (CCPR/C/NZL/CO/6 of 28 April 2016), para. 3; on Uzbekistan (CCPR/C/UZB/CO/4 of 17 August 2015),

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.[144]

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. 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 modelling the competences of national human rights institutions.[145]

The benefit of the change in perspective is diminished, however, in that the international mechanisms are themselves weak when it comes to enforcing human rights. The only option for individual complaints at the international level are the communications to the various Human Rights Treaty Bodies which depend on the States' separate acceptance of jurisdiction. Of course, the domestic institutions are the primary enforcers of international human rights.[146] If a domestic court were to condemn organs of the State for a violation of human rights

---

para. 19 on "corruption in the cotton industry" related to forced labour, child labour, and deaths in connection with cotton harvesting. See further examples in notes 21 and 23.

[143] See among concluding observations the one on Morocco, E/C.12/MAR/CO/4 of 22 October 2015, paras 3, 11-12; see also on Guyana (E/C.12/GUY/CO/2-4 of 28 October 2015), paras 18-19; on Iraq (E/C.12/IRQ/CO/4 of 27 October 2015), paras 11-12; on Sudan (E/C.12/SDN/CO/2 of 27 October 2015), paras 15-16; on Burundi (E/C.12/BDI/CO/1 of 16 October 2015, paras 11-12; on Gambia (E/C.12/GMB/CO/1 of 20 March 2015), paras 4 and 9.

[144] See, e.g. Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Affordability of water and sanitation services, Mr. Léo Heller (A/HRC/30/39) of 5 August 2015, paras 19-20 and 55 (on „costs of corruption"); report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Urmila Bhoola, Thematic report on eradicating contemporary forms of slavery from supply chains (A/HRC/30/35) of 8 July 2015, paras 23, 43, 46, 62; Report of the Special Rapporteur on the right to education, Kishore Singh, Protecting the right to education against commercialization (A/HRC/29/30 of 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 (A/HRC/31/61) of 15 January 2016, paras 5 and 75.

[145] A number of NHRIs is already entrusted with such a mandate (see Human Rights Council, *Best practices*, 2016 (note 25): Azerbaidjan (para. 99); Peru (para. 104)).

[146] For example, 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) 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 ressources (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 (Communication submitted in 2007, *Asociación Pro Derechos Humanos de España (APDHE) v. Equatorial Guinea*, https://www.opensocietyfoundations.org/sites/default/files/a_communication_20071012.pdf, last visited 21 June 2016). 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.

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.[147] This means that the human rights lens does not necessarily empower individual victims of corruption in the practical sense of opening up new pathways of access to justice for them. The empowering effect of the human rights-based approach is first of all symbolic.

5. Conclusion

In terms of communication theory, the change in perspective proposed here is a kind of "framing", i.e., a new intellectual framework associated with a new prerogative of interpretation. Importantly, this prerogative shifts in institutional terms as well, away from the World Bank and toward 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 subareas 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 complain that this smacks of "human rightism",[148] or of a "hubris" of international human rights protection.[149] But this alleged hubris can also be seen in more positive terms as the reinstitution of the human being as the normative reference point for all law, including international law.

Speaking practically, the global anti-corruption effort does not need new institutions but better implementation. The human rights-approach can contribute to closing the implementation gap. Based on the insight that corruption "undermines" the enjoyment of human rights, the universal, non-adversarial human rights monitoring bodies may legitimately address corruption in detail without overstepping their mandate. But it is a different question whether corruption can in itself constitute a human rights violation which can be invoked in an individual complaints procedure. The demonstration of an actual *violation* is difficult in terms of both legal argument and proof but possible, as this paper has sought to show. By contributing to a change of the frame of reference and by opening up new options for

[147] See above note 23. "Bearing in mind the independence of the judiciary and its crucial role in combating corruption", Article 11(1)UNCAC prescribes that "each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary."

[148] See Alain Pellet, "Human Rightism" and International Law, Italian Yearbook of International Law 10 (2003), 3-16.

[149] See Eric Posner, The Twilight of Human Rights Law (Oxford: OUP 2014), 148.

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.

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

"Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute's mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice…. The depicted sculpture…[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts … [represent] the individual states …. [The division] of the figure … into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable…. The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds." [transl. by S. Less]

Art in architecture, MPIL, Heidelberg

MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Im Neuenheimer Feld 535
D-69120 Heidelberg
Tel.: +49 (0)6221 482 - 1
Fax: +49 (0)6221 482 - 288

www.mpil.de
SSRN@mpil.de