

Corruption and Human Rights

Beyond the Link

André T. D. Figueiredo



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Foreword

Anyone interested in the link between corruption and human rights, a crucial topic maybe now more than ever, will benefit from reading this treatise written by Andre Tanure D. Figueiredo. The vantage point is how human rights could be of use for international lawyers in order to effectively fight corruption. In addition, I believe, consulting this treatise is interesting for readers concerned with effective protection of human rights. After all, effective protection includes by necessity addressing systemic problems such as corruption. The relationship appears self-evident both ways, but still requires continuous assessment.

Mr. Figueiredo has a clear vision on the causes of corruption, and the manners in which it should be addressed. As one would expect in a work such as this, before discussing the connection with human rights, it first discusses the meaning of corruption and the general international law framework. This is done in a clear and well-structured manner.

Mr. Figueiredo convincingly defended his Master thesis on this topic in the early Summer of 2016 at Radboud University Nijmegen. He developed the result into this publication. He conscientiously discusses two earlier publications, dating from 2009 and 2012, which may be considered the most significant with regard to the link between corruption and human rights. He analyses their commonalities and differences. Adding other sources and new developments, he offers his own analysis, showing how the approaches could be reconciled.

When discussing the added value for corruption fighters to using human rights, Mr. Figueiredo refers to certain important human rights actors who can help address corruption. He also provides suggestions as to how the United Nations human rights bodies in particular could contribute more in this respect. Finally, he touches upon the very serious situation where anti-corruption advocates are suffering death threats, pointing out that in fact many of them may qualify as human rights defenders under the UN Declaration on Human Rights Defenders and deserve special protection in that role.

Readers interested in both a state of the art discussion of the issue of corruption and human rights *and* wishing to benefit from a clear perspective on the relationship between the two and on how previous literature can be reconciled, are recommended to consult this treatise.

Eva Rieter

Acknowledgments

This book is an adapted version of my LL.M. thesis presented at Radboud University in June 2016. My thesis supervisor was Dr. Eva Rieter, LL.M., who was also the lecturer of the core courses I followed in the completion of my Master of European Law, with specialization in Human Rights and Migration. My special thanks go to her, for all the guidance and support she has always provided me with, even regarding matters beyond her responsibilities. I also want to thank mr. drs. M. Slager, whose help regarding legal writing in English was essential to the result of the thesis, and ms. R. Möhrlein, LL.M., second assessor of the Committee that evaluated my thesis. In addition, I want to thank all the other lectures and teachers I had during my time at Radboud University, and also the staff of the International Office of the Law Faculty, whose support is indispensable for those who are studying abroad. A special thanks also to the Radboud Rector and the Selection Committee for granting me one of the Radboud Scholarships for the academic year 2015/16. Lastly, I want to thank all the friends I made in my year abroad, from whom I learned a lot; all the Dutch people, for welcoming students from all over the globe so well and helping them to change their perspectives; my family, for continuous support; and my girlfriend, for everything.

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Introduction

1. Background

“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. This evil phenomenon is found in all countries - big and small, rich and poor - but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.”¹

Kofi A. Annan

With the statement above, the former Secretary-General of the United Nations introduced the UN Convention Against Corruption, in 2004.² The establishment of this convention within the UN forum confirmed a thought that was growing in the international community: corruption is a problem of all countries and consequently should be dealt with by international law. This statement also represents the official recognition by the UN Secretary-General that *corruption leads to the violations of human rights*.

Some scholars³ and even human rights monitoring bodies have started to make the connection between corruption and human rights violations by

¹ Foreword of the UN Convention Against Corruption (UNCAC), enacted in 2004.

² Today, the UNCAC has 178 state parties: <<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>. Accessed on 27 May 2016.

³ For an overview of the scholars addressing corruption and human rights until 2012, see: Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Intersentia 2012) (p. 2–7). After 2012, some publications addressing the issue are: Sébastien Coquoz, “Corruption and Human Rights: An International and Indonesian Perspective” (Pusham UII / Norwegian Centre for Human Rights 2012); VN Viswanathan, *Corruption and Human Rights* (Allied Publishers 2012); Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, “The International Legal Framework against Corruption: Achievements and Challenges” (2013) 14 *Melbourne Journal of International Law* 1; Bryane Michael and Habit Hajredini, “What Does Kosovo Teach Us about Using Human Rights Law to Prosecute Corruption Offences?” [2016] *European Human Rights Law Review* 7, p. 176-189; C Raj Kumar, “Corruption in India: A Violation of Human Rights: Promoting Transparency and the Right to Good Governance” (2015) 49 *UC Davis Law Review*, p. 741-792.

following the general tendency to ‘humanize’ international law. The ‘good governance’ agenda of the 1990s also might have contributed to make this link. Development has been considered by some as a tool for the realization of human rights, and since ‘good governance’ has recognized corruption as a negative phenomenon hindering development, then corruption would also hinder the realization of human rights. Indeed, one can easily connect corruption with human rights violations by arguing that the former “[undermines] a Government’s ability to provide basic services.”⁴ Even the Secretary-General of the UN recognized the link in the foreword to the most important treaty addressing corruption. When asked about this connection, most people easily picture an country ruled by a dictator who steals public money to support his luxury life while the population suffers from hunger, bad nutrition, and lack of essential public services, such as healthcare and education. The connection in itself is appealing, and it would be hard to argue against it. Certainly, it would be a tough task to defend that in the given example corruption did not violate or led to the violation of human rights. Unfortunately, sometimes the connection is made because it is appealing, but without the proper concern for fully developing the argument and its consequences.

2. Purpose of the study

The underlying purpose of this study is to go beyond this appealing link and investigate how human rights can be used to strengthen the global fight against corruption and its negative effects. The first step in this wide and ambitious task is to clarify the argument that making an explicit link with human rights has indeed added value. This is the main question addressed in this study. Framing corruption as a human rights violation cannot be an end in itself, a pure exercise of relabeling the problem. It is important to give practical value to this connection by demonstrating how human rights law can be used to strengthen the global fight against corruption and its negative effects. If no added value is identified, then the academic exercise of framing corruption as a human rights violations is worthless and might even undermine human rights law, since the lack of added value to the connection would implicitly suggest that human rights law is ineffective to protect people against human rights violations. If one identifies that a particular problem causes human rights violations, then the human rights system should be able to protect against these violations. Considering there are not many academic publications presenting the added value of the connection in a systematic and comprehensive way, this study advances on presenting a research that

⁴ Using the words of Kofi A. Annan, from the statement mentioned above.

congregates some arguments and findings made in the publications thus far and adds a critical analysis.

To answer the main question of whether making an explicit link between corruption and human rights has added value, this study needs to address some preliminary questions. Firstly, this study must present a brief understanding of the meaning of corruption, as well as demonstrate how international law has been dealing with this issue. Secondly, this study needs to clarify the connections between corruption and human rights. As argued before, one can easily connect corruption and human rights by picturing the example of an extremely corrupt state that lets his population starve while its rulers spend public money to support their luxury life. However, this superficial connection is not enough to understand the complexity of the subject. In order to reason about the added value of the connection between corruption and human rights, the connection itself must be made clear. As noted, there are not many academic publications describing with precision the links between corruption and human rights violations.⁵ The main publications are from the International Council of Human Rights Policy (ICHRP)⁶ and from Boersma,⁷ each with its own approach to address the connection. Using these publications and other sources thus far, including a recent report of the Human Rights Council Advisory Committee,⁸ the study reconciles the existing literature and tries to clarify the connections between corruption and human rights. Thirdly, while addressing the added value of making the connection between corruption and human rights, the study presents a brief inventory of how UN human rights bodies are referring to corruption, and how they could strengthen their efforts and expertise to contribute more to the fight against corruption.

⁵ This argument is also recognized in: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (2009) (p. 23); Boersma (p. 195). Despite the fact that these publications already have some years, from that time until now no major publication addressed the connections between corruption and human rights violations in a comprehensive way.

⁶ The ICHRP's publication referred to is: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection*. The report was prepared by Magdalena Sepúlveda Carmona, Research Director at ICHRP, on the basis of working papers commissioned by the ICHRP, and in particular the preparatory reports of Christian Gruenberg and Julio Bacio Terracino.

⁷ The latter publication referred to is: Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Intersentia 2012).

⁸ UN Human Rights Council, "Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights." A/HRC/28/73 (5 January 2015).

3. Summary of the research question and sub-questions

This study addresses the question whether making an explicit link with human rights has added value when developing strategies to fight corruption. In order to answer this main question, this study first addresses the following sub-questions:

- (i) What is the meaning of corruption? (addressed in chapter 1)
- (ii) What is the international law setting of corruption? (addressed in chapter 1)
- (iii) In what ways are corruption and human rights linked? How can the existing literature on this issue be clarified and reconciled? (addressed in chapter 2)

After answering these sub-questions, this study dedicates chapter 3 to address the question whether making an explicit link with human rights has added value when developing strategies to fight corruption (main question). While addressing this main question, one more sub-question must be addressed: how UN human rights bodies are referring to corruption, and how they could contribute more to fighting corruption. (addressed in chapter 3 subparagraph 4.1).

4. Outline of the book

The book is divided into five parts. Introduction, chapters 1 to 3, and conclusion. *Chapter 1* tries to clarify the meaning of the term ‘corruption’ (paragraph 1), as well as addresses some specific acts of corruption that are criminalized by international, regional or domestic legislation (paragraph 2). Paragraph 3 historically contextualizes corruption on the international level, analyzing how corruption is no longer considered a ‘necessary cost of business’ by the international community but is now considered as one of the major problems hindering economic development and social stability. This paragraph also cites the major international and regional anti-corruption instruments. Lastly, paragraph 4 presents some arguments that might explain how corruption became a human rights concern, not restricted to general international law only.

After an opening chapter regarding the meaning of corruption and its contextualization, *chapter 2* tries to clarify the connections between corruption and human rights. Using the publications from the ICHRP and Boersma as initial sources, this second chapter analyzes the connections between corruption and human rights and presents how these publications contributed to the study of the subject. Paragraph 1 presents the ‘causal link’ approach of the ICHRP and sets out how the classical human rights

operational framework can help to identify if a corrupt act violates or leads to a violation of human rights. Paragraph 2 presents the ‘alternative’ approach developed by Boersma, which focuses on the dimensions of the connection instead of on the causal link. Paragraph 3 briefly presents a classification used by the Human Rights Council Advisory Committee, distinguishing between ‘individual’, ‘collective’, and ‘general negative impact’. Paragraph 4 reconciles the existing literature thus far, demonstrating the contributions they offered to the academic discussion on the connection between corruption and human rights violations. Paragraph 5 uses the classical human rights operational framework used in the approaches of the ICHR and Boersma to illustrate how corruption may violate or lead to the violation of human rights. This last paragraph presents a brief analysis of some specific rights, and then demonstrates how corruption practices can violate them.

Finally, *chapter 3* presents the added value of making the connection between corruption and human rights violations. It aims to give a practical significance to the connection by addressing, in a non-exhaustive way, the practical value of framing corruption as a human rights violation and the possibilities in which international human rights law can be used to strengthen the fight against corruption and against its negative effects. At this point, one important observation must be made. The practical relevance of the connection is presented with the main perspective of adding value to the fight against corruption. However, sometimes the arguments are intrinsically related to improving human rights protection. In this case, the ultimate goal of increasing human rights protection is to build a more favorable and effective environment to tackle corruption. Paragraph 1 presents how the support offered by human rights is relevant to change public attitudes towards corruption. Paragraph 2 demonstrates why anti-corruption strategies should also focus on the victims of corruptions, especially those belonging to vulnerable groups. Paragraph 3 presents how the human rights approach to the principles of participation, transparency and accountability can help to strengthen the fight against corruption. Paragraph 4 presents a number of human rights actors that can address corruption. In particular, this paragraph also briefly presents how the UN human rights bodies are addressing corruption and how they can contribute more. Lastly, paragraph 5 argues that anti-corruption advocates suffering threats can be protected by use of mechanisms designed to protect human rights defenders.

5. Scope of the research

In the course of the chapters, this study will run into some interesting and relevant issues that are not the object of the study, and therefore will not be addressed. For instance, some scholars support the creation of an

autonomous human right to a corruption-free society. This idea, however, is not widely supported and will not be dealt with at this book.⁹ Another issue that is beyond the scope of this research concerns the arguments against the link between corruption and human rights. Some scholars defend the position that linking corruption and human rights is harmful. Among other arguments, they claim that the anti-corruption movements use neo-imperialist development discourse and linking human rights to them would threaten human rights law itself. In addition, they disagree with the integration of topics of international concern into the human rights agenda.¹⁰

6. Methodology

In chapter 1, this study uses doctrinal analysis (secondary sources) to examine the meaning of corruption and to contextualize the subject within the international community. To define some specific acts of corruption (paragraph 2), the study is based mainly on a primary source (UNCAC), complemented by some brief doctrinal analysis.

In chapter 2, the first part of the study (paragraphs 1 and 2) involves doctrinal analysis (secondary source) of two publications.¹¹ Paragraph 3 consists of a reflective analysis of the aforementioned publications. In paragraph 4, the study firstly uses primary sources (treaties such as ICCPR and ICESCR; and authoritative interpretation from human rights bodies) and secondary sources to define the content and core elements of some human rights. Secondly, the study uses primary sources (such as reports from human rights monitoring bodies) and secondary sources to provide illustrations of how corruption can violate the content of the rights.

⁹ For more about the autonomous right to a corruption-free society, 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" (2000) 34 *The International Lawyer*, p. 149-178; C Raj Kumar, "Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India" (2003) 17 *Columbia Journal of Asian Law*, p. 31-72. For a brief criticism of Kofele-Kale and Kumar's arguments, see: Boersma (p. 264–267).

¹⁰ Morag Goodwin and Kate Rose-Sender, "Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse" in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary perspective*, p. 221-240 (Intersentia 2010); Cecily Rose, "The Limitations of a Human Rights Approach to Corruption" (2016) 16 *International & Comparative Law Quarterly*, p. 405-438. For a brief critical analysis of the arguments offered by these scholars against the link, see: Boersma (p. 200); Wouters, Ryngaert and Cloots (p. 36–37).

¹¹ ICHRP, *Corruption and Human Rights: Making the Connection* (2009); and Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Intersentia 2012).

In chapter 3, to identify the literature that could be dealing with the issue of corruption and human rights violations, the catalog from 'Radboud University Library',¹² 'Picarta',¹³ 'Westlaw',¹⁴ and 'SSRN'¹⁵ were searched systematically. In addition, the 'snowball' technique was used to identify some arguments from different sources. The reports from human rights bodies that were referred to by literature were also checked in order to permit their full evaluation in their original context. Identified the relevant literature, a qualitative analysis of its arguments and conceptual framework was performed in order to select the most appropriate arguments to be used in the study. Chapter 3 does not present an exhaustive list of arguments about the added value of framing corruption as a human rights violation. In paragraph 3, the study also uses primary and secondary sources specifically to explain the content of the principles of participation, transparency and accountability. In paragraph 4, subparagraph 4.1, this study analyzes how the UN human rights monitoring bodies are addressing corruption. To make this analysis, this study firstly draws from the thorough research previously performed by Boersma.¹⁶ For the period beyond the completion of her research,¹⁷ this study analyses primary documents found based on searches performed in the database of the Universal Human Rights Index¹⁸ using as keyword the term 'corrupt*'.

¹² Radboud University Library catalog: <<http://cat.ubn.ru.nl/DB=1/LNG=EN/>>.

¹³ Picarta: <<http://www.picarta.nl/>>.

¹⁴ Westlaw: <www.westlaw.com>.

¹⁵ SSRN: <<http://www.ssrn.com/>>.

¹⁶ Boersma (p. 103–176).

¹⁷ January 2011 or June 2011, depending on the human rights monitoring mechanism.

¹⁸ <<http://uhri.ohchr.org/Search/Annotations>>.

Chapter 1

Corruption: meaning and international law context

Introduction

In order to address the connections between corruption and human rights (chapter 2) and the added value of making this connection (chapter 3), this initial chapter briefly presents some basic concepts related to the subject, as well as contextualizes corruption on the international level. Paragraph 1 analyzes the meaning of corruption, highlighting the lack of consensus about the one definition. Paragraph 2 describes some specific acts of corruption, using the UN Convention Against Corruption (UNCAC) as the main source. Paragraph 3 presents how corruption became an international law problem. It briefly explains the evolution of the way the international community deals with corruption and cites the major international and regional instruments addressing the problem. Lastly, paragraph 4 presents how corruption also became a problem in the human rights agenda, not restricted to general international law.

1. The meaning of corruption

Scholars addressing corruption usually start their arguments by saying that there is no consensus on its definition.¹⁹ This difficulty in establishing a consensus may be explained by the complexity of the concept²⁰ and by the different nature of the causes and effects of corruption depending on the

¹⁹ See, for example: Michael Johnston, “The Definitions Debate: Old Conflicts in New Guises” in Arvind K Jain (ed), *The Political Economy of Corruption* (Routledge 2001) (p.11); Zoe Pearson, “An International Human Rights Approach to Corruption” in Peter Larmour and Nilk Wolanin (eds), *Corruption and Anti-Corruption*, p. 30-61 (Asia Pacific Press 2001) (p. 32); Adam Graycar and Tim Prenzler, *Understanding and Preventing Corruption* (Palgrave Macmillan 2013) (p. 10); Wouters, Ryngaert and Cloots (p. 18); Graham Brooks and others, *Preventing Corruption: Investigation, Enforcement and Governance* (Palgrave Macmillan 2013) (p. 11); Mark Jorgensen Farrales, “What Is Corruption?: A History of Corruption Studies and the Great Definitions Debate” [2005] SSRN Electronic Journal 1, (p. 13) <<http://www.ssrn.com/abstract=1739962>>. Accessed on 15 May 2016. The Human Rights Council also recognized this in: UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para. 5).

²⁰ World Bank, “Helping Countries Combat Corruption: The Role of the World Bank” [1997] *Poverty Reduction and Economic Management* 1. Cited in: Pearson (p. 32).

context in which the problem is analyzed.²¹ The fact that several different disciplines²² study corruption also contributes to the lack of consensus on the definition.²³ The definitional debate is beyond the scope of this study,²⁴ but it appears that many contemporary definitions have a public-office-centered approach.²⁵ In 1967, Nye provided a public-office-centered definition that has influenced several contemporary scholars. In his words:

“[Corruption is] behavior which deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains; or violates rules against the exercise of certain types of private-regarding influence.”²⁶

Nye’s classical definition influenced one of the most cited definitions of corruption nowadays, the one provided by Transparency International (TI). According to TI, corruption is the “abuse of entrusted power for private gain.”²⁷ This type of ‘minimal’ definition causes less disagreement because it has broad and concise terms, which embrace most instances of corruption.²⁸ Still, the broad terms used by TI makes it necessary to clarify some issues. For instance, the ‘gain’ referred to in the definition is not limited to financial gain.²⁹ It can also include “the abuse of power to enhance personal or organizational reputation or for political purposes; preferential treatment;

²¹ *ibid.*

²² Such as law, economics, sociology, anthropology, political science, and psychology.

²³ A Morgan, *Corruption: Causes, Consequences, and Policy Implications* (The Asia Foundation 1998). Cited in: Pearson (p. 32).

²⁴ For information about the definitional debate around the term ‘corruption’, see: Farrales; Brooks and others; Johnston.

²⁵ Farrales (p. 25).

²⁶ JS Nye, “Corruption and Political Development: A Cost-Benefit Analysis” (1967) 61: 417–27 *American Political Science Review*. Cited in: Farrales (p. 25). Also cited in: Johnston (p. 18); Brooks and others (p. 14).

²⁷ ‘Transparency International’ is an international NGO founded in 1993 with the purpose of advocating for “a world in which government, business, civil society and the daily lives of people are free of corruption.” Their purpose and their concept of corruption can be found in: <<http://www.transparency.org/what-is-corruption/>>. Accessed on 15 May 2016. The concept is cited by almost every scholar dealing with corruption, including: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 16); Boersma (p. 27); John Hatchard, “Adopting a Human Rights Approach towards Combating Corruption” in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary perspective*, p. 7-23 (Intersentia 2010) (p. 8); Pearson (p. 32); Brooks and others (p. 14). This definition is also adopted by the World Bank: <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>>. Accessed on 15 May 2016.

²⁸ Pearson (p. 32); Farrales (p. 25).

²⁹ Brooks and others (p. 15).

cronyism in recruitment practices; and sexual exploitation.”³⁰ In addition, the ‘private gain’ may include wider interests than just personal, such as the interests of a political party or business organization.³¹

The difficulties in defining corruption seems to have been recognized by international law.³² Several international and regional anti-corruption instruments addressing corruption do not define it. Instead, they enumerate a range of criminal acts that amount to corruption, such as bribery, embezzlement of funds, and illicit enrichment.³³ In legal terms, corruption is the generic heading for a range of different and specific criminal acts.³⁴ For the purpose of discussing the connection between corruption and human rights violations (chapter 2) and the added value of this connection (chapter 3), the definitions of corruption acts provided for by international law are more relevant than the academic definitional debate. Therefore, the next paragraph briefly presents some of the most common criminalized acts of corruption.

2. Specific acts of corruption

As stated in the previous paragraph, several international and regional anti-corruption instruments do not define corruption, but criminalize some acts of corruption. This paragraph presents some of these acts, using the

³⁰ *ibid.*

³¹ Brooks and others argue that TI’s definition do not cover adequately corruption conducted by wider interests than just the personal. In: *ibid.* However, one may counter-argue that this criticism does not necessarily show a flaw in TI’s definition, but only highlight an explanation that must be made in regard to the extent of the expression ‘private gain’.

³² Argument also used in: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 16).

³³ *ibid.*; Hatchard (p. 8–9); Graycar and Prenzler (p. 10). As stated in the Council of Europe, “Criminal Law Convention on Corruption: Explanatory Report (1999)” (para. 2): “Notwithstanding the long history and the apparent spread of the phenomenon of corruption in today’s society, it seemed difficult to arrive at a common definition and it was rightly said, ‘no definition of corruption will be equally accepted in every nation’. Possible definitions have been discussed for a number of years in different fora but it has not been possible for the international community to agree to on a common definition. Instead international fora have preferred to concentrate on the definition of certain forms of corruption, e.g. ‘illicit payments’ (UN), ‘bribery of foreign public officials in international business transactions’ (OECD), ‘corruption involving officials of the European Communities or officials of Member States of the European Union’ (EU).” The CoE Report is also cited in: Wouters, Ryngaert and Cloots (p. 18).

³⁴ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 18).

UN Convention Against Corruption (UNCAC) as the main source, since this convention is the broadest in number of members and has a recent and comprehensive list of acts.³⁵

2.1 Bribery

Bribery is the most commonly perceived act of corruption.³⁶ Some scholars and some legal instruments even use the terms as synonyms.³⁷ Nonetheless, as explained in previous paragraphs, corruption is a generic heading covering different criminal acts, including bribery.³⁸ Inspired by the words of article 15 UNCAC, bribery can be defined as:

“the promise, offer or gift, to a public official, or the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official himself or another person or entity, in order that the official act or refrain from acting in the exercise of his official duties.”³⁹

In simple terms, bribery occurs when “somebody offers money to persuade another to do something that is wrong or, if not wrong, inappropriate in the circumstances.”⁴⁰ It can have the purpose of facilitating an outcome that would not happen without the undue advantage, or would not happen as quickly.⁴¹

Bribery can be classified in ‘active bribery’ (regarding the bribe-payer side) or ‘passive bribery’ (regarding the bribe-taker side).⁴² It can have a transactive element, when there is a mutual and beneficial agreement between bribe-payer and bribe-taker, or it can be extortive, when there is no other possibility for the bribe-payer part.⁴³ There is also a reference to bribery of foreign public officials (also called transnational bribery), which has the different condition that the undue advantage is given in relation to the conduct of international business.⁴⁴

³⁵ *ibid.*

³⁶ Graycar and Prenzler (p. 3); Wouters, Ryngaert and Cloots (p. 18).

³⁷ For references, see: Boersma (p. 33).

³⁸ *ibid.*

³⁹ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 19). This definition unites article 15(a) and (b) of UNCAC.

⁴⁰ Graycar and Prenzler (p. 3).

⁴¹ *ibid.*

⁴² Boersma (p. 34–35); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 19).

⁴³ Boersma (p. 34).

⁴⁴ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 19). There is also reference to bribery in the private

2.2 *Embezzlement*

Unlike bribery, embezzlement or misappropriation is a form of corruption that does not necessarily include two parties.⁴⁵ In simple terms, embezzlement can be defined as the “theft of public resources by public officials.”⁴⁶ According to the technical definition of article 17 UNCAC, embezzlement is the:

“[...] misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.”⁴⁷

2.3 *Trading in influence*

Another corruption act with an active and a passive side is trading in influence.⁴⁸ Inspired by the words of article 18 UNCAC, trading in influence or influence peddling⁴⁹ can be defined as:

“The promise, offering or giving to a public official or any other person, or the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority an undue advantage for the original instigator of the act or for any other person.”⁵⁰

2.4 *Abuse of functions or position*

In the wording of article 19 UNCAC, abuse of function can be defined as “the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person

sector. TI’s definition of corruption includes the corruption within the private sector, or private-to-private corruption. However, there is some disagreement about the inclusion of exclusively private acts within the definition of corruption. Since the object of this study does not involve definitional discussions, the question of whether the term corruption should be used for exclusively private acts is not addressed. This study deals only with corruption acts involving the public sector. For more about the definitional issues of corruption, see: Farrales; Brooks and others; Johnston.

⁴⁵ Boersma (p. 35).

⁴⁶ Brooks and others (p. 20).

⁴⁷ Article 17 UNCAC.

⁴⁸ Boersma (p. 35).

⁴⁹ Graycar and Prenzler (p. 9).

⁵⁰ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 19). This definition unites article 18(a) and (b) of UNCAC.

or entity.” This generic provision works as a residual category for corruption acts, including conduct that could not be qualified as bribery, embezzlement, or trading in influence.⁵¹ Its characterization depends on the domestic legislation of the state, considering the expression “in violation of laws” present in the definition.⁵²

2.5 *Illicit enrichment*

The last and most controversial form of corruption provided in the UNCAC is illicit enrichment. According to the wording of article 20 UNCAC, illicit enrichment is “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.” The controversies related to this form of corruption are many. First, one could argue that the unexplained increase in income does not constitute corruption in itself, since the money could have been obtained from another illegal source.⁵³ The most vigorous criticism, however, is related to the possible infringement of some core principles of criminal law and human rights, namely the principle of presumption of innocence, burden of proof and the guarantee against self-incrimination.⁵⁴ Despite some criticism, illicit enrichment is characterized as a form of corruption in UNCAC and some other regional anti-corruption instruments,⁵⁵ as well as some domestic legislation.⁵⁶ The ECtHR has also recognized the compatibility of the concept with human rights,⁵⁷ which could suggest a

⁵¹ Boersma (p. 36).

⁵² *ibid.*

⁵³ *ibid.* (p. 38).

⁵⁴ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 20); International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (2010) (p. 63–66).

⁵⁵ Boersma (p. 38).

⁵⁶ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 63).

⁵⁷ ECtHR *Salabiaku v France*, Application no 10519/83, Judgment of 7 October 1988. It is not the purpose of this study to discuss in depth the compatibility of the crime of ‘illicit enrichment’ with human rights. For more about this issue, see: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 63–66), which also cites *Salabiaku* case; Lindy Muzila and others, *On the Take Criminalizing Illicit Enrichment to Fight Corruption*. Stolen Asset Recovery Series (World Bank 2012). For arguments against the criminalization of illicit enrichment, see: Jeffrey R Boles, “Criminalizing the Problems of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights” (2014) 17 *New York University Journal of Legislation and Public Policy*, p. 835-880. This last publication also provides alternative measures to address the problem without the necessity of criminalizing ‘illicit enrichment’.

tendency in international human rights law to accept the criminalization of ‘illicit enrichment’.

2.6 Favoritism

Favoritism is not referred to as a form of corruption in UNCAC. Still, several scholars recognize favoritism or its specific forms (patronage, nepotism, and cronyism) as a type of corruption.⁵⁸ In simple terms, favoritism occurs when “who you are, rather than what you can do, is the criterion for bestowing benefits.”⁵⁹ Patronage as a corruption act occurs when an influential person “sponsors another in employment or promotes them to an influential position”, later demanding influence or power.⁶⁰ Nepotism is a form of favoritism related to close family.⁶¹ It is showing “special favor or unfair preference to a relative in conferring a position, job, privilege, etc.”⁶² Cronyism is defined similarly to nepotism, but the beneficiaries are friends or business associates instead of family members.⁶³

3. Corruption as an international law problem

Corruption was not always recognized as a major problem in the international agenda. During the Cold War, the foreign policy of both sides was mainly focused on getting support for their ideological models.⁶⁴ In this process, USA and USSR had little or no concern for the level of corruption within the states they managed to get support.⁶⁵ In the 1960s and 1970s, the international community also ignored the problem of corruption in newly independent African countries.⁶⁶ Western countries did not engage in open criticism of the new African nations, since the former did not want to be

⁵⁸ Graycar and Prenzler (p. 8–9); Boersma (p. 36); World Bank (p. 8). Boersma cites patronage and nepotism as types of ‘abuse of function’ (article 19 UNCAC). She argues that it is possible to classify patronage and nepotism as abuse of function considering that article 19 UNCAC is residual and captures acts of corruption that could not be considered as bribery, embezzlement or trading in influence.

⁵⁹ Graycar and Prenzler (p. 9).

⁶⁰ *ibid.* (p. 8).

⁶¹ Boersma (p. 37).

⁶² Oxford English Dictionary (<<http://www.oed.com/>>). Cited in: *ibid.*

⁶³ Graycar and Prenzler (p. 9).

⁶⁴ Wouters, Ryngaert and Cloots (p. 3); James Thuo Gathii, “Defining the Relationship between Human Rights and Corruption” (2009) 31 *University of Pennsylvania Journal of International Law* (p. 134).

⁶⁵ Wouters, Ryngaert and Cloots (p. 3); Gathii (p. 134).

⁶⁶ *ibid.* (p. 133).

accused of political interference or labeled as racists.⁶⁷ In addition, some economists stated that certain types of corruption were actually beneficial to society and to economic development.⁶⁸ They argued that corruption was a necessary cost of business and could help to circumvent inefficient regulations at a low cost, reduce the uncertainty over enforcement, speed up bureaucracy, and mediate the interest of different political parties.⁶⁹

In 1977, influenced by the Watergate scandal, the USA enacted the Foreign Corrupt Practices Act (FCPA), the first law prohibiting transnational bribery.⁷⁰ After that, since the FCPA prohibitions represented a competitive disadvantage for US companies, the US initiated efforts to achieve a global anti-corruption treaty.⁷¹ At the UN forum, the discussion did not evolve due to political disagreements between developing and developed nations.⁷² After the end of Cold War, the way international community faced the issue began to change. Transparency International (TI) was founded in 1993 by, among others, a former World Bank Director disappointed with the fact that the bank refused to address corruption.⁷³ Also in the 1990s, the World Bank itself changed its policy and started to address corruption within its 'good governance' agenda,⁷⁴ followed by the International Monetary Fund (IMF) in 1996-97.⁷⁵ During the Bill Clinton administration, the US pressure for an international treaty addressing corruption proved to be fruitful within the economic oriented Organization for Economic Co-operation and Development (OECD). In 1997, the OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions (OECD Convention) was enacted. The OECD Convention follows the US FCPA approach and addresses corruption (bribery) only in the context of international business transactions.⁷⁶

Regional forums also started to address the problem of corruption. Within the context of the Organization of American States (OAS), the Inter-American

⁶⁷ *ibid.*

⁶⁸ Wouters, Ryngaert and Cloots (3); Gathii (134–137).

⁶⁹ *ibid.* (p. 134–135).

⁷⁰ Wouters, Ryngaert and Cloots (p. 3); Gathii (p. 141); Boersma (p. 55).

⁷¹ Wouters, Ryngaert and Cloots (p. 4); Boersma (p. 56).

⁷² Wouters, Ryngaert and Cloots (p. 3).

⁷³ *ibid.* (p. 4 and 6).

⁷⁴ The 'good governance' agenda aimed at structural adjustments or macroeconomic reform and stabilization. In this context, corruption started to be seen as a problem inhibiting macroeconomic reforms and economic development. Considering that, anti-corruption reform became one condition imposed by the World Bank for borrowing money. Wouters, Ryngaert and Cloots (p. 6); Gathii (p. 143–144).

⁷⁵ Wouters, Ryngaert and Cloots (p. 6).

⁷⁶ Boersma (p. 74); Wouters, Ryngaert and Cloots (p. 5).

Convention Against Corruption (IACAC) was adopted in 1996. Unlike the OECD Convention, the IACAC was drafted addressing corruption in a broader way, considering the problem of corruption as a risk to recent democracy.⁷⁷ In Europe, efforts to address corruption also began around the same period. In 1997, the Council of Europe created the Twenty Guiding Principles against Corruption.⁷⁸ In 1999, the legally binding Criminal Law Convention on Corruption was enacted. All these changes in the international level, including the ‘good governance’ program of international financial organizations, led the UN to review its anti-corruption agenda.⁷⁹ In 1996, the International Code of Conduct for Public Officials (ICCPO) and the UN Declaration against Corruption and Bribery in International Commercial Transactions (UNDAC) were adopted. These instruments and the following intense discussion within the UN about the problem of corruption led to the creation of the landmark UN Convention Against Corruption (UNCAC), in 2003.⁸⁰ In Africa, some regional instruments also were created, such as the African Development Community Protocol Against Corruption (2001), the Economic Community of West African States Protocol on the Fight Against Corruption (2001), and the African Union Convention on Preventing and Combating Corruption (2003).

As demonstrated, the way the international community evaluates corruption has changed through time. Because of this evolution, several anti-corruption instruments emerged in the mid-1990s⁸¹ and, nowadays, there is a consensus on the negative effects of corruption to society.⁸² Somehow, the problem of corruption also started to be addressed in the human rights agenda, fact that is presented in the next paragraph.

4. Corruption as a human rights problem and the ‘humanization’ of public international law

The last paragraph briefly presented how corruption became a problem recognized by international law. However, there is not much literature

⁷⁷ *ibid.* (p. 6). In fact, the IACAC was the first international treaty addressing corruption. It was enacted before the OECD Convention. However, negotiations within the OECD started earlier. In 1994, for instance, the OECD enacted a Recommendation that included, among others, the orientation to criminalize active bribery of foreign officials. In: Boersma (p. 74).

⁷⁸ *ibid.* (p. 81).

⁷⁹ Wouters, Ryngaert and Cloots (p. 6).

⁸⁰ *ibid.*

⁸¹ Boersma (p. 53). It is not the purpose of this study to analyze all anti-corruption treaties. For that, see: Wouters, Ryngaert and Cloots (p. 7–18); Boersma (p. 53–99).

⁸² For the latter argument: Wouters, Ryngaert and Cloots (p. 33).

explaining when and how corruption became an issue in international human rights law. Usually, scholars and reports simply state that corruption has a negative impact on the enjoyment of human rights.⁸³ Maybe the connection is slightly obvious, at least when the link is considered in simple terms. This could explain why literature does not identify when and how the link started to be made. Indeed, it is clear that if public money is misappropriated by corruption, less money will be spent on the fulfillment of human rights, such as the right to education.⁸⁴ This basic connection does not depend on complex academic argumentation. However, one could argue that making the connection between corruption and human rights violations follows some recent tendencies in international and human rights law.

As presented in the previous paragraph, the problem of corruption was included in the ‘good governance’ agenda in the 1990s. At this time, the consensus about the negative effects of corruption started to emerge within the international community. The ‘good governance’ agenda overlaps the human rights agenda in some aspects, since the respect, protection, and fulfillment of human rights by the states is dependent on their capacity to effectively administrate the public machine. ‘Good governance’ aims at the economic development, and some have seen economic development as a tool to realize human rights. Since corruption was identified as a problem hindering economic development, then one can conclude that corruption is also a problem hindering the realization of human rights.⁸⁵ Another

⁸³ For instance, in: UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para 13); Wouters, Ryngaert and Cloots (p. 35).

⁸⁴ This simple connection made as an example does not depend on complex academic argumentation. Ordinary people without specific academic background could make or understand this connection. This does not mean that the whole issue of the connection between corruption and human rights does not deserve academic attention. On the contrary, in order to understand better the details of this connection and the consequences of it, much academic work should be dedicated to the subject. This will be further discussed in Chapter 2, which deals with the link between corruption and human rights.

⁸⁵ Some scholars criticize this connection between human rights and ‘good governance’, since they evaluate the ‘good governance’ agenda as an imposition of western ideology. Using this argument, they also criticize the connection between human rights and corruption. An example of this criticism is: Goodwin and Rose-Sender. As explained in the scope of this study (p. 5), it is not the object of this book to counter-argue the critics against the connection between corruption and human rights. Thus, it will not be addressed whether the link between human rights and ‘good governance’ is correct. In addition, the argument made in paragraph 4 does not use the ‘good governance’ to justify the connection itself, but simply to present one tendency in international law that is in line with the connection between corruption and human rights.

tendency in accordance with the connection between corruption and human rights is the general ‘humanization’ of public international law.⁸⁶ This ‘humanization’ has shifted the public international law focus from state-centered to individual-centered.⁸⁷ Since corruption had become a problem of international law, then this ‘humanization’ movement might also have influenced the anti-corruption efforts in the international agenda.

Considering human rights monitoring mechanisms, some of them already addressed corruption in specific cases.⁸⁸ In 2003, the former Sub-Commission on the Promotion and Protection of Human Rights appointed a Special Rapporteur to prepare a comprehensive study on corruption and its impact on human rights.⁸⁹ In 2004, the Office of the High Commissioner for Human Rights (OHCHR) jointly with the UN Development Programme organized a seminar on good governance practices for the promotion of human rights, including anti-corruption practices.⁹⁰ In 2013, the Human Rights Council requested its Advisory Committee to submit a report about the negative impact of corruption on human rights, making recommendations on how the Council and UN bodies should consider the problem.⁹¹ The final report was submitted to the Council in 2015, suggesting, among others, the increase of special procedures addressing corruption in order to integrate human rights perspective into anti-corruption strategies.⁹² In the academic field, the publications of the International Council of Human Rights Policy⁹³

⁸⁶ Argument also used in: Wouters, Ryngaert and Cloots (p. 35).

⁸⁷ Theodor Meron, *The Humanization of International Law*, vol 3 (Martinus Nijhoff Publishers 2006) (p. xv). For more about the humanization of international law, see the aforementioned book, as well as: AA Cañado Trindade, “International Law for Humankind: Towards A New Jus Gentium. General Course on Public International Law” (2005) 316 Hague Academy of International Law Collected Courses 203; AA Cañado Trindade, *Judge Antônio A. Cañado Trindade. The Construction of a Humanized International Law* (Koninklijk Brill NV 2015) (especially Book 1, chapter 3, p. 99–164).

⁸⁸ Such as the Human Rights Council and its Special Rapporteurs, Human Rights Treaty-monitoring bodies, and the Universal Periodic Review. In: OHCHR, *The Human Rights Case Against Corruption - HR/NONE/2013/120 (2013)* (United Nations) (p. 6). The issue about human rights monitoring mechanisms addressing corruption will be briefly dealt with in Chapter 3, paragraph 4 (p. 64). For a more comprehensive analysis of how monitoring bodies had already addressed corruption, see: Boersma (p. 103–176).

⁸⁹ OHCHR, *The Human Rights Case Against Corruption - HR/NONE/2013/120 (2013)* (p. 6).

⁹⁰ *ibid.*

⁹¹ UN Human Rights Council, Resolution 23/9 (2013).

⁹² UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para. 52).

⁹³ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection*; and International Council on Human Rights Policy, *Integrating Human*

and of Martine Boersma⁹⁴ also contributed to strengthening the discussion on the connection between corruption and human rights violations.⁹⁵

Conclusion

This chapter addressed the meaning of corruption and the international law setting of the problem. These are necessary sub-questions that must be answered in order to permit the clarification of the link between corruption and human rights and the investigation of the added value of this connection. Paragraph 1 addressed the lack of consensus on the definition of corruption and presented the minimalistic concept of Transparency International as the most used definition nowadays. It also explained that international and regional anti-corruption instruments do not define corruption in legal terms. Instead, they address some specific forms of corruption, such as bribery, embezzlement and trading in influence. Paragraph 2 presented the definitions of these specific forms of corruption, using UNCAC as the main source. Paragraph 3 addressed corruption as an international law problem. It showed that until the end of the Cold War there was no interest from the international community to tackle corruption. In fact, some scholars in the 1970s even justified corruption as a ‘necessary cost of business’. With the fall of the Iron Curtain, the international community started to recognize the necessity to address corruption, influenced by the ‘good governance’ agenda and the creation of Transparency International. In this period of change in the way the international community perceived corruption, several international and regional anti-corruption instruments were created. Paragraph 4 presented some arguments suggesting when and how corruption started to be addressed also in the human rights agenda. As argued, the general humanization of public international law and the ‘good governance’ agenda might have contributed to the recognition of the connection between corruption and human rights violations.

Rights in the Anti-Corruption Agenda. The ICHRP “was first conceived in 1994 by a group of eminent human rights advocates, scholars and policy makers, to address the dilemmas and challenges of translating international human rights principles and standards into policy realities. Between 1998 and 2012 it undertook thirty-five major research projects addressing a wide range of policy questions and providing a forum for applied research, reflection and forward thinking.” One of its projects were about the connection between corruption and human rights. Information from the website: <<http://www.ichrp.org/>>. Accessed on 30 April 2016.

⁹⁴ Martine Boersma obtained in 2012 her PhD with a dissertation on the ways in which international human rights law and international criminal law can possibly be employed to address corruption in the public sector.

⁹⁵ Wouters, Ryngaert and Cloots (p. 35).

Chapter 2

The link between corruption and human rights violations

Introduction

As far as the connection between corruption and human rights is concerned, it is usually taken for granted that the former violates the latter.⁹⁶ However, in order to establish the added value of framing corruption as a human rights violation (Chapter 3), one should first clarify the connection between corruption and human rights. Unfortunately, there are not many academic publications describing with precision the links between corruption and human rights violations.⁹⁷ The main publications about this connection come from the International Council of Human Rights Policy (ICHRP)⁹⁸ and from Boersma,⁹⁹ both discussed in this chapter. Paragraph 1 presents the ‘causal link’ approach developed to address the connections between corruption and human rights violations by the ICHRP. This approach is commonly cited by some scholars and human rights bodies, even if they only use the classification between ‘direct’, ‘indirect’ and ‘remote’ violations. Paragraph 2 addresses the ‘alternative’ approach developed by Boersma. The author has reservations with regard to the terminology used by the ICHRP and prefers to address the connections between corruption and human rights considering the different dimensions of the link. Subsequently, paragraph 3 briefly refers to a classification used by the Human Rights Council Advisory Committee, distinguishing between ‘individual’, ‘collective’, and ‘general negative impact’. Paragraph 4 tries to reconcile the existing literature thus far, demonstrating the contributions they offered to the academic discussion on the connection between corruption and human rights violations. Lastly, paragraph 5 uses the classical human rights operational framework to illustrate how corruption may violate or lead to the violation of human rights. This important last paragraph briefly analyzes the content and core elements of some specific human rights and then demonstrates how corruption can violate them.¹⁰⁰

⁹⁶ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 23).

⁹⁷ *ibid.* See also: Boersma (p. 195).

⁹⁸ The ICHRP’s publication referred to is: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection*.

⁹⁹ Boersma.

¹⁰⁰ The analysis, however, does not have the purpose of providing an exhaustive list of

1. The approach by the International Council on Human Rights Policy: the ‘causal link’

In its first publication about corruption and human rights, the International Council on Human Rights Policy (ICHRP) proposed to set out an operational framework establishing when corrupt acts violate human rights or lead to a violation of human rights.¹⁰¹ Although all forms of corruption may have a long-term impact on human rights, it is incorrect to conclude that all acts of corruption automatically infringe human rights.¹⁰² Hence, it is necessary to make an individual assessment of the corrupt practice to identify whether it has caused or has led to the violation of human rights. The purpose of the ICHRPs publication is “to provide a technique for analyzing corruption in human rights terms”¹⁰³ and to serve as “an analytical tool that should assist in determining when and how violations of human rights and acts of corruption can be connected.”¹⁰⁴ The ICHRPs classifies the connection between corruption and human rights violations taking into account the moment when the rights were violated, and the causality between the corruption practice and the violation.¹⁰⁵ The framework proposed by the ICHRPs distinguishes between (i) direct violations; (ii) indirect violations; and (iii) remote violations.

Direct violations take place when, by analyzing the causal chain of events, the corrupt practice can be directly linked to the human rights violation. It may occur “when a corrupt act is deliberately used as a means to violate a right” (for example, when a judge is bribed the right to a fair trial is directly violated).¹⁰⁶ It may also occur when the human rights violation was foreseeable and the state did not act with due diligence to prevent it.¹⁰⁷ Lastly, a direct violation may exist when the state “acts or fail to act in a way that prevents individuals from having access to [a human right]” (for example, there is a direct violation of the right to health if an individual has to bribe a doctor in order to have access to medical treatment).¹⁰⁸

how corruption may violate human rights, neither of which human rights can be violated by corruption. For a more complete (but still not exhaustive) analysis of the cases in which corruption violates human rights, see: Boersma (p. 202-264); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 31-61).

¹⁰¹ *ibid.* (p. 24).

¹⁰² *ibid.* This is also stated in Boersma (p. 195).

¹⁰³ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 24).

¹⁰⁴ *ibid.* (p. 31).

¹⁰⁵ See: *ibid.* (p. 24–29).

¹⁰⁶ *ibid.* (p. 27).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

On the other hand, *indirect violations* occur when the act causing the human rights violation arises from a corrupt practice. Corruption would be a necessary condition for the violation, “an essential factor contributing to a chain of events that eventually leads to a [human rights violation].”¹⁰⁹ The example given by the ICHRP is the bribery of public officials to allow the illegal importation of toxic waste, which is then deposited near a residential area. In the example, the right to health of the people living near the waste would not have been directly violated by the act of corruption, but the bribery was essential to allow the violation to occur.¹¹⁰

Lastly, *remote violations* occur when corruption is one of many factors contributing to the human rights violation.¹¹¹ For instance, corruption in the electoral process may cause doubts about the accuracy of the election result. Then, the social instability caused by this situation leads to protests that are violently repressed by the state.¹¹² In this example the ICHRP gives, corruption was only one factor that contributed to the violation (violent repression of protests).

Besides this classification in direct, indirect and remote violations, the ICHRP also contributes to draw an operational framework to evaluate if and in what way corruption violates human rights, as well as how to remedy the harm suffered. This framework is basically the application of the classical human rights framework to the examination of violations, but its contribution to the fight against corruption lies in its specific focus on corruption practices. Firstly, it is necessary to identify which corrupt act is involved (bribery, embezzlement, fraud etc.)¹¹³ and who is the perpetrator (state actor or someone acting in official capacity;¹¹⁴ or a private party through the failure of the state to prevent it). Secondly, the extent of the state’s human rights obligations must be identified. To perform this task, the content and scope of the right in question must be studied, as well as the actions the state has to take to comply with its obligation considering the tripartite typology of obligations (‘respect, protect and fulfill’). Regarding social, economic and cultural rights, the standards of ‘availability’, ‘accessibility’, ‘acceptability’

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.* (p. 28).

¹¹² *ibid.*

¹¹³ About this issue, see Chapter 1, paragraph 2 (p. 9).

¹¹⁴ For the latter, see: International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 30 (Chapter II, p. 38–54).

and ‘adaptability’¹¹⁵ also must be assessed. Thirdly, the victim(s)¹¹⁶ and the harm suffered must be identified, as well as whether the harm corresponds to the failure of the state to respect, protect or fulfill the human right in question. The fourth step is the evaluation of the causal link between the corrupt practice and the harm (whether the link is direct, indirect or remote). Lastly, the state’s responsibility for the harm caused and the reparations that should be made as a result must be evaluated.¹¹⁷

2. Boersma’s approach: “dimensions” of the connection

Unlike the approach from the ICHRP, Boersma’s approach to the connection between corruption and human rights does not focus on the ‘types’ of violations. Rather, it focuses on the ‘dimensions’ of the connection. The author argues that the terminology used by the ICHRP (‘direct’, ‘indirect’ and ‘remote’) leads to “conceptual confusion and uncertainty in legal terms.”¹¹⁸ As an ‘alternative’, she proposes an approach that considers the dimensions of the connection.¹¹⁹

¹¹⁵ The concepts of ‘availability’, ‘accessibility’, ‘acceptability’ and ‘adaptability’ were first dealt with by the former Special Rapporteur on the Right to Education, Katarina Romasevski (1998-2004). In the context of Social, Economical and Cultural Rights, the ‘4-A’s’ constitute an additional analytical tool to clarify the content of states’ obligations to ensure access to social goods and services. As stated in the General Comment No. 13, The Right to Education (E/C. 12/1999/10), ‘availability’ correspond to the obligation of the state to make the particular service or good available in sufficient quantity within its jurisdiction. ‘Accessibility’ corresponds to the state obligation to provide a service or good to everyone within its jurisdiction, without discrimination. It includes also the physical and economical accessibility. ‘Acceptability’ means that the service or good must be of good quality, respecting minimum standards. ‘Adaptability’ entails that the state must be flexible and adapt to the needs of communities, responding to the diverse social and cultural settings of all groups within the society. In: Olivier de Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014) (p. 291–292).

¹¹⁶ About the identification of the victim, see: UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution A/RES/60/147, adopted on 16 December 2005 (para. 8–9). The Resolution is about gross human rights violations, but the content about the identification of the victim might be applicable to other cases. Still, a human rights violation caused by corruption may be considered a gross human rights violation, depending on the case.

¹¹⁷ This ‘analytical tool’ is summarized in: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 28–29).

¹¹⁸ Boersma (p. 197).

¹¹⁹ *ibid.*

The *first* and broadest dimension is the ‘shared environment of corruption and human rights violations’. This dimension is related to the general idea that corruption and human rights violations are consequences of the same inadequate behavior in state’s practice and politics.¹²⁰ States with highly corrupt leaders are more likely to commit human rights violations, and states with poor human rights standards are usually corrupt.¹²¹ The *second* dimension relates to ‘human rights necessary to fight corruption’. It emphasizes that there are important human rights essential in the fight against corruption, such as freedom of expression, the right to assembly and the right to freedom of association.¹²² The *third* dimension deals with the ‘human rights of persons accused of corruption’. Considering that anti-corruption measures may violate the human rights of persons accused of corruption, it is important to strike a balance between combating corruption as effectively as possible and guaranteeing the rights of the accused.¹²³ The *fourth* dimension is described as ‘anticorruption reforms negatively impacting upon the human rights of vulnerable groups’.¹²⁴ This dimension is related to the fact that anti-corruption reforms usually give priority to the economic aspect and to the rights of the investors, leaving unaddressed the rights of the vulnerable groups.¹²⁵ The *fifth* and last dimension deals with ‘corruption as a violation of human rights’. It entails that corruption in itself may constitute a violation of human rights¹²⁶, without making any kind of distinction related to direct, indirect or remote violations.¹²⁷

¹²⁰ *ibid.* This idea can also be seen in: Nihal Jayawickrama, “The Impact of Corruption on Human Rights”, *United Nations Conference On Anti-Corruption Measures, Good Governance And Human Rights* (Office Of The United Nations High Commissioner For Human Rights 2006); Boersma (p. 197); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 23); Julio Bacio-Terracino, “Linking Corruption and Human Rights”, *Proceedings of the Annual Meeting (American Society of International Law)*, p. 243-246 (2010) (p. 2).

¹²¹ Boersma (p. 197).

¹²² *ibid.* (p. 198).

¹²³ *ibid.* (p. 199). In the discussion of human rights of persons accused of corruption, three sensitive issues are usually dealt with: (i) the offence of ‘illicit enrichment’ and the presumption of innocence; (ii) special investigative techniques; (iii) asset recovery process. These are important concerns for academic discursion, but are not the object of this study. For more about the topic, see: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (2010) (p. 63-69).

¹²⁴ Boersma (p. 199). The author is quoting the ideas of: Gathii.

¹²⁵ Boersma (p. 199).

¹²⁶ *ibid.*

¹²⁷ Boersma briefly presents these dimensions and then starts to give insights about how corruption can violate human rights (issue related to her fifth dimension).

3. The classification used by the Human Rights Council Advisory Committee

In 2013, the Human Rights Council requested its Advisory Committee to submit a report about the negative impact of corruption on human rights and make recommendations on how the UN bodies should consider the problem.¹²⁸ In the report,¹²⁹ submitted to the Council in 2015, the Advisory Committee briefly classifies the possible violations of human rights caused by corruption according to the “different obligations imposed on states”,¹³⁰ although it seems that the classification is based on the identification and extent of the victims. The classification distinguishes between (i) individual negative impact; (ii) collective negative impact; and (iii) general negative impact. The *individual negative impact* is related to the corruption practices that directly or indirectly affect individual rights, such as when there is discriminatory access to public service. *Collective negative impact* includes corruption acts that affect not only individuals, but also groups of individuals. For instance, when the right of vulnerable groups to have access to public services is hindered by officials demanding bribes. The *general negative impact* occurs when corruption can affect society at large, whether in a national or international sense. This general impact is related to the reduction of financial and economic resources, and the general destabilization of democracy and the rule of law due to distrust of people about the government. Lastly, in addition to the classification aforementioned, the Advisory Committee also seems to endorse the classification developed by the ICHRP between ‘direct’ and ‘indirect’ violations.¹³¹

4. Reconciling the literature

As stated in paragraph 2, Boersma argues that the ICHRP’s causality approach has some flaws due to the lack of precision in the terms ‘direct’, ‘indirect’ and ‘remote’. To justify this, the author says that some ‘indirect’ violations are in fact ‘direct’ violations.¹³² Indeed, the terms used by the ICHRP are not legally

¹²⁸ UN Human Rights Council Resolution 23/9 (2013).

¹²⁹ UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015).

¹³⁰ *ibid.* (para. 20).

¹³¹ *ibid.* (para. 29). The Committee uses almost the same words of the ICHRP to explain the distinction between ‘direct’ and ‘indirect’ violations, but, unfortunately, the Committee does not make the proper reference to the ICHRP’s publication.

¹³² Boersma (p. 196). Boersma’s reasoning: “it was argued [by the ICHRP] that there is an indirect violation of the right to health when bribery of a public official leads to the dumping of toxic waste in a residential area. Yet, under the right to health there is a

precise, but they may be useful to explain in a simple and pedagogic way to the ordinary reader how corruption can violate or lead to the violation of human rights. The ICHRP's publication was made not only for legal scholars, but also and most importantly for "human rights specialists and organisations who want to know how they might effectively address corruption and the harm it causes."¹³³ Moreover, the ICHRP major contribution is not the classification between 'direct' and 'indirect' violations, but the way in which it integrated anti-corruption and human rights language. For instance, the classical human rights framework to examine violations was well adapted by the ICHRP to analyze corruption practices. This contributed to translate the human rights operational framework to those dealing with corruption.

Boersma's 'alternative approach' recognizes a broader spectrum of connections between corruption and human rights, not only the one in which corruption practices cause human rights violations. The other dimensions are also relevant and must be studied as well.¹³⁴ However, her 'approach' does not offer a method to analyze the connections between corruption and human rights violations. It simply highlights that the connection has several dimensions. Placing aside the divergences, the publications from the ICHRP and Boersma use the same classical human rights operational framework to illustrate how corruption can violate or lead to the violation of human rights. In sum, both explain the content and core elements of a right and then present how corruption can violate all different types of state's obligations deriving from that right.

Different from the ICHRP and Boersma's studies, the report from the Human Rights Council Advisory Committee does not contribute significantly to the discussion about the connection between corruption and human rights violations. While it does not contribute to the discussion, it is nevertheless an important report that translates the significance of the issue to the Human Rights Council and to the UN in general. It also provides useful recommendations to guide how the Council and other UN human rights monitoring bodies should address corruption.¹³⁵ The classification used in the report between 'individual', 'collective', and 'general negative impact' may be interesting to demonstrate how broad the impact of corruption can

State obligation 'to protect' individuals against infringements by third parties. Hence, by allowing the waste to be dumped, the State breaches its obligation to protect, which constitutes a direct violation of the right to health [...]."

¹³³ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 4).

¹³⁴ The other dimensions are not the object of this study, with the exception of the second one ('human rights necessary to fight corruption'), which is dealt with in Chapter 3, especially in paragraph 3 (p. 50).

¹³⁵ The report is further analyzed in Chapter 3, subparagraph 4.1.1 (p. 65).

be. However, this classification is more appropriate to social sciences, since it has no clear application when assessing state's responsibility for human rights violations. For instance, the Committee could have just used human rights language to highlight that corruption has a wide effect on the society, but without the need to classify the issue according to the extent of its effect.

Classification systems have the purpose of facilitating the study of one particular subject, and they are not mutually exclusive. From all that has been explained, the illustrations provided in the literature are the most relevant contribution to clarify how corruption violates or leads to the violation of human rights. The literature does not diverge on how to analyze corruption practices which violate human rights, since the classical human rights framework is usually used. Hereinafter, a useful and effective way to study this subject should not focus on classifying the casual link between corruption and human rights violations, neither the extent of the impact on victims or any other imprecise factor. Instead, future studies could firstly highlight the several dimensions between corruption and human rights violations. Secondly, they could indicate which dimension the study will use to address the subject. In the case of corruption as a violation of human rights, which is the dimension mainly used in this study, the third step could consist of the presentation of important background information about the impact of corruption on human rights. In this step, information about the broad extent of the negative impact of corruption on human rights could be presented, such as the individual, collective and general negative impact. Subsequently, the fourth step could present the operational human rights framework to evaluate violations. The fifth step could apply the classical framework on specific rights, analyzing in depth how corruption can affect all states obligation deriving from one specific human rights. The sixth and final step could suggest how to remedy the harms caused, including how to prevent future violations.

5. Illustrating corruption as a human rights violation

Following the human rights framework to analyze violations, this paragraph briefly presents specific examples of how corruption may violate or lead to the violation of human rights. As explained in paragraph 1, it is incorrect to conclude automatically that all acts of corruption violate human rights.¹³⁶ In order to evaluate when that is the case, an individual assessment of the corrupt practice and the causal link between this practice and the human rights violation must be made. In this assessment, the content and scope of

¹³⁶ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 24).

the human rights obligations of the states need to be correctly identified. Then it must be evaluated whether the corrupt practice affected any of the three levels of states' obligations ('respect', 'protect' and 'fulfill') and/or the '4-A's' standards ('availability', 'accessibility', 'acceptability' and 'adaptability').¹³⁷ However, as stated in the introduction of this chapter, this analysis does not have the purpose of providing an exhaustive list of how corruption may violate human rights, neither of which specific human rights can be violated by corruption.

5.1 *Corruption as a violation of Civil and Political Rights*¹³⁸

5.1.1 *Right to equality and non-discrimination*

The principles of equality and non-discrimination are fundamental principles of Human Rights Law and are referred to in all main human rights treaties.¹³⁹ As defined by the Human Rights Committee (HRCtee) in General Comment 18:

“[...] the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹⁴⁰

All direct and indirect acts of discrimination are prohibited unless they are justified by reasonable and objective criteria and have the aim to achieve a legitimate purpose according to human rights.¹⁴¹ The right to equality and non-discrimination includes several elements. Some of the most relevant

¹³⁷ It is not the object of this study to present a deep analysis of the content and scope of different human rights. Their content and scope will be presented briefly in order to permit the assessment of the impact of corrupt practices on them.

¹³⁸ The division between ‘civil and political rights’ and ‘economic, social, and cultural rights’ is made only for organizational purposes. Human rights must be considered as indivisible and the division does not suggest any hierarchy between those rights.

¹³⁹ Daniel Moeckli, “Equality and Non-Discrimination” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (1st edn, Oxford University Press 2010) (p. 189). Some treaty provisions: articles 2(1) and 26 ICCPR; articles 2(2) and 3 ICESCR; article 14 and Protocol No. 12 ECHR; article 24 ACHR; articles 2 and 3 ACHPR; art. 1(3) UN Charter.

¹⁴⁰ UN HRCtee, General Comment No. 18: Non-discrimination (10 November 1989) 1989 (para. 7).

¹⁴¹ *ibid.* (para. 13).

are enshrined in article 26 ICCPR,¹⁴² in which it is set out the general right to equality before the law, the right to equal protection of the law, and the general prohibition of discrimination directed to the legislative power.¹⁴³ The principle of non-discrimination also has a general character.¹⁴⁴ This means that several treaty articles related to particular categories of human rights are derived from the principle, such as article 14(1)¹⁴⁵ and (3)¹⁴⁶ and article 25,¹⁴⁷ both from ICCPR. Lastly, the right to non-discrimination is autonomous, since it guarantees non-discrimination as a general obligation of the state and not only in the context of other human rights protected in treaties.¹⁴⁸

By analyzing corruption according to the HRCtee's definition of 'discrimination', one may note that corrupt practices can be discriminatory because (i) they intrinsically distinguish, exclude or prefer; (ii) have a discriminatory purpose and effect; and (iii) may have the result of nullifying or impairing the equal recognition, enjoyment or exercise of a human right.¹⁴⁹ As demonstrated, the principles of equality and non-discrimination protect the right of every person to be treated equally by public officials. Hence, when somebody acquires a 'privileged status' due to the payment of a bribe, there is a violation of the right to equality, since individuals in a similar situation who have not bribed will not receive the benefit of 'special treatment'.¹⁵⁰ In the same way, there is a violation of the right when somebody is asked to pay a bribe in order to obtain a public service.¹⁵¹ In this case, those who were not requested to pay bribes have a better situation than those who had to bribe public officials. This requirement to pay bribes is particularly dangerous to the rights of vulnerable groups, considering that they may not be able to

¹⁴² ICCPR. Article 26 – "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹⁴³ Boersma (p. 203).

¹⁴⁴ See UN HRCtee General Comment No. 18: Non-discrimination (10 November 1989) (para. 3).

¹⁴⁵ Which states that all persons shall be equal before the courts and tribunals.

¹⁴⁶ Which states that everyone shall be entitled, in full equality, to minimum guarantees when they are facing criminal charges.

¹⁴⁷ Which protects the equal participation in public life of all citizens.

¹⁴⁸ Moeckli (p. 195). This is the position of the Human Rights Committee, in: UN HRCtee General Comment No. 18: Non-discrimination (10 November 1989) (para. 12).

¹⁴⁹ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 32).

¹⁵⁰ *ibid.* (p. 33).

¹⁵¹ *ibid.*

afford it.¹⁵² In addition, the discriminatory outcome of corruption practices commonly violates the right to equality in combination with another human right, such as the right to education, health or adequate housing. As an example, there is a violation of the right to equality and of the right to health whenever somebody has to bribe a public official to have access to medical treatment that should be provided free.¹⁵³

5.1.2 *Right to a fair trial and to an effective remedy*

The right to a fair trial is the application of the principle of equality aimed at the proper administration of justice.¹⁵⁴ This right is a key element of human rights protection and a safeguard to the rule of law,¹⁵⁵ being guaranteed by all major human rights treaties.¹⁵⁶ The right to a fair trial entails (i) the equality before the courts and tribunals; (ii) the equal access to justice; (iii) the equality of arms; and (iv) the right to a fair and public hearing conducted by an independent and impartial tribunal established by law.¹⁵⁷ The guarantee of a fair trial also has a relevant connection to the right to an effective remedy,¹⁵⁸ since no remedy can be made effective without ensuring equality before the law and fairness of the judicial procedures.

Corruption in the judiciary harms all of the broad range of standards deriving from the right to a fair trial. It erodes the independence, impartiality, and integrity of the judiciary; harms the right to a fair trial; hinders the effective and efficient administration of justice; and undermines the credibility of the entire justice system.¹⁵⁹ Political interference in the appointment of judges and during court procedures involving the state or those in power violates the partiality of

¹⁵² *ibid.* (p. 41); Boersma (p. 208).

¹⁵³ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 33).

¹⁵⁴ See, for instance, the wording of article 10 UDHR: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

¹⁵⁵ UN HRCtee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007).

¹⁵⁶ For instance: Article 14 ICCPR; articles 6 and 7 ECHR; articles 8 and 9 ACHR; article 7 ACHPR; article 15(2) CEDAW.

¹⁵⁷ For an analysis of these individual features, see: Sangeeta Shah, “Administration of Justice” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, p. 304-330 (Oxford University Press 2010).

¹⁵⁸ See: UN HRCtee General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) (para. 58). The right to an effective remedy is provided, for instance, in article 2(3) ICCPR; article 13 ECHR; article 25 ACHR; article 7 ACHPR.

¹⁵⁹ SR on the Independence of Judges and Lawyers, “Report A /67/305 (2014)” (p. 109).

the judiciary and the rights of those who trusted in the courts.¹⁶⁰ One example of this interference comes from Egypt, where the Ministry of Justice gives bonuses to compliant judges and demand them to supply copies of all civil and criminal lawsuits against important officials.¹⁶¹ In Turkey, the Ministry of Justice “finalises all key personnel decisions, appoints judges and prosecutors at all levels, including to the appeal court; and is in charge of promotions, transfers and the lifting of immunity.”¹⁶² One example of the Ministry’s interference is the transferal of the prosecutor responsible for uncovering a criminal group using its contacts to influence high court decisions (Operation Scalpel case, in 2003).¹⁶³ This lack of independence of the judiciary directly violates the right to a fair trial, as well as hinders the effective prosecution and punishment of officials involved in corrupt practices.

Bribery is another main issue related to corruption in the judiciary.¹⁶⁴ There is a violation of the right to equal access to justice when public officials demand bribery as a condition to access the judicial system or to speed up a court service.¹⁶⁵ As an example, a survey conducted by Transparency International showed that in Paraguay 18,7% of the respondents had to pay bribes in order to receive a court service.¹⁶⁶ The requirement to pay bribes also poses a serious threat to the rights of vulnerable groups, considering that poor people cannot afford to pay bribes for a court service.¹⁶⁷ Bribery can also directly violate the right to a fair trial and to an effective remedy when it is used to secure the favorable outcome of a lawsuit.¹⁶⁸ If the judicial

¹⁶⁰ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 37–38). Political interference is also recognized as a form of corruption within the judiciary in: SR on the Independence of Judges and Lawyers, “Report A /67/305 (2014)” (para. 25).

¹⁶¹ Hossam Baghat, “Egypt’s Judiciary Flexes Its Muscles” in Diana Rodriguez and Linda Ehrichs (eds), *Transparency International Global Corruption Report 2007*, p. 201-214 (Cambridge University Press 2007) (p. 201). Cited in: Boersma (p. 210).

¹⁶² Transparency International Istanbul, “Judiciary in Turkey: Rooting out Corruption” in Diana Rodriguez and Linda Ehrichs (eds), *Transparency International Global Corruption Report 2007*, p. 278-282 (Cambridge University Press 2007) (p. 279–280).

¹⁶³ *ibid.* (p. 280).

¹⁶⁴ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 37–38).

¹⁶⁵ Boersma (p. 208).

¹⁶⁶ Transparency International Paraguay, “Politics and Nepotism Plague Paraguay’s Courts” in Diana Rodriguez and Linda Ehrichs (eds), *Transparency International Global Corruption Report 2007*, p. 255-258 (Cambridge University Press 2007) (p. 257). Cited in: Boersma (p. 208).

¹⁶⁷ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 41); Boersma (p. 208).

¹⁶⁸ International Council on Human Rights Policy, *Corruption and Human Rights:*

decision was influenced by a corrupt practice, then the result will not be fair. Lastly, corruption in the judiciary has a negative effect not only on the right to a fair trial. It will also jeopardize other rights that are being analyzed in a lawsuit and will contribute to perpetuate impunity among those involved in corrupt practices.¹⁶⁹ In addition, impunity and the lack of trust in the justice system may encourage the perpetuation of corruption.¹⁷⁰

5.1.3 Rights of political participation

The rights of political participation are a “hallmark of democracy.”¹⁷¹ They are stated in all major human rights treaties¹⁷² and include the right to take part in the conduct of public affairs; to vote and to be elected; and to equal access to public services.¹⁷³ Regarding electoral rights, states have the obligation to adopt positive measures to ensure the full, effective and equal enjoyment of the rights, as well as the essential freedoms of expression, information, assembly and association.¹⁷⁴ The right of participation in the conduct of public affairs is a broad concept that includes the exercise of political power and the formulation of policy at all levels.¹⁷⁵ Corruption may have a negative effect on all the rights of political participation. The possibility of buying votes (or the abstention from voting) is a violation of the right to vote,¹⁷⁶ since it hinders the free choice of citizens and negatively interferes in the electoral process by reducing its legitimacy. For instance, in Nigeria, 20% of the citizens are exposed to vote buying offers.¹⁷⁷ This situation corresponds to a violation of the right to vote and negatively affects the fairness of the electoral process outcome. In the same way, corruption interfering in

Making the Connection (p. 42); Boersma (p. 208–209).

¹⁶⁹ Regarding the impunity of those involved in corruption: Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 1999) (p. 151). Cited in: Pearson (p. 55).

¹⁷⁰ SR on the Independence of Judges and Lawyers, “Report A /67/305 (2014)” (para. 36).

¹⁷¹ OHCHR, “Report on Promotion, Protection and Implementation of the Right to Participate in Public Affairs in the Context of the Existing Human Rights Law: Best Practices, Experiences, Challenges and Ways to Overcome Them - A/HRC/30/26 (2015)” (para. 4).

¹⁷² For instance: article 25 ICCPR; article 3 First Protocol to the ECHR; article 23 ACHR; article 13 ACHPR; article 7 CEDAW.

¹⁷³ OHCHR, “Report on Factors That Impede Equal Political Participation and Steps to Overcome Those Challenges - A/HRC/27/29 (2014)” (para. 7).

¹⁷⁴ *ibid.* (para. 12).

¹⁷⁵ *ibid.* (para. 18).

¹⁷⁶ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44); Boersma (p. 215); Pearson (p. 55).

¹⁷⁷ Michael Bratton, “Vote Buying and Violence in Nigerian Election Campaigns” (2008) 27(4) *Electoral Studies*, p. 621-632. Cited in: Boersma (p. 215).

the process of vote counting is a direct violation of the right to vote of the citizens¹⁷⁸ and the right to be elected of the candidates that did not engage in corruption practice. If there is a fraud in the elections, then the results do not represent the will of the people and the right to vote was violated. The right to be voted may also be harmed by corruption when public officials block the access to registering procedures at the electoral process because they were bribed or due to political influence.¹⁷⁹ Lastly, the right to have access to public service imply that admission to public jobs should respect equality and general principles of merit.¹⁸⁰ Restricting the access to public service only to those who engage in a corrupt practice (bribery, political influence or nepotism) is a violation of the right.¹⁸¹ All these aforementioned situations of corruption are extremely harmful, since they do not only violate the rights of political participation, but also because they constitute a threat to the “normative and institutional framework of democratic governance.”¹⁸²

5.2 Corruption as a violation of Economic, Social and Cultural Rights

5.2.1 The obligation of progressive realization (article 2(1) ICESCR)

The wording of article 2(1) of the ICESCR¹⁸³ is different from the one adopted at article 2 ICCPR. In the latter, there is a clear and immediate obligation of states to “respect and ensure” the civil and political rights recognized in the Covenant.¹⁸⁴ Since the positive obligations created by economic, social and cultural rights¹⁸⁵ are highly dependent on financial resources, article 2(1)

¹⁷⁸ *ibid.*; International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44); Pearson (p. 55).

¹⁷⁹ Boersma (p. 215–216); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44).

¹⁸⁰ UN HRCtee, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service. CCPR/C/21/Rev.1/Add.7 (12 July 1996) (para. 23).

¹⁸¹ Boersma (p. 216); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44). The example of ‘nepotism’ is not in the literature here cited.

¹⁸² *ibid.* (p. 45).

¹⁸³ ICESCR. Article 2 (1) “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

¹⁸⁴ Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) (p. 133).

¹⁸⁵ From now on, ‘ESC rights’.

ICESCR was drafted establishing the obligation of ‘progressive realization’ of the rights therein.¹⁸⁶ The principle of ‘progressive realization’ does not imply that ESC rights are programmatic.¹⁸⁷ It simply recognizes “the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”¹⁸⁸ The ‘full realization’ of all rights is progressive, but the ICESCR prescribes mandatory and immediate obligations to guide this progressive realization.¹⁸⁹ Thus, states parties have the obligation to: (i) take steps and devote the maximum of available resources to fulfill ESC rights; (ii) continuously improve conditions of the rights; (iii) accord a degree of priority to human rights in the allocation of resources; (iv) take appropriate measures towards the full implementation of the rights; (v) monitor the realization of rights; (vi) ensure a minimum core level of each right; and (vii) participate in international assistance and cooperation towards the full realization of ESC rights.¹⁹⁰

Considering the obligation to take steps and to devote the maximum of available resources to fulfill ESC rights, it can be argued that the embezzlement of funds is a direct violation of article 2(1) ICESCR.¹⁹¹ If money is stolen from public funds, then state’s resources are not being used in its maximum availability to the fulfillment of ESC rights.¹⁹² The UN Committee on the Rights of the Child (CRC) has already recognized this argument by stating that corruption reduces the resources available to fulfill children’s human rights.¹⁹³ In addition, there is a violation of the obligation to give priority to human rights in the allocation of resources when public funds are embezzled,¹⁹⁴ since the private gain of private parties had priority over the realization of human rights. The same violation occurs when governments choose to give priority to projects that offer more opportunities to corruption instead of projects that would better fulfill ESC rights.¹⁹⁵

¹⁸⁶ Sepúlveda (p. 133).

¹⁸⁷ *ibid.* (p. 311).

¹⁸⁸ CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) - Contained in Document E/1991/23 (1990) (para. 9). Also cited in: Sepúlveda (p. 312).

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.* (p. 426).

¹⁹¹ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 46); Boersma (p. 231).

¹⁹² International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 46).

¹⁹³ CRC, “CRC/C/VEN/CO/3-5 - Venezuela (2014)”; CRC, “CRC/C/KHM/CO/2 - Cambodia (2011)” (para. 16); CRC, “CRC/C/TGO/CO/3-4 - Togo (2012)” (para. 17); CRC, “CRC/C/THA/CO/3-4 - Thailand (2012)” (para. 21).

¹⁹⁴ Boersma (p. 233).

¹⁹⁵ *ibid.* There is research demonstrating that corrupt governments spend more money

5.2.2 Right to an adequate standard of living (right to food, housing and health)¹⁹⁶

According to the right to an adequate standard of living, “everyone should be able to enjoy their basic needs under conditions of dignity.”¹⁹⁷ The right provided in article 11 ICESCR and article 27 CRC includes the rights to food, housing, and health.¹⁹⁸

The *right to food*¹⁹⁹ is fulfilled when every individual has “physical and economic access at all times to food or means for its procurement.”²⁰⁰ The core content of the right implies that food must be available in sufficient quantity and quality to dietary needs, respecting safety standards and being acceptable within a given culture, as well as physically and economically accessible without interfering with the enjoyment of other human rights.²⁰¹ The states have the obligation to respect the right to food by refraining from acting in a way that would prevent the access to food.²⁰² The obligation to protect demands measures to safeguard the access to food from private parties’ negative interference.²⁰³ The obligation to fulfill means that states have to proactively strengthen “people’s access to and utilization of resources and means to ensure their livelihood” (obligation to facilitate), as well as provide adequate food for those who cannot enjoy the right by themselves (obligation to provide).²⁰⁴

on items that provide more opportunities for corrupt behavior, fact that causes the decrease of investments in the right to education. Paolo Mauro, “Corruption and the Composition of Government Expenditure” (1998) 69 *Journal of Public Economics*, p. 263-279. Cited in: Pearson (p. 57).

¹⁹⁶ The publications from the ICHRP and from Boersma analyzed how corruption can violate the rights to food, housing and health in separate paragraphs. This study preferred to address them under the same paragraph since they are all provided for in article 11 ICESCR, therefore sharing some common characteristics.

¹⁹⁷ Asbjørn Eide, “Adequate Standard of Living” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, p. 233-256 (Oxford University Press 2010) (p. 235).

¹⁹⁸ *ibid.* (p. 237).

¹⁹⁹ Article 11(1) and (2) ICESCR; articles 24 and 27 CRC. Also in article 12 Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights; implicit in the ACHPR, deriving from the right to human dignity (as decided in *AComHPR. The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, *Comm No 155/96, Decision from October 27, 2001*).

²⁰⁰ CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11) - E/C.12/1999/5 (1999) (para. 6); SR on the Right to Food, “A/HRC/25/57 (2014)” (para. 2).

²⁰¹ CESCR General Comment No. 12: The Right to Adequate Food (Art. 11) - E/C.12/1999/5 (1999) (para. 8).

²⁰² *ibid.* (para. 15).

²⁰³ *ibid.*

²⁰⁴ *ibid.*

In a landmark report from 2001, the SR on the Right to Food identified seven major obstacles hindering or preventing the realization of the right, among them the problem of corruption.²⁰⁵ The Rome Declaration on World Food Security also recognized that corruption contributes significantly to food insecurity.²⁰⁶ In the same way that it can harm all ESC rights, corruption may violate directly or indirectly the right to food by diverting funds from social spending.²⁰⁷ For instance, the embezzlement of funds intended for food aid is a direct violation of the state obligation to provide food for those who cannot have access to the right by their own means.²⁰⁸ In a food aid program in India, a study has shown that more than 50% of the food grain did not reach the people in need due to corruption.²⁰⁹ In 2007/08, Venezuela purchased over 1 million tons of food for US\$2.24 billion, but around 25% of the food was received (and only 14% distributed to those in need).²¹⁰ The right of indigenous peoples to have physical access to food may also be violated when corruption practices reallocate those people in order to favor private interests.²¹¹ Indigenous peoples usually use their lands for agriculture and/or livestock as a means to guarantee food. Their displacement may affect their possibility to maintain themselves with autonomy. The right to food security may also be endangered when unsafe products are on the market due to corruption practices (such as bribery or political interference in order to obtain a license or to ignore inspection procedures).²¹²

²⁰⁵ SR on the Right to Food, “Report E/CN.4/2001/53 (2001).” Also cited in: Kolawole Olaniyan, *Corruption and Human Rights in Africa* (Hart Publishing 2014) (p. 271); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44).

²⁰⁶ Rome Declaration on World Food Security – World Food Summit (1996). Available in: <http://www.fao.org/WFS/>. Accessed on 5 June 2016. Also cited in: Olaniyan (p. 271).

²⁰⁷ *ibid.*; International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44).

²⁰⁸ Boersma (p. 238); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44); Olaniyan (p. 271).

²⁰⁹ George Cheriyan, “Enforcing the Right to Food in India Bottlenecks in Delivering the Expected Outcome.” Research Paper No. 2006/132 (Helsinki: UNU-WIDER 2006). Also cited in: Boersma (p. 238).

²¹⁰ Fernando Tineo, “PDVAL and the Rotten Food Scandal.” In: http://www.transparency.org/news/feature/corruption_and_human_rights_violations_in_venezuela. Accessed on 5 June 2016.

²¹¹ Boersma (p. 238); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 44).

²¹² *ibid.* (p. 44).

The *right to housing*²¹³ is another element of the right to an adequate standard of living. This right requires that all individuals must have an adequate place to live, “a physical space which provides personal and family security, basic infrastructure, satisfactory privacy, necessary warmth on cold days, and protection against heat on warm days.”²¹⁴ As stated by the Committee on Economic, Social and Cultural Rights (CESCR), the right to housing includes: (i) the guarantee of legal protection against forced eviction (security of tenure); (ii) the availability of services and infrastructure such as water and energy; (iii) “affordability”; (iv) the habitability in terms of adequate space and protection from weather; (v) the “accessibility” to all who are entitled to it; (vi) a “location” allowing access to employment and public services; and (vii) “cultural adequacy.”²¹⁵ In sum, a right to “live somewhere in peace, security and dignity.”²¹⁶

Corruption practices may violate the right to housing by undermining the ‘security of tenure’, such as when forced evictions are caused for the private gain of corrupts.²¹⁷ For instance, in Burma, government policies lead to the displacement of ethnical villagers from their lands, which were later occupied by military families and sold to third parties for private gain.²¹⁸ Corruption in housing programs of the government may reduce the number of beneficiaries and/or cause the construction of low quality houses, violating the right to housing.²¹⁹ In addition, corruption may also affect the ‘accessibility’ of housing when officials require bribery as a condition to be a beneficiary of the public program.²²⁰

²¹³ Article 11 and 25 ICESCR; article 27 CRC; article 21 Convention Relating to the Status of Refugees; Article 31 European Social Charter. The ACHR and the ACHPR do not explicitly refer to the right to adequate housing, but the right has been recognized as deriving from other human rights, as stated in: OHCHR, “The Right to Adequate Housing - Fact Sheet No. 21 (Rev. 1)” (p. 12).

²¹⁴ Eide (p. 241).

²¹⁵ CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11) - Contained in Document E/1992/23 (1991) (para. 8). Confirmed in: SR on the Right to Housing, “Implementing the Right to Adequate Housing: A Guide for Local Governments and Civil Society (2016)” (p. 3).

²¹⁶ SR on the Right to Housing, “Report A/70/270 (2015)” (2015) (para. 12). Summarizing the ideas from: CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11) - Contained in Document E/1992/23 (1991) (para. 7).

²¹⁷ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 51); Boersma (p. 243).

²¹⁸ Ashley South, “Displacement and Dispossession: Forced Migration and Land Rights in Burma.” Centre on Housing Rights and Evictions Country Report (November 2007) (p. 48). Cited in: Boersma (p. 240–241, 243).

²¹⁹ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 51).

²²⁰ *ibid.*; Boersma (p. 242).

The last core right included in the right to adequate standard of living is the *right to health*. Present in several human rights treaties,²²¹ the right to health provides for the “enjoyment of the highest attainable standard of physical and mental health.”²²² Article 12(2) ICESCR sets out four steps to the fulfillment of the right to health, including assurance of medical treatment to all and preventive obligations to treat and control epidemic diseases.²²³ Besides healthcare, the right includes some “underlying determinants of health”, such as safe drinking water and food; adequate nutrition, housing and sanitation; healthy working and environmental conditions; health-related education and information; gender equality.²²⁴ In General Comment 14, the CESCR stated that governments must ensure functioning healthcare facilities and services available in sufficient quantity and accessible to everyone,²²⁵ with good quality and respecting medical ethics and cultural appropriateness.²²⁶ Considering the financial limitations of the state, the CESCR enumerated some core obligations of the right to health, including (i) access to healthcare without discrimination; (ii) minimum nutritional food; (iii) basic housing, sanitation and supply of water; and (iv) access to essential drugs.²²⁷

Corruption practices may violate several elements of the right to health.²²⁸ The SR on the Right to Health recognizes that widespread corruption can diminish the state’s capacity to allocate public funds towards the realization of the right to health.²²⁹ Corruption may violate the right to health in relation to the “management of financial resources”; the “distribution of

²²¹ Article 12 ICESCR; article 12 CEDAW; article 24 CRC; article 11 European Social Charter; Article 10 Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights; article 16 ACHPR.

²²² Eide (p. 244).

²²³ ICESCR. Article 12 [...] 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

²²⁴ OHCHR and World Health Organization, “The Right to Health Factsheet 31” (2008) (p. 3).

²²⁵ Physical accessibility, economical accessibility, and information accessibility.

²²⁶ CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) - E/C.12/2000/4 (2000) (para. 12).

²²⁷ *ibid.* (para 43).

²²⁸ For a more comprehensive approach of corruption in the health sector, see: Brigit Toebes, “Health Sector Corruption and Human Rights: A Case Study” in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary perspective*, p. 91-123 (Intersentia 2010).

²²⁹ SR on the Right to Health, “Report A /67/302 (2012)” (para. 2).

medical supplies”; and the “relationship of health workers with patients.”²³⁰ As it does with other ESC rights, the embezzlement of funds directed to the health sector directly violates the right to health of the whole society, since money that should be spent in the health system is diverted for private gain.²³¹ Corruption associated with public contracts may also violate the right to health by jeopardizing the quality of the construction of health facilities or the supply of health goods.²³² The right to health and its accessibility is violated when someone has to pay bribes in order to have access to health care services, such as medical treatment and medicines.²³³ This situation is particularly harmful to disadvantaged groups that may have denied their access to healthcare due to their lack of resources to pay bribes.²³⁴ Health workers corruptly associated with pharmaceutical industries may prescribe medicines with no benefits (or even with negative consequences) to the health of patients, in violation of the right to health.²³⁵ In addition, corruption may also cause widespread violations of the right to health when the pharmaceutical industry engage in corruption practices to ensure the selling of unsafe or counterfeit medicines.²³⁶ Lastly, corruption may harm the right to health when public officials allow private parties to pollute the environment.²³⁷

5.2.3 Right to education

The right to education is an important “human right in itself and an indispensable means of realizing other human rights.”²³⁸ It is “crucial for a persons’ self-fulfillment and the development of society as a whole”²³⁹, since education is a vehicle for empowering the disadvantaged and improving social

²³⁰ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 53).

²³¹ Boersma (p. 264); Toebes (p. 106).

²³² International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 53); Toebes (p. 109).

²³³ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 52); Boersma (p. 261); Toebes (p. 107).

²³⁴ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 52); Boersma (p. 261).

²³⁵ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 53); Toebes (p. 108).

²³⁶ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 53); Boersma (p. 261); Toebes (p. 109).

²³⁷ Boersma (p. 262).

²³⁸ First sentence of CESCR, General Comment No. 13: The right to education (art. 13 of the Covenant) - Contained in Document E/C.12/1999/10 (1999) (para. 1).

²³⁹ Fons Coomans, “Education and Work” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, p. 280-302 (Oxford University Press 2010) (p. 281).

and economic standards.²⁴⁰ The right to education is contained in several human rights treaties.²⁴¹ It involves two aspects: the right to receive education (social dimension) and the right to choose educational institutions that reflect the individuals personal beliefs (freedom dimension).²⁴² According to the CESCR's General Comment 13, the right to education includes the obligation to provide (i) functional educational institutions in sufficient numbers (availability); (ii) physically and economically accessible to everyone; (iii) with good quality and culturally acceptable; and (iv) adaptable to cultural and social context.²⁴³ The core content of the right to education includes its access on a non-discriminatory basis and the free and compulsory right to primary education.²⁴⁴ In addition, education must have a holistic approach, promoting human rights values and the preservation of multicultural diversity.²⁴⁵

The negative effects of corruption on the right to education have already been recognize by the CRC.²⁴⁶ Indeed, corruption practices can hinder the right to education in several different ways. The effects of corruption on education are particularly dangerous because of its long-term consequences.²⁴⁷ Corruption can undermine the access to education and the quality of educational services, hindering social and economic development of society as a whole and, especially, of vulnerable groups.²⁴⁸ The embezzlement of funds can reduce the availability dimension of the right to education, since fewer resources to spend on education means a reduced number of schools, teaching materials, school meals and other goods necessary to maintain an educational institution.²⁴⁹ Corruption practices can also jeopardize the right to equal and free access to primary education when the payment of bribery is required as a condition of admission or to receive books that should be provided free of charge.²⁵⁰

²⁴⁰ CESCR General Comment No. 13: The right to education (art. 13 of the Covenant) - Contained in Document E/C.12/1999/10 (1999) (para. 1).

²⁴¹ Article 13 and 14 ICESCR; article 28 CRC; article 2 First Protocol ECHR; article 13 Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights; article 17(1) ACHPR.

²⁴² Coomans (p. 284).

²⁴³ CESCR General Comment No. 13: The right to education (art. 13 of the Covenant) - Contained in Document E/C.12/1999/10 (1999) (para. 6).

²⁴⁴ Coomans (p. 285–288).

²⁴⁵ SR on the Right to Education, "Report A/HRC/26/27 (2014)" (para. 24 and 29).

²⁴⁶ CRC, "CRC/C/OPSC/TGO/CO/1 - Togo (2012)" (para. 18); CRC, "CRC/C/ALB/CO/2-4 - Albania (2012)" (para. 70 f).

²⁴⁷ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 57).

²⁴⁸ *ibid.*

²⁴⁹ *ibid.* (p. 56); Boersma (p. 248); Pearson (p. 57).

²⁵⁰ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 56); Boersma (p. 248).

Conclusion

This chapter has shed some light on the connection between corruption and human rights. Paragraph 1 addressed the contributions of the ICHRP to the issue. It presented the ‘causal link’ approach developed by the ICHRP, as well as the successful application to corruption practices of the classical human rights framework to evaluate violations. Paragraphs 2 presented the ‘dimensions’ approach developed by Boersma. The recognition of these different ‘dimensions’ is relevant because it highlights the existence of a broader range of connections between corruption and human rights, not only the one in which corruption violates human rights. Thus, studies that propose themselves to analyze corruption and human rights must recognize they will look to the connection from one particular dimension. Paragraph 3 briefly presented a classification used by the Human Rights Council Advisory Committee, distinguishing between ‘individual’, ‘collective’, and ‘general negative impact’. The Committee stated that the classification was drafted according to the “different obligations imposed on states”, although it seems that it is based on the identification and extent of the victims. Paragraph 4 reconciled the mentioned literature, pointing out that the publications from the ICHRP and Boersma supplement each other, since both use the same classical human rights operational framework to illustrate how corruption can violate or lead to the violation of human rights. These illustrations are the major contribution of the publications to the clarification of the connection between corruption and human rights violations. Considering this, paragraph 5 used the classical human rights operational framework to illustrate in a non-exhaustive way how corruption can violate or lead to the violation of human rights. This illustration consisted of the individual assessment of corrupt acts in light of the content and scope of the human rights obligations that states have. For example, one element of the right to education is the obligation of the state to provide free primary education to everyone. Thus, if public officials request bribes in order to admit a student to school, there is a direct violation of the right to education in the case. This clarification of the link between corruption and human rights was a necessary step to the next chapter, which will go beyond this connection to address whether making an explicit link with human rights has added value when developing strategies to fight corruption.

Chapter 3

The added value of linking ‘corruption’ and human rights

Introduction

The connections between corruption and human rights violations were clarified in the previous chapter. However, this academic link cannot be an end in itself, a pure exercise of relabeling corruption. The current chapter addresses the question whether making an explicit link with human rights has added value when developing strategies to fight corruption. In general, most scholars defend the position that inadequate human rights protection is associated with high corruption indexes,²⁵¹ which would suggest that the improvement of human rights protection by itself is already a mechanism to reduce corruption. Although not wrong, this abstract argument alone is not sufficient to give effective significance to the link between corruption and human rights. Therefore, the present chapter addresses the added value of making an explicit link between corruption and human rights. It presents, in a non-exhaustive way, the possibilities in which international human rights law can be used to strengthen the fight against corruption and its negative effects. The arguments are presented with the main perspective of adding value to the fight against corruption. However, sometimes the arguments are intrinsically related to improving human rights protection. In this case, it will be demonstrated that the ultimate goal of increasing human rights protection is to build a more favorable and effective environment to tackle corruption. In addition, considering the shared environment in which corruption and human rights violations flourish, sometimes it is hard to differentiate measures to tackle corruption from measures to protect human rights.

To start the arguments, paragraph 1 demonstrates that the moral, political and social support offered by human rights is a relevant tool that can help to change public attitudes towards fighting corruption. Thereafter, paragraph 2 argues that anti-corruption strategies should also focus on the victims of corruption. Currently, these strategies focus only on the economic and criminal perspectives, failing to address how corruption negatively affects people’s rights and lives, especially those belonging to vulnerable groups.

²⁵¹ Bacio-Terracino (p. 2). See also: Jayawickrama; Boersma (p. 197); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 23).

Paragraph 3 demonstrates that a human rights approach to the principles of participation, transparency and accountability can help to strengthen the fight against corruption. These important principles for anti-corruption strategies are human rights principles that have been developed for years by human rights bodies. Paragraph 4 presents a number of human rights actors that can address corruption and consequentially contribute to better fight the problem. This paragraph also demonstrates that these actors have already been addressing corruption, but not to the full extent of their possibilities. Lastly, paragraph 5 argues that anti-corruption advocates suffering threats can be protected by mechanisms designed to protect human rights defenders.

1. Social, political and moral support of human rights law

When presenting the added value of framing corruption as a human rights issue, most scholars initiate their arguments with the statement that if corruption is shown as a violation of human rights, this might influence public attitudes toward fighting corruption.²⁵² This argument is mainly based on the moral dimension of human rights, which has the power to influence public attitudes²⁵³ and to create a greater social and political response to the problem of corruption.²⁵⁴ By increasing the awareness of how corruption may violate human rights and harm public and individual interests, anti-corruption programs and campaigns may gain wider support from all actors involved, including public officials, the judiciary, the business sector, the media and the public in general.²⁵⁵

According to Kumar,²⁵⁶ the type of moral, social and political reaction created in a society after a violation of human rights is more significant than the response generated by criminal law, independently of the seriousness of the crime. As the author states, “corruption couched in the language of human rights becomes more serious than an act of crime.”²⁵⁷ Thus, by recognizing

²⁵² *ibid.* (p. 5); Wouters, Ryngaert and Cloots (p. 35); Boersma (p. 268); Bacio-Terracino (p. 3); CRajKumar, *Corruption and Human Rights in India* (Oxford University Press 2011) <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198077329.001.0001/acprof:9780198077329>>. Accessed on 15 February 2016; Hachard (p. 16).

²⁵³ Boersma (p. 268).

²⁵⁴ For the latter, see: Kumar, *Corruption and Human Rights in India* (p. 4).

²⁵⁵ UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para. 27); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 5); Boersma (p. 268).

²⁵⁶ Kumar, *Corruption and Human Rights in India* (p. 4).

²⁵⁷ *ibid.*

corruption as a human rights violation, the response of the state must be the same as when it deals with other human rights violations.²⁵⁸ Although the responses of states concerning human rights violations are not as effective as they should be, it is clear that these violations do receive attention.²⁵⁹

However, this first argument about the added value of framing corruption as a human rights issue is sometimes underestimated. Although most scholars mention this argument, some of them do that in one simple sentence. This lack of reasoning may suggest that the weight of human rights law has not been given its due. Undervaluing the moral, social and political significance of framing corruption as a human rights issue is undervaluing the importance of human rights law itself. Regardless of the current existence of several human rights violations in the world, and the lack of effective remedies to some of these violations, the positive impact of international human rights law has generally been accepted. As demonstrated by Risse and Ropp, international human rights law has made a significant difference in bringing improvements in human rights practices all over the world.²⁶⁰

The development of human rights discourse in international relations has been remarkable, so that it is now considered as an essential aspect of international law.²⁶¹ This mainstreaming of human rights²⁶² in the international agenda and the creation of universal standards led to the recognition of human rights law as a legitimate international concern.²⁶³ Moreover, another positive characteristic of human rights is the clarity in its language to affirm that states have obligations to respect, protect and fulfill, for the benefit of individuals and population in general.²⁶⁴ This characteristic, together with the importance of international human rights law in changing policies, certainly attests the added value of framing an issue as a human rights violation. Therefore,

²⁵⁸ *ibid.*

²⁵⁹ In this perspective, specifically about South Asia, see: *ibid.*

²⁶⁰ Thomas Risse and Stephen C Ropp, "International Human Rights Normas and Domestic Change: Conclusion" in Thomas Risse, Stephen C Ropp and Kathrin Sikkink (eds), *The power of Human Rights. International Norms and Domestic Change* (5th edn, Cambridge University Press 2004) (p. 275).

²⁶¹ Pearson (p. 44).

²⁶² "Mainstreaming of human rights" is understood as "the reorganization, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making." In: Christopher McCrudden, "Mainstreaming Human Rights" in C Harvey (ed), *Human Rights in the Community: Rights as Agents for Change*, p. 9-20 (Bloomsbury Publishing 2005) (p. 9), citing; Council of Europe, "Rapporteur Group on Equality Between Women and Men, Gender Mainstreaming, GR-EG (98) 1, Mar. 26, 1998" (p. 6).

²⁶³ Pearson (p. 44).

²⁶⁴ Coquoz (p. 15).

assessing corruption as a human rights issue creates a powerful moral, social and political response to the problem, due to the weight international human rights law has in the current world and the accomplishments it has already achieved. Lastly, this argument about the social, political and moral support of human rights law will constantly be retaken as it is intrinsically related to all the other arguments presented hereinafter.

2. Focus on the effects of corruption on the victims

As stated in the introduction to this chapter, this paragraph will demonstrate that a human rights approach to fighting corruption would help to focus on the effects corruption has on its victims, especially those belonging to vulnerable groups (subparagraph 2.1). Following this argument, this paragraph also presents how ‘corruption indicators’ could reflect this special attention to vulnerable groups (subparagraph 2.2). Lastly, the study reflects on whether focusing on the victims adds value to human rights law or to anti-corruption strategies, or both (subparagraph 2.3).

2.1 Focus on the victims and ‘vulnerable groups’

Corruption has always been considered a victimless crime.²⁶⁵ This perception has hindered the study of the effects of corruption on human rights and the vigorous prosecution of the offense.²⁶⁶ As set out in chapter 2,²⁶⁷ corruption has a harmful effect on people’s rights. Despite this fact, the current approaches that view corruption exclusively in the economic and political perspective do not give adequate significance to the effect of corruption on ordinary people’s lives and rights.²⁶⁸ Indeed, “as a result of the focus on the economic and political consequences of corruption, the strategies that are commonly developed to combat corruption also adopt this approach.”²⁶⁹ By contrast and differently from the economic and political approach, the examination of a topic with a human rights law perspective would involve paying special attention to the effects of the problem on the people affected.²⁷⁰

²⁶⁵ Wouters, Ryngaert and Cloots (p. 37); Martine Boersma and Hans Nelen, “General Introduction” in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary perspective* (Intersentia 2010) (p. 2).

²⁶⁶ Wouters, Ryngaert and Cloots (p. 37).

²⁶⁷ See p. 21.

²⁶⁸ Pearson (p. 30).

²⁶⁹ Morgan; In: Pearson (p. 36). Argument also used in: Gauthier De Beco, “Monitoring Corruption from a Human Rights Perspective” (2011) 15 *The International Journal of Human Rights* 1107, p. 1107-1124 (p. 1110); Gathii (p. 182).

²⁷⁰ Pearson (p. 46).

This shift from an economic perspective to a human rights perspective is well defended by Pearson:

“Moving from an economic and political perspective on corruption to a human rights approach involves shifting from viewing corruption as being a misappropriation of wealth and distortion of expenditure (that is bad for the economic and political stability of a country), to viewing corruption and the tolerance of corruption by states as also being a breach of fundamental human rights (due to the deleterious effects corruption has on people and on the state’s ability to enforce these rights). Using the discourse of human rights enables the effects that corruption has on the ordinary person—especially in his/her contact with the state—to be recognised. Too often, the sufferings of people as a result of corrupt practices are hidden behind vague euphemistic statements of development and poverty levels that fail to draw national or international attention and stimulate the necessary action.”²⁷¹

Besides focusing on the impact of corruption on ordinary people, a human rights perspective would also highlight the consequences of corruption for vulnerable groups.²⁷² Usually, these consequences are dealt with only as a marginal issue in the context of corruption.²⁷³ The human rights framework would “[emphasize] explicitly that vulnerable and disadvantaged groups must be protected from abuse.”²⁷⁴ In general, corruption affects the human rights of all individuals in a society. However, it has a disproportionate impact on vulnerable groups, such as women, children, minorities, indigenous peoples, migrants, refugees, disabled people, prisoners, and poor individuals.²⁷⁵

There are some clear examples on how corruption causes a disproportionate impact on vulnerable groups. For instance, the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography concludes in one of his reports²⁷⁶ that Romani people have to pay more bribes than

²⁷¹ *ibid.*

²⁷² International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 5).

²⁷³ De Beco (p. 1110).

²⁷⁴ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 6).

²⁷⁵ *ibid.* (p. 7). The particular vulnerability of poor people to corruption is also recognized in: SR on extreme poverty and human rights, “Report A/HRC/23/36 (2013)” (para. 13).

²⁷⁶ UN Special Rapporteur on the sale of children, child prostitution and child pornography. SR on the sale of children, “Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - E/CN.4/2006/67/Add.2.” Also cited in: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 7).

other groups to have access to health and educational services.²⁷⁷ In the same way, one research from Transparency International Sri Lanka concludes that the State under analysis must recognize that corruption affects women differently in order to effectively “implement programs to fight the prevalence of systemic discrimination that women face as recipients of public services.”²⁷⁸ As demonstrated by these examples, it can be argued that, in general, women and their dependents are more often affected by corruption, since “they are on average less able to afford bribes, depend more on public [health] services, and sometimes (for example during pregnancy) require services that men do not.”²⁷⁹ A human rights perspective to approach corruption would require states to analyze how and in which way the creation and implementation of anti-corruption strategies would affect these vulnerable groups.²⁸⁰ Moreover, focusing on disadvantaged groups could provide information about the consequences of corruption that would not necessarily be viewed from another way.²⁸¹ To sum up, a human rights approach that focuses on the effect of corruption on ordinary people’s lives and rights, and also highlights the disproportionate impact on vulnerable groups, is important to provide policy guidelines for anti-corruption strategies and for empowering the victims of corruption.²⁸²

2.2 ‘Corruption indicators’ and the focus on vulnerable groups

A practical consequence of the focus on the victims of corruption, especially those belonging to vulnerable groups, is the inclusion of this issue in corruption indicators. Today, corruption indicators rely mainly on people’s perception

²⁷⁷ Excerpt of SR on the Sale of Children, “Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - E/CN.4/2006/67/Add.2.”, para. 47: “The enjoyment of economic, social and cultural rights is affected by stigmatization and discrimination suffered by Roma. ‘As soon as they see our colour, it is clear that we have to pay get services’, said a group of Roma reporting cases of corruption in the health and education sectors. Even corruption impact more severely on Roma.”

²⁷⁸ Transparency International Sri Lanka, “Women’s Experience of Corruption in Public Service” (2014) (p. 42) <<http://www.tisrilanka.org/pub/reports/WEC.pdf>>. Accessed on 20 April 2016.

²⁷⁹ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 8); International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 58).

²⁸⁰ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 6).

²⁸¹ Similar argument was used in: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 30).

²⁸² The “empowerment of the victims” aspect is further developed in subparagraph 3.1 (p. 50).

of corruption.²⁸³ This represents a focus on the economic and political consequences of corruption,²⁸⁴ as explained in the previous subparagraph. The indicators usually apply composite indexes obtained by measuring different variables against each other, which entails establishing some sort of hierarchy between those variables.²⁸⁵ The composite indexes, consequently, do not address the variable ‘impact of corruption on vulnerable groups’. This approach is not compatible with a good human rights practice since it is not possible to measure different types of human rights violations in a qualitative way.²⁸⁶ The solution, according to De Beco, would be to disaggregate the data of corruption indicators with respect to vulnerable groups, separating the data considering the gender, race, age, income, minorities, region, refugees, migrants and so on. This would allow the individual assessment of how corruption affects vulnerable groups.²⁸⁷ In addition, data collected by local stakeholders including information about vulnerable groups could be used in the elaboration of corruption indicators. This would lead to a better understanding of the corruption’s effects on people’s lives and would represent a form of verification of the accuracy of data collected by other sources.²⁸⁸ This individual evaluation of the impact of corruption on a vulnerable group could provide important information for drafting and enforcing public policies to fight corruption and its effects on vulnerable groups.²⁸⁹ Lastly, this shift from an economic and political perspective to a human rights based perspective could also influence the development of a new and inclusive framework for corruption monitoring indicators.²⁹⁰

2.3 Improvement of human rights only or also strengthening of anti-corruption strategies?

The previous subparagraphs argued that anti-corruption programs should pay special attention to the effects of corruption on peoples’ rights and

²⁸³ De Beco (p. 1109).

²⁸⁴ *ibid.* (p. 1110).

²⁸⁵ Joe Foweraker and Roman Krznaric, “Measuring Liberal Democratic Performance: An Empirical and Conceptual Critique” (2000) 48 *Political Studies*, p. 759-787. In: De Beco (p. 1115).

²⁸⁶ De Beco (p. 1113).

²⁸⁷ *ibid.* (p. 1114).

²⁸⁸ Global Integrity and UNDP, “A Users’ Guide to Measuring Corruption” (2008) (p. 30); In: De Beco (p. 1119).

²⁸⁹ Wouters, Ryngaert and Cloots (p. 36).

²⁹⁰ De Beco suggests three frameworks for new monitoring indicators, including an adaptation of the ‘structural-process-outcome indicator’ framework developed by the OHCHR. For more information about these indicators, see: De Beco (p. 1114 – 1117).

lives, especially those belonging to vulnerable groups. From a human rights perspective, focusing on the victims is clearly a good practice. However, one might ask whether this would also contribute to the fight against corruption. First of all, fighting the effects of corruption is also part of fighting corruption. The consequences of an illegal act must be remedied in order to fully address the problem. In addition, focusing on the victims would move them to the center of the fight against corruption,²⁹¹ empowering them to participate more in public life and to hold power-holders accountable for their actions. This issue of increasing participation and accountability will be further discussed in paragraph 3, but it can be anticipated that creating mechanisms for effective participation of the victims of corruption would lead to a greater social accountability since there will be more people monitoring public policies and demanding power-holders to answer for their actions. Therefore, to focus on the victims of corruptions is relevant to improve human rights protection and to address more effectively the problem of systemic corruption.

3. Integrating human rights’ principles in anti-corruption strategies and policies

The human rights approach regarding the principles of participation, transparency and accountability can help to strengthen anti-corruption programs and to integrate human rights and anti-corruption strategies.²⁹² The International Council on Human Rights Policy dedicated most of its second publication²⁹³ to address this issue of how to integrate human rights expertise regarding the aforementioned principles into the anti-corruption agenda. This paragraph presents the contribution to the discussion as made in the publication mentioned above, as well as some arguments by other scholars and case-law.

3.1 Participation

Participation has already been recognized as an important principle for anti-corruption programs, based on the idea that it contributes to the decision-

²⁹¹ UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para. 27).

²⁹² International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 1); De Beco (p. 1117).

²⁹³ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda*.

making process and the implementation of public policies.²⁹⁴ For instance, the UNCAC²⁹⁵ and the IACAC²⁹⁶ highlight the state obligation to promote the active participation of society in the public sector. The participation of individuals and civil society in the public life enables oversight of public officials and policies, preventing abuse of power and detecting/denouncing corruption.²⁹⁷ Meaningful and effective participation enables the exercise of autonomy and self-determination, as well as limits the capacity of elites to impose their will on individuals.²⁹⁸ However, despite its recognized importance, some participation processes are *pro forma*, designed to give legitimacy to predetermined policies, ineffective and/or inaccessible to vulnerable groups.²⁹⁹ Taking an explicit human rights approach would make participation in anti-corruption programs more effective. The principle of participation has been laid down in several human rights treaties and has been developed by different international adjudicators.³⁰⁰ Indeed, “the

²⁹⁴ *ibid.* (p. 2).

²⁹⁵ UNCAC, art. 13: “1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. [...]”

²⁹⁶ IACAC, Article III: “11. [to create, maintain and strengthen] mechanisms to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption.”

²⁹⁷ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 2).

²⁹⁸ SR on Extreme Poverty and Human Rights (para. 16).

²⁹⁹ *ibid.* (para. 17).

³⁰⁰ Argument used in: De Beco (p. 1117), without the following references. Some of the treaty provisions protecting the principle of participation are: (i) art. 21 UDHR; (ii) art. 25 ICCPR; (iii) art. 7 and 14(2) CEDAW; (iv) article 5 ICERD. Some important UN documents about the principle of participation: UN HRCtee, General Comment No. 23: Article 27 (Rights of Minorities). CCPR/C/21/Rev.1/Add.5 (8 April 1994) 1994 1988; UN HRCtee General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service. CCPR/C/21/Rev.1/Add.7 (12 July 1996). For relevant case-law, see: *JGA Diergaardt (late Captain of the Rehoboth Baster Community) et al v Namibia*, 25 July 2000, CCPR/C/69/D/760/1997. See also: IAComHR, Considerations Regarding The Compatibility Of Affirmative Action Measures Designed To Promote The Political Participation Of Women With The Principles Of Equality And Non-Discrimination. 1999 Annual Report (OEA/Ser.L/V/II.106, Doc 6 rev., April 13, 1999). For more about human rights and the principle of participation, see: UN Economic and Social Council, “Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Participation and Its Application in the Context of Globalization - E/CN.4/2005/41 (2004).”

experience of implementation that human rights actors have acquired over the last 60 years should help anti-corruption organisations to make participation operational and effective for anti-corruption purposes.”³⁰¹ The operationalization of participation according to human rights practice can be divided into two dimensions: breadth and depth.³⁰²

Breadth is related to the range of parties involved. It should be as broad as possible, including the people affected by the decisions.³⁰³ It should also focus attention on vulnerable groups and to the victims of corruption.³⁰⁴ The breadth of participation is intrinsically related to paragraph 2 of this chapter,³⁰⁵ in which it is stressed that a human rights approach to corruption can help to focus on the effects of corruption on the victims, especially vulnerable groups. Focusing on the victims and vulnerable groups implies defending a participatory process in policy-decision making in which they are involved. Participation must be broad and states have to take proactive steps to include vulnerable groups, since these groups are particularly affected by exclusion and discrimination and are less likely to be consulted by public institutions and/or officials.³⁰⁶ The legal conditions of inclusion and broad participation also must comprise making, with enough time to act, relevant information available, including by facilitating the communication when necessary (‘speaking the language’ of the vulnerable groups).³⁰⁷

About this aspect of the principle of participation, human rights law practice can assist with some relevant developments that were made regarding ‘environmental impact assessments’ and effective participation of indigenous and tribal peoples.³⁰⁸ Inspired by Principle 10 of Rio

³⁰¹ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 4).

³⁰² De Beco (p. 5); International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 6).

³⁰³ De Beco (p. 1117).

³⁰⁴ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 6).

³⁰⁵ See p. 46.

³⁰⁶ *ibid.*; OHCHR, “Report on Promotion, Protection and Implementation of the Right to Participate in Public Affairs in the Context of the Existing Human Rights Law: Best Practices, Experiences, Challenges and Ways to Overcome Them - A/HRC/30/26 (2015)” (para. 68).

³⁰⁷ Adapted from Christian Gruenberg, *Participation, Transparency and Accountability in Targeted Social Programs: Case Study Handbook* (Tinker Foundation and Corporación Participa 2009); In: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 8). “Speaking the language” means using understandable language, avoiding technical terms and jargons that would be incomprehensible to vulnerable groups.

³⁰⁸ *ibid.* (p. 7). The contribution of recent developments regarding the rights of indigenous

Declaration,³⁰⁹ articles 6 to 8 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) establishes useful guidelines on public participation on environmental matters.³¹⁰ These guidelines include the obligation of states to “ensure that in the decision [which may have a significant effect on the environment] due account is taken of the outcome of the public participation.”³¹¹ Similarly, in the Akwé: Kon Voluntary Guidelines,³¹² the effective participation of relevant stakeholders, including indigenous and local communities, is recognized as a precondition for a successful environmental impact assessment.³¹³ Regarding indigenous and tribal peoples, the ILO Convention No. 169³¹⁴ and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) have many provisions safeguarding their effective participation in all decisions affecting them.³¹⁵ The Inter-American Human Rights System also contributed to protect the right to participation of indigenous and tribal peoples. According to its jurisprudence, the consultation of indigenous peoples must be carried out in advance,³¹⁶ with good faith and the aim of reaching an agreement.³¹⁷ The

peoples to the strengthen of a wider interpretation of the right to participation is also recognized by the HRCtee. The Committee also highlight the contribution of developments concerning the rights of persons with disabilities, minorities, and the role of civil society organizations. In: OHCHR, “Report on Factors That Impede Equal Political Participation and Steps to Overcome Those Challenges - A/HRC/27/29 (2014)” (para. 21).

³⁰⁹ Rio Declaration. Principle 10. “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

³¹⁰ Also cited in: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 15).

³¹¹ Article 6(8) Aarhus Convention.

³¹² Akwé: Kon Voluntary Guidelines. Endorsed by United Nations Environment Programme - Convention on Biological Diversity, Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment. UNEP/CBD/COP/8/27/Add.2 (9 January 2006).

³¹³ *ibid.* (para. 5).

³¹⁴ International Labor Organization. Indigenous and Tribal Peoples Convention.


³¹⁵ See, for instance, articles 2, 5, 6, 7, 15, and 29 ILO Convention No. 169; and articles 5, 18, 27, and 41 UNDRIP.

³¹⁶ IACtHR. *Case of the Indigenous People Kichwa de Sarayaku v Ecuador Judgement on Merits and Reparations (27 June 2012)* (para. 180–184).

³¹⁷ *ibid.* (para. 185–200).

consultation must be adequate and accessible,³¹⁸ informed,³¹⁹ and include environmental impact assessments.³²⁰

The depth dimension, on the other hand, is related to the fact that participation should be meaningful, effectively allowing people to exercise their influence on the decision-making process.³²¹ According to human rights law standards, it is not enough that people are heard in the policy-making process, their opinions and demands have to influence public decisions.³²² From a superficial to a deep level of participation, the following figure illustrates several examples of practices:³²³



Beneficiary assessment; attitude surveys; report cards; complaint box	Public hearings; neighborhood meetings; popular consultation	Plebiscities; referendums	Participatory budgeting and development planning	Governance councils in education and health sectors; electoral councils
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³¹⁸ *ibid.* (para. 201–203).

³¹⁹ *ibid.* (para. 208–210).

³²⁰ Regarding the latter: *ibid.* (para. 204–207).

³²¹ De Beco (p. 1117).

³²² See, for instance: SR on Extreme Poverty and Human Rights (para. 17).

³²³ Examples taken from: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 10); adapted from: Gruenberg. The examples given in the figure vary in a continuum from a superficial (or less deep) to a more deep level of influence in public life. The classification of some practice as superficial does not mean that they are not desired. The level of influence in public life of the practices enumerated in the first column is superficial compared to the other practices cited, but these “superficial” examples still constitute public participation of society in politics. The argument is that only these superficial practices are not enough to give significance to a deep level of participation in policy making.

Therefore, enhancing participation as a human right more than as an instrument of administrative effectiveness would allow anti-corruption strategies to focus more on the breadth, depth, and legitimacy³²⁴ of participatory processes.³²⁵

3.2 Transparency

Transparency is the second principle that a human rights approach can assist to strengthen, further enhancing anti-corruption programs and integrating human rights and anti-corruption strategies. The recently elaborated UNCAC expressly lays down the principle of transparency in article 10,³²⁶ demonstrating the already existent importance of the principle to the anti-corruption agenda.

As described by Transparency International, transparency is the “degree to which governments, companies, organisations and individuals openly disclose information, rules, plans, processes and actions.”³²⁷ Although the term ‘transparency’ is not expressly written in any human rights treaty, human rights law recognizes it as deriving from the content of ‘freedom of expression’ and the ‘right to have access to public information’.³²⁸ Regarding the right to access public information, the UN Special Rapporteur on Freedom of Opinion and Expression, in his 1998 Annual Report, stated that:

“[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems. [...]”³²⁹

³²⁴ Another important element further discussed by the International Council on Human Rights Policy is that of legitimacy. The Council deals with the legitimacy of participation by identifying the powers in the participatory process (visible, hidden and invisible powers). The correct identification of these relations is crucial in order to prevent fraud on the participatory process. See more in: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 11/13).

³²⁵ *ibid.* (p. 12).

³²⁶ UNCAC, art. 10: “Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision making processes, where appropriate. [...]”

³²⁷ *In: ibid.* (p. 14).

³²⁸ *ibid.* (p. 16).

³²⁹ SR on Freedom of Opinion and Expression, “Report E/CN.4/1998/40 (1998)” (para. 14). *In: Toby Mendel, Freedom of Information: A Comparative Legal Survey* (2nd edn, United Nations Educational Scientific and Cultural Organization 2008) (p. 8) <www.unesco.org/webworld/en/foi>. Accessed on 20 February 2016.

Later, in November 1999, the three special mandate-holders on freedom of expression³³⁰ adopted a Joint Declaration for the first time, in which the following was stated:

“Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”³³¹

The human rights NGO Article 19³³² developed a set of principles to guide the implementation and full respect of the transparency principle and the right to access information.³³³ The UN further endorsed this set of principles,³³⁴ recognizing that they “are based on international and regional law and standards, evolving State practice, and the general principles of law recognized by the community of nations.”³³⁵

The IACtHR was the first international adjudicator to recognize the right to access information held by the government as a consequence of the guarantee of freedom of expression.³³⁶ In the paradigmatic *Claude Reyes v*

³³⁰ [1] The UN Special Rapporteur on Freedom of Opinion and Expression; [2] the OSCE Representative on Freedom of the Media; and [3] the OAS Special Rapporteur on Freedom of Expression.

³³¹ Joint Declaration adopted following the Global Campaign for Free Expression, under the support of “Article 19”, an human rights NGO.,; In: Mendel (p. 8).

³³² The name of the NGO is a reference to Article 19 of the Universal Declaration of Human Rights, which states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

³³³ In resume, these principles are: (*Principle 1*) maximum disclosure –presumption that all information held by public bodies should be subject to disclosure; (*Principle 2*) public bodies should be under an obligation to publish key information; (*Principle 3*) public bodies must actively promote open government; (*Principle 4*) exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests; (*Principle 5*) requests for information should be processed rapidly and fairly and an independent review of any refusals should be available; (*Principle 6*) individuals should not be deterred from making requests for information by excessive costs; (*Principle 7*) meetings of public bodies should be open to the public; (*Principle 8*) laws which are inconsistent with the principle of maximum disclosure should be amended or repealed; (*Principle 9*) individuals who release information on wrongdoing must be protected. In: SR on Freedom of Opinion and Expression, “Report E/CN.4/2000/63 (2000)” (Annex 2).

³³⁴ SR on Freedom of Opinion and Expression, “Report E/CN.4/2000/63 (2000).”

³³⁵ *ibid.* (para. 44).

³³⁶ Kevin Boyle and Sangeeta Shah, “Thought, Expression, Association, and Assembly” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, p. 217-237 (2nd edn, Oxford University Press 2013) (p. 228).

Chile,³³⁷ it was specified that the ‘transparency principle’ includes the right to seek and receive state-held information:

“In this regard, the State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.”³³⁸

The HRCtee also decided on a case relevant for the freedom of expression and the right to information. In *Sa’di v Uzbekistan*, the Committee highlighted the right of the public to receive information “as a corollary of the specific function of a journalist and/or editor to impart information.”³³⁹ Another important development in the context of the freedom of expression occurred in 2011, when the HRCtee issued a General Comment specifically about article 19 ICCPR (freedoms of opinion and expression).³⁴⁰ The document constitutes an authoritative interpretation by the Committee about the application and extension of freedoms of expression and opinion. It strengthens the framework for the protection of the right and establishes a significant contribution to the application of restriction clauses.³⁴¹ In this comment, the Committee states that freedom of expression is a “necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”³⁴²

Transparency and the right to access public information are essential human rights guaranteed under international law.³⁴³ They are protected under

³³⁷ IACtHR. *Claude Reyes et al v Chile*. Judgment on Merits, Reparations and Costs (September 19, 2006) (para. 77).

³³⁸ *ibid.* (para. 86).

³³⁹ UN HRCtee. *Rakhim Mavlonov and Shansiy Sa’di v Uzbekistan* CCPR/C/95/D/1334/2004 (April 29, 2009) (para. 8.4).

³⁴⁰ UN HRCtee, General Comment No. 34, Article 19, Freedoms of opinion and expression. CCPR/C/GC/34 (12 September 2011).

³⁴¹ M O’Flaherty, “Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34” (2012) 12 Human Rights Law Review, p. 627-654. <<http://www.scopus.com/inward/record.url?eid=2-s2.0-84873860901&partnerID=tZOtx3y1>>. Accessed on 20 April 2016.

³⁴² UN HRCtee General Comment No. 34, Article 19, Freedoms of opinion and expression. CCPR/C/GC/34 (12 September 2011) (para. 3).

³⁴³ Mendel (p. 29).

different human rights treaties and enforced by several international actors.³⁴⁴ Consequently, there is a great expertise developed to protect and enhance these rights. Thus, integrating the expertise in defending transparency developed by human rights practice into anti-corruption strategies can help to strengthen the effectiveness of the latter.

One accomplishment of human rights practice is the enactment of national 'access to information laws', which are extremely useful for anti-corruption programs. Currently, 99 countries have enacted national access to information laws, and three additional nations have actionable constitutional provisions.³⁴⁵ National 'access to information laws' are fundamental to ensure states' transparency and to monitor corruption. The human rights practice, especially through international pressure and litigation, can assist to enact 'access to information laws' in countries where they still do not exist. In addition, it can support already existing laws so they are fully implemented/respected. Human rights principles can also strengthen the social request for information and for the respect/enactment of 'access to information laws'.³⁴⁶ It is important that pressure for change come from below, from the victims of corruption and from the disadvantaged groups. As argued before, the human rights approach to fighting corruption would focus on the victims (and disadvantaged groups),³⁴⁷ thereby contributing to increase their participation in public life.³⁴⁸ This increased participation should include the demand for transparency and for state-held information.

Lastly, a human rights approach can assist to make transparency policies more accessible to disadvantaged groups.³⁴⁹ Data collected regarding the use of 'access to information laws' suggests that they are mostly used by those in privileged positions.³⁵⁰ In other words, vulnerable groups do not know

³⁴⁴ Enforced by international actors such as the Human Rights Committee (based on article 19 ICCPR); IACoMHR and IACtHR (based on article 13 IACHR); ECtHR (based on article 10 ECHR); ACoMHR and ACtHR (based on article 9 ACHPR).

³⁴⁵ Right2INFO.org and Open Society Justice Initiative. Right2INFO is a website that organizes and analyzes legal information on the right of access to information from more than 80 countries, providing comparative overviews of the current state of the right to information held by governments and bodies that perform public functions or operate with public funds. The website was launched in 2008 by the Open Society Justice Initiative. Information updated in February 2014. Link: <<http://www.right2info.org/access-to-information-laws>>. Accessed on 25 February 2016.

³⁴⁶ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 20).

³⁴⁷ See Chapter 3, subparagraph 2 (p. 46).

³⁴⁸ See Chapter 3, subparagraph 3.1 (p. 50).

³⁴⁹ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 20).

³⁵⁰ *ibid.*

about ‘access to information laws’ and, even if they are aware of the existence of the law, they do not use it. Once this problem has been recognized, the human rights standards of availability and adaptability³⁵¹ could help to design and implement access to information procedures that effectively include vulnerable groups.³⁵² In order to enable vulnerable groups to seek and receive public information, the procedures must be adapted to their needs and cultural differences.³⁵³ With effective transparency and access to information, a human rights approach can increase education and awareness by showing the link between human rights and corruption, “translating the cost of corruption into every-day realities for the citizens.”³⁵⁴ A good example is the practice of Kenya National Commission on Human Rights (KNCHR), with projects such as ‘Living Large’ and ‘Unjust Enrichment’.³⁵⁵ The projects

³⁵¹ ‘Availability’ correspond to the obligation of the state to make the particular service or good available in sufficient quantity within its jurisdiction. ‘Adaptability’ entails that the state must be flexible and adapt to the needs of communities, responding to the diverse social and cultural settings of all groups within the society. In: Schutter (p. 291–292).

³⁵² International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 22).

³⁵³ *ibid.* The International Council on Human Rights Policy gives good examples of how the adaptability and accessibility of information to vulnerable groups can result in positive outcomes. In Mexico, it was enacted a project (*Proyecto Comunidades*) to make more democratic the right to access information. Due to this project: “(1) poor women [...] increased access to social benefits because they learned from information requests that their names were listed for health and housing benefits they had never received; (2) a poor community [...] halted a federal construction project on its land after an information request revealed that no environmental impact study had been completed as required by law; (3) federal prisoners [...] used the AIL to access their personal files [...] 36% of those who asked to see their files were subsequently released.” Juan P Guerrero, “Openness, Transparency and Accountability: The Case of Mexico.” Presentation to the Organization of Economic Co-operation and Development, Federal Institute for Access to Public Information (June 2008). <<http://www.oecd.org/gov/digital-government/41025662.pdf>> Accessed on 16 April 2016. Cited in: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 23).

³⁵⁴ Maina Kiai, “The Role of National Human Rights Institutions in Combating Corruption.” Review Meeting Corruption and Human Rights, Geneva (28-29 July 2007) <www.ichrp.org/files/papers/133/131_-_Maina_Kiai_-_2007.pdf> (p. 3). Accessed on 10 February 2016.

³⁵⁵ These projects are well explained by Kiai, in: *ibid.*:

“KNCHR has started a series of publications, dubbed “Living Large.” The first issue published in January 2006 quantified the cost of official extravagance on luxurious vehicles for senior officials. This joint report with Transparency International-Kenya documents how the purchase of expensive luxurious vehicles for the personal use by Government Ministers and other senior officials negatively impacts on the lives of ordinary folk.

translated the corrupt scandals’ numbers into concepts that citizens could easily understand,³⁵⁶ and that increases public awareness and accountability.

In sum, transparency and the right to access information are important human rights that are also essential cornerstones to anti-corruption strategies and programs. Therefore, in order to be effective, anti-corruption strategies regarding transparency and the right to access information must take into account the developments of human rights practice. As argued, human rights practice and principles can assist to enact ‘access to information laws’ where they do not exist; and to support existing laws so they are fully implemented and respected. In addition, a human rights approach concerning transparency would encourage availability and adaptability of information to vulnerable groups, helping to empower the victims of corruption.

3.3 Accountability

Accountability is a relationship between those entrusted with power and those affected by their actions.³⁵⁷ Power-holders are accountable for their conduct and performance.³⁵⁸ They should be bound to “obey the law and not abuse their powers” and to “serve the public interest in an efficient, effective and fair manner.”³⁵⁹ The concept of accountability can be distinguished in two basic forms: the obligation to “provide information about one’s actions

In addition, the KNHCR has also begun a series of reports entitled “Unjust Enrichment” chronicling endemic grabbing of forest land and what the public has lost as a result of these illegal and irregular allocations of public land. This joint report with the Kenya Land Alliance unmasks well known public figures who profited from free public land allocations and later sold the allocated land to third parties for handsome returns. The report’s key findings are that public officials from the former President, to Ministers, State House Officials and the provincial administration, abused their offices and benefited unjustly from these illegal allocations.”

Also referred to in: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 70).

³⁵⁶ Kiai (p. 3).

³⁵⁷ Anne Marie Goetz and Rob Jenkins, “Voice Accountability and Human Development: The Emergence of a New Agenda” Background paper for HDR 2002 (United Nations Development Programme 2002). <http://hdr.undp.org/sites/default/files/goetz-jenkins_2002.pdf>. Accessed on 12 March 2016. Also cited in: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 26).

³⁵⁸ Carmen Malena, Reiner Forster and Janmejay Singh, “Social Accountability: An Introduction to the Concept and Emerging Practice.” Social Development Papers Participation and Civic Engagement No. 76 (2004) (p. 2). <<http://documents.worldbank.org/curated/pt/2004/12/5529556/social-accountability-introduction-concept-emerging-practice#>>. Accessed on 19 March 19 2016.

³⁵⁹ *ibid.*

and justifications for their correctness”; and the capacity to “suffer penalties from those dissatisfied either with the actions themselves or with the rationale invoked to justify them.”³⁶⁰ The concept also includes three perspectives: horizontal, diagonal and vertical accountability.³⁶¹ Horizontal accountability “exists when one state actor has the formal authority to demand explanations or impose penalties on another state actor”³⁶²; vertical accountability is the one “in which citizens and their associations play direct roles in holding the powerful to account”³⁶³; diagonal accountability relates to individuals using state institutions to stimulate better oversight of state’s actions.³⁶⁴

Horizontal accountability is crucial to fighting corruption, but it has revealed itself as insufficient to reduce levels of corruption and to address the deeper causes of the problem, especially regarding structural corruption.³⁶⁵ Accountability is more effective when society plays a central role as well.³⁶⁶ In this perspective, vertical accountability viewed with a human rights lens (or ‘social accountability’) could offer important complementary mechanisms and strategies to tackle corruption and its causes. ‘Social accountability’ can be defined as:

“[A]n approach towards building accountability that relies on civic engagement, i.e., in which it is ordinary citizens and/or civil society organizations who participate directly or indirectly in exacting accountability.”³⁶⁷

The starting point for social accountability is the existence of free and regular elections.³⁶⁸ However, strong social accountability goes beyond choosing those in power³⁶⁹ to include human rights practices that enhance

³⁶⁰ Goetz and Jenkins (p. 5).

³⁶¹ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 26).

³⁶² Goetz and Jenkins (p. 7).

³⁶³ *ibid.*

³⁶⁴ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 27).

³⁶⁵ *ibid.* (p. 28).

³⁶⁶ John M Ackerman, “Social Accountability in the Public Sector: A Conceptual Discussion.” Social Development Papers; participation and civic engagement, Paper No. 82 / March 2005 (p. 11) <<http://documents.worldbank.org/curated/pt/2005/03/6705775/social-accountability-public-sector-conceptual-discussion>>. Accessed on 15 March 2016.

³⁶⁷ Malena, Forster and Singh (p. 2).

³⁶⁸ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 29); Malena, Forster and Singh (p. 3).

³⁶⁹ It is important to highlight that a human rights approach also reveals itself important to guarantee a good practice concerning free, fair and regular elections.

effective participation in public life,³⁷⁰ increasing the role of individuals, civil society, and independent institutions to better monitor and influence state actions.³⁷¹ Some traditional examples of social accountability include public demonstrations; protests; advocacy campaigns and lobby of professional associations, business leaders, religious leaders and civil society; public interest litigation; investigative journalism and public debate on media.³⁷² However, with the strengthening of ‘participation’ and ‘transparency’,³⁷³ a new generation of social accountability mechanisms has been developed, such as participatory policy and budget formulation and analysis, public expenditure tracking (citizens tracking how the government spends funds), and participatory performance monitoring and evaluation.³⁷⁴ These social accountability mechanisms involving the participation of society in “allocating, disbursing, monitoring and evaluating the use of public resources” have proved to be effective.³⁷⁵ Transparency and access to information empower individuals to make informed decisions, to monitor state budget allocation and to hold power-holders accountable.³⁷⁶

The implementation of this enhanced concept of social accountability would enlarge the extent of power-holders’ accountability in order to include the content of public policy and their results.³⁷⁷ Indeed, “accountability systems would increasingly need to show not only that their processes had integrity but also that they responded to norms of social justice.”³⁷⁸

³⁷⁰ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 29). Also, see Chapter 3, subparagraph 3.1 (p. 50).

³⁷¹ *ibid.* (p. 26). Also: Malena, Forster and Singh (p. 3), in which it is stated: “[Social accountability] offer citizens the opportunity to express their preferences on specific issues, to contribute in a meaningful way to public decision-making or to hold public actors accountable for specific decisions or behaviors.”

³⁷² Examples from: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 29); Malena, Forster and Singh (p. 3).

³⁷³ As explained in Chapter 3, subparagraphs 3.1 (p. 50) and 3.2 (p. 55), respectively.

³⁷⁴ *ibid.* (p. 3, 10–12); About “budget analysis”, also: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 36); and International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 72–73).

³⁷⁵ Malena, Forster and Singh (p. 10). In this sense, the SR on Extreme Poverty and Human Rights stated that “participation in processes like budget formulation or service monitoring has brought tangible benefits to persons living in poverty in specific cases.” In: SR on Extreme Poverty and Human Rights (para. 18).

³⁷⁶ UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para. 33).

³⁷⁷ In this perspective: International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 30); Malena, Forster and Singh (p. 11–12).

³⁷⁸ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-*

A good example of this is public procurement. A human rights approach to public procurement would emphasize ‘content and outcomes’, and not just the bureaucratic process.³⁷⁹ Besides monitoring the rightfulness of the procedure, multiple actors (due to the increased participation process³⁸⁰) would also monitor whether the projects correspond to social needs. In this perspective, monitoring the entire project cycle with a wider range of factors and by a broader spectrum of social actors would significantly reduce the opportunities for corruption.³⁸¹

One fundamental aspect that must be observed in these ‘social accountability’ mechanisms and strategies is the inclusion and empowerment of disadvantaged groups.³⁸² A human rights approach to social accountability must focus on the interests of vulnerable groups and create mechanisms for them to act by themselves, claiming rights and participating in policy-making processes.³⁸³ This because social accountability is mainly about societal participation in holding those in power accountable. The ‘societal participation’ must embrace society as a whole, including vulnerable groups. Moreover, the focus on disadvantaged groups that are more affected by corruption illuminates consequences of the problem “that would not necessarily be highlighted by other forms of accountability mechanisms.”³⁸⁴

Lastly, the human rights approach to social accountability would help to identify who is entitled to a right, and consequently to claiming these rights, as well as who has the obligation to respect/protect/fulfill that right.³⁸⁵ To conclude, the integration of human rights principles and practices would help to strengthen a social accountability concept in which society effectively participates in public life. Besides, the human rights approach would guarantee that participation is not exclusive to certain groups, but includes society as a whole, especially vulnerable groups.

Corruption Agenda (p. 30).

³⁷⁹ *ibid.* (p. 44).

³⁸⁰ See Chapter 3, subparagraph 3.1 (p. 50).

³⁸¹ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 44).

³⁸² *ibid.* (p. 29–30); Malena, Forster and Singh (p. 5). The topic “empowerment of disadvantaged groups” was previously discussed in paragraph 2 and subparagraph 3.1.

³⁸³ International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda* (p. 30).

³⁸⁴ *ibid.* In this perspective, see also Chapter 3, subparagraph 2.1 (p. 46).

³⁸⁵ *ibid.* (p. 34).

4. Increased number of actors (and actions)

By framing ‘corruption’ in the human rights’ agenda, new actors are added to the fight against this global problem. This is another commonly cited argument of connecting corruption and human rights, although sometimes scholars do not explain which actors can be added and what these actors can actually do to increase the fight against corruption.³⁸⁶ The connection between acts of corruption and human rights violations creates new possibilities of action by use of national, regional and international monitoring mechanisms.³⁸⁷ Additionally, international organizations and institutions that already participate in human rights issues would strengthen the efforts towards anti-corruption by monitoring public policies and pressuring states to reform.³⁸⁸ Indeed, by using human rights law to tackle corruption, one clear consequence is that all actors connected to this body of law will be involved in the problem of corruption. In order to understand the added value of this, it is necessary to name some of these actors and to analyze how they can contribute to solve the problem.

4.1 United Nations’ actors

The former High Commissioner of Human Rights, Navtej Singh Johal, in her opening statement at the 22nd session of the Human Rights Council, observed that:

“There is growing awareness of the intrinsic links between human rights and the struggle to combat corruption. As a result, we are seeing increasing activism on the part of UN human rights mechanisms such as the treaty bodies, special procedures and the Universal Periodic Review. But the stakes are high, and we cannot afford to spread ourselves thin. There is an urgent need to increase synergy between efforts to implement the United Nations Convention against Corruption and international human rights conventions. Strengthened policy coherence and collaboration is required between the UN Office on Drugs and Crime, UNDP, my Office, civil society and the intergovernmental processes in Vienna, Geneva and New York. [...]”³⁸⁹

³⁸⁶ For instance, the following publications cite this argument: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 5–6, 69, 72); Pearson (p. 59); Wouters, Ryngaert and Cloots (p. 35); De Beco (p. 1119); Boersma (p. 268–274); UN Human Rights Council “Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para. 32).

³⁸⁷ *ibid.* (para. 32); International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 5); Wouters, Ryngaert and Cloots (p. 35). *ibid.* (p. 35).

³⁸⁸ Pearson (p. 59).

³⁸⁹ OHCHR, *The Human Rights Case Against Corruption - HR/NONE/2013/120* (2013) (p. 9).

Pillay continues her statement by saying that both anti-corruption and the promotion of human rights share similar values and must be seen as complementary to each other. Due to that fact, the clarification of the link between corruption and human rights will lead anti-corruption groups to see more clearly the value of working together with human rights' agencies (and the other way around is also true). To conclude, Pillay urges all Council members to bring the discussion of the links between corruption and human rights violations into the Human Rights Council.³⁹⁰ This statement is relevant to show that corruption is now an official concern for the UN human rights mechanisms and that increasing efforts to tackle corruption can be expected from UN human rights actors. Subparagraphs 4.1.1 and 4.1.2 present these actors and demonstrate how they can contribute to the fight against corruption. The following subparagraphs also present how these actors are addressing corruption and suggest improvements that could be made.

4.1.1 Charter-based actor - The Human Rights Council. Universal Periodic Review and special procedures:

According to the United Nations Charter, signed in 1945, one of the major purposes of UN is to promote and protect human rights.³⁹¹ The Charter-based human rights monitoring system has undergone structural changes in 2006/2007.³⁹² As a result of these changes, the Human Rights Council was created, replacing the former Commission on Human Rights.³⁹³ In order to accomplish its objectives,³⁹⁴ two mechanisms at the disposal of the Human

³⁹⁰ *ibid.*

³⁹¹ Jane Connors and Markus Schmidt, "United Nations" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International human rights law*, p. 359-397 (2nd edn, Oxford University Press 2013) (p. 359).

³⁹² Schutter (p. 935).

³⁹³ It is not purpose of this study to discuss the circumstances of the Human Rights Council's creation. This fact is cited *en passant* to introduce the Charter-based monitoring mechanism and how they can be used to address corruption.

³⁹⁴ A summary of the Human Rights Council purposes is presented by Connors and Schmidt (p. 362). Quote: "The principal duties of the Human Rights Council are spelled out in General Assembly Resolution 60/251. These include: promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner; address and make recommendations on situations of violations of human rights, including gross and systematic violations; promote effective coordination and mainstreaming of human rights in the UN system; promote human rights education and learning; help prevent human rights violations through advisory services, technical assistance and capacity building in consultation with, and the consent of, the state concerned; serve as a forum for dialogue on thematic issues; make recommendations to the General

Rights Council may be highlighted: the Universal Periodical Review (UPR) and the special procedures (addressing specific countries or themes).

The *Universal Periodical Review* (UPR) is “a form of ‘peer review’ of UN member states’ action to fulfill their human rights obligations, as well as a means of identifying areas in which help and advice are required.”³⁹⁵ In simple terms, it is an inter-state mechanism in which states make comments and recommendations to the human rights situation of other states under review.³⁹⁶ Since the UPR is a relatively new mechanism, it is still premature to conclude whether it is effective. Despite that, initial analysis are positive.³⁹⁷ Serious efforts have been made to give meaning and depth to the UPR, and countries under review have demonstrated self-criticism and accepted recommendations.³⁹⁸ One study reports that over two-thirds of the recommendations made in the UPR have been accepted.³⁹⁹

From the 192 UN Member States reviewed in the first cycle of UPR sessions, the issue of corruption was dealt with in the outcome reports of 97 countries.⁴⁰⁰ From the 13th to the 23th sessions of the second cycle, corruption was dealt with in the outcome reports of 52 countries (from 140 that were reviewed).⁴⁰¹ The content and extent of the discussion was different in each country, but some interesting remarks can be highlighted. For instance, some states under review received the relevant recommendation to sign

Assembly on developing new human rights standards; help prevent human rights violations through dialogue and cooperation; and respond promptly to human rights emergencies.”

³⁹⁵ *ibid.* (p. 363).

³⁹⁶ Boersma (p. 135).

³⁹⁷ Schutter (p. 961).

³⁹⁸ Kevin Boyle, “The United Nations Human Rights Council: Origins, Antecedents, and Prospects” in Kevin Boyle (ed), *New Institutions for Human Rights Protection*, p. 11-48 (Oxford University Press 2009). Cited in: Schutter (p. 961).

³⁹⁹ UPR Info, “Universal Periodic Review: On the Road to Implementation” (2012) <http://www.upr-info.org/sites/default/files/general-document/pdf/2012_on_the_road_to_implementation.pdf>. Accessed on 2 June 2016. Also cited in: Connors and Schmidt.

⁴⁰⁰ According to Boersma’s research, from the 1st to the 8th sessions ‘corruption’ was dealt with in 77 outcome reports. In: Boersma (p. 136). From the 9th to the 12th sessions, our own research showed that ‘corruption’ was dealt with in the outcome reports of 20 countries. My research was performed in the ‘Universal Human Rights Index’ (<http://uhri.ohchr.org/Search/Annotations>), using as keyword the term ‘corrupt*’. Own research performed on 30 May 2016.

⁴⁰¹ Own research performed in the ‘Universal Human Rights Index’ (<http://uhri.ohchr.org/Search/Annotations>), using as keyword the term ‘corrupt*’. Data of the 23th, 24th, and 25th sessions were not available in the ‘Universal Human Rights Index’. Research performed on 30 May 2016.

or ratify anti-corruption instruments;⁴⁰² to seek technical assistance to strengthen domestic anti-corruption actors;⁴⁰³ or even to launch informative programs to raise awareness of anti-corruption mechanisms.⁴⁰⁴ Some other interesting recommendations were the necessity to increase financial support to the judiciary or anti-corruption institutions,⁴⁰⁵ and to effectively protect whistleblowers, including the adoption of legislation if necessary.⁴⁰⁶

Another mechanism of the Human Rights Council is the creation of *special procedures*. These procedures are carried out by independent experts (individually or in working groups) and they address “country-specific situations or thematic issues that concern all states.”⁴⁰⁷ Although not binding, the outcomes of the special procedures have strong political and moral value.⁴⁰⁸ Special procedures can contribute to the progressive development of human rights law by (i) preparing thematic studies; (ii) developing human rights standards, guidelines, and good practices; (iii) participating in or organizing expert consultations, seminars and conferences; (iv) providing technical assistance; (v) raising public awareness through public statements and interaction with a wide variety of different partners.⁴⁰⁹ The effectiveness of the special procedures is well described by Pinheiro, former Special Rapporteur on the situation of human rights in Myanmar:

“[...] the work of special rapporteurs remains a powerful tool for the powerless. Reports ask member states for clarifications about allegations, request responses to specific problems, expose perpetrators, develop analyses, and propose recommendations. They may not produce immediate changes, but they do contribute to the struggle for human rights; they increase transparency and accountability. This is not a minor accomplishment. And the victims appreciate the effort.”⁴¹⁰

⁴⁰² Some states that received this recommendation: Marshal Islands (1st cycle); Equatorial Guinea and Germany (2nd cycle).

⁴⁰³ For the latter, recommended to Cameroon by Angola (2nd cycle).

⁴⁰⁴ Recommended to Liberia by Germany (2nd cycle).

⁴⁰⁵ Recommended: to Honduras by Germany (2nd cycle); to Guinea-Bissau by Sweden (2nd cycle); to Liberia by Germany (2nd cycle).

⁴⁰⁶ For the latter, recommended: to Guinea-Bissau by Sweden (2nd cycle); to Madagascar by USA (2nd cycle).

⁴⁰⁷ Connors and Schmidt (p. 367).

⁴⁰⁸ Boersma (p. 146).

⁴⁰⁹ Information from the OHCHR, in <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>. Accessed on 1 June 2016. See also: Connors and Schmidt (p. 367).

⁴¹⁰ Paulo Sérgio Pinheiro, “Musings of a UN Special Rapporteur on Human Rights” (2003) 9 *Global Governance* (Lynne Rienner Publishers), p. 7-13. Also cited in: Boersma (p. 176).

By analyzing the former and current special procedures, one can see that the issue of corruption has already been addressed. In 2003, the Human Rights Council appointed a Special Rapporteur on Corruption and Its Impact on the Full Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights. The mandate of this Rapporteur had a great potential to develop the issue, but the few reports produced were superficial and did not contribute academically or practically to the issue as such.⁴¹¹ Other Special Rapporteurs (SR) are addressing corruption as well. The SR on the Independence of Judges and Lawyers paid substantial attention to ‘judicial corruption’, suggesting some interesting and specific measures, such as: (i) disclosure of personal assets by important authorities; (ii) development of control mechanisms at the institutional level to ensure the transparency of operations; (iii) establishment of internal oversight bodies and confidential complaint mechanisms; (iv) regular and systematic publication of activity reports; (v) improvement of the salaries of judges, magistrates and judicial staff to reduce susceptibility to corruption.⁴¹² This SR also provided one report specifically about corruption, in which she analyzes judicial corruption and gives useful recommendations on how to combat corruption through the judicial system.⁴¹³ A good example of a recommendation can also be seen from the Independent Expert (IE) on Economic Reform and Foreign Debt, who suggested to Vietnam the creation of an independent anti-corruption body with investigative and enforcement powers. The IE also recommended the strengthening of mechanisms for public oversight of public finances, in particular the “[adoption of] legislation to guarantee access to information, transparent public consultations and to ensure the availability and accessibility of accurate, comprehensive and timely data concerning public finances and external debt.”⁴¹⁴ Unfortunately, most of the

⁴¹¹ *ibid.* (p. 150). The mandate of the ‘Special Rapporteur on Corruption and Its Impact on the Full Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights’ ended in 2006.

⁴¹² SR on the Independence of Judges and Lawyers, “A/65/274 (2011)” (para. 44–45). In: Boersma (p. 152). Boersma analyzed all the discussions about ‘corruption’ in ten different special procedures. Her research covers these special procedures from their creation until 1st January 2011. For more about her research, see: *ibid.* (p. 150–176). After 1st January 2011, our own research identified that ‘corruption’ was dealt with in the recommendations of 22 reports (addressing 19 countries). Own research performed in the ‘Universal Human Rights Index’ (<http://uhri.ohchr.org/Search/Annotations>), using as keyword the term ‘corrupt*’. Own research performed on 30 May 2016.

⁴¹³ SR on the Independence of Judges and Lawyers, “Report A /67/305 (2014).”

⁴¹⁴ IE on the Effects of Foreign Debt, “Report 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/20/23/Add.1 - Vietnam (2012).”

recommendations are still very general.⁴¹⁵ For instance, the SR on the Sale of Children, Child Prostitution and Child Pornography gave some broad and useless recommendations using almost the same words in five different reports.⁴¹⁶ In general, the extent of the recommendations must be improved, since these broad ones do not add value to the fight against corruption and even undermine the reputation of the special procedures.

Besides these recommendations to states, the special procedures can also improve how they have been using their other possibilities of action, namely the development of standards, guidelines, and good practices, as well as the organization of seminars and conferences. In the past decade, some relevant actions started to be taken,⁴¹⁷ but a strong and coordinated effort by special procedures and the Human Rights Council is still desirable. This conclusion can also be made by analyzing the Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.⁴¹⁸ Several states that cooperated with the

⁴¹⁵ Boersma came to this conclusion analyzing the reports issued before 1 January 2011. In: Boersma (p. 174–176). From that date on, our own research supports the findings.

⁴¹⁶ The general recommendation involved “[taking] decisive action to fight corruption and impunity.” Recommendation given in: SR on the Sale of Children, “Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - A/HRC/25/48/Add.3 - Benin (2014)” (para. 99b); SR on the Sale of Children, “Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - A/HRC/25/48/Add.1 - Kyrgyzstan (2013)” (para. 111g); SR on the Sale of Children, “Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - A/HRC/25/48/Add.2 - Madagascar (2013)” (para. 112a); SR on the Sale of Children, “Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - A/HRC/22/54/Add.2 - Honduras (2013)” (para. 111f); SR on the Sale of Children, “Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography - A/HRC/22/54/Add.1 - Guatemala (2013)” (para. 33g).

⁴¹⁷ In 2004, the ‘Office of the High Commissioner for Human Rights’ (OHCHR) jointly with the ‘UN Development Programme’ organized a seminar on good governance practices for the promotion of human rights, including anti-corruption practices. In 2006, a conference on anti-corruption measures was organized in Warsaw, Poland. In 2007, the OHCHR published a booklet on Good Governance Practices for the Protection of Human Rights that included some anti-corruption practices. In 2013, the Human Rights Council convened a panel discussion on the negative impact of corruption on the enjoyment of human rights. Also in 2013, the Human Rights Council requested its expert Advisory Committee to submit a research-based report about the negative impact of corruption on human rights, and to make recommendation on how the UN bodies should consider the issue. This outline of actions can be seen in: OHCHR, *The Human Rights Case Against Corruption - HR/ NONE/2013/120* (2013) (p. 6–7). The Advisory Committee delivered its final report in 2015.

⁴¹⁸ UN Human Rights Council “Final report of the Human Rights Council Advisory

Committee suggested the development of good practices of combining anti-corruption and human rights.⁴¹⁹ This suggestion was endorsed by the Advisory Committee and inserted in the list of recommendations to the Human Rights Council.⁴²⁰ Other recommendations were the appointment of an independent expert or a working group to address violations of human rights caused by corruption, and the realization of a comprehensive study aimed at developing concrete measures on how to use human rights into anti-corruption strategies.⁴²¹

The examples and arguments provided show that both UPR and special procedures can be used as additional channels to address corruption and human rights violations. UPR can be used to (i) increase inter-state dialogue and exchange experience in how they are addressing the problem; and (ii) to recommend or pressure other states under review to change practices, enact anti-corruption laws and ratify anti-corruption treaties. However, the UPR has its limitations. Since it corresponds to a system where states review states, the specificity of the recommendations may not be as deep as in other monitoring mechanisms. Despite these limitations, the UPR is a good channel to address corruption, and states should increase the extent of the recommendations made considering this issue. Regarding special procedures, the examples and arguments demonstrated that they have a great potential that is still underexplored. There are some good examples of recommendations to states, but the majority is too general. The special procedures should address more the issue of corruption and give recommendations that can really help states to tackle corruption better and more efficiently. The organization of conferences and seminars can also be increased, since only a few were realized until now. Most important, special procedures or the Human Rights Council should urgently develop standards, guidelines and good practices on how to use human rights to fight corruption. A good example is the ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ analyzing judicial corruption and how to combat corruption through the judicial system.⁴²² The extent of this report is limited to judicial corruption due to the scope of the special procedure, but different procedures could cover other aspects of corruption. The integration of efforts by different special procedures with the coordination of the Human Rights Council would result in the development of a comprehensive approach to fight corruption using human rights law. Unfortunately, the

Committee on the issue of the negative impact of corruption on the enjoyment of human rights.” A/HRC/28/73 (5 January 2015) (para. 52).

⁴¹⁹ *ibid.* (para. 41).

⁴²⁰ *ibid.* (para. 48 and 52).

⁴²¹ *ibid.* (para 49 and 52).

⁴²² SR on the Independence of Judges and Lawyers, “Report A /67/305 (2014).”

Human Rights Council Advisory Committee spent almost two years to recommend, among other things, the realization of studies to identify the best practices and guidelines, instead of already performing the study itself.

4.1.2 Treaty-based actors:

The treaty-based system for protection of human rights constitutes an essential part of international human rights law. There are nine ‘core’ international human rights treaties,⁴²³ each one with its own treaty body (Committees).⁴²⁴ Each treaty body examines the progress made by states in the implementation of rights and guarantees provided in the respective treaty.⁴²⁵ To reach their objectives, they receive and examine state reports, issue general comments, initiate inquiries, and receive complaints (from another state party or from individuals).⁴²⁶ In general, the reporting procedures of treaty bodies have had their quality, specificity and usability gradually improved through time, making possible for States to follow-up on recommendations effectively.⁴²⁷

The concluding observations made so far by the treaty bodies demonstrate that corruption has already been addressed as a human rights related issue. According to Boersma’s research,⁴²⁸ until 15 June 2011, there

⁴²³ International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons from Enforced Disappearance; Convention on the Rights of Persons with Disabilities.

⁴²⁴ Human Rights Committee (HRCtee); Committee on Economic, Social and Cultural Rights (CESCR); Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); Committee against Torture (CAT); Subcommittee on Prevention of Torture (SPT); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Enforced Disappearances (CED).

⁴²⁵ Connors and Schmidt (p. 376).

⁴²⁶ Individual complaints procedures are usually optional and depend on the previous acceptance of the State. For more about the treaty bodies mechanisms of action: *ibid.* (p. 376–384).

⁴²⁷ *ibid.* (p. 387).

⁴²⁸ Boersma (p. 103). From the 131 concluding observations analyzed by Boersma, 50 are from the CRC; 31 from CESCR; 28 from HRCtee; 12 from CAT; 7 from CED; and 3 from CEDAW. At the time of her research, there were no concluding observations from the CED, CMW and CRPD.

were 131 concluding observations discussing corruption. After this date, the committees have addressed recommendations about the issue of corruption in 96 concluding observations.⁴²⁹ There are a few good examples of recommendations from the committees. For instance, the CESCR recommended that Slovenia should set up policies and mechanism to combat corruption, including: (i) adoption of anti-corruption law, action plan and codes of conduct for public institutions; (ii) fostering transparent corruption monitoring and ensuring adequate investigation into corruption cases and prompt punishment of perpetrators with commensurate sanctions; (iii) ensuring safe, accessible and visible channels for reporting corruption, as well as effective protection of anti-corruption activists and human rights defenders involved; (iv) conducting awareness-raising campaigns.⁴³⁰ However, similarly to the special procedures, most of the recommendations made so far are still too general. For example, CEDAW has made the simple and broad recommendation to “strengthen anti-corruption mechanisms in order to enhance women’s confidence in the judiciary,”⁴³¹ while the CRC recommended to “take all necessary measures to prevent and combat corruption”⁴³² and to “prosecute perpetrators of corruption in schools.”⁴³³

Regarding the individual complaints procedure, the treaty bodies’ mechanisms may represent an “opportunity for the victims of corruption to complain about a specific violation of their rights as brought about by corrupt practices.”⁴³⁴ For instance, individuals can file complaints arguing a violation of their right to a fair trial (art. 14 ICCPR) when corruption in the judiciary influence the decision of their cases.⁴³⁵ It is also possible to address

⁴²⁹ Own research performed in the ‘Universal Human Rights Index’ (<http://uhri.ohchr.org/Search/Annotations>), using as keyword the term ‘corrupt*’. Own research performed on 3 June 2016. The research presents the concluding observations that address corruption in their recommendations. From this 96 concluding observations addressing corruption in their recommendations, 38 are from the CRC; 19 from CESCR; 14 from HRCtee; 10 from CAT; 8 from CMW; 5 from CEDAW, 1 from CERD; and 1 from CRPD. Boersma research did not include the Subcommittee on Prevention of Torture (SPT). Our own research showed that the SPT have addressed corruption in the recommendations of 5 reports.

⁴³⁰ CESCR, “E/C.12/SVN/CO/2 - Concluding Observations Slovenia (2014).”

⁴³¹ CEDAW, “CEDAW/C/COD/CO/6-7 - Concluding Observations Democratic Republic of the Congo (2013).”

⁴³² CRC, “CRC/C/IND/CO/3-4 - India (2014)”; CRC, “CRC/C/OPSC/IND/CO/1 - OPSC India (2014)”; CRC, “CRC/C/TKM/CO/2-4 - Turkmenistan (2015).”

⁴³³ CRC, “CRC/C/ALB/CO/2-4 - Albania (2012).”

⁴³⁴ Boersma (p. 269).

⁴³⁵ HRCtee. *Munguwambuto Kabwe Peter Mwamba v Zambia, Communication No 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010)*. Example from: Boersma (p. 115).

the misappropriation of funds as the cause of human rights violations, as it was done in *Michael and Brian Hill v Spain*.⁴³⁶

As demonstrated, the monitoring mechanisms of the UN human rights treaty bodies can be employed as additional actors to address corruption. In reporting procedures, committees can monitor how corruption is affecting the human rights situation in the State reviewed, and whether serious efforts are being made to address corrupt practices.⁴³⁷ However, the committees should increase the quantity and depth of recommendations addressing corruption. In addition, they could also issue general comments on the impact of corruption on human rights, as well as on how to use human rights law to address corruption. Boersma even suggests the publication of a joint General Comment by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights,⁴³⁸ which would certainly be a landmark event.

4.2 *International and regional human rights adjudicators*

A solid academic literature supporting the connections between corruption and human rights violations, in addition to the recognition of this link by the international community, would contribute to the use of international and regional human rights adjudicators to analyze and judge state violations related to corruption, thus increasing accountability at the international level.⁴³⁹ International and regional human rights adjudicators⁴⁴⁰ could be used to provide substantive remedies to victims of corruption whenever it can be demonstrated that corrupt practices infringed some of their rights protected under the respective regional instrument.⁴⁴¹ In addition, organized civil society could use litigation on the international level to address high-level corruption or to challenge national laws that are insufficient to tackle corruption. States' actions and/or omissions that are tolerant to corruption

⁴³⁶ HRCtee *Michael and Brian Hill v Spain*, *Communication No 526/1993*, UN Doc CCPR/C/59/D/526/1993 (April 2, 1997). This case dealt with the misappropriation of funds intended for food to detainees as a violation of art. 10 ICCPR. Example cited in: Boersma (p. 115-116).

⁴³⁷ *ibid.* (p. 269).

⁴³⁸ *ibid.*

⁴³⁹ In this perspective: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 72); Boersma (p. 270).

⁴⁴⁰ Such as the Human Rights Committee (HRC), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court on Human and People's Rights (ACtHPR).

⁴⁴¹ In this perspective: *ibid.* (p. 270).

practices can entail human rights breaches,⁴⁴² to which civil society can seek redress in international and regional adjudicators.

One successful example is from the Community Court of Justice of West African States in Lagos (ECOWAR CCJ).⁴⁴³ In the case *SERAP v. Nigeria*,⁴⁴⁴ a national NGO challenged the Federal Republic of Nigeria due to the embezzlement of funds for basic education by high-level government authorities.⁴⁴⁵ In the final judgment, the Court recognized the negative effect of the embezzlement of funds to the right to education, and ordered:

“[...] whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme.”⁴⁴⁶

Unfortunately, there are not many international human rights cases dealing with corruption issues. One of the reasons for this is related to the difficulty to gather sufficient evidence to bring a corruption-related case.⁴⁴⁷ Nevertheless, the evidentiary difficulty itself must not prevent individuals and civil society from addressing corruption cases before human rights adjudicators. As seen in the *SERAP v. Nigeria* case, it is possible to address corruption before an international court. Most importantly, it is possible to provide remedies to corruption cases.

The specific remedy ought to be chosen by the Court considering the particularities of the case in question. However, some possible remedies could be:

- (i) *The obligation to take the necessary measures to investigate, prosecute and punish individuals responsible for corruption acts.* For instance, it is well-known that some of those accused of corruption hinder the investigation or interfere with the judiciary (political influence or bribery) with the purpose of protecting their parties and themselves. In cases like this, international courts could be used to remedy impunity. Similarly to cases in which states are ordered to investigate, prosecute and punish police officers that committed human rights violations, it is also possible

⁴⁴² Pearson (p. 60).

⁴⁴³ Boersma (p. 270).

⁴⁴⁴ *SERAP v Nigeria*, Suit No: ECW|CCJ|APP|12|07; Judgment No: ECW|CCJ|JUD|07|10 (November 30, 2010).

⁴⁴⁵ Boersma (p. 270).

⁴⁴⁶ *SERAP v Nigeria*, Suit No: ECW|CCJ|APP|12|07; Judgment No: ECW|CCJ|JUD|07|10 (November 30, 2010) (para. 28).

⁴⁴⁷ Boersma (p. 194).

to sentence states to end impunity regarding acts of corruption. This remedy would constitute a reparation to the victims and would help to prevent future violations.

- (ii) *The obligation to enact anti-corruption laws that effectively address the problem, or to void domestic laws that are considered an obstacle to tackle corruption.* For example, some corrupt practices are not considered illegal by domestic laws (such as nepotism or political favoritism). Thus, international courts could be used to circumvent domestic legal obstacles preventing prosecution.⁴⁴⁸ The remedies, in this example, could be the obligation to stop the practices of nepotism ('cessation') and the need to enact laws prohibiting nepotism practices ('guarantees of non-repetition').
- (iii) *The obligation to enact transparency laws that will help to prevent corruption.* In countries where transparency laws are not available, international courts can be used to recognize a breach of the right to information. In this case, the state would have recognized the obligation to enact effectively transparency laws. This remedy would halt the violation of the right to information ('cessation') and would help to prevent future acts of corruption.

One may argue about the non-justiciability of economic, social and cultural rights as a barrier to the litigation of corruption cases. As stated before, each case has to be analyzed separately in order to assess whether they are justiciable or not. However, the fact that the case is about an economic, social or cultural right does not necessarily mean that it cannot be brought to court. In this perspective, it is important to recall the AComHPR and its decision in the *Ogoni case (SERAC v. Nigeria)*,⁴⁴⁹ in which it was explicitly stated that there is no right under the African Charter that cannot be made effective.

To summarize, despite its limitations and evidentiary difficulties, litigation before international and regional adjudicators is a good way to address

⁴⁴⁸ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 72).

⁴⁴⁹ AComHPR *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, Decision from October 27, 2001 (para. 68). *In verbis*: "The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective."

human rights violations related to corruption cases. The development of academic discourse relating corruption and human rights violations will certainly help to increase the legal arguments for addressing these issues before international courts. With more cases being brought before those adjudicators, a solid jurisprudence can be expected to emerge, helping to lead to public policies in fighting corruption.

4.3 Domestic courts, including Constitutional Courts

At the national level, it is possible to fight corruption by using human rights contained in domestic constitutions.⁴⁵⁰ Depending on the legal system, it is even possible to bring a case before a domestic court by using international human rights provisions. This additional possibility, for instance, enables organized civil society and anti-corruption organizations to use public interest litigation before domestic and constitutional courts.⁴⁵¹

Considering that each State has its own domestic and constitutional system, it is not possible to analyze in depth the possibilities of action that can be applied by all states. Hatchard, for instance, presents his arguments making it clear he is using a common-law background. Within this common-law perspective, he argues that tackling corruption as a constitutional issue has some advantages. Firstly, it reduces the chances of political interference, since the government cannot prevent the case from going to trial. Secondly, the case would be judged by a superior or constitutional court, a multi-member body composed of senior and experienced judges, which in theory are less inclined to improper judicial behavior. Thirdly, the evidentiary requirements in a constitutional case are less strict than in criminal judgments. Fourthly, there is usually more assistance to persons bringing a constitutional case, and even the possibility of institutions acting on behalf of victims or the public interest. Fifthly, since the case is against the state, courts may award significant damages to the victims.⁴⁵²

A good example of successful constitutional litigation regarding corruption issues is from the Supreme Court of India. In the case *Vineet Narain v. Union of India*, after the inaction of the Central Bureau of Investigation (CBI), the Supreme Court held that the CBI should continue with the investigation of a bribe case concerning high-ranking politicians. After this, the investigation resulted in 34 charges against 54 persons.⁴⁵³

⁴⁵⁰ Boersma (p. 271); Kumar, *Corruption and Human Rights in India* (p. 6).

⁴⁵¹ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 74); Boersma (p. 271).

⁴⁵² *ibid.*

⁴⁵³ Supreme Court of India, *Vineet Narain & Others vs Union Of India & Another* (8 December 1997). This landmark case is also cited in: Kumar, "Corruption in India:

4.4 National Human Rights Institutions

National Human Rights Institutions (NHRIs) “are State bodies with a constitutional and/or legislative mandate to protect and promote human rights.”⁴⁵⁴ These institutions have the vital function of promoting and protecting human rights, by “creating a national culture of human rights where tolerance, equality and mutual respect thrive”⁴⁵⁵ and “helping to identify and investigate human rights abuses, to bring those responsible for human rights violations to justice, and to provide a remedy and redress for victims.”⁴⁵⁶ To accomplish these goals, they can issue opinions, recommendations or even seek remedies before the courts.⁴⁵⁷ Today, there are over 100 NHRIs in the world.⁴⁵⁸ In May 2015, 72 of them were accredited with ‘A’ Status⁴⁵⁹ by the International Coordinating Committee of NHRIs.⁴⁶⁰ The importance of NHRIs has grown in the international scenario,⁴⁶¹ as stated in the Vienna Declaration at 1993:

“The World Conference on Human Rights reaffirm the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.”⁴⁶²

A Violation of Human Rights: Promoting Transparency and the Right to Good Governance” (p. 749); and Boersma (p. 271).

⁴⁵⁴ OHCHR, *National Human Rights Institutions - History, Principles, Roles and Responsibilities*, vol (Rev. 1) (United Nations Publication 2010) (p. 13). This statement is based on: UN General Assembly, Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993, article 1.

⁴⁵⁵ OHCHR, *National Human Rights Institutions - History, Principles, Roles and Responsibilities* (p. 21).

⁴⁵⁶ *ibid.*

⁴⁵⁷ *ibid.*

⁴⁵⁸ Data from OHCHR. <<http://nhri.ohchr.org/EN/AboutUs/Pages/HistoryNHRIs.aspx>>. Accessed on 7 April 2016.

⁴⁵⁹ Which means they are in compliance with the Paris Principles.

⁴⁶⁰ Data from the OHCHR. Link: <http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>. Accessed on 7 April 2016.

⁴⁶¹ Catherine Renshaw, Andrew Byrnes and Andrea Durbach, “Human Rights Protection in the Pacific: The Emerging Role of National Human Rights Institutions in the Region” [2010] *New Zealand Journal of Public and International Law*, p. 1-21 (p. 4).

⁴⁶² United Nations World Conference on Human Rights - Vienna Declaration and Programme of Action - A/CONF.157/23 (1993). Quote also made in: Renshaw, Byrnes and Durbach (p. 4).

The importance and capacity of NHRIs to improve human rights protection and practices are well recognized. Thus, having this additional actor addressing corruption together with human rights issues can contribute to strengthening the fight against corruption. NHRIs could campaign for the enactment of laws and policies that reduce secrecy in government and promote access to information and transparency.⁴⁶³ They could use ‘name and shame’ campaigns and take part in public interest litigation.⁴⁶⁴ Additionally, NHRIs could “engage in human rights education and awareness that shows the linkage between human rights and corruption, translating the cost of corruption into every-day realities for the citizens.”⁴⁶⁵ Another positive feature of NHRIs is the fact that they investigate individual complaints free of charge.⁴⁶⁶ This characteristic facilitates the access to complaint mechanisms by ordinary citizens, since the procedure is easier than going directly to national courts, regional or international monitoring bodies.

Ghana’s NHRI is usually cited by scholars as an example of NHRI that has been addressing corruption, due to the fact that its mandate explicitly includes investigative powers to address corruption.⁴⁶⁷ Nevertheless, it is important to highlight that even if there is no mandate explicitly granting powers to address corruption, NHRIs can tackle the problem by associating corruption to human rights violations. Another good example is Kenyan National Commission of Human Rights (KNCHR) with its work on transparency, already described in subparagraph 3.2 of this chapter.⁴⁶⁸ In this case, the KNCHR highlighted the necessity to show society the connections between corruption and human rights violations, since its involvement in issues of corruption was criticized at the beginning for not being human rights related.⁴⁶⁹

5. Protecting anti-corruption advocates as human rights defenders

A final argument to add value to the connection between corruption and human rights is the possibility to protect anti-corruption advocates facing threats by use of human rights law designed to protect human rights defenders. To fight against corruption and to expose those who are profiting with it may sometimes lead anti-corruption advocates to dangerous situations. As stated by the International Council on Human Rights Policy:

⁴⁶³ Kiai (p. 3).

⁴⁶⁴ *ibid.*

⁴⁶⁵ *ibid.*

⁴⁶⁶ Hatchard (p. 19–22).

⁴⁶⁷ See, for instance: *ibid.* (p. 19); Kiai; Boersma (p. 272–273).

⁴⁶⁸ See p. 55.

⁴⁶⁹ *ibid.* (p. 273).

“Those who campaign against corruption and call for transparent government often themselves become victims of human rights violations. Risks and threats take many forms. Journalists and anti-corruption defenders are often harassed, threatened and sometimes killed to prevent them from making corruption cases public. Whistleblowers are silenced by imprisonment, threats or violence. Sometimes those who investigate or report instances of corruption find themselves facing criminal charges that have been fabricated or applied inappropriately (laws against dishonouring the government or subversion, for example, or national security laws). Prominent journalists or human rights advocates may be accused (falsely) of accepting bribes or misrepresenting their finances. Opposition candidates may be prevented from standing for election until they have cleared themselves of (bogus) corruption allegations.”⁴⁷⁰

One example of this practice can be seen from Algeria, where an anti-corruption activist was convicted for “incitement to an unarmed gathering” simply because he posted a sarcastic charge on Facebook.⁴⁷¹ Despite these common harassments and threats, anti-corruption treaties do not have specific provisions designed to protect anti-corruption advocates when they are facing threats. On the other hand, specific support and protection are provided to human rights defenders in the context of their work.⁴⁷² For instance, the UN General Assembly enacted a declaration⁴⁷³ articulating “existing rights in ways that make them easier to apply to the needs and experience of human rights defenders.”⁴⁷⁴ Considering the lack of protective provisions specifically designed for anti-corruption advocates, they can use UN mechanisms for their protection.⁴⁷⁵ Anti-corruption advocates that are being threatened can send a ‘communication’ to UN special procedures in the form of an ‘urgent appeal’.⁴⁷⁶ When analyzing

⁴⁷⁰ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 68).

⁴⁷¹ He was convicted to a fine of 20,000 Algerian dinars (around US\$190) and six months’ of imprisonment – reduced to four months on appeal. In: Amnesty International, *Amnesty International Report 2015* (p. 66) <<https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/>>. Accessed on 20 May 2016.

⁴⁷² International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 68).

⁴⁷³ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by UN General Assembly resolution 53/144 of 9 December 1998.

⁴⁷⁴ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 68).

⁴⁷⁵ *ibid.*

⁴⁷⁶ According to the OHCHR, the thematic special procedures that are currently sending ‘urgent appeals’ are: SR on adequate housing as a component of the right to an adequate

these urgent appeals, which are designed for time-sensitive violations,⁴⁷⁷ the chairman of a special procedure can contact “the government of the state in question and request it to investigate into the allegations, and to ensure the safety of the alleged victim.”⁴⁷⁸ Nowadays, communications to special procedures can even be submitted online, facilitating for those who need urgent help.⁴⁷⁹

standard of living; Working Group on arbitrary detention; SR on the sale of children, child prostitution and child pornography; SR on the right to education; Working Group on enforced or involuntary disappearances; SR on extrajudicial, summary or arbitrary executions; SR on the right to food; SR on the promotion and protection of the right to freedom of opinion and expression; SR on the right to freedom of religion or belief; SR on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Representative of the Secretary-General on the situation of human rights defenders; SR on the independence of judges and lawyers; SR on the situation of human rights and fundamental freedoms of indigenous peoples; Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination; SR on the situation of human rights of migrants; IE on minority issues; SR on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; SR on the promotion and protection of human rights while countering terrorism; SR on torture and other cruel, inhuman or degrading treatment or punishment; SR on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights; SR on trafficking in persons, especially in women and children; SR on violence against women, its causes and consequences. In: <http://www2.ohchr.org/english/bodies/chr/special/docs/communicationsbrochure_en.pdf>. Accessed on 15 February 2017. According to the International Council on Human Rights Policy, the most useful ‘special procedures’ for anti-corruption advocates are the SR on the Situation of Human Rights Defenders; the SR on the promotion and protection of the right to freedom of opinion and expression; the Working Group on arbitrary detention; and the SR on extrajudicial, summary or arbitrary execution. In: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (p. 66). To these lists, it can be added regional mechanisms, such as: the Commissioner for Human Rights of the Council of Europe; the Inter-American Commission Rapporteurship on Human Rights Defenders; and the Special Rapporteur on Human Rights Defenders of the AComHPR.

⁴⁷⁷ See the “communications’ brochure” of the OHCHR: <http://www2.ohchr.org/english/bodies/chr/special/docs/communicationsbrochure_en.pdf>. Accessed on 15 February 2017.

⁴⁷⁸ Beate Rudolf. *The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights*. Max Planck Yearbook of United Nations Law (2000), v. 4, p. 289-329 (p. 304).

⁴⁷⁹ Online submission to special procedures: <<https://spsubmission.ohchr.org/>>. Communications can also be submitted by email to “urgent-action@ohchr.org” or by postal mail. In: <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>>. Accessed on 15 February 2017.

By analyzing the communications reports of special procedures,⁴⁸⁰ it is possible to identify that urgent appeals are already being used to protect anti-corruption advocates. For instance, on the communications report from February 2016,⁴⁸¹ one can see that the special procedures issued urgent appeals to the governments of Kazakhstan,⁴⁸² Myanmar,⁴⁸³ and

⁴⁸⁰ <<http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx>>. Accessed on 17 February 2017.

⁴⁸¹ UN Human Rights Council, “A/HRC/31/79 (19 February 2016).”

⁴⁸² KAZ 2/2015 – “Arbitrary detention; Freedom of expression; Freedom of peaceful assembly and of association; Human rights defenders; Allegations concerning the arrest and detention of a human rights defender for his role in convening a peaceful assembly and for denouncing corruption cases. According to the information received, on 28 June 2015, Mr. Narymbaev participated in and spoke to the media during a peaceful gathering of about 15 people convened in the Republic Square in Almaty in order to express concern about public services costs. On 3 July 2015, police officers of the Auezov district arrested Mr. Narymbaev at his home in connection with the events of 28 June. They subsequently transferred Mr. Narymbaev to the police station of the Bostandyk district. On 4 July 2015, the judge of the Specialised Inter-District Administrative Court of Almaty City found Mr. Narymbaev guilty of participating in an unauthorized assembly in accordance with article 488 of the new Code on Administrative Offenses and sentenced him to 15 days in detention. On 20 August 2015, Mr. Narymbaev announced on his Facebook page that he intended to handover a petition denouncing corruption crimes to the authorities that same day. At 6.30 p.m., the police arrested him under the same legal provision as in July 2015. On 21 August 2015, the judge sentenced Mr. Narymbaev to 20 days of detention.”

⁴⁸³ MMR 6/2015 – “Freedom of expression; Myanmar; Allegations of criminal prosecution and sentencing of several media workers in Myanmar for publishing stories criticising Government officials or departments and expressing their opinion about draft legislation. According to the information received, in March 2014, Mr. Ko Si Thu Lwin, senior reporter at The Myanmar Times, was convicted under articles 499 and 500 of the Penal Code in Madaya Township Court for an article considered damaging to the reputation of the electricity department. Since October 2014, Mr. Nay Htun Naing, Mr. Thein Myint, Mr. Wai Phyo, Mr. Myat Thit and Mr. Than Htut Aung, members of the Eleven Media Group including its Chief Executive Officer, have faced prosecution for defamation for an article criticising a proposed bill. In November 2014, Mr. Than Myat Soe, journalist at the Myanmar Thandawsint, was charged under article 9(g) of the News Media Law for publishing information on allegations of police corruption. Eleven other staff members of the Myanmar Thandawsint also face charges under article 9(g) after publishing an interview criticising Myanmar’s President. In March 2015, two journalists were sentenced to two months imprisonment for defamation after publishing an article about a military member of Parliament.”

India,⁴⁸⁴ all of them regarding continuous harassments of anti-corruption advocates.

Conclusion

As demonstrated in the present chapter, there is added value to making an explicit link between corruption and human rights, since international human rights law can be used in several different and relevant ways to strengthen the fight against corruption and its negative effects. International human rights law assisted to improve people's lives and rights all over the globe and its importance is generally well recognized. Thus, its moral, social and political support can certainly contribute to a more effective fight against corruption (paragraph 1). A human rights approach would also focus on the effects of corruption on the victims, especially on those victims belonging to vulnerable groups (paragraph 2). Following this approach, data of corruption indicators could be split up according to vulnerable groups (subparagraph 2.2). This new data organization system would provide useful information for drafting and enforcing specific public policies and strategies to fight corruption and its effect on vulnerable groups. As demonstrated in subparagraph 2.3, the advantage of focusing on the victims is not restricted to improving general human rights protection. Fighting the effects of corruption is also part of fighting corruption. Furthermore, focusing on the victims would empower them to participate more often and more actively in public life. This increased participation leads to a greater social accountability, since more people will be monitoring public policies and demanding that power-holders should answer for their actions.

Moreover, the human rights expertise and practice can help to increase the effectiveness of the principles of participation, transparency and accountability (paragraph 3). These are human rights principles that

⁴⁸⁴ IND 11/2015 – “Freedom of expression; Human rights defenders; Summary executions; Alleged attacks and death threats against a human rights and anti-corruption activist in the District of Shahjahanpur, Uttar Pradesh, India. According to the information received, on 15 December 2010 Mr. Prakash Chandra Pathak, a human rights and anti-corruption activist, was driving home when his car was shot at indiscriminately by unknown assailants. On 14 January 2015, Mr. Pathak's house was set on fire while he was inside. He managed to escape from the house unharmed and identified one of the assailants. On 22 July 2015, he filed a request with the authorities for protection against death threats he had been receiving from people accused by him of corruption and malpractices. On 27 August 2015, Mr. Pathak's house was again attacked by four or five unidentified individuals, with the presumed intention to kill him. On 3 September, Mr. Pathak filed a complaint regarding a corruption case following which he received new death threats.”

are cornerstones of a good anti-corruption strategy. The human rights approach would guarantee a broad and deep participation of society in public life (subparagraph 3.1). It would demand full respect of the principle of transparency, including the obligation to take positive actions towards making the information available and accessible to vulnerable groups (subparagraph 3.2). Effective participation and full transparency would be the basis for the development of a real accountability system. The principle of accountability viewed from a human rights perspective would not be restricted to a horizontal dimension. It would also, and most importantly, guarantee a strong vertical (social) dimension (subparagraph 3.3).

The use of international human rights law to address corruption would also increase the number of actors fighting the problem. In other words, a whole army of monitoring bodies with lots of experience and support would be added to the fight (paragraph 4). As shown in subparagraph 4.1.1, states have already started to address corruption in the UPR, which can be used to increase dialogue, exchange experience, and to recommend/pressure states under review to change practices, enact anti-corruption laws and ratify anti-corruption treaties. Despite its limitation, the UPR is a good channel to address corruption, and states should increase the extent of the recommendations made considering this issue. Subparagraph 4.1.1 also showed how the special procedures of the Human Rights Council are addressing corruption. In sum, several documents addressing corruption were identified, but the special procedures and the Council still must improve how they have been dealing with the problem in order to contribute fully to the fight against corruption. For instance, the special procedures should increase the specificity of the recommendations given to states; organize more conferences and seminars do increase the interest and incentive studies of the link between corruption and human rights; and, most importantly, develop standards, guidelines and good practices on how to use human rights to fight corruption. Similarly, subparagraph 4.1.2 showed how the monitoring mechanisms of the UN human rights treaty bodies are addressing corruption, and how they should contribute more. The committees have the possibility of monitoring how corruption is affecting the human rights in the state under review, and how states are addressing the problem. To contribute more and add more value to the fight against corruption, the committees should increase the quantity and depth of recommendations; and issue general comments on the impact of corruption on human rights and as on how to use human rights law to address corruption.

Moreover, corruption cases could be brought before international and regional human rights adjudicators, increasing accountability on the international level and providing remedies for the victims (subparagraph 4.2). In the same way, victims of corruption and the organized civil society

could use domestic litigation (including constitutional litigation) to enhance the fight against corruption. NHRIs could also strengthen the fight against corruption even if they do not have explicit provisions in their mandate to do so (subparagraph 4.4). Lastly, anti-corruption advocates could use human rights mechanisms to ask for protection when they are threatened, since anti-corruption treaties do not have protective provisions (paragraph 5).

The arguments presented in this chapter had the main objective of adding value to the fight against corruption. However, sometimes the arguments are intrinsically related to improving human rights protection. For instance, a broad and deep participation of society in public life is a fundamental requirement to increase accountability of power-holders for corruption acts. To guarantee a broad concept of participation, it is necessary to pay special attention to the victims of corruption (especially the vulnerable groups). Another example is the 'principle of transparency'. Effective transparency guarantying accessible information to all society is also important to monitor public policies and, therefore, increase accountability for corruption practices. The arguments presented in this chapter give effective and practical meaning to the link between corruption and human rights, proving that the connection is not only an academic exercise of relabeling corruption.

Conclusion

This study aimed at answering the question whether making an explicit link with human rights has added value when developing strategies to fight corruption. In order to provide an answer to the main question, this study also had to address some important sub-questions. To analyze whether there is an added value in making the connection, the study first had to clarify the connection itself; and before clarifying the connection, the study first had to present a brief understanding of the meaning of corruption, as well as to demonstrate how international law deals with this issue. For organizational purposes, the conclusion of the study will recapitulate these research questions and present their answers individually.

What is the meaning of corruption?⁴⁸⁵

As shown, there is no consensus among scholars on the definition of corruption. Some factors that might contribute to this lack of consensus are (i) the complexity of the concept; (ii) the different nature of the causes and effects of corruption, depending on the point of view from which corruption is analyzed; and (iii) the fact that corruption is studied from the perspective of several different disciplines. Considering this lack of consensus, the minimal and public-office-centered definition provided by Transparency International (TI) has thrived and became the most used by scholars and international bodies, since its broad and concise terms cause less disagreement and embrace most instances of corruption. According to TI, corruption is the “abuse of entrusted power for private gain.” In legal instruments, such as the UNCAC, corruption also does not have one definition and is used as the generic heading for a range of different and specific criminal acts. Some specific acts of corruption are (i) bribery; (ii) embezzlement or misappropriation; (iii) trading in influence; (iv) abuse of functions or position; (v) illicit enrichment; and (vi) favoritism (including patronage, nepotism, and cronyism).

What is the international law setting of corruption?⁴⁸⁶

Today, corruption is considered as a major problem hindering economic development, the rule of law and the full realization of human rights. However,

⁴⁸⁵ This sub-question was addressed in chapter 1, paragraphs 1 and 2.

⁴⁸⁶ This sub-question was addressed in chapter 1, paragraphs 3 and 4.

this was not always the case. During the Cold War, the world was divided and there was no interest from the international community to tackle corruption. There were even some scholars in the 1970s that justified corruption as a ‘necessary cost of business’. In the 1990s, the ‘good governance’ agenda and the creation of Transparency International contributed to change the way international community perceived corruption. Corruption started to be seen as a global problem deterring economic development. This fact led to the creation of several international and regional instruments to address the problem.⁴⁸⁷ After becoming a problem addressed by general public international law, corruption started to be addressed also by human rights law. This connection might have started due to the growing ‘humanization’ of international law and because of the ‘good governance’ agenda (which had been linked previously with human rights).

In what ways are corruption and human rights linked? How can the existing literature be clarified and reconciled?⁴⁸⁸

The study showed that there are not many academic papers addressing the connection between corruption and human rights violations. The main publications are from the ICHRP and from Boersma. The ICHRP developed a ‘causal link’ approach to analyze the connection between corruption and human rights violation, distinguishing between ‘direct’, ‘indirect’ and ‘remote’ violations. In addition, the ICHRP successfully analyzed corruption practices by using the classical human rights framework to evaluate violations. On the other hand, Boersma criticized this ‘causal link’ approach arguing that the terms ‘direct’ and ‘indirect’ are legally imprecise. As an alternative, she suggested an approach that considered the several ‘dimensions’ of the connections between corruption and human rights, and not only the one in which corruption violates human rights. After proposing this approach, Boersma also successfully used the human rights operational framework for evaluating violations to illustrate how corruption can violate or lead to the violations of human rights. Regarding attempts to classify the connection

⁴⁸⁷ Such as the OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions (1997); Inter-American Convention Against Corruption (1996); Council of Europe Twenty Guiding Principles against Corruption (1997); Council of Europe Criminal Law Convention on Corruption (1999); UN Declaration against Corruption and Bribery in International Commercial Transactions (1996); UN International Code of Conduct for Public Officials (1996); UN Convention Against Corruption (2003); African Development Community Protocol Against Corruption (2001); Economic Community of West African States Protocol on the Fight Against Corruption (2001); African Union Convention on Preventing and Combating Corruption (2003).

⁴⁸⁸ This sub-question was addressed in chapter 2.

between corruption and human rights violations, this study also analyzed the ‘Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights’. In this report, the Human Rights Council Advisory Committee tried to classify the connection according to the “different obligations imposed on states”, distinguishing between ‘individual’, ‘collective’, and ‘general negative impact’. This system, however, seems to be based on the identification of the victims, rather than on the “different obligations imposed on states.”

Indeed, the ‘causal link’ approach is not very precise in legal terms, but it has contributed to explain the connection between corruption and human rights violations in a simple and pedagogic way. In other words, the human rights operational framework was successfully translated to the general public, organizations and policy-makers dealing with corruption. In turn, Boersma’s ‘alternative’ approach contributed to the recognition of a broader spectrum of connections between corruption and human rights, such as the ‘shared environment of corruption and human rights violations’ and ‘human rights of persons accused of corruption’. All these ‘dimensions’ of the connection are relevant and must be studied as well. However, to name the recognition of these dimensions as an ‘approach’ might be exaggerated, since Boersma did not develop one method to analyze these dimensions. Placing aside the divergences, the publications from the ICHRP and Boersma supplement each other, since both use the same classical human rights operational framework to illustrate how corruption can violate or lead to the violation of human rights. Together, they started to build a good academic framework to clarify and illustrate the connection between corruption and human rights violations. On the other hand, the report from the Human Rights Council Advisory Committee might be important for translating the significance of the issue to the UN, but it does not contribute very much to clarify the connection between corruption and human rights violations

Reconciling the literature, this study showed that a good way to clarify the connection between corruption and human rights is by providing illustrations on how the former can violate or lead to the violation of the latter. These illustrations start by explaining the content and core elements of a right and then present how corruption can violate all different types of state’s obligation deriving from that right. Hereinafter, a useful and effective way to study this subject could try not to focus on classifying the casual link between corruption and human rights violations, neither the extent of the impact on victims or any other imprecise factor. Instead, future studies could firstly highlight the several dimensions between corruption and human rights violations. Secondly, they could indicate which dimension the study will use to address the subject. In the case of corruption as a violation of human rights, which is the dimension mainly used in this book, the third

step could consist of the presentation of important background information about the impact of corruption on human rights. In this step, information about the broad extent of the negative impact of corruption on human rights could be presented, such as the individual, collective and general negative impact. Subsequently, the fourth step could present the operational human rights framework to evaluate violations. The fifth step could apply this classical framework on specific rights, analyzing in depth how corruption can affect all states' obligations deriving from one specific human rights. The sixth and final step could suggest how to remedy the harms suffered, including how to prevent future violations.

Does making an explicit link with human rights adds value when developing strategies to fight corruption?⁴⁸⁹

The arguments presented in this study support the idea that there is added value to making an explicit link between corruption and human rights, since international human rights law can be used in several different and relevant ways to strengthen the fight against corruption and its negative effects. This effective and practical meaning demonstrates that the connection is not only an academic exercise of relabeling corruption. *Firstly*, framing corruption as a human rights violation has a strong moral, social and political value, thus creating a greater response to corruption and influencing public attitudes towards fighting the problem in a more holistic and effective way. This might be a broad argument, but it cannot be underestimated, considering the generally well-recognized importance of international human rights law to assist in the improvement of people's lives and rights all over the globe.

Secondly, the human rights approach would add value to the fight against corruption by enlarging the focus of anti-corruption strategies. Instead of focusing only on the economic and criminal consequences of the problem, anti-corruption strategies with a human rights approach would also focus on the effects of corruption on the victims, especially on those belonging to vulnerable groups. Considering this, corruption indicators could start to split up collected data according to vulnerable groups, providing valuable information on how corruption affects those groups in different ways. This information would be useful for drafting and enforcing specific public policies and strategies to fight corruption and its effect on vulnerable groups. The added value of focusing on the victims is not restricted to improving general human rights protection. Fighting the effects of corruption is also part of fighting corruption. In addition, focusing on the victims would empower them to participate more often and more actively in public life.

⁴⁸⁹ Main question, addressed in chapter 3.

Increased participation leads to a greater social accountability, since more people will be monitoring public policies and demanding that power-holders should answer for their actions. Instead of being considered just as victims, the human rights approach could empower the individuals affected by corruption and transform them into central actors on the fight against the problem.

Thirdly, the connection would also add value to the fight against corruption by helping to increase the effectiveness of the principles of participation, transparency and accountability. These are human rights principles that are cornerstones of a good anti-corruption strategy. The human rights approach can assist anti-corruption strategies to guarantee a meaningful and effective participation of society in public life. Participation must be broad, including all actors affected by the decisions. It also has to be deep, which means that the participation must effectively allow people to exercise their influence on the decision-making process. Participation cannot be *pro forma*, serving only to give legitimacy to decisions that were already taken by power-holders. The human rights approach would also contribute to strengthening the principle of transparency. For instance, human rights practice and principles can assist to enact 'access to information laws' where they do not exist; and to support existing laws so that they are fully implemented and respected. In addition, a human rights approach would demand availability and adaptability of information to vulnerable groups, helping to empower the victims of corruption. With the strengthening of 'participation' and 'transparency', a greater concept of accountability would be built. The principle of accountability viewed from a human rights perspective would not be restricted to a horizontal dimension. It would also, and most importantly, guarantee a strong vertical (social) dimension, including new mechanisms such as (i) participatory policy and budget formulation and analysis; (ii) public expenditure tracking (citizens tracking how the government spends funds); and (iii) participatory performance monitoring and evaluation. In sum, the human rights approach can assist to increase participation of the whole society in public decision-making processes, as well as increase the transparency of the government. With greater participation and transparency, citizens will be able to monitor more effectively power-holders and public policies, increasing accountability and reducing chances of corruption.

Fourthly, the connection adds value to the fight against corruption by increasing the number of actors fighting the problem. There are several different human rights monitoring mechanisms in the world, each with its own expertise and possibilities of action. By framing corruption as a human rights violation, all these human rights monitoring bodies will be included in the fight against corruption, increasing the chances of addressing more

effectively the problem. For instance, there are several monitoring possibilities within the UN system, such as (i) the Universal Periodic Review (UPR); (ii) the Human Rights Council; (iii) the special procedures; and (iv) the treaty-based actors (committees). All these mechanisms have already addressed corruption, thus adding value to the fight against corruption. However, they still can increase the extent of their activities towards fighting corruption.⁴⁹⁰ In addition to the UN monitoring mechanisms, international and regional human rights adjudicators could also start to address more issues related to corruption. Corruption-related cases could help to increase accountability on the international level and to provide remedies for the victims. Eventual remedies could embrace (i) the obligation to take the necessary measures to investigate, prosecute and punish individuals responsible for corruption acts; (ii) the obligation to enact anti-corruption laws that effectively address the problem, or to void domestic laws that are considered an obstacle to tackle corruption; or (iii) the obligation to enact transparency laws that will help to prevent corruption. In the same way that international and regional adjudicators can be used to tackle corruption, domestic litigation (including constitutional litigation) are also important mechanisms to address the problem. The specific possibilities of actions will depend on the legal system of each country. However, in general, constitutional provisions protecting human rights could allow the use of different avenues to address corruption, and not only the criminal law one. Lastly, National Human Rights Institutions (NHRI) can also reinforce the fight against corruption by using their monitoring and enforcing possibilities. The connection between corruption and human rights allows NHRI to address corruption even if they do not have explicit provisions in their mandate to do so.

Fifthly, with the connection between corruption and human rights violations, anti-corruption advocates could use human rights mechanisms to ask for protection when they have been threatened. Despite the common harassments and threats, anti-corruption treaties do not have specific provisions designed to protect anti-corruption advocates when they are facing threats. Thus, considering this absence of protective provisions in the anti-corruption treaties, anti-corruption advocates can protect themselves by using mechanism designed to safeguard human rights defenders.

⁴⁹⁰ How the UN monitoring mechanism are addressing corruption and how they can improve is a sub-question that surged while addressing the main question of this study. For organizational purposes, the conclusion of the study will address this sub-question in more detail after presenting the answer to the main question.

***How have UN human rights bodies referred to corruption, and how could they contribute more to fighting corruption?*⁴⁹¹**

The increased number of actors was the fourth argument analyzed in order to evaluate whether there is added value in making an explicit link between corruption and human rights. While addressing this question, this study presented the UN human rights monitoring mechanisms as additional actors in order to increase the fight against corruption. However, these bodies have already been addressing corruption. This triggered the question of how they are referring to corruption, and how they could contribute more to strengthen the fight against this problem. Regarding the UPR, states have addressed corruption by giving some useful recommendations to states under review, such as the recommendation to (i) sign or ratify anti-corruption instruments;⁴⁹² (ii) to seek technical assistance to strengthen domestic anti-corruption actors;⁴⁹³ or (iii) to launch informative programs to raise awareness of anti-corruption mechanisms.⁴⁹⁴ However, in general, the recommendations are broad. In order to increase the added value of using the UPR to address corruption, states should increase the extent of the recommendations.

Regarding special procedures, this study demonstrated that they have a great potential that is still underexplored. The mandate of the Special Rapporteur on Corruption and Its Impact on the Full Enjoyment of Human Rights, created in 2003, did not contribute to clarify the connection between corruption and human rights, nor to add value to this connection. Analyzing all the special procedures, there are some good examples of recommendations to states, such as the one suggesting the creation of an independent anti-corruption body with investigative and enforcement powers.⁴⁹⁵ However, most of the recommendations are still very general. Thus, special procedures should improve the extent of the recommendation, since these broad ones do not add value to the fight against corruption and even undermine the reputation of the special procedures. In addition, special procedures and the Human Rights Council could increase the organization of conferences and seminars, since only a few were realized until now. Most important, these actors should urgently develop standards, guidelines and good practices on

⁴⁹¹ Sub-question addressed in chapter 3 subparagraph 4.1.

⁴⁹² Some states that received this recommendation: Marshal Islands (1st cycle); Equatorial Guinea and Germany (2nd cycle).

⁴⁹³ For the latter, recommended to Cameroon by Angola (2nd cycle).

⁴⁹⁴ Recommended to Liberia by Germany (2nd cycle).

⁴⁹⁵ IE on the Effects of Foreign Debt, "Report 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/20/23/Add.1 - Vietnam (2012)."

how to use human rights to fight corruption. A good example is the ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ analyzing judicial corruption and how to combat corruption through the judicial system.⁴⁹⁶ The report is limited to judicial corruption due to the scope of this special procedure, but different procedures could cover other aspects of corruption. The integration of efforts by different special procedures with the coordination of the Human Rights Council would result in the development of a comprehensive approach to fight corruption using human rights law. One last measure that can be considered is the appointment of a new Special Rapporteur, Independent Expert or Working Group to address the effects of corruption on human rights and how to integrate human rights into anti-corruption strategies.

This study also identified that treaty bodies (committees) already addressed corruption. Some interesting recommendations were analyzed. However, once again the majority of the recommendations are too general and do not contribute significantly to increase the fight against corruption. The committees have the possibility of monitoring how corruption is affecting the human rights in the state under review, and how states are addressing the problem. To contribute more, the committees should increase the quantity and depth of recommendations. In addition, they could issue general comments on the impact of corruption on human rights and on how to use human rights law to address corruption.

Final remarks and suggestions for future studies

This study presented arguments supporting the idea that there is added value to making an explicit link between corruption and human rights, since international human rights law can be used in several different and relevant ways to strengthen the fight against corruption and its negative effects. However, the arguments were presented in a non-exhaustive way. Thus, new studies investigating different ways to use human rights law to fight corruption are welcome. In addition, this book encourages future studies to investigate individually and thoroughly the arguments that are presented here. For instance, the use of human rights expertise regarding the principle of participation to fight corruption could be the sole object of papers and even theses. Another good idea would be to draft good practices and guidelines on how to integrate human rights practice into the anti-corruption agenda.

⁴⁹⁶ SR on the Independence of Judges and Lawyers, “Report A /67/305 (2014).”

Making the connection and starting to use human rights law to fight corruption will not solve the problem instantly, but it will definitely contribute to a more effective fight. Considering the magnitude of the phenomenon of corruption, the complexity of its causes and effects, and the difficulties to break the vicious cycle of systemic corruption, a holistic approach is the best chance to try to solve the problem.

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Corruption and Human Rights

Beyond the Link

André T. D. Figueiredo

Some scholars and even human rights monitoring bodies have started to make the connection between corruption and human rights violations. When asked about this connection, most people easily picture a country ruled by a dictator who steals public money to support his luxury life while the population suffers from the lack of essential public services, such as healthcare and education. The connection in itself is appealing. Nonetheless, sometimes this connection is made without the proper concern for fully developing the argument and its consequences.

The purpose of this study is to go beyond this appealing link and to clarify the argument that making an explicit link with human rights has indeed added value. Framing corruption as a human rights violation cannot be an end in itself, a pure exercise of relabeling the problem. This study aims to give a practical significance to the connection by addressing, in a non-exhaustive way, the practical value of framing corruption as a human rights violation and the possibilities in which international human rights law can be used to strengthen the fight against corruption. By doing so, this book also presents how UN human rights bodies are referring to corruption, and how they could contribute more to fighting this global problem.

This book is an adapted version of the author's LL.M. thesis presented at Radboud University in June 2016, where he graduated *cum laude* after being the recipient of a scholarship.



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