
Human Rights & Corruption

States' Human Rights Obligation to fight Corruption

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ABSTRACT

FOR AS LONG AS MANKIND REMEMBERS, CORRUPTION HAS BEEN A MAJOR ISSUE IN MOST PARTS OF THE WORLD. CORRUPTION IS AN EXTREMELY COMPLEX PROBLEM, AND CAUSES, AS WELL AS CONSEQUENCES VARY FROM CASE TO CASE. ALTHOUGH CORRUPTION IS A LOT OLDER THAN THE CONCEPT OF HUMAN RIGHTS, THE INTERNATIONAL FIGHT AGAINST CORRUPTION IS STILL RATHER YOUNG. THE FIRST INTERNATIONAL HUMAN RIGHTS TREATIES DATE BACK TO 1948, WHEREAS THE INTERNATIONAL FIGHT AGAINST CORRUPTION ONLY STARTED SOMETIME IN THE MID-1990S.

CORRUPTION DEFLECTS MONETARY FUNDS NECESSARY TO PROMOTE HUMAN RIGHTS, IT UNDERMINES DEVELOPMENT EFFORTS AND IT ERODES TRUST IN THE GOVERNMENT AS WELL AS THE JUDICIAL SYSTEM. BECAUSE CORRUPTION HAS A NEGATIVE EFFECT ON HUMAN RIGHTS, THE QUESTION ARISING HERE IS: DO STATES HAVE A HUMAN RIGHTS OBLIGATION TO FIGHT CORRUPTION?

THIS PAPER CONCLUDES THAT BECAUSE CORRUPTION DIRECTLY AND INDIRECTLY VIOLATES HUMAN RIGHTS IT TRIGGERS THE STATES' POSITIVE OBLIGATION TO RESPECT, PROTECT AND FULFILL HUMAN RIGHTS. FROM THIS IT FOLLOWS THAT STATES ARE REQUIRED TO FIGHT CORRUPTION DUE TO THEIR DUTIES ENSHRINED UNDER THE CORE HUMAN RIGHTS TREATIES.

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I. Introduction

According to the World Bank the ‘industry’ of bribery, including private bribery, is estimated to be in excess of 1,000,000,000,000 (one trillion) US-Dollars a year.¹ The overall damage created by corruption is estimated at four trillion US-Dollars or around twelve per cent of the global gross production.² According to the Office of the High Commissioner for Human Rights (OHCHR), the money lost to corruption would suffice to provide food 80 times over to all the people of the world suffering from hunger.³ Corruption has the most negative impact on the poor of our world and undermines human rights in every way possible.⁴ Corruption negatively influences investments in poverty reduction, reduces the efficiency of food distributions as well as development support and leads to the denial of the right to food and therefore to a violation of the right to life.⁵ However, corruption is by no means a problem only prevalent in the poorer parts of the world. Corruption exists

¹ World Bank, 2013, Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html> – Switzerland’s Gross Domestic Product in 2012 was 631.2 billion US-Dollars, just over half of what is lost to corruption.

² Neuhaus Gabriela, 2014, Korruption, Milliardenverluste für Entwicklungsländer, in; Eine Welt, *Das DEZA-Magazin für Entwicklung und Zusammenarbeit*, No. 2 June 2014, p. 17.

³ OHCHR_a, 2014, Core International Instruments, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

⁴ Cockroft Laurence, 2012, *Global Corruption, Money, Power and Ethics in the Modern World*, L.B. Tauris and Co. Ltd, New York, USA, p. 3; Shah Anup, 2011, *Corruption, Global issues*, available at: <http://www.globalissues.org/article/590/corruption>.

⁵ OHCHR_a.

almost everywhere.⁶ On 22 January 2013 the Secretary General of the Council of Europe, stated that “Corruption is today’s biggest threat to democracy”⁷ proving that also the western world faces serious corruption issues. The money lost through corruption disables states from effectively providing education, stops governments from providing medical support and renders impossible the guarantee to a fair trial and the right to due process. The main responsibility to secure human rights lies with the state⁸ and although corruption may take place between private entities, this paper will look more closely at corruption at the state level, in which at least one of the actors of a corruption incident is a state official with some sort of public function.

As states have the responsibility to respect, protect and fulfil human rights, and corruption is known to undermine such fulfilment, it should become clear that it is part of each state’s responsibility to fight corruption⁹ in order to fulfil its human rights obligations. It is very easily said that this is the case. However, to prove that this statement is correct it is not only necessary to connect human rights violations with corrupt actions but at the same time prove that it is the state which is responsible to prevent these violations from happening. To build up this argument successfully, it is necessary, in a first step, to clarify the meaning of human rights and human rights obligations. In a second step, corruption must be defined and in some further step a direct link between corruption and human rights violations has to be established. By expanding on the obligations arising from human rights treaties it will be argued that a human rights obligation to fight corruption exists.¹⁰

II. Human Rights

A. Human Rights and the different Treaties

To analyze the relationship of human rights and corruption it is necessary in a first step to define both of these expressions. Human rights are most often defined as the entirety of the rights considered as being naturally connected to human beings and are universally imposed upon states for them to respect and protect¹¹ The concept of human rights is based on the belief that all human beings are born equal and that these rights belong to every human individual due to that individual simply being human.¹² In

⁶ Shah.

⁷ Jagland Thorbjom, 2013, Secretary General of the Council of Europe, speech delivered in Strasbourg, 22 January 2013, available at: [mms://coenews.coe.int/vod/20130122_03_e.wmv](https://www.coe.int/t/press/2013/20130122_03_e.wmv).

⁸ International Council on Human Rights Policy (ICHRP), 2009, Corruption and Human Rights: Making the Connection, available at: <http://www.u4.no/recommended-reading/corruption-and-human-rights-making-the-connection/downloadasset/2329>, p. 5.

⁹ For a paper analyzing the possibility of states violating human rights in the course of fighting corruption please read through Ivory Radha Dawn, The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases, *Utrecht Law Review*, Volume 9, Issue 4, September 2013.

¹⁰ For analysis of the connection of corruption and a list of human rights enshrined in the ICCPR and the ICESCR, please refer to Martine Boersma, 2012, Corruption: A Violation of Human Rights and a Crime under International Law, pp. 202 – 264.

¹¹ Schmid Evelynne, 2005, Comment La Corruption Affecte-t-elle Les Droits De L’Homme?, Une Approche Internationale et l’Observation du Cas Libanais ; Attention Particulière aux Effets de la Corruption sur la Jeunesse Libanaise, available at : www.business-humanrights.org/Categories/Issues/Other/Corruption, p. 11.

¹² Kofele-Kale Ndiva, 2000, The Right to a Corruption-Free Society as an Individual and Collective Human Rights : Elevating Official Corruption to a Crime under International Law, in ; Atatnasio John

the Proclamation of Teheran the International Conference on Human Rights declared that “The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community”.¹³ Therefore, human rights apply to all people without any exception.¹⁴

Human rights are protected by a number of treaties, declarations and protocols. Following the OHCHR, the documents covering human rights include the International Bill of Rights, which includes the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) as well as its two Optional Protocols (OP).¹⁵ The UDHR, the ICCPR and the ICESCR and their OPs are therefore the three main covenants for the protection of human rights and each of them contains information on what is expected from states to comply with their human rights obligations.¹⁶

It is impossible to analyze and explain all human rights treaties in full depth but nonetheless all should at least receive a short introduction. The core human rights treaties are comprised of ten human rights instruments, consisting of nine human rights treaties as well as the OP to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁷ Furthermore, there are of course many other universal instruments related to human rights including for example the Convention against Discrimination in Education or the Basic principles for the Treatment of Prisoners but as none of the human rights treaties addresses corruption directly the focus will be laid on the core human rights treaties.¹⁸ These documents will only be analyzed where they might help providing an answer to the question of this paper.

B. The UDHR and the UNCAC

The UDHR defines the civil, cultural, economic, political and social rights that are essential for the wellbeing of each individual.¹⁹ The rights enshrined in the UDHR are universal and inseparably linked to each person.²⁰ Looking at corruption the most specific international document is the United Nations Convention against Corruption (UNCAC) established by General Assembly resolution 58/4 on 31 October 2003, which entered into force on 14 December 2005.²¹ The UNCAC requires the

and Steinberg Marc (eds.), *International Lawyer (ABA)*, Volume 34, pp. 149 - 178 at 163, available at: <http://heinonline.org/HOL/LandingPage?handle=hein.journals/intlyr34&div=19&id=&page=>.

¹³ Proclamation of Teheran, 1968, Section 2, available at: <http://www1.umn.edu/humanrts/instree/l2ptichr.htm>.

¹⁴ Schmid, p. 11.

¹⁵ OHCHR_b, 1996, Fact Sheet No. 2, *The International Bill of Human Rights*, p.1, available under <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

¹⁶ Schmid, 2005, p. 12.

¹⁷ OHCHR_a.

¹⁸ OHCHR_c, 2014; *Universal Human Rights Instruments*, available at:

¹⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>.

²⁰ Schmid, p. 11.

²¹ Ibid.

²¹ United Nations Office on Drugs and Crime (UNODC), 2014, *United Nations Convention Against Corruption*, available at: <https://www.unodc.org/unodc/en/treaties/CAC/>.

countries to establish rules that make corruption illegal and also provides model policies and preventive measures for countries to adopt.²²

States have three different levels of obligations towards human rights, the obligation to respect, to protect and to fulfill human rights.²³ To comply with the obligation of respecting human rights, the state may not take any actions that could lead to a deprivation of an individual’s enjoyment of their rights or the impairment of the ability to satisfy those rights by their own efforts.²⁴ The obligation to protect human rights requires that states take necessary measures to prevent human rights violations by third parties.²⁵ According to an ICHRP report from 2009 this is one of the central functions of a state and includes the prevention of human rights violations by individuals or other non-state actors, the elimination of incentives to violate human rights as well as providing access to effective legal remedies in case of human rights violations.²⁶ Finally, the obligation to fulfill human rights requires states to take measures that enable people under its jurisdiction to satisfy their basic social and economic needs such as access to food, water and education but also civil and political rights such as the right to fair elections or the right to legal assistance.²⁷

C. Millennium Declaration

In 2000 all 189 member states of the UN General Assembly at that time adopted the Millennium Declaration.²⁸ The Millennium Declaration sets goals that states have agreed upon to achieve by 2015.²⁹ During the concluding meeting of the millennium summit, the then UN Secretary General Kofi Annan explained that the world leaders had agreed on clear directions of development. He also stated that “*it lies in your power, and therefore in **your responsibility**, to reach the goals that you have defined*”.³⁰ Although the Millennium Declaration contains political statements, which are not legally binding, it nonetheless contains political commitments by all member states. Additionally, every goal of the Millennium Declaration is connected to a human rights norm, which can provide the necessary legal obligation to achieve these goals.³¹ Those rights are included in one or the other of the core human rights treaties. These may consist of civil and political rights as enshrined in the ICCPR or for example the right to education protected within the ICESCR.³²

²² UNODC.

²³ ICHRP, p. 25.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ OHCHR_d, 2014, The Millennium Development Goals and Human Rights, p. 3, available at: http://www.un-kampagne.de/fileadmin/downloads/news3/final_human_rights_and_mdgs_brochure.pdf.

²⁹ UN Millennium Declaration, 2014, available at: <http://www.un.org/en/development/devagenda/millennium.shtml>.

³⁰ Ibid., – emphasis added.

³¹ OHCHR_d, p. 10.

³² Ibid., p. 3.

D. The ICCPR and the ICESCR

The ICCPR was adopted on 16 December 1966 and entered into force on 23 March 1976, once 35 states had ratified the convention.³³ Today the ICCPR has been ratified by 168 states.³⁴ The implementation of the ICCPR rights is monitored by the Human Rights Committee to which states also have to submit regular reports as well as reports on request on the status of how the rights are being implemented.³⁵ The Human Rights Committee does not have the same power as a court may have, as it can only provide views and general comments on the reports submitted by the member states.³⁶ Although the recommendations of the Human Rights Committee are non-binding upon states its influence should not be underestimated. Often states have taken actions based on the Committee's recommendations.³⁷

Just as the ICCPR, the ICESCR was also adopted on 16 December 1966 and entered into force on 3 January 1976.³⁸ Even though the indivisibility of human rights is regularly highlighted, the ICESCR is often seen as slightly inferior to the ICCPR.³⁹ This has to do with the fact that civil and political rights were interpreted as immediately applicable whereas the rights enshrined in the ICESCR were seen as rights, which should progressively be realized.⁴⁰ However, many economic, social and cultural rights are immediately applicable too and can be successfully claimed for as well.⁴¹ The implementation of the ICESCR is monitored by the Committee on Economic, Social and Cultural Rights (CESCR) and includes 18 independent experts.⁴² Today, the ICESCR has been ratified by 162 states.⁴³

In addition to the global efforts that have been undertaken to secure human rights, there are also many regional and sub-regional agreements aiming at the achievement of protecting human right. When examining human rights obligations it makes sense to compare those different regional human rights treaties as well as the different international human rights treaties to better understand the goals of certain international human rights norms.⁴⁴

³³ Stahl Sandra, 2012, Obligations to Protect in International Law – Doctrinal Reflections, A Contribution to Basis, Content and Limits of the Doctrine of Obligations to Protect under International Human Rights Conventions, in; von Bogdandy Armin and Rüdiger Wolfrum (eds.) *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Volume 232, p. 81.

³⁴ The Status of each UN treaty can be verified online, for the ICCPR it is the following link:
https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en.

³⁵ OHCHR_d.

³⁶ Stahl, p. 82.

³⁷ Ibid.

³⁸ OHCHR_e, 2014, Human Rights Committee, available at:
<http://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>.

³⁹ Saul Ben, Kinley David and Mowbray Jacqueline, 2014, The International Covenant on Economic, Social and Cultural Rights, Commentary, *Cases and Materials*, Oxford University Press, p. 1.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² OHCHR_e.

⁴³ The Status of each UN treaty can be verified online, for the ICESCR it is the following link:
<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en>
viewed 18 June 2014.

⁴⁴ Stahl, p. 63.

E. Core Human Rights Treaties and Corruption

Although there are ten core human rights treaties and numerous regional treaties, none of these treaties explicitly mentions corruption at all.⁴⁵ It has to be pointed out that the first human rights covenants and declarations were established and created between 1948 and 1966. Even the African Charter on Human and Peoples' Rights was adopted by 1981 and came into force in 1986.⁴⁶ International anti-corruption efforts however, only started to become reality by the mid-1990s.⁴⁷ So while international human rights efforts starting from the UDHR have more than sixty years of history, global anti-corruption has only been around for ten to twenty years. According to Wolf and Schmidt-Pfister, the recent development of international anti-corruption efforts can be divided into five different phases.⁴⁸ During the first phase there are no transnational anti-corruption initiatives at all, in a second phase, there are unilateral actions to combat overseas bribery but there is no international coordination yet. In the third phase global anti-corruption efforts gain momentum followed by the implementation of international anti-corruption rules in the fourth phase. In the fifth phase these rules slump into a legitimacy crisis.⁴⁹

The UNCAC is the most recent and the most extensive anti-corruption treaty and links developed states in Europe with developing states in other regions in their commitments against corruption.⁵⁰ It is the first comprehensive and binding global anti-corruption instrument and came into force in 2005.⁵¹ The creation of the UNCAC is a clear indication that aforementioned phase four (implementation of international anti-corruption rules) has been reached.⁵² From 1995 onwards, many other international legal documents from different international organizations have been enacted.⁵³ According to Ndiva Kofele-Kale⁵⁴, the World Bank, the International Monetary Fund (IMF), the Council of Europe, the European Union (EU), the Organization of American States (OAS), as well as the Organization for Economic Co-operation and Development (OECD) and the Global Coalition for Africa have introduced anti-corruption policies and strategies.⁵⁵ Because the adoption of the UNCAC is a very big step in the international fight against corruption it had to be mentioned in this paper. The UNCAC further provides the definition to understand what corruption consists of under a legal aspect. However, as this is a specific convention against corruption and it is not part of the ten core human

⁴⁵ Boersma Martine, 2012, Corruption: A Violation of Human Rights and a Crime Under International Law?, School of Human Rights Research Series, Volume 56, p. 2.

⁴⁶ African Commission on Human and Peoples' Rights, 2014 available at: <http://www.achpr.org/instruments/achpr/history>.

⁴⁷ Wolf Sebastian and Schmidt-Pfister Diana (eds.), 2010, Between Corruption, Integration, and Culture: The Politics of International Anti-Corruption, in; *International Anti-Corruption Regimes in Europe, Between Corruption, Integration and Culture*, Schriftenreihe des Arbeitskreises Europäische Integration e.V., Volume 70, p. 13.

⁴⁸ Ibid., p. 14.

⁴⁹ Ibid.

⁵⁰ Ivory Radha Dawn, 2013, The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases, *Utrecht Law Review*, Volume 9, Issue 4, p. 151, available at: www.utrechtlawreview.org; Neuhaus, p. 8.

⁵¹ Neuhaus, p. 8; Wolf and Schmidt-Pfister, p. 15.

⁵² Wolf and Schmidt-Pfister, p. 15.

⁵³ Kofele-Kale Ndiva, p. 152.

⁵⁴ Ibid., pp. 152 – 153.

⁵⁵ For details on the different instruments, please refer to Kofele-Kale Ndiva, 2000, The Right to a Corruption-Free Society as an Individual, and Collective Human Rights: Elevating Official Corruption to a Crime under International Law.

rights instruments it does not directly provide any answer to the question of this paper.⁵⁶ Therefore, although the UNCAC will provide substantive support for the definition of corruption the focus for answering the question whether or not there is a human rights obligation to fight corruption will lie upon the answers provided by the core human rights instruments.

III. Corruption

A. Definition of Corruption

After human rights, the theoretical framework of human rights and state obligations arising therefrom have been explained, it is now time to turn to the definition of corruption as well as its causes and effects. Corruption is a lot older than the idea of human rights. Corruption is actually as old as humanity itself if we look at a rather wide definition of the subject.⁵⁷ Corruption is rather difficult to describe or define, and even more difficult to measure.⁵⁸ One of the reasons corruption is so hard to grasp is that generally none of the actors contributing to corruption have an interest in publicizing any information and therefore it is not clear who is directly damaged by such behavior.⁵⁹ Often there is a lack of a plaintiff or damaged party actually trying to gain access to such information.⁶⁰ Generally there is not one specific victim in corruption cases which makes it easier for corrupt officials to get away unpunished.⁶¹ It is argued that corruption actually depends on the perception of the speaker, basically meaning that some may consider a behavior corrupt while others would consider the behavior acceptable.⁶² For example if a public official hires a friend for an open position, this may not be considered illegal practice, but then having salary lists with fictive employees clearly is.⁶³ According to the Oxford Dictionaries, corruption is “*Dishonest or fraudulent conduct by those in power, typically involving bribery*”.⁶⁴ The World Bank Group defines corruption as “*the abuse of*

⁵⁶ OHCHR_a.

⁵⁷ Hettinger Michael, 2003, Die strafrechtlichen Regelungen zur Eindämmung korruptiven Verhaltens, in; von Nell Verena, Schwitzgebel Gottfried and Vollet Matthias (eds.), *Korruption, Interdisziplinäre Zugänge zu einem komplexen Phänomen*, p. 99; Neuhaus, 2014, p. 6; Funderburk Charles, 2012, Political Corruption: Causes and Consequences, in; *Political Corruption in Comparative Perspective, Sources Status and Prospects*, p. 1; Pearson Zoe, 2001, An international human rights approach to corruption, in; Larmour Peter and Wolanin Nick (eds.), *Corruption and anti-Corruption*, pp. 30 – 61, at 30.

⁵⁸ Charron Nicholas, Lapuente Victor and Rothstein Bo, 2013, Quality Of Government And Corruption From A European Perspective, A Comparative Study of Good Government in EU Regions, p. 5; Wolf and Schmidt Pfister, 2010, p. 16; World Bank, 2013.

⁵⁹ Jansen Stephan A., 2005, Elemente “positive” und “dynamischer” Theorien der Korruption – Multidisziplinäre Provokationen zur Form der Korruption, in; Jansen Stephan A. and Priddat Birger P. (eds.), *Korruption, Unaufgeklärter Kapitalismus – Multidisziplinäre Perspektiven zu Funktionen und Folgen der Korruption*, pp. 11 – 42 at 15.

⁶⁰ Ibid.

⁶¹ Castresana Carlos, 2007, Prosecution of Corruption Cases and Respect of Human Rights, The International Council on Human Rights Policy, Review Meeting, Corruption and Human Rights, Geneva, 28 – 29 July 2007, para. 66, available at: http://www.ichrp.org/files/papers/123/131_-_Carlos_Castresana_-_2007.pdf.

⁶² Uslander Eric M, 2008, Corruption, Inequality, and the Rule of Law, *The Bulging Pocket Makes the Easy Life*, p. 6.

⁶³ Neuhaus, p. 11.

⁶⁴ Oxford Dictionaries, 2014, available at: <http://www.oxforddictionaries.com/definition/english/corruption>.

public office for private gain”⁶⁵ which is probably the most used definition⁶⁶ and was originally provided by Transparency International.⁶⁷ It is possible that corruption includes actions by public officials, which are actually legal but nonetheless questionable in terms of the integrity of a system.⁶⁸ This paper will follow the provided definition of Transparency International but will also follow the ICHRP reports approach to defining corruption based on a legal approach. The ICHRP report relies on a definition of corruption, which is based on the law and looks at which acts are legally defined as ‘corrupt acts’.⁶⁹ To a large part corruption also involves a violation of legal norms.⁷⁰ The acts that fall under the definition of corruption are listed in the UNCAC and include such acts as bribery, embezzlement, trading in influence, abuse of function or position as well as illicit enrichment.⁷¹ Bacio-Terracino connects the Transparency International definition and the corrupt acts to create a legal definition, which states that corruption is ‘*the illegal abuse of entrusted power for private gain*’.⁷²

The obligation to criminalize corrupt acts can be found enshrined in chapter III of the UNCAC. It lists acts such as bribery of national public officials in Art. 15, or embezzlement, misappropriation or other diversion of property by a public official in Art. 17. It also includes the criminalization of trading in influence in Art. 18, the abuse of function in Art. 19 or for example the obstruction of justice in Art. 25. Chapter III closes with Art. 42 which asks state parties to adopt all necessary measures to establish its jurisdiction over acts of corruption either committed in the territory of that state or committed by or against one of the states’ nationals.

As corruption is a very complex issue, not all of the corrupt acts can be taken into account. The focus will be laid especially on the consequences of bribery and the closely connected corrupt acts such as obstruction of justice, abuse of power or diversion of property by a public official.

B. Causes and Consequences of Corruption

Because corruption is a very complex phenomenon it is very difficult to clearly establish the different possible causes for corruption.⁷³ When looking at the reports from Transparency International as well as the statistics of the World Bank Institute the data shows that generally, richer countries with higher economic growth rates tend to have less corruption and better functioning governments than their poorer counterparts.⁷⁴ However, it is unclear whether poverty is a cause for or the consequence of corruption.⁷⁵ Eric Uslaner explains that corruption develops from economic inequality and low trust in

⁶⁵ World Bank Group, 2014, *Helping Countries Combat Corruption: The Role of the World Bank*, available at: <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>.

⁶⁶ Bacio-Terracino Julio, 2008, *Corruption as a Violation of Human Rights*, International Council on Human Rights Policy, p. 5, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107918; Warner Carolyn M., 2010, *Excerpts from The Best System Money Can Buy: Corruption in the European Union*, in; Johnston Michael (ed.), *Public Sector Corruption*, Volume 2, p. 389.

⁶⁷ Bacio-Terracino, p. 5; Transparency International, 2014, *FAQs on Corruption*, <http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/.

⁶⁸ Funderburk, p. 1.

⁶⁹ ICHRP, p. 16.

⁷⁰ Warner, p. 389.

⁷¹ ICHRP, pp. 19 – 21.

⁷² Bacio-Terracino, p. 6 – emphasis added.

⁷³ Pearson, p. 34.

⁷⁴ Rose-Ackerman Susan, 2012, *Corruption and government*, in; Cheng Christine S. and Zaum Dominik (eds.), *Corruption and Post-Conflict Peacebuilding, Selling the peace?*, p. 50.

⁷⁵ Ibid.

people who are different from oneself.⁷⁶ Unfortunately though, corruption leads to more inequality and to even less trust.⁷⁷

Within the European Union, enhanced competition and privatization has led to more opportunities to commit corrupt acts, as private companies offer money in exchange for political support.⁷⁸ On the other hand, although many European countries are thriving democracies, the democratic system includes competing political parties. These parties need to finance their activities and their fight for power and when these funds cannot be acquired on a legal basis, they may refer to corrupt means to acquire money.⁷⁹ According to Carolyn Warner this is one of the major drivers for corruption within the European Union.⁸⁰ Until recently it was even possible to deduct bribing costs from the tax declaration in countries including France, Germany as well as the United Kingdom.⁸¹ Rich western countries as well as western corporations have also often supported and committed corrupt acts abroad and have encouraged corruption in third world countries instead of impeding it.⁸²

After seeing that western countries and well established democracies face problems with corruption it becomes clear that until today there is no real proven connection between economic situation and corruption. Some countries such as India or China have, despite a very high corruption index, achieved extraordinary economic growth.⁸³ However, it has to be said that nobody knows what growth rates China and India might have achieved with little or no corruption. According to Transparency International's survey, Afghanistan, North Korea and Somalia were the countries with the worst corruption score of all 177 surveyed countries, scoring 8 points on a scale of 100.⁸⁴ Denmark achieved the highest score with 91 out of 100 possible points of not being corrupt.⁸⁵ However, a liberal market and democratic structures do not by themselves provide a corruption free environment and competition is not a cure for corruption.⁸⁶ One of the reasons that corruption persists is that corrupt politicians enjoy the power to disrupt law enforcement activities.⁸⁷ It is possible for those politicians to block investigations, to interfere with the judiciary system or to award themselves or their colleagues' amnesty as well as invoke secrecy on political procedures on grounds of national security.⁸⁸

A further cause for corruption according to Warner is privatization.⁸⁹ Although privatization was originally said to reduce corruption, by moving assets from public officials control over to the private sector, it has created many possibilities for corrupt actions.⁹⁰ Officials who were responsible for the privatization process could be bribed in order for individuals to receive part of the privatization cake.⁹¹

⁷⁶ Uslaner, p. 4.

⁷⁷ *Ibid.*, pp. 4 – 5.

⁷⁸ Warner, p. 378.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Hawley Susan, 2000, *Exporting Corruption, Privatisation, Multinationals & Bribery*, p. 2, available at: http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/19bribe_0.pdf.

⁸² Neild Robert R., 2002, *Public Corruption: The Dark Side of Social Evolution*, pp. 208 – 209.

⁸³ Jansen, p. 16 f.

⁸⁴ Transparency International, 2013.

⁸⁵ *Ibid.*

⁸⁶ Warner, 2010, p. 379.

⁸⁷ *Ibid.*, p. 386.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, p. 394.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

Once it becomes clear that the whole world is affected, it is even more interesting to examine the different levels of corruption within each state system. Generally, corruption has a lot to do with poor transparency and the inability to hold public officials accountable for their corrupt actions.⁹² One of the reasons why different public officials are more or less corrupt is connected to the possibilities each public official has.⁹³ It can be said that the price for a corrupt act evolves from supply and demand in the corruption market.⁹⁴ The price varies, as some favors are more expensive than others. At the same time, the corrupt service is sometimes required from someone who is rich and other times from someone with limited monetary funds.⁹⁵ This leads to variations regarding how much money is spent on, as well as on how much money is earned through corruption. Following Hunt's argument it further also depends on the internal competition a corrupt public official faces.⁹⁶ For example, where only one single public official has the power to change something in favor of a private actor, this person can charge more than when there are twenty public officials with the same possibilities. A judge would be a public official with a monopoly for the case he or she rules upon and would be in a position to ask for a large sum in return for a favorable ruling.⁹⁷ In a survey made for Peru, Hunt finds that the judiciary is the most corrupt public sector and alone accounts for 42 percent of the money paid in bribes.⁹⁸ The police are accountable for another 27 percent, making the judiciary and the police the receiving side for 69 percent of all bribes in the country.⁹⁹

Corruption undermines the trust people have towards the state and disables the creation of an efficient administration.¹⁰⁰ Corruption further reduces economic growth and slows down the development of economic and political institutions.¹⁰¹ It reduces foreign investments to a country due to legal uncertainty and undermines the legitimacy of the state.¹⁰²

C. Corruption and Politics

In general, corruption is often very closely connected to politics. On the one side of corruption there is the state represented by its politicians, public officials, functionaries and bureaucrats and on the other side are the people wanting and needing their service.¹⁰³ Bribery is the most representative act of corruption¹⁰⁴ and is only possible between two parties, the one paying and the one receiving the bribe.¹⁰⁵ It normally consists of some kind of benefit for a public official or a relative of a public official in an exchange for some kind of service by this public official.¹⁰⁶ Bribery is closely connected

⁹² Uslaner, p. 31.

⁹³ Hunt Jennifer (Hunt J.), 2010, Why are Some Public Officials More Corrupt than Others?, in; Johnston Michael (ed.), *Public Sector Corruption*, Volume 2, pp. 302 – 303.

⁹⁴ Funderburk, p. 26; Hunt J., pp. 302 – 303.

⁹⁵ Ibid.

⁹⁶ Hunt J., p. 303.

⁹⁷ Ibid.

⁹⁸ Ibid., pp. 307 – 308.

⁹⁹ Ibid.

¹⁰⁰ Neuhaus, p. 7.

¹⁰¹ Funderburk, p. 2.

¹⁰² Ibid.

¹⁰³ Amundsen Inge, 1999, Political Corruption: An Introduction to the Issues, Chr. Michelsen Institute, Development Studies and Human Rights, WP 7, p. 2, available at: <http://www.cmi.no/publications/file/1040-political-corruption.pdf>.

¹⁰⁴ Bacio-Terracino, p. 6.

¹⁰⁵ ICHRP, p. 19.

¹⁰⁶ ICHRP, p. 19; United Nations Convention Against Corruption (UNCAC), Arts. 15 and 16.

to illicit enrichment, which occurs where public power and private wealth overlap.¹⁰⁷ This is where corruption occurs.¹⁰⁸ According to the ICHRP report and following Art. 20 of the UNCAC, illicit enrichment can be defined as an increase in the assets of a public official that cannot be reasonably explained by the official's income.¹⁰⁹ The UNCAC obliges each state party to adopt legislative and other measures to make sure that bribery as well as illicit enrichment are established as a criminal offence when committed intentionally.¹¹⁰

The level of political corruption is regularly presented by Transparency International reports, but according to Funderburk, these reports tend to favor western countries.¹¹¹ The reason for these results is that focus is put on traditional corruption behaviors such as bribery and extortion.¹¹² Generally western countries have a better control over the types of corrupt behavior being monitored.¹¹³ However, there are indications suggesting that many western countries suffer from other forms of corruption.¹¹⁴ One example would be a form known as *Elite Cartel* corruption which involves high-ranking leaders from politics, economics and military who share corrupt benefits to maintain their advantages on the political field and to fight off opposition.¹¹⁵ Further, different western countries such as the United Kingdom and Italy, have had quite a few corruption scandals to deal with in the recent past.¹¹⁶

Corruption is still a problem of the individual state and has not yet been moved to supra-national organizations such as the European Union.¹¹⁷ Therefore the responsibility to fight corruption remains with the individual state. The implementation of the UNCAC has not changed this approach, as it basically requires states to introduce the necessary measures to fight corruption themselves.

IV. Corruption and Human Rights Violations

A. Connection between Corruption and Human Rights Violations

Obviously, corruption harms individuals and it is therefore often assumed that corruption automatically also violates human rights.¹¹⁸ C. Raj Kumar argues that promoting human rights and fighting corruption have a lot in common as corrupt governments which reject both transparency and accountability, are also not going to respect human rights.¹¹⁹ Therefore the fight against corruption and

¹⁰⁷ Rose-Ackerman, p. 48.

¹⁰⁸ Ibid.

¹⁰⁹ ICHRP, p. 20.

¹¹⁰ UNCAC, Arts 15, 16 and 20.

¹¹¹ Funderburk, p. 11.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid., p. 12.

¹¹⁶ Davies Lizzy, 2013, The six things wrong with Italy – and how to solve them, *The Guardian*, available at: <http://www.theguardian.com/world/2013/feb/20/six-things-wrong-with-italy>; Transparency International UK, 2014.

¹¹⁷ Warner, p. 382.

¹¹⁸ ICHRP, 2009, p. 23.

¹¹⁹ Kumar C. Raj., 2002, Corruption and Human Rights, <http://www.frontline.in/static/html/fl1919/19190780.htm>.

the movement of human rights protection and promotion cannot be separated.¹²⁰ In a cross regional statement, Morocco, on behalf of 134 states, declared that corruption has a massive negative impact on the effective promotion and protection of human rights.¹²¹ Corruption also undermines the development necessary to achieve the goals of the Millennium Declaration such as the eradication of extreme poverty or the achievements strived for regarding primary education.¹²² According to Ms. Hayden during HRC panel discussions in Geneva in March 2013, it is impossible to look at corruption and not see the causal connection to human rights.¹²³ The HRC itself shares this view too and has stated that it recognizes the fact that corruption can have a serious negative impact on all human rights.¹²⁴ However, in the ICHRP report it is argued that only because corrupt practices in the long run mostly have an impact on human rights it cannot be concluded that any act of corruption per se violates human rights.¹²⁵ As corruption cuts into the efficiency of states organization and state finances it also reduces the states' ability to respect, protect, and fulfill its human rights obligations.¹²⁶ However, in reality the analysis of the influence of corruption on human rights and the connection between the two only started very recently and is by no means complete.¹²⁷ Bacio-Terracino argues that the presence of corruption shows that a state is not taking enough measures to prevent it and is therefore violating its obligations mentioned above.¹²⁸ The problem faced by many trying to make the connection between corruption and human rights is similar to the problems that were faced when trying to measure corruption. As explained above, one reason why measuring corruption is complicated is because the damage is difficult to measure due to the secret nature of corruption and the lack of a directly damaged party.¹²⁹ The same is valid for the impact corruption has on human rights. Although it seems clear that corruption has a negative impact on human rights in many cases the negative effect does not necessarily amount to a human rights violation.¹³⁰

As posited earlier¹³¹, the international development of anti-corruption has gone through five phases. A first phase with no international anti-corruption, a phase where some nations have taken national actions, the next one starting off global anti-corruption measures, followed by the implementation of international anti-corruption rules and a last phase in which anti-corruption treaties sink into a legitimacy crisis. Following Wolf and Schmidt-Pfister's explanations, the fifth phase, the legitimacy crisis of anti-corruption efforts, is connected to the mixed outcome of anti-corruption campaigns around the world, combined with issues following the global financial crisis and joined by concerns regarding the control of international anti-corruption regimes.¹³² Perhaps, connecting human rights to combating corruption can help to regain the legitimacy that stand-alone anti-corruption efforts are

¹²⁰ Ibid.

¹²¹ OHCHR, 2013, *The Human Rights Case Against Corruption*, p. 17, available at: <http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCCaseAgainstCorruption.pdf>

¹²² Ibid.

¹²³ HRC_a, 2013, para. 12; Her view is shared by many other contributors of the HRC panel discussion of 13 March 2013.

¹²⁴ HRC_b, 2013, para. 2.

¹²⁵ ICHRP, 2009, p. 24.

¹²⁶ Gathii, p. 1; Ngugi, p. 246.

¹²⁷ Gathii, p. 2.

¹²⁸ Bacio-Terracino, 2008, p. 9.

¹²⁹ Jansen, p. 15.

¹³⁰ Bacio-Terracino, 2008, p. 8.

¹³¹ Section III.

¹³² Wolf and Schmidt-Pfister, p. 15.

currently unable to create. But what exactly are the obligations states have in regards to corruption and human rights? There seems to be a general awareness and common knowledge that corruption practices are negative for society as a whole, but perhaps this is not enough.¹³³ As commended by Ngugi, corruption not only reduces a government's capacity to protect, respect and fulfill human rights, but also reduces the level of revenue available to the government to fulfill other major tasks.¹³⁴ Losing money to corruption makes it harder for governments to fund basic services such as schools, the provision of water and food and all kinds of social services, thereby undermining the realization of social and economic rights.¹³⁵

B. Violation of Human Rights

So it is clear that corruption has a negative effect on human rights. But how negative must this impact be, for the behavior of a state to amount to a violation of human rights? When is the behavior of a state considered a human rights violation and how must a state respond to this? Nobody would question whether or not genocide, ethnic cleansing or mass murder, are human rights violations.¹³⁶ However, with such an abstract phenomenon as corruption it is much more difficult to achieve such certainty. One might argue that a violation of human rights in connection with corruption exists, when a corrupt practice affects human rights either directly or indirectly and the state does not comply with all its human rights obligations.¹³⁷ A direct violation may for example be present, when the corrupt act is deliberately used to violate a right. This situation is given if a judge is bribed, as the judge is no longer independent or impartial.¹³⁸ This has to be distinguished from actions that may lead to human rights violations but which themselves are not a violation as such.¹³⁹ Therefore, an indirect violation would be found where corruption contributes to a chain of events, which lead to a violation of human rights. The example provided by Martine Boersma is the one of the dumping of toxic waste, which was only possible after bribing a public official.¹⁴⁰ The toxic waste then violates the right to health.¹⁴¹ This differentiation is also important when looking at corrupt practices for which it is not possible to make a direct link between the corrupt act and the violation of human rights.

Stahl explains that a human right is violated when the impairment of the right is legally relevant and sufficiently severe for it to constitute a factual violation of the right protected.¹⁴² For example, the right to life might be breached when someone is killed by the state. However, the state responsibility does not only begin at the level of a violation of a human rights obligations but actually starts a lot earlier, as the state is responsible for the protection of its citizens.¹⁴³ Human rights treaties are not to be used as penal codes, but actually impose protection obligations upon the states from which follows that human rights can be violated even by only endangering those rights.¹⁴⁴ This position has been confirmed by the Human Rights Committee in *E.W. et al. v. The Netherlands*, where the committee

¹³³ Bacio-Terracino, p. 8; Uslaner, p. 42.

¹³⁴ Ngugi, 2010, p. 246.

¹³⁵ Ibid.

¹³⁶ Barnhizer, 2001, p. 11.

¹³⁷ Ibid.

¹³⁸ Boersma, 2012, p. 196.

¹³⁹ ICHRP, 2009, p. 24.

¹⁴⁰ Boersma, 2012, p. 196.

¹⁴¹ Ibid.

¹⁴² Stahl, 2012, p. 150.

¹⁴³ Ibid., p. 154.

¹⁴⁴ Ibid.

stated that for a person to claim to be a victim of a violation of a right protected by the covenant (ICCPR) the persons' right must either already be negatively affected or the negative effect must be imminent.¹⁴⁵ For an imminent risk to amount to a violation of a human right it is sufficient to find that the likelihood of the negative impact is sufficiently probable.¹⁴⁶ This probability analysis has to be conducted for each situation individually as there is no generally accepted formula for this analysis.¹⁴⁷ An abstract risk on the other hand is not sufficient to affirm the violation of a human right.¹⁴⁸ According to Xenos, the ECHR has moved on to the point under which the entitlement to human rights entails the right to enjoy those rights and the protection of these rights is not limited to non-violation by state agents.¹⁴⁹

Now there are limited possibilities under which a state may derogate from some of the rights protected under the human rights conventions. However, these derogations are generally only possible during emergencies and this subject is not very important for the question addressed in this paper.¹⁵⁰

Wenzel posits that each state is responsible for the protection of its own citizens.¹⁵¹ By taking this responsibility seriously it gains the power of sovereignty.¹⁵² However, when a state is incapable of providing this protection to its citizens, it must step aside when this protection can be and is provided by others.¹⁵³ This is the responsibility a state has towards the United Nations (UN) as well as towards its citizens.¹⁵⁴ This is the mechanism that provides the UN with the competency to reduce a state's sovereignty, where it becomes indispensable to provide the protection individuals have the right to enjoy.¹⁵⁵ Non-compliance with the obligation to protect human rights may provide one part of the necessary connection between human rights violations and corruption.¹⁵⁶ As states are obliged to take measures to avoid human rights violations by third parties and may not violate human rights themselves it may be successfully argued that a state that does not try to prevent or does not punish forms of corruption, is actually not fulfilling its obligation to protect and promote human rights.¹⁵⁷ The question therefore must be, how far do the obligations a state needs to comply with reach, and how are these obligations constructed?

¹⁴⁵ Human Rights Committee, *E.W. et al. v. The Netherlands*, 1990, para. 6.4.

¹⁴⁶ Stahl, 2012, p. 156.

¹⁴⁷ *Ibid.*, p. 157.

¹⁴⁸ *Ibid.*, p. 158.

¹⁴⁹ *Ibid.*

¹⁵⁰ For explanations on the possibility of derogation from human rights obligations, please read Hafner-Burton, Helfer and Fariss, 2011, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*,

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2947&context=faculty_scholarship>
viewed 23 June 2014.

¹⁵¹ Wenzel, 2010, p. 23.

¹⁵² *Ibid.*

¹⁵³ Wenzel, 2010, p. 23.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ ICHRP, 2009, p. 25.

¹⁵⁷ *Ibid.*

C. Interpretation of Human Rights Treaties

1. *Standards of Interpretation*

There are different standards on how to interpret obligations arising from human rights treaties.¹⁵⁸ According to Art. 38 of the International Court of Justice (ICJ), there are four sources of law states have to adhere to.¹⁵⁹

These are:¹⁶⁰

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) General principles of law recognized by civilized nations;
- d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International conventions are therefore the first source of law.¹⁶¹ The relevant international law principles on the interpretation of treaties are enshrined in the Vienna Convention on the Law of the Treaties (VCLT) Arts. 31 to 33. According to Art. 31 VCLT, a treaty has to be interpreted in good faith in accordance with the ordinary meaning of the terms enshrined in a treaty within the context and in the light of the object and purpose of that treaty.¹⁶² It also includes the preamble and the annexes to such a treaty and any agreement related to the treaty as well as any instrument, which was implemented as part of the conclusion of the treaty and which has been accepted by the other parties. For the interpretation it is also necessary to take into account any subsequent agreement regarding the interpretation or application of the treaty provisions and any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding the treaty's interpretation. Furthermore, any rules of international law applicable to the state parties as well as any special meaning given to a term within the treaty have to be taken into consideration. Art. 32 VCLT further explains that reference may also be made to the preparatory work of the treaty and the circumstances of the conclusion to confirm the meaning of a norm following the interpretation according to Art. 31 VCLT. The preparatory work can also be consulted when the interpretation under Art. 31 VCLT results in uncertainty regarding the meaning of a treaty text or actually leads to absurd or unreasonable results.¹⁶³ Art. 33 VCLT then explains that the interpretation of a contract with more than one authenticated language must nonetheless lead to the same result of interpretation no matter in what language the interpretation is conducted. It is presumed that the terms of a treaty remain the same in each authentic text.¹⁶⁴

According to the Advisory Opinion of the IACtHR the rules of a treaty must be interpreted in good faith in accordance with the ordinary meaning given in a treaty within the context of the treaty and in

¹⁵⁸ Stahl, 2012, p. 53.

¹⁵⁹ Ibid., p. 74.

¹⁶⁰ Statute of the ICJ, Art. 38.

¹⁶¹ Stahl, 2012, p. 74.

¹⁶² Letsas, 2007, p. 62.

¹⁶³ VCLT, Art. 32 (1) and Art. 32 (2).

¹⁶⁴ VCLT, Art. 33 (3).

the light of its object and purpose.¹⁶⁵ To precisely construct the meaning of a treaty, it is also necessary to look at the preparatory work of the relevant treaty.¹⁶⁶ Because the preparatory works only include the information shared by the founding states of a treaty and because the view is historical, the information included must be less weighted than the results from the other interpretation techniques.¹⁶⁷ Nonetheless, the preparatory works provide additional guidance and must be taken into consideration where necessary.¹⁶⁸ While interpreting international treaties the principle of the primacy of the text has to be followed and provides the objective criteria of interpretation. Because the goal of human rights treaties is not to provide mutual benefits to the contracting states but rather aims at protecting the basic rights of individual human beings against all contracting states, it is necessary to adhere to such objective interpretation.¹⁶⁹

2. *Effet Utile and Dynamic Interpretation*

Besides following the objective interpretation, the construction of articles of a convention must also lead to an effective implementation (*effet utile*)¹⁷⁰ of the obligations arising from human rights and must not remain a theoretical framework only.¹⁷¹ The construction of an obligation must keep the goal of that obligation in mind and must ascertain that the obligation is fulfilled. If an interpretation would be possible in which the effective result of a provision is disregarded, it would lead to a hollow provision with no meaning.¹⁷² The ECtHR has underlined this view in *Artico v. Italy* by stating that the objective of Art. 6 of the ECHR is to provide an effective right to fair trial and not a theoretical or illusory right for the individual.¹⁷³ The *effet utile* compatible interpretation of treaty obligations is further supplemented by the ruling of the ECtHR in *Airey v. Ireland* in which the court states that all human rights treaties must be construed according to the conditions at the time of interpretation.¹⁷⁴ This means that human rights treaties need to be interpreted dynamically, taking into account the social, scientific as well as technical advancements made.¹⁷⁵ The interpretation of human rights treaties is what enables the determination of which rights must be protected under the individual treaty.¹⁷⁶

When analyzing the rights protected under the human rights treaties it has to be kept in mind that all human rights conventions are living instruments.¹⁷⁷ In other words, they have a life of their own, from which follows that human rights conventions adapt to a certain degree to the current situations as well as to regional values and beliefs.¹⁷⁸ This requires a dynamic interpretation of human rights conventions against the prevailing conditions.¹⁷⁹ The ECtHR in *Soering v. United Kingdom* held that a state must also refrain from actions that are contradictory to the underlying values of the ECHR such as

¹⁶⁵ IACtHR, Advisory Opinion, OC-3/83, Series A, No. 3, 1983, para. 49.

¹⁶⁶ IACtHR, Advisory Opinion, OC-3/83, Series A, No. 3, 1983, para. 49; Stahl, 2012, p. 61.

¹⁶⁷ Stahl, 2012., p. 62.

¹⁶⁸ Ibid.

¹⁶⁹ IACtHR, Advisory Opinion, OC-3/83, Series A, No. 3, 1983, para. 50.

¹⁷⁰ Stahl, 2012, p. 57.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ ECtHR, *Artico v. Italy*, 1980, para. 33.

¹⁷⁴ ECtHR, *Airey v. Ireland*, 1979, para. 26.

¹⁷⁵ Letsas, 2007, p. 65; Stahl, 2012, p. 59.

¹⁷⁶ Stahl, 2012, p. 60.

¹⁷⁷ Ibid., p. 59.

¹⁷⁸ Letsas, 2007, p. 65; Stahl, 2012, p. 59.

¹⁷⁹ Stahl, 2012, p. 59.

“common heritage of political traditions, ideals, freedom and the rule of law” mentioned in the preamble of the convention (ECHR).¹⁸⁰

The combination of the interpretation under consideration of the *effet utile* as well as the dynamic element of human rights conventions provides the human rights courts with the necessary tools for effective judgments in favor of the protection and promotion of human rights.¹⁸¹ The goal must therefore be, to duly consider all rules of interpretation and nonetheless successfully explain why a state has a duty to fight corruption and also has to be held responsible for human rights violations committed through corruption.

D. Does Corruption violate Human Rights in General?

The ICHRP report argues that corruption amounts to a violation of human rights because a state must use the maximum of its available resources to achieve the full realization of economic, social and cultural rights.¹⁸² According to Art. 2 (1) ICESCR, each party to the covenant must undertake steps, individually and with international assistance, using the maximum of its available resources, to progressively achieve the full realization of all economic, social and cultural rights enshrined in the ICESCR.¹⁸³ Further, according to the ICHRP report, UN treaty bodies and UN special procedures have posited that where corruption is common, states cannot fulfill their human rights obligations.¹⁸⁴ The Committee on Economic, Social and Cultural rights (CESCR) has argued that corruption has a negative effect on the full exercise of the rights covered in the ICESCR.¹⁸⁵ Also the Committee on the Rights of the Child has expressed its concerns by stating that corruption has a negative impact on the allocation of the already limited resources to effectively improve the promotion and protection of children’s rights.¹⁸⁶

As explained earlier¹⁸⁷, there must be a certain level of impairment of a human right for the right to be violated. From this also follows the statement provided by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in which he held that where a state fails to achieve a certain level of health care, this does not directly lead to the assumption that this state is in breach of international health obligations.¹⁸⁸ Rather the situation is as follows: When the failure to achieve a certain standard is beyond the control of the relevant state, the state is not in breach of its obligations.¹⁸⁹ However, if for example the failure was caused by corruption within the health sector, then the relevant state has probably failed to comply with its international obligations.¹⁹⁰ It is when corruption becomes institutionalized and systematic that it affects the social, economic, cultural, as well as the civil and political rights so severely that it can amount to a human rights violation.¹⁹¹

¹⁸⁰ ECtHR, 1989, *Soering v. United Kingdom*, para 88.

¹⁸¹ *Ibid.*, p. 60.

¹⁸² ICHRP, 2009, p. 60.

¹⁸³ Bacio-Terracino, 2008, p. 9.

¹⁸⁴ ICHRP, 2009, p. 23.

¹⁸⁵ CESCR, 2003, para. 12.

¹⁸⁶ Committee on the Rights of the Child, 2006, para. 14.

¹⁸⁷ Section IV B.

¹⁸⁸ Hunt P., 2006, para. 44.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Castresana, 2007, para. 24.

As clarified previously, the protection of human rights has moved on from the understanding that their protection is limited to non-interference by state officials to a point at which there is an entitlement to enjoy human rights.¹⁹² In the light of this approach the ECtHR takes a slightly different methodology to securing human rights than the widely applicable obligation to protect, respect and fulfill, by dividing the states' obligation between a negative and a positive obligation towards human rights.¹⁹³ The ECtHR in *Marckx v. Belgium*¹⁹⁴ declared for the first time that positive obligations are mandatory for the effective protection of human rights.¹⁹⁵ It decided that a state not only, may not negatively impact human rights but actually has a positive obligation to actively support the protection and promotion of human rights in its country, including the protection against actions committed by third parties.¹⁹⁶ According to Xenos, the uniqueness of the positive obligation is that the active protection of human rights is demanded immediately or should have been provided even earlier where the state is aware of human rights issues.¹⁹⁷ He further explains that whenever an individual can establish entitlement to a human right, the state is under a positive obligation to guarantee the protection of that human right.¹⁹⁸

After having read about the positive obligation towards human rights a few words must also be addressed to the negative obligations. Whereas the positive obligation requires a state to take action to promote and protect human rights, the negative obligation requires the state not to interfere with human rights.¹⁹⁹ Quite often it is difficult to determine whether a state has violated a positive or a negative obligation as elements of inaction and action may exist simultaneously in any given situation.²⁰⁰ This also means that a state may violate both positive and negative obligations at the same time.²⁰¹ A positive obligation arises always when the state should take action to protect human rights in danger. The negative obligation is where the state only needs to remain passive to guarantee this right. Like the positive obligations, the negative obligations form a part of the human rights guaranteed under the ECHR and both contribute to their effective protection.²⁰² So, for the ECHR, every violation of the Convention is a result of non-compliance by a state, where the state behavior is incompliant either with a positive or a negative obligation.²⁰³ A further kind of distinction is made between procedural and substantive obligations.²⁰⁴ Procedural obligations are the steps a state must undertake to improve domestic procedures necessary to protect its people effectively.²⁰⁵ The substantive obligations consist of the basic measures needed for the full enjoyment of the rights guaranteed.²⁰⁶ It is the

¹⁹² Xenos, 2012, p.2.

¹⁹³ Akandji-Kombe, 2007, p. 5.

¹⁹⁴ ECtHR, 1979, *Marckx v. Belgium*.

¹⁹⁵ Stahl, 2012, p. 106; Xenos, 2012, p. 24.

¹⁹⁶ Xenos, 2012, p. 25.

¹⁹⁷ *Ibid.*, p. 3.

¹⁹⁸ Xenos, 2012, p. 70.

¹⁹⁹ Akandji-Kombe, 2007, p. 11.

²⁰⁰ Akandji-Kombe, 2007, p. 12.

²⁰¹ *Ibid.*, p. 13.

²⁰² *Ibid.*, p. 4.

²⁰³ *Ibid.*, p. 11.

²⁰⁴ *Ibid.*, p. 16.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

combination of negative and positive obligations as well as substantive and procedural obligations that provide the necessary tools for the ECtHR to provide strong judgments in favor of human rights.²⁰⁷

What the ECtHR has done systematically is to base the positive obligations on a combination of the respective article in question and Art. 1 of the ECHR.²⁰⁸ The ECtHR in *Assanidzé v. Georgia* and *Ilascu and others v. Moldova and Russia* affirmed the obligation of the state to secure the rights and freedoms enshrined within the ECHR. The court took the position that Art. 1 of the ECHR imposes upon states the duty to answer any infringement of the rights and freedoms protected by the convention if any individual under their jurisdiction were affected.²⁰⁹ The same position has been taken in *Assanidzé v. Georgia* where the court said that it follows from Art. 1 of the ECHR that each state must take responsibility for any violation of the protected rights and freedoms of anyone within their jurisdiction.²¹⁰

According to Akandji-Kombe²¹¹, these two judgments of 2004 underline even more clearly the new function of Art. 1 of the ECHR as an “*independent source of general obligations.*” Following this line of argument, Art. 1 of the ECHR comprises the duty for each member state to protect all rights enshrined in the convention.²¹² The obligations arising from Art. 1 ECHR are positive as well as negative obligations.²¹³ The ICCPR provides a similar connection possibility and normally cases under the ICCPR refer to Art. 2 as the general source of state responsibility, combined with the substantive norm that may have been violated.²¹⁴ Like the ECHR and the ICCPR, the ACHR also has Art. 1 (1) that underlines the obligation of states to protect and secure the rights enshrined within the convention.²¹⁵ Therefore also under the ACHR the process of establishing a violation of the rights enshrined is to connect the violation of a substantive norm within the ACHR with the general obligation to protect and secure this right enshrined in the convention according to Art. 1 (1) of the ACHR.²¹⁶ This view has also been confirmed by the IACtHR in *Lopez Mendoza v. Venezuela* where the court declared that the state had violated the right to fair trial established in Art. 8 (1) ACHR “*in relation to the obligation to respect and guarantee rights, established in Article 1 (1) of the American Convention on Human Rights*”.²¹⁷

As a state itself is a legal construction with no capacity to act, a state action requires human behavior that can be attributed to the state.²¹⁸ According to Art. 4 of the International Law Commission (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts 2001²¹⁹, the conduct of any state organ shall be considered an act of that state under international law. An organ is any person or entity, which according to the internal law of the state is described as such.²²⁰ Even if a person is not

²⁰⁷ Ibid.

²⁰⁸ Ibid. p. 8.

²⁰⁹ ECtHR, *Ilascu and Others v. Moldova and Russia*, 2004, para. 310.

²¹⁰ ECtHR, *Assanidze v. Georgia*, 2004, para. 137.

²¹¹ Akandji-Kombe, 2007, p. 9.

²¹² Stahl, 2012, p. 110.

²¹³ Akandji-Kombe, 2007, p. 9.

²¹⁴ Stahl, 2012, p. 113.

²¹⁵ Ibid.

²¹⁶ Ibid., p. 115.

²¹⁷ IACtHR, *Lopez Mendoza v. Venezuela*, 2011, Section VIII, para. 2.

²¹⁸ Stahl, 2012, p. 123.

²¹⁹ Available with commentaries:

<http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> viewed 19 June 2014.

²²⁰ ILC Draft articles on Responsibility of States for Internationally Wrongful Acts 2001, Art. 4 (2).

an organ, the actions of that person will still be attributed to the state where that person is empowered by the law of that state to exercise elements of governmental authority.²²¹ A state is responsible for actions or omissions that violate human rights when these were “committed, instigated, incited, encouraged or acquiesced in by any public authority or any person acting in an official capacity”.²²² For a human rights violation to be found there is no necessity to prove that the violation has happened intentionally because the human rights must be protected either way.²²³ It is further irrelevant whether or not the state can identify the organ that committed a human rights violation. As the IACtHR held in *Velasquez Rodriguez v. Honduras*, the violation of a human right can be established without identifying the individual perpetrator.²²⁴ Besides, the entire subjective side of a human rights violation is irrelevant too.²²⁵ It does not matter whether the violation was done on purpose or not, as it does not require any guilt for the responsibility of the state to be triggered.²²⁶

The ECtHR in *Assanidze v. Georgia* explained that the obligations arising from the ECHR does not only impose a duty upon the higher authorities of a contracting state to respect the rights and freedoms of the convention, but also includes a duty to prevent or remedy any breach committed by officials on a subordinate level.²²⁷ The higher authorities are under an obligation to make sure that the lower level authorities adhere to human rights.²²⁸ They cannot excuse themselves by stating that they are unable to enforce the respect of the convention.²²⁹ Human rights obligations are within the responsibility of all branches of government and are valid on all levels of government too. It makes no difference whether the legislative or judicial branch violates human rights and it makes no difference if the violation is committed at the local or at the national level.²³⁰ As explained previously²³¹ a state is responsible for the omission or an act when it was committed by a public official or a person acting in a public function.²³² Art. 2 of the UNCAC provides the definition of what a public authority or public official includes and states that it may be any person holding a legislative, executive, administrative or judicial office of a State Party or any person who performs a public function or provides a public service as defined by domestic law of the state party.²³³

One last line of argument that corruption violates human rights in general might be the approach followed by Ndiva Kofele-Kale. He claims that corruption amounts to a crime of universal interest arguing that corruption represents an international crime, which triggers responsibility of all states to react.²³⁴ An international crime must be an act that is so grave that the whole international community should direct its attention to it.²³⁵ Indications that corruption is recognized as such a serious crime can be found for example in the preamble of the European Council’s Criminal Law Convention on

²²¹ Ibid., Art. 5.

²²² ICHRP, 2009, p. 24.

²²³ Stahl, 2012, p. 190.

²²⁴ IACtHR, *Velasquez Rodriguez v. Honduras*, 1988, para. 173.

²²⁵ Stahl, 2012, p. 191.

²²⁶ Ibid.

²²⁷ ECtHR, *Assanidze v. Georgia*, 2004, para. 146.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ ICHRP, 2009, p. 24.

²³¹ Section IV C.

²³² ICHRP, 2009, p. 24.

²³³ Ibid., p. 25.

²³⁴ Kofele-Kale, 2000, p. 169.

²³⁵ Ibid.

Corruption, in which the Council stated that “*corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society*”.²³⁶ Further indications are also provided by state and international community practice. The ratification of the UNCAC, or the establishment of special procedures and special tribunals for the fight against corruption underline how serious corruption is taken.²³⁷ Kofele-Kale goes even one step further and argues that there is an emerging customary law criminalizing corruption under international law.²³⁸ The reasoning for this emerging law is based on the consistent and widespread practice of the international community, the widespread condemnation of corruption in a very clear language in many international treaties against corruption combined with the cooperation of different states in fighting corruption.²³⁹ However, even with the establishment of the UNCAC it does not look like anti-corruption norms themselves have reached the status of *jus cogens*.²⁴⁰ However, it is controversial whether or not these indications suffice to successfully argue the emergence of international customary law.²⁴¹ One major issue is that there is currently an absence of international jurisprudence clearly supporting this position.²⁴² It is further uncertain whether or not state practice against corruption has been constant enough to classify it as consistent and uniform.²⁴³

Although it might be difficult to argue successfully that there is an international law obligation to fight corruption, there is still the possibility that the fight against corruption is enshrined within the core human rights treaties. As numerous mentioned, it appears to be evident that corruption has a negative effect on the protection and fulfillment of human rights. However, if an individual wants to file a claim against a state, the individual will have to refer to a violation of a specific human right. Therefore the next step is to look at specific human rights obligations that may be violated by corrupt acts. When trying to make the legal connection between human rights and an obligation to fight corruption the specific articles of the core human rights instruments need to be analyzed according to the rules of interpretation described previously.²⁴⁴ As Akandji-Kombe explains on the possibility to address human rights violations before the ECtHR, the “*observance can be tested only on the occasion of an application alleging violation of one of the substantive rights secured by the European Convention*”.²⁴⁵ This rule is applicable for human rights conventions in general as the general protection norm does not provide the necessary substantive law.²⁴⁶ In other words, there cannot be a violation of the obligation to protect, respect and fulfill human rights, when there is no violation of a substantive norm of a convention. Therefore, to determine if there is a human rights violation, it has to

²³⁶ Criminal Law Convention on Corruption, 1999, preamble; Kofele-Kale, 2000, p. 170.

²³⁷ Kofele-Kale, 2000, p. 170.

²³⁸ Ibid., p. 172.

²³⁹ Ibid.

²⁴⁰ Kofele-Kale, 2000, p. 178; Martine Boersma criticizes the work of Kofele-Kale and others and states that in general, the information provided on the criminalization of corruption under international law is far from exhaustive. She provides extensive information on further approaches to the notion of corruption as a crime under international law in part C of her book, *Corruption: A Violation of Human Rights and a Crime under International Law?*

²⁴¹ Boersma, 2012, pp. 265 – 266.

²⁴² Ibid., p. 266.

²⁴³ Ibid., p. 265.

²⁴⁴ Section IV C.

²⁴⁵ Akandji-Kombe, 2007, p. 9.

²⁴⁶ Stahl, 2012, p. 119.

be established what scope and content is covered by individual substantive human rights norms and whether or not the states behavior is directed against one of these norms.²⁴⁷ This has to be combined with the general duty of the states to secure the rights and freedoms defined in the relevant human rights treaties in order to provide the detailed obligations resting upon the state.²⁴⁸

V. Conclusion

After having looked at the different aspects of human rights and corruption, an answer to the question whether or not states have a human rights obligation to fight corruption must be provided. In a first step what seems absolutely clear for everyone is that corruption has a negative impact on the enjoyment of human rights as a whole. The main question remaining is does this negative impact amount to a violation of human rights and do states therefore have a duty to fight corruption under their human rights obligations?

Taking into consideration the negative impact corruption has on human rights, the recommendation of the ICHRP report to use a human rights approach to combatting corruption may be promising. Although there should be a human rights obligation to fight corruption it is very difficult to combat corruption by using the human rights obligations by themselves. The development of international anti-corruption law since the mid-1990s is an indication that the international community is aware of the impact corruption has, but also doubts that the existing international treaties suffice to successfully combat corruption. The creation of the UNCAC is a strong signal that the international community is working on the fight against corruption. When a state has ratified the UNCAC it certainly has an international law obligation to fight corruption. Although it seems complicated to successfully construct the notion that there is an emerging customary law containing an obligation to fight corruption it is still possible to argue successfully that the fight against corruption is enshrined in norms provided by the core human rights treaties

As human rights necessarily need a connection to a substantive norm to become a claimable right it is impossible to answer the question of this paper simply over all human rights obligations. There is just no single answer to the negative influence of corruption on all human rights obligations. Unfortunately it is, in the course of this paper, also impossible to provide an analysis on all human rights enshrined in the core human rights treaties. However, if we look at all the information provided explained here, there are multiple points that speak in favor of a human rights obligation to combat corruption.

Firstly, the state obligation to respect, protect and fulfill human rights is similar to the approach taken by the ECtHR which includes positive and negative obligations of states towards the protection of human rights. The position taken in *Marckx v. Belgium* clearly underlines that it is not sufficient for a state to simply remain inactive and not take any measures against corruption at all. The positive obligation or the obligation to fulfill human rights is what enables the people to effectively enjoy human rights.

Secondly, more than once international human rights courts have taken the position that human rights treaties do not simply provide a theoretical framework of human rights. As explained by the ECtHR in *Artico v. Italy* and in *Airey v. Ireland*, human rights treaties have to be interpreted in a way that human

²⁴⁷ ICHRP, 2009, p. 23.

²⁴⁸ Akandji-Kombe, 2007, p. 9; Stahl, 2012, p. 120.

rights become effective rights and the Court underlines that these rights cannot remain illusory. It is true that human rights treaties do not mention corruption explicitly. But in light of the interpretation in accordance with the *effet utile*, the approach necessary to provide an effective enjoyment of human rights necessarily enshrines a protection against corrupt acts wherever those acts violate one of the substantive norms of a human rights treaty.

Thirdly, it has been established that for a violation of human rights obligations to be found, it suffices that there is an imminent threat to the fulfillment of any human right. As held by the Human Rights Committee in *E.W. et al. v. The Netherlands*, a human rights violation can be found where the risk of a human rights violation is imminent. Therefore, even if corruption would not directly violate a human right protected under the core human rights treaties, the threat corruption poses could be enough to argue that corruption violates human rights. As states are the duty bearers regarding the protection of human rights, it is clear that states are obliged to take measures to reduce the risk of human rights being violated. This view can be confirmed by looking at the positive obligation which contains the obligation to protect human rights even before an actual human rights violation occurs.

And last but not least, when looking at specific human rights, it becomes even clearer that states have an obligation to fight corruption. Corruption is absolutely able to violate certain human rights, such as the right to a fair trial or the right to education. This is the case, even when under some circumstances the human rights in question are only slightly impaired or are only threatened to be impaired. Corrupt acts within the judiciary system can not only lead to a direct violation of human rights. It can also undermine the entire judiciary procedures and lead to a complete defiance of the rule of law. Where a judge is successfully bribed, the impartiality of a court is undermined. This is one of the central obligations enshrined in the right to a fair trial and the right to a fair trial must not be interpreted restrictively. Corruption not only has a negative impact on civil and political rights but also impairs the social and cultural rights protected by the ICESCR. The right to education enshrines also the accessibility to education and also includes the obligation of non-discrimination of people. The right to education requires states to provide elementary education free of charge to everybody. Corruption puts a price tag on the entry to basic education and therefore leads to a violation of the right to education.

So, do states have a human rights obligation to fight corruption?

This paper concludes that due to the potential violation of human rights inherent in all corrupt acts, states indeed have a human rights obligation to fight corruption.