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List of Abbreviations

Artt. - Articles

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CERD - Convention on the Elimination of All Forms of Racial Discrimination

CESCR - Committee on Economic, Social and Cultural Rights

CoSP – Conference of States Parties

CPI – Corruption Perception Index

CRC – Convention on the Right of the Child

CSOs – Civil Society Organisations

ESC – Economic Social and Cultural

FCPA – Foreign Corrupt Practices Act

HRBA – Human Rights-based Approach

HRC – Human Rights Council

IACA – International Anti-Corruption Academy

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic Social and Cultural Rights

ICHRP – International Council on Human Rights Policy

IRG – Implementation Review Group

NGO(s) – Non-Governmental Organisation(s)

NHRI(s) – National Human Rights Institutions

OAS – Organization of American States

OHCHR – Office of the High Commissioner on Human Rights

OLA – Office of Legal Affairs (of the United Nations)

OSCE - Organization for Security and Co-operation in Europe

RTI – Right to Information

SDG(s) – Sustainable Development Goal(s)

TI – Transparency International

ToR – Terms of Reference

UDHR – Universal Declaration of Human Rights

UKBA – United Kingdom Bribery Act

UNCAC – United Nations Convention against Corruption

UNGA – United Nations General Assembly

UNICRI - United Nations Interregional Crime and Justice Research Institute

UNODC – United Nations Office on Drugs and Crimes

UNSG – United Nations Secretary General

UNTOC - United Nations Convention against Transnational Organized Crime

UPR – Universal Periodic Review

Introduction

Although there is an understandable tendency to associate corruption to keywords such as public officials, business, capitalism or even bureaucracy, it is worth pointing out how this phenomenon dates back to times significantly preceding the coinage of such terms. Primitive forms of corruption like bribery and fraud were, in fact, already addressed and forbidden in ancient texts such as the Old Testament in its second book Exodus[1], and the 1800BC Code of Hammurabi.[2] Later on, thanks to the Romans, such acts were incorporated into a more comprehensive concept, namely *corruptio*, which encompassed behaviours characterised by misconduct and dishonesty: principles considered by a number of scholars to constitute integral part of the so-called "moral decay" of the Roman Empire[3]. In more recent times - specifically around the end of the Middle Ages - acts of corruption in the Catholic Church were considered a serious problem, as clergy members developed several corrupt practices to afford their extravagant lifestyles.[4] This brief historical introduction serves, as stated by Blackburn, to illustrate how corruption itself, in a certain sense, can be considered as old as human civilisation; and that "it may occur everywhere in the world, in all political-economic systems, to a lesser or greater extent".[5] Nevertheless, the contemporary occurrence of corruption scandals involving immense amounts of money has largely spurred academics to insert the corruption debate into developmental, economic and legal discourses and, due to its high topicality, to frame it in the post-industrialist modern-states context.[6] Still from an historical perspective, the term has always been largely identified as the abuse of office of public officials.

[1] "You shall take no bribe, for a bribe blinds the eyes of those who have sight and perverts the words of the righteous". Wayne A., Exodus 23:8, New Heart English Bible, (website) http://biblehub.com/nheb/exodus/23.htm (accessed 10 April 2017).

[2] "If a man (in a case) bear witness for grain or money (as a bribe), he shall himself bear the penalty imposed in that case". Hammurabi, The Code of Hammurabi King of Babylon about 2250 B.C. Autographed Text Transliteration Translation Glossary Index of Subjects Lists of Proper Names Signs Numerals Corrections and Erasures with Map Frontispiece and Photograph of Text, by Robert Francis Harper, Chicago: University of Chicago Press, 1904.

[3] Williams, S., Corruption and the Decline of Rome, History Today, (website) http://www.historytoday.com/stephen-williams/corruption-and-decline-rome (accessed 15 April 2017).

[4] Gbenga, Z., 'Corruption of the Church during the medieval period: a brief study' *Academia.edu*, available from Academia.edu (accessed 15 April 2017).

[5] Blackburn, K., et al., 'The incidence and persistence of corruption in economic development' *Journal of Economic Dynamics & Control*, vol. 30, 2006, pp. 2447–2467.

[6] For more details about corruption scandals in the last century visit: http://carnegieendowment.org/1995/06/01/corruption-eruption-pub-648

According to Nye, for instance, corruption is a "behaviour which deviates from the normal duties of a public role because of private-regarding (family, close clique), pecuniary or status gains; or violates rules against the exercise of certain types of private regarding influence. This includes behaviours as bribery, nepotism, and misappropriation".[7] In the last decades, however, attempts to define corruption have been progressively moving from the public sphere connotation to a more comprehensive identification: "the misuse of entrusted authority/power for private gain"[8]; a definition which is, moreover, currently used by a wide range of non-governmental and regional organisations such as, *inter alia*, Transparency International and the European Union.[9]

However, in spite of thorough studies on social and economic causes and consequences, and on the several definitions provided by national and regional jurisdictions; a universally accepted definition of corruption is still far from being reached. A theoretically reasonable justification for such lack might rely on the abovementioned Blackburn's argument: namely, that corruption is a human misconduct old as civilisation.[10] Following this theory, corruption as human behaviour, has been assuming different forms and connotations depending on the societal and cultural development of different populations in different geographical areas. Hence, the general understanding of corrupt practices could vary from society to society, implying that what can constitute misconduct in a given environment might be a necessary and lawful custom in another.[11] The cultural relativism connotation of this claim, however, is not to be understood as an obstacle to the worldwide willingness of combating corruption: in fact, notwithstanding significant differences, jurisdictions from all over the world have been increasingly adopted and implemented a remarkable amount of laws and regulations aimed at limiting

[7] Nye, J., *Corruption and Political Development: A Cost-Benefit Analysis* American Political Science Review, 1967, p. 419.

[8] Transparency International, *How do you define corruption?*, (website), 2017, http://www.transparency.org/what-is-corruption/#define (accessed 18 April 2017).

[9] "In line with international legal instruments, this report defines corruption in a broad sense as any abuse of power for private gain" European Commission, 'Report from The Commission to The Council and The European Parliament, EU Anti-Corruption Report', 2014, Available from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf (accessed 19 April 2017).

[10] Blackburn, pp. 2447–2467.

[11] For a better understanding of anthropological and sociological discourse see, *inter alia*, Mauss, M., 1924. "The Gift".

and countering the economic, social and political consequences arising from corruption.[12] At this point, an explanation of what corruption can specifically imply seems to be necessary, and would reason, eventually, that the will of this work to focus on it is of not little relevance.

From an economic perspective, surveys conducted by academics as well as international organisations have addressed the undermining role of corruption as negatively affecting economic growth due to a broad variety of factors such as the increase of costs of transactions, the decrease of foreign investments and a general lack of inputs to development due to the increase of budgeted costs. However, the latter assumption shall not lead to the conclusion that development (in its economic acceptation) is necessarily inversely proportional to corruption. For instance, countries like China or Albania are nowadays experiencing massive GDP growths[13], yet their Corruption Perception Indexes (CPI) published by Transparency International (TI) indicate the existence of high levels of corruption in their respective territories.[14] Consequently, what can be seen as an incongruity is nothing but the umpteenth proof that corruption, as a human behaviour, cannot be tackled by merely framing it in the developmental and economic discourses: assertion, the latter, of which veracity assessment constitutes a latent objective of this work. Likewise, different studies have shown that the reason why individuals, although condemning corruption, take part in corrupt practices seems to be that they understand the situation as a "collective action" problem, where it makes little sense to be "the only

[12] See, amongst the others, the 1977 United States Foreign Corrupt Practices Acts (FCPA), the 2010 UK Bribery Act (UKBA), the 2014 Brazilian Clean Company Act, and the 1998 Canadian Corruption of Foreign Public Officials Act (CFPOA). Source: Gan Business Anti-Corruption Portal, Anti-corruption conventions and legislation have global reach and introduce compliance demands on companies to prevent bribery. (website), 2017, http://www.business-anti-corruption.com/anti-corruption-legislation (accessed 11 April 2017).

[13] In December 2016, the GDP growth rates of China and Albania were 6.8% and 4.0% respectively. Source: Trading Economics, China GDP Annual Growth Rate, (website), 2017 http://www.tradingeconomics.com/china/gdp-growth-annual/forecast (accessed 18 April 2017).

[14] Transparency International (TI) is an international non-governmental organization founded in 1993. Its main purpose is to act to combat corruption and prevent criminal activities arising from it. Amongst its activities, it publishes the Global Corruption Barometer and the Corruption Perceptions Index (CPI). The latest consists of a number between 100 (very clean) to 0 (highly corrupt) which, on an annual basis, ranks countries (176 in 2016) "by their perceived levels of corruption, as determined by expert assessments and opinion surveys". The CPI generally defines corruption as "the misuse of public power for private benefit." With regards to China and Albania, in 2016 their CPIs scored 39/100 and 40/100 respectively.
Source: Transparency International, *Corruption Perception Index Overview*, (website), 2017, https://www.transparency.org/research/cpi/overview (accessed 17 April 2017).

one" that refrains from using or accepting bribes and other kick-backs.[15] Thus, not engaging in certain practices would affect not only business-related performances, but also the attainment of fully-fledged membership both at the micro- (close clique) and macro-level (society). Therefore, it seems reasonable to affirm that society is an influential actor in shaping individuals' behaviours and, in view of the innumerable facets of existing different societies all around the world, framing corruption in the universalism-relativism dialectic seems to be a reasonable means to analyse the phenomenon with. In this regard, a relativist conceptualisation of corruption could consist of arguing that to different societies correspond different perceptions of corrupt practices. Yet, as a problematic consequence, this proposition may entail the disaggregation of anti-corruption initiatives: corruption can assume different forms in different places; hence, initiatives aimed at countering them might substantially vary in relation to their geo-political localisation.

A way to tackle this argument would consist of overstepping the acknowledgment of cultural aspects of corruption and, additionally, affirming that all societies can, to a certain extent, identify acts of misconduct as corrupt practices regardless of when, why and how they occur. Bribing or giving small facilitating payments might be seen as harmless practices, but when vulnerable groups of citizens living at the margins of the society are directly affected, what can be seen as a naïve custom might turn into tragedies. As an example, in 2014 a nine-year-old boy named Rausha Kumar died at a government hospital in the northern India state of Bihar after being fitted with an empty oxygen cylinder allegedly because his family was not able to pay a Rs100 ($1.64) bribe.[16] Similarly, there are certain grounds to believe that the immense consequences of the earthquakes that lashed the Italian cities of L'Aquila and Amatrice in 2009 and 2016 causing more than

[15] Persson, A., Rothstein, B., et al., 'Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem' *Governance: An International Journal of Policy, Administration, and Institutions*, vol. 26, no. 3, 2013, pp. 449–471, available from Wiley Periodicals, Inc. (accessed 17 April 2017).

[16] Cassin, R., 'Nine-year-old boy dies because of unpaid bribe in India hospital', The FCPA Blog, (web blog), 22 September 2014, http://www.fcpablog.com/blog/2014/9/22/nine-year-old-boy-dies-because-of-unpaid-bribe-in-india-hosp.html#sthash.uG1pMsNh.dpufA, (accessed 18 April 2017).

600 victims, could have been limited by guaranteeing more transparency in the invitation to tenders for the construction of both residential and public buildings.[17]

In other words, there seems to exist a universal understanding of what should count as corruption (and its consequences) despite its enormous variations both in types, frequency and location.[18] Along these lines, it can be argued that in all cultures, in order to survive, all groups of people have had to produce at least a minimal set of public goods such as security measures, a basic infrastructure or organised/collective forms for constituting what we can define as society. When the management of such public goods is misused by those entrusted with the responsibility for handling them, the ones that are victimised see this as corruption.[19] It can be argued, furthermore, that in case of private sector-corruption, the incorrect allocation of (economic, political, social) resources affects the community in a similar manner. Thus, in this sense, the "public goods" approach applies also to the private sphere and constitutes the basis of the direct counterargument of cultural relativism: i.e., universalism.

Attempts to support this concept have been hitherto carried out by regional organisations (by providing definitions of corruption) as well as the international community as such.[20] Already in 1975, in fact, the United Nations General Assembly (UNGA) reported on the relevance of tackling "corrupt practices of certain transnational and other corporations" and condemned "all corrupt practices".[21] After more than 20 years, however, the UNGA took a more comprehensive approach to the matter and, in 1996, expressed its concern on

[17] Ansa, 'Five arrested in L'Aquila post-quake corruption case', ANSA, 27 July 2015, Available from http://www.ansa.it/english/news/2015/07/27/five-arrested-in-laquila-post-quake-corruption-case_f67a96fe-755a-4e4b-93c1-81222924e40a.html (accessed 18 April 2017). And A., Williams, 'Italy earthquake - Once again Italian Corruption proves to be as devastating as nature', Huffington Post, Available from http://www.huffingtonpost.com/antonia-williams/italy-earthquake-once-aga_b_11776670.html

[18] Rothstein, B., Torsello, D., 'Is Corruption Understood Differently in Different Cultures?' *QOG the quality of government institute*, 2013, Available from QOG University of Goteborg (accessed 19 April 2017).

[19] *Ibid.*

[20] See *supra* note 9.

[21] United Nations General Assembly Resolution 3514, Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved, A/RES/3514 (15 December 1975), Available from https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/002/27/IMG/NR000227.pdf?OpenElement (accessed 19 April 2017).

the seriousness of problems posed by corruption, which "may endanger the stability and security of societies, undermine the values of democracy and morality and jeopardise social and political development".[22] Along this path, an increasing number of stakeholders have been addressing the undermining role of corruption on a continuous manner: 1996, thus, symbolises the beginning of a new tendency, within the international community which, eventually, led the latter to give birth to the United Nations Convention against Transnational Organised Crime (UNTOC) in 2000 and, more importantly, to the United Nations Convention against Corruption (UNCAC) in 2003. The emphasis given here to UNCAC, of which analysis will constitute an integral part of this work, finds its justification in its symbolic nature: entered into force in 2005, the Convention as of date counts 181 parties and constitutes the only globally agreed measure aimed at effectively curbing corruption.[23] In this regard, given the will to frame the anti-corruption agenda in the universalism-relativism dialectic, lingering on the analysis of regional initiatives would not guarantee enough room for a universalistic approach to take place.[24]

Having said that, the UNCAC can be interestingly identified, to a certain extent, with the result of a process which, starting from acknowledging the limits of approaching corruption purely from universalistic or relativistic standpoints, led to the creation of a strategic compromise. The Convention, in fact, instead of defining corruption as such, rather defines specific acts of corruption that should be considered harmful in every jurisdiction. Specifically, in Chapter III ("Criminalization and law enforcement") the

[22] United Nations General Assembly Resolution 51/59, Action against corruption, A/RES/51/59 (12 December 1996), Available from http://www.un.org/documents/ga/res/51/a51r059.htm (accessed 19 April 2017). And United Nations General Assembly Resolution 51/191, United Nations Declaration against Corruption and Bribery in International Commercial Transactions, A/RES/51/191 (16 December 1996), Available from http://www.un.org/documents/ga/res/51/a51r191.htm (accessed 19 April 2017).

[23] United Nations Office on Drugs and Crimes, *Signature and Ratification Status of UNCAC*, (website), 2017, https://www.unodc.org/unodc/en/corruption/ratification-status.html (accessed 11 May 2017).

[24] The will of this work to only focus on the international level is not to be misunderstood. As readable in the text, the dissertation will not take into consideration regional initiatives and achievements purely for framing the discussion in the international - national dialectic. The analysis of regional mechanisms would, in this sense, leave small room to develop an analysis based on universalism vs relativism. Consequently, discussions on EU anti-corruption laws, Council of Europe (CoE) anti-corruption standards, the Organizations of American States' Inter-American Convention Against Corruption (IACAC), The African Union Convention on Preventing and Combating Corruption, and the OECD Convention on Combating Bribery will not be taken into account entirely for this reason.

Convention lists bribery and embezzlement, but also money laundering, concealment and obstruction of justice as criminal acts. Also, in defining who might be considered as possible participants in corruption, the UNCAC uses a functional approach to define "public servant": a term which covers anyone who holds a legislative, administrative, or executive office, or provides a public service, including employees of private companies under government contract.[25]

The need of effective measures characterised by a comprehensive approach towards countering corruption has been quite often expressed in the last two decades by a broad range of different international bodies. For instance, in occasion of the adoption of UNCAC in 2003, UN Secretary General (UNSG) Kofi Annan asserted that:

> 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 organised crime, terrorism and other threats to human security to flourish.[26]

Similarly, in 2015 the Human Rights Council (HRC) stressed that preventive measures are one of the most effective means of countering corruption and of avoiding its negative impact on the enjoyment of human rights.[27] In the same occasion, the HRC stated that:

> … (it) recognises that the negative impact of corruption on human rights and sustainable development can be combated through anti-corruption education, and notes with appreciation the capacity-building activities and specialised curricula developed by relevant institutions, such as the United Nations Office on Drugs and Crime and the International Anti-Corruption Academy.[28]

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[25] U4 Anti-Corruption Resource Centre, *UNCAC in a nutshell*: A quick guide to the United Nations Convention against Corruption for embassy and donor agency staff, (website), 2013, http://www.u4.no/publications/uncac-in-a-nutshell-a-quick-guide-to-the-united-nations-convention-against-corruption-for-embassy-and-donor-agency-staff/ (accessed 15 April 2017).

[26] United Nations Secretary General, *Statement on The Adoption By The General Assembly Of The United Nations Convention Against Corruption* (31 October 2003), Available from https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html (accessed 21 April 2017).

[27] United Nations Human Rights Council, the negative impact of corruption on the enjoyment of human rights, 20 June 2013, A/HRC/RES/23/9, available from http://www.refworld.org/docid/51cd59284.html (accessed 29 April 2017).

[28] *Ibid*.

In developing the 2030 Agenda for Sustainable Development, in fact, the UN included "Substantially reduce corruption and bribery in all their forms" in the 16th of the 17 Sustainable Development Goals (SDGs).[29] Furthermore, the threefold interconnection between development, human rights, and anti-corruption education as an effective preventive measure has been also demonstrated by the massive number of anti-corruption initiatives carried out by the International Anti-Corruption Academy (IACA). At the 2015 United Nations Sustainable Development Summit, in fact, the Dean and Executive Secretary of the Academy stated, *inter alia*, that "corruption is the antithesis *vis-à-vis* human rights, the venom *vis-à-vis* the rule of law, the poison for prosperity and development, and the reverse of equity and equality" and, in addition, that "investing in anti-corruption education and empowerment is the smart way towards sustainable development, safeguarding human rights, and strengthening the rule of law on the road to 2030 and beyond".[30]

Here, the will of this work to focus on preventive measures and the role of actors involved in their implementation is not to be underestimated. In this regard, in spite of the absence of a specific reference to human rights in its text[31], UNCAC dedicates an entire chapter to preventive measures and invites States Parties to engage in collaborations with all the stakeholders concerned.[32] Starting from the assumption that human rights principles are readable between the lines of specific provisions of the Convention[33], the ultimate aim of this dissertation is to assess the involvement of actors such as educational institutions,

[29] United Nations Development Programme, *Goal 16 Targets*, (website), 2017, http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions/targets/ (accessed 29 May 2017).

[30] United Nations Sustainable Development Summit 2015, *Statement by Mr. Martin Kreutner Dean and Executive Secretary of the International Anti-Corruption Academy (IACA)*, United Nations, New York, 2015, pp. 3. and 5.

[31] The term "human rights" is mentioned only in the foreword.

[32] UNCAC's chapter II "Preventive Measures" includes articles of which provisions invite State Members to collaborate with third parties in order to better counter corruption at the earliest stage possible. However, the extent to which the compulsoriness is intended in these provision is not to be taken for granted. Consequently, an analysis of this chapter will be provided in the next sections.

[33] Notwithstanding the fact that "human rights" are only mentioned in the foreword, human rights principles can be identified especially in the provision contained in Chapter II of UNCAC. Especially in article 13 "Participation of society" UNCAC promotes active collaboration of individuals in preventing corruption. This principle is, in this sense, part and parcel of the Human Rights based approach promoted here as it implies the promotion of individuals' empowerment through their progressive involvement in the decision-making and implementation processes.

non-governmental organisations (NGOs), civil society organisations (CSOs), media and national human rights institutions (NHRIs) in the fight against corruption pursued by UNCAC's States Parties. Thus, the recognition of the fruitfulness of the progressive inclusion of such non-state actors is seen here as a reasonable pathway and this work will possibly promote its enhancement. Consequently, the role of stakeholders and their inclusion in the UNCAC system of actors will be, henceforth, energetically addressed throughout the course of this work. In practical terms, the basis on which the involvement of stakeholders is here intended to be part of the human rights agenda stands in its intrinsic nature. In fact, in addition to constituting a framework operationally directed to define states as duty bearers and individuals as holders of rights[34]; the human rights agenda encompasses the creation of effective tools aimed at entitling human beings to empower themselves with the goal of directly monitoring and countering the emergence of unlawful acts at the earliest stage possible. In this sense, UN human rights bodies comments and publications serve as strategic tools for illustrating where the will of discussing human rights and corruption comes from.

[34] According to UNICEF, for example, a human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. it seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress. Source: United Nations Children's Fund, *Human Rights-based Approach to Programming*, (website), 2016, https://www.unicef.org/policyanalysis/rights/index_62012.html (accessed 20 April 2017).

Methodology

Assumption/Hypothesis

By looking at worldwide known anti-corruption laws, such as the 1977 United States Foreign Corrupt Practices Act (FCPA)[35] or the 2010 United Kingdom Bribery Act (UKBA), it can be easily noticed how the will to prosecute corruption as a violation under criminal law has been constituting the mainstream of the last five decades.[36] In spite of this, especially from the 2000's, regional and international organisations have been progressively framing anti-corruption measures into a more comprehensive agenda aimed at tackling underdevelopment from economic, political and social perspectives. The assumption of this dissertation is based on the fact that, given academic efforts to establish a link between corruption and human rights, the UNCAC system of actors should consequently show the will to insert human rights bodies' standards of participation and review mechanisms in its agenda.

The will to provide the reader with a brief explanation of the assumption has a twofold purpose: first, it serves to explore what the abovementioned literature consists of, to assess the extent to which corruption can be identified as a violation of human rights, and in what way States might fail in complying with the obligations involved in this regard. Secondly, its functional nature helps to formulate the second research question.

[35] The Foreign Corrupt Practices Act (FCPA), in a nutshell, criminalizes the bribery of foreign government officials anywhere in the world if the purpose of the bribe is to influence an official decision in order to obtain a business benefit. Additionally, the FCPA requires companies whose stock is traded on a U.S. exchange to meet certain standards regarding their accounting practices, books and records, and internal controls. Source: Suarez, E., *The Basics of the Foreign Corrupt Practices Act (FCPA)*, (website), 2008, https://www.avvo.com/legal-guides/ugc/the-basic-of-the-foreing-corrupt-practices-act-fcpa (accessed 20 April 2017).

[36] The United Kingdom Bribery Act (UKBA) establishes company liability for acts of corruption committed by persons acting on behalf of the company (i.e., employees, agents or subsidiaries). Companies should be aware that the Bribery Act has near global jurisdiction and does not distinguish between bribery and facilitation payments or large and small bribery payments. The Bribery Act also establishes a defence for a company that can prove it has 'adequate procedures' to prevent a bribe being paid on its behalf. Source: GANBACP, *UK Bribery Act 2010*, (website), 2017, http://www.business-anti-corruption.com/anti-corruption-legislation/uk-bribery-act (accessed 20 April 2017).

Research Question(s)

The research conducted so far led me to the formulation of the following research questions:

(i) How and to what extent do academics and human rights bodies address corruption as interconnected with human rights?

(ii) Given such efforts to frame corruption in the human rights discourse, how is a human rights system-based approach being enhanced in the fight against corruption within the UNCAC system?

Methodological Approach

In this section, I will illustrate the research methods used for developing the chapters constituting the dissertation. Overall, the type of research is of qualitative nature: in fact, rather than identifying what, when or who have addressed the human rights and corruption nexus, the ultimate goal of this work is to gather information suitable enough for understanding *how* and to what extent the existence of the aforementioned nexus can be considered relevant. Furthermore, the analysis will help me to assess areas of improvement in the enhancement process of a human rights-based approach to the UNCAC agenda.

Literature Review

In order to answer the first research question, chapter 1 is dedicated to a systematic review of relevant literature dealing with the human rights and corruption nexus. In this chapter, I will examine relevant publications delivered by international human rights bodies, non-governmental organisations, as well as a selected set of scientific papers provided by academics.

The United Nations Convention against Corruption (UNCAC)

In this section, I will provide for an overview of the Convention. In light of the very comprehensive approach to corruption, however, I will mainly focus on its Chapter II, entitled “Preventive measures”. The latter, in fact, includes articles which specifically refer to the participation of society in the fight against corruption. In analysing the

provisions, also, I will pay attention to the language used. An examination of the coercive power of articles is, in fact, of fundamental importance in order to understand what legal principles an evidence-based promotion of civil society involvement can be based on.

Chronological Analysis of CoSP

In order to answer the second research question, I will also assess the nature of States Parties' political willingness to further involve society in the implementation mechanism set in the UNCAC system. A possible way to comply with this objective consists of analysing, by following a chronological order, how often and in what way the various speakers have addressed the role of society in their speeches. In doing so, I will employ an empirical research in which I will scrutinise the official reports of the Conference of the States Parties (CoSP) to the UNCAC published by the United Nations Office on Drugs and Crimes (UNODC) and identify not only the frequency, but also the nature of the speeches addressing society's involvement.[37]

A post-positivist approach to the chronological analysis

As already described, in scrutinising the different CoSP reports I will try to identify the frequency and political nature (supportive/denying) of speeches addressing society's involvement in anti-corruption measures enshrined in the UNCAC. However, notwithstanding the goal of pursuing objectivity, the recognition of possible effects of bias constitutes an integral part of my approach. In practice, assuming that from the first CoSP session in 2006 to the latest in 2015 the frequency of speeches addressing society's involvement has been increasing with a progressive rate, I will expect the reports to present more and more speeches dealing with this topic. In other words, beliefs and values which characterise my personal opinion about how the UNCAC system should operate, might shape my observation. Therefore, oppositely to positivist approaches, according to which the researcher and the researched objective are independent from each other, recognising my influence towards what I will observe has brought me to acknowledge the post-positivist connotation of my analysis.

[37] The full list of reports is available at http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html.

Interviews

The involvement of society in the UNCAC's monitoring mechanism has been addressed in the debates not only by States representatives but also by non-governmental organisations. In order to gather more in-depth information, however, I will interview a limited number of relevant stakeholders. In details, in my qualitative research I will employ semi-structured interviews and instead of submitting questionnaires, I will provide for a general framework of themes to be explored and let the interviewees answer as broad as they wish.

Clarification of terms

In order to better understand the content of the dissertation, the following recurring concepts and terms need to be clarified:

Human Rights-based Approach (HRBA)

The general understanding of the HRBA consists of a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. In addition, it serves as a tool to identify rights-holders (and their entitlements) and corresponding duty-bearers (and their obligations), and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations. In doing so, the HRBA encompasses two concepts: participation and inclusion. Every person and all peoples are, according to these principles, entitled to actively participate in, and meaningfully contribute to promoting the enjoyment of civil, economic, social, cultural and political rights.[38]

Society

The term society is meant here to include a broad variety of stakeholders such as: national human rights institutions, civil society, non-governmental organisations, media, associations, victims of corruption, and educational institutions delivering anti-corruption trainings and courses. The public sector is excluded from the concept of society given here.

[38] See *supra* note 34.

UNCAC system

The United Nations Convention against Corruption is a multilateral treaty negotiated by Member States of the United Nations. In addition, as of December 2016, it counts 181 Parties: 177 UN Member States plus the Cook Islands, the Holy See, the State of Palestine, and the European Union. Consequently, the term UNCAC system would intuitively refer to the abovementioned Parties. In spite of this, the concept of system which will be used throughout the dissertation encompasses a broader variety of stakeholders concerned in the fight against corruption. Specifically, the term UNCAC system will also refer to: public sector, private sector, civil society organisations, non-governmental organisations, media, associations, victims of corruption, and educational institutions delivering anti-corruption trainings and courses.

Victims empowerment

Victims empowerment is meant here to illustrate the outcome of the adoption of a Human Rights-Based Approach. It ultimately consists of the possibility, for victims of acts of corruption, to engage in all the anti-corruption initiatives carried out by society in implementing the preventive measures enshrined in UNCAC Chapter II.

1. Linking Corruption and Human Rights

1.1. Introduction

Policymakers and scholars have always been actively involved in addressing the role of corruption in undermining the correct allocations of resources, be it in Europe, Africa, Asia, or America. Yet, it might be often appropriate to step out of a grip characterised by figures, charts and macro-level statistics and concentrate on the micro-level, by looking at corruption not only as a developmental problematic but also as a serious threat to the well-being and dignity of human beings. As previously mentioned, in September 2014 the 9 years old boy Rausha Kumar met a cruel end at a government hospital in Bihar (India) after being fitted with an empty oxygen cylinder allegedly because his family could not afford to pay a Rs100 bribe.[39] By understanding such events uniquely as unfortunate consequences of a "complicated" system, policy makers would not only make a mistake, but also underestimate a problem characterised by countless consequences of which nature would not be addressed with due attention. In this regard, especially in the last decade, scholars have provided relevant literature on corruption and human rights with the essential goals of identifying the extent to which it is reasonable to address their connection and, at the same time, of broadening the set of tools made available to all the stakeholders concerned about eradicating corruption. In addition, although global human rights instruments have recently started acknowledging the relevance of integrating the fight against corruption into the human rights agenda[40], the following section will provide for an overview of pertinent UN human rights treaty committees general comments[41], a

[39] L. Rani, 'Bihar boy dies in hospital over unpaid Rs100 bribe', Gulf News-India, 19 September 2014, Available from http://gulfnews.com/news/asia/india/bihar-boy-dies-in-hospital-over-unpaid-rs100-bribe-1.1387191, (accessed 20 April 2017).

[40] One of the first documents addressing the importance of fighting corruption for a proper enjoyment of human rights dates back to 2005 when the Office of the High Commissioner of Human rights, in its Human Rights Commission Resolution urged "States to provide transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, including members of vulnerable and marginalized groups, and to respect and protect the independence of judges and lawyers in order to achieve the full realization of human rights". Source: United Nations Commission on Human Rights, Human Rights Resolution 2005/68: The Role of Good Governance in the Promotion and Protection of Human Rights, 20 April 2005, E/CN.4/RES/2005/68, available from http://www.refworld.org/docid/45377c7fc.html (accessed 17 April 2017).

[41] The United Nations system of human rights treaties is composed by: Covenant on Civil and Political Rights (CCPR,1976), Covenant on Economic Social and Cultural Rights (CESCR, 1976), Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1969), Convention on the Elimination of

review of key literature on the topic, and an analysis of what specific human rights affected by corrupt practices have been mainly discussed in academia.[42]

1.2. The corruption and human rights nexus

1.2.1. What is understood by Corruption

Before proceeding with defining the linkages, it seems necessary to provide an overview of what is understood by corruption in academia. In this sense, the Anti-Corruption Resource Centre U4, in relation to its size and nature, interestingly classifies corruption as follows:[43]

- Petty corruption: it is the everyday corruption that takes place both within the private sector and where bureaucrats meet the public directly. Petty corruption is also described as "survival" corruption ("corruption of need"): a form of corruption which is pursued by junior or mid-level agents who may be grossly underpaid and who depend on relatively small but illegal rents to feed and house their families and pay for their children's education. It is important to highlight, however, that although petty corruption usually involves much smaller sums than those that change hands in acts of "grand" or political corruption, the amounts are not "petty" for the individuals adversely affected. In fact, petty corruption disproportionately hurts the poorest members of society, who may experience requests for bribes regularly in their

All Forms of Discrimination Against Women (CEDAW, 1981), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1987), Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC, 2003), Convention on the Rights of the Child (CRC, 1990), Convention on the Rights of Persons with Disabilities (CRPD, 2008), Convention for the Protection of All Persons from Enforced Disappearance (CED, 2010). A specific section of this chapter will also provide for an overview of the mechanisms adopted by States Members to the conventions for monitoring the implementation of principles enshrined therein.

[42] As a disclaimer, the purpose of the section dedicated to the analysis of specific human rights is far from being of exhaustive nature. The reader is therefore suggested to look at this section as a starting point for further examinations.

[43] The U4 Centre offers relevant anti-corruption material, including applied research (featured under Themes), through an extensive web based resource centre. U4 also runs in-country workshops and online courses on anti-corruption measures and strategies for partner agencies and their counterparts. Finally, a Helpdesk service providing expert answers to the most pressing questions faced by development practitioners in the field. Source: U4 Anti-Corruption Research Centre, *About U4*, (website), 2017, http://www.u4.no/info/about-u4/ (accessed 21 April 2017).

encounters with public administration and services like hospitals, schools, local licensing authorities, police, taxing authorities and so on.[44]

- Grand corruption: high level or "grand" corruption takes place at the policy formulation end of politics. It refers not so much to the amount of money involved as to the level at which it occurs - where policies and rules may be unjustly influenced. The kinds of transactions that attract grand corruption are usually large in scale – and, therefore, involve more money than bureaucratic or "petty" corruption. Grand corruption is sometimes used synonymously with political corruption, referring to corruption involved in financing political parties and political campaigns.[45]
- Systemic corruption (or endemic corruption): as opposed to exploiting occasional opportunities, endemic or systemic corruption occurs when corruption is an integrated and essential aspect of the economic, social and political system. Systemic corruption can be detected in a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which most people have no alternatives to dealing with corrupt officials.[46]

In addition, although definitions such as the TI's "misuse of entrusted power for private gain" are nowadays worldwide accepted[47]; by looking at the matter as subject of a dispute between cultural relativist approaches, illustrating what acts have universally been accepted as practical forms or corruption appears to be more reasonable than defining corruption as such. In this regard, the Resource Centre U4 identifies, *inter alia*:[48]

- Fraud: meaning economic crimes which entail deceit, trickery or false pretences, by which someone gains unlawfully. In addition, an actual fraud is motivated by the desire to cause harm by deceiving someone else, while a constructive fraud is a profit made from a relation of trust.[49]

[44] U4 Anti-Corruption Resource Centre, *Glossary*, (website), 2017, http://www.u4.no/glossary/ (accessed 22 April 2017).
[45] *Ibid*.
[46] *Ibid*.
[47] Transparency International, *What is corruption?*, (website), 2017, http://www.transparency.org/what-is-corruption/ (accessed 17 April 2017).
[48] See *supra* note 44
[49] *Ibid*.

- Bribery: it consists of offering someone money, services or other valuables, in order to persuade him or her to do something in return. The U4 describes bribery as corruption by definition. Bribes are also called kickbacks, baksheesh, payola, hush money, sweetener, protection money, boodle, gratuity etc.[50]
- Embezzlement: it is the misappropriation of property or funds legally entrusted to someone in their formal position as an agent or guardian.[51]
- Gift giving: cultural practice in many societies, it occurs when people offer presents and favours in various circumstances according to local customs. However, legal consequences arise when gift giving to and by public officials contradict the principles of impartiality, professionalism, and meritocracy. In exchange for a gift, the official is expected to show preferential treatment to the giver. In those cases, gift-giving can be regarded as bribery.[52]
- Money laundering: it is any act or attempted act to disguise the source of money or assets derived from criminal activity. Also, it is often used to disguise the proceeds of corruption, and is widely practiced by drug traffickers, human traffickers, kleptocrats and white-collar criminals.[53]

1.2.2. An introduction to human rights

Starting with the origins, the creation of the Universal Declaration of Human Rights (UDHR) in 1948 marked a watershed moment in the history of international relations.[54] For the very first time, in fact, an immense paradigm shift occurred by introducing a subject unknown hitherto: international human rights law.[55] Further, this date established the beginning of an era of drafting, writing, and ratifying a series of international

[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] The term "origins" here stands for meaning the real first attempt in which the international community reacted to the spread cruelty of World Wars I and II, in which violations of human rights and crimes against humanity occurred on a daily basis. In addition, the term is not used here in relation to the philosophical and historical background of human rights, which dates back to ancient times.
[55] Scaturro, R., 2017. 'Promoting a Human Rights based approach to Anti-corruption' *IACALUMNI Magazine*, 2017, pp. 32-36 Available from IACA Alumni Magazine online (accessed 24 April 2017).

covenants which brought about the coinage of the term Core Human Rights Treaties.[56] For the sake of clarity, however, the philosophical foundation of human rights did not appear for the first time in 1948: in fact, already in the 18th century documents such as the 1776 American Declaration of Independence and the 1789 French "*Declaration des droits de l´homme et du citoyen*" constituted strong advances in the protection of civil and political rights.[57]

The United Nations Office of the High Commissioner on Human Rights (OHCHR) defines human rights as:

> … inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. (Human Beings) are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.[58]

Functionally, the OHCHR also highlights the importance of the principle of universality of human rights as "the cornerstone of international human rights law".[59] First emphasised in the UDHR[60], this principle has been reiterated in numerous international human rights conventions, declarations, and resolutions[61]. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.[62]

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[56] See *supra* note 41

[57] See: Office of the Historian, The Declaration of Independence, 1776, USA Department of State. Available from https://history.state.gov/milestones/1776-1783/declaration (accessed 19 April 2017). And: *Conseil Constituionnel.* Declaration of Human And Civic Rights, 1789, available from http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf (accessed 19 April 2017)

[58] United Nations Office of the High Commissioner on Human Rights, *What are human rights?*, (website), 2017, http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx (accessed 23 April 2017).

[59] *Ibid.*

[60] United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available from http://www.refworld.org/docid/3ae6b3712c.html (accessed 18 April 2017).

[61] OHCHR supra note 58.

[62] "The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question". United Nations Office of the High Commissioner on Human Rights, Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, (Vienna: United Nations, 1993), available from http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (accessed 23 April 2017).

From a descriptive point of view, human rights are those fundamental rights which empower human beings to shape their lives by liberty, equality, and respect for human dignity.[63] Not surprisingly, it is exactly the focus on the latter and individuals that set the aforementioned watershed. While classical international law has always been based on the concept of states' sovereignty[64], meaning that states are the main subjects entitled to provide for the enforcement of any international obligation, international human rights law sets individuals' protection as the subject of any regulation and introduces the concept of collective enforcement through international bodies.[65] In this regard, the extent to which international human rights treaty committees have addressed the nexus between corruption and human rights will be further analysed in the next section.

1.2.2.1. Human rights and state obligations

At the international level, the United Nations human rights system of protection can be summarily divided into charter-based and treaty-based mechanisms. The latter, in addition, is composed by the abovementioned core human rights treaties of which the 1966/76 ICCPR and ICESCR constitute, together with the UDHR, the most important source of international human rights law (the so called "International Bill of Rights") and have achieved, with regards to some provisions, the status of customary international law.[66]

In principle, the application of international human rights law implies the creation of a system of rights and corresponding obligations (implying rights holders and duty bearers) which can also attach to private individuals, international organisations and other non-

[63] Luf, G., on Nowak, M., Januszewski, K., et al., (ed.), *All human rights for all*, Vienna manual on human rights, NWV Graz, Austria, 2012, p. 36. In Scaturro, R., 2017, at p. 34.
[64] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available from http://www.refworld.org/docid/3ae6b3930.html (accessed 26 April 2017).
[65] In this regard, a clarification seems to be needed. The difference between classical international law and human rights law stands here in identifying the ultimate recipient of the provisions enshrined in the treaties. Also, according to international law, states (but also other non-state actors such as IOs, the Holy See, the ICRC, the Order of Malta etc.) as sovereign entities, are the only subjects entitled to sign and ratify treaties. The argument meant in the text, in fact, relies on the important process of shifting, from states to individuals, the focal point of treaties, with the ultimate goal to hold states accountable, depending on how they comply with the implementation of international agreements on human rights.
[66] Nowak, M, Introduction to human rights, Lecture notes, Vienna Master of Arts in Human Rights, Vienna, delivered on October 2, 2015.

State actors[67]. However, as also pointed out by the OHCHR, States remain the primary duty-bearers under international law, and cannot abrogate their duty to set in place and enforce an appropriate regulatory environment for private sector activities and responsibilities.[68] Thus, international human rights law lays down obligations which States are bound to meet.[69] In brief, by becoming parties to human rights international treaties, States assume duties under international law to:

- respect human rights – meaning that states must refrain from interfering with or curtailing the enjoyment of human rights;[70]
- protect human rights – meaning that states must protect individuals and groups against human rights abuses perpetrated by non-state actors;[71]
- fulfil human rights – meaning that states must take positive action to facilitate the enjoyment of basic human rights.[72]

The importance of focusing on treaty-based protection mechanisms stands in their peculiarity. In fact, the implementation of each UN human rights convention is monitored by a committee (a quasi-judicial body established by the treaty and/or an additional protocol to the convention) of independent and impartial experts (between 10 and 26) which issues non-binding general comments/recommendations after analysing states reports (mandatory procedures in all treaties), and individual complaints (optional procedure), and conducting on-site visits amongst other procedures.[73] Interestingly, although the committees cannot provide for legal enforcement, they base their recommendations on state reporting and (usually in case of the adoption of an additional protocol) individual complaints: procedures involving actors which, in classical international law, are left aside. Indeed, through writing shadow reports and assisting victims whose rights have been violated, society and even single individuals are entitled

[67] International Council on Human Rights Policy, 'Taking Duties Seriously: Individual Duties in International Human Rights Law', 1997.
[68] United Nations Office of the High Commissioner on Human Rights, 'Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation', 2006, Available from http://www.ohchr.org/Documents/Publications/FAQen.pdf (accessed 28 April 2017).
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*

to play a fundamental role in holding states under examination accountable (at least politically) raising victims´ awareness and, thus, empowering the vulnerable groups concerned.[74]

By having a look at the committees' general comments and recommendations, it is worth pointing out the existence, as of date, of a discrepancy between the number of cases in which corruption has been addressed by some committees (CCPR committee: 28 times, CESCR committee 31 times, CRC committee: 50 times) and the volume of cases in which the undermining role of corruption has been underestimated or even ignored (CEDAW committee: 3 times, CERD committee: 7 times)[75]. The existing inhomogeneity within the set of recommendations may indicate two possible root causes: a first reasonable assumption could imply that corruption has less to do with certain human rights. Alternatively, the low number of observations addressing corruption might be a consequence of a lack of information and accountability: an option more likely to be taken into account, especially in presence of vulnerable groups such as women, refugees, and ethnic minorities.[76] Yet, what is important to point out is that, whereas the low level of attention to corruption by the CERD committee could be justified by the nature of the matter (racial discrimination might have less to do with corruption), in literature there has been said a lot regarding gender-based differences in terms of corruption impacts as well as with regards to the disparity of financial resources that women should copy with in comparison with men.[77] However, stating that corruption has a minor impact on ethnic minorities and women cannot be scientifically demonstrated in this work. Moreover, notwithstanding the relevance of such issues, analysing why there exists a lack of

[74] Shadow reporting is an important tool for NGOs supporting human rights. By submitting a shadow report to a UN treaty body committee, NGOs can highlight issues not raised by their governments or point out where the government may be misleading the committee from the real situation. Source: International Women's Rights Action Watch, *Shadow Reporting to UN Treaty Bodies*, (website), 2013, Available from http://hrlibrary.umn.edu/iwraw/reports.html (accessed 27 April 2017).

[75] As of 2012: CCPR 28 cases, CESCR 31 Cases, CRC 29 cases, CAT 12 cases, CERD 7 cases, and CEDAW 3 cases. Source: Boersma, M., *Corruption: A violation of Human Rights and a Crime Under International Law?*, Cambridge, Intersentia, 2012, at p. 131.

[76] Scaturro, R., p. 34.

[77] See, *inter alia*: Dollar, D., et al., 'Are women really the "fairer" sex? Corruption and women in government' *Journal of Economic Behavior & Organization*, vol. 46, Issue 4, 2001, pp. 423–429. And Swamy, A., et al., 'Gender and corruption' *Journal of Development Economics*, vol. 64, Issue 1, 2001, pp. 25–55.

corruption-related general comments by certain human rights committees might lead to a discussion far from being pertinent to this dissertation.

Having said that, in view of different approaches to defining the corruption and human rights nexus, simplifying the process by sorting the literature in three main subcategories seems to be an efficient solution. In this sense, scholars, and their respective works, are divided into: those supporting the existence of a nexus between corruption and specific human rights violations, the ones advocating for the creation of an independent human right to a corruption-free society, and others affirming that connecting them would constitute an inconvenient choice.

1.2.3. Corruption as a cause of human rights violations

In 2009, the International Council on Human Rights Policy (ICHRP) published the report "Corruption and Human Rights: Making the Connection" with the ultimate purpose of exploring:[78]

> …the links between corruption and human rights on the assumption that, if corruption occurs where there is inclination and opportunity, a human rights approach may help to minimise opportunities for corrupt behaviour and make it more likely that those who are corrupt are caught and appropriately sanctioned.[79]

Also, the ICHRP pointed out that:

> because all forms of corrupt practice may in the long run have an impact on human rights, it cannot be concluded mechanically that a given act of corruption violates a human right.[80]

Yet, what can be done is assessing the extent to which acts of corruption can be considered as interconnected with human rights violations through a causal link. In doing so, the ICHRP has developed a framework operationally aimed at distinguishing:

[78] International Council on Human Rights Policy, 'Corruption and Human Rights: Making the Connection', Versoix, Switzerland, 2009, p. 5.
[79] *Ibid.*
[80] *Ibid.,* p. 24.

- Direct violations: when corruption may be linked directly to a violation i.e. when a corrupt act is deliberately used to violate a right or when the standard of due diligence is not met.[81]
- Indirect violations: when corruption is an essential factor contributing to a chain of events that eventually leads to violation of a right. In this case, the right is violated by an act that derives from a corrupt act and the act of corruption is a necessary condition for the violation, without which the violation would not have taken place.[82]
- Remote violations: when many other factors contribute to the human right violation, for instance when electoral corruption leads to societal protests which are then violently repressed by the State.[83]

In framing the nexus between corruption and human rights in this sort of classification, the ICHRP's approach leads to further interesting conjectures. In fact, by combining the ICHRP's frame with the classification of states obligations, it seems theoretically reasonable to esteem whether, and if yes to what extent, the occurrence of certain acts of corruption are to be understood as causes of human rights violations. As also pointed out by Terracino, in fact, to determine if a particular corrupt practice violates a human right it is central to first identify which actions or omissions are required from the state to protect, respect and fulfil that specific human right.[84]

Moreover, the approach of Terracino does not seem to significantly differ from the ICHRP's one. In fact, in analysing the causal link between corruption and human rights he affirms that:

> …the corrupt practice in question has to be analysed in the context of the scope and content of a human right and if it affects such content in a direct or indirect way and the state fails to meet its obligation to protect, respect and fulfil the human right one may refer to corruption as violating a human right.[85]

[81] *Ibid.,* p. 27.
[82] *Ibid.*
[83] *Ibid.*
[84] Terracino, J, 'Corruption as a violation of human rights' *International Council on Human Rights Policy*, 2008, p. 10.
[85] *Ibid.*

Differently from the ICHRP, however, Terracino does not identify remote violations, but rather inserts them in the more comprehensive connotation of "indirect violation".[86] For better understanding his standpoint, Terracino efficiently provides for the following illustrative example:

> …the use of bribery to influence public officials' decisions to allow the illegal importation of toxic waste from other countries is "a common practice around the world". If a corrupt Minister allows the illicit dumping of toxic waste in a place close to a residential area the rights to life and health of the people in the area are violated. Yet, the rights are violated by the act of allowing the illicit dumping of toxic wastes. The right to health in this example is not directly violated by the bribe received by the corrupt Minister. What violates the human rights is an act that derives from such corrupt act. But, the act of corruption was a necessary condition for the violation. Without the bribe, the official would not have allowed the illicit dumping of toxic wastes.[87]

Hence, even if the occurrence of an act of corruption (in this case bribery) does not constitute a violation of human rights *per se*, there exist certain grounds to believe that the act is, nonetheless, a contributing factor in a chain of events that eventually leads to an "indirect" violation[88]. Thus, as recognisable in their works, both for Terracino and the ICHRP, before proceeding with any assessment of causal links, what is important to clarify first is whether, and to what extent, the duty bearer (i.e. the state under examination) has met its obligations to respect, protect, and fulfil a given human right. Subsequently, it is possible to assess where (at what level) and how corruption has negatively affected the state in the process of complying with its obligations.

Similarly, in "Corruption and Human Rights", Peters clearly states that "this is not about any (new) human right to a corruption-free society".[89] Rather, it is important to identify

[86] *Ibid.*
[87] Terracino, p. 11.
[88] *Ibid.*
[89] Peters, A., 'Corruption and Human Rights' Basel Institute of Governance, Basel, Switzerland, 2015, p. 11.

how corruption might (directly or indirectly) negatively affect the enjoyment of human rights enshrined in UN conventions.[90]

Although there exists a general tendency by international human rights bodies to broadly rely on such approaches[91]; classifications like the ICHRP's and others akin to it are not exempt from criticism. In fact, according to Boersma, the use of terms like "direct", "indirect", or even "remote" violations might lead to conceptual confusion and uncertainty in legal terms.[92] Furthermore, she proposes an alternative approach which encompasses various "dimensions" of the connection between corruption and human rights, with the aim of avoiding heterogeneity in identifying violations.[93]

Specifically, she defines five dimensions:

(i) Shared environment of corruption and human rights violations

In this dimension, the author identifies a determined environment which, due to a lack of integrity, constitutes a fertile ground for corruption and violations of human rights to flourish.[94] Empirically, Boersma identifies the lack of integrity with low scores of CPIs, stating that human rights-respecting democracies are generally less corrupt than authoritarian states.[95]

(ii) Human rights necessary to fight corruption

According to the author, this dimension consists of understanding human rights as essential tools in the fight against corruption. In identifying the rights, however, she affirms that it is mainly the right to freedom of expression, the right to

[90] *Ibid.*
[91] In 2013, the General Assembly adopted resolution 23/9 by the Human Rights Council (HRC) titled "The negative impact of corruption on the enjoyment of human rights". In the resolution, the HRC highlighted, inter alia, that: "…corruption constitutes one of the obstacles to the effective promotion and protection of human rights, as well as to the achievement of the Millennium Development Goals and other internationally agreed development goals" and that "Recognizes that all forms of corruption can have a serious negative impact on the enjoyment of all human rights, and that the Human Rights Council should consider this issue further", See s*upra* note 27.
[92] Boersma, M., *Corruption: A violation of Human Rights and a Crime Under International Law?*, Cambridge, Intersentia, 2012, p. 197.
[93] *Ibid.*
[94] Kolthoff, E., 'Integriteit, Mensenrechten en de Veiligheidsmyhte' *Boom Juridische Uitgevers*, Den Haag, 2010. In Boersma, p. 197.
[95] Boersma, p. 197.

assembly, and the right to freedom of association that are violated in case of corrupt regimes eager to preserve their power.[96] Nevertheless, this approach might be exploited by policy makers which, by only focusing on the protection of such civil and political rights, would end up creating a sort of hierarchy amongst equal principles and jeopardising the universal foundation of human rights, i.e. that human rights are interdependent and indivisible.[97]

(iii) Human Rights of Persons Accused of Corruption

An aspect which is often left aside is the possibility that, as interestingly highlighted by Kututwa, persons accused of corruption might have to face violations of their own rights deriving by anti-corruption measures.[98] As interestingly pointed out by the ICHRP, in fact:

> Anti-corruption campaigns do not operate in a political vacuum. Many anti-corruption campaigns that claimed to tackle corruption (often at the highest levels of government) also promoted political interests. In Thailand in 2007, Bangladesh in 2007 and Fiji in 2006, elected heads of government were deposed by military leaders on grounds of corruption. Military involvement in anti-corruption programmes poses particular threats to human rights. The constitution is often suspended. Restrictions on civil liberties, such as freedom of assembly, are frequently imposed. Opposition politicians and activists are often unlawfully detained. In many instances press freedom is severely restricted.[99]

[96] Buckley, M., on Alfredsson, G., et al., (ed.), Anti-Corruption Initiatives and Human Rights: The potentials, The Raoul Wallenberg Institute Human Rights Library 9, The Hague, 2002, p. 188-90.
[97] "All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others." OHCHR, *supra* in note 68.
[98] Kututwa, N., 'How to Combat Corruption While Respecting Human Rights' *Working Paper International Council on Human Rights Policy*, 2007. In Boersma, p. 198.
[99] ICHRP, 2009, p. 65.

(iv) Anti-Corruption Reforms Negatively Impacting upon the Human Rights of Vulnerable Groups

As highlighted by Gathii, author of "Defining the Relationship between Rights and Corruption", in taking measures against corruption (especially African) governments tend to always focus on the eradication of grand corruption.[100] On the other side, petty corruption acts are rarely addressed and, considering the ultimate goal of attracting foreign investors, the poor can never benefit from reforms.[101]

(v) Corruption as a Violation of Human Rights

This dimension is identified by Boersma as when the occurrence of acts of corruption affect and/or prevent states to comply with their obligations to respect, protect, and fulfil human rights.[102]

Yet, especially in view of point (v), Boersma acknowledges that her "dimensions" of connection between human rights and corruption do show some overlaps with the ICHRP categorisation.[103] However, notwithstanding the importance of Boersma's tendency to frame the nexus in a more comprehensive discourse, the goal of this work consists of focusing on the fifth dimension, i.e. how corruption might lead to human rights violations. In this regard, scholars have provided substantial literature on how acts of corruption might lead to the violation of civil and political, as well as economic, social and cultural rights. The aim of disclosing such analyses, though, is far from being of exhaustive nature. In fact, as also pointed out by Boersma:

> …the study does not claim exhaustiveness: corrupt acts may also violate other rights. Also, generalisations ought to be avoided. Each case of corruption should be examined individually to ascertain whether there is a violation of certain rights.[104]

[100] Gathii, J., 'Defining the Relationship between Rights and Corruption' *University of Pennsylvania Journal of International Law*, vol. 31, 2009, p. 125-202 at p. 180-197. In Boersma, p. 199.
[101] *Ibid*.
[102] Boersma, p. 199.
[103] *Ibid.*, p. 198.
[104] *Ibid*., p. 267.

Having said that, an additional reason supporting the will to only focus on the latter rights derives from the availability of sources: as previously mentioned, in fact, the examination of causal links between acts of corruption and violations of rights enshrined in the CEDAW might be affected by a series of intervening variables which would lead the discussion away from the very focal point.[105] Consequently, as the following subchapter has a mere indicative purpose, the next sections are dedicated to assessing the extent to which certain rights codified in the ICCPR and ICESCR might be affected by the interference of corrupt practices.[106]

1.2.3.1. The impact of corruption on Civil and Political Rights

The following chapter is dedicated to a review of literature on three rights enshrined in the ICCPR: the right to equality in the judicial system, the right to political participation, and the right to freedom of expression. Yet, whereas the undermining role of acts of corruption in the enjoyment of the first two rights has been thoroughly discussed by different scholars, the right to freedom of expression enshrined in Art. 19 ICCPR seems to be given lesser focus by academics, especially with regards to its clause n. 2, i.e. the right to information. This is why the analysis of the latter will be conducted in different terms.

1.2.3.1.1. The rights to equality before Courts and to a Fair Trial[107]

According to Nowak, the right to equality before courts and tribunals enshrined in Art. 14 ICCPR constitutes a specific expression of the general right to equality extensively treated in article 26.[108] Thus, in this context, the right to equality implies equal access to justice and ensures the treatment of parties without discrimination based on race, colour,

[105] See *supra* note 77.
[106] As already said, the selecting process of rights analysed in the following section is not to be misunderstood. Far from being exhaustive, the chapter is comprised by those rights which have been majorly discussed in literature and of which illustrations will guarantee the reader a better understanding of the nexus between human rights and corruption. Otherwise, in order to provide for a more complete illustration the author should engage in legal analyses far from being pertinent to the aim of this chapter.
[107] United Nations General Assembly, International Covenant on Civil and Political Rights, Art. 14, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available from http://www.refworld.org/docid/3ae6b3aa0.html (accessed 29 April 2017).
[108] Nowak, M., 'UN Covenant on Civil and Political Rights: CCPR Commentary', 2nd edn., Kehl, Engel, 2005, p. 307. In Boersma, p. 207.

sex, language, religion, political opinion, status and so on.[109] In practice, as also highlighted by the ICHPR and Boersma, this means that Art. 14 ICCPR is violated whenever public officials actively discriminate against the parties of a dispute by asking for and/or accepting bribes for speeding up processes or steering investigations and verdicts.[110] In this regard, TI, e.g., reported on two concrete examples of bribes paid to speed up court processes: Croatia and Paraguay.[111] Thus, by accepting bribes judges jeopardise non-discrimination and equality: principles at the basis of the impartiality of judicial systems. As interestingly stated by Terracino, however, the independence of the judiciary is not usually infringed upon only through bribery, but also by means of trading in influence and abuse of functions.[112]

Moreover, as pointed out by the HR Committee in General Comment 32, Art. 14 ICCPR also gives individuals the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[113]

Therefore, the occurrence of acts of corruption in the process of judges' appointment would not only violate procedural norms, but also compromise judges' competence.[114] Consequently, Terracino argues that the appointment of judges should be based on personal qualifications and moral authority: characteristics susceptible to be affected by acts of corruption but without which a given state would not comply with the obligation to respect the rights of those citizens who apply to the justice system.[115]

[109] United Nations Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, available at: http://www.refworld.org/docid/478b2b2f2.html (accessed 30 April 2017).
[110] ICHRP, p. 35-37. And Boersma, p. 208.
[111] See: Transparency International Croatia, 'Croatia Still in Transition' (ed.), on Transparency International, *Global Corruption Report 2007: Corruption in Judicial System*, Cambridge University Press, 2007. And Transparency International Paraguay, 'Politics and nepotism Plague Paraguay's Courts' (ed.) on Transparency International, *Global Corruption Report 2007: Corruption in Judicial System*, Cambridge University Press, 2007. In Boersma, p. 207.
[112] Terracino, p. 10.
[113] *Supra* note 108.
[114] Terracino, p. 10.
[115] *Ibid*.

1.2.3.1.2. The rights of political participation[116]

According to Art. 25 ICCPR, States Parties to the Covenant shall recognise and protect the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service.[117]

With regards to the voting process, the HR Committee also affirms that States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.[118] However, according to Terracino, acts of corruption are most likely to undermine the right to vote, in fact:

> … it is fairly straightforward to determine that the bribing of voters in order to persuade them to vote or refrain from voting constitutes an interference with the integrity of an election and therefore, a direct violation of the right to vote.[119]

This is why, according to Nowak, States Parties not only have to respect the right to political participation, but are also obliged to actively take all the positive measures to guarantee that citizens have actual opportunities to exercise their rights.[120] Specifically, as highlighted by the ICHRP, states have the duty to assure that citizens must be free to vote without undue influence or coercion of any kind that may distort the free expression of their will.[121]

Although there exists a significant number of papers dealing in depth with the different principles enshrined in Art. 25 ICCPR[122]; in 2004, Joseph *et al*. interestingly pointed out that:

> …the General Comment (No. 25) fails to mention one of the biggest threats to the right of political participation: corruption. Corrupt political processes

[116] *Supra* note 107, Art. 25.
[117] United Nations Human Rights Committee, CCPR 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, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available from http://www.refworld.org/docid/453883fc22.html (accessed 5 May 2017).
[118] *Ibid*., para 11.
[119] Terracino, p. 15.
[120] Nowak, 2005, p. 569, para 9. In Boersma, p. 213.
[121] ICHRP, 2009, p. 43.
[122] For example, the ICHRP, in "Corruption and Human Rights: Making the Connection" affirms that: "corrupt practices can also negatively affect another right of political participation: the right to equal access to public service. Access to positions in the public service should be based on an objective and reasonable appointment process". ICHRP, 2009, p. 44.

> systematically deny persons the right, on a fair and equal basis, to take part in public affairs. In order to fully comply with art. 25, a State party must take measures to prevent and punish instances of corruption and bribery.[123]

Admittedly, it seems inconceivable that the HR Committee has never analysed corruption in its General Comment 25, especially in view of the ease with which a vote, for example, might be interpreted as a commodity rather than a right. However, as efficiently reported by Boersma, the HR Committee published its General Comment No. 25 already in 1996: i.e. when the international community was still starting to properly tackle corruption and insert it in the human rights discourse.[124]

1.2.3.1.3. The right to information[125]

As interestingly explained by Weeramantry in 1994: "libertarian or liberalist theories concentrate on the right of the speaker".[126] That is, perhaps because Art. 19 ICCPR has been traditionally identified as the general right to freedom of expression. However, as interestingly pointed out by Beatson and Cripps, differentiating freedom of expression from the right to information might constitute an unwelcome choice insofar the second constitute a precondition of the full exercise of the first.[127] In this sense, the HR Committee, in 1999, stated what can constitute a remarkable break with the abovementioned tradition. In fact, in expressing its view on the *Gauthier v Canada* case, it stated that Art. 19 ICCPR:

[123] Joseph, S., et al., 'The International Covenant on Civil and Political Rights: Cases, Materials and Commentary' 2nd edn, Oxford: Oxford University Press, 2004. In Boersma, p. 213.
[124] Boersma, pp. 213-214.
[125] *Supra* note 107, Art. 19.
[126] Weeramantry, 'Access to information: A New Human Right. The Right to Information', 4 *Asian Year Book of International Law*, vol. 99, 1994, p. 103. In McDonagh, M., 'The Right to Information in International Human Rights Law' *Human Rights Law Review*, vol. 13:1, Oxford, Oxford University Press, 2013, p. 43.
[127] Beatson and Cripps (eds), 'Freedom of expression and Freedom of information: Essays in Honour of Sir David Williams', Oxford. Oxford University Press, 2000.

> implies that citizens, in particular through the media, shall have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.[128]

Seven years later, precisely in December 2004, the UN Special Rapporteur on Freedom of Opinion, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression adopted a joint Declaration in which they stated, *inter alia*, that:

> the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[129]

This new tendency within the international human rights bodies system, of highlighting the importance of the right to information as independent from freedom of expression, has been further developed again by the HR Committee which, in 2011, published General Comment No. 34. In paragraph 18 and 19, in fact, the Committee affirmed not only that paragraph 2 of article 19 ICCPR embraces a right of access to information held by public bodies, but also that in order "to give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest" and that States "parties should make every effort to ensure easy, prompt, effective and practical access to such information".[130]

To date, claims in favour of understanding the right of information as an intrinsic right rather than an instrumental right have been supported by a wide range of scholars. For example, Florini argued that access to information is not only "a necessary concomitant

[128] Robert W. Gauthier v. Canada, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999), para 13.4.
[129] OSCE Representative on Freedom of the Media, 'International Mechanisms for Promoting Freedom of Expression', Available from http://www.osce.org/fom/38632?download=true (accessed 3 May 2017).
[130] United Nations Human Rights Committee, General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, available from http://www.refworld.org/docid/4ed34b562.html (accessed 6 May 2017).

of the realization of all other rights but also a fundamental human right".[131] Similarly, in "The role of Transparency in Public Life", Stiglitz affirms that, notwithstanding the instrumental role of the right to information, already the concept of openness is an intrinsic value as "citizens have the right to know".[132] Moreover, a number of scholars have also addressed the "the right to know" as a fundamental pre-requisite of the implementation of principles at the basis of democratic societies, i.e. transparency and accountability in government.[133] While it seems clear that access to information plays a pivotal role in the achievement of transparency[134]; in terms of how it could enhance governments' accountability, the role of access to information has been accurately supported, *inter alia*, by Franschett and Bishop. Precisely, the first affirms that the right to information "can be used for exposing wrongdoing or highlighting areas of conflict within government, (and) thereby serving the value of accountability"; whereas Bishop suggests that "access to information is necessary in order to hold governments accountable and to discover and prevent government corruption".[135]

It is interesting to notice that neither the ICHRP, nor Boersma and Terracino include access to information as one of the possible rights which might be affected by the occurrence of acts of corruption. Bribing a public official for the disclosure of information supposed to be of public domain by law might constitute, in fact, a straightforward example of how corruption might lead to a violation of such right.

Yet, a possible reason of such lack in literature might rely on the fact that academics have been so far focusing on the "main" principle enshrined in Art. 19, i.e. the right to freedom of expression. Alternatively, the specific nature of the right to information still affects the ways it is generally understood. In fact, as also pointed out by Peters, the effective

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[131] Florini, A., *The Right to Know: Transparency for an Open World*, New York, Columbia University Press. 2007. In McDonagh, 2013. p. 38.

[132] Stiglitz, J., 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life' *Oxford Amnesty Lecture*, Oxford, U.K., 1999.

[133] McDonagh, M., 'The Right to Information in International Human Rights Law' *Human Rights Law Review*, vol. 13:1, Oxford, Oxford University Press, 2013, p. 53

[134] Hale, T., 'Transparency, Accountability and Global Governance' *Global Governance*, Vol. 14, No. 1, 2008, pp. 73-94. In McDonagh, p. 53.

[135] Bishop, C., Internationalizing the Right to Know: Conceptualizations of Access to Information in Human Rights Law, PhD Thesis, University of North Carolina at Chapel Hill, p. 69, Available from https://cdr.lib.unc.edu/indexablecontent/uuid:14f234b7-8689-4dee-a674-f7d91b51e4e8 (accessed 7 May 2017). In McDonagh, p. 54.

protection of the right to information is an indispensable instrument of combating corruption[136]. In other words, there seems to exist a general tendency to still approach the right to information as a tool: an effective measure that States are called upon to use for better complying with transparency standards and for increasing their liability.

As an example, in 2005 the Parliament of India adopted an act which, according to Aruna Roy, constitutes the most fundamental law India has never seen: the Right to Information Act (RTI Act).[137] In brief, this law provides for setting out the practical regime for citizens to secure their access to information under the control of public authorities, with the goal of promoting transparency and accountability of the government.[138] Defined also by the Times of India as a "very good tool to improve the functioning of government", the RTI Act constitutes a fundamental right in India and a worldwide milestone in the protection and promotion of the right to access to information.[139]

1.2.3.2. The impact of corruption on Economic, Social and Cultural Rights

This section encompasses a review of relevant literature on how corruption might affect the enjoyment of three fundamental rights enshrined in the ICESCR: the right to food, the right to education, and the right to health. The will to focus only on these three rights relies on the fact that, according to the author, the level of exhaustiveness of the existing respective academic analyses allows to better illustrate the matter. However, before proceeding with the analysis of such rights, in order to understand how the occurrence of corruption leads social rights violations, due attention shall be given to the nature of State Party obligations deriving from Article 2 ICESCR.[140]

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[136] Peters, p. 8.

[137] Aruna Roy is an Indian social activist who co-founded the Mazdoor Kisan Shakti Sangathana (MKSS), a social and grassroots organization for the empowerment of workers and peasants. It is a major civil rights movement in India and played a crucial role in the establishment of the Right to Information Act (RTI). Source and more information at http://www.thefamouspeople.com/profiles/aruna-roy-5442.php.

[138] Madhavi, K., 'Right to Information Act: A Tool to Tackle Corruption "Cancer Of Corruption And The Numbering Millennium" *IOSR Journal Of Humanities And Social Science* (IOSR-JHSS), vol. 21, Issue 2, 2016, pp. 13-15.

[139] *Ibid*.

[140] United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available from http://www.refworld.org/docid/3ae6b36c0.html (accessed 7 May 2017).

According to the UN Committee on Economic, Social and Cultural Rights:

> while great emphasis has sometimes been placed on the difference between the formulations used in this provision and those contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities.[141]

Besides the "significant similarities", however, as pointed out by a wide range of scholars, while it seems clear how corruption may affect States' compliance with the obligations enshrined in Art. 2 ICCPR, Art. 2 ICESCR substantially differs from the latter[142], as it contains, *inter alia*, three main principles deserving due attention, especially in relation to how anti-corruption measures can fruitfully intervene in this framework:[143]

a. The first obligation enshrined in article 2 ICESCR is "to take steps". These steps, according to the CESCR, must be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[144] According to Boersma, in addition, it seems reasonable to understand such steps as the States' positive obligation to remove all the obstacles to the realisation of economic, social and cultural rights.[145] Thus, in affirming that States are in principle required by the ICESCR to take anti-corruption measures[146], Boersma's argument relies on the fact that although the word corruption is not even mentioned in the ICESCR, there exists a consistent enough amount of literature on the undermining role that corruption can

[141] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, available from http://www.refworld.org/docid/4538838e10.html (accessed 7 May 2017).
[142] Peters, p. 16.
[143] Scholarly efforts have substantially contributed to better understanding such provisions, including the Limburg Principles and the Maastricht Guidelines. The Limburg Principles were drafted in 1986 by a group of 29 experts who agreed upon aa number of principles which, in their view, reflected the state of international law at that time. The Maastricht came into being in 1997 when a group of experts elaborated upon the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies. Source: Dankwa, V., et al., 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' *Human Rights Quarterly*, vol. 20, No. 3, 1998, pp. 705-730. In Boersma. p. 229.
[144] *Supra* note 141, para 2.
[145] Boersma, p. 230.
[146] Peters, p. 17, and Boersma p. 230.

play in the enjoyment of ESC rights that it sounds reasonable to insert anti-corruption initiatives in the set of positive measures that States are called upon to take.[147]

b. The second core obligation upon States parties set out in Article 2 ICESCR consists of requesting the achievement of the full realisation of the rights recognised in the Covenant in a progressive and continuous manner.[148] In other words, the term "progressive realisation" is intended to require States parties to respect, protect, and fulfil economic, social, and cultural rights as expeditiously and effectively as possible.[149] Furthermore, as pointed out by the ICHRP and in the Maastricht Guidelines, the CESCR remarks that the adoption of deliberately retrogressive measures constitutes a violation of the Covenant.[150]

   Moreover, Sepùlveda affirms that Art. 2 ICCPR establishes the obligation to allocate a certain degree of priority to human rights in the management of resources.[151] In this light, scholars as well as the ICHRP argue that the embezzlement of public funds by high level officials violates the latter obligation since, in such cases, "the financing of the lifestyle of a country's officials enjoys priority over the realisation of economic, social and cultural rights" and, consequently, private interests dominate over the public's.[152]

c. Last but not least, Art. 2 ICESCR calls upon States parties to take steps "to the maximum of their available resources".[153] Whereas this principle does not imply that States have to dedicate *all* their resources to the realisation of the rights enshrined in the covenant; as pointed out by Sepùlveda and Boersma, it does regulate the freedom

[147] See, *inter alia,* Terracino and Peters.
[148] Supra note 141, para 9.
[149] *Ibid*.
[150] Dankwa and ICHRP, 2009. In Boersma, p. 232.
[151] Sepùlveda, M., *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerp, Intersentia, 2003, p. 324. In Boersma, p. 232.
[152] As an example, Boersma reports on Greace Mugabe (the First Lady of Zimbabwe) and her shopping sprees as a "flagrant violation of the obligation to accord priority to human rights in resource allocation". Source: UK Harare, 'Mugabe buys 'Gucci' Grace $1.3m diamond', New Zimbabwe, 8 December 2016, Available from http://www.newzimbabwe.com/news-33668-Mugabe+buys+%E2%80%98Gucci%E2%80%99+Grace+$1.3m+diamond/news.aspx (accessed 9 May 2017). In Boermsa, p. 233.
[153] United Nations General Assembly, *supra* note 140.

of States to allocate resources and requires the latter to do so in an effective and efficient manner.[154] In complying with this obligation, Peters affirms that States parties shall primarily define what resources are available and, subsequently, what the relative maximum is.[155] Therefore, scholars affirm that whenever the pre-established resources to be allocated to the realisation of economic, social and cultural rights are misappropriated and devoted to private interests of public officials, this constitutes, also according to the Maastricht Guidelines, a violation of Art. 2 ICESCR.[156]

1.2.3.2.1. The right to food

The right to food is one of the provisions enshrined in Art. 11 ICESCR and constitutes an element of a broader principle enshrined in the article, i.e. the right to adequate standard of living.[157] To better understand the content of the right to food, the 1999 CESCR's General Comment No. 12 exhaustively clarifies, *inter alia*, two precepts at the basis of the right to food: adequacy and sustainability of food availability and access.[158]

First, the notion of adequacy is meant to encompass a "number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances".[159] Second, the term "sustainability" implies that food should be accessible for present and future generations and, as also highlighted by Boersma, it should incorporate availability and accessibility in the long run.[160] The latter principles are also considered by the CESCR as linchpins of the adequate understanding of the right to food. In fact, in paragraph 12 the Committee affirms that the term "availability" refers to individuals' possibility to either feed

[154] Boersma, p. 232.
[155] Kinley, D., Saul, B., and Mowbray, J., *The International Covenant on Economic, Social and Cultural Rights*, Oxford, Oxford University Press, 2014, p143. In Peters, p. 17.
[156] Dankwa and ICHRP, 2009. In Boersma, p. 231.
[157] United Nations General Assembly, *supra* note 140.
[158] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, available from http://www.refworld.org/docid/4538838c11.html. At para 7 (accessed 8 May 2017).
[159] *Ibid*.
[160] *Ibid*., and Boersma, p. 236.

themselves directly from natural resources, or to rely on a well-functioning distribution of food products from the site of production to the place of demand.[161]

General Comment No. 12 paragraph 13 is, instead, dedicated to explaining the principle of accessibility which encompasses two dimensions of "access" to food: economic and physical.[162] While economic access entails that food has to be affordable in relation to standards of living, physical access implies that food should be accessible to everyone, vulnerable and disadvantage groups included.[163]

In 2001, the Special Rapporteur on the Right to Food identified corruption, together with other seven phenomena, as one of the major problem areas which directly affect the realisation of the right to food.[164] The report, however, does not provide for a detailed explanation of how, and to what extent acts of corruption might undermine the enjoyment of the right.

Yet, while international human rights bodies seem to fail in addressing the nexus between corruption and the right to food, analyses of the matter have been provided in academia especially with regards to the four principles discussed above. According to the ICHRP, for instance, "corrupt practices related to the possession and use of land and natural resources can restrict the availability of food and violate the right".[165] As an example, Boersma discusses a case of corruption in the supply of humanitarian food aid: in her view, in fact, when food is embezzled by public officials, the availability element is unarguably violated by such an act of corruption.[166]

With regards to the principle of accessibility, Terracino affirms that there might be specific circumstances under which corruption plays a strong undermining role, i.e. in case of particularly impoverished groups of people in need of welfare through special

[161] *Ibid*., para 12.
[162] *Ibid*. para 13.
[163] *Ibid*.
[164] United Nations Economic and Social Council, *Report by the Special Rapporteur on the Right to Food, Jean Ziegler, Submitted in Accordance with Commission on Human Rights Resolution 2000/10*, E/CN.4/2001/53, 7 February 2001, para 69, Available from http://www.righttofood.org/wp-content/uploads/2012/09/ECN.4200153.pdf. (accessed 10 May 2017).
[165] ICHRP, 2009, p. 50.
[166] Boersma, p. 236.

food programmes.[167] In describing how the right to food can be violated in such situations he provides for the following example:

> … when a person in the programme embezzles funds, which were destined to buy and distribute food, or when he embezzles the food itself, and diverts the food into the black market for personal profit, this practice will result in socially vulnerable people without direct access to their food ration.[168]

According to Boersma, in addition, corruption in the food production chain may affect the nutritional value of the food (dietary needs[169]) and its adequacy, for instance, when food inspectors are bribed to turn a blind eye to unsafe products.[170]

In conclusion, while it is true that the role of corruption in undermining the right to food needs further in-depth analyses, international human rights bodies seem now to tackle the issue with greater attention: in fact, although until the 2000's corruption has been slightly addressed as a violation of the right to food[171], the last decade has witnessed an increase in the number of human rights mechanisms properly dealing with it, such as the United Nations High Commissioner for Human Rights Navy Pillay, who, in 2001, stated that:

> The money stolen through corruption every year is enough to feed the world's hungry 80 times over. Nearly 870 million people go to bed hungry every night, many of them children; corruption denies them their right to food, and, in some cases, their right to life.[172]

And, more specifically, the CESCR in its 2008 concluding observations on India where, *inter alia*, affirmed that:

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[167] Terracino, p. 17.
[168] *Ibid*.
[169] "*Dietary needs* implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation". *Supra* note 141, para 9.
[170] Boersma, p. 236.
[171] See, *inter alia*, the Report of the Special Rapporteur on the right to food. CHR 57th session. 7 February 2001. UN Doc. E/CN.4/2001/53, at para 28.
[172] United Nations Office of the High Commissioner for Human Rights, *The Human Rights Case Against Corruption*, Geneva, United Nations, 2013, Available from http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf (accessed 11 May 2017).

the Committee is also concerned by reports of corruption, inefficiency and discrimination in distribution that hamper access to food, particularly by the disadvantaged and marginalised groups of society who have been excluded from the benefits of the State party's economic growth.[173]

1.2.3.2.2. The right to education

The right to education is recognised by States parties to the ICESCR at artt. 13 and 14, in which they affirm, *inter alia*, that the role of education should be directed to the full development of the human personality and the sense of its dignity.[174]

Regarding corruption, interestingly, neither the Special Rapporteur on the Right to Education nor the he CESCR in its General Comment No. 13 have so far addressed the undermining role in the enjoyment of the right to education.[175] Nevertheless, similarly to other rights enshrined in the Covenant, the CESCR frames the obligations upon States parties in a system of four principles: availability, accessibility, acceptability, and adaptability and, besides the U4 Research Centre efforts aimed at identifying corruption at specific levels of the education sector[176], academics have so far mainly focused on how corrupt practices may affect the right to education by framing their analyses in the abovementioned system of principles.[177]

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[173] United Nations Economic and Social Council, *Concluding Observations of the Committee on Economic, Social and Cultural Rights on India*, E/C.12/IND/CO/5, 8 August 2008, Available from https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/436/08/PDF/G0843608.pdf?OpenElement (accessed 11 May 2017).

[174] United Nations Committee on Economic, Social and Cultural Rights, *supra* note 140, Art. 11.

[175] For the sake of truth, however, the Special Rapporteur on the right to education has addressed corruption and its undermining role at the twenty-ninth session of Human Rights Council; precisely in the "Protecting the right to education against commercialization" report. Source: United Nations General Assembly, *Report of the Special Rapporteur on the right to education, Kishore Singh*. A/HRC/29/30. 10 June 201, Available from https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/120/82/PDF/G1512082.pdf?OpenElement (accessed 11 May 2017).

[176] In 2006, the U4 Research Centre issued a report named "Corruption in the education sector" in which it shows how corruption can affect the education sector at three macro-levels: at the policy level, at the central ministry level, and at the school and administrative level. Source: U4 Anti-Corruption Resource Centre, *Corruption in the education sector*, (website), 2006, http://www.u4.no/publications/corruption-in-the-education-sector/ (accessed 9 May 2017).

[177] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, available from http://www.refworld.org/docid/4538838c22.html. At para 6. (accessed 8 May 2017).

First, with regards to acceptability, the CESCR intends education as a service which should be relevant, culturally appropriate, and of good quality.[178] In defining how corruption might affect this aspect of the right to education, the ICHRP highlights how corruption in procurement affects the acquisition of educational material, meals, buildings, and equipment, with the consequence of making education often inappropriate by lowering its quality.[179]

Second, according to the CESCR, educational institutions and programmes must be accessible to everyone in respect of three "overlapping dimension": non-discrimination, physical accessibility, and economic accessibility.[180] However, as also pointed out by Boersma, the principle of accessibility might be affected by a wide range of corrupt practices.[181] As an example, she argues that bribes can be asked or offered for countless purposes like for passing exams, having good grades, or for admission to educational institutions.[182]

Third, in General Comment No. 13 the CESCR highlights the importance of the principle of availability; meaning that educational institutions and programmes must be equipped with what they require to function, such as buildings, sanitation facilities, safe drinking water, trained teachers receiving competitive salaries, and teaching materials.[183] In this light, Terracino argues that a number of corrupt practices might have negative effects on the availability of such requirements.[184] As an example, public officials' embezzlement of funds originally meant to provide education might prevent the correct allocation of resources to equip educational institutions.[185]

In addition, as interestingly pointed out by Boersma, States might violate the principle of availability of the right to education also in ways different from embezzlement.[186] As an example, whenever public officials accept or demand bribes for the procurement of

[178] *Ibid*.
[179] ICHRP, 2009, p. 56.
[180] United Nations Committee on Economic, Social and Cultural Rights CESCR, *supra* note 177, para 6.
[181] Boersma, p. 248.
[182] *Ibid*.
[183] Terracino, p. 24.
[184] *Ibid*.
[185] *Ibid*.
[186] Boersma, p. 248.

educational materials by third parties, States infringe the obligation to protect the right to education due to their failure in preventing the occurrence of such acts.[187] Remarkably, it seems reasonable to clarify that corruption has a disproportionate effect on vulnerable groups who, without access to education (or with access only to education of poor quality because parents may not afford to pay bribes to afford their children education), can count on very little chances to break the cycle of poverty.[188] Yet, in 2009, a corruption scandal caused profound indignation in the German academic environment as several professors were getting bribes for awarding doctoral titles to PhD candidates.[189] Reporting on such events is, therefore, of fundamental relevance insofar, as also affirmed by Boersma, whereas it is undeniable that corruption affects vulnerable groups in a greater way, its manifestation might occur everywhere, even at unexpected "high" levels.[190]

1.2.3.2.3. The right to health

The right to health, also known as the "right to the highest attainable standard of physical and mental health", is enshrined in Article 12 ICESCR and has been defined as the "right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health" by the CESCR in General Comment No. 14.[191] As interestingly pointed out by the ICHRP, notwithstanding the broad nature of the right to health, the latter does not imply that people have the right to be healthy.[192] Rather, the CESCR acknowledges that, in order to comply with the obligations to protect, respect, and fulfil the right to health, States must consider that it encompasses a series of factors which significantly contribute to the realisation of high health standards, such as safe drinking water, adequate sanitation, adequate supply of safe food, nutrition, housing, occupational health, environmental health, and access to health-

[187] *Ibid*.
[188] ICHRP, 2009, p. 57.
[189] Boersma, p. 245.
[190] *Ibid*.
[191] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, para 9, E/C.12/2000/4, available from http://www.refworld.org/docid/4538838d0.html. (accessed 9 May 2017).
[192] ICHRP, 2009, p. 45.

related information.[193] This is why Toebes, in her "Health Sector Corruption and Human Rights", affirms that:

> when looking at corruption in relation to the right to health, it is important to scrutinise not only the health care sector, but also other sectors such as water provision and the occupational and environmental health sectors.[194]

Along these lines, Terracino, considering that the right to health underlines a broad series of factors, affirms that corruption in the health sector can assume several forms, such as bribery of regulators and medical professionals, manipulation of information on drug trials, the diversion of medicines and supplies, and fraud in procurement.[195] In this regard, it is reassuring that the magnitude of corruption consequences in the health sector has been thoroughly addressed in academic environments. In fact, in defining the costs of the occurrence of corruption, Vian *et al*., affirm that:

> … in the health sector, corruption is literally a matter of life and death, if hospitals crumble because of embezzled construction funds, if doctors extort under-the-table payments from patients who cannot afford to pay, and if corrupt regulators allow fake drugs to flood markets.[196]

Notably, the causal link between corruption and the violation of the right to health has not been addressed only by academics, but also by different international human rights bodies. For example, already in 2005, the Special Rapporteur on the right to health expressed his concern on the consequences of corruption in the Mozambique health care section affirming that:

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[193] United Nations Committee on Economic, Social and Cultural Rights, *supra* note 191, para 11.
[194] Toebes, B., 'Health Sector Corruption and Human Rights: A Case Study' on Boersma, M., and Nelen, H., (ed.), Corruption and Human Rights: Interdisciplinary Perspective, Antwerp, Intersentia, 2010. In Boersma, p. 253.
[195] Terracino, p. 20.
[196] Vian, T., Savedoff, W., and Mathisen, H., 'Introduction: Closing Opportunities for Corruption in the Health Sector' (ed.), Vian, T., Savedoff, W., and Mathisen, H., *Anticorruption in the Health Sector: Strategies for Transparency and Accountability*, Sterling, VA. Kumarian Press, 2010, pp. 77-84. In Boersma, p. 253.

> Corruption can act as a severe constraint to the enjoyment of the right to health, for example when resources intended for the health-care system are diverted into private pockets, or when bribery comes to define priorities.[197]

And, more importantly, that:

> Integral features of the right to health include participation, access to information, transparency, monitoring and accountability. Each of these features helps to establish an environment in which corruption cannot survive. In other words, a right-to-health policy is also an anti-corruption policy.[198]

Yet, notwithstanding that anti-corruption measures constitute an integral part of right-to-health policies, the extent to which it is possible to address corruption in the health care section has been mainly addressed in academic environments. Similarly to other ESC rights, the right to health features a system of principles which States parties to the ICESCR are obliged to comply with. Thus, the following section is dedicated to review how academics have identified corruption-related risks with regards to the availability, accessibility, acceptability, and quality of the right to health.

The principle of availability has been defined by the CESCR, in General Comment No. 14, as the obligation to provide for functioning public health and health-care facilities, goods and services, as well as programmes, in sufficient quantity within the State party.[199] As argued by Terracino, however, although the term "sufficient" might vary from State to State, many corrupt acts in the health sector restrict this aspect of the right to health regardless of when they occur: for example, corruption in the procurement of medicines affecting the availability of drugs or, as pointed out by Vian et *al*., whenever funds originally intended for health care are embezzled for private purposes, the quality of health services might be affected.[200]

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[197] Report of the Special Rapporteur on the right to health, Mission to Mozambique, CHR 61st session, 4 January 2005, UN Doc. E/CN.4/2005/51/Add.2, para 69, Available from https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/101/64/PDF/G0510164.pdf?OpenElement (accessed on 9 May 2017)
[198] *Ibid*.
[199] United Nations Committee on Economic, Social and Cultural Rights, *supra* note 191, para 12.
[200] Vian, T., Savedoff, W., and Mathisen, H., *supra* in note 196.

Second, according to the CESCR, health facilities as well as goods and services must be accessible to everyone without discrimination. Accessibility, thus, entails its physical, economic (in the sense of affordability of health care), and information-related aspects.[201] As highlighted by Terracino and the ICHRP, health services are affected by corruption when, for example, health officials request fees for drugs that have been provided free of charge by pharmaceutical companies or donor organisations, or demand patients to offer "informal payments" in order to be treated, x-rayed and so on.[202]

Third, the CESCR affirms that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate.[203] Interestingly, in defining how corruption might interfere with States obligation to ensure the acceptability of health services, both Terracino and the ICHRP, which only affirms that health professionals shall not abuse their position of power, seem to fail in addressing its nature and extent.[204] In fact, it is Toebes that notably provides for an exhaustive example of a situation in which the principle of acceptability might be affected by corruption. In her view, whenever there exists asymmetry of information between patients and medical doctors, the latter have a stronger bargaining power over the first. This could lead to a situation in which "a health professional, being influenced by a pharmaceutical company, prescribes drugs which are not ethically appropriate".[205]

In conclusion, in General Comment No. 14 the CESCR affirms that health facilities, goods and services must also be scientifically and medically appropriate and of good quality.[206] Therefore, Art. 12 ICESCR calls upon States parties to ensure that the quality of health services is guaranteed at all levels of the health sector.[207] However, similarly to other principles at the basis of the right to health, corruption can constitute a serious threat to its enjoyment. In fact, health workers might be tempted to create artificial drug and supply shortages or queues in order to extort bribes from patients. In addition, as argued

[201] United Nations Committee on Economic, Social and Cultural Rights, *supra* note 191, para 12.
[202] See: Terracino, p. 21, and ICHRP, 2009, p. 52.
[203] United Nations Committee on Economic, Social and Cultural Rights, supra note 191, para 12.
[204] ICHRP, 2009, p. 53.
[205] Toebes, B., *supra* note 194. In Boersma, p. 257.
[206] United Nations Committee on Economic, Social and Cultural Rights, supra note 191, para 12.
[207] ICHRP, 2009, p. 53.

by Maestad and Mwisongo, the quality of health care may be deliberately reduced by health workers (e.g. nurses) so as to induce their colleagues (e.g. doctors) to share their bribes with them.[208] At this point, it is important to point out that corruption-related infringements of the States obligation to protect the right to health might happen not only at the micro-level, but also at the macro one: in fact, as reported by Jayawickrama, an often-used example is the case of a Minister of Health who, contrary to his obligation, corruptly purchases expired drugs and when an epidemic breaks out, a whole community is affected.[209]

1.2.4. The right to a corruption free-society

The proposition of creating a human right of a corruption-free society has been advanced, for the first time in 2000, by Ndiva Kofele Kale in "The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law".[210] Specifically, Kofele Kale argued that:

> … there is a sufficient State practice to support a claim for an emerging international customary law prohibiting corruption in all societies. That is, a case can be made for the right to a corruption free society as a fundamental human right; a right that should be recognised as a component part of the right to economic self-determination and the right to development.[211]

The assumptions characterising Kofele Kale's work, however, have been discussed in academia especially with regards to the extent to which a right to a corruption-free society would lack effectiveness and efficiency. In fact, according to Coomans:

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[208] Maestad, O., and Mwisongo, A., 'Informal Pay and the Quality of Health Care: Lessons from Tanzania' (ed.), Vian, T., Savedoff, W., and Mathisen, H., Anticorruption in the Health Sector: Strategies for Transparency and Accountability, Sterling, VA. Kumarian Press, 2010, pp. 45-53. In Boersma, p. 257.
[209] Jayawickrama, N., 'Corruption - A Violation of Human Rights?' *Transparency International Working Paper*, 1998, p. 5. In Terracino, p. 22.
[210] Kofele Kale, N., 'The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law' *The International Lawyer*, Vol. 34, No. 1, 2000, pp. 149-178, Available from Jstor (accessed: 17.04.2017).
[211] *Ibid*., p. 152.

> … a device that is all too often used to blur the lines between *lex lata* and *lex ferenda* is that of 'emerging' human rights or 'emerging' interpretations of such rights. The term 'emerging' in this context may provide a smokescreen for wishful thinking and should be employed only sparingly.[212]

At first glance, it might be noticed that the criticism given to Kofele Kale would only depend on the language used in his work. However, as pointed out by Boersma, also claims about "emerging customary law" ought to be critically analysed.[213] As argued by Dixon, in fact, the formation of a norm of customary law requires both States practice as well as *opinio iuris.*[214] State practice includes actual State activity (acts and omissions), statements made in concrete situations or disputes, statements of legal principles made in the abstract, domestic legislation and the practice of international organisations.[215] In addition, while Kofele Kale argued "that there is a sufficient State practice to support a claim for an emerging international customary law"[216], a number of scholars have argued that notwithstanding the existence of a wide range of global and regional anti-corruption treaties, as well as domestic anti-corruption laws, it is by no means self-evident that these constitute enough general, uniform and consistent State practice to argue that corruption is condemned all over the world.[217] Moreover, as already mentioned in the introduction, cultural relativism approaches have always prevented the international community to agree on a universal definition of corruption; hence, in order for a rule to be considered as a custom, its content should be clear and accepted by all the actors concerned.

[212] Coomans. F., Gruenefeld, F., and Kamminga, M., 'A Primer' (ed.), Coomans. F., Gruenefeld, F., and Kamminga, M., *Methods of Human Rights Research*, Antwerp, Intersentia, 2009, p. 11-17 at p.16. In Boersma, p. 265.
[213] Boersma, p. 265.
[214] Dixon, M., *Textbook of International Law*, 6th edn., Oxford, Oxford University press, 2007. p.31. In Boersma, p. 265.
[215] *Ibid.*
[216] Kofele Kale, p. 160.
[217] Dixon, at p. 34-36. In Boersma, p. 266.

Kofele Kale, in addition, argued that:

> the right to a society free of corruption is inherently a basic human right because life, dignity, and other important human values depend on this right. That is, it is a right without which these essential values lose their meaning.[218]

It is true, on the one hand, that when it comes to threats to dignity and life, systemic corruption leads to serious impairments of human rights; however, as argued by Boersma, affirming that corruption is, in all cases, a threat to the enjoyment of human values such as life and dignity, might constitute an unwelcome assumption because, in view of the different forms that corruption can assume all over the world, it is most unlikely that life and dignity are, in all cases, affected and undermined by acts of corruption.[219]

Finally, as argued by Kofele Kale, the right to a society free of corruption constitutes a component part of the right to economic self-determination and the right to development.[220] Indeed, self-determination and the right to development are principles enshrined in Art. 1 ICCPR and ICESCR[221], however, the exact interpretation of these principles is still under debate, especially in view of the so called "progressive realization" principle. In this regard, while according to some, States are obliged to take appropriate measures towards the full realisation of economic, social and cultural rights to the maximum of their available resources; the concept of progressive realisation has been often misinterpreted as if States are obliged to comply with their obligations to protect, promote, and fulfil economic, social and cultural rights only if they declare to have sufficient resources to do so.[222]

Notwithstanding limits and critiques, Kofele Kale's theory has been supported by a substantial range of scholars which includes, amongst others, Raj Kumar with his "Corruption and Human Rights: Promoting Transparency in Governance and the

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[218] Kofele Kale, p. 165.
[219] Boersma, p. 266.
[220] Kofele Kale, p. 167.
[221] "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Art.1 of ICCPR and ICESCR available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx and http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (accessed 2 May 2017).
[222] OHCHR. Supra note 68, p. 12.

Fundamental Right to Corruption-Free Service in India"[223] and by Matthew Murray together with Andrew Spalding, authors of "Freedom from Official Corruption as a Human Right".[224] Despite the common will of pursuing the establishment of an independent human right of freedom from corruption, the two works significantly differ from each other with regards to the context. Specifically, while Raj Kumar's argument limits the claims to the Indian territory, Spalding and Murray, similar to Kofele Kale, advocate for a universal human right regardless of national boundaries.

While according to Boersma it is possible to extend Kofele Kale's criticism to Kumar's claim, it might be counterargued that the latter's assertion finds a certain degree of obstruction, especially with regards to those Kumar's assumptions relegated to the Indian context.[225] In fact, in the last three decades, the Republic of India has experienced thorough development in the fight against corruption of which significant extent is proved, as already stated in the previous section, by the creation of the Right to Information (RTI) Act in 2005.[226] Having said that, and in view of the attention to corruption given by both Indian society and institutions, the establishment of an independent human right of a society free from corruption in India would likely be exempt from Boersma's criticism and find more fertile ground than anywhere else.

On the other side, Murray and Spalding's claim to frame corruption as a right violation is based on the idea that this process would change the way corruption is understood and treated in important ways.[227]

According to them, in fact, there exist four main reasons to recognise corruption as a human right violation:

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[223] Kumar, R., 'Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India' University of California, Davis, vol. 49, no. 741, 2015, pp. 741-792, Available from ucdavis.edu (accessed 18 April 2017).
[224] Murray, M., and Spalding A., 'Freedom from Official Corruption as a Human Right' *Governance Studies at Brookings*, 2015, p. 4.
[225] "In sum, on the basis of the preceding legal analysis, Kofele Kale's and Raj Kumar's claim to the existence, *lex lata*, of a separate right to a corruption-free society can be dismissed". Boersma, p. 266.
[226] See, inter alia, the work done by MKSS "Mazdoor Kisan Shakti Sangathan" (Association for the Empowerment of Workers and Peasants), an Indian social movement and grassroots organisation best known for its successful struggle and demand for the Right to Information Act (RTI) which grew out of the demand for minimum wages for workers.
[227] Murray, M., and Spalding A., p. 5.

- First, as human rights take root in philosophy and legal theory they grow organically and spread to from a universal ethos; and this makes them transcend the political, economic and cultural circumstances often used to justify and rationalise misconduct.[228]
- Second, as rights violations are more resistant to trade-offs[229], deeming corruption a rights violation gives international and domestic laws greater normative weight, heightening their importance in public policy.[230]
- Third, acknowledging a universal human right to be free from corruption effectively counters the most oft-heard objection to international anti-corruption initiatives: that corruption is cultural.[231]
- Fourth, a principal goal of international anti-corruption conventions is preventative - to create higher standards of official conduct that facilitate good governance, economic growth, and national security.[232]

Similarly, as also pointed out by Chapman, a "violations approach" would heighten the importance of anti-corruption efforts in public policy, especially in view of the fact that the monitoring of human rights is not an academic exercise but is intended to ameliorate human suffering resulting from violations of international human rights standard.[233] Abstractly following this argument, it could also result reasonable to affirm that the occurrence of serious impairments to the enjoyment of human rights would lead public institutions to not only tackle corruption with greater political commitment, but also to philosophically circumvent, as suggested by Murray and Spalding, the cultural-relativistic justification to corruption by employing the universalistic nature of human rights.[234]

[228] *Ibid*.
[229] *Ibid*.
[230] *Ibid*., p. 6.
[231] *Ibid*.
[232] *Ibid*.
[233] Chapman, A., 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' *Human Rights Quarterly*, Vol 18, no. 1, 1996, pp. 23-66, Available from Muse (accessed 25 April 2017).
[234] Murray, M., & Spalding, A., p. 7.

However, on the other hand, it is also true that international human rights instruments have so far failed to mention corruption. In their own words, in fact, Murray and Spalding assert that:

> …in the Universal Declaration of Human Rights (UDHR), the ICCPR and the ICESCR, the word "corruption" does not even appear, nor does freedom from corruption by any other name.[235]

Yet, according to the authors, the dearth of attention to corruption-related issued in human rights conventions is not to be misdiagnosed. In fact, since 1948 (date of the adoption of the UDHR), history has seen the creation of a number of new human rights which, for academic purposes, have been divided, in 1977, into three generations by Karel Vasak.[236]

In brief:

- first-generation rights deal essentially with liberty and participation in political life. They are fundamentally civil and political in nature. First-generation rights include, *inter alia*, the right to life, equality before the law, freedom of speech, the right to a fair trial, freedom of religion and voting rights.[237]
- second-generation rights are fundamentally economic, social, and cultural in nature. They guarantee different members of the citizenry equal conditions and treatment and include, *inter alia*, a right to be employed in just conditions, rights to food, housing and health care, as well as social security and unemployment benefits. [238]
- third-generation rights are those rights that go beyond the mere civil and social, as expressed in many progressive documents of international law, including the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development.[239] Third-generation

[235] *Ibid*.
[236] Vasak, K., 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to give Force of law to the Universal Declaration of Human Rights' *UNESCO Courier*, vol. 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, 1977.
[237] *Ibid.*
[238] *Ibid*.
[239] "The Stockholm and Rio Declarations are outputs of the first and second global environmental conferences, respectively, namely the United Nations Conference on the Human Environment in Stockholm, June 5-16, 1972, and the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, June 3-14, 1992. Other policy or legal instruments that emerged from these conferences, such as the Action Plan for the Human Environment at Stockholm and Agenda 21 at Rio, are

> rights include, *inter alia*, group and collective rights, the right to self-determination, the right to economic and social development, and the right to a healthy environment.[240]

It is interesting to see how Murray and Spalding, however, do not tend to insert the right to freedom from official corruption in any of the abovementioned generations. In addition, they rather acknowledge that doing so would not have let them find a way to counter cultural relativistic claims, and engage in an understanding process which, in the end, made their assertion substantially differ from the abovementioned Kofele Kale's claim of framing freedom from corruption, *de lege lata*, as a principle of international customary law.

First, they realise that from a political philosophy-perspective, the western worldview of human rights has been strongly influenced by Liberalism of which main argument, proposed by John Locke, is based on the idea that societies originate from the so called "social contract".[241] The latter concept posits that, starting from a condition called "state of nature" in which all individuals are free and equals, in order to solve disputes, the need to a neutral third party arises.[242] Therefore, individuals consent, either explicitly or tacitly, to surrender some of their freedoms and submit to the authority of *super-partes* governments in exchange for the protection of their right to liberty.[243] However, when governments and their officials abuse the entrusted power for private gain, citizens are no longer equal and get relegated back to the original state of nature.[244]

Secondly, in their own words:

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intimately linked to the two declarations, conceptually as well as politically. However, the declarations, in their own right, represent signal achievements. Adopted twenty years apart, they undeniably represent major milestones in the evolution of international environmental law, bracketing what has been called the "modern era" of international environmental law". Source: Handl, G., 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development 1992' *United Nations Audiovisual Library of International Law*, available from UN Office of Legal Affairs, 2012.

[240] Vasak, *supra* note 236.

[241] Locke, J., *The Second Treatise on Civil Government*. Prometheus Books, 1986, p. 13. In Murray, M., and Spalding, A., p. 9.

[242] *Ibid.*

[243] *Ibid.*

[244] *Ibid.*

> a distinctly Anglo-American intellectual tradition, however, cannot provide the sole basis for a universal human right. Locke's theory of natural rights, and the broader western framework that rests upon it, is widely criticized for growing out of and reinforcing a uniquely western worldview.[245]

In fact, as also pointed out by Amartya Sen, "western ideas of rights fail to recognise distinctly Asian values, which emphasise family and community over the individual, value social harmony over personal freedom, and value a much higher level of deference to political leaders and institutions".[246] Nonetheless, instead of understanding cultural differences as an obstacle, Murray and Spalding engage in a cross cultural research that, eventually, leads them to discover values shared by all cultures, the so called "cross-cultural universals".[247] In other words, according to the authors, there exist certain anti-corruption fundamental principles which are "owed to every human being by virtue of being human and therefore trump other policy considerations, the violation of which is a grave affront to justice"[248], be it in Asia, Middle East or Europe.[249]

In addition, since human rights treaties such as the Convention on the Right of Child (CRC) and the ICCPR have been ratified by a massive number of States; the step that, according to Murray and Spalding, the international community shall be taking at this stage consists of applying the already reached cross-cultural anti-corruption consensus to create a new human right.[250]

In conclusion, by limiting the objective of their work to merely stating that the international community is ready to create a new right, Murray and Spalding seem to pursue a twofold purpose: first, they highlight the functional aspect of a new right as able to "provide essential social service and create conditions for sustainable economic growth".[251] Second, they avoid the criticism received by Kofele Kale: in fact, rather than affirming that the right to freedom from corruption is *lex lata*, the analysis conducted

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[245] Murray, M., and Spalding, A., p. 9.
[246] Sen, A., 'Human Rights and Asian Values' *Carnegie Council on Ethics and International Affairs*, 1997. In Murray, M., and Spalding, A., p. 9.
[247] Murray, M., and Spalding, A., pp. 10-11.
[248] *Ibid*.
[249] Emphasis added.
[250] Murray, M., and Spalding, A., p. 14.
[251] *Ibid.*

brought them about to exhort the international community to take effective measures, and at the same time prudently delegate the latter to define the content of the right.

1.2.5. Linking corruption and human rights: an unwelcome choice

For the sake of pursuing objectivity and completeness, the last paragraph of this chapter is dedicated to reviewing those papers of which authors do not seem to welcome the mainstream idea of supporting the essential functionality of connecting human rights and corruption. Whereas due attention will be given to Rose-Senders and Goodwin's argument, it is also reasonable to briefly examine an interesting claim by James Thuo Gathii, whose perspective seems to show hesitation in fully supporting the human rights and corruption nexus; specifically with regards to the misappropriation of human rights mechanisms.[252] In effect, in "Defining the Relationship between Human Rights and Corruption", although acknowledging the undermining role that corruption can play in the enjoyment of certain rights[253], Gathii interestingly states that:

> …corruption by high-level government officials can siphon millions of dollars of the country's wealth, which in turn handicaps the government from fulfilling its duty to protect, ensure, and respect the rights guaranteed to its people. This relationship between human rights and corruption is ambiguous however; while corruption negatively affects human rights protection, human rights can help corruption to flourish.[254]

In describing how such situations may occur, Gathii affirms that certain rights - like the right to a fair trial and the right not to have undue delay in court proceedings - can be

[252] As stated in section 1.2.3., in defining one of her dimensions of corruption and human rights, Boersma quotes Gathii for supporting the idea that "in taking measures against corruption (especially African) governments tend to always focus on the eradication of grand corruption. On the other side, petty corruption acts are rarely addressed and, considering the ultimate goal of attracting foreign investors, the poor can never benefit from reforms". Gathii, *supra* note 100.
[253] Gathii, p. 126.
[254] *Ibid*.

> used by corrupt government officials to circumvent and avoid punishment and accountability for the role they played in acquiring personal gain for themselves at the expense of the people they should be serving.[255]

As practical example, Gathii analyses an episode which, in his own words, constitutes one of the most widely reported cases involving due process rights in the corruption context: the "Republic v. Judicial Comms'n of Inquiry into the Goldenberg Affair ex parte Saitoti" case.[256] In a nutshell, in that case the Kenyan Constitutional Court found that the Kenyan Anti-Corruption Commission, in investigating George Saitoti (*pro tempore* Finance Minister of Kenya during the Goldenberg Scandal)[257], acted in a biased manner which led to alleged Saitoti's rights to a fair trial and presumption of innocence violations. In doing so, according to Gathii, the Kenyan Constitutional Court obstructed the regular course of investigations and used human rights claims for protecting the Minister's reputation, with the ultimate consequences of compromising the nascent efforts to properly prosecute corrupt offenders and "to build a culture of accountability in grand corruption cases" in Kenya.[258]

A significantly disapproving approach to the connection of human rights and corruption has been shown, in 2010, by Rose-Sender and Goodwin in their "Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse".[259] While the first part of their work is dedicated to a critique of methods employed by the World Bank and western institutions to tackle corruption[260]; more pertinently to the scope of this chapter they affirm, *inter alia*, three controversial concepts which deserve due analysis.

First, although stating that "such a connection may exist is clear", they contest the latter with regards to what it may actually achieve. In their own words:

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[255] *Ibid.*
[256] See, e.g., Republic v. Jud. Comm'n of Inquiry into the Goldenberg Affair ex parte George Saitoti, petition 102 of 2006 (High Ct. of Kenya at Nairobi July 31, 2006) (finding that prosecuting Saitoti would be contrary to the Constitution of Kenya). Source: REPUBLIC v JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 2 others Ex-parte George Saitoti [2006] eKLR. In Gathii, p. 160.
[257] For more info on the Goldenberg Scandal please visit http://www.nation.co.ke/news/How-Goldenberg-scandal-was-hatched-and-executed-/1056-1628532-8k2yos/index.html.
[258] *Ibid.*
[259] Rose-Sender, S., Goodwin, M., Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse, Tilburg University Legal Studies Working Paper Series. No. '12/2010. June 2010
[260] *Ibid.*

> This beg the question of how an individual complaint through an international human rights mechanism to a body sitting in Geneva would help in combating corruption. There are perhaps more effective mechanisms for tackling corruption, if that is the aim.[261]

And in reasoning the argument they affirm that:

> …(it) portrays citizens as victims of rather than as participants in society i.e. it says nothing about who wins and who loses in the redistribution of resources that are labelled by corruption.[262]

In criticising whether a non-legally binding recommendation by a human rights treaty body seated in Geneva would guarantee an added value in the fight against corruption, Rose-Sender and Goodwin, however, seem to misinterpret the nature and scope of such committees. To date, no scholars or experts have ever dared to believe in the exhaustiveness of tackling corruption from a human rights perspective. In addition, while it seems obvious that such observations or recommendations would not prevent states to engage in corruption, be it grand or endemic; influential views might, in compliance with the ultimate goals of human rights treaty committees, raise awareness within the international community, hold the State politically accountable and, as also emphasised by Boersma, offer relief in individual situations.[263] Also, the assumption that this approach "portrays citizens as victims of rather than as participants in society" constitutes a questionable consideration.[264] Whenever a crime occurs, there can be identified victims and perpetrators, be it citizens, or the system as such. Yet, as already said, states obligations to respect, protect and fulfil human rights are aimed at eradicating victims' impairment in a broad set of different situations. Specifically, the obligation to protect calls upon the State to intervene when the dispute occurs between non-state actors, individual citizens included; therefore, whereas it is true that the human rights-based approach portrays citizens as victims, likewise citizens are held accountable as participants and ultimately perpetrators of human rights violations.

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[261] *Ibid.*
[262] *Ibid*., p. 17.
[263] Boersma, p. 202.
[264] Rose-Sender & Goodwin, p. 16.

Second, according to Rose-Sender and Goodwin, a human rights-based approach constitutes an umpteenth attempt, by the World Bank and western "activists", to impose neo-liberal attitudes towards anti-corruption in developing countries, of which citizens need the connection to human rights to understand that their interests are being harmed.[265] If it is true, on the one hand, that the work of the World Bank constitutes an integral part of the sources developed to counter corruption worldwide[266], there are no grounds to necessarily believe that it implies that anti-corruption efforts from all around the world can be considered as the outcome of western and neo-liberal thoughts.[267] Moreover, if the will of connecting anti-corruption and human rights constitutes a neo-liberal claim, as a consequence, anti-corruption efforts from developing countries should reject any form of association of the two concepts. However, as efficiently argued by Boersma, this might not be the case. For instance, in issuing reports on the human rights and corruption nexus, the Kenya National Commission on Human Rights adopted terms and definitions of corruption developed by the World Bank considering them the most comprehensive.[268] As a consequence, the argument that citizens of developing countries are being once again colonised by western values might become a sterile critique, especially in view of its intrinsic generalisation claim.

Third, in analysing the extent to which it is reasonable to connect corruption to human rights violations, Rose-Sender and Goodwin affirm that:

> corruption, even where it takes place on a massive scale, is only one element that contributes to the realisation of rights in this way, and it is arguably not even the most important.[269]

[265] *Ibid*. p. 13.
[266] See, *inter alia*, the Stolen Asset Recovery Initiative (StAR) at http://star.worldbank.org/star/
[267] Interestingly, Boersma cites a very eloquent and self-explanatory thought by Nelken who, in his "Corruption and Human Rights: An Afterword" states that: "we should not take it for granted that anti-corruption or human rights proposals can only reinforce an approach to economic development that seeks to extend the sway of the free market". Nelken, D., 'Corruption and Human Rights: An Afterword', on Boersma, M., and Nelen, H., (ed.), Corruption and Human Rights: Interdisciplinary Perspective, Antwerp, Intersentia, p. 201.
[268] Kimathi, W., 'Corruption: A Complex Phenomenon That Undermines Government's Capability of Working for the Poor', Nguzo za Haki: a publication of the KNCHR, 2005, p. 3. In Boersma. p. 201.
[269] Rose-Sender, S., Goodwin, M., p. 15.

In effect, by having a look at the aforementioned ICHRP's classification of causal links, it is possible to identify a category which encompasses those situations in which corruption constitutes a "remote violation", a contributory factor rather than the main cause.[270] Yet, this argument fails, once again, to avoid generalisations: while there might happen that corruption is allegedly a remote cause, it might also be argued that especially the occurrence of petty corruption might directly lead to human rights violations. Rausha Kumar's fate, reported over and over again throughout the course of this work, constitutes a flawless example in this regard. Consequently, the assessment of whether corruption is the most important cause of human rights violation or not might deserve more caution.

In conclusion, it has been argued that integrating corruption in the human rights agenda is the proof of a greater tendency to tackle every international concern from such perspective, with ultimate effect of letting the rule-based dimension dominate over the symbolic values of human rights.[271] Yet, regardless relevant developments generated by the integration of human rights principles in positive law, Rose-Sender and Goodwin argue that if the human rights discourse is mainly aimed at the political empowerment of individuals, those advocating for the integration of anti-corruptionism in the human rights agenda do not let the latter pursue its main objective.[272] However, as counterargued by Boersma:

> Using human rights mechanisms (meaning the rule-based aspect of human rights) to tackle corruption *is* empowering, since it creates ways of action which are available if a human rights approach is not adopted.[273]

In other words, the legal and political aspects of the human rights agenda are essentially interconnected, as without due regulations and norms, the ultimate purpose of empowering victims would not find a fertile environment to take place in.

[270] ICHRP, 2009, *supra* note 78.
[271] Boersma, p. 201.
[272] *Ibid*.
[273] *Ibid*.

1.2.6. General Remarks

The literature review provided in this chapter has served to illustrate how and to what extent academics and other relevant actors frame corruption in the human rights discourse. As noticeable, the chapter encompasses three main schools of thought: first, academics such as Kofele Kale and Raj Kumar advocate for a right to a corruption-free society as a principle of customary law; second, especially the work of the ICHRP has highlighted the existence of a nexus between certain human rights violations and the occurrence of corrupt practices; and third, an interesting paper by Rose-Sender and Goodwin shows how, according to the authors, it might be useless to approach corruption from a human rights perspective. During the review, furthermore, especially thanks to the legal analyses offered by Boersma in her book "Corruption: A Violation of Human Rights and a Crime Under International Law?", due attention has been paid to the works by two treaty-based mechanisms: the HR Committee and the CESCR. Specifically, the analyses of general comments by the committees and the academic efforts to provide for possible scenarios in which acts of corruption might lead to human rights violations has helped to show that both in academia and in the treaty-based mechanisms of protection of human rights the issue of corruption seems to have been considered with due attention. Yet, in order to provide the reader with a broader view of how human rights mechanisms have tackled the issue of corruption, the next paragraph will be focusing on a charter-based mechanism which represents a milestone in the implementation of the so called human rights based approach: the Universal Periodic Review (UPR).

1.2.6.1. The UPR

The Universal Periodic Review is a procedure of the UN Human Rights Council created through the UN General Assembly on 15 March 2006 by resolution 60/251.[274] In brief, under the UPR, the human rights protection and promotion performances of all the 193 UN Member States are periodically reviewed in cycles of four/five years. Moreover, given the inter-State nature of the procedure, during the cycles of examination States are

[274] United Nations General Assembly, Human Rights Council: resolution / adopted by the General Assembly, 3 April 2006, A/RES/60/251, available from http://www.refworld.org/docid/4537814814.html (accessed 16 May 2017).

subjected to a peer review of their human rights situations on the basis of three report: one drafted by the state under examination, one compiled by the OHCHR and, more importantly, one submitted by national non-state actors, such as NGOs, CSOs and NHRIs.[275] Subsequently, the three reports are examined by a working group of the Council under the lead of three selected States ("Troika") and the outcome report consists of a set of recommendations to the States under examination.[276] The will to briefly illustrate the inner workings of the UPR derives from the fact that to date, as also pointed out by Boersma, the issue of corruption has been addressed, in their respective reports, by a wide range of States under review.[277] As illustrative example, during the 6th session of review, Albania stated, *inter alia*, that:

> the Albanian Government is convinced that corruption can be successfully combated only through vigorous legal and organizational measures designed to disrupt its sources, which in their essence affect human rights.[278]

In addition, in its national report submitted to the HRC, Albania dedicates an entire chapter to corruption and, at paragraph 114 interestingly states that "another component of the government program is the active inclusion of civil society in monitoring anti-corruption measures cases and investigating corruption cases".[279] Remarkably, Boersma reports on and examines a massive number of cases in which States under review have addressed corruption in relation to violations of not only civil and political, but also social, economic, and cultural rights. Therefore, Boersma concludes that, in view of the substantial cases in which States (and not only academics or NGOs) have touched upon corruption and its consequences on the enjoyment of human rights, it can be stated that

[275] Nowak, M., Januszewski, K., et al., (ed.), *All Human Rights for All*, Vienna Manual on Human Rights, Intersentia, NWV: Graz, Austria, 2012, p. 77.
[276] *Ibid*.
[277] Boersma, p. 137.
[278] UN HRC, UPR Working Group outcome report Albania, 6th session (2009), UN Doc. A/HRC/13/6, para 6.
[279] United Nations General Assembly, *National Report Submitted in accordance with paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1*UNHRC,* A/HRC/WG.6/6/ALB/1, 17 August 2009, para 114, Available from http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/AL/A_HRC_WG6_6_ALB_1_E.pdf (accessed 18 May 2017).

corruption *is* a human rights issue, and that the UPR reports, together with treaty-based mechanism recommendations can prove it.[280]

1.2.6.2. Conclusions

In practical terms, framing corruption in the human rights debate has led to two main outcomes: first, at the political level there seems to exist a substantial degree of consensus amongst States and academia on the abstract statement that corruption leads to human rights violations. Yet, at the practical level, tackling corruption from a human rights-based approach means that the occurrence of such acts must be tackled and prevented at the earliest stage possible through a broad series of actors: from the international level to small and local civil society organisations. Society is, in fact, a fundamental actor in implementing human rights systems of protection and accountability: it submits shadow reports to treaty-based committees, draft officials reports to the UPR, and engages in a series of awareness-raising campaigns aimed at empowering individuals whose rights have been abused, and holding states accountable for their conducts. Thus, with regards to anti-corruption, the nature of society's role should not change its connotation but adapt to the needs of individuals in this environment. In other words, a human rights-based approach to anti-corruption is of fundamental importance as society involvement implies its engagement in initiatives aimed at empowering victims of corrupt practices through enhancing transparency, access to information held by the public, and raising awareness with the ultimate goal of holding states accountable for their anti-corruption performances. In conclusion, considering the human rights treaty- and charter-based mechanisms attention given to the involvement of society, and the degree of political consensus on the nexus between corruption and human rights reached also thanks to academic efforts, the review provided in Chapter 1 helped me to formulate a second research question, of which answer will be reached throughout the course of the second chapter. Briefly, since the notion of corruption has been rather addressed and discussed in human rights fora, the question which arises in this regard is whether the UNCAC system has addressed and integrated the human rights dimension in its efforts in the fight against corruption.

[280] Boersma, p. 145.

2. The UNCAC system

2.1. Introduction

The following chapter is dedicated to assessing the extent to which human rights aspects of the goals pursued by the Convention have been framed in its agenda by the different actors involved. Second, due attention will be given to UNCAC's Chapter II: the analysis, however, will be focused, due to its peculiarity, on Article 13 "Participation of Society". Third, an analysis of the debate currently taking place on the enhancement of society participation in the Review Mechanism of the Convention will be provided. In this regard, such analysis will be also relying on how different UNCAC actors interpret the Terms of Reference (ToR) of the UNCAC Review Mechanism and, subsequently, it will proceed by examining different claims and opinions by international NGOs and CSOs, speeches delivered by the different speakers at the various sessions of the CoSP from 2006 to 2015, and the interviews conducted.

2.2. The Convention

As mentioned in section 1.1., the United Nations Convention against Corruption (UNCAC) entered into force in 2005 and, to date, counts 181 Parties.[281] Furthermore, having been ratified almost all around the world, the UNCAC enumerates a massive amount of Parties, representing what the U4 Research Centre has defined as "a global response to a global problem".[282] Also, put in the universalism vs relativism dialectic, it can be affirmed that the Convention's reach constitutes a real compromise. As already discussed, in fact, in order to avoid disputes in the negotiation process, UNCAC was not meant to describe corruption as such. Rather, representatives of different societal identities, agreed on defining specific acts of corruption that should be considered in every State party's jurisdiction. These include bribery and embezzlement, but also money laundering, concealment and obstruction of justice amongst others. Also, in defining who might be considered as possible participants in corruption, the UNCAC uses a functional

[281] *Supra* note 23.
[282] U4 Anti-Corruption Resource Centre, *supra* note 25.

approach to the term 'public official': a term which covers (i) any person holding a legislative, executive, administrative or judicial office of a State Party; (ii) any other person who performs a public function; (iii) any other person defined as a "public official" in the domestic law of a State Party.[283]

In details, UNCAC consists of 71 Articles divided into eight chapters:

- Chapter I – General provisions: it is mainly aimed at illustrating the threefold purpose of the Convention, namely:
  a. to promote and strengthen measures to prevent and combat corruption more efficiently and effectively.[284]
  b. to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery.[285]
  c. to promote integrity, accountability and proper management of public affairs and public property.[286]

- Chapter II – Preventive measures: it consists of a set of preventive measures aimed at hindering corruption at the earliest stage possible both in the public and private sectors. The Convention further calls for the participation of citizens and civil society organisations in accountability processes and underlines the importance of citizens' access to information.[287] According to some, however, the language used in this chapter seems to undermine the compulsory nature of the provisions: expressions such as "States shall endeavour to" instead of "States shall" might, in fact, shape the nature of the norm and make it look optional.[288]

[283] United Nations General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, available from http://www.refworld.org/docid/4374b9524.html Chapter I, Art. 2. (accessed 11 May 2017)
[284] *Ibid*.
[285] *Ibid*.
[286] *Ibid*.
[287] U4 Anti-Corruption Resource Centre, *supra* note 25.
[288] Webb, P., 'The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?' *Journal of International Economic Law*, 2005, p. 191-229 at 205-206.

- Chapter III – Criminalisation and law enforcement: this section is dedicated to listing all the acts of corruption which the Convention is intended to fight against, and identifies them as infringements of criminal law. Specifically, according to UNCAC, States Parties must criminalise bribery, embezzlement, trading in influence, abuse of functions, illicit enrichment, obstruction of justice, and the concealment, conversion or transfer of criminal proceeds.

- Chapter IV – International cooperation: by addressing the cross-border nature of corruption, UNCAC's third chapter is aimed at enhancing legal and technical mutual assistance between States parties and encourages extradition of perpetrators.

- Chapter V – Asset recovery: considered one of the most interesting and powerful points of the Convention, the provisions of this section touch upon not only the seizure but also the total repatriation of assets and the guarantee of compensations of victims.

- Chapter VI – Technical assistance and information exchange: it consists of a set of articles aimed at promoting the importance of initiating, developing and/or improving specific training programmes for personnel responsible for preventing and combating corruption.

- Chapter VII – Mechanisms for implementation: through this section the Convention establishes, with Art. 63, the Conference of the States Parties to the Convention (CoSP), consisting of bi-annual meetings aimed at improving the capacity of and cooperation between States Parties, achieving the objectives set forth in the Convention, and at promoting and reviewing its implementation.[289] In detail, the Conference of States parties has, inter alia, the ultimate goals of:
    a. facilitating the exchange of information among States Parties on patterns and trends in corruption and on successful practices for preventing and combating it.[290]

[289] *Ibid*.
[290] UN General Assembly, *supra* note 283.

b. cooperating with relevant international and regional organisations and mechanisms and non-governmental organisations.[291]
c. periodically reviewing the implementation of the Convention by its States Parties.[292]

- Chapter VIII – Final provisions: the last section of UNCAC is dedicated to calling upon States to take all the necessary legislative and administrative measures, in accordance with fundamental principles of domestic laws, to ensure the implementation of the obligations deriving from the Convention.[293]

To date, the CoSP has been taking place on a biannual basis starting with a session in Amman in 2006 to the last held in St. Petersburg in 2015.[294] Throughout the course of more than a decade, the Conference, in order to further the implementation of the several aspects of the Convention, has been establishing a number of subsidiary bodies such as, *inter alia*, the Working Group on Asset Recovery, the Working Group on Prevention, and the Implementation Review Group (IRG), of which inner mechanisms will be analysed in a separate section.[295]

The UNGA Resolution 58/4, which contains the UNCAC in its Annex, also includes a foreword by he then UN Secretary General Kofi Annan, whose thoughts on the importance of having a global anti-corruption instrument touched upon a broad variety of topics. Interestingly for the purpose of this chapter, the UNSG stated, *inter alia*, that:

> …the adoption of the United Nations Convention against Corruption will send a clear message that the international community is determined to prevent and control corruption. It will warn the corrupt that betrayal of the public trust will no longer be tolerated. And it will reaffirm the importance of core values such as honesty,

[291] *Ibid*.
[292] *Ibid*.
[293] *Ibid*.
[294] To date, the different Conferences of States Parties have taken place in Jordan (2006), Indonesia (2008), Qatar (2009), Morocco (2011), Panama (2013), and Russian Federation (2015).
[295] United Nations Office on Drugs and Crime, 3rd session, Report of the Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2009/15, 1 December 2009, Vienna, 2009.

> respect for the rule of law, accountability and transparency in promoting development and making the world a better place for all.[296]

Moreover, as already argued in the introduction of this work, if it is true, on the one hand, that the UNCAC does not explicitly mention human rights[297]; on the other hand, the literature review provided in Chapter 1 serves to illustrate that both academics and international human rights bodies have reached a certain degree of consensus on addressing the negative impact of corruption on the enjoyment of certain human rights: opinion shared also by many anti-corruption experts and practitioners, at least at the political level.[298] Furthermore, academic efforts to analysing general comments issued by the ICCPR and ICESCR committees and by Human Rights Council highlighted the importance, in certain cases, of inserting anti-corruption initiatives for better pursuing the implementation of principles such as non-discrimination, equality, transparency, rule of law, and accountability. Thus, if anti-corruption measures reinforce principles underpinning human rights, the latter bond should then work on a mutual manner.

Yet, although some of the aforementioned academic works date back to times preceding the adoption of the Convention, UNCAC negotiators seem to have worked on tackling corruption independently from Geneva-based "best practices" and, when it came to establish and implement a review mechanism, they ended up circumventing any suggestion supporting the adoption of mechanisms already employed by human rights treaty- and charter-based bodies. In this regard, as also pointed out by Mr. Joutsen (Annex II), it appears odd that what seemed to work in Geneva, in one part of the UN system, could not be introduced in Vienna, in another part of the UN system. Interestingly, in analysing why human rights "best practices" have not be taken into consideration he stated that:

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[296] United Nations General Assembly, *supra* note 283.
[297] U4 Research Centre, *supra* note 25.
[298] During an interview with Mr. Dimitri Vlassis (Secretary of UNCAC Conference of States Parties) he stated, *inter alia*, that: "I don't think you will find a person objecting the general statement that corruption negatively impacts the enjoyment of human rights. However, if you go beyond that, what I am saying here is that besides the political level, at the legal level the two things should be treated and tackled in their respective ways, because mixing the two things might not serve either the fight against corruption or the fight to protect human rights". Source: Interview with Dimitri Vlassis, Vienna, 10 May 2017, full interview in Annex I.

> … (for instance) the Human Rights Council was established in 2006, and the periodic reviews did not begin until 2008; the Doha decision on the UNCAC implementation review mechanism was in 2009. For that reason, it was much too early to say that the Geneva model reflected "best practice".[299]

On the one side, thus, it seems reasonable that the UNCAC system did not look at the UPR as "best practice" for a matter of time. Yet, on the other side, there seems to exist substantial, but also political arguments against the "adoption" of human rights-related mechanisms. Notably, it has also been affirmed that the nature of discussing approaches of other mechanisms could be informative. Yet, introducing or even adopting them *in toto* would not have helped the UNCAC system to create an efficient review mechanism, simply because anti-corruption and human rights mechanisms "are meant to look at different things".[300] A hypothesis, the latter, also supported by Matsheza, who, on defining the relation between the UNCAC and human rights treaties affirms that:

> …(UNCAC) has been designed differently from most human rights treaties. It is programmatic in approach and is not generally declaratory of rights. The Convention has mandatory sections, recommendations and guidelines; and this makes the Convention fairly complex as compared to most human rights treaties.[301]

However, despite its overall programmatic nature, it can be argued that the UNCAC, to a certain extent, already includes a series of articles supporting and regulating a human rights-based approach to preventing and combating corruption. In fact, Chapter II, by regulating society's participation, establishes the goal of pursuing accountability, transparency, and rule of law's enhancement: principles constituting the basis of human

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[299] In an interview conducted with Mr. Matti Joutsen (the then director of International Affairs at the Finland's Ministry of Justice and co-author of "When Experts and Diplomats Agree") on why human rights review mechanisms have not been considered he states, *inter alia*, that "(it) *may be that UNCAC is, ultimately, something rather different from human rights instruments, and for a variety of reasons (different reasons for different negotiators) the Geneva model did not seem appropriate. Those pushing for the "open model" in Vienna were generally OECD and Council of Europe members, who were more familiar with peer review, and wanted the models used in those contexts to be used*". Source: Interview with Matti Joutsen, 2 May 2017, full interview in Annex II.

[300] *Supra* note 298.

[301] Matsheza, P., 'Fighting Corruption While Safeguarding Human Rights', Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, 2006, p. 3, Available from http://www.ohchr.org/documents/issues/development/goodgovernance/matsheza.pdf (accessed 19 May 2017).

rights/bottom-up approaches to vulnerable groups empowerment and human rights advocacy. In other words, given the fact that within the UNCAC system of States Parties there already exists commitment to comply with values such as good governance and transparency, what seems to lack is, probably, the acknowledgment that pursuing the implementation of such principles implies, at the same time, compliance with the human rights-based approach doctrine.[302] It is true, however, that such abstract – yet reasonable! – connection might not be clear to all the potential stakeholders.

Here, before proceeding with the analysis of Chapter II and the debate on the nature of the UNCAC review mechanism, it seems important, as also pointed out by Abrams in his book on discourse analysis, to pay attention to:

> … the (different) uses of language in a running discourse involving the interaction of speakers and auditors (or readers) in a specific situational context, and within a framework of social and cultural conventions.[303]

Simply put, this means that in analysing the provisions of the Convention and the relative debates, it seems relevant to also consider the specific environment and the purpose for which terms are used. In fact, while there seems to exist, in the human rights system of actors, a substantial degree of consensus on the interpretation of terms like transparency and participation[304]; it became clear from an interview with Mr. Dimitri Vlassis (Annex I) that, within the UNCAC system, the term transparency can assume different meanings in different settings: an assumption further supported by Mr. Joutsen (Annex II) who also highlighted the importance, (especially) for diplomats engaged in UNCAC-related discussions, to first make certain that principles like transparency are being used by others in a clear and specific context, rather than in another.[305] Thus, the usage of such terms

[302] Please see the HRBA paragraph in the "Methodology" chapter at p. 19.
[303] Abrams, M., *A Glossary of Literary Terms*, Boston, Heinle & Heinle, 1999.
[304] The term transparency has been often understood as the result of the implementation of policies aimed at guaranteeing society participation in decision-making processes, access to information (right to information, art. 19 ICCPR) held by the public sector and so on. Therefore, from this perspective, transparency can be interpreted as the outcome of the adoption of a human rights-based approach, as it serves to counter public-sector impunity, and implies equality and citizens' self-empowerment through greater accountability of public officials.
[305] From 2001 to 2003, Mr. Dimitri Vlassis was Secretary of the Ad Hoc Committee on the Negotiation of the UNCAC and he is currently Secretary of the Conference of the States Parties to the Convention. Also, as Chief of the Corruption and Economic Crime Branch, he leads UNODC's work on action against

should always be preceded by the acknowledgement that they might assume different connotations depending on where and by whom they are used.[306]

Furthermore, precisely the notions of transparency and participation have often been subject of disputes between CSOs and NGOs on the one side, and UNCAC States Parties' representatives on the other. Specifically, the focal point of such debates hinges on two specific circumstances in which the role of society is addressed by the Convention and its additional documents: i.e. UNCAC's Chapter II "Preventive measures" and the "Terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption".

In this light, the following sections are dedicated to assessing how the abovementioned debate has been developing in both circumstances, and whether (and where) principles like transparency and society's participation enshrined in the Convention have ultimately served to enhance a human rights-based approach to the fight against corruption.

2.3. UNCAC's Chapter II – Preventive measures

In view of the highly technical nature of the Convention, in 2009 the United Nations Office on Drugs and Crime (UNODC) has developed, together with the United Nations Interregional Crime and Justice Research Institute (UNICRI), the "Technical Guide to The United Nations Convention against Corruption": a document created with the goal of providing States Parties to the Convention with guidance throughout the provisions implementation process.[307] As also readable in the Guide, Chapter II encompasses 10 articles aimed at countering the emergence of corruption at the earliest stage possible. In order to pursue this objective, the chapter is dedicated to calling upon States Parties to adopt and/or adapt policies that prevent corruption, and designate bodies to coordinate

corruption and other forms of economic crime. Source: http://www.icac.org.hk/symposium/2012/dimitri_vlassis.html (accessed 18 May 2017).

[306] *Supra* note 299.

[307] "The objective of the Guide is to lay out a range of policy options and considerations that each State Party needs, or may wish, to take into account in national efforts geared towards implementation of the Convention". Source: United Nations Office on Drugs and Crime, *Technical Guide to the United Nations Convention against Corruption*, UNODC, Vienna, 2008, Available from https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf (accessed 13 May 2017).

and oversee their implementation. Such policies include, *inter alia*, transparent procurement, measures to prevent money-laundering, the creation of codes of conduct and, more importantly, effective access to public information, independent judiciary and active involvement of civil society.[308]

Specifically, with regards to the involvement of civil society, UNCAC's Article 13 states, *inter alia*, that:

> 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.[309]

In addition, according to the UNCAC Technical Guide, promoting society participation in preventing and fighting corruption can lead to a series of substantial outcomes, such as more transparent and equitable decision-making processes, more efficient and effective public services, and the creation of laws more aligned to the needs and expectations of vulnerable groups affected by the occurrence of acts of corruption.[310] Despite that, there seems to exist two opposite ways of interpreting the provisions enshrined in UNCAC's Chapter II. According to some, in fact, Art. 13 strongly promotes society participation in countering corruption and, in calling upon States Parties to comply with such objective, it relies on mandatory provisions[311]. On the other side, especially according to Webb, while the compulsoriness of the Convention is continuously affirmed throughout its text, when it comes to addressing society involvement, the Convention, at Art. 13 seems to leave room to what, for instance, international human rights lawyers recognise as the so-called "margin of appreciation".[312] In other words, by subordinating the implementation

[308] U4 Research Centre, *supra* note 25.
[309] United Nations General Assembly, *supra* note 283, Art. 13.
[310] United Nations Office on Drugs and Crime, *supra* note 307, p. 61.
[311] Dell, J., and Chene, M., 'UNCAC and the participation of NGOs in the fight against corruption' *U4 Research Centre*, 200, p. 8.
[312] "The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on

of its provisions to States' interpretations, the language used in Art. 13 lacks the necessary authority to bind States Parties.[313] In understanding why the language used in Chapter II differs from the rest of the Convention, however, due attention should be paid to the fact notwithstanding the willingness of UN Member States to become Parties to the UNCAC, notions and how society is seen by different governments might substantially vary in relation to geo-political variances. In fact, as also pointed out by the UNCAC Coalition[314], a key obstacle to society participation at the international level is the way in which NGOs and other civil society members are perceived, treated and regulated in different countries; and where some governments consider them enemies, others embrace them as key partners.[315] In this regard, a confirmation of the validity of such argument can also be read between the lines of the interview with Mr. Vlassis, who, in analysing NGOs' claims of more transparency and society's involvement in implementing UNCAC Chapter II, affirmed that:

> … the Convention has been achieved by consensus. Meaning that (it) represents the degree of achievable agreement reached so far. Of course, one of the main concerns is state sovereignty and we all know how sensitive the issue of corruption is in this regard and how much it always depends on countries political agendas. Times are changing, and everything can change but we also have to be respectful of the concerns and the fears of the countries around the world.[316]

However, although its questionable compulsoriness, Art. 13 is not to been seen as a threat to the credit given to its provisions by all the actors concerned. In fact, as also pointed out by Dell, within the UNCAC system there already exists a growing consensus that civil society organisations have a critical role to play in upholding governments to their

Human Rights". Source: Council of Europe, The Lisbon Network website: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

[313] Webb, pp. 205-206.

[314] The UNCAC Coalition is a global network of over 350 civil society organisations (CSOs) in over 100 countries, committed to promoting the ratification, implementation and monitoring of the UN Convention against Corruption (UNCAC). Established in August 2006, it mobilises civil society action for UNCAC at international, regional and national levels. Source: UNCAC Coalition, *About the Coalition*, (website),2017, http://uncaccoalition.org/en_US/about-us/about-the-coalition/ (accessed 20 May 2017).

[315] UNCAC Coalition, *The UNCAC needs civil society in order to succeed*, (website), 2015, http://uncaccoalition.org/en_US/the-uncac-needs-civil-society-in-order-to-succeed/ (accessed 13 May 2017).

[316] *Supra* note 298.

commitment to fight corruption.[317]Assumption, the latter, also confirmed during the interview conducted with Mr. Vlassis, in which he stated, *inter alia*, that "it might be very hard" to find an actor politically arguing against the importance, for State Parties, to engage in collaborations with society for better implementing the provisions enshrined in UNCAC's Chapter II.[318]

Further, the importance of enhancing the role of society in preventing corruption has been given due attention already at the first session of the CoSP held in Jordan in 2006. On that occasion, in fact, the representative of Finland, on behalf of EU States Parties to the Convention stated, *inter alia*, that:

> … (the focus) should be placed, in particular, on ensuring the comprehensive participation of civil society and the engagement of the private sector in the prevention and control of corruption. Governments should involve all sectors of society to give their efforts the necessary strength and reach.[319]

The latter consideration, in addition, was ushered by the UNODC Executive Director who, on that occasion, concluded the CoSP's session stating that the Convention "belongs to everyone", and recalled that all actors of society and government must be involved in combating corruption.[320]

At the CoSP held in Indonesia in 2008, speeches supporting the relevance of increasingly involving society were not lacking. For instance, during the "expert consultations on the prevention of corruption", Horacio Bazoberry (representative of Bolivia and chair of the consultations) recalled that the Convention devotes an entire chapter to a variety of prevention measures, and underscored the role of society and its members, such as non-governmental organisations and the media.[321]

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[317] Dell, J., and Chene, M., p. 8.
[318] *Supra* note 298.
[319] United Nations Office on Drugs and Crime, 1st session, Report of the Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2006/12, 27 December 2006, Vienna, 2006, p. 17.
[320] *Ibid*.
[321] United Nations Office on Drugs and Crime, 2nd session, Report of the Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2008/15, 27 February 2008, Vienna, 2008, p. 23.

In this light, it appears reasonable to affirm that, since UNCAC's entry into force in 2005, different States Parties' representatives participating in the first two CoSPs have been showing increasing concern and commitment to comply with the provisions enshrined in Chapter II "Preventive measures", especially with regards to the enhancement of society participation set in Art. 13. Consequently, in view of the progress achieved in this regard, at the subsequent CoSP held in Doha in 2009 States Parties remarkably ended up adopting Resolution 3/2 "Preventive Measures".[322] The decision, which *inter alia* recognises the importance of good governance and transparency, highlights the multiplicity and diversity of approaches to preventive measures, and specifies that such approaches may require context-based, sector-specific or country-specific adaptation. Yet, in spite of this, its operative paragraph 15 states that:

> The CoSP calls upon States Parties to enhance dialogue and synergies with other stakeholders outside the public sector in order to promote the involvement and engagement of those groups in the development and implementation of broader national policies and plans for promoting integrity and preventing corruption.[323]

In examining the reports of the two subsequent CoSPs which took place after the one held in Doha, it can be easily noticed that what emerged in the two sessions is not only a substantial amount of speeches addressing the importance of society participation[324], but also the confirmation of a general willingness, within the UNCAC system, to implement the provisions enshrined in Chapter II and put the nice talks into practice. In doing so, the CoSPs of 2011 and 2013 adopted the two following meaningful documents:

a. <u>the 2011 "Marrakech Declaration on the prevention of corruption" (Resolution 4/3)</u>
   Adopted in 2011 at the CoSP held in Morocco, the Declaration, throughout its text interestingly affirms that, although the implementation of the Convention remains the responsibility of States Parties, the promotion of a culture of transparency and accountability in preventing corruption is a responsibility to be shared by all

[322] United Nations Office on Drugs and Crime, supra note 295, p. 19.
[323] *Ibid*. Res. 3/2, para 15.
[324] The number of times in which the participation of society has been reported on the official UNODC CoSP reports as addressed by the various speakers to the CoSPs held in Morocco and Panama amounts to 13 and 15 respectively.

stakeholders and sectors of society. In doing so, it is noteworthy that in stressing the importance of non-state actors' involvement, the declaration pays due attention to the importance of creating opportunities for young people as key actors in the process of prevention; and promotes the responsible and professional reporting by journalists on corruption.[325]

b. the 2013 "Follow-up to the Marrakech Declaration on the prevention of corruption" (Resolution 5/4)

Adopted at the CoSP session held in Panama in 2013, Resolution 5/4 is aimed at further encouraging the implementation of UNCAC's Chapter II already stressed in the Marrakech Declaration two years before. In doing so, the CoSP urged:

> … States parties, in accordance with article 13 of the Convention, to continue promoting the 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 encourages States parties to enhance the capacity of such individuals and groups in this regard.[326]

In addition, the relevance of involving society at all its levels is further remarked in its operative paragraph 26, where, *inter alia*, the Declaration reaffirms States Parties should continue to strengthen awareness-raising, and that special attention should be devoted to work with young people and children as part of a strategy to prevent corruption.[327]

Two years later, at the CoSP session held in St. Petersburg in 2015, the level of enthusiasm in advocating for, and reporting on greater society involvement seemed to have reached – or even surpassed – the one of previous sessions. At that time, in fact,

[325] United Nations Office on Drugs and Crime, 4th session, Report of the Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2011/14, 11 November 2011, Vienna, 2011, Resolution 4/3, p. 7.
[326] United Nations Office on Drugs and Crime, 5th session, Report of the Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2013/18, 29 January 2014, Vienna, 2014. Resolution 5/4, para 25.
[327] *Ibid*., para 26.

different speakers highlighted the will to keep on sharing best practices on society involvement. As an illustrative example, the Chief of Staff of the Executive Office of the President of the Russian Federation reported on the benefits deriving from society engagement in Russian anti-corruption initiatives and underscored, *inter alia*, the importance of participation by civil society in the prevention and countering of corruption.[328]

As a result, at the CoSP session held in St. Petersburg, States Parties adopted two important documents: Resolution 6/5 "St. Petersburg statement on promoting public-private partnership in the prevention of and fight against corruption" and Resolution 6/6 "Follow-up to the Marrakech Declaration on the prevention of corruption".[329] Amongst the various provisions, Res. 6/5, at paragraph 2, calls upon States Parties to take appropriate measures to promote the active participation of individuals and groups outside the public sector, such as the private sector and civil society, in the prevention of and fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.[330] Further, States Parties adopted Res. 6/6 to keep on stressing, along the same lines of the Marrakesh Declaration, the prominence given by the Convention to preventive measures and society involvement as parts of a comprehensive approach aimed at tackling corruption at all levels.[331]

2.4. The Implementation Review Mechanism

Although its comprehensive approach, academics have often addressed and discussed the way how, especially at the time of its entry into force, the UNCAC would have had an impact on the fight against corruption performed at the national level by States Parties.[332] In fact, regardless of the different degrees of compulsoriness of the provisions, each State

[328] United Nations Office on Drugs and Crime, 6th session, Report of the Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2015/10, 3 December 2015, Vienna, 2015, p. 36.
[329] *Ibid*., Res. 6/5 and 6/6.
[330] *Ibid*., Res. 6/5 at para 2.
[331] *Ibid*., Res. 6/6 at p. 21.
[332] See, *inter alia*, Webb, at p. 191-229.

party is asked to take domestic actions to comply with and implement the Convention. As also pointed out by Joutsen and Graycar, in fact:

> while the objectives of UNCAC are specified throughout the treaty, agreement could not be reached during the negotiation phase on how to review this implementation, and on how the States Parties could ascertain that implementation in their own country.[333]

In this regard, however, the Convention itself already tries, with Art. 63, to address this issue by establishing its "supreme" body: the CoSP, of which ultimate goal is to promote and review the implementation of its provisions.[334] In spite of this – and perhaps for the sake of creating a mandate-wise specific body – already at the first CoSP held in Amman in 2006 the need to create a proper mechanism aimed at monitoring the review of the provisions arose. In that occasion, in fact, the CoSP adopted Resolution 1/1 in which, *inter alia*, it expressed the crucial concern that an "effective and efficient review of the implementation of the Convention" would have been "of paramount importance" and that it was "necessary to establish an appropriate and effective mechanism to assist in the review of implementation".[335] In addition, during the session held in Jordan, the CoSP created the IRG on the Review of the Mechanism, with the mandate of making recommendations to the Conference at its second session on the appropriate mechanisms or bodies for reviewing the implementation of the Convention and on the terms of reference of such mechanisms or bodies.[336]

At the second CoSP held in Indonesia in 2008, in negotiating and discussing on how such mechanism should have worked and looked like, two main ideological currents took shape: the "open review" and the "controlled review" positions.[337] In brief, according to the first, the review mechanism should have worked not differently from the peer review mechanisms already adopted by regional organisations such as the OECD and the Council of Europe and it should have taken into consideration the possibility to visit the country

[333] Joutsen, M., and Graycar, A., 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention Against Corruption' *Global Governance*, vol. 18, 2012, p. 425-439 at p. 426.
[334] United Nations General Assembly, *supra* note 283, Art. 63.
[335] United Nations Office on Drugs and Crime, *supra* note 319, Res. 1/1, p. 3.
[336] *Ibid*., Res. 1/1, para 2.
[337] *Ibid*., p. 429.

under review, to establish a dialogue with a wide range of stakeholders, and to publish and discuss the final report in the plenary session of the CoSP.[338] On the other side, the controlled review position supported the creation of a mechanism based on the submission, by the government under review, of a report on the status of the implementation to a team of experts (members of the examined State included) without the possibility, for the team, to engage in discussions with relevant non-state actors involved at the national level. In addition, the controlled review position advocated for impeding any publication of reports without the consent of the state under review.[339]

In view of the different currents of thoughts on the nature of an eventual review process, after one year, at the session held in Doha in 2009, the CoSP ended up giving birth to Resolution 3/1 and attaching the Terms of Reference (ToR) of the mechanism in its Annex I.[340]

In this light, an examination of the ToR is of fundamental importance in order to understand the basis on which CSOs' and NGOs' claims of more involvement in the process of review rely on, and, furthermore, to see whether and how such issue has been addressed so far in the various CoSP sessions which took place after the one held in 2009.

Contained in Annex I of Resolution 3/1, the ToR is a document divided into 8 chapters which defines the mandate of the Mechanism for the Review of Implementation.[341] However, in order to better understand the inner workings of the Mechanism, due attention shall be paid especially to two specific paragraphs of the decision: the guiding principles and characteristics, and the review process:

a. Guiding principles and characteristics of the Mechanism

This section consists of 7 paragraphs in which States Parties expressed the will to create a transparent, efficient, non-intrusive, and impartial Mechanism, which should be of non-punitive nature and, importantly, aimed at avoiding the creation of any sort of ranking.[342] In addition, with regards to the composition of the Mechanism, at paragraph 4, the

[338] *Ibid*.
[339] *Ibid*.
[340] United Nations Office on Drugs and Crime, *supra* note 295, Res. 3/1, p. 3.
[341] *Ibid*., Resolution 3/1, p. 5.
[342] *Ibid*., para 3.

resolution clarifies that it "shall be an intergovernmental process", meaning that only States Parties to the Convention, through their representatives, are entitled to fully participate in the review procedures.[343]

b. Review process

In this chapter, the CoSP decided to regulate the process of review by defining its goals, the way to conduct the country review, and the roles of the IRG and the CoSP. Regarding the goals, the CoSP recalls the purposes of the Convention enshrined in Art. 1 and reaffirms the importance of creating a collaborative environment aimed at enhancing Countries performances in monitoring their implementations.[344] In detail, the Country review consists of an examination of every State party by the governmental experts of other two State Parties.[345] Precisely, one of the two reviewing countries has to be from the same UN Regional Group as the State under review.[346] What has been happening in reality is, however, that the nature of conducting country visits and meeting local NGOs and CSOs, has been shifting from optional to habitual. As a result, the outcome of the review consists of a country report, which includes successes, challenges, and possible best practices and observations on the implementation of UNCAC.[347]

However, while IRG's Executive Summaries are rather being published on the UNODC's website; the reports remain confidential until the State reviewed, upon request, gives its consent and makes it available to other States.[348] With regards to the roles of the IRG and the CoSP: the first has the duty to oversee the review process and to report to the CoSP[349], and the latter is asked to be responsible for establishing policies and priorities related to the review process and consider the recommendations and conclusions of the IRG.[350]

Already at the occurrence of its first cycle, however, the nature of the review mechanism has not been exempt from criticism. Several observations, considerations, and

[343] *Ibid*., para 4.
[344] *Ibid*., para 11.
[345] *Ibid*., para 18.
[346] *Ibid*., para 19.
[347] *Ibid*., para 33.
[348] *Ibid*., para 38 and 39.
[349] *Ibid*., para 42.
[350] *Ibid*., para 45 and 46.

recommendations on the process have been delivered, in fact, not only by CSOs and NGOs, but also by States Parties and IOs representatives.

As already discussed in section 2.3., in order to frame the debate on the UNCAC review mechanism in the human rights discourse, the focus will be put on two main principles which a human rights-based approach to anti-corruption should be based on: transparency and participation.

In this view, especially TI and the UNCAC Coalition have often addressed, through their reports and advocacy campaigns, the importance of increasing transparency at the different stages of the Review Mechanism. In its 2013 Progress Report, for instance, TI recommended states under review to publish their reports not only on the UNODC's but also on their national websites, in order to increase public awareness and public understanding of the status of the UNCAC implementation process.[351] Also, with regards to country visits, TI affirmed that the majority of the ones conducted by that time did have the opportunity to benefit from consultations with national NGOs, and encouraged States Parties to increase the dialogue for making the reviews more credible and participatory. Furthermore, with regards to NGOs participation in the Mechanism, TI expressed its concern about the refusal, by a number of countries, to grant society fully-fledged participation in the IRG.[352]

In principle, transparency claims by TI consists of supporting the active involvement of society representatives at various stages, and in the worst case (i.e. where the access is denied) States should provide society with the means to access country reports in a transparent way.[353] Moreover, in TI's view, mentioning countries' names and publicising government performances would guarantee true access to information and enable the society to hold governments accountable.[354]

The basis which society representatives rely on in claiming and advocating for more participation was further expressed during the CoSP session held in Morocco in 2011. On that occasion, in fact, a TI delegate expressed his concern "about the wavering of some

[351] Dell, G., et al., 'UN Convention against Corruption Progress Report 2013', *Transparency International*, Berlin: Germany, 2013, p. 4.
[352] *Ibid*.
[353] *Ibid*., p. 5.
[354] *Ibid*., p. 6.

countries in honouring their commitment to the involvement of civil society in the Convention review process" and used the Arab Spring movement as a proof that "there can be no effective fight against corruption without citizen involvement".[355]

Further claims of greater society involvement were made especially in view of the fact that, according to the TI speaker, the CoSP was not making sure that the IRG was complying with the CoSP Rule of Procedure No. 17, which provides for society participation.[356] Moreover, the speaker concluded his intervention with a series of suggestions, such as the inclusion of society inputs in the country review process and the publication of all the country reports: initiatives aimed at making the procedure more effective and transparent.[357]

By looking at UNODC's reports of the various CoSP sessions held after 2009, speakers from different regions have been progressively addressing the cruciality of both making society participate more in the review process for pursuing inclusion and transparency, and re-viewing the legal aspects of the Mechanism, with the aim of legitimating (and legitimising) society's greater involvement in the implementation review process. As a proof, in 2011 States Parties adopted Resolution 4/6 "Non-governmental organizations and the Mechanism for the Review of Implementation of the United Nations Convention against Corruption"[358] in which, given the increasing "confidence in the role of non-governmental organizations in the review process", the CoSP established the creation of briefings (with UNODC) conducted on the outcomes of the working group sessions.[359] Such decision, however, was not exempt from TI's criticism: according to the latter, in

[355] Poortman, C., 'Transparency International address the plenary assembly of the Fourth Session of the Conference of States Parties to the United Nations Convention against Corruption', Marrakesh, Morocco, 2011, p. 2.

[356] United Nations Office on Drugs and Crime, *Rules of Procedure for the Conference of States Parties to the United Nations Convention against Corruption*, Vienna, 2007, Available from https://www.unodc.org/pdf/crime/convention_corruption/cosp/07-80230_Ebooke.pdf (accessed 17 May 2017)

[357] See *supra* note 355.

[358] At the session held in Morocco in 2011, the CoSP adopted Resolution 4/6 "Non-governmental organizations and the Mechanism for the Review of Implementation of the United Nations Convention against Corruption" in which States parties agreed on creating briefings of the IRG meetings with society organizations. The principles regulating such briefings are enshrined in Res. 4/6 paragraph 1. Source: United Nations Office on Drugs and Crime, 4th session, Report of the Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2011/14, 11 November 2011, Vienna, 2011.

[359] *Ibid*.

fact, such briefings represented an inadequate substitute to the possibility to attend the Mechanism sessions with full observer status.[360]

Two years later, at the CoSP held in Panama in 2013, the discussion took place along the same lines of the session held in Morocco. For example, in his opening remarks, the Executive Director of UNODC not only commended participating States Parties for their enthusiasm in complying with the objectives of the review mechanism, but also underlined the valuable role played by civil society in this regard[361]; opinion, the latter, further shared by other speakers throughout the course of the session.[362] Moreover, claims of greater involvement of society in the review mechanism were further supported, in Panama, by civil society representatives who also stressed the importance of guaranteeing public access to country reports.[363]

In 2013, TI and the UNCAC Coalition, on behalf of the NGOs and CSOs community, submitted a letter to the Chair and members of the UNCAC IRG in which they stated, *inter alia*, that in order to better comply with the goals of the review mechanism, there should have been a progressive and constructive inclusion of society representatives in the works of the group, and that the legitimacy of such participation was in compliance with Rules 2 and 17 of the Rules of Procedure of the UNCAC Conference of States Parties which, according to them, also apply to the IRG.[364] Further, according to them, the exclusion of society observers from IRG sessions would have implied the impossibility to not only concretely contribute to the review mechanism (in compliance with good UN practice – other convention review committees included), but also to assist the IRG in building public trust and confidence in this body.[365]

At this point, it seems useful to examine the legal basis which TI and the UNCAC Coalition rely on in advocating for their legitimacy in participating, with observer status, to the IRG sessions. In this regard, in 2010 the UN Office of Legal Affairs (OLA)

[360] See *supra* note 351.
[361] United Nations Office on Drugs and Crimes, *supra* note 325, p. 26.
[362] *Ibid*., p. 31.
[363] *Ibid*., p. 38.
[364] Transparency Palestine, *UNCAC Coalition: Strengthening UNCAC and its Review Mechanism*, (website), 2013, https://www.aman-palestine.org/en/media-center/1421.html (accessed 18 May 2017).
[365] *Ibid*.

expressed its view on the matter by stating that the "rules of procedure (of the CoSP) shall apply to any session of the Conference in accordance with article 63 of the Convention" and that such rules "shall apply, *mutatis mutandis*, to any mechanism or body that the Conference may establish in accordance with article 63 of the Convention, unless it decides otherwise".[366] In addition, the OLA decided that the CoSP:

> … when establishing the Implementation Review Group under the resolution, did not indicate that there should be special procedures for its activities or specifically give the Implementation Review Group the authority to decide upon its own rules of procedure for the conduct of its work. Therefore, the rules of the Conference apply to the Implementation Review Group as a subsidiary body that the Conference has established in accordance with article 63 of the Convention.[367]

Thus, albeit the will to avoid in-depth legal discussions, in claims by society representatives supporting their participation in the IRG sessions, there rather seems to exist a certain degree of legitimacy, not only from a shared political, but also legal perspective. On the other side, however, claims relying on the intergovernmental nature of the Mechanism confirm that – at the legal level – there still exists debate: society *is* already involved, and granting more room would go against the rules negotiated and achieved by consensus.

In this regard, during the CoSP session which took place in St. Petersburg in 2015 the issue seemed to have been taken into consideration with more attention. As a consequence, however, the debate consisted of a series of interventions ultimately highlighting the existence of the aforementioned ongoing debate. On that occasion, in fact, while some speakers, such as the representative of the European Union, stressed the importance of the States Parties to reach a consensus on the role of society by advocating for more transparency and inclusiveness[368]; several other speakers expressed the view that the existing mechanisms created pursuant to Conference Resolution 4/6 (IRG

[366] United Nations Conference of States Parties to the UN Convention against Corruption, *Legal Opinion from the Office of Legal Affairs*, CAC/COSP/IRG/2010/9, 26 August 2010, Vienna, 2010, available from https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/29Nov-1Dec2010/V1056031e.pdf (Accessed 18 May 2017).
[367] *Ibid*.
[368] United Nations Office on Drugs and Crime, *supra* note 328, p. 38.

included) provided sufficient means for States Parties to engage with non-governmental organisations, and highlighted the intergovernmental nature of the subsidiary bodies of the Conference.[369]

In addition, by highlighting the relevance of using the added values, expertise and resources provided by society to other UN bodies and agencies as valuable reference, some speakers advocated for progressively achieving a balanced approach to a greater involvement.[370] However, counterarguments to such claims were not lacking and relied, mostly, on the fact that according to some speakers, applying different rules in the middle of the ongoing process of reviews would have had negatively affected the respective outcomes and jeopardised the consensus reached until then in this regard.[371]

As noticeable, after the adoption of Res 3/1, the nature and inner workings of the Mechanism were – and are – still under debate. Although due nuances, in fact, the two negotiating "arrays" identified by Joutsen and Graycar at the times of the Amman, Bali, and Doha CoSP sessions seem to still exist.[372] Furthermore, although the positive outcomes experienced and reported by different States Parties, claims supporting the idea of not changing the *status quo*, were not only based on technical arguments, but also, as expressed by Mr. Joutsen in an interview, because "the positions in Vienna have become so solidified that at times they seem to be engraved in stone".[373] In other words, from a political perspective, according to him "it is simply not possible to shift from the current UNCAC model to something that is more "inclusive" and "transparent" and:

> Any efforts to do so – as seen most clearly in the very lackadaisical "constructive debate" on the involvement of nongovernmental organizations and civil society representatives in the review – will be opposed on the grounds that the Doha outcome was a "delicate compromise" which cannot be reopened.[374]

Furthermore, from a political perspective, in analysing claims stressing the importance of increasing transparency, it became clear from the interview with Mr. Vlassis that, once

[369] *Ibid*., p. 43.
[370] *Ibid*., p. 54.
[371] *Ibid*.
[372] Joutsen, M., & Graycar, A., p. 426.
[373] *Supra* note 299.
[374] *Ibid*.

again, the concept of "transparency" might be looked at from different perspectives, even in the same context.[375] Specifically, in advocating for avoiding any sort of change of the nature of the Mechanism, he stated that transparency was already an intrinsic prerogative of it, meaning that the review itself is a transparent process, and further expressed his view relying on the fact that the ToR already describes the Mechanism as an intergovernmental process. Therefore, from that perspective, transparency is meant to attest that the Mechanism should not – and in fact does not – have any hidden or discriminatory item in the agenda.[376]

Last but not least, during the interview, Mr. Vlassis reported on a shared concern by States Parties about a crucial issue often stressed by TI and the UNCAC Coalition, i.e. making the publication of Country review reports mandatory. In this regard, presumably on behalf of a series of States Parties' representatives, he clearly stated this would have implied a violation of Rule 37 of the ToR – according to which the report shall remain confidential.[377] Secondly, such publications would have been at the mercy of political exploitations, and affected the collaborative and non-intrusive spirit of the Convention. Specifically, in hypothesising such scenario, Mr. Vlassis relied on the criticism received by TI for its anti-corruption advocacy strategies based on the Corruption Perception Index, which indeed produces numbers and, ultimately, rankings.[378]

2.5. Final considerations

Almost twelve years after UNCAC's entry into force, the Convention system of actors seems to be still engaged in interesting debates on a series of substantial topics. In order to comply with the objectives of the second chapter of this dissertation, however, we have decided to analyse the current debate focusing on a particular issue: society participation. The will of scrutinising the Convention and its relative debate on when and how society is encouraged to take action, as already said, derives from a certain degree of confidence in understanding such tendency as the adoption – yet with due adjustments! – of a human rights-based approach to anti-corruption.

[375] *Supra* note 298.
[376] *Ibid*.
[377] United Nations Office on Drugs and Crime, *supra* note 295, Res. 3/1, Annex I: Rule 17.
[378] *Supra* note 298.

The outcome of the analysis, interestingly, has a twofold nature. On the one side, in fact, the UNCAC system of actors seems to have already achieved a large degree of consensus on the fruitfulness of encouraging – and practically supporting – society participation. Especially with regards to UNCAC Chapter II, in fact, States Parties' inclination to engage in a deeper and deeper collaboration with society has been shown not only at the political level, but also by the fact-based occurrence of participatory practices which, throughout a decade, have been becoming the rule and no longer the exception: the best practice to comply with.

With regards to the Implementation Review Mechanism, nevertheless, the analysis became more challenging. On the one hand, most of States Parties are already involving society in the review process, allowing for country visits, meetings with NGOs and CSOs, and consenting the publication of reports. On the contrary, at the political level, dissimilar interpretations of principles such as transparency and involvement, but also political discussions on the nature of the IRG prevent the achievement of a fully shared view amongst the different actors involved. As already said, supported by a legal opinion by the OLA, CSOs and NGOs see the fully-fledged membership in the working group as the only way to reach a real engagement of society in the review process. The latter claim, however, as also pointed out by Joutsen, still finds opposition as the Mechanism is seen by some as a "delicate compromise" to safeguard.

Yet, from the society's standpoint, asking for more participation should implicitly entail a certain degree of confidence in affirming the fruitfulness of the pathway suggested, a guarantee that society's greater involvement would give further added-value to the pursuit of the IRG's objectives. Consequently, society, and its representatives, are called upon to carry out a task of non-little complexity.

Claiming and advocating for "steps forward", without knowing whether, how and when to intervene, seems to be a recurring characteristic of modern politics and activism, where slogans and a general lack of preparation replace rationality and knowledge. In this regard, this work – yet mainly at its beginning – has been characterised by an ardent desire to enhance, promote, and ultimately crave greater society's engagement. However, analysing interests and concerns of UNCAC States Parties from a scientific perspective

has allowed to abandon political opinions: the idea of how "the system" should look like and work. Conducting a scientific analysis, thus, has meant to engage in a process encompassing the acknowledgement of what has been accomplished and an engagement in the rational research of areas of improvement. First, in order to appreciate the progress attained so far, the research has highlighted the relevance of what the word consensus stands for. In international fora every rule and provision represent the level of achievable agreement; however, as also stated by Mr. Vlassis, this has not to be seen as an obstacle to the general willingness to improve, but as a point where the identification of fertile grounds should start from. In this sense, the progress reached so far by the UNCAC system of actors is also the outcome of the outstanding job done by society: from TI's and UNCAC Coalition's publications to the myriad of inputs offered by small organisations at the local level. Considering the amount of meticulous initiatives aimed at raising the awareness on anti-corruption, empowering and protecting whistle-blowers, and constructively monitoring States Parties implementation performances, society *is* a necessary actor for progress, truly deserving due consideration.

Yet, merits aside, society is not to be considered exempt from criticism, especially with regards to the attitude sometimes shown in approaching sensitive topics. Diplomatic environments – UNCAC system included – can often constitute a slippery slope for those not prepared to engage in discussions in such delicate manners. Consequently, advocating for collaboration without a collaborative spirit towards the dialogue, might cause reluctance in the recipients. In this regard, it appeared odd – yet problematic – that in analysing TI's and UNCAC Coalition's claims for full membership of NGOs in the IRG, especially by addressing States Parties violation of CoSP Rule of procedure 17, the nature of the claim seemed to have shifted from a result-oriented approach to an egoistic pursuit of inclusion, causing more than slight concerns.

In conclusion, where the IRG nature-related debate currently taking place is still witnessing substantial disagreement at the political level; for better complying with Chapter II, UNCAC States Parties have already acknowledged, not only at the practical but also at the practical level, the importance of engaging society and the pivotal role which it ultimately plays.

Conclusions

Analysing a phenomenon like corruption is always an arduous task, especially when the perspective taken substantially differs from the mainstream. Specifically, as already argued in the introduction, attempts to address, define, and ultimately tackle corruption have been so far mainly approached from either an economic or criminal law perspective. Notwithstanding the relevance of such approaches, however, the will to develop a dissertation on how corruption can be framed in the human rights discourse originated from the assumption that when it comes to analysing a deviant behaviour with a strong cultural and/or social connotation, its mere criminalisation might not be enough. Hence, for better understanding corruption's causes and consequences, and providing with an alternative – yet pertinent – perspective, the need of broadening the range of approaches arises. Furthermore, the will to only focus on the international level is not to be misunderstood. It originates, in fact, from the aim of this work to rely on the inherent universalistic nature of human rights to better counter what, by some, is seen as serious impediment to the development of anti-corruption strategies, i.e. that corruption can be – to a certain extent – justified by culture and tradition.

In this light, inputs from international human rights bodies, academic efforts as well as the ongoing debates within the UNCAC system, have served to develop an analysis of the matter from a scientific point of view, and to prevent – at least that was the goal – any useless digression. In order to comply with such objective, further, the dissertation has been functionally divided into two main chapters, each dedicated to a specific research question.

The first chapter consists of a systematic literature review on relevant sources aimed at answering the question about how and to what extent academics and international human rights international bodies have, to date, addressed corruption as interconnected with human rights. Throughout the research, three main currents of thought have been identified and analysed.

First, works by Ndiva Kofele Kale and Raj Kumar, based on the assumption that corruption directly affects the life and human dignity of individuals, highlight the need to create a right to a corruption-free society. Along the same lines, Murray and Spalding

advocate for the same objective but with a functional approach. In fact, rather than directly connecting corruption with the affection of human dignity, they emphasise the importance of creating such right in order to accomplish a series of goals, such as, *inter alia*, transcending the political, economic and cultural circumstances often used to justify and rationalise misconducts.

Second, the research proceeded with the analysis of a position diametrically opposed to the first. In their paper, in fact, Rose-Sender and Goodwin argue against any sort of "contamination" of human rights claims in the anti-corruption discourse. Such perspective, however, is not to be misinterpreted: in their analysis, in fact, they do not refrain from accepting the general assumption that corruption affects the enjoyment of human rights. Rather, they disagree with any argument supporting that such statement should go beyond its political aspect, as neither the human rights nor the anti-corruption systems would ever benefit from each other's mechanisms.

Furthermore, the third current of thought encompasses the majority of papers and documents scrutinised. Boersma, Terracino, Peters, but also the ICHRP as well as UN human rights bodies, in fact, seems to agree – with due differences – to the general idea that corruption *does* lead to violations of civil and political, but also economic, social and cultural rights.

In conclusion, the analysis provided is not to be seen as an exercise's static outcome, but has encouraged an already existing willingness to go beyond what has been defined – in Rose-Sender and Goodwin words – as "stating the obvious". Therefore, the review has stimulated the will to take the issue one step further.

Since anti-corruption initiatives constitute nowadays an integral part of broader human rights campaigns, the question which arises is whether, and how, in the anti-corruption environment – and specifically within the UNCAC system – human rights mechanisms and inner workings are looked at, and taken into consideration for better pursuing the objectives set in the Convention.

Admittedly, at the time of approaching the research, ambitions and expectations were completely different. At the beginning, in fact, the idea that promoting a human rights-

based approach to anti-corruption would have been an easy task was more a certainty rather than an assumption.

As already said, furthermore, claiming for improvements without knowing whether and what to improve has been representing a serious risk, a weakness to overcome. While it is true that the levels of inclusiveness and transparency reached in the human rights system can be considered as best practices, adopting such working mechanism *in toto* without the precise identification of the nature of its extent would have meant ending up creating a political manifesto lacking analytical and, ultimately, scientific foundations.

Contextualisation, in this regard, might be an answer. The international human rights system of protection came into being at the same time of the creation of the United Nations itself. For 70 years it has been constituting, together with Peace and Security, and Development, the so called three pillars of the United Nations agenda. The UNCAC, on the other side, was signed and ratified only in the 2000's during a favourable time window which, if we look at the current worsening of international relations, would improbably occur again. Also, with regards to the actors involved, the human rights system of protection, as essentially aimed at alleviating peoples' suffering and despair, *has* the necessity to deal with individuals and their representatives, both at the state and non-state levels. That is why, perhaps, CSOs and NGOs have found fertile grounds for an increasing engagement in the decision-making process, and enjoy a non-slightly respect position in such environment.

On the other side, corruption has always been a sensitive topic to governments, something to hide in order to avoid scandals at any cost. Further, anti-corruption policies have always been approached from economic and criminal law perspectives: assets to recover and corrupt people to imprison.

To tell the truth, however, the UNCAC system symbolises a countertrend, and its comprehensive approach breaks the quite long-standing tradition of framing anti-corruption in the cops and the robber game. The Convention, in fact, dedicates an entire chapter to the prevention of corruption, in which States Parties have acknowledged that relying on society is of fundamental importance. Specifically, the level of NGOs and CSOs' participation, especially under UNCAC Art. 13, constitutes a meaningful

achievement insofar as States Parties are now aware that the anti-corruption system of actors is not only about consultants and experts on macro-level policies, but also the social fabric: media, associations, single individuals. Consideration, the latter, which might sound obvious to some, but arriving to such an achievement was not an easy task. The study of how States Parties are complying with UNCAC Chapter II, especially with its non-mandatory provisions, has been constantly shaping the attitude towards the way of interpreting their conduct: no longer the enemy to fight, but the ally to support and assist.

Further, it could be argued that this work has not met its original aim, and this might be partly true. Its title, indeed, opens for new walkable paths, whereas after conducting the analysis, it is quite safe to assert that the path already undertaken by States Parties to the Convention is the right one, and will, eventually, lead to succeed also in adopting a human rights-based approach.

Yet, it should not be forgotten that the approach of this work – a journey, indeed – has been encountering criticism of not little relevance: a considerable amount of UNCAC stakeholders, in fact, still argue that although corruption leads to human rights violations, anti-corruption and human rights mechanisms are meant to look at different things, as if the UNCAC system should be protected from a human rights contamination. However, affirming that there exists connection is not enough, and this is where the value of this work shall be framed: providing for the umpteenth proof that human rights and anti-corruption can be mutually reinforcing.

A last consideration, regarding the approach to the decision-making process characterising the Review Mechanism, seems to be needed. From an interview with Mr. Joutsen, in fact, it became clear that agreement on adopting the UPR model could not be reached. Nonetheless, if it is true that the inclusion of society in the Mechanism did not represent a shared opinion during the negotiations; throughout the various cycles of review, its role has been constantly promoted. Therefore, if it is quite safe, nowadays, to state that society can count on meaningful consideration, it is because of its efforts to always represent a valid alternative: i.e. that a bottom-up approach to the decision-making process can represent a win-win situation for all the stakeholders concerned about wisely fighting corruption at any cost.

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Abstract

Supporting the Human Rights cause is always a challenging task, especially when it comes to analysing topics that have always been looked at from a strictly legal perspective. However, when it comes to analysing a deviant behaviour with a strong cultural connotation, its mere criminalisation might not be enough. Hence, the need of broadening the range of approaches arises. In this regard, the promotion of a human rights-based approach is meant to look at anti-corruption as linked to the protection of certain fundamental rights. The assumption taken here indicates, ultimately, two benefits: a better philosophical understanding of corruption's consequences and, on the other side, the possibility to insert the human rights protection mechanisms in the fight against corruption pursued by the UNCAC system.

Abstrakt

Es ist immer eine herausfordernde Aufgabe das Thema Menschenrechte zu unterstützen. Besonders jedoch, wenn es um Bereiche geht, die immer nur aus einem rein rechtlichen Blickwinkel betrachtet wurden. Wenn es um die Untersuchung eines abweichenden Verhaltens mit einem starken kulturellen Beiklang geht, könnte die bloße Kriminalisierung jener nicht ausreichend sein. Aus diesem Grunde besteht eine Notwendigkeit der Erweiterung der Lösungsansätze. In dieser Hinsicht, wird mit der Förderung eines auf Menschenrechte basierten Ansatzes gemeint, einen Blick auf die Antikorruption in direktem Zusammenhang mit dem Schutz von bestimmten Grundrechten zu werfen. Die hier gemachten Annahmen bringen schlußendlich zwei Vorteile: ein besseres philosophisches Verständnis für die Konsequenzen von Korruption und zweitens, die Möglichkeit den Schutz der Menschenrechte in den Kampf gegen die Korruption einzubinden, welcher von der UNCAC umgesetzt wird.

Annex I

Interviewee: Mr. Dimitri Vlassis

1. **At the 2006 CoSP held in Amman, the diplomats agreed on creating a supplementary review mechanism with, amongst others, two noteworthy characteristics: transparency and non-intrusiveness. In this regard, what shall we mean by transparency?**

By necessity, transparency has different meanings in different settings, if you look at the convention you will see that the term is used in different locations. (the convention) speaks generally about transparency in chapter 2. it also speaks about transparency in the context of governments budgets and so on. So, I think there is no single definition of transparency. You need to look at always in relation to the context. However, if you want to have a better understanding of the concept of transparency, the terms of reference of 2009 can be considered as the source to be looked at. In the review mechanism, however, what we mean by transparency is that the mechanism itself is transparent, but again, you have to look at the context because there is another element which has been discussed extensively: namely the nature of the mechanism. In this sense, the terms of reference describes the mechanism as intergovernmental process. Therefore, you need to look at transparency in the context of the nature of the process. So, from that perspective, transparency means that the mechanism needs to not have any hidden or discriminatory agenda. And as (the mechanism) has been working correctly and in compliance with this principle, I don't see why it should change.

2. **But considering the debate, would a universal definition of transparency have helped to better understand the conditions which every actor should work at?**

Please note that all The documents you mention have been reached and achieved by consensus. Meaning that they represent the degree of achievable agreement reached so far. Of course, one of the main concerns is state sovereignty and we all know how sensitive the issue of corruption is this regard and how much it always depends on countries political agendas. Times are changing, and everything can change but we also have to be respectful of the concerns and the fears of the countries around the world.

3. **How do you consider the criticism on the language used in UNCAC chapter II?**

True, chapter 2 is written in a different way from other chapters and the reason for that is that in most cases and in most articles the provision starts by stating the principle, and then the articles essentially provide the means which can be applied - and this is the general rule which underlines this section. And that was because it was realised when this has been negotiated, meaning that there are different approaches which depend on several things such as the level of development of states, the availability of means, the capacity, national legislations etc. And since many of the principles of chapter 2 were relatively or entirely new at the time of the negotiation of the convention. Over the years there have been different models that have been applied depending on the different situations and level in which country found themselves at the time of their ratifications. You have, for example, a lot of countries in Europe that only have prevention authorities or they have departments in already existing institutions which have been given more powers and the convention only states that an authority is needed, but it's up to states to determine what the mandate of anti-corruption bodies should look like. In addition, it is going to be interesting to see how states are implementing chapter 2, as the next session of reports will be dealing with it, and it will give us more insights on what states are doing in implementing the obligations and also to see how far things have moved since the entry into force of the convention.

4. **Considering the level of authority and legitimacy that the various human rights treaty committee have achieved, do you see any room for them to be adopted and or adapted by the UNCAC system for reviewing the implementation of the convention?**

I think the two processes and the way they operate in their respective environments are fundamentally different. You have a convention and the mechanism is supposed to review its implementation, it means that if u have a convention you have to look at its provisions and the obligations they create which, in addition, states parties are undertaking freely by ratifying the convention. Thus, by introducing or even injecting the approaches of other mechanisms can be informative, but I'm not sure of how it's adaptation would help the review of UNCAC provisions simply because they are looking at different things. It is not a question of how much legitimacy the existing mechanisms have reached because when we were discussing the terms of reference of this mechanism, countries came to the table with the experiences of other mechanisms for example the OECD, or GRECO mechanisms, but again people looked at them carefully and some of the elements have been incorporated with the consequence that now we have a peer review mechanism. But how the issue of whether to replicate those mechanisms or not was easily and quickly resolved by looking at the scope of the convention both in geographical terms and in terms of substance. So, you look at the OECD convention and it has only one corruption -related offence: bribery. UNCAC has many more offences and 181 parties, and the number of parties in these cases do matter. Because by looking at the numbers you also appreciate the levels of development and capacity, and of the duty of the mechanisms is that you can get a country like Fiji reviewing the US, and this is particularly important because it's a mutual learning process for everybody, regardless of the levels of development. So it's not a matter of replication, you can be inspired, but first you always have to look at what we are trying to implement. and the main goal of the review mechanism is establishing a feeling of ownership in order to keep the enthusiasm in engaging in the reviews, in respect of equality between state parties.

5. **Although the UNCAC review mechanism shall not provide for any form of ranking, rankings are already there. In this regard, the majority of states constituting the Group of 77 plus China, are at the bottom of the rankings annually based on TI's CPI. Low national scores coincide with the group of 77- membership. What do you think about this correlation?**

The Review mechanism is very clear in this - it shall not produce any form of ranking. Substantively speaking, it is impossible to produce a ranking, and it is very sad to see that an index originally aimed at raising awareness has become a policy tool. Also con the cpi takes into consideration, in its methodology only the perception of corruption. The UNCAC review mechanism has shown us that corruption is a very complex phenomenon, and it is basically impossible to reduce its complexity to a figure in a table. Of course, the cpi a great tool for the media because it serves as a tool for articles, analyses and depending on the subjects of the analyses it helps to criticise or appreciate the government in consideration. But I think that if you look at it from a substantive point of view, as I said, for me it is very sad that it has become in some cases a policy tool; it was never intended to be one and I don't think it should be one. I think it is misguiding to have a policy objective movement in the index or to present a favourable movement in the index as a success and vice versa. I think we should look at the issue of rankings from the scientific point of view and result is that it is impossible to actually rank countries because corruption manifests itself in different ways in different settings and it implies different impacts. So, we have to focus on the fact that CPI measures the perception, we don't know whose perception, but it is perception.

6. How do you see the connection between human rights violations and corruption?

I think you will find very few people objecting the political statement of the connection between corruption and human rights, and the negative impact of the first over the second. and I think this statement is absolutely true so, ultimately, at the political level there is a link. But if you go beyond that, and you try to find more specific links then you enter in a slippery slope. For example, to the question is whether there exists a right to asset recovery. Perhaps the activist would jump and say YES, but if you look at it a little bit more carefully then you would say ok, we are looking at assets... whose assets? Because human rights are the rights of individuals. So, is there a right for every individual to have an asset? No! This is why, not to diminish the importance of human rights or asset recovery but there are things that should be looked at very carefully from different perspectives in order to understand the importance of pursuing the achievement of each goal and sometimes in these particular topics the achievement of goals can be more successful by looking at things separately. In general, nobody would reject the general statement that corruption undermines human rights but if you go beyond that and leave the political sphere I don't see how either the human rights world and the anti-corruption agenda could benefit from further connections. at the same time the emergence of a right to a society free from corruption, is not reflecting the reality that this connection cannot be taken much more further, like the right to development, there are endless discussion both in politics and academia but the level of agreement reached is still far from being universal.

Annex II

Interviewee: Mr. Matti Joutsen

1. At the 2006 CoSP held in Amman, the diplomats agreed on creating a supplementary review mechanism with, amongst others, two noteworthy characteristics: transparency and non-intrusiveness. In this regard:

1.1. What do you mean by transparency? Is it meant amongst peers or towards third-actors?

As I wrote in CAC/COSP/2015/CRP.3, the conference room paper submitted by Finland to the sixth session of CoSP, held in St Petersburg in November 2015,

> *"An argument related to the wording of the terms of reference that has less often been made is that art. 3(a) provides that the mechanism should be (among other things) transparent and inclusive. These words have apparently been interpreted differently by the two sides. Those advocating for the "closed model" see transparency and inclusiveness as extending (only) to all States parties; all State parties should have an opportunity to participate in the review process. Those advocating for the "open model" argue that transparency and inclusiveness means that also other stakeholders (including but not limited to NGOs) should be allowed to follow the review process as observers and provide inputs for States Parties to consider."*

If you ask for my personal understanding of the word "transparency", I am inclined to align myself with the opinion referred to above put forward by the "open model" proponents. However, negotiating within the framework of the United Nations has taught me that words take on different meanings in different contexts. You have to accept this peculiarity, and at the same time you must make certain that you understand how the word is being used by others in that specific context. All too often, negotiators find that they have to fall back on "agreed language" from earlier resolutions or other documents. As a result, language becomes stultified and less easy to understand.

1.2. As a diplomat supporting the "open review", do you see the openness promotion as a threat to states sovereignty?

First of all, I am not a diplomat in the sense that I work for the Foreign Ministry. (Although I would say that working for so long in the UN has had its impact on how I negotiate.)

Second, your question is understandable, but difficult to answer for the reason that it is very general. Different observers may have quite different understanding of what is a "threat to state sovereignty".

From the point of view of international law, states (and states parties to a convention) have the sovereign right to decide what obligations they wish to undertake. If a state (state party) decides to go along with the consensus on a peer review mechanism, in my view there is no violation of sovereignty. Such a violation would occur only if the state (state party) is forced to accept a decision, or an act of another state (state party) violates the terms of the consensus.

The concept of peer review as such was unfamiliar to many of those involved in the negotiations. My understanding is that what was odd to them was that persons from one state party would ask questions about implementation in a second state party. The practice with the implementation of the UNCAC review mechanism has shown the value of expert-to-expert dialogue. And perhaps more importantly, as the years go by, more and more of the states parties to UNCAC have become warmly welcoming of this expert-to-expert dialogue.

2. In "when diplomats and experts agree" you affirm that the debate between the two arrays didn't look like a north-south dialectic and that national positions were often nuanced. However, although the UNCAC review mechanism shall not provide for any form of ranking, rankings are already there. In this regard, the majority of states constituting the Group of 77 plus China, are at the bottom of the rankings annually based on TI's CPI. Low national scores coincide with the group of 77-membership. What do you think about this correlation?

What do you mean by "rankings are already there"? If you are referring to the rankings put out by Transparency International and other non-governmental organizations, you should note that many governments have criticized these rankings as being not only unhelpful, but directly harmful to anti-corruption efforts. (It is another matter that, over the years, documents in the UN crime prevention and criminal justice programme have contained many, many rankings. I myself have contributed to a great number of documents reporting on the results of the periodic UN Surveys on Crime Trends and Operation of Criminal Justice Systems, in which there are tables showing, for example, the number of offences per capita. Once the discussion took off in the UNCAC context on the need to avoid rankings, the UNODC has quite clearly tried to avoid such rankings also in documents not connected with UNCAC. Times do change!)

As for your question regarding my opinion of whether there is a general correlation between development and corruption, my understanding is that this is widely recognized in the literature on corruption, but the correlation is not straightforward. You can find highly developed countries that have a problem with corruption. I will be politically incorrect and identify the Russian Federation, Greece and Italy in this context; many other developed industrialized countries can be mentioned. (Also the United State has a serious corruption problem; this varies from one sector to another, and from one part of the country to another. New York and New Jersey have serious corruption problems; so do "Deep South" states, but in different contexts.) On the other hand you can find some developing countries (e.g. Uruguay, Ecuador and Botswana) and even a "least developed country" – Bhutan - for which the TI rankings (for example) seem to reflect a perception of a low level of corruption.
The amount of corruption varies from one country to another, and the type of corruption varies, as does the sectors and contexts in which it appears.

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3. During the Bali CoSP in 2008 the group of 77 plus China strongly opposed the appointment of independent experts as they would have lacked deep enough understandings of national dynamics, especially in view of the different cultural connotations that corruption might have. How did the "open review" group counter this argument? Would a universal definition of corruption have helped in this regard?

I do not recall this specific argument (although I attended the Bali meeting). The position of a state party varies from time to time, depending on a variety of factors; even clear national positions may change when the administration changes, and what were once "clear" national positions may become more muddied when a new representative appears, with his or her own understanding of this position. Moreover, negotiators may change their position when they see in what direction the negotiations are moving.

As for the arguments that negotiators may raise, I will again be rather politically incorrect and say that these arguments may be spur-of-the-moment, and not thought out at all. (I am sitting right now in a meeting on the proposed UNTOC review mechanism, and at times it is difficult to keep a straight face listening to some of the rather silly arguments put forward!)

But to take the argument at face value that "independent experts" would not be qualified to understand national dynamics in another state (state party), I cannot see that this has any serious merit. After all, the same argument should apply to "governmental experts" from another state (state party). The entire concept of peer review is based on the ideas that experts from the reviewing states would talk with experts (and other stakeholders) from the state under review. Just one month ago, I participated in an UNCAC country

visit to Morocco. I may not understand the national dynamics of Morocco, but I do believe that I am qualified to discuss issues of corruption prevention and the return of assets with the Moroccan experts.

As for the possibility of a universal definition of corruption, the academic experts have so far written volumes on the topic without agreeing among themselves on a working definition. It would be too much to ask the national representatives – the diplomats! – to agree on such a definition. Yes, corruption has its cultural context, but breaking the definition down into separate components which can be criminalized – such as bribery, embezzlement, trading in influence and illicit enrichment – helps overcome this cultural relativism.

Cultural relativism continues to be used to excuse a variety of behaviour. Outside of the framework of corruption, I could mention the corporal punishment of children, spousal rape, honour killings, slavery and forced labour, all of which continue to exist today and even have their proponents. Within the framework of corruption, in turn, we have facilitation payments, gifts to professors and physicians, and "finder's fees" to go-betweens. What is today an "accepted part of life" is some parts of the world may tomorrow be regarded with distaste.

4. The argument raised by the group of 77 seems to rely on the so called "cultural relativism" of which the counterpart is, most likely, universalism. As corruption does not have a universal definition, what could have been done in this regard? In other words, do you think that replying to political issues with technocratic arguments has been the right tool to negotiate with?

This is a fundamental question. What are "political issues" for one state can fairly be countered with what you refer to as technocratic arguments, although I would prefer to use the term "substantive arguments". To an increasing degree, decisions within the framework of the United Nations crime prevention and criminal justice programme are being made by diplomats, not by the "experts from the capitals". (I used these two terms deliberately in the title of our paper; the ascendancy of diplomats in the negotiations has been the result of a long evolution.) Diplomats do not (necessarily) understand or appreciate the substantive reasons for advocating a certain position, and have an innate tendency to fall back on political arguments which they believe – correctly or mistakenly – are in their national interests.

My view is that decisions (or recommendations) on crime prevention and criminal justice policy must be made on both substantive and political grounds. To give you a simple example, unrelated to corruption: some countries criminalize begging, and sentence offenders to imprisonment. Advocating decriminalization will not succeed unless something is done to change the political environment in the country in question, since "public opinion" is seen to support such a punitive approach.

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5. (In relation to question number 4) Academics, NGOs as well as International human rights bodies have often addressed the nexus between human rights and corruption and the possibility to benefit from the Human rights agenda. In this regard, has the work of human rights treaty committees ever been mentioned as a "best practice" in the negotiation process?

Yes, it has been mentioned, and more than one time. I myself find it odd that what seems to work in Geneva, in one part of the UN system, cannot be used in Vienna, in another part of the UN system. I assume that there were several reasons that the human rights mechanisms were not used when developing the UNCAC implementation review mechanism. Perhaps the most important reason is that the human rights periodic review mechanism – which was heavily debated – was only being introduced at the time of the UNCAC implementation review mechanisms. (The Human Rights Council was established in 2006, and the periodic reviews did not begin until 2008; the Doha decision on the UNCAC implementation review mechanism was in 2009. For that reason, it was much too early to say that the Geneva model reflected "best practice".)

Another reason may be that one hand simply does not know what the other hand is doing. The negotiators in Vienna were quite different than those in Geneva, and thus were not familiar with the Geneva negotiations – other than that they were indeed difficult ones.

A third reason may be that UNCAC is, ultimately, something rather different from human rights instruments, and for a variety of reasons (different reasons for different negotiators) the Geneva model did not seem appropriate. Those pushing for the "open model" in Vienna were generally OECD and Council of Europe members, who were more familiar with peer review, and wanted the models used in those contexts to be used.

5.1. The Human rights based approach employed in the review mechanisms of conventions such as the ICCPR and the ICESCR has reached noteworthy levels of inclusiveness and transparency. Could some aspects of these mechanisms be adopted by the IRG?

Short answer? Nope.

Longer answer? The positions in Vienna have become so solidified that at times they seem to be engraved in stone. It is simply not possible to shift from the current UNCAC model to something that is more "inclusive" (by which you presumably mean that all relevant stakeholders can participate in some way, shape or form) and "transparent" (by which you presumably mean accessible to all stakeholders). Any efforts to do so – as seen most clearly in the very lackadaisical "constructive debate" on the involvement of nongovernmental organizations and civil society representatives in the review – will be opposed on the grounds that the Doha outcome was a "delicate compromise" which cannot be reopened.

The same dynamics are at play in the current discussions on the proposed UNTOC implementation review mechanism. In theory, we could have proceeded by taking the UNCAC model and simply (although this is by no means simple!) adjust it to the peculiarities of UNTOC and its three protocols. (This has been proposed many, many times.) That has not worked, in particular since two things have happened since 2009: the costs of the UNCAC review have skyrocketed (USD 5,000,000 a year for the UNODC alone), and, following the 2006-2008 economic crises around the world, the major donors to the UN budget vehemently object to any increase in the regular UN budget. To put it simply: adapting the Geneva model to UNTOC or UNCAC is financially unsustainable.

5.2. Considering that almost all the states constituting the group of 77 have signed and ratified human rights conventions, would this have been a political argument able to counter the cultural relativism raised by the "controlled review" group?

The cultural relativism argument simply was not a major factor in the negotiations. And as I have noted, what happened in Geneva seemed to have very little impact on Vienna.

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6. Do you see addressing ways that IRG could learn from human rights review mechanisms as a walkable path?

It would be nice to say that we can learn from experience, and that the "evidence-based success" of the Geneva periodic review mechanism could help in the negotiations in Vienna. This, however, would require two unlikely – perhaps impossible – events: (1) the diplomats in Vienna would recognize the value of the Geneva model, and (2) the major donors would be willing to accept an increase in the UN regular budget of several million dollars each year.

In "Alice in Wonderland", the Queen of Hearts tells Alice that she should practice believing impossible things. "When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."

Even believing two impossible events – diplomats changing their style of working, and major donors unloosing their purse strings – would at least today be a stretch, even after breakfast.