Università
Ca'Foscari
Venezia

Master's Degree in

Comparative International Relations

Final Thesis

Re-Framing Corruption under International Human Rights Law

Supervisor
Prof. Sara De Vido

Assistant supervisor
Prof. Stéphanie Novak

Graduand
Federico Anastasia
Matriculation number
867778

Academic Year
2018 / 2019

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ABSTRACT

Con la caduta del muro di Berlino, il dilemma sulla scelta del sistema politico ed economico più funzionale è stato apparentemente risolto. La narrativa liberale, ponendo fine al corso della storia, ha preso il sopravvento sulla narrativa comunista e si è presentata come una guida vincente e sostenibile per la comunità globale. Di conseguenza, il nuovo ordine internazionale è stato caratterizzato da una rapida diffusione dei principi democratici, dei diritti umani, delle libertà economiche e della concezione di stato sociale. Anche l'indipendenza dei sistemi giudiziari, le libertà di stampa e lo stato di diritto sono diventati dei paradigmi fondamentali per poter essere riconosciuti dalla comunità internazionale. Sebbene la nuova comunità globale sia stata fondata sul rispetto del diritto internazionale e sul riconoscimento delle libertà individuali, nuove questioni sociali hanno iniziato a mettere a rischio questa idea emergente di equilibrio internazionale. Tra questi fenomeni, anche la corruzione ha continuato la sua penetrazione negli apparati istituzionali degli stati, senza distinzione tra quelli fortemente sviluppati e industrializzati e quelli meno stabili e in via di sviluppo. Dunque, nonostante si tratti di un'antichissima questione, la corruzione domina ancora le prime pagine delle più importanti testate giornalistiche. Tuttavia, essa non appare più come una minaccia puramente risolvibile all'interno dei confini nazionali ma come un problema di scala globale, il quale richiede una strategia di risposta multilaterale.

A partire dagli anni Novanta, definiti il periodo della globalizzazione della corruzione dagli esperti del settore, gli stati godono di un quadro giuridico internazionale che conta più di dieci trattati contro tale fenomeno. Oltre agli accordi giuridici, la comunità internazionale continua a riconoscere in diverse occasioni l'importanza della cooperazione al fine di sviluppare una risposta multilaterale. Infatti, ogni anno si celebra la Giornata internazionale contro la corruzione, che cade il giorno precedente alla Giornata internazionale dei diritti umani. Anche da un punto di vista accademico, la corruzione continua a essere oggetto di numerose ricerche da parte di studiosi di diverse discipline. Tali accademici non solo si limitano al suo studio per facilitarne la comprensione, ma tendono anche a proporre diverse strategie d'intervento. Per questo motivo, oggi la corruzione non può ancora essere considerata una questione risolta, ma,

al contrario, una minaccia rilevante per gli equilibri sociali, politici ed economici della società contemporanea, così come lo è stato al principio della sua condanna.

Durante il corso della storia si è assistito ad alcune scuole di pensiero "revisioniste", che difendevano fortemente le conseguenze positive della corruzione. Eppure, gli effetti negativi risultano ad oggi piuttosto evidenti e di conseguenza sono facilmente condivisi da tutte le correnti di pensiero. È evidente che non sarebbe necessario sviluppare strumenti volti a combattere la corruzione se essa non fosse per sua natura un processo dannoso di distaccamento dalla legge. Nonostante i danni causati dalla corruzione siano universalmente riconosciuti, ancora oggi si tende a delimitarne gli effetti. Infatti, è molto diffusa la concezione di corruzione come un crimine senza una vittima specifica, il quale colpisce negativamente gli aspetti politici, economici e istituzionali. Con un cambio di prospettiva, si possono arrivare a comprendere anche le diverse sfaccettature che la corruzione è in grado di assumere. Per questo motivo, oltre a descrivere l'ormai evidente collegamento tra corruzione, recessioni economiche e crisi politico-istituzionali, risulta opportuno analizzare più nel dettaglio le conseguenze sociali della corruzione collegata al paradigma dei diritti umani.

Dunque, il presente lavoro di tesi intende offrire un approccio più ampio allo studio della corruzione. Tale fenomeno non solo deve essere considerato un'appropriazione indebita di denaro o un semplice abuso di potere, ma anche un ostacolo allo sviluppo della società, in quanto deleteria per la crescita degli individui, gruppi e organizzazioni. In particolare, l'obiettivo di questo elaborato è quello di far luce sul rapporto tra corruzione e diritti umani. In questo senso, l'analisi del concetto di corruzione sarà riformulata in base alle relazioni e implicazioni che essa può assumere insieme alla tutela dei diritti umani nell'ordinamento internazionale. A livello internazionale, l'attuale modello di lotta alla corruzione trova le sue radici agli inizi degli anni Novanta. Tuttavia, l'applicazione della normativa internazionale dei diritti umani sulla lotta alla corruzione è piuttosto recente. Attraverso gli strumenti del diritto penale internazionale e del diritto internazionale dei diritti umani, l'elaborato esplora nuove metodologie per contrastare il problema della corruzione. Nello stesso modo, tale sistema assumerà un ruolo notevole nel processo di sradicamento della natura complessa e multiforme della corruzione.

Per ragioni principalmente metodologiche, in primo luogo, risulterà necessario concentrarsi sullo studio dell'evoluzione che il concetto di corruzione ha assunto nel

corso della storia. Dunque, si cercherà di fornire una breve ma esaustiva analisi di questo complesso fenomeno sociale. Successivamente, il primo capitolo presenterà le diverse categorie utilizzate dalla letteratura per analizzare e classificare la corruzione. Lo studio approfondito di tale questione risulterà necessario per comprendere le sue radici politiche, economiche e culturali e di conseguenza i principali effetti e le conseguenze sugli apparati politici, economici e sociali degli stati.

Partendo da questo processo di analisi, il presente studio connetterà la corruzione con il paradigma dei diritti umani. In particolare, si sottolineerà come il concetto di corruzione e di diritti umani siano legati da una triplice connessione. Il primo livello di connessione dei due paradigmi presi in analisi sarà costruito sullo studio delle loro basi teoriche. Per questo motivo, il primo collegamento sarà definito come concettuale. Successivamente, il secondo livello sarà costruito da un punto di vista puramente giuridico. Attraverso l'analisi dei principi generali di diritto internazionale, il nesso di causalità, le obbligazioni in materia di diritti umani e l'imputabilità a un soggetto di diritto internazionale, si presenterà il collegamento definito sostanziale. In altre parole, viste le molteplici difficoltà, verrà analizzato il modo in cui la corruzione e la sua tolleranza da parte degli stati possa costituire una violazione del diritto internazionale dei diritti umani.

A questo punto, il collegamento concettuale e quello sostanziale potranno essere messi in pratica per dimostrare il valore strategico di tale connessione. Dimostrando come la corruzione e i diritti umani siano concettualmente, sostanzialmente e strategicamente collegati, questo elaborato finale presenterà una serie di modelli innovativi per lo sviluppo di strategie di contrasto alla corruzione. Dunque, i valori aggiunti di questa rivoluzione concettuale della corruzione saranno elencati secondo i principi del diritto internazionale dei diritti umani.

Per raggiungere tale obiettivo, un ulteriore studio critico dell'attuale quadro normativo internazionale per il contrasto alla corruzione risulterà essere necessario. Per questo motivo, nel terzo capitolo sarà dedicata una parte allo studio della sua evoluzione e della storia politica e giuridica degli sforzi anticorruzione del XX secolo. In secondo luogo, oltre a delineare i regimi internazionali della lotta alla corruzione sviluppati dall'Organizzazione delle Nazioni Unite, dall'Organizzazione degli Stati Americani e dal Consiglio d'Europa, lo studio analizzerà il modo in cui i principali meccanismi impegnati nella promozione e protezione dei diritti umani affrontano il tema. Il capitolo, dunque,

concluderà cercando di mettere in risalto gli aspetti positivi e migliorativi che un cambio di prospettiva della lotta alla corruzione è in grado di offrire verso un approccio tendente alla promozione e protezione dei diritti umani.

Il fulcro di questo elaborato, ovvero il legame tra corruzione e diritti umani, rappresenta una sfida tematica multidimensionale. Infatti, oltre a coinvolgere i principali aspetti giuridici dell'attuale quadro internazionale contro la corruzione, il presente studio tocca temi di fondamentale importanza per l'ordine internazionale di recente formazione: i diritti umani. Grazie all'analisi della letteratura, dei preamboli delle convenzioni internazionali e dei principali documenti normativi, è possibile riconoscere come l'impatto negativo che la corruzione produce sull'esercizio dei diritti umani sia ampiamente apprezzato e, in particolari circostanze, facilmente riconoscibile. Tuttavia, questa mera consapevolezza non permette lo sviluppo di un'ulteriore azione giuridica contro la corruzione. Infatti, il legame strategico e, in alcuni casi, anche il legame sostanziale, che tale riformulazione del concetto di corruzione è in grado di produrre, non vengono presi in considerazione dagli attuali attori coinvolti.

In conclusione, il presente lavoro di tesi intende innanzitutto ridurre la complessità del fenomeno sociale e globale della corruzione, caratterizzato da una mancanza di una definizione universalmente accettata e circondato da una generale confusione concettuale. Attraverso un'analisi sotto il punto di vista dei diritti umani, si intende provare come la corruzione di per sé possa costituire una violazione dei diritti umani e, quindi, una violazione di diversi tipi di obblighi statali derivanti da tale branca del diritto internazionale. Infine, l'elaborato mira a dimostrare come l'integrazione degli strumenti per la protezione e promozione dei diritti umani nelle strategie anticorruzione possa produrre diversi valori aggiunti, i quali, a loro volta, produrrebbero una riduzione dell'attuale divario con l'implementazione del diritto penale internazionale contro la corruzione.

INTRODUCTION

Starting from the fall of the Berlin Wall, the principles of democracy, liberalism, and human rights have quickly spread within the international community prevailing on the communism narrative. As a consequence, the independence of the judiciary systems, the free press, and the rule of law have begun to be implemented by many countries. In short, the liberal narrative has given the impression to be the indispensable guide for acting in the world of the future. Nevertheless, different types of societal problems, such as terrorism, drug or human trafficking, have appeared in every corner of the globe affecting the economic and social development in every sense. Within this framework, corruption is still having a significant importance for the contemporary society. It is still affecting developing as well as developed countries. As a matter of fact, it is one of the topics most frequently discussed.

Although it occurs within national borders, due to its transborder features, corruption requires a global and multilateral response. Therefore, starting from the 1990s, the so-called "globalization of corruption" brought about the creation of an international anti-corruption regime. As a demonstration of the international community's increased recognition of the importance of anti-corruption measures, today, on 9 December each year, the world celebrates International Anti-Corruption Day, anticipating the International Human Rights Day.

Concerning corruption's struggle, the efforts taken thus-far to combat corruption are endless. On the one hand, almost every academic discipline has tried to develop its own understanding of corruption as well as methods to counter it. On the other hand, the current international legal framework against corruption is profuse. Indeed, it is comprised of more than ten international or regional treaties or conventions developed to face this issue. Nonetheless, all the efforts developed to curb it seems to be uncomplete. The culture of corruption has survived, remaining as relevant today as it was at the beginning of its condemnation. Indeed, governments and civil societies are still facing massive corruption both in the private and public sectors.

Despite its adverse effects are universally recognized, the mainstream conceptualization of corruption tends to categorize it as victimless economic or political crime. Conversely, corruption is capable of affecting every part of society, eroding every

aspect of the social, economic, and political process. As a matter of fact, it has been estimated by the Office of the High Commissioner for Human Rights (OHCHR) that the money lost to corruption would suffice to provide food 80 times over to all the people of the world suffering from hunger. As a result, corruption and the current anti-corruption instruments necessitate further analysis. For that reason, besides creating the linkage among corruption and economic recessions or political crises, this final thesis seeks to link corruption with human rights violations.

More specifically, the focus of this present study is to shed light on the relationship between corruption and human rights. In practice, corruption will be re-conceptualized under the framework of the international human rights law discourse. This attempt represents a critical investigation of the core concept of corruption and its relationship with human rights under international law. The present thesis aims at going beyond the criminal approach to corruption, offering a holistic approach capable of addressing the complex and multi-faced nature of corruption.

The idea to conceptualize corruption and the state's tolerance of corruption as a possible violation of human rights has been brought about by the fact that the attention to this particular aspect of corruption is still at an early stage. Despite the fact that this issue is not receiving the attention it deserves, taking up the relationship between corruption and human rights can be classified into the new general tendency of humanization of international law. Traditionally, international law was considered to be "horizontal" or "state-centered." In this sense, it used to regulate only the international relations between sovereign states. Nowadays, international law achieved another "vertical" scope in the international community, taking into analysis also societal problems of contemporary society. For that reason, it is often labeled as "individual-centered." This evolutionary role accomplished by international law is also reflected by the growing personality of individuals in modern international law and by the importance that human rights law has achieved. As a matter of fact, the influence of human rights norms has not remained confined to a few particular branches of public international law. On the contrary, its inspiration spread to many sectors of international law affecting also the study of corruption.

Through the examination of the relationship between corruption and human rights, in short, this dissertation addresses the questions of whether a human rights

conceptualization of corruption could provide added values to the current international anti-corruption instruments. However, beforehand, it will be necessary to demonstrate that corruption itself may constitute a violation of human rights, and hence, how corruption can violate all different types of state's obligation deriving from that right.

To analyze these aspects, it will be necessary to dedicate the first chapter on the evolution of the current conceptualization of corruption, providing a brief analysis of this complex societal phenomenon. Since adopting a common understanding is a methodological need in order to grasp its real essence, it will be presented the current debate on the definition of corruption. Subsequently, the chapter classifies the common categories of corruption developed by the extensive literature. It aims to reduce the complexities highlighted in the previous paragraph. More specifically, the categorization of corruption allows focusing on where corruption occurs, considering the level of authority involved, and taking into account who has benefited the most from it. Finally, from a legal perspective, this paragraph deals with the analysis of the corrupt criminal acts. Progressively, the chapter concludes with the analysis of its political, economic, and cultural causes, and its political, economic, and social consequences. This process will be useful to comprehend the real roots and effects of the problem, and hence, to develop better strategies to cope with it.

The second chapter gets to the point and analyzes corruption using an international human rights law lens. After briefly presenting the main theoretical aspects of the connection, this section affirms the several ways in which corruption and human rights are interlinked. In practice, two levels of this threefold relationship will be presented. Firstly, the second paragraph of this chapter will analyze the common aspects of the two discourses from a theoretical point of view, presenting the so-called conceptual link. Progressively, this first level of the relationship will be considered from a legal point of view in order to construct what is defined as the substantive link. Despite the fact that it will result to be extremely challenging, the legal analysis aims to show whether corruption violates human rights. It attempts to verify if, how, when, and why states that allow corruption are in breach of the human rights agreements to which they are signatories. Finally, these conceptual and legal tools will be applied to the right to a fair trial and to an effective remedy in order to show, in a detailed manner, how corrupt practices violate human rights.

To conclude, the third and last chapter offers an overview of the current international legal framework against corruption. Specifically, the first paragraph briefly presents the genealogy and the evolution of the current international legal framework regarding corruption. In short, it focuses on the political and legal history of the anti-corruption efforts of the 20th century. Progressively, the international anti-corruption regimes will be outlined. On the one hand, internationally, it deals with the anti-corruption norm developed by the United Nations. On the other hand, regionally, it deals with the normative regime established by the Council of Europe and the Organization of American States. This analysis also includes the way in which international organization's human rights mechanisms have dealt with corruption so far. In this sense, this section will address the work developed by the United Nations human rights mechanisms, by the Council of Europe, including the ECtHR, and by the Organization of American States, including the IACtHR. Finally, without advocating for an extreme change of the current practice, the concept of human rights approach to anti-corruption will be provided. Thus, what has been named strategic link will be outlined. In this way, the added values of a human rights approach to international anti-corruption strategy will be presented.

Concerning the methodology, the most research method applied will be the bottom-up approach. In this way, through an inductive analysis of the most critical secondary sources connected with corruption scandals, I will be able to elaborate my assumptions in order to provide the answers to the research questions. With respect to the chapter I and chapter II, it will be necessary to apply secondary literature deriving from several academic disciplines, such as political science, economics, law, sociology, and anthropology. As a result, this research method could give an interdisciplinary approach to the issue of corruption, which reflects the approach of my Master's Degree in Comparative International Relations. Then, the third chapter will be drafted through an analysis of the international and regional treaties concerning corruption. Certainly, the drafting of the legal and regional framework against corruption will be enriched by reporting the common critics highlighted in the legal analysis of the treaties made by professionals. Finally, as it is possible to read, this dissertation reports several corrupt scandals related to the Argentine Republic. It is due to the fact that the idea of the present study was born during my traineeship experience at the Consulate General of Italy in Bahia Blanca, Argentina.

Lastly, it is also important to underline that the link between corruption and human rights is a multi-dimensional thematic challenge of the current anti-corruption framework. While the negative impact of corruption on human rights is widely appreciated and, under particular circumstances, easily recognizable, the potential of human rights law to counter corruption is less often examined. By representing a rights-based advocacy against corruption, this present thesis aims at demonstrating the added values of a human rights integration into the anti-corruption strategies. Thus, it will help to reduce the gap of implementation of the current international criminal law framework against corruption. At the same time, in order to achieve the general purpose of this work, the present study aims at reducing the complexity of the global societal phenomenon of corruption. Since a common definition is lacking, corruption is often surrounded by a great deal of conceptual confusion. Progressively, it aims at identifying in which sense human rights and corruption could be interconnected. In this sense, it will be argued that there is a threefold linkage. Corruption and human rights are conceptually, substantially, and strategically linked. Therefore, the re-framing process of corruption as a human rights issue allow transforming a common corrupt practice into a possible starting point for a legal action.

CHAPTER I

CONCEPTUALIZING CORRUPTION

1) An Unshared Definition

Marìa Julia Alsogay was a former Argentinian public official during the Carlos Menem administration. In November 1991, Alsogay was appointed Secretary of Natural Resources and Sustainable Development. For the first time, in 2004, she was condemned by the Tribunal Oral Federal n° 4 with a penalty of three years' imprisonment for illicit enrichment. The Argentinian Court found that, while in public office and with the consent of the former Argentinian President Menem, the former Minister had illegally enriched herself by US$ 500,000, by acquiring multiple real estate properties, automobiles, and stock in companies.[1]

In 1991 Ibrahim Al Ibrahim, former husband of Amira Yoma, sister in law and political advisor of President Carlos Menem, was appointed Co-director of customs at the Ezeiza airport, even though he was a Syrian citizen and he was not able to speak Spanish. Before appointing Al Ibrahim, the former President had to sign two "unusual" decrees. With the first decree the president modified the public employment regime and with the second one Al Ibrahim was officially appointed. The second decree was also signed by the former Vice-president Eduardo Duhalde. In the same year, in the aftermath of the Spanish magazine announcement that 595 kg of cocaine had been sequestrated, the so-called money laundering scandal Yomagate started. The Al Ibrahim appointment occurred in the framework of an absolute lack of limits to the powers of the designation of the executive, such as the confirmation by the Senate or the citizens participation. Moreover, this occurred without providing any minimum standard of eligibility – Al Ibrahim could not even speak Spanish – and without any attempt to comply with the rules that regulate nepotism.[2]

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[1] La Nacion. (2013). *María Julia Alsogaray vuelve a ser juzgada por hechos de presunta corrupción*. [online] Available at: https://www.lanacion.com.ar/politica/maria-julia-alsogaray-vuelve-a-ser-juzgada-por-hechos-de-presunta-corrupcion-nid1562178 [Accessed 24 Jun. 2019]; Rose, C. (2015). *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal System*. Oxford: Oxford University Press, p.9; Geuna, N. (2017). *Quién era María Julia Alsogaray, la 'cara bonita' de la corrupción menemista*. [online] Perfil.com. Available at: https://www.perfil.com/noticias/politica/quien-era-maria-julia-alsogaray-la-cara-femenina-de-la-corrupcion-menemista.phtml [Accessed 24 Jun. 2019].

[2] Volosin, N. (2019). *La máquina de la corrupción*. 1st ed. Ciudad Autónoma de Buenos Aires: Aguilar, pp.18-19, 148-149.

At this point, some questions arise. Are illicit enrichment or nepotism forms of corruption? Is there a standard definition of corruption? What constitutes corruption? Finding these examples was not an arduous undertaking. Not only does the Argentine Republic have several "cases of corruption" available, but nowadays it is a ubiquitous term used vaguely throughout all kinds of societies and cultures.[3] Corruption is easy to condemn, but it could be extremely difficult to determine it.[4] As a matter of fact, despite the growing awareness of the substantial amount of extensive academic analysis and commentary, there is no single accepted definition of corruption. Nowadays, corruption is used as a catch-all term.[5] It also occurs in the legal sphere, where a legal definition of corruption lacks, and the term encloses several criminal acts. Indeed, national laws and most international and regional treaties do not define accurately the notion.[6] For instance, the United Nations Convention Against Corruption (UNCAC), which is considered "the only legally binding universal anti-corruption instrument"[7], does not provide a one-line definition of the notion.[8] On the contrary, it requires state parties to establish a number of offenses as crimes of corruption in their domestic criminal law, constituting a common ground for the analysis of international corrupt acts.[9]

Despite these controversies, nowadays, corruption is generally considered as:

> "everything from the paying of bribes to civil servants […] to a wide range of dubious economic and political practices in which politicians and bureaucrats enrich themselves and any abusive use of public power to a personal end."[10]

At first glance, it is easy to detect how this comprehension of corruption concerns actions caused by specific individuals: those in charge of public service and those who

[3] Buchan, B. and Hill, L. (2014). *An Intellectual History of Political Corruption*. New York: Palgrave Macmilllan, p.1.

[4] Underkuffler, L. (2009). Defining Corruption: Implications for Actions. In: R. Rotberg, ed., *Corruption, Global Security, and World Order*. Cambridge, Massachusetts: World Peace Foundation and American Academy of Arts & Sciences, p.27.

[5] Bacio Terracino, J. (2012). *The international legal framework against corruption*. Cambridge: Intersentia. p.7; Boersma, M. and Nelen, H. ed., (2010). *Corruption and Human Rights: Interdisciplinary Perspectives*. Antwerp-Cambridge-Portland: Intersentia, p.1.

[6] Rose, C. *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal System*. p. 7; Boersma, M. and Nelen, H. ed., *Corruption and Human Rights: Interdisciplinary Perspectives*. p.55.

[7] Unodc.org. (n.d.). *United Nations Convention against Corruption*. [online]
Available at: https://www.unodc.org/unodc/en/corruption/uncac.html [Accessed 2 Jul. 2019].

[8] Holmes, L. (2015). *Corruption: A Very Short Introduction*. Oxford: Oxford University Press, p.2.

[9] Bacio Terracino, J. *The international legal framework against corruption*. p.81.

[10] Amundsen, I. (1999). *Political Corruption: An Introduction to the Issues*. CMI Working Paper. Bergen: Chr. Michelsen Institute. p. 1.

seek to influence public officials' behavior.[11] Thus, according to this definition, it is possible to define corruption as a one-dimensional phenomenon, namely as a classification of different behaviors.[12]

Nonetheless an accepted definition of the issue has been provided, according to some social scientists, the notion of corruption is still dominated by a significant level of conceptual disagreement and confusion. According to Bacio Terracino, the definition of the parameters, which considers certain types of behavior or abuses, represents the key to the current dilemma among scholars.[13] Indeed, corruption is considered by many scholars as an ambiguous term with a "dual quality" connotation. On the one hand, it is possible to affirm that corruption is clearly defined.[14] On the other hand, if we try to expand the contours of meaning, corruption will still have a "nebulous charge."[15]

The study of corruption has been an important part of the Western political theory tradition. It has also been the subject of study of many academic researchers, who developed their understanding of corruption elaborating different interpretations of the issue. Despite the abundant literature developed in several academic fields (political science, economics, sociology, anthropology, and law), "no one has ever devised a universally satisfying one-line definition of corruption."[16] Thus, the purpose of this introductive session is not the attempt to solve the definitional issue about corruption. As the German political scientist Von Alemann argues, "perhaps it is wrong to search for one true and correct universal definition. Maybe such definition is like the Holy Grail, i.e something unattainable that can only be a kind of guided star."[17] However, the lack of a

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[11] Johnston, M. (1996). The search for definitions: the vitality of politics and the issue of corruption. *International Social Science Journal*, [online] 48(149), pp.321-335. Available at: https://onlinelibrary.wiley.com/doi/pdf/10.1111/1468-2451.00035 [Accessed 24 Jun. 2019].

[12] Buchan, B. and Hill, L. *An Intellectual History of Political Corruption*., p.7.

[13] Bacio Terracino, J. *The international legal framework against corruption*. p.10.

[14] As it will be analyzed later, a very basic definition of corruption could be the one provided by Transparency International: "the abuse of entrusted power for private gain; or the definition elaborated by the World Bank, namely "the abuse of public office for private gain" (see World Bank. (1997). *Helping countries combat corruption*. Washington, D.C.: The World Bank, Operational Core Services (OCS), Poverty Reduction and Economic Management (PREM) Network. [Online] Available at: http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf [Accessed 25 Jun. 2019]).

[15] Buchan, B. and Hill, L. *An Intellectual History of Political Corruption*. p. 5

[16] Philp, M. (1987). Defining Corruption: An Analysis of the Republican Tradition. International Political Science Association research roundtable on political finance and political corruption, Bellagio, Italy. Cited in: Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 321.

[17] Von Alemann, U. (2004). The unknown depths of political theory: The case for a multidimensional concept of corruption. *Crime, Law and Social Change*, [online] 42(1), pp.25-34.

clear definition makes the analysis of corruption more complicated and it could affect the aim of this thesis, namely trying to analyze the relationship between corruption and human rights. In line with the need to operate within a definitional framework, this session aims to outline different concepts of corruption and tries to reconcile the most critical approaches of the current literature. To conclude, the most appropriate approach for this study will be presented.

1.1) An Etymological Approach

First of all, it is necessary to provide the etymological meaning of corruption in order to understand the subsequently approaches. The term corruption derives from the Latin *corruptionem* (nominative *corruptio*). It implies "dissolution", "decay," and the act of becoming "putrid".[18] Nowadays, the term corruption has acquired vastly different meanings and connotations in every language.

According to the *Oxford English Dictionary* (OED), corruption could be defined in nine ways. In turn, these different meanings can be classified into three categories: “physical definition”, “moral definition”, and “corruption as a perversion”. [19] According to the first category, the OED defines corruption as “the destruction or spoiling of anything, esp. by disintegration or by decomposition with its attendant unwholesomeness; and loathsomeness; putrefaction. Obsolete”.[20] Secondly, the "moral" category explains corruption as the "perversion or destruction of integrity in the discharge of public duties by bribery or favor; the use or existence of corrupt practices, esp. in a state, public corporation, etc."[21] Finally, corruption also involves “a perversion of anything from an original state of purity.”[22] It could imply a “violation of chastity” or “the perversion of an institution, custom, etc. from its primitive purity; an instance of this perversion.”[23]

Available at: https://link.springer.com/content/pdf/10.1023%2FB%3ACRIS.0000041035.21045.1d.pdf [Accessed 26 Jun. 2019].

[18] Etymonline.com. (n.d.). *corruption | Origin and meaning of corruption by Online Etymology Dictionary*. [online] Available at: https://www.etymon2line.com/word/corruption [Accessed 27 Jun. 2019].

[19] Heidenheimer, A. and Johnston, M. ed., (2002). *Political Corruption: Concepts and Contexts*. 3rd ed. New Brunswick, N.J: Transaction Publishers, pp.6-7.

[20] Oed.com. (n.d). *Home : Oxford English Dictionary*. [online]
Available at: https://www.oed.com/view/Entry/42045?redirectedFrom=corruption#eid [Accessed 27 Jun. 2019].

[21] *Ibid*.

[22] *Ibid.*

[23] *Ibid*.

In the history of the western political thought, the "moral connotation" of corruption (the second category) was the most influential. As it will be analyzed in the next section, in the political field, rarely has the term corruption been characterized by collective actions. However, it was firmly connected to the standards and principles of the society, namely its morality.[24] As a matter of fact, according to Heidenheimer, the Western political thought tradition has employed the definition of the "corruption of the bad polity to characterize situations which they perceived as marked by the decay of the moral and political order."[25]

1.2) An Historical Perspective of Corruption: The Classical and the Modern Definition

As indicated earlier, throughout the history of the literature about corruption, the term has admitted several meanings. During the classical and modern times, corruption was based on the morality of society. Since society was conceived as a coherent system of values, corruption was perceived in moralistic terms. [26] Corruption was the loss of moral values, a process of destruction, perversion, and decay.[27] Moreover, this process of moral degeneracy was also considered as an inevitability characteristic of the human being. Within this framework, according to many classical thinkers, the final consequence of corruption was tyranny and the loss of freedom.[28]

Conceptualizing corruption as the decline of a state came from the founding fathers of the Western political thought who lay the foundation of our political philosophy. During Greek and Roman times, human political society was imagined as a body, in which individuals from different class formed its members. According to Aristotle, all the bodies were in a constant process of change. The change was considered as a vital feature of the "body", because it may modify its substance. It was essential to determine the "coming to be" (generation) of the body or its "passing away"

[24] Bacio Terracino, J. *The international legal framework against corruption*. p.8.
[25] Heidenheimer, A. and Johnston, M. ed., *Political Corruption: Concepts and Contexts*., p.5.
[26] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 322.
[27] Buchan, B. and Hill, L. *An Intellectual History of Political Corruption*. pp. 9-11.
[28] *Ibid*.

(corruption).[29] In this sense, corruption was the "passing away" of a political group after a process of change.[30]

Following this concept, Aristotle identified two types of political corruption. The first type of corruption that can be experimented by society was the "distortion of personal judgment through passions". Aristotle described this type of corruption as a natural entity that can involve a significant number of individuals. However, had corruption involved the behavior of a "ruler", it would generate negative consequences on the entire *polis*. As a result, Aristotle believed that the best way to limit the spring of corruption is to distribute power. He stated that, "the many are more incorruptible than the few; they are like the greater quantity of water which is less easily corrupted than a little."[31] The second type of corruption is the "avarice in magistrates or public officials"[32], namely the public officials' enrichment or private gains at the expenses of the entire society. In this case, Aristotle proposed the introduction of the law to restrict the public officials' private gain, consequently avoiding the establishment of a perfect environment for corruption.[33] In this sense, Aristotle made the distinction between "rule of law" and "rule of force". The former was the law for the benefit of the entire population, whereas the latter was an authoritarian, perverted, and corrupted form of law for the advantage of the ruler.[34]

Hence, according to Aristotle, the political problem of corruption could be overcome by managing the different groups or factions of the *polis* in order to avoid any unbalanced used of power.[35] Starting from this assumption, according to Friedrich, Aristotle introduced the concept of "law" and "public or general interest" to curb the substantial interest of the elite for private gain.[36] Moreover, following Aristotle's interpretation, not only was corruption the "distortion of personal judgment" or the

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[29] Aristotle (1930) 'De Generatione et Corruptione, H.H. Joachim (trans.)' in W. Ross (ed.) *The Works of Aristotle*, Vol. 2, Oxford: Clarendon Press, p. 317. Cited in: Buchan, B. and Hill, L. *An Intellectual History of Political Corruption*. p. 13.
[30] Buchan, B. and Hill, L. *An Intellectual History of Political Corruption*. p. 13.
[31] See, Aristotle (1905). *Aristotle's Politics*. Oxford: Clarendon Press.
[32] Buchan, B. and Hill, L. *An Intellectual History of Political Corruption*. p. 13.
[33] *Ibid*.
[34] Amundsen, I. *Political Corruption: An Introduction to the Issues*. p.8
[35]This understanding of corruption derives from Plato's theory of the "corrupted" or "perverted" constitutions-democracy, oligarchy, and tyranny system. Plato argued that these regimes were corrupted because they were serving the interest of the elite.
[36] Friedrich, C. (2002). Corruption Concepts in Historical Perspective. In: A. Heidenheimer and M. Johnston, ed., *Political Corruption: Concepts & Context*, 3rd ed. New Brunswick, N.J: Transaction Publishers. p.17

"avarice in magistrates" but a general disease of the system. Corruption was a process of destabilization that could destruct the political order of the polity.

At first glance, this interpretation of corruption seems to emphasize the necessity of a democratic system, where the power is redistributed among people that detained the rule. However, Aristotle argued that democracy was especially prone to corruption. According to him, ordinary people were more corruptible than rich people, because the former will target before their own profit rather than the common good.[37]

The classical notion of corruption as a disease of the moral and political system persisted throughout the history of the western political thought. As a result, although it took a different form, the moral failing and degeneracy of the political order became a central issue on the Machiavelli's political thought. According to the father of the modern political philosophy and political science, corruption is a process of moral failing that weaken the autonomy of the population. This process of moral decay was a direct consequence of the 'loss' of *virtù* (virtues) by the polities or citizens and the consequently great victory of avariciousness. Corruption is a decline of political values, the one who was lacking *virtù* could "sow the seeds of corruption."[38]

Machiavelli's understanding of corruption was not only turning around the classical and Aristotelian notion of moral and political decay, but the philosopher also added a temporal and historical dimension of corruption, as if corruption could depend on specific political conditions. Even though corruption affects any kinds of regimes from the small villages to the giant empires, a balance political-institution order could produce fewer conditions to the spring of by corruption. Corruption is considered a normal condition of a disunited political system with frequent disorders. In this sense, political weakness could be an inevitable precondition of the corruption manifestation.[39] Machiavelli also introduced a geographic element that could influence the spread of corruption. For example, he associated corruption with the "luxury of Asia in contrast to the relevant vigor of Europe."[40]

Although classical and modern conceptualization of corruption had been re-absorbed into contemporary social scientists' theories, the classical and modern

[37] Buchan, B. and Hill, L. *An Intellectual History of Political Corruption*. p. 14.
[38] *Ibid*., p. 92.
[39] *Ibid*., p. 93.
[40] *Ibid*., p. 96.

understanding has been criticized by others. According to the German political scientist Ulrich Von Alemann, seeing corruption as a moral value could be misleading. First of all, applying this definition, any misconduct by public officers would appear to be a corrupt act. Nowadays, corruption literature has developed more concrete terms for indicating which misconduct acts can be entered under the umbrella of corruption.

As it will be analyzed in the following section, the currently mainstreaming definition differs from the classical and modern conceptualization. The contemporary definitions focus more on the actions of individual and consequently refers less on the moral health of the society.[41]

1.3) A Behavioral Framework

Nowadays, society has been defined as an "arena for contention among groups and interests than as embodying any coherent system of values."[42] According to social scientists, in politics, the moral goals are not pursued anymore. The conservation of the arena for the competition among groups got the attention of the political agenda. Therefore, the scope of politics broadened, and the structure of the current institution became more complex. Thus, defining as corrupt the whole political order became misleading. Paradoxically, even though the sphere of application of politics and government has expanded, the conception of corruption has narrowed.[43] Today the definition of corruption refers to specific actions by individuals holding public positions, such as the abuse of public office, power, or resources, for private benefit. These specific actions are considered as such according to a variety of standard that allows categorizing a criminal act as a corrupted act. The identification of this variety of standard represents the critical challenge for the definition of corruption. Scholars have identified two types of standards in order to provide a definition of corruption, the subjective and the objective standards.[44]

According to the subjective standard theory, corrupt behavior can be identified using public opinion or cultural standards. Corruption is what people in a nation define and understand as a corrupt action according to their cultural background. Subjective

[41] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 322.
[42] *Ibid*.
[43] *Ibid*.
[44] Bacio Terracino, J. *The international legal framework against corruption*. p.10.

theorists argue that this interpretation of corruption is constructive for the enforcement of anti-corruption normative because it will enjoy more legitimacy among the population.[45] However, many intellectuals criticize this approach because it does not help to develop a universally standard definition of corruption. Firstly, it is tough to find a single uniform public opinion on corruption. It can be very different not only between two different countries but also among all the segments of the same society. There can be differences between mass opinion and elite. In this sense, the American political scientist Arnold Heidenheimer, considered by the scholars as the grandfather of corruption studies, has illustrated how public opinion may vary, introducing the so-called shades of corruption: "black", "grey", and "white" corruption.[46]

> "Black corruption" indicates that in that setting that particular action is one which a majority consensus of both elite and mass opinion would condemn and would want to see punished on grounds of principle. "Gray corruption" indicates that some elements, usually elites, may want to see the action punished, others not, and the majority may well be ambiguous. "White corruption" signifies that the majority of both elite and mass opinion probably would not vigorously support an attempt to punish a form of corruption that they regard as tolerable. This implies that they attach less value to the maintenance of the values involved than they do to the costs that might be generated as the result of a change in rule enforcement."[47]

Furthermore, another criticism concerns the fact that culture and public opinion are not unaltered entities. On the contrary, they could be very changeable and influenced by other tendencies over time.[48] Colgate University Professor Michael Johnston argues that public opinion attitude towards corruption, and in general towards any issue, fluctuate over time. Thus, other dilemmas could arise. The subjective standard theory implies a measurement of public opinion during a specified period. However, since culture and public opinion are not fixed, the measurement of the perception of corruption will change, being completely different in diverse contexts and periods. Thus, culture or public opinion might provide a different definition of corruption during a different time. For example, corruption understanding could be utterly different before or after a corruption scandal.

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[45]Gardiner, J. (2002). Defining Corruption. In: A. Heidenheimer and M. Johnston, ed., *Political Corruption: Concepts & Context*, 3rd ed. New Brunswick, N.J: Transaction Publishers. p. 33.

[46] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 323

[47] Heidenheimer, A. (2002). Perspective in the Perception of Corruption. In: A. Heidenheimer and M. Johnston, ed., *Political Corruption: Concepts & Context*, 3rd ed. New Brunswick, N.J: Transaction Publishers. p. 152.

[48] Bacio Terracino, J. *The international legal framework against corruption*. p.10.

Here, Johnston provides as an example the importance that official integrity acquired after the Watergate scandal in the US.[49]

Due to the several weak points of the subjective definition of corruption, more objective explanations of the issue have been developed. Arnold Heidenheimer summarized these objective interpretations into three categories: "market-centred", "public-office centred", and "public interest-centred".

A market-centred definition is related to the demand, supply, and exchange concepts derived from economic theory. It has been developed by scholars dealing with earlier Western and contemporary non-Western societies, in which the norms governing public officeholders are not clearly articulated or are nonexistent.[50] A classical market-centred definition has been developed by the Emeritus Professor of Economic History at the University of Frankfurt Van Klaveeren. He argued that:

> "A corrupt civil servant regards his public office as a business, the income of which he will...seek to maximize. The office then becomes a—maximizing unit." The size of his income depends... upon the market situation and his talents for finding the point of maximal gain on the public's demand curve."[51]

It regards the application of economic methods and models for the analysis of corruption. However, since market-centred definition relied on prior understanding of "corrupted civil servant", namely a set of cases identifiable as corrupted, it could not be universally accepted. It is considered useful for explaining the incidence of corruption and it certainly helps professionals dealing with its understanding, but it is not a way to define corruption.[52] This conceptualization of corruption represents more a claim than a definition because it allows foreseeing the "amount" of corruption that it will take place in a determined situation without defining what is corruption.[53]

On the other hand, a public office-centred definition explains corruption by taking into consideration the concept of public office and its deviation from norms and rules.[54]

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[49] Johnston, M. (1982). *Political Corruption and Public Policy in America*. Monterrey: Brooks/Cole. Cited in Gardiner, J. (2002). Defining Corruption. In: A. Heidenheimer and M. Johnston, ed., *Political Corruption: Concepts & Context*, 3rd ed. New Brunswick, N.J: Transaction Publishers. p. 33.
[50] Heidenheimer, A. and Johnston, M. ed., *Political Corruption: Concepts and Contexts*., p.8.
[51] *Ibid*.
[52] Philp, M. (2002). Conceptualize Political Corruption. In: A. Heidenheimer and M. Johnston, ed., *Political Corruption: Concepts & Context*, 3rd ed. New Brunswick, N.J: Transaction Publishers. p. 50.
[53] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 323
[54] Heidenheimer, A. and Johnston, M. ed., *Political Corruption: Concepts and Contexts*., pp. 7-8.

One of the most distinguished scholars who developed the best public office-centred definition of corruption is Joseph S. Nye, an Harvard political scientist and Dean of the John F. Kennedy School of Government at Harvard University. In his study on corruption in developing countries, the author defines it as a:

> "Behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private regarding influence. This includes such behavior as bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses."[55]

We can consider this approach as a normative analysis of corruption because corruption is the "deviated behavior" that violate certain types of rules. Indeed, this approach is also defined as the legalistic approach to corruption and reminds the Aristotelian introduction of the law to restrict public officials' private gain. Since this definition is based on legal or formal norms of official conduct, it provides more precision to the concept of corruption. However, this implies a common acceptance of a set of standards to apply to the public office holders in order to distinguish corrupt from noncorrupt acts. For that reason, Nye's approach has received several criticisms by other scholars from different academic disciplines. Critics underline the fact that the individuation of legal standard may westernize the definition of corruption. They claim that focusing on the law could be misleading because rules change and sometimes can be vague and contradictory. For example, they argue that legal standard may not cover cases that instead are generally perceived as corrupt.[56] Moreover, they claim that one same action could be considered differently in two countries because of differences in laws.[57] However, as it will be analyzed later, the so-called "legalistic" interpretation of corruption can be an optimal starting point for a universally understanding of corruption, its causes and its consequences on the whole society. As a matter of fact, despite these counterarguments, Nye's definition of corruption is still the most often used.[58]

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[55] Nye, J. (1967). Corruption and Political Development: A Cost-Benefit Analysis. *American Political Science Review*, [online] 61(2), pp.417-427.
Available at: https://www.jstor.org/stable/1953254?seq=1&cid=pdf-reference#page_scan_tab_contents [Accessed 4 Jul. 2019]. p. 419.
[56] Philp, M. Conceptualize Political Corruption. p. 46.
[57] Gardiner, J. Defining Corruption. p. 30.
[58] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 323; Bacio Terracino, J. *The international legal framework against corruption*. p.12.

Finally, the third common objective definition of corruption focuses on the role of public interest. It is recognized as the public-interested centered interpretation of corruption. Some scholars have defined previous approaches as vague and not completed. For that reason, they tried to add the concept of public interest to explain the core definition of corruption. Carl Friedrich, who was Professor of Political Science at Harvard and Heidelberg Universities, argues that:

> "The pattern of corruption can be said to exist whenever a powerholder who is charged with doing certain things, i.e., who is a responsible functionary or office holder, is by monetary or other rewards not legally provided for, induced to take actions which favor whoever provides the rewards and thereby does damage to the public and its interests."[59]

Defining corruption through the concept of public interest requires to consider the consequences of a corrupt act instead of its violation of a determined set of law.[60] If it is harmful to the public interest, it will be considered as corrupt even though it is a legal action according to law. On the other side, if an activity violates the law, but it does not produce harmful effects on the public, it will not be considered as corrupt.[61] This definition entails a crucial moral aspect of corruption,[62] precisely the harm to the public. However, this approach has been rather criticized because it tries to define corruption by considering its consequences. It could be misleading mostly for two reasons. Firstly, "the *definition* of corruption and its *consequences* are distinctive issues".[63] Secondly, this implies the recognition of corruption, only after its manifestation, namely when it starts to produce adverse effect on the public interest.[64]

As the title of this section suggests, these approaches share one crucial feature. They explain corruption through a classification of behaviors. Highlighting behavior allows scholars to recognize forms of corruption and to analyze the consequences of these corrupt acts. However, despite their apparent precision and objectivity, hardly can these approaches alone provide a general and reliable understanding of the core of corruption. On the contrary, a behavioral definition might create other dilemmas and debates on the

[59] Heidenheimer, A. and Johnston, M. ed., *Political Corruption: Concepts and Contexts*., p. 9.
[60] Bacio Terracino, J. *The international legal framework against corruption*. p.11.
[61] Gardiner, J. Defining Corruption. p. 32.
[62] This reminds the Machiavelli's understanding of corruption as the loss of *virtù* by citizens and public officials and the consequently great victory of avariciousness that undermines the public interest. See, Philp, M. Conceptualize Political Corruption. p. 45.
[63] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 324.
[64] Bacio Terracino, J. *The international legal framework against corruption*. p.11

identification of a variety of standards. Indeed, as Michael Johnston argues in his paper "The search for definition", "even where norms and roles are relatively settled, there will be substantial grey areas in any behavior-classifying definition of corruption."[65] Thus, the path toward a general understanding of corruption appears to be still longer.

1.4) Economic Approaches to the Meaning of Corruption

As indicated earlier, corruption is currently studied by several academic disciplines. Among them, economists have developed an extensive literature about it, applying economic theories to understand corruption. The economic approaches define corruption by explaining the interactions of the actors rather than classifying their behaviors. In other words, economics conceptualization of corruption defines the conditions that might produce corrupt acts.

An approach that has been developed under this umbrella is the Principal-Agent-Client (PAC) method. Within this framework, corruption is defined as the relationship among a Principal (the public charged with carrying out public function), an Agent (a public official who performs the operational functions of the agency), and a Client (a private individual with whom the agent interacts).[66] In this context, Robert Klitgaard, professor at Claremont Graduate University, defines corruption "in terms of the divergence between the principal's interests and those of the agent: corruption occurs when an agent betrays the principal's interest in the pursuit of her own."[67] Thus, it is no longer an act of an individual that violates a set of standards, but it regards the agent and the client behavior within an institutional and political setting.[68] This definition can be applicable only in a situation characterized by determined conditions that allow an agent to pursue her interests with impunity. These conditions usually are a monopoly of certain goods, discretion in their distribution, and a lack of accountability.[69] In this sense, Klitgaard has defined corruption through an equation, namely "corruption = monopoly power + discretion – accountability". This understanding of corruption, rather than

[65] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 325.
[66] Bacio Terracino, J. *The international legal framework against corruption*. p.12.
[67] Klitgaard, R. E. (1998). *Controlling Corruption*. Berkley: University of California Press. p. 24. Cited in: Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 325
[68] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 326.
[69] Philp, M. (2015). The Definition of Political Corruption. In: P.M. Heywood, ed., *Routledge Handbook of Political Corruption.* London and New York: Routledge, p.18.

explaining what corruption is, underlines the condition and causes that facilitate the spread of corruption, namely monopoly power, discretion, and accountability.[70]

1.5) Neo-Classical Approach

In search of a definition of corruption, some classical assumptions have rebirthed and have entered the contemporary notions of corrupt politics, such as the moral health of the societies. This is the so-called neo-classical approach, which understands corruption as a moral and political issue, rather than a process of specific actions. This approach has in common with the previous approaches that it defines corruption as "the abuse of a public role" for private gain. Both in the behavioral and neo-classical approaches, the conception of "abuse of a public role" is strictly tied to the legal and social standards that constitutes the social system of public order. The difference lies in the fact that the neo-classical approach does not attempt to specify a set of behaviors that can be considered as corrupt acts. On the contrary, the neo-classical approach faces corruption as a political and moral issue, going further than just the explanation of wrongful behaviors. It connects corruption with a broader phenomenon rather than the merely specific actions, namely politics.[71] Taking into consideration also politics in the notion of corruption is necessary. It allows analyzing the interaction of formal institutions and the social practices that together establish a social system of public order.[72]

An example of a neo-classical understanding of corruption[73] has been promoted by the political scientist and Professor at Harvard University Dennis Thompson. The Professor expanded the notion of "conventional corruption" introducing in the corruption literature the notion of "mediated corruption". Thompson considers corrupt actions, practices that damage the democratic process. According to him, these acts have been facilitated ("meditated") by the political and institutional background. In this sense, the conventional corrupt act, namely the public officers who are adopting a wrong behavior, is legitimate by the political process. In short, the concept of "mediated corruption" allows

[70] Nash Rojas, C., Pedro, A. and Matías, M. (2014). *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. Santiago, Chile: Universidad de Chile. [Online] Available at: http://repositorio.uchile.cl/handle/2250/142495 [Accessed 05 Jul 2019]. p. 18.
[71] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. pp. 329-331.
[72] *Ibid*., pp. 326-327.
[73] For other theories, see Philp, M. The Definition of Political Corruption. pp. 21-22; the *combination theory* Underkuffler, L. Defining Corruption: Implications for Actions. pp. 35-37.

us to expand the focus of corruption. It includes political and not only personal gains. Thus, personal gain is incorrect not just because it is personal, but because it might damage the entire system. This approach explains that the connection between the gain and the benefit is improper because it damages the democratic process, and not because the public official provides the benefit with a corrupt motive.[74] According to Johnson, Thompson's understanding of corruption places the importance of the democratic process back at the center of the corruption debate. In this regard, democracy is not considered as a formality of the contemporary societies but embodies moral values, such as representation, open debate, accountability, and equality.[75]

1.6) Conclusion: An International Human Rights Law Approach to the Definition of Corruption

Before being able to demonstrate whether there is a connection between human rights and corruption, it was necessary to reflect on the meaning of the term "corruption". As this section has tried to explain, corruption represents a complex societal phenomenon surrounded by a great deal of conceptual confusion.[76] It is extremely difficult to define corruption mainly for three reasons. Firstly, the nature of corruption is without any limits and this allows to include very different human activities under the same broad concept. As Von Alemann notes, "corruption is as old as human civilization, its forms subject to continual change and redefinition."[77] Secondly, these different practices that are corrupt acts may depend on the cultural interpretation that heavily influence any approach to corruption. For example, what has been described as "economic corruption" is often called "Western" corruption, whereas "social" or "traditional" corruption has been labeled "Asiatic".[78] Finally, the term counts very different, sometimes contrasting, definitions. As it will be analyzed in the last chapter of this present study, starting from the end of the

[74] Thompson, D. (1993). Mediated Corruption: in the case of the KeatingFfive. *American Political Science Review*, 87, pp.369-381. Cited in: Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. pp. 331-332.
[75] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 332.
[76] Boersma, M. (2010). Corruption as a Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education. In: M. Boersma and H. Nelen, ed., *Corruption & Human Rights: Interdisciplinary Perspectives*. Antwerp-Cambridge-Portland: Intersentia, pp.54-55.
[77] Von Alemann, U. The unknown depths of political theory: The case for a multidimensional concept of corruption. p. 33.
[78] Holmes, L. *Corruption: A Very Short Introduction*. pp. 4-5

cold war corruption became an important international issue for the contemporary world. For that reason, it has been studied by various discipline that developed a broad literature.[79] As a matter of fact, throughout this introductory section, corruption was analyzed from different disciplines, such as philosophy, sociology, political science, and economics. However, as it stated above, it may be impossible to provide a single comprehensive and universally accepted definition of corruption. Indeed, as the Council of Europe states, "no precise definition can be found which applies to all forms, types and degrees of corruption, or which would be acceptable universally as covering all acts which are considered in every jurisdiction as contributing to corruption."[80] For that reason, the aim of this section was not to increase the extensive literature on the notion of corruption. Due to methodological reasons, however, this section wants to provide a starting point definition that undoubtedly can be subject of several interpretations and criticism.

The policy analyst at the OECD Julio Bacio-Terracino defined corruption by splitting the term into two parts. He identifies a descriptive core and a normative element.[81] Taking into consideration this dual composition of the term “corruption”, we are able to provide a “pragmatic”, workable, and usable definition for the aim of this study on corruption and human rights.

The descriptive core of corruption is the easiest part to define, because there is a relatively strong agreement on that. As a matter of fact, the entire literature on corruption presented in this section has some features in common. As the Georgetown University Professor of Government Mark Warren noted, there is no debate on the descriptive core of corruption. Corruption is "the inappropriate use of common power for purposes of

[79] Morgan, A. (1998). Corruption: causes, consequences, and policy implications. *The Asia Foundation, San Francisco*. [Online] Available at: https://pdfs.semanticscholar.org/4c78/25eab52d838ed678f2f31a2eb0c533ee732b.pdf [Accessed 25 Jun. 2019]. Cited in: Pearson, Z. (2013). An international Human rights approach to corruption. In: P. Larmour and N. Wolanin, ed., *Corruption and Anti-Corruption*. [online] Canberra: ANU E Press, p.32. Available at: https://www.jstor.org/stable/j.ctt2tt19f.6 [Accessed 8 Jul. 2019].
; Boersma, M. (2010). Corruption as Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education., pp.54-55.

[80] World Bank. (1997). *Helping countries combat corruption*. Washington, D.C.: The World Bank, Operational Core Services (OCS), Poverty Reduction and Economic Management (PREM) Network. [Online] Available at: http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf [Accessed 25 Jun. 2019].

[81] Bacio Terracino, J. *The international legal framework against corruption*. p.14.

individual or group gain at common expenses."[82] For that reason, the conventional definition provided by the non-governmental organization (NGO) Transparency International (TI)[83] could be efficient and summarize the several existing attempts that define corruption. In short, according to the NGO, corruption is "the abuse of entrusted power for private gain."[84]

However, while this concept somehow clarifies our understanding of corruption, it is still vague. Since it does not allow to distinguish corrupt practices from other types of breaches of duties, it is not entirely serviceable. The solution lies on delimiting the concept by referring to the factors that allow us to consider any criminal act as corrupted.[85] As a result, to determine which specific acts determine a corrupt practice, namely abuse of entrusted power for private gain, the descriptive core needs to be measure against a normative element. Here, lies the dilemma on which normative element should be adopted.

With the purpose to determine whether corrupt practices can constitute a violation of human rights, the normative element must be the law. More precisely, international law and international human rights law will determine which actions constitute the abuse of power for private gain. Corruption is logically linked to a normative system.[86] The

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[82] Warren, M. (2004). What Does Corruption Mean in a Democracy?. *American Journal of Political Science*, [online] 48(2), pp.328-343. Available at: http://www.jstor.org/stable/1519886 [Accessed 8 Jul. 2019]. p. 332.

[83] Transparency International (TI) is an international non-governmental organization founded in 1993 and has the headquarter in Berlin, Germany. Its mission is to stop corruption and promote transparency, accountability, and integrity at all levels and across all sectors of society. See TI website for more information about their missions and strategies (*Transparency International - The Global Anti-Corruption Coalition*. [online] Transparency.org. Available at: https://www.transparency.org/ [Accessed 25 Jun. 2019].

[84] Transparency International. (2009). *The Anti-Corruption Plain Language Guide.* Berlin: Transparency International. [Online] Available at: https://www.transparency.org/whatwedo/publication/the_anti_corruption_plain_language_guide. [Accessed 25 Jun. 2019.] p. 14.

[85] Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p. 16.

[86] Although legal definitions are widely accepted, the logicality of the role of law is heavily criticized by social scientists. They claim that the law will never contain all corrupt acts and that many actions will fall outside the legal sphere, but without specifying which acts. Some social scientists argue that law, as a normative element, considers as illegal, actions that may be considered morally defensible. For example, Rose-Ackerman notes that "one does not condemn a Jew for bribing his way out of a concentration camp". However, although it legally remains a corrupt act, this kind of situation are taken into consideration by criminal law, for example by applying the principle of the lesser harm defense. Finally, other criticisms concern the influence of a powerful group in the law-making process. They will legalize practices to pursue their interests. For instance, Johnston notes how Ferdinand Marcos rewrote sections of the Philippine Constitution to legalize his embezzlement of public assets. In this case, this critic affects only temporarily the legal definition of corruption without taking into consideration the essence of legislative process under

normative system concedes to public officers the duties to make decision on interests that are not directly related to them. In this sense, corruption necessarily implies the violation of a duty and a contradiction of interests. The violation of the duty is motivated by the impossibility to get the "private gain" complying with the obligations of the normative system. This benefit will be of an economic or monetary nature. However, it can also be political, professional, or sexual. Since the public official is aware of the negative consequences of the corrupt act, another essential feature is that any corrupt act will be kept hidden.[87] In this sense, utilizing law is it possible to criminalize conducts which are considered as crimes because they are directly or indirectly threatens the security or well-being of society.[88] As Bacio-Terracino notes, "law is a formal of social control."[89]

Another theory committed with a certain kind of normativity, which completes and goes further the simplistic notion of the issue, is the democratic conceptualization of corruption. This approach has been developed by Warren, who connects democratic theory to the concept of corruption. The political scientist deals with corruption by considering the normativity of the political system that derives from democracy. According to him, this should help to understand corruption with a normative framework, established with democratic institutions and through a democratic process.[90] Generally speaking, democracy is based on a norm of democratic political equality: "every individual potentially affected by decision should have an equal opportunity to influence the decision."[91] In this sense, democracy requires that individuals have an equal opportunity to participate at institutional level to affect such collective matters. Moreover, this opportunity must be effective in two dimensions: "power" and "judgment". Concerning "power", democracy requires institutionalized empowerments of individual participation, such as with the right to vote. Whereas, "judgment" implies the recognition of equal opportunities to influence the public judgment, through effective rights and

a democratic system, namely that in the later period with the same democratic process other normative standards could be adopted. That was the case of the new government of Corazon Aquino that amended the Philippine Constitution modify the provisions introduced by Marcos. See Bacio Terracino, J. *The international legal framework against corruption*. pp. 14-17.

[87] Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p. 16.

[88] Smith, J. and Hogan, B. (1992). *Criminal Law*. 7th ed. London: Butterworths, p.16. Cited in Bacio Terracino, J. *The international legal framework against corruption*. p.16.

[89] Bacio Terracino, J. *The international legal framework against corruption*. p.16.

[90] Warren, M. What Does Corruption Mean in a Democracy?. pp. 332-333.

[91] *Ibid*.

opportunities to speak and be heard in the public deliberations that define the agendas and public elections.[92] Applying the democratic theory, corruption can be understood as an exclusion from collective actions of people, who according to democratic rules have the right to be included. The aim of the exclusion is motivated by the purpose of obtaining individual gains or advantages, which are in contrast with the interests of the society. Warren points out that it is possible to consider this form of exclusion as corruption only if it involves hypocrisy. In this sense, corruption is the "corrosion of public norms by those who profess them", it is a form of deceptive or fraudulent exclusion.[93] Adopting this conceptualization of corruption, it is possible to set as a normative parameter the rules that govern the democratic process. It makes the definition of which acts are corrupt or not to be dynamic, and to look beyond individual behaviors, focusing the attention also on institutions. Moreover, this permits to consider as corrupt not only individual but also institutions.[94] Hence, the search of a normative framework become essential in the search for a definition of corruption

The lack of universality is a common critic presented to definitions based on law as normative standard. Since law and the form of government differ in every legal system, the definition of corruption varies from country to country.[95] However, it is well established that corruption became a global political issue and requires a global political response.[96] For that reason, throughout the international legal framework[97], international law may be useful to provide a sort of cohesion among all the domestic legal system and provide a universally common accepted understanding of corruption.[98] International treaties on corruption requires states parties to uniform their domestic law by defining certain types of conducts as crimes of corruption.[99] In this sense, the sources of

[92] Warren, M. What Does Corruption Mean in a Democracy?. pp. 332-333.
[93] *Ibid.*
[94] Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p. 19.
[95] Bacio Terracino, J. *The international legal framework against corruption*. p.18.
[96] *Ibid*., p. 47.
[97] As it will be introduced in the third chapter, it is composed of both hard law (international treaties) and soft law (guidelines and recommendation).
[98] Not only a universally accepted definition of corruption, but at least a common understanding.
[99] Nowadays, the supremacy of international law on domestic law is no longer taken for granted. However, from a legal logic point of view, the supremacy of international law should not raise any doubts. The *raison d'être* of international law is to impose the compliance of uniformed rules. Whereas, concerning domestic law, it is characterized by the peculiarity of every domestic law. Thus, the uniformity of international law postulates its superiority in comparison with the specificity of domestic law. (See Carreau, D. and Marrella, F. (2018). *Diritto internazionale*. Milano: Giuffrè Editore, pp.33, 34.)

international law could be the standards of the normative element. This multilateral response under the sphere of international law produces a process of harmonization of domestic law against corruption. Thus, to understand corruption universally, analyzing international law becomes necessary to provide a definition of corruption in the international arena.[100] However, it is important to specify that international treaties do not provide a one-line definition of corruption and they may include different approaches. As it will be analyzed further in the third chapter of this thesis, the sources of international law deal with corruption, not directly defining it, but as a group of criminal offences. Indeed, the next session aims to identify and define the different types of corruption and criminal acts.

To conclude, this complex societal phenomenon needs to be adapted to each field of study. As Johnston notes, "our definitions may vary according to the questions we wish to ask and the setting within which we ask them."[101] Since the problem of corruption has been internationalized and in terms to understand whether it affects the promotion, protection, and enjoyment of human rights, which transcends every legal system[102], a narrow definition of corruption will be adopted. As Bacio-Terracino theorized, corruption is the result of the combination of a descriptive core and a normative element. Since each legal system could have a different understanding of corruption, the standard of the normative element will be provided by international law.

Furthermore, the democratic theory on corruption will play an important role. It allows broadening the application of the notion of corruption expanding its focus. It also permits to better understand its consequences and to identify the harms caused to the society. Conceptualize corruption as a lawbreaking for private gain allow us to classify objectively the examples provided at the beginning as corruption scandals. Thus, experts could analyze these cases from the same point of view. This "revisited" conceptualization

[100] Bacio Terracino, J. *The international legal framework against corruption*. p.18.
[101] Johnston, M. The search for definitions: the vitality of politics and the issue of corruption. p. 333.
[102] "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignt" (UDHR, Article 2). Some social scientists claim that human rights are not universal because it is impossible to find the same relationship between government and individuals in all the countries of the world. However, although it is only recognized at the normative level, in a heavily fragmentary international community the presence of general precepts concerning human rights represents an important unifying factor. (See Cassese, A. (1994). *I diritti umani nel mondo contemporaneo*. Roma-Bari: Editori Laterza, pp.51,71-73.)

of corruption together with an analysis of its types, causes, and consequences can help the present study to explore the relationship between corruption and human rights.

2) Types of Corruption

The previous section has testified how complex is dealing with corruption. Notwithstanding, the development of domestic law primarily and the progressive expansion of an international legal framework against corruption highlights the strong commitment of states to cope with the issue. Thus, adopting a common understanding of corruption became a methodological need in order to grasp its real essence. Although, corruption maintains its "hidden nature", the previous section is an attempt to provide a workable definition of corruption.

This section aims to classify the common types of corruption. The examination of its typologies will allow to better understand corruption by reducing its complexity. As the Research Manager at the New South Wales (NSW) Independent Commission Against Corruption[103] Angela Gorta stated, "the more information one has about corruption, the better-equipped one is to prevent it."[104] This section will take into account just the main important categorizations of corruption developed by the extensive literature. Here, corruption will be analyzed by distinguishing different categories.

The first typology focuses on where corruption occurs, namely in the private and in the public sector. Afterward, the second category considers the level of authority that corruption involves, drawing the famous distinction between the so-called "grand" and "petty" corruption. Subsequently, two types of corruption will be drawn in the base of who has benefited the most from it. It is the case of redistributive and extractive corruption. Finally, apart from these categories, it is also necessary to analyze the criminal acts that constitute the normative element that determines what is considered an abuse of entrusted power for private gain. From a legal perspective, it would help to detect which acts individually are considered as corrupt criminal acts.

[103] The Independent Commission Against Corruption (ICAC) was established by the NSW Government in 1988 in response to growing community concern about the integrity of public administration in NSW. See Icac.nsw.gov.au. (n.d.). *Home - Independent Commission Against Corruption*. [online] Available at: https://www.icac.nsw.gov.au/ [Accessed 18 Jul. 2019].

[104] Gorta, A. (2001). Research. A Tool for Building Corruption Resistance. In: P. Lamour and N. Wolanin, ed., *Corruption and Anti-Corruption*. Canberra: Asia Pacific Press, p.35.

2.1) Private and Public Corruption

The descriptive core of corruption, which has been provided previously, does not distinguish its two primary forms. It defines corruption as "the abuse of entrusted power for private gain" without considering where it occurs. Indeed, corruption can arise both in public and in the private sector.[105] The former occurs when a corrupt act involves "anyone who holds a position of authority to allocate rights over (scarce) public resource in the name of the state or the Government"[106], a State actor, and a private party, such as a citizen or a company. Whereas, private sector corruption includes the corrupt relationships within and between non-State actors, namely corporations, NGOs, and other private institution.[107] For example, this is the case of a company sales representative who gives gifts to the purchasing manager of another company intending to place a new order.[108] Corruption in the private sector, also called private-to-private corruption, is not taken into consideration by most of the literature about the issue. Although extending the analysis of corruption to the private sector could instead be necessary, social scientists prefer to deal with private sector corruption as a commercial criminal activity. Due to the privatization process of public functions and the growing of international business transaction, nowadays, corruption in the private sphere is no longer a matter of commercial criminal activity. In contrast, it undermines values like trust, confidence, or loyalty, and it causes damages to society.[109]

However, the present study will concern only corruption involving the public sector for two reasons. Firstly, the state is solely responsible for any violation of human rights protected by international law.[110] Secondly, cases of corruption within the private sector may not cause a violation of human rights.[111] For example, in the case of the sale representative, there would appear to be no direct consequences on human rights. Thus,

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[105] For example, the general definition provided by the World Bank does not take into account the possibility of private corruption. Indeed, the WB defines corruption only as abuse for private gain committed by a public official.
[106] Amundsen, I. *Political Corruption: An Introduction to the Issues*. p. 2.
[107] Boersma, M. (2010). Corruption as Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education., p. 56.
[108] Bacio Terracino, J. *The international legal framework against corruption*. p.20.
[109] Council of Europe. *Explanatory Report to the Criminal Law Convention on Corruption*. European Treaty Series – No.173.
[110] McCorquodale, R. (2010). Non-state actors and international human rights law. In: S. Joseph and A. McBeth, ed., *Research Handbook on International Human Rights Law*. Cheltenham, UK - Northampton, MA, USA: Edward Elgar, p.100.
[111] Bacio Terracino, J. *The international legal framework against corruption*. p.316.

henceforth, the term corruption will use to indicate corrupt acts involving State actors and politics.

2.2) "Grand" and "Petty" Corruption

Another important classification of corruption is based on its "intensity". In this sense, corruption has been divided into "grand" and "petty". Grand or political corruption occurs in the highest level of the state. Thus, it directly involves the formulation of political decisions. It is when politician are themselves corrupt, namely when they use their political power not in the name of the people but for their private gain.[112] An example of grand corruption is a group of politicians adopting legislation that favors a private group that has bribed them.[113] On the other side, kinds of corruption that occur in citizen everyday life are defined as "petty" forms of corruption. Petty corruption, which is also named as bureaucratic corruption, is strictly linked with the implementation of laws and with the situation in which citizens meet public officials.[114] Although this distinction could seem arguable because it depends on the separation of politics from administration, it is essential in practical terms for the analysis of the effects on society.

As the term reminds, "grand" corruption may create serious consequences that can affect the functioning of the entire system. Differently from petty corruption, political corruption occurs at the elite level of the state, in a way distant from ordinary citizen everyday lives. However, it has political repercussion in the entire system.[115] It affects the misallocation of resources, how decisions are made, and generally, it impoverishes

[112] Amundsen, I. *Political Corruption: An Introduction to the Issues*. p. 3.
[113] Holmes, L. *Corruption: A Very Short Introduction*. p. 10.
[114] *Ibid*.
[115] It is interesting to note that political corruption is also considered as a strategy. Corruption as a master plan is the case of the policymakers in the authoritarian regimes. They use grand corruption to enrich themselves. Amundsen argued that, in authoritarian contexts, this form of corruption is merely a normal condition to govern. For example, it was the case of the authoritarianism and neo-patrimonial states of the MENA region, before the revolts of 2011. Even if some social scientists argue that it is still the case for some countries. The stability of the governments depended on the existence of corruption and a clientelist system. Moreover, in this case, where corruption and authoritarianism are strictly interconnected, the violation of human rights is a commonplace, such as intimidation, repression of political opposition, and imprisonment and torture.

the functioning of the democratic institutions.[116] Grand corruption makes people less trusting in government and increases inequality.[117]

Furthermore, this form of corruption can become degenerative and embedded in a broader political and economic situation, which, in turn, helps to sustain it. This subcategory of the grand corruption is named endemic or systemic and classifies corruption on the base of its prevalence. According to Johnston, systemic corruption is 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 many people have few practical alternatives to dealing with corrupt officials."[118] Another term related to grand corruption is kleptocracy. The term has been introduced by the sociologist Stanislav Andreski in his book *Parasitism and Subversion: The Case of Latin America.* The term is composed of the word *klepto* (to steal/thief) and *kratos* (rule). Thus, it literally means "rule by looters".[119] In practice, kleptocracy refers to "a state dominated by kleptocrats who engage in corruption as a major, if not principle, means of capital accumulation".[120] In other words, it means high-level politicians and bureaucrats who utilize corruption as a *modus operandi* to accumulate capital in order to serve their private interests.

2.3) Redistributive and Extractive Corruption

A third distinction often drawn is between redistributive and extractive corruption. This categorization classifies corruption in the base of who initiates the corruption process, the office-holder or the favor-seeker. In this sense, this classification analyzes the relationship between the State (public officials) and private citizens (economic and social groups).

Redistributive corruption occurs when the state is the weaker part of the corrupt relationship. The state is politically incompetent and is no longer able to implement coherent policies. On the contrary, private social and economic groups are the stronger

[116] Amundsen, I. *Political Corruption: An Introduction to the Issues*. p. 3.
[117] Uslaner, E. (2015). The Consequences of Corruption. In: P.M. Heywood, ed., *Routledge Handbook of Political Corruption.* London and New York: Routledge, p.200.
[118] Johnston, M. (1998). Fighting Systemic Corruption: Social Foundations for Institutional Reform. *The European Journal of Development Research*, 10(1), pp.85-104.
[119] Boersma, M. (2012). *Corruption: a violation of human rights and a crime under international law*. Cambridge: Intersentia, p.29.
[120] Alatas, S.H. (2015). *The Problem of Corruption*. Kuala Lumpur: The Other Press. pp. xi-xii.

part of the state-society relationship. Indeed, they are obtaining more benefits from the corrupt practices thanks to their power and organization. This kind of corruption damages the poor and most vulnerable social segments because the resources obtained by the private groups will not be distributed universally.[121] A typical example of redistributive corruption is the control of the vast state's prerogative by *mafia* organizations.

Instead, extractive corruption occurs when the state is the stronger part of the relationship. In this case, the state apparatus is used by the ruling elite to extract resources from society for the only benefit of the rules. Once again, this is the case of authoritarian and neo-patrimonial states, in which rulers use the power capabilities of the state to increase their powers.[122] As indicated earlier, since the state is solely responsible for any violation of human rights protected by international law, this present study will take particularly into account extractive corruption.

2.4) Common Criminal Acts related to Corruption

Finally, it is necessary to consider also offenses related to corruption, which sometimes are used as interchangeable terms. In the previous section, it has been claimed that a legal definition of corruption is lacking. Indeed, in the international treaties, the term "corruption" gathers different criminal activities which correspond to the descriptive core of corruption, the abuse of entrusted power for private gain.[123] The ordinary criminal acts related to corruption are bribery, embezzlement, illicit enrichment, trading in influence, and abuse of power.[124]

The most prevalent form of corruption is bribery. It is so representative that in popular expression, bribery is often used as a synonym to replace the term corruption. Undoubtedly, this kind of offenses represents the essence of corruption. Indeed, bribery

[121] Amundsen, I. *Political Corruption: An Introduction to the Issues*. pp. 5-7.
[122] *Ibid*., pp. 7-10.
[123] Bacio Terracino, J. *The international legal framework against corruption*. p.18.
[124] These are the criminal acts concerning corruption that are specified in the UNCAC. As it will be analyzed in the third chapter, the different international instruments addressing corruption have interpreted the criminal acts differently. Indeed, some treaties criminalize as corrupt only the act of bribery. This is the case of CoE's Law Convention on Corruption, the OECD convention, the EU protocols to the PFI convention, and the Convention on the Fight Against Corruption Involving Officials of the European Communities or Official EU Member States. In the case of UNCAC, besides recognizing as corrupt act also trading in influence, abuse of functions, and illicit enrichment, it obliges states parties to criminalize in their domestic law only bribery and embezzlement as corrupt acts. The criminalization of the other corrupt acts is optional.

can be found in all the classification of corruption explained above. Moreover, it is criminalized by all the international and regional anti-corruption treaties. The international legal framework against corruption obliges state parties to prohibit bribery at national level.[125] This act of corruption has been defined as "the promise, offering or giving, to a public official[126], or the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties".[127]

Since it is a form of corruption, it necessarily involves a relationship composed by at least two parts. Consequently, analyzing the *actus reus* provided by the definition, it is possible to distinguish two types of bribery. The first form will be named as *active bribery*. It entails the actions of *promise, offering, or giving to a public official*. In this case, the act of bribery will be committed by the bribe-payer or bribe-giver.[128] On the other hand, the second type will be named as *passive bribery*. In this case, the breach of duty will no longer be committed by the bribe-giver, but by the bribe-taker, or rather the public official. The civil servant "solicitates" or "requests", implicitly or explicitly, to the other part of the corrupt relationship a bribe that has to be given in order to obtain a specific behavior from the public officials. In other words, by the mere *active* fact of soliciting a bribe, the civil servant commits *passive bribery*. If in the first type of bribery explained above, the bribe can be offered voluntarily. The active part usually consists of the mere exchange of the bribe, where both the parties will benefit. This is usually named as *transactive corruption*.[129] However, in *passive* bribery, a public official can compel the other party to bribe. In this way, bribery will represent the only instrument in order to get the benefit. This situation is also known as *extortive corruption.*[130] Even though active

[125] Boersma, M. Corruption as Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education., p. 59.
[126] The UNCAC not only define bribery in the public sector but also in Art. 21 entails this type of corruption in the private sector.
[127] UNCAC, Art. 15.
[128] However, the acceptance of the promise, offer, or gift by the bribe-taker still represents an unsolved issue. There is no agreement among countries on how considering the acceptance of "kickbacks" by an official as an essential element of the offense of the bribery.
[129] Boersma, M. Corruption as Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education., p. 59.
[130] Making the connection between corruption and the violation of the human rights of education, Marine Boersma argues that cases of extortive bribery sometimes are the results of a necessity rather than of greed. The professor explains how, in many developing countries, several civil servants are unpaid. Therefore,

and passive bribery could be understood as two different breaches of duties, they share the same *mens rea,* namely the mere intention to commit the bribe. The element of intention is essential. It allows distinguishing several corrupt practices that could be considered as acts of bribery. For instance, if someone offers a gift to civil servant without the intention to ask something in exchange, there is no bribery.[131] As a matter of fact, the element of intentionality is specified in Article 15 of the UNCAC, "each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally". Moreover, both types of bribery can take place directly and indirectly. The difference lies in the fact that indirect bribery implies the role of an intermediary, who will be in charge to perform the *actus reus*. The third part can be anyone and does not directly connect with the briber or the public official.[132]

Another common practice of corruption is the embezzlement of public properties. It involves "the intentional misappropriation or embezzlement of property or funds legally entrusted to someone in their formal position as an agent or guardian."[133] It is the case of a public official who uses "any property, public or private funds or securities or any other thing of value", entrusted to him or her by virtue of his or her position, in order to get a private gain.[134] In other words, embezzlement is "theft of public resources by public officials."[135] This form of corruption is composed of two different types of acts: embezzlement and misappropriation. The former gathers all the offenses concerning the use of another's money or properties for private gain. Instead, the latter refers to unauthorized, improper, or unlawful use of money or properties.[136] Moreover, these offenses are considered the most efficient ways for enrichment by the ruling class, sometimes more lucrative than bribery and many other forms of corruption.[137] Unlike other forms of corruption, embezzlement is considered by many scholars as a form of

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they try to earn their income through bribes. (See Boersma, M. Corruption as Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education., p. 59.)

[131] Bacio Terracino, J. *The international legal framework against corruption*. p.89.

[132] For a complete conceptualization of bribery, see Bacio Terracino, J. *The international legal framework against corruption*. pp.88-112.

[133] Rose, C. *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal System*. p.8.

[134] UNCAC, Art. 17. Embezzlement is also considered as a corrupt act by the Inter-American Convention Against Corruption in his Article XI (d).

[135] Amundsen, I. *Political Corruption: An Introduction to the Issues*. p.11.

[136] Bacio Terracino, J. *The international legal framework against corruption*. p.112.

[137] Amundsen, I. *Political Corruption: An Introduction to the Issues*. p.11.

"autocorruption".[138] It does not necessarily involve directly the second part of the corrupt relationship, namely the private side.

Illicit enrichment is considered another criminal offense that fits under the umbrella concept of corruption. It may be defined as a "significant increase, or as unexplained or excessive wealth, in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."[139] However, according to Bacio Terracino, this definition of illicit enrichment is not complete, since it does not take into account the action or omission of the public official. Therefore, he categorizes as illicit enrichment a type of corrupt criminal act when "a public official during incumbency has acquired property that has is manifestly disproportionate to her or his salary level and other lawfully earned income, such assets are presumed to have been unlawfully acquired, unless the official can justify their legitimacy."[140] In this sense, illicit enrichment can also be defined not only as an action but as an omission, namely "the forbidden conduct consists of the lack of justification by the public official of his/her unexplained wealth".[141]

In addition, dissimilarly from the bribery and embezzlement, the recognition of illicit enrichment as a criminal corruption offense at the international arena should not be taken for granted. On the contrary, this is a wholly problematic concept, because a universal legal recognition is still lacking.[142] The burden of proof is the cause of the current debate about the legal recognition of illicit enrichment. Supporters of this claim argue that illicit enrichment reverses the burden of proof. In this sense, the alleged corrupt civil servant must demonstrate that the unexpected increase in income is caused by legal means. Thus, according to some, the criminalization of illicit enrichment goes against the so-called presumption of innocence. "Any person who is charged with a criminal offense has the right to be presumed innocent until proven guilty in accordance with the law".[143] It is an essential legal principle recognized in many national Constitutions and considered

[138] Boersma, M. Corruption as Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education., p. 60.
[139] UNCAC, Art. 20. Illicit enrichment is also considered as a corrupt act by the Inter-American Convention Against Corruption in his Article IX.
[140] Bacio Terracino, J. *The international legal framework against corruption*. p.115.
[141] Jorge, G. (2007). The Romanian Legal Framework on Illicit Enrichment. *American Bar Association Central European and Eurasian Law Initiative, American Bar Association, Washington, DC*.
[142] Boersma, M. Corruption as Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education., p. 61.
[143] Bacio Terracino, J. *The international legal framework against corruption*. p.116.

the core of international human right law.[144] On the other side, there are also many supporters of the offense of the illicit enrichment.[145] They counterattack by arguing that the concept of illicit enrichment does not violate any legal principle, but it revolutionizes the traditional understanding of the legal principle of presumption of innocence. Furthermore, they claim that concerning corruption, the presumption of innocence should be more flexible as occurs with criminals of terrorism, drug trafficking[146], and money laundering. Indeed, these criminal acts do not require "suspicion" but the merely "indications" of a crime.[147] In this sense, the burden of proof could be "eased", allowing the protection of both the right of the accused person and the interest of the entire community.[148] For example, due to the importance to find an acceptable balance between the presumption of innocence and the need of society to combat corruption, the Hong Kong Court of Appeal in *Attorney General v. Hui Kin-hong* has held that the presumption of innocence is not absolute and can be subject to limitation so long as this rational and proportional. Explicitly, the Court stated that "there are exceptional situations in which it is possibly compatible with human rights to justify a degree of deviation from the normal principle of that the prosecution must prove the accused's guilt beyond reasonable doubt".[149]

Trading in influence is a corrupt act very similar to bribery that aims to include those corrupt acts not covered by bribery. It can be defined as "the intentional promise,

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[144] Universal Declaration of Human Right, Art. 11(1); International Covenant on Civil and Political Rights, Art. 14 (2); Inter-American Convention on Human Rights, Art. 8(2); European Convention on Human Rights, Art. 6 (2); African Charter on Human and People's Rights, Art. 7(1).

[145] For example, in the case of *Alsogaray, María Julia s/ recurso de casación e inconstitucionalidad*, Case A. 1846. XLI, (CSJN, Dec. 29, 2008), presented at the beginning of this thesis, the Argentine Supreme Court analyzed the issue and determined that the offense of illicit enrichment does not violate the principle of presumption of innocence.

[146] See the judgment of the European Court of Human Rights (ECtHR) in *Salabiaku v. France*. The court accepted the use of a legal presumption of guilt. For more on the disagreement concerning the presumption of innocence see Van Sliedreget, E. (2009). A contemporary reflection on the presumption of innocence. *Revue internationale de droit pénal*, 80(1), p.247.

[147] Mackor, A. and Geeraets, V. (2013). The Presumption of Innocence. *Netherlands Journal of Legal Philosophy*, 42(3), pp.167-169.

[148] Jayawickrama, N., Pope, J. and Stolpe, O. (2002). Legal provisions to facilitate the gathering of evidence in corruption cases: easing the burden of proof. *Forum on Crime and Society*, [online] 2(1). Available at: https://www.researchgate.net/publication/265156270_Legal_provisions_to_facilitate_the_gathering_of_evidence_in_corruption_cases_easing_the_burden_of_proof [Accessed 17 Jul. 2019].

[149] Landwehr, O. (2019). Article 20. Illicit enrichment. In: C. Rose, M. Kubiciel and O. Landwehr, ed., *The United Nations Convention Against Corruption A Commentary*. Oxford: Oxford University Press, p.233.; Hatchard, J. (2010). Adopting a Human Rights Approach towards Combating Corruption. In: M. Boersma and H. Nelen, ed., *Corruption & Human Rights: Interdisciplinary Perspectives*. Antwerp-Cambridge-Portland: Intersentia, pp.12-13.

offering, or giving to a public official or any other person, or the intentional solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage in order for the public official or the person to abuse her on his real or supposed influence with a view to obtaining from an administration or public authority an undue advantage for the original instigator of the act or for any other person".[150] Like bribery, trading in influence has an active and passive side. The active side consists of giving an advantage in exchange for influence, while the passive form consists of the requesting or accepting an advantage in exchange for influence.[151] Moreover, trading in influence is considered as "corrupt trilateral relationship" and as a case of "background corruption".[152] This corrupt act involves not only a public official and a "bribe-giver", but also an "influence peddler", namely who has real or apparent influence on the decision-making of a public official exchanges this influences for an undue advantage. Thus, unlikely with bribery, in this case the "bribe-taker" will be the "influence peddler". Therefore, this is a case of "background corruption" because the offense will be located on "the close circle of the official or the political party to which he belongs and… the corrupt behavior of those persons who are in the neighborhood of power and try to obtain advantages from their situation…"[153]

Finally, abuse of function or position refers to the "intentional public official's illegal performance or failure to perform an act in discharging his or her functions, for the purpose of obtaining an undue advantage for her or himself or for another person or entity".[154] Abuse of function is similar to passive bribery, but compared to it, this offense includes the unlawful action or omission of the civil servant, while passive bribery covers only the fact of accepting or soliciting a bribe.

In the current literature, it is common to deal with corruption as if it were a single social complex phenomenon. However, as explained above, corruption involves several criminal activities and has different shades. Since corruption cannot be perceived as one

[150] UNCAC, Art. 18. It is also defined in the Art. 23 of the CoE Criminal Law Convention. Although the consideration of trading influence as a corrupt act is significant, its criminalization is still controversial in many countries and it is still not mandatory under the UNCAC.
[151] Bacio Terracino, J. *The international legal framework against corruption*. p.124.
[152] *Ibid*.
[153] Council of Europe. *Explanatory Report to the Criminal Law Convention on Corruption*. European Treaty Series – No.173. para. 64-66.; Bacio Terracino, J. *The international legal framework against corruption.* p.124.
[154] UNCAC, Art. 19.

single problem, the effort to divide the concept into different types can help to tackle it effectively. Furthermore, it would help to dismantle the vagueness of the concept, and consequently, to build a shared conceptualization of corruption. For example, it can facilitate the identification of the factors leading to corruption, its consequences, and its solutions. The analysis of some of the corrupt offenses, such as bribery, embezzlement, illicit enrichment, trading in influence, and abuse of functions, help to provide a better understanding of the normative element of what is considered as an abuse of entrusted power for private gain. Consequently, clearly defining the specific forms of corruption and its offenses permits to demonstrate in detail whether one of these corrupt offenses may constitute a violation of a specific human right.

3) Factors Leading to Corruption

Since corruption is a complex phenomenon without a universal understanding, on no account is it surprising that many causes have been identified. People, countries, and institutions are corrupt for numerous reasons that differ from one corrupt subject to the next. Thus, it would be misleading to provide only one general explanation for the presence of corruption. Indeed, various lines of the current corruption literature explain why corruption thrives. They identified a list of common determinants. These factors vary depending on the methodological approaches applied.[155] These causes explain why some countries, people, or institutions experiment more corruption than others. Even though the current explanation of the causes of corruption seems still undefined, its understanding is necessary. It is the first move to implement patterns of anti-corruption efficiently. It allows us to comprehend the real roots of the problem and consequently to develop suitable strategies to cope with it. With a universalistic approach to corruption,

[155] Combining the different determinants of corruption, the World Bank suggests a harmonization of the causes which bring about the establishment of a perfect corrupt environment. According to the World Bank, corruption flourishes: where distortions in the policy and regulatory regime provide scope for it and where institutions of restraint are weak. The problem of corruption lies at the intersection of the public and the private sectors. It is a two-way street. Private interests, domestic and external, wield their influence through illegal means to take advantage of opportunities for corruption and rent-seeking, and public institutions succumb to these and other sources of corruption in the absence of credible restraints. (See Ajay, C., Simon John, C., Alison Margaret, E., Harald L, F., Cheikh T, K., Chad, L., Brian David, L., Sanjay, P. and Beatrice Silvia, W. (1997). *World Development Report 1997: The state in a changing world ().* World Development Report. Washington, DC: World Bank Group. p. 102. [online]
Available at:
http://documents.worldbank.org/curated/en/518341468315316376/pdf/173000REPLACEMENT0WDR01997.pdf [Accessed 17 Jul. 2019].)

this section aims to report some of the critical conventional driving forces identified by the literature.

From this perspective, however, the determinants of corruption will not be understood as isolated factors directly linked to corruption. On the contrary, controlling and understanding corruption efficiently requires a combination of these aspects, letting them interact and overlap with each other.[156] Due to the complexity of the phenomenon, the factors leading to corruption will be classified into three general categories.[157] In the present study, the first two categories utilize social science models and approaches. In the first part, it is analyzed the institutional and political factors, studying the systemic roots of corruption. Instead, in the second part, it takes into account the economic causes, namely the economic incentives for an official to behave corruptly. Finally, the last category focuses on how ethical and cultural considerations might relate to corruption. As it has been stated before, although here it will be presented a list of possible explanations of corruption, not precisely one of these factors is the only responsible for corruption. Corruption thrives because of the interaction of all these factors.

3.1) Political and Institutional Factors

Nowadays, the vast majority of countries have developed a national legal framework against corruption. Hence, the deficiency of the legal basis regulating corruption as a criminal offense could be one of its primary cause. But, there still are some cases in which law does not erase the presence of corruption completely. Many public officials abuse their power throughout the replace of formal rules with informal rules. The existence of such formal rules depends on the political regime of a country. Thus, the analysis of the root of corruption requires as necessary the selection of some variables concerning the different characteristics of the political institutions.

[156] Holmes, L. *Corruption: A Very Short Introduction*. p. 55.

[157] The three categories adopted here summarize the most important and common explanation of the factors leading to corruption. However, there are other accepted interpretations of the causes of corruption that will not be considered, such as psycho-social explanations. This approach attempts to identify why individual become corrupt throughout criminological theories. Firstly, the study individuals focusing on how and why they think and behave in a certain way. After that, they focus on the structure of the society, examining individuals and their interaction with the social context. (See Holmes, L. *Corruption: A Very Short Introduction*. pp. 56-60).

One variable can be political competition. It has been used by several scholars to explain the level of corruption in a country. For example, in authoritarian regimes, the level of political competition is shallow. Consequently, the entire power is held by the leader and by his cartel. In this situation, the public interests will be pursued by taking into consideration only the mere interests and targets of the political elite, without considering the will of the population. For these reasons, authoritarian systems are more prone to the establishment of a corrupt environment. In this kind of states, corruption flourishes also because of the lack of an independent media, limits to civil liberties, and because legal channels are not equally available to everyone. On the contrary, in a democratic system, the community has the power to select and replace their representatives according to the interests of the majority. In this sense, the population is directly or indirectly taking part in the legislative process that will govern their lives. Obviously, since this form of government implies more political competition, democracy will limit the presence of corruption.

However, even if stable democracies appear to be less corrupt than authoritarian regimes, unfortunately, democracy is not the cure for corruption. According to Treisman, the current degree of democracy in a country makes almost no difference to how corrupt it is perceived to be. What matters is whether a country has been democratic for decades.[158] Furthermore, it is not always a matter of democracy, but a matter of bad governance of the democratic country. Indeed, there still are several democratic countries with a high rate of corruption. At the international level, democracies developed in different forms. For that reason, many aspects make democracy vulnerable to corruption or not. These are, for example, the electoral system and the preference for a presidentialism, parliamentarism, federalism, or bicameralism system.[159] Many political scientists argue that unitarism and parliamentarism are inversely correlated with political corruption.[160] Moreover, other experts claim that presidential democracies have more corruption than parliamentary ones and that multi-party system is more corrupted than

[158] Treisman, D. The causes of corruption: a cross-national study. p. 439.
[159] Sekkat, K. *Is corruption curable?*. pp. 74-75.
[160] Gerring, J. and Thacker, S. (2004). Political Institutions and Corruption: The Role of Unitarism and Parliamentarism. *British Journal of Political Science*, [online] 34(2), pp.295-330. Available at: http://people.bu.edu/jgerring/documents/Corruption.pdf [Accessed 26 Jul. 2019].

the two-party system.[161] As a matter of fact, concerning the last hypothesis, many corruption cases that involve Western democracies concern the funding of political parties.

Another important political variable, which has been explored in relation to corruption, is the level of efficiency of the public administration. This efficiency is calculated according to the quality and clearness of the norms regulating the functioning of the public administration. As the German social theorist Max Weber stated, a well-functioning modern state should have a well-developed rule-of-law culture.[162] The malfunction of the public administration creates a suitable environment for corruption. Firstly, the lack of clear limits allows public officials to act as bribe-taker quickly. Secondly, the general ineffectiveness of the system encourages individuals to resort to the corrupt way in order to hasten the functioning of the public system. As a result, rarely does corruption take place when a Weberian rule-of-law bureaucratic form of public administration is established.[163]

Regarding the size of the government and of its public administration, it has been often claimed that the more government is wider, the more corruption there will be. However, this assumption seems to not include countries with a stable democracy, such as Sweden. The relationship between corruption and government size must also include the variable of the quality of the democratic system. For that reason, it is possible to find extended public administration with a firm democracy that registers a low level of corruption.[164]

In addition, according to some political scientists, if the highest levels of the state are corrupt, it will be more likely that the lower stratum of the political system will be corrupt as well. Corruption will spread to all the levels because an agent's behavior depends on what they think the other agents will do. This assumption is explained by the "social trap" or "collective" theory of corruption, which understands corruption as a collective-action problem.

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[161] Rose-Ackerman, S. (2004). Governance and Corruption. In: B. Lomborg, ed., *Global Crises, Global Solutions*. Cambridge: Cambridge University Press, pp. 301-344. Cited in: Rothstein, B. and Teorell, J. Causes of Corruption. p. 85.
[162] Holmes, L. *Corruption: A Very Short Introduction*. p.81.
[163] Rothstein, B. and Teorell, J. Causes of Corruption. p. 85-86.
[164] Holmes, L. *Corruption: A Very Short Introduction*. p.78.

The last political variable analyzed in this section is the gender balance in the government. According to David Dollar, Raymond Fisman, and Roberta Gatti, women may have higher standards of ethical behavior and be more concerned with the common good. Thus, conducting empirical cross-national research, they found that at the country level, higher rates of female participation in government are associated with lower levels of corruption.[165] Along these lines, the best anti-corruption strategy would be to increase the involvement of women in governments. However, this argument has been contested by other social scientists. Firstly, this argument has been denied because this approach considers women merely as an instrument to achieve a broader development goal. In this case, the right of political participation should not be allowed because it is a fundamental human right. But, access to public positions to women should be guaranteed because it would improve the general functioning of the system, namely by reducing corruption.[166] Secondly, it is not a matter of the percentage of women in the government but rather the robustness of the liberal democracy that leads to fewer levels of corruption.[167] Thus, this assumption should be understood differently. Fewer degrees of corruption is the mere consequence of the establishment of stable liberal democracies. At the same time, they promote gender equalities that may lead to more female political participation as well as less corruption. Indeed, there is no evidence to assume that women are less involved in corrupt cases because of their higher awareness of social responsibility. On the contrary, the moral standards concerning corrupt behaviors by men and women do not differ significantly. The problematic issue concerning corruption and gender relies on the fact that women are rarely in powerful decision-making positions and, therefore, not as much involved in corruption as men.[168]

[165] Dollar, D., Fisman, R. and Gatti, R. (2001). Are women really the "fairer" sex? Corruption and women in government. *Journal of Economic Behavior & Organization*, [online] 46(4), pp.423-429. Available at: https://www.sciencedirect.com/science/article/pii/S016726810100169X [Accessed 25 Jul. 2019].
[166] Goetz, A. (2007). Political Cleaners: Women as the New Anti-Corruption Force?. *Development and Change*, [online] 38(1), pp.87-105. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-7660.2007.00404.x [Accessed 25 Jul. 2019].
[167] Holmes, L. *Corruption: A Very Short Introduction*. p. 86.
[168] De Nève, D. and Olteanu, T. (2010). Corruption and Gender Equality: a Human Rights Concern?. In: M. Boersma and H. Nelen, ed., *Corruption and Human Rights: Interdisciplinary Perspectives*. Antwerp-Cambridge-Portland: Intersentia, pp.153-176.

3.2) Economic Factors

According to several social scientists, the phenomenon of corruption is strongly influenced by the economic background of a given country. Likewise, it has been done for political and institutional factors. For this section it will also be necessary to identify some variables.

From the point of view of state intervention, it is often claimed that the more the state is intervening adjusting and regulating the economic and market activity, the higher will be the presence of corruption level among the country. Therefore, countries with more political and economic freedom will be less corrupt. Following this theory, the regulation and adjustment of the market system, which aims to correct market failures, can harm the public interests. It would open the way to corruption. At first glance, corruption could be considered as a logical consequence of state intervention. More regulations automatically imply a deep bureaucratic system. Therefore, it will be more levels of interactions between civil servants and business people. In this context, public officials could increase their income acting as bribes-taker.[169] However, many empirical researches demonstrate that the presence of corruption is not always correlated with the level of intervention of the state into the market system.[170] Paradoxically, it could be the privatization of the economy, a key feature of the neoliberal thought, which can create new opportunities for corruption. Privatization could encourage businesspeople to offer bribes in order to gain the tender for the allocation of the public service.

Another economic variable that may influence the rise of corruption is the level of competition available in the system. The amount of competition is considered as an ambiguous and paradoxical variable. On the one hand, in a system with high rates of competition, companies do not have enough profits to pay bribes. Thus, the competition seems to limit the spread of corruption. But, on the other hand, due to the high rate of competition, getting higher profit to become more difficult. As a result, companies will try to corrupt commercial agents to gain advantages over their competitors.[171] In this case, bribery becomes a business strategy in order to keep participating in market activity. Indeed, the cost of bribery starts to be accepted as another type of business costs. In some

[169] Holmes, L. *Corruption: A Very Short Introduction*. pp. 69-71.
[170] *Ibid*., p. 71.
[171] Sekkat, K. *Is corruption curable?*. pp. 77-78

cases, companies must bribe to remain competitive and get an important share of the market. Otherwise, other rivals will do it. Within this framework, bribery is considered part of the old business practice. It is just part of the business game.[172]

Finally, according to several economists and social scientists, the economic development rate can also affect the amount of corruption in a given country. According to Treisman, the most important economic factors of corruption is economic development, measured by real GDP per capita. Rich countries are perceived to be less corrupt than poor ones.[173] In this case, economic development works as deterrence of corruption. Indeed, economic development increases the spread of education, literacy and depersonalized relationships.[174] Furthermore, development implies more economic transactions at the same time. This allows for increasing the opportunity costs of time. Businesspeople will ask to the public administration to work more rapidly. As a result, the administration will become more transparent and efficient.[175] Thus, in a more developed country, leaders, thanks to economic development, have more incentive to control and fight corruption.[176]

3.3) Ethical and Cultural factors

Another debate concerning the concept of corruption is why it is perceived to be more common in some countries than others. Many social scientists often claim that corruption is strictly related to cultural background.[177] According to them, cultural values and habits make the definition of some activities as corrupt.[178] Thus, there will be cultures more compatible with corruption than others and different countries will have different attitudes toward corruption. In other words, there is an alteration of the expected cost of

[172] Šumah, Š. Corruption, Causes and Consequences. p. 67.
[173] Treisman, D. The causes of corruption: a cross-national study. p. 430.
[174] Andving, J. C and Fjeldstad, O. (2001). *Corruption. A Review of Contemporary Research.* CMI Working Paper. Bergen: Chr. Michelsen Institute. p. 75
[175] Sekkat, K. *Is corruption curable?*. p.78.
[176] Rothstein, B. and Teorell, J. Causes of Corruption. p. 84.
[177] In this context culture is understood as "a fuzzy set of basic assumptions and values, orientations to life, beliefs, policies, procedures and behavioral conventions that are shared by a group of people, and that influence (but do not determine) each member's behavior and his/her interpretations of the 'meaning' of other people's behavior". (See Spencer-Oatey, H. (2008) *Culturally Speaking. Culture, Communication and Politeness Theory*. 2nd edition. London: Continuum. Cited in: Spencer-Oatey, H. (2012). *What is culture? A compilation of quotations*. [online] GlobalPAD Core Concepts. Available at: http://www.warwick.ac.uk/globalpadintercultural [Accessed 23 Jul. 2019]).
[178] Sekkat, K. (2018). *Is corruption curable?*. 1st ed. London: Palgrave Macmillan. p. 73.

a corrupt act against the expected benefit according to the type of cultural and ethics tradition.[179] As a matter of fact, under the same circumstance, the act of bribery can be socially accepted in one country and unacceptable in another one. Several academicians usually provide as an example of this assumption the two extremes that we can find in Europe. On the one hand, there are the North-Western countries that appear to be utterly intolerant to corruption, experimenting much lower levels of it. On the other, the South-Eastern countries where corruption seems to be a socially acceptable phenomenon.[180] Within this framework, supporters of this theory argue that a specific type of corruption cases may be related to the impact of some cultural variables. The cultural variables analyzed here are as follows: the religious tradition, the level of loyalty to family opposed to the rest of the population (familism), the colonial heritage, and the legal system.

One way in which the historical-cultural tradition might affect the perception of corruption is the impact of the dominant religious tradition.[181] Indeed, empirical cross-national studies show that religions with a more hierarchical structure, like Catholicism, Eastern Orthodoxy, and Islam, tend to be more prone to official abuses than in cultures influenced by more individualist religions, such as Protestantism, Buddhism, and Hinduism.[182] Affirming that, Protestant countries may be less corrupt than Catholic ones due to historical and systemic reasons. Actually, Protestantism arose as a protest to the corruption of the Catholic Church. Thus, Protestantism would be more prone to monitor, discover, and denounce abuses of power by public officials. Moreover, it is often claimed that more hierarchical systems, such as Catholicism and Islam, are more likely to have more scandals of official abuses.[183] Generally speaking, concerning religion, it has also been demonstrated that secularized countries experiment less corruption level than religious ones. This analysis does not want to affirm that religion can cause corruption.

[179] Treisman, D. (2000). The causes of corruption: a cross-national study. *Journal of Public Economics*, [online] 76(3), pp.399-457.
Available at: https://www.sciencedirect.com/science/article/pii/S0047272799000924 [Accessed 23 Jul. 2019].
[180] Šumah, Š. (2018). Corruption Causes and Consequences. In: V. Bobek, ed., *Trade and Global Market*. [online] London: IntechOpen, pp.63-79. Available at: https://www.intechopen.com/books/trade-and-global-market [Accessed 23 Jul. 2019].
[181] In this section, it will be analyzed the correlation from just a theoretical point of view. For more empirical cross-country analysis see Sekkat, K. *Is corruption curable?*.pp. 79-114. and Treisman, D. (2000). The causes of corruption: a cross-national study. *Journal of Public Economics*, [online] 76(3), pp.399-457.
[182]Treisman, D. The causes of corruption: a cross-national study. p. 402.
[183] Holmes, L. *Corruption: A Very Short Introduction*. pp. 61.

However, if religion is strictly interconnected with the moral standard of society, the level of corruption might not decrease.[184]

Another ethical and cultural factor that can influence corruption is the attitudes towards the family and the state. There are some cultures in which loyalty to relatives and friends is more important than the respect towards the rules of the state. Within this context, forms of corruption are more prevalent in family-oriented countries than in less-family oriented ones. As a matter of fact, societies characterized by a strong family trust and strong intragroup ties are more likely to develop networks that facilitate the spread of corruption and its social acceptability.[185] This assumption could be part of an explanation of the differences in the level of corruption among countries of North-Western Europe and countries in South-Eastern Europe, where the influence of family is still dominant.[186] Indeed, countries in this region, such as Italy, Greece, and Spain, are known for cases of nepotism and patronage. Moreover, it has been noticed that the importance of familism could be a consequence of Catholic influence.[187]

Another critical factor that may lead to corruption is colony heritage. Some social scientists argue that countries that suffered forms of imperialism are more likely to experiment corruption. A possible explanation concerning this problem relies on the capacity to collect taxes. Colonized countries used to collect taxes through the presence of tax collectors, who were quickly corruptible with bribes. This practice continued into the post-colonial era.[188]

However, there are notable exceptions to this assumption. There are former colonies that experimented fewer levels of corruption compared to others. The condemnation of a corrupt act also depends on the possibility of being caught, which relies on the legal framework of a specified country. Countries with different colonial histories can be expected to develop different legal systems. As a matter of fact, there is evidence that former British colonies are less corrupt than former French and Portuguese ones.[189] This could be linked to the legal system that many imperial powers established

[184] Rothstein, B. and Teorell, J. (2015). Causes of Corruption. In: P. Heywood, ed., *Routledge Handbook of Political Corruption*. London and New York: Routledge, pp.79-90.
[185] Sekkat, K. *Is corruption curable?*. p. 319.
[186] Holmes, L. *Corruption: A Very Short Introduction*. pp. 62.
[187] Šumah, Š. Corruption, Causes and Consequences. pp. 68-69
[188] Holmes, L. *Corruption: A Very Short Introduction*. p. 62.
[189] Treisman, D. The causes of corruption: a cross-national study. p. 402

in their colonies, namely common law or civil law. Common law, typical of Anglophone countries, is based on precedent judicial decisions of courts. Whereas, civil law, dominant in continental Europe, is based on written code. Within this distinction, it has been often claimed that countries with a common law system are less corrupt than countries with a civil law system.[190] Many arguments have been provided by several scholars to support the case. It could be because the judiciary in a common law system is more independent from the political elite than in the civil law system.[191] Indeed, common law system has been developed to provide greater protection of parliaments and property owners against the state. Thus, judges seem more willing to follow procedures even when cases involve some positions of the political elite. On the contrary, civil law system developed to be an instrument available to the sovereign to build the state and to control the economic life.[192]

To conclude, culture can help our understanding of corruption across countries. Despite cultural differences exists, sometimes they are quite exaggerated.[193] It is necessary to understand that culture could not be the most reliable explanation of the factors leading to corruption. Indeed, there are several examples of countries with very similar religions, cultures, and values that experiment very different levels of corruption. Moreover, it is essential to underline that a relativistic cultural understanding of corruption would be misleading. If corruption is a permanent feature of a given country's culture, it will be impossible to solve it. This would be incompatible with the core of this study, namely the universal condemnation of corruption.

4) The Consequences of Corruption

In his book entitled *The Problem of Corruption,* the Malaysian academician and sociologist Syed argues that corruption is an age-old problem that all human societies have experimented in several circumstances. No country, region, or civilization has been untouched by the corruption pestilence. Corruption has inflicted suffering to many human communities, such as in Ancient Greece, the Roman, and in Ancient China. Indeed, in combination with other causes, corruption has been responsible for wars and breakdowns

[190] Treisman, D. The causes of corruption: a cross-national study. p. 402.
[191] Holmes, L. *Corruption: A Very Short Introduction*. pp. 62-65.
[192] Treisman, D. The causes of corruption: a cross-national study. p. 402; Sekkat, K. *Is corruption curable?*. pp. 73-74.
[193] Holmes, L. *Corruption: A Very Short Introduction*. p. 7.

of societies.[194] The causes and consequences of a complex social phenomenon sometimes intertwine and, due to their complexity and varieties, they are quite troublesome. Despite these methodological issues, it is still necessary to consider the consequences of corruption and how it could be harmful. Thus, this section aims to provide a short overview of the most common effects of corruption.

Although the types of corruption are not universally considered as criminal offenses, in this section, I will claim that corruption is harmful. Consequently, the debate concerning whether corruption is dangerous will not be thoroughly considered in this section. Not only is corruption deleterious, because it implies a departure from the law, but also it negatively affects the political, economic, and social development of every state.[195] Corruption has adverse effects on the efficiency, effectiveness, authority, and goals of the organization of the country. It aims to jeopardize, thwart, or halt the development of society, damaging individuals, groups, and organizations. Since the political, economic, and social effects of corruption depend on the type of corruption analyzed and on the background of the country damaged, this section will not be an exhaustive explanation of the all the possible consequences of corruption. As a matter of fact, for instance, the effects of corruption would be different if a corrupt act involves money produces instead of licenses. However, it is beyond any doubt that corruption is a serious problem. As the Executive Secretary of the GRECO Gianluca Esposito affirmed, states should pay more attention to the consequences of corruption because its unknown effects on the society and the public institutions are hazardous. According to Esposito, the results of corruption are a threat to human rights, especially the right to life. He also claimed that corruption can kill, and that corruption is a threat to democracy, to the rule of law and the economic system of a country.[196]

This section fits perfectly with the aim of this chapter. Hardly is corruption easy to eradicate, when it is entrenched in the political system. Conceptualizing corruption through the analysis of its consequences may be a necessary step in order to outline the

[194] Alatas, S.H. *The Problem of Corruption*. p. 63.
[195] Johnston, M. (1986). The Political Consequences of Corruption: A Reassessment. *Comparative Politics*, [online] 18(4), p.459. Available at: https://www.jstor.org/stable/421694?seq=1#page_scan_tab_contents [Accessed 7 Aug. 2019].
[196] Esposito, G. (2018). *The Role of GRECO in the fight against Corruption.* Council of Europe. [Lecture notes].

most efficient strategy to curb it. In this way, the fight against corruption will take form by considering its political, economic, and social consequences.

4.1) Political Consequences

According to several scholars, high presence of corruption affects the entire political system and how it is ruled.[197] Corruption renders the political system instable and impotent with a notable reduction of its administrative capacity. Due to an endemic presence of corruption, the state seems no longer able to accomplish with its everyday tasks, such as extracting taxes or implementing development policies. Despite these inabilities, there will not be the desire to solve and fix the problem at the political level, because the power-holders are the primary beneficiaries.

Furthermore, corruption alters the function of the political process of identifying, interpreting, and achieving the need and desires of the population. On the contrary, it privileges the satisfaction of the so-called internal demand. As a result, this implies an adjustment in the rule of law. In other words, corruption is able to manipulate the law-making process and the implementation of the norms in favor of the civil servants' private benefits. Generally speaking, this variation, consequently, undermines the strength and legitimacy of political institutions, causing a general dysfunction of the governance and institutional decay.[198] The government's reputation among society will be damaged, generating widespread skepticism. Since corruption alters the political process and creates a general distrust towards the public officials, citizens will lose their faith in the government and, hence, public institutions will lose their legitimization.

Not only corruption will directly affect the political system, but it will also have conceded indirect consequence that may have more devastating effects. According to some scholars, corruption creates a general sense of uncertainty; in extreme cases, it brings about the decline in legitimacy of the democratic system.[199] For example, this

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[197] Amundsen, I. *Political Corruption: An Introduction to the Issues*. p.20.

[198] Jhonston, M. (1997). Private Officials, Public Interests, and Sustainable Democracy: When Politics and Corruption Meet. In: K. Elliott, ed., *Corruption and the Global Economy*. Washington D.C: Institutes for International Economics, pp.61-82.

[199] Warf, B. (2019). *Global corruption from a geographic perspective*. Cham, Switzerland: Springer. pp. 6-7; Della Porta, D. and Vannucci, A. (1997). The 'Perverse Effects' of Political Corruption. *Political Studies*, [online] 45(3), pp.516-538. Available at: https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-9248.00094?casa_token=swBWZiNrAdsAAAAA:FmodeoDwL0oOvyvDqxbUsSZ9YgcCjjlL1KWbIkaKixR4c93mqgpvm4u6EP3T_777zZ3JI3ST5y-vl5g [Accessed 8 Aug. 2019].

widespread sense of uncertainty and the reduction of people's trust in the political system put in crises the social order established in the country's social contract.[200] As a matter of fact, according to Homans, "the true cost of illegal corruption, in countries where it is rampant, is rarely the direct one; it is the way even the most banal and minor forms of it erode the rule of law, introducing uncertainty into every dealing with the state and reducing it to the self-interest of its human agents: not just politicians but also customs inspectors, permit issuers, police officers, anyone vested with enough power to extract a dollar."[201]

Besides, in the political (and economic) discourse, one of the most discussed consequences of corruption is the distortion of the effectiveness of government policies. In other words, the pure waste of government resources and public spending, because corruption will alter the entire decision-making process connected with public investment projects and the composition of government expenditure. In practice, corrupt governments tend to finance more big and costly projects or sectors (military), instead of necessary public services small projects (education, healthcare). This is the case of the so-called "white elephant", namely an important project whose benefits are not able to compensate for its construction and management. The reason of these changes in the plan is because costly projects offer more opportunities and more significant gains for corrupt deals.[202] In this way, the civil servants' revenues will be higher, but at the same time, the costs for the entire population and society will be higher too.

For example, the presence of this kind of corruption could reduce the effectiveness of medical or financial foreign aid. The money coming from a financial assistance program would not reach their target recipients and will be lost. Therefore, rightly, donors will terminate to provide funds to corrupt countries. Unfortunately, the poorest members of society will suffer the most for this.

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[200] Uneke, O. (2010). Corruption in Africa South of the Sahara: Bureaucratic Facilitator or Handicap to Development? *Journal of Pan African Studies*, 3(6), 111–129. Cited in: Sekkat, K. *Is corruption curable?*. p. 124.

[201] Homans, C. (2018). Americans think 'corruption' is everywhere. Is that why we vote for it? *The New York Times*. [Online] Available at: https://www.nytimes.com/2018/07/10/magazine/americans-thinkcorruption-is-everywhere-is-that-why-we-vote-for-it.html. [Accessed 8 Aug. 2019].

[202] Andving, J. C and Fjeldstad, O. *Corruption. A Review of Contemporary Research*. p. 75; Sekkat, K. *Is corruption curable?*. p. 124; Della Porta, D. and Vannucci, A. The 'Perverse Effects' of Political Corruption. p.518.; Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.29

Concerning public construction, it has been often claimed that "as long as the government has been involved in construction, there has been corruption in it."[203] Indeed, the construction sector has several peculiarities that make it more vulnerable to corruption. Whoever will try to get money from public construction, like corrupt politicians, will tend to alter the government expenditure budget by saving money through the purchase of cheaper materials. Furthermore, this type of misallocation of public funds is complicated to recognize. But, at the same time, its effects could be catastrophic. As a matter of fact, hardly had people known that the school was constructed using substandard materials when the building collapsed. Thus, if corruption relates to the construction industry, it will endanger lives. This example allows us to measure the consequences of corruption not only in terms of political and administrative costs but also in terms of human tragedy, showing how the different effects of corruption are intertwined.[204]

Finally, another political cost of corruption could be the isolation of the corrupt country at the international level. Perception of the high level of corruption in a particular state has also repercussion in the international relations of that country. For example, it can render difficult or impossible to be admitted to international agreements. An example is the first refuse that Bulgaria and Romania received in their attempt to join the Schengen zone because of their high level of corruption among border guards and customs office.[205]

In short, corruption weakens the political system. If the population is aware of the negative consequences created by corruption, one might hope that it would mobilize citizens to take the streets and protest the current corrupt political system. On the contrary, however, it has been demonstrated that the effect could be the opposite. When corruption is considered as a reasonable condition of the political system, citizens will not mobilize themselves against it, but they will take distances from it. Consequently, this estrangement for the national political issue can exacerbate the situation. As a matter of fact, in many cases of endemic corruption, this removal from political and democratic participation has left politicians less accountable to their citizens. Thus, it increases

[203] Fisman, R. and Golden, M. *Corruption. What everyone needs to know.* p.92.
[204] Holmes provides some examples of the human costs of corruption in the public construction area by reporting some catastrophes that caused injuries and even death. For example, the collapse of a building in the Egyptian city of Alexandria in 2007 or the collapse of a department store in Seoul in 1995. (See Holmes, L. *Corruption: A Very Short Introduction.* pp.21-22.)
[205] Holmes, L. *Corruption: A Very Short Introduction.* p.25.

political instability and creates a threat of an autocratic reversal.[206] As Holmes stated, "if people lose faith in the rule of law in states where it has previously existed, the likelihood of arbitrary abuse of civil liberties and human rights increases."[207]

The harmful effects of corruption on the political system of a country will be detrimental regardless of its political organization. Paraphrasing the sociologists Alessandro Pizzorno, Della Porta and Vanucci argue that "while corruption is in no way limited to democracies, it is in such systems that its effects are most disruptive. By attacking two of the fundamental principles on which democracy is based, the equality of citizens before institutions and the open nature of decision making, corruption contributes to the delegitimating of the political and institutional systems in which it takes root."[208]

4.2) Economic Consequences

It should be uncomplicated to state that corruption consequences are always harmful and that they affect the economic development of a country negatively. However, it is not always been like that. Only a half-century ago, primary economic literature about corruption theorized that corruption in certain circumstances is good for the growth of a country and has several economic advantages. The most important and cited authors who highlight the benefits of corruption are the economist Nathaniel Leff with his essay of 1964 entitled *Economic Development through Bureaucratic Corruption* and the political scientist Samuel P. Huntington with his section named *Modernization and Corruption*, appeared in the famous book *Political Order in Changing Societies* of 1968.

Since Leff was a classical economist, who believed in the adjustment power of the market, he suggested that in the presence of antimarket policies corruption would allow the invisible hand to help the market to function efficiently. Corruption is a tool for the market to overcome the issues coming from bureaucracy. According to the economist, in the presence of bad regulations that retard the functioning of the market, corruption can allow an economy to grow.[209] On the other hand, Huntington shared Leff's opinion and

[206] Fisman, R. and Golden, M. (2017). *Corruption. What everyone needs to know*. New York: Oxford University Press. p. 101; Sekkat, K. *Is corruption curable?*. p. 153.
[207] Holmes, L. *Corruption: A Very Short Introduction*. p. 30.
[208] Della Porta, D. and Vannucci, A. The 'Perverse Effects' of Political Corruption. p.537.
[209] Leff, N. (1964). Economic Development Through Bureaucratic Corruption. *American Behavioral Scientist*, 8(3), pp.8-14.; Fisman, R. and Golden, M. *Corruption. What everyone needs to know*. pp.86-89.

argued that corruption could help to overcome tedious bureaucratic regulations, to foster growth, and to ease the path to modernization. According to the American political scientist, the presence of corruption in a modernizing society was due to the multiplication of laws that, hence, multiplies the possibilities of corruption. In this sense, Huntington interpreted corruption as a way to surmount the traditional laws that are hampering the economic expansion. The author provided as an example of the fact that in the US during the 1870s and 1880s corruption speeded the growth of the American economy. Furthermore, in terms of economic growth, the political scientists affirmed that "the only thing worse than a society with a rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy." In other words, according to Huntington, corruption could be a "welcome lubricant" to ease the path to modernization.[210]

In short, the cited scholars share the assumption that corruption can contribute to growth and development because it compensates for the negative effects of burdensome regulations and bureaucracy. Corruption allows to "grease the wheels" saving time and improving efficiency.[211] However, this view of corruption as beneficial to an economic system works just on the short-term. Corruption does not reduce time spent with regulations and bureaucracy in the long-term. Paradoxically, corruption requires more time, such as the time spent on negotiating with the other part and brings about higher costs of capitals.[212]

Although the former economic literature concerning corruption claims the contrary, there is a negative correlation between corruption and long-term sustainable development. Several economic studies had demonstrated that corruption undermines the economic system and reduces economic growth.[213] It is detrimental to foreign investments and foreign aid, the quality of local private investments, taxation, entrepreneurship, and planning.[214] As a matter of fact, nowadays, there is a great consensus on the negative effects of corruption on economic development. The former

[210] Huntington, S. (1968). *Political order in changing societies*. New Haven, Conn.: Yale Unersity Press, pp.59-71.
[211] Sekkat, K. *Is corruption curable?*. p. 137.
[212] Andving, J. C and Fjeldstad, O. *Corruption. A Review of Contemporary Research.* p. 70.
[213] For more economic, empirical cross-national studies, and microeconomic analysis concerning how corruption reduces economic growth see: Sekkat, K. *Is corruption curable?;* Mauro, P. (1996). The Effects of Corruption on Growth, Investment, and Government Expenditure. *IMF Working Papers*, [online] 96(98), p.1. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=882994 [Accessed 8 Aug. 2019].
[214] Amundsen, I. *Political Corruption: An Introduction to the Issue.* p. 19.

President of the World Bank Jim Yong Kim at an event hosted by the World Bank's anti-corruption investigative arm in 2013 declared that "in the developing world, corruption is public enemy number one."[215]

One of the first scholars who started to deny the correlation between corruption and development is Paolo Mauro, who currently holds the role of Deputy Director in the IMF's Fiscal Affairs Department. To summarize, Mauro claims that corruption retards economic growth. In his essay, Mauro shows empirically how corruption lowers economic growth in the long-term, highlighting a range of channels through which this may happen.[216]

First of all, according to him, corruption affects the size, the composition, and the quality of total investment. With the presence of corruption, investment rate decreases. Entrepreneurs are aware that corrupt officials may claim a portion of their invested capital and that they will have to bribe for applying for a loan. As a consequence, entrepreneurs will less be interested in investing and expanding their businesses.[217] They know that, in an economic system characterized by a corrupt environment, the business costs will be higher due to the time spent on negotiating with corrupt officials.[218] Furthermore, not only corruption affects domestic investments; it also modifies the overall volume of foreign direct investment (FDI). Corruption can be a major obstacle to FDI because corrupt countries are, in general, less attractive for investors.[219] According to Habib and Zurawicky, foreign investors generally avoid corrupt countries because it is considered

[215] World Bank. (2013). *Corruption is "Public Enemy Number One" in Developing Countries, says World Bank Group President Kim*. [online] Available at: https://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim [Accessed 8 Aug. 2019].
[216] Mauro, P. The Effects of Corruption on Growth, Investment, and Government Expenditure. p. 7.
[217] *Ibid*.
[218] Sekkat, K. *Is corruption curable?*. p. 120.
[219] For more on corruption and FDI, see: Wei, S. (2000). Local Corruption and Global Capital Flows. *Brookings Papers on Economic Activity*, [online] 2000(2), pp.303-346. Available at: https://www.brookings.edu/wp-content/uploads/2000/06/2000b_bpea_wei.pdf [Accessed 8 Aug. 2019]; Sekkat, K. *Is corruption curable?*. p. 121.

wrong, and it can create operational inefficiencies.[220] In addition, according to Sekkat, the main problem is the excess risk that corruption could generate.[221]

In terms of economic development, corruption also has important effects on human capital, generating the so-called human capital fight. It causes the misallocation of talents, bringing about the brain drain of the well-qualified people who became frustrated.[222]

Corruption may also have an impact on the taxation system. The more corrupt the country is, the less able it is to collect taxes. Due to corruption, fewer taxes are levied because they end up in the pockets of corrupt tax officials. Thus, there is much less tax revenue, and as a result less money than the country could have.[223] Lack of a minimum amount of money brings about the financial deficit, which affects economic growth.[224] Corruption does not have only economic consequences, but it also has distributional consequences. There is a strong correlation between corruption and inequality, also under the economic sphere. By affecting tax collection or the level of public expenditure, corruption may lead to more inequitable income distributions. Corruption distorts the allocation of the public resources directly affecting the daily life of individuals. The use of public funds for personal gains will cause distributive inefficiency by assigning certain rights or providing services to actors who violate the law at the expenses of law-abiding citizens who would be willing to act legally. This will spread economic and income inequality among the system at the expenses of the government funds, which aim is to provide the basic service.[225]

In short, corruption increases the transaction costs of any economic activities at the external and domestic level. Thus, both nationally and internationally, it reduces

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[220] Habib, M. and Zurawicki, L. (2002). Corruption and Foreign Direct Investment. *Journal of International Business Studies*, [online] 33(2), pp.291-307. Available at: https://www.jstor.org/stable/pdf/3069545.pdf?casa_token=jntTEDd3KDQAAAAA:YJk49UUEimPbXMu7bTrsJcrFuahD_4GjmXmPFLS-fHOLnt6hDl9h-QxqCuHxR8g6P7ZgGXns35jC2vZaiGIEM4CjFCeQfsr-RFhBuwef_fC9IC0NAT8 [Accessed 8 Aug. 2019].

[221] Sekkat, K. *Is corruption curable?*. p. 121.

[222] Mauro, P. The Effects of Corruption on Growth, Investment, and Government Expenditure. p. 7.; Sekkat, K. *Is corruption curable?*. p. 122.

[223] Sekkat, K. *Is corruption curable?*. p. 122.

[224] Šumah, Š. Corruption, Causes and Consequences. p.72.

[225] Gupta, S., Davoodi, H. and Alonso-Terme, R. (1998). Does Corruption Affect Income Inequality and Poverty?. *IMF Working Papers*, [online] 98(76).
Available at: https://www.imf.org/external/pubs/ft/wp/wp9876.pdf [Accessed 8 Aug. 2019].; Della Porta, D. and Vannucci, A. The 'Perverse Effects' of Political Corruption. pp. 524-525.

economic efficiency and lowers productivity. As Uneke stated, corruption, particularly in countries where it has become an integral part of the entire system, is a major handicap to sustainable development.[226] It will establish a less competitive business climate and thus undermines the incentives for private entrepreneurship. Moreover, it increases the size of the black market, such as smuggling and drug trade and the emergence of the shadow and informal economy.[227] In countries with a high level of corruption, people will try to enter that part of the economy that is neither taxed nor monitored by the government. However, within the underground economy, people will not have any guarantees concerning, for example, the minimum wage or the general working condition. Thus, damaging the economic sphere, corruption also affects the quality of governance and the standards of living. Some analysis has also demonstrated how an increase in corruption negatively affects the likelihood of innovation.[228] An example of the growing size of the underground economy is the increasing level of the new modern form of slavery in corrupt countries, namely human trafficking.

4.3) Social Consequences

Most of the current literature concerning the effects of corruption focuses only on the political and economic costs. Thus, after having analyzed the political and economic consequences, it is necessary, especially for the present study, to focus on the social charges of corruption. From a sociological point of view, according to the Malaysian academician and sociologist Syed Hussein Alatas, "from whichever point of view we look at it, it does not contribute positively towards development, for a part of government funds is continuously drained for negative purposes. In the last analysis, the function of corruption is comparable to a disease: if well under control, harmless; if not, deadly".[229] Corruption indirectly is able to alter the most common priorities of any society, such as

[226] Uneke, O. Corruption in Africa South of the Sahara: Bureaucratic Facilitator or Handicap to Development? p. 111.
[227] An example of the growing size of underground economy is the increasing level of the new modern form of slavery in corrupt countries, namely human trafficking. For more on the relationship between corruption and human trafficking see Osita, A. (2003). Corruption and Human Trafficking. *West African Review*, [online] 4(1). Available at: https://childhub.org/en/system/tdf/library/attachments/agbu_2003_corruption_and_t_0.pdf?file=1&type=node&id=16339 [Accessed 8 Aug. 2019].
[228] Sekkat, K. *Is corruption curable?*. p. 134.
[229] Alatas, S.H. *The Problem of Corruption*. p. 37.

development, access to health, education, enforcement of the rule of law, or the fight against environmental degradation. As a result, this modification of the politicians' priority lists will affect the lives of several ordinary citizens. Indeed, as the Polish-British sociologist Andreski stated, "the losses caused by corruption far exceed the sum of individual profits derived from it, because graft distorts the whole economy. Important decisions are determined by ulterior anti-social motives regardless of the consequences of the community."[230]

This section aims to show how the political and economic consequences have a direct influence on the living condition of the entire society, and hence, producing social consequences. First of all, corruption exacerbates inequalities and poverty within society. One of the most critical studies concerning inequalities and corruption is the work of the Professor of Government and Politics at the University of Maryland Eric M. Uslaner. The Professor, focusing on the relationship between the consequences of corruption and inequalities, pointed out that "corruption leads to a wide range of social ills that take a greater tool on poor people and enrich the well-off."[231] In other words, in the long term, corruption will lead to a greater inequality that, if it is not tackled, it will create a vicious cycle.

More specifically, the presence of corruption creates inequalities in access to public services.[232] It does not matter that the total amount of the bribe will be the same for both rich and poor people because undoubtedly it will be more onerous for poor people.[233] For example, a public service which is frequently undermined by corruption is education. As it has been stated in the previous section, since corruption reduces the amount of revenue collected through taxation, the public funds available for public education will automatically decrease. In this sense, access to schooling will be arduous and may be available only to the parents who can afford to pay bribes. This example also shows the selective and discriminatory nature of corruption that will be more detrimental

[230] Andreski, S. (1966). *Parasitism & subversion*. New York: Schocken Books, pp.67-68. Cited in: Alatas, S.H. *The Problem of Corruption*. p. 24.
[231] Uslaner, E. M. (2015). The Consequences of Corruption. In: P.M. Heywood, ed., *Routledge Handbook of Political Corruption.* London and New York: Routledge. p. 200.
[232] Sekkat, K. *Is corruption curable?*. p. 145.
[233] Fisman, R. and Golden, M. *Corruption. What everyone needs to know.* p.96.

to the most vulnerable social groups. Here, discrimination could also be traced following the ethnicity line.[234]

Furthermore, as it has also been underlined in the previous section, corrupt governments tend to invest more public funds on important construction and the military sector, instead of spending in social services where there are fewer opportunities to bribe. Therefore, the inequalities among the society will be reinforced and the poor part of the community will always face an extra cost in order to receive an essential social service such as water, electricity, or gas, even if they could not afford it.[235] A related fact to inequality, highlighted by Leslie Holmes, is that corruption tends to create a greater sense of "them" and "us." This sense of division occurs both in a vertically way, between the corrupt civil servants and the ordinary citizens, and in a horizontally way, between those who do not want to use bribes for obtaining a personal gain and those who are willing to pay bribes.[236]

Corruption could also affect working conditions for ordinary people. In countries with a high level of corruption, the employer may hire who is ready to pay or to return the favor, instead of the most qualified candidate.[237] Moreover, concerning the world of work, corruption generally makes workplaces more dangerous. Analyzing the rates of workplace fatalities of politically connected companies and companies without any political connections, Ray Fisman and Miriam Golden found out that workplace death rates were more than twice high at politically connected companies than in non-connected ones. Moreover, they highlighted how connected companies were immune from being inspected for safety problems.[238]

Finally, it has been claimed that corruption also accelerates the destruction of our collective natural heritage.[239] Thus, linking corruption not only to economic and social development but also to environmental sustainability becomes necessary for this study. According to some scholars, the noncompliance with environmental laws may find its

[234] Volosin, N. *La máquina de la corrupción*., p. 309.
[235] Uslaner, E. M. The Consequences of Corruption. p. 203.
[236] Holmes, L. *Corruption: A Very Short Introduction*. p. 19.
[237] Šumah, Š. Corruption, Causes and Consequences. p. 72; Holmes, L. *Corruption: A Very Short Introduction*. p. 18.
[238] Fisman, R. and Golden, M. *Corruption. What everyone needs to know*. pp.91-92.
[239] *Ibid*.

roots in the corruption of the political system.[240] Thus, corruption plays a sizeable negative role in practically all environmental problems, affecting natural systems and their dependent communities.[241] For example, it is the case of illegal logging and deforestation encouraged by corrupt acts. Every year corruption allows selling a significant quantity of wood illegally and does not reinforce regulations or punish perpetrators. As a matter of fact, a report on deforestation in Indonesia by the Environmental Investigation Agency and Telapak explicitly affirmed that forests are being destroyed because Indonesia is one of the most corrupt countries in the world.[242] Generally speaking, any damages affecting the natural environment will also affect the standard of living of the people living in that area. Furthermore, since some fundamental human rights are strictly interconnected with the natural environment, some of these rights, such as the right to health, food, or housing, may be at stake.[243]

[240] Diarra, G. and Marchand, S. (2019). Environmental Compliance, Corruption and Governance: Theory and Evidence on Forest Stock in Developing Countries. *Centre d'Etudes et de Recherches sur le Developpement International*, [online] (1). Available at: https://halshs.archives-ouvertes.fr/halshs-00557677/document [Accessed 8 Aug. 2019].

[241] Leitao, A. (2016). Corruption and the Environment. *Journal of Socialomics*, [online] 05(03). Available at: https://www.longdom.org/open-access/corruption-and-the-environment-2471-8726-1000173.pdf [Accessed 8 Aug. 2019].

[242] Environmental Investigation Agency and Telepak (2003). *Above the Law: Corruption, Collusion, Nepotism and the Fate of Indonesia's Forests*. London-Washington-Bogor: EIA and TELEPAK. [Online] Available at: https://eia-global.org/reports/above-the-law-corruption-collusion-nepotism-and-the-fate-of-indonesias-fore [Accessed 8 Aug. 2019].

[243] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.50.

CHAPTER II

AN ANALYSIS OF CORRUPTION THROUGH AN INTERNATIONAL HUMAN RIGHTS LAW LENS

1) Methodological Issues: Corruption and Human Rights

The previous chapter provides a brief introduction to the analysis of corruption. As it has been explained above, corruption is a complex social phenomenon studied by several academic disciplines. For that reason, the precedent study is limited in scope and does not aim at presenting an exhaustive conceptualization of corruption. However, through the examination of the current debate on the definition of the term, its different typologies, its causes, and consequences, a specific way of thinking concerning corruption has been provided.

Therefore, it is now time to get to the point and analyze corruption using an international human rights law lens. In the first part of this chapter, the set of research questions will regard the conceptual link between corruption and human rights discourses. After briefly introducing the main theoretical aspects of the connection, it will be affirmed that corruption and human rights are conceptually interlinked. Thereafter, once the link between corruption and human rights will be assumed, the next section will try to construct the substantive link from a legal point of view. The legal analysis aims to show whether corruption violates human rights and it attempts to verify if, how, when, and why states that allow corruption are in breach of the human rights agreements to which they are signatories. Finally, these conceptual and legal tools will be applied to the right to a fair trial and to an effective remedy in order to show, in a detailed manner, how corrupt practices violate human rights.

This process will be necessary in order to introduce the core of the following conclusive section. Accordingly, in the next chapter, the implication of the alleged connection will be applied to the international fight against corruption, demonstrating another type of linkage between corruption and human rights: the strategic one. Thus, the narrownesses of the current criminal law approach will be outlined, and a human rights approach to corruption will be presented.

Since this section concerns the various way corruption and human rights are interconnected, before going to the core of this chapter, it is necessary to clarify the

terminology of the issues taken into analysis. Although it does not represent the essential aspect of this study, it still remains necessary. As stated in the previous chapter, corruption is lacking a common understanding. However, adopting a conceptualization of corruption became a methodological need in order to grasp its real essence and apply it to the human rights domain. Thus, the term corruption has been split into two parts. Its understanding is considered as the result of the combination of a descriptive core and a normative element. The descriptive core of corruption is the inappropriate use of power for purposes of individual or group gains at common expenses, which has been simplified by Transparency International as "the abuse of entrusted power for private gain."[1] On the other hand, the identification of the normative core became necessary to determine which actions constitute the abuse of power for private gain. In this case, the normative standards adopted will be international law and international human rights law. These standards will help us to determine whether corrupt practices can constitute a violation of human rights. This kind of definitional approach, developed by Julio Bacio Terracino, is the more appropriate for the present study. It allows giving to corruption, not only a negative moral connotation but also a significant illegal implication.[2]

After having briefly summarized the definition of corruption adopted in this present study, it is now time to turn the attention on the concept of human rights.[3] The concerns for the idea of human rights are as old as humanity. Philosopher of every era, cultures, and society have wondered whether the existence of a natural law that recognizes individual rights to all human beings.[4] Thus, the conception of human rights has been a reality throughout all human history. But, it started to gain importance only at the end of the 17th century as a protest toward the abuses of the monarchy system.

In brief, human rights theories shared the idea that human beings, as such, are recognized as owners of individual and natural rights. In a short time, these doctrines directly influenced the French Declaration of the Rights of Man and the Citizens of 1789 and the first ten amendments to the United States Constitution, the so-called United States

[1] Transparency International. *The Anti-Corruption Plain Language Guide.* p. 14.
[2] For a deeper analysis concerning the current conceptual debate on the meaning of corruption see the first chapter of this work.
[3] Clearly, despite a human rights' definition is necessary, the attempt to analyze the theoretical concept of human rights will not be exhaustive. Overlooking its complexities, a comprehensive analysis of the term would be a strong departure from the scope of this present study.
[4] Hansungul, M. (2010). The Historical Development of International Human Rights. In: A. Chowdhury and J. Bhuiya, ed., *An Introduction to International Human Rights Law*. Leiden-Boston: Brill. p.6.

Bill of Rights of 1791. For the first time, a set of liberties and rights that limited the absolute power of the State were established.

However, rarely were human rights, a discussion topic in international politics.[5] Indeed, the decision to recognize, respect, and protect these rights were at the discretion of each state. Only in the middle of the 20th century, due to the outbreak of the Second World War and the atrocities that took place during the war, human rights started to acquire the status of international law. In 1945 the Charter of the United Nations gave birth to the Post-World War II international public order in which human rights emerged as a central element of the new global legal system.[6] Indeed, the third clause of the Article 1 of the *Charter* establishes that one of the four principal tasks of the United Nations is to promote and encourage the "respect for human rights and fundamental freedoms."[7]

Nowadays, human rights are considered as those rights connected to human beings which are indispensable to achieve a life of dignity in an organized society.[8] Human rights are distinguished from other types of rights by the presence of three essential characteristics. Firstly, they are regarded as inherent, in the sense that they exist as a result of a person's humanity. Secondly, human rights are considered inalienable, which means that they cannot be taken or given away. [9] Finally, they are universal. As the article 2 of the Universal Declaration of Human Rights states, "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[10] In other words, they are equally applied to all people.

Furthermore, human rights are also universally imposed upon states. Therefore, states have duties concerning human rights. They must respect and protect them.[11] In this sense, the concept of human rights establishes a state-individual relationship between human beings and the state. Within this relationship, the former are rights-holders while the latter are duty-bearer that have to act, or in some cases to refrain from acting, to allow

[5] Hansungul, M. The Historical Development of International Human Rights. p.1.
[6] *Ibid*., p. 3.
[7] Charter of the United Nations, Art. 1.
[8] Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p. 3.
[9] Pearson, Z. An international Human rights approach to corruption. p. 44.
[10] UDHR, Art. 2.
[11] Dixon, M. (2013). *Textbook on International Law*. 7th ed. Oxford: Oxford University Press. p. 356.

each individual to live a life of dignity.[12] It is also important to specify that the respect of this legal agreement is not only subject to national sovereignty. But, it is also assumed as the commitment to the international community.[13]

According to several international law scholars, the granting of international protection through the law of human rights represents an example of the personality of the individuals in modern international law. The counterpart to this international protection would be the responsibility that each individual bear for certain criminal acts, such as war crimes and crimes against humanity. The international personality of individuals is an example of how far international law had come since it was concerned only with relations between sovereign states. Thus, the presence of specific duties placed upon persons and the grant of certain rights make individuals a subject of international law.[14]

Through these achievements, the human rights discourse became a central matter of the international legal concern, becoming a significant branch of international law. The basis of the so-called "international human rights law"[15] is settled on the International Bill of Rights. The term "international bill of rights" refers to three documents: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[16] Briefly, these three documents proclaim a list of fundamental rights and freedoms that are recognized as universal and necessary to the enjoyment of life by all people.[17] Together, these provisions constitute the legal

[12] Nadakavukaren Schefer, K. (2010). Causation in the Corruption – Human Rights Relationship. *Rechtswissenschaft*, [online] 1(4), pp.397-425. Available at: https://www.nomos-elibrary.de/10.5771/1868-8098-2010-4-397/causation-in-the-corruption-human-rights-relationship-volume-1-2010-issue-4 [Accessed 25 Aug. 2019]. p. 401.

[13] Nash, C. (2018). Derechos Humanos y Corrupción. Un enfoque multidimensional. *Estudios de Derecho*, [online] 75(166), pp.138-162. Available at: http://aprendeenlinea.udea.edu.co/revistas/index.php/red/article/view/336377/OEA/Ser.L/V/II.Doc40/15 [Accessed 9 Sep. 2019].

[14] Dixon, M. *Textbook on International Law*. pp. 128-130.

[15] In addition to these international efforts, at the regional level, there are also several international organizations in charge for the protection of human rights, such as the Council of Europe (CoE), the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE), the Organization of American States (OAS), and the African Union (AU). These organizations and in particularly their mechanisms for the protection of human rights will be taken into consideration by the present study.

[16] Letsas, G. (2013). International Bill of Rights. In: H. LaFollette, ed., *The International Encyclopedia of Ethics*. Oxford: Blackwell Publishing Ltd., pp. 2706–2715.

[17] *Ibid*.

foundation for the international human rights law framework.[18] Since many of which are relevant to the study of corruption and human rights, they will represent the normative standards for the present study. [19]

Finally, it is essential to underline that the inspiration for these treaties and obligation can find their roots in morality, justice, ethics, or on the merely "dignity of Mankind."[20] Nevertheless, as the British academic lawyer Martin Dixon states, "despite profound advances in the law and practice of human rights, we must be wary of making broad generalization and statements of high moral principle."[21] Therefore, when dealing with human rights and especially with the link with corruption, it is crucial to draw a clear distinction between "substantive rules of law" and "rules of morality."[22] Thus, this implies that, if corruption is regarded only as a moral issue or as "the disease of the body politic," this will not ensure that a state will observe an international obligation concerning corruption but only a "rules of morality." For that reason, regarding the existence of a link between corruption and human right it is necessary to consider two critical preliminary aspects. Firstly, there is the need to be sure that the substance of what is being promoted, in this case, human rights, resides in a recognized source of legal obligation and not only in moral principle. Secondly, the link with corruption and human rights will not solely rely on the fact that both discourses share a moral connotation, but also in a legal connection between them. For that reason, the purpose of this chapter is to find out the if corruption may violate human rights.

2) The Conceptual Link Between Corruption and Human Rights

Seldom have human rights and corruption been addressed as connected domains of knowledge in academic and practical work. Precisely, the different origin and, in a

[18] United Nations. (2017). *Basic Facts about the United Nations. 42nd Edition*. New York: United Nations Department of Public Information.
[19] The United Nation has gradually expanded human rights law. For that reason, there are also other five human right treaties that are considered as core instruments for the protection of human rights: International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Right of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Moreover, the international human rights legal framework is also composed by other non-binding soft law norm, such as declarations and resolutions.
[20] Dixon, M. *Textbook on International Law*. p. 355.
[21] *Ibid.*
[22] *Ibid.*

certain sense, the opposite or detached direction of the fight against corruption and protection of human rights proves that the two agendas have not seen each other with confidence.[23] This justifies the fact that each of these matters has its own legal framework, composed by its own treaties, conventions, and its legal mechanism for enforcement and implementation.[24]

Indeed, corruption is often considered only as a transgression of the rules of the market and a threat to the functioning of the state's public institution.[25] Due to the increasing importance of economic activities in society and international discourse, and also due to the growing notions of individuality in society, the current economic focus considers corruption only as being a misappropriation of wealth and distortion of expenditure.[26]

This common reality, however, does not imply that a connection with other non-economic aspects is a trifle or of secondary importance. On the contrary, it seems necessary to make a comparative analysis of these objects in order to provide a new interpretation which connects these phenomena. Indeed, according to the Guest Researcher at the Danish Institute for International Studies Morten Koch Andersen, "the two fields of human rights and corruption closely intersect with international policy frames and institutions."[27] As a matter of fact, for anyone who has experienced corruption, it is not difficult to realize that there is a connection between corruption and human rights discourse.

To make sure that this does not remain an apparent link experienced by individuals, going further is necessary. For that reason, the task to verify how these two discourses are interconnected represents a relevant question for policymakers and legal scholars. However, as the Vice-director and Head of the Legal Division at the Swiss Institute of Comparative Law Krista Nadakavukaren Schefer states, "it is no exaggeration

[23] Quintero, R. (2016). Corrupción y Derechos Humanos. En particular, la Corte Interamericana de Derechos Humanos. *Euronomía. Revista en Cultura de la Legalidad*, [online] 10, pp.8-33. Available at: https://e-revistas.uc3m.es/index.php/EUNOM/article/view/3073/1771 [Accessed 3 Sep. 2019]. p. 10.
[24] Burneo Labrín, J. A. (2009). Corrupción y Derecho internacional de los derechos humanos. *Revista de la Facultad de Derecho PUCP*, [online] 63, pp.333-347. Available at: http://revistas.pucp.edu.pe/index.php/derechopucp/article/view/2981 [Accessed 3 Sep. 2019]. p. 337.
[25] Andersen, M. (2018). Why Corruption Matters in Human Rights. *Journal of Human Rights Practice*, [online] 10(1), pp.179-190. Available at: https://academic.oup.com/jhrp/article/10/1/179/4937879 [Accessed 26 Aug. 2019]. p. 179.
[26] Pearson, Z. An international Human rights approach to corruption. p. 51
[27] *Ibid*., p. 180.

to say that corruption is one of the most complex problems in legal research today."[28] Corruption is also a legal issue covered by several law branches, such as private law as well as public law, civil law as well as criminal law, and international law as well as domestic law.

Thus, the question arises: should it also be covered by international human right law? After the methodological clarification provided above, this section will explore several conceptual dimensions that allow considering corruption as a human right issue.

2.1) The Consequences of Corruption from a Human Rights Perspective

Despite the majority of the "classic corruption literature" has its principal focus on the political and economic costs to development, corruption could also negatively affect the enjoyment of human rights. However, this understanding of corruption requires a fundamental change of perspective. There is a need for a departure from the traditional approaches. In the previous chapter, corruption has been defined as an act of abuse of a position power, which entails the breach of a normative mandate. According to the democratic theory of the definition of corruption, this departure from the normative mandate constitutes a break of the regulatory system, which directly affects a third party. In this case, the rest of the population. Thus, the impact of corruption in the "third party" is essential to adequately understand and recognize the various way in which corruption is linked to human rights.[29]

In this sense, the human rights discourse applied to corruption will help identifying the social and individual harms caused by corruption. It would encompass the social, economic, psychological, and environmental injuries inflicted on society by the acts of individuals, organization, or governments.[30] Therefore, analyzing corruption with a human rights lens would come necessary in order to understand its adverse effects on the enjoyment of human rights.

For example, it has been repeatedly affirmed that corruption by definition distorts the normal functioning of the institutional and political system and hampers the equal

[28] Nadakavukaren Schefer, K. Causation in the Corruption – Human Rights Relationship. p. 399.
[29] Nash, C. Derechos Humanos y Corrupción. Un enfoque multidimensional. p. 141.
[30] Barkhouse, A., Hoyland, H. and Limon, M. (2018). *Corruption: a human rights impact assessment*. [online] Versoix: Universal Rights Group. Available at: https://www.universal-rights.org/lac/urg-policy-reports/corruption-human-rights-impact-assessment/ [Accessed 27 Aug. 2019].

access to opportunities and services. Examining these consequences through a human rights perspective, corruption may directly or indirectly negatively affect the principle of equality and non-discrimination.[31]

The principle of equality and non-discrimination is considered one of the foundational principles of the human rights law and is likewise essential for the effective protection of the rest of human rights.[32] According to the Austrian human rights lawyer Manfred Nowak, "along with liberty, equality is the most important principle imbuing and inspiring the concept of human rights."[33] As a matter of fact, besides being recognized by both national constitutions and universal and regional human rights instruments[34], the Inter-American Court held that "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all law."[35] Hereafter, the Court specified that this principle entail obligation *erga omnes* of protection that bind al States.[36]

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[31] Committee on Economic, Social, and Cultural Rights (CESCR), (2017). *General Comment no. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of Business Activities.* UN Doc. E/C.12/GC/24. para. 20. In scholarship, see Garciandia, R. (2018). Euro-Latin-American Cooperation against Corruption and Its Impact in Human Rights. *Araucaria. Revista Iberoamericana de Filosofia, Politica, Humanidades y Relaciones Internacionales*, [online] 20(40), pp.605-629.
Available at: https://pdfs.semanticscholar.org/c544/e7d0a05d9a7526fc7abef11ff489ac4127ca.pdf [Accessed 27 Aug. 2019]. p. 609-610.

[32] Sepulveda Carmona, M and Bacio Terracino, J. (2010). Corruption and Human Rights: Making the Connection. In: M. Boersma and H. Nelen, ed., *Corruption and Human Rights: Interdisciplinary Perspectives*. Antwerp-Cambridge-Portland: Intersentia, pp.25-49. p. 31.

[33] Nowak, M. (2005). *UN Convenant on Civil and Political Rights: CCPR Commentary*. 2nd ed. Kehl: Engel, p.598.

[34] Some of the most relevant instruments defining and protecting this right are the Charter of the United Nations (1945), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1981), the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999), the European Convention on Human Rights (1950), the European Social Charter (1961) and the revised European Social Charter (1996) and the EU Charter for Fundamental Rights (2000).

[35] Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, Juridical Condition and Rights of Undocumented Migrants, para. 101; See International Commission of Jurists. (2019). *Chapter two: Universality, Equality and Non-Discrimination*. [online] Available at: https://www.icj.org/sogi-casebook-introduction/chapter-two-universality-equality-and-non-discrimination/ [Accessed 12 Sep. 2019].

[36] *Ibid*., para. 110.

Indeed, according to Sepúlveda Carmona and Bacio Terracino, corruption, by definition, "has both a discriminatory purpose and discriminatory effects."[37] Many corruption cases bring about "the specific result of nullifying or impairing the equal recognition, enjoyment or exercise of a human right."[38] Corruption creates distinctions affecting the exercise of one or more rights. For instance, a public official that accepts bribes to facilitate someone's access to a public service negatively affects the principle of equality and non-discrimination. In that event, the right to equality and the prohibition of discrimination are affected. As Professor Eric M. Uslaner claims, in this case, "corruption gives some people advantages that others don't have."[39]

Despite these apparent negative effects on the principle of equality and non-discrimination, it seems that the UN treaty bodies have failed to make the specific connection between the corrupt acts and this cornerstone principle of human rights law.[40] The equal treatment guaranteed in the ICCPR[41] and in the ICESCR[42] does not seem to offer a "legal weapon" against corruption.[43] Indeed, the principle of non-discrimination applies in connection only with the enjoyment of a right under the covenants, and hence, for this reason corruption can never be captured.[44] One attempt to address corruption in this way has been formulated by former UN Secretary-General Kofi Annan, "corruption hurts the poor disproportionately – by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and justice, and discouraging foreign investment and aid."[45]

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[37] Sepulveda Carmona, M and Bacio Terracino, J . Corruption and Human Rights: Making the Connection. p. 32.
[38] *Ibid*.
[39] Uslaner, E. (2010). *Corruption, inequality, and the rule of law*. Cambridge: Cambridge University Press, p.24.
[40] *Ibid*., p. 203.
[41] As Nowak stated, "The principle of equality and the prohinition of discrimination runs like a red thread throughout the *Covenant on Civil and Political Rights.*" See Art. 2 (1); Art. 3; Art. 4 (1); Art. 23; Art. 25; Art. 26. Nowak, M. *UN Convenant on Civil and Political Rights: CCPR Commentary*. p.600.
[42] The principle is set forth in Art. 2 (2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[43] Peters, A. (2018). Corruption as a Violation of International Human Rights. *European Journal of International Law*, [online] 29(4), pp.1251-1287.
Available at: https://academic.oup.com/ejil/article/29/4/1251/5320164 [Accessed 27 Aug. 2019]. p. 1265.
[44] *Ibid*.
[45] Unodc.org. (2003). *Speech of the Secretary-General on the adoption of the Convention against Corruption*. [online] Available at: https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html [Accessed 10 Sep. 2019].

Furthermore, there are other cases in which human rights are affected by corruption, especially by petty corruption. For example, in the health sector, corruption can deprive people of access to health care. According to Dr. Brigit Toebes, a Dutch legal scholar involved in the areas of health law, corrupt behaviors could hurt some of the recognized international human rights. Conducting a study on corruption in the health sector, she found out that corrupt behaviors such as the misappropriation of funds or a selection of patients based on their financial capabilities negatively affect individuals.[46] More precisely, it would attack the right of everyone to the highest attainable standard of health recognized by Article 12 of the ICESCR.[47]

Not only does corruption undermine economic, social, and cultural human rights, but also political and civil human rights are affected. Indeed, it has been demonstrated that law enforcement and prison facilities are areas where corrupt practices have been witnessed regularly, causing adverse effects on the human rights' prisoners. For example, this has emerged from several reports published by the European Committee for the Prevention of Torture (CPT). It has been found that corruption in the whole law enforcement system and impunity may cause episodes of torture and other forms of physical ill-treatment.[48] Indeed, the CPT has reported that, under certain conditions, prisoners have to pay money in exchange for improving their basic living conditions.[49] For example, it could be the case of a prisoner that has to give the guard something in return for a blanket or better food. In this case, these forms of corruption could produce a negative impact on the right to humane conditions of detention guaranteed under Article 10 of the ICCPR.[50]

An example of the negative impact on the enjoyment of human rights has been the case of the Nigerian human rights NGO *Socio-economic rights and accountability project (SERAP) v. Nigeria* at the Economic Commission of West African States (ECOWAS)

[46] Toebes, B. (2010). Health Sector Corruption and Human Rights: A Case Study. In: M. Boersma and H. Nelen, ed., *Corruption and Human Rights: Interdisciplinary Perspectives*. Antwerp-Cambridge-Portland: Intersentia, pp.119-121.
[47] ICESCR, Art. 12.
[48] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2018). *28th General Report of the CPT*. [online] Council of Europe, p.18. Available at: https://rm.coe.int/16809420e3 [Accessed 27 Aug. 2019].
[49] Group of States against Corruption (GRECO) (2018). *Corruption and Human Rights*. [online] Council of Europe. Available at: https://rm.coe.int/factsheet-human-rights-and-corruption/16808d9c83 [Accessed 27 Aug. 2019].
[50] See Peters, A. Corruption as a Violation of International Human Rights.

Court of Justice.[51] The claim was based on alleged violations of the rights to education, human dignity, and the rights of peoples to freely dispose of their natural wealth and resources. It was caused by the plundering of state funds by the Universal Basic Education Commission (UBEC).[52] More precisely, it was alleged that between 2006 and 2007 alone, the UBEC embezzled US$ 351.51 million of public funds.[53] For that reason, due to the lack of adequate implementation of Nigeria's Basic Education Act and Child's Rights Act of 2004, the complainant brought the case to court. SERAP argued that such grand corruption case would have violated peoples' right to education. This right is guaranteed under Article 17 of the African Charter of Human and Peoples' Rights (ACHPR), which has been ratified by the Federal Republic of Nigeria in 1983. Briefly, the article highlights that every individual shall have the right to education and may freely take part in the cultural life of his community under the duty of the State.[54]

This case is significant because the court affirmed that "embezzling stealing or even mismanagement of funds meant for the education sector util has a negative impact on education since it reduces the amount of money made available to provide education to the people."[55] Then, the Court ordered to Nigeria "to take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education program, lest a section of the people should be denied a right to education."[56] However, in the end, the court decided that it does not *per se* constitute a violation of human rights.

The impact of corruption on the enjoyment of human rights demonstrates that it should not only be conceptualized as a "victimless economic crime." The bias of economic studies or game theory that thinks of corruption from econometric analysis relies on their deal with corruption only with a logic of incentives and institutional designs. On the contrary, there is the need to also advocate for the human costs of corruption and not only for the political and economic ones. As a matter of fact, through

[51] *SERAP v. Nigeria*, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010).
[52] The UBE Commission (UBEC) is a Federal Governments Agency. It is responsible for coordinating all aspects of the Universal Basic Education (UBE) program implementation. The UBE Program was introduced in 1999 by the Federal Government of Nigeria as a reform aimed at providing greater access to and ensuring quality of basic education throughout Nigeria. It was given statutory authority in 2004 with the Basic Education Act and Child's Rights Act. (See Ubec.gov.ng. *Universal Basic Education Commission*. [online] Available at: https://www.ubec.gov.ng/ [Accessed 28 Aug. 2019].)
[53] Barkhouse, A., Hoyland, H. and Limon, M. (2018). *Corruption: a human rights impact assessment*. p. 7.
[54] ACHPR, Art. 17.
[55] *SERAP v. Nigeria*, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010), para 19.
[56] *Ibid*., para 28.

a human rights framework, the current director at the Max Plank Institute for Comparative Public Law and International Law Anne Peters provides as an example a case in which students have to pay for additional private lessons from a teacher who indicates that they will not pass the examination otherwise. In terms of human rights, the students are considered as victims because their consent to the illegal *quid pro quo* is the result of a desperate situation. In this sense, the permission of the student is not free but, somewhat, is coerced.[57]

Furthermore, not only could corruption create identifiable victims, but also it can be considered as "the denominator of all the transitional crimes" such as drugs, smuggling, or human trafficking. In transnational crimes, the identification of the victims is not an arduous process.[58] Human trafficking is an illustrative example of how corruption may have an identifiable victim with a negative impact on human rights. As expected, according to several studies, it seems that corruption is usually proactively involved in trafficking-related crime. Indeed, many scholars placed corruption as the most significant indicator of human trafficking.[59] More precisely, through corruption, the crime of human trafficking could remain invisible and induces police, border control, or immigration and customs officials to look the other way.[60] This could affect the human right protection from slavery and servitude, guaranteed under Article 8 of ICCPR.

An example is the 2010 judgment of *Ranstev v. Cyprus and Russia* by the European Court of Human Rights (ECtHR). Briefly, the case concerns a 21-year-old female Russian national who had moved to Cyprus intending to work as an artist in a cabaret and then was found dead in mysterious circumstances. Finding a violation of the right to life (Art. 2 of the European Convention of Human Rights (ECHR)), the court stated that "the authorities were under an obligation to investigate whether there was any indication of corruption within the police force in respect of the events leading to Ms. Rantseva's death."[61]

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[57] Peters, A. Corruption as a Violation of International Human Rights. p.1255.
[58] Barkhouse, A., Hoyland, H. and Limon, M. (2018). *Corruption: a human rights impact assessment*. p. 5.
[59] For more on corruption and human trafficking see Zhang, S. and Pineda, S. (2008). Corruption as a Casual Factor in Human Trafficking. In: D. Siegel and H. Nelen, ed., *Organized Crime: Culture, Markets and Policies.*, 7th ed. New York, NY: Springer, pp. 41-55.
[60] Garciandia, R. Euro-Latin American Cooperation against Corruption and its Impact in Human Rights. p. 609.
[61] *Ranstev v. Cyprus and Russia*, Application no. 25965/04, (ECtHR, Jan. 7, 2010). Para, 238.

2.2) The "Two Side of the Same Coin": The Shared Conditions of Corruption and Human Rights Violation

At the deepest conceptual levels of the complex interaction between human rights and the fight against corruption, it is possible to find common fundamentals and objectives. Although the human rights and anti-corruption agendas have run in parallel, considering the state's legitimacy, they are not a different process but inextricably and interdependently linked. Using the words of Rajagopal, Associate Professor of Law and Development at the Department of Urban Studies and Planning at MIT (Massachusetts Institute of Technology), "they are two sides of the same coin."[62]

Following the dominant strands of Western political theory, the legitimacy of the modern liberal state is judged by the extent to which it protects the public interests and guarantees the benefit of the community as a whole. In other words, the state is justified only if it protects human rights. The respect of human rights became the *condicio sine qua non* for the achievement of a full international legitimization and hence for an active participation at the international relations dynamics.[63] Following the Lockean ideas of liberal democracy, the state exists to protect the rights of the citizens. Consequently, from the perspective of international law, the respect of human rights has become the primary source of legitimacy of the state.[64] In other words, a state is legitimized if human rights are guaranteed and respect.

In this sense, corruption and violation of human rights share the same roots and environment. They will thrive in the presence or absence of many conditions, such as integrity, misuse of power, or lack of accountability. The fight against corruption and respect for human rights also share the same enemies. Their failures are produced by the same conditions of failing the rule of law, inequality, oppression, and opportunism by the elite minorities.[65]

Thus, the elimination of corruption and the strengthening of human rights both require a healthy, accountable, and transparent integrity system which aim the establishment of a well-functioning and independent judiciary system, separate and

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[62] Rajagopal, B. (1999). Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship. *Connecticut Journal of International Law*, [online] 14(2), pp.495-507. Available at: https://ssrn.com/abstract=940042 [Accessed 3 Sep. 2019]. p. 495.
[63] Cassese, A. and Gaeta, P. (2008). *Le sfide attuali del diritto internazionale.* Bologna: Il Mulino. p. 145.
[64] Rajagopal, B. Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship. p. 495.
[65] Andersen, M. Why Corruption Matters in Human Rights. p. 186.

productive parliaments, and vigorous bureaucracies. As a matter of fact, a state with a highly corrupt political institution is less likely to respect human rights, and hence it will be less legitimized. At the same time, rarely is a state clean when it has a poor human rights record.[66] For example, in a recent study, conducted by the Institute of Social Investigations at the National Autonomous University of Mexico, has been demonstrated that the more significant corruption, the less civil and political rights. This directly affects the empowerment of an individual because it concerns rights such as the freedom of expression, religion, meeting and association, and self-determination. Moreover, the investigation demonstrates the massive disparity in the living condition for people who live in countries that are worse positioned in corruption and human rights violations in comparison to the best positioned.[67]

Thus, it is possible to consider corruption and human rights as two sides of the same coin because, according to one of the experts in international criminal law José A. Burneo Labrín, "combating corruption means establishing favorable conditions to the realization of human rights."[68] Indeed, corruption is also taken into consideration by the Sustainable Development Goals (SDGs). The Sustainable Development Agenda of 2015 in the 16.5 goal target requires all state to "substantially reduce corruption and bribery in all their forms."[69] Otherwise, the realization and implementation of the SDGs would be impossible. The Sustainable Development Agenda depends on good governance, transparency, participation, and accountability, namely the cornerstones of anti-corruption policy.[70]

This interconnection between corruption (the fight against it) and human rights (their respect) has also been explained by three South African Courts judgments. In the case of the *South African Association of Personal Injury Lawyers v. Health and Others*, the Constitutional Court of South Africa stated that "corruption and maladministration are inconsistent with the rule of law and the fundamental of our constitution. They

[66] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p. 197.
[67] See Cardona Acuna, L., Ortis Rios, H. and Vazquez Valencia, L. (2018). Corrupción y derechos humanos: de la intuición a la convicción. *Revista Mexicana de Sociologia*, [online] 80(3), pp.577-610. Available at: http://www.scielo.org.mx/pdf/rms/v80n3/0188-2503-rms-80-03-577.pdf [Accessed 3 Sep. 2019].
[68] See Burneo Labrín, J. A. Corrupción y Derecho internacional de los derechos humanos.
[69] United Nations Sustainable Development. (2015). *Peace, justice and strong institutions - United Nations Sustainable Development*. [online] Available at: https://www.un.org/sustainabledevelopment/peace-justice/ [Accessed 3 Sep. 2019].
[70] Barkhouse, A., Hoyland, H. and Limon, M. (2018). *Corruption: a human rights impact assessment*. p. 2.

undermine the constitutional commitment to human dignity, the achievement of equality, and the advancement of human rights and freedom. They are the antithesis of the open, accountable, democratic government required by the Constitution."[71] Furthermore, in the 2011 *Hugh Glenister v. President of the Republic of South Africa* case, the Constitutional Court held that "it is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy."[72] Similarly, in *S v Shaik and Others*, the Supreme Court of Appeal of South Africa pointed out that "the seriousness of the offense of corruption cannot be overemphasized. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights."[73]

2.3) The Concept of Human Rights: An Essential Tool to the Fight Against Corruption

The conceptual link between corruption and human rights also relies on the fact that human rights are essential tools in the fight against corruption. For example, without the right to freedom of expression, preventing, exposing and fighting corruption will be particularly tricky.[74] Thus, by definition, denouncing corruption supposes the exercise of the right to freedom of expression.[75]

Some judgments of the European Court of Human Rights have noticed how the human rights of a person raveling corruption guaranteed under Article 10 (freedom of expression) of the European Convention of Human Rights may be violated by state actors involved in corrupt practices. An example is the 2008 judgment *Guja v. Moldova* in which the ECtHR sided with the whistleblower ruling that Moldova breached Article 10 when it dismissed a civil servant. The public official had revealed information of general interest regarding attempts by high-ranking politicians to influence the judiciary.[76] Not only the right to freedom of expression of whistleblowers concerns civil servants but also

[71] *South African Association of Personal Injury Lawyers v. Health and Others*, Case CCT 27/00 (Constitutional Court of South Africa, Nov. 28, 2000).
[72] *Hugh Glenister v. President of the Republic of South Africa*, Case CCT 48/10, (Constitutional Court of South Africa, Mar. 17, 2011).
[73] *Shaik v The State*, Case SCA 34 (Supreme Court of Appeal of South Africa, Nov. 6, 2006). para. 223.
[74] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. pp. 197-198.
[75] Vazquez Valencia, L. (2018). *Corrupcion y Derechos Humanos ¿Por dónde comenzar la estrategia anticorrupción?*. New York: Peter Lang. p. 176.
[76] *Guja v. Moldova*. Application no. 14277/04, (ECtHR, Feb. 12, 2008).

it has been extended to journalists seeking to shed light on corruption facts. Indeed, the ECtHR in the case *Kasabova v. Bulgaria* has held that suspicious about the implication of officials in bribery is a question of general interest on which the press must report any information in its possession.[77] Furthermore, the court reminded the importance of the press underling "the vital role of a public watchdog which the press performs in a democratic society."[78]

On the other side of the ocean, the Inter-American Court of Human Rights (IACtHR) followed the same path. In 2013, in *Luna López v. Honduras*, the Inter-American Court held that states should provide the necessary means for persons who are denouncing corruption and who are defenders of human rights.[79] In the judgment of *Memoli v. Argentina,* a case which refers to the alleged violation of the right to freedom of expression, the IACtHR held that corruption is a matter of public interest and those who denounce corrupt scandals require the protection of the International Human Rights Law.[80] Furthermore, a landmark case in the history of the Inter-American Court of Human Rights is *Ivcher Bronstein v. Peru.* In this case, the right to freedom of thought and expression was essential to denounce a decade of an incredibly corrupt and controversial Peruvian government. Indeed, Mr. Baruch Ivcher Bronstein started to condemn grave violations of human rights and acts of corruption committed by Alberto Fujimori's administration. Consequently, the State arbitrarily deprived the Applicant, a naturalized Peruvian citizen and majority shareholder and Director and President of Channel 2-Frecuencia Latina of the Peruvian television network, of his nationality title in order to remove him from the editorial control of the channel and restrict his freedom of expression.[81] Finally, the Court found that the State violated the American Convention of Human Rights to the detriment of Mr. Ivcher Bronstein. Moreover, the Court clarified that the State not only restricted the right of freedom of thought and expression but also

[77] *Kasabova v. Bulgaria.* Application no. 22385/03, (ECtHR, Apr. 19, 2011).
[78] *Ibid*., para 55.
[79] *Luna López v. Honduras*, Case No. 269, (IACtHR, Oct. 10, 2013). para. 123.
[80] *Mémoli v. Argentina*, Case No. 265, (IACtHR, Aug. 22, 2013).; Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p.13.
[81] See Perez, G. (2014). Ivcher Bronstein v. Peru. *Loyola of Los Angeles International and Comparative Law Review*, [online] 36, pp.2437-2461. Available at: https://iachr.lls.edu/sites/default/files/iachr/Cases/Ivcher_Bronstein_v_Peru/Ivcher%20Bronstein%20v.%20Peru.pdf [Accessed 12 Sep. 2019].

affected “the right of all Peruvians to receive information, thus limiting their freedom to exercise political options and develop fully in a democratic society.”[82]

2.4) Corruption as a Human Rights Issue

Despite the conceptual interconnections between corruption and human rights presented above, in the field of international law, the protection of human rights and the fight against corruption have not been yet jointly addressed.[83]

As it will be analyzed in a more detailed way in the next chapter, the international legal instruments concerning corruption do not even refer to the human rights discourse. The only exception is for the Preamble of the 1999 Council of Europe Criminal Law Convention of Corruption[84], the Foreword of the United Nation Convention Against Corruption[85], and the African Union Convention on Preventing and Combating Corruption.[86]

It also works in the other way. Human rights treaties do not mention corruption or their relationship in their treaty texts. Unexpectedly, in this case, the only exception is the Preamble of 1789 the French Declaration of the Rights of Man and of the Citizen, which inspired the current international human rights law. In this situation, corruption has been remarked. The declaration stated, “the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and the corruption of governments.” [87]

An explanation could be the fact that the legal analysis of corruption only begun during the 1990s. The legal approach to corruption consisted of a technical legal examination of the issue, such as defining the crime of corruption for legislative purpose or enforcing the legal rules. Progressively, thanks to the success of the NGO Transparency

[82] *Ivcher Bronstein v. Peru*, Case No. 74, (IACtHR, Feb. 6, 2001). para. 163.
[83] Quintero, R. Corrupción y Derechos Humanos. En particular, la Corte Interamericana de Derechos Humanos. p. 9.
[84] “Emphasizing that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.”
[85] “Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.”
[86] In the Preamble, the Convention reminds the need to promote and protect human and peoples’s rights. Furthermore, in Article 2, the treaty establishes as a fourth objective the promotion of socio-economic development in order to guarantee the enjoyment of the recognized human rights.
[87] Declaration of the Rights of Man and of the Citizen, Preamble.

International the human rights law perspective on the topic started to appear.[88] On the contrary, academic legal research on the human rights impact of corruption is recent[89] as the intervention of the international and regional organization.

For instance, in the 2011 case *Lopez Mendoza v. Venezuela*, the IACtHR has indicated that "the fight against corruption is of great importance, and it will keep in mind such circumstance when in it is presented with a case wherein it has to rule on such matter."[90] On the other hand, as it will further developed in the next chapter, the international and regional organization adopted several resolutions concerning corruption and human rights. In 2017 the UN Human Right council passed a resolution concerning the negative impact of corruption on the enjoyment of human rights.[91] A few months later, the Parliament of the European Union adopted a resolution regarding corruption and its effects on human rights, especially in the third countries.[92] Recently, publishing the Resolution 1/18, the Inter-American Commission on Human Rights declared that corruption is a complex phenomenon that affects human rights in its integrality.[93]

However, according to several legal scholars involved into this analysis, it could not be considered as a systematic human rights approach to corruption.[94] These considerations still remain weak, unprecise, and less influential. The majority of the current approaches to corruption focus on the negative impact that it may cause on the enjoyment of human rights, emphasizing only its grave effects.[95] Rarely do reports or official statements refer to a violation of human rights generated by corruption. They still tend to use a weak vocabulary.[96]

Indeed, this general approach is also reflected by the 2010 judgment by ECOWAS analyzed before, in which the Court stated that the misallocation of funds destinated to the education system does not *per se* constitute a violation of human rights. The court

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[88] Nadakavukaren Schefer, K. Causation in the Corruption – Human Rights Relationship. p. 399.
[89] Among the most important: Zoe Pearson, Magdalena Sepulveda Carmone, Martine Boersma, Anne Peters, Julio Bacio Terracino, and Kolawole Olaniyan.
[90] *Lopez Mendoza v. Venezuela*, Case No. 233, (IACtHR, Sep. 1, 2011). Footnote. 208.
[91] United Nation Human Rights Council. (2017). *Resolution 35/25: The negative impact of corruption on the enjoyment of human rights.*(23 June 2017).
[92] European Parliament. (2017). *Resolution C 337/82: Corruption and human rights in third countries.* (13 September 2017);
[93] Inter-American Commission on Human Rights. (2018). *Resolution 1/18: Corruption and Human Rights.* (02 March 2018).
[94] For example, see Peters, A. Corruption as a Violation of International Human Rights.
[95] Peters, A. Corruption as a Violation of International Human Rights. p. 1257.
[96] *Ibid*.

affirmed that "there must be a clear linkage between the acts of corruption and a denial of the right to education. In a vast country like Nigeria, with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though as earlier pointed out it has a negative impact on education."[97]

Despite this final judgment, according to some international scholars, it is somewhat confusingly. For example, Anne Peters underlined how the court viewed corruption as a matter of domestic criminal law and civil law, but not of international human rights law. Indeed, according to the domestic court, corruption would not have been fallen within the jurisdiction of the regional human rights court of ECOWAS.[98]

As expected, this case demonstrates the predominant practice of international organizations and human rights institutions in dealing with the connection between corruption and human rights. Expectedness, at the European level, there are not too many differences in the approach of the Court toward corruption and human rights. Indeed, it has been argued that there are several areas where violations of human rights contained in the ECtHR can be connected with corruption. However, corruption is still running in the background. The Court has not yet pronounced on all possible areas where corruption could come into play.[99]

Luckily, it is also possible to find very different conclusions. Indeed, the case of *State of Maharashtra through CBI, Anti-Corruption Branch, Mumbai V. Balakrishna Dattatrya Kumbhar* represents an exception. In this judgment, the Supreme Court of India held that "corruption is not only a punishable offense but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights violation in itself, as it leads to systemic economic crimes."[100]

However, one exception does not make the general rule. Despite these pieces of evidence, human rights and corruption discourse remain separated in the international law. On the contrary, corruption should be considered as a human right issue not only by some national courts but also by the entire international public order. For that reason, there is the need to legally build the substantial link between corruption and human rights.

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[97] *SERAP v. Nigeria*, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010), para 19.
[98] *Ibid*., para 46.
[99] Group of States against Corruption (GRECO). *Corruption and Human Rights*.
[100] *State of Maharashtra through CBI, Anti-Corruption Branch, Mumbai V. Balakrishna Dattatrya Kumbhar*. Criminal Appeal No.1648 of 2012, (Supreme Court, 15 Oct. 2012).

This section sought to show how corruption influences the enjoyment of human rights. It results that corruption can negatively affect those rights protected by the ratified treaties and conventions of the international human right law. It has been also claimed that corruption (the fight against it) and human rights (their protection) are interlinked because of their nature. They are considered as two sides of the same coin. They share the same environment and the same root. In this sense, corruption and human rights are complementary, reducing one helps to lessen the other.[101] Indeed, the existence of human rights allows the fight against corruption. Human rights are essential tools because they are an incentive to denounce corrupt acts.

More importantly, it has been showed that corruption is strictly linked with human rights because widespread corruption impedes the establishment of a government which is able to make the same human rights effective. For example, corruption may impede the allocation of government resources destinated to the implementation of human rights. Following this logic, corruption and human rights are conceptually linked also because corruption circumvents the respect of the rule of law, namely a necessary condition for the establishment of a human rights system. In this way, corruption represents the negation of the idea of human rights. Thus, paraphrasing Peters, there not only is a conceptual nexus between corruption and human rights but even almost a tautology.[102]

Corruption must be recognized as a human rights issue. The way in which corruption could be responsible for any human rights violations explains why there is a conceptual link.[103] Now, from a legal standpoint, it became necessary to distinguish a corrupt act, which merely undermines human rights, from another corrupt situation, which constitutes an actual unlawful human right violation.[104] For that reason, through legal analysis, the next section analyzes the substantive link between corruption and human rights. It attempts to verify whether corruption may lead to a violation of human

[101] Anukansai, K. (2010). Corruption: The Catalyst for the Violation of Human Rights. *Journal of the National Anti-Corruption Commission.* [Online] Available at: https://www.nacc.go.th/images/journal/kanokkan.pdf [Accessed 17 Jul. 2019]. p. 14.
[102] Peters, A. (2015). Corruption and Human Rights. Basel Institute on Governance Working paper series No. 20. Basel: Basel Institute on Governance. [Online] Available at: https://www.baselgovernance.org/sites/default/files/2019-06/WP20_Corruption_and_Human_Rights.pdf. [Accessed 26 Aug. 2019]. p. 9.
[103] *Ibid*.
[104] Peters, A. Corruption as a Violation of International Human Rights. p. 1257.

rights, and hence whether the state is responsible for its action or omission of an international human rights obligation.

3) The Substantive Link: Determining When Corruption is a Human Rights Violation

The previous section concludes by stating that corruption and human rights are conceptually linked. The conceptual linkage between corruption and human rights relies on the fact that, under certain conditions, corruption could be the cause for a human right violation. For that reason, this section seeks to go one step further than the conceptual link and represents an attempt to define the substantive link of this connection. It will be argued that some specific corrupt practices could involve international legal responsibilities of the state for having breached a human right obligation.[105]

Following this way of thinking, the section opens with a brief analysis of violation in international law. Hereafter, the paragraphs will outline how corruption may cause human rights violations. In particular, it will be highlighted the direct, indirect, or remote link that exists between the corrupt practices and the human right violation. Furthermore, taking into consideration the fact that this debate has not been thoroughly addressed in the past, this section seeks to create the legal relevance of the substantive link. In this sense, with the purpose to reconceptualize corruption in human rights terms, the analysis of the main principles of international law doctrine will be necessary. After that, the legal relevance of the substantive link between corruption and human rights will be built. By outlining the most crucial aspects of the state's obligation, causation, and the rules of attribution, this section will seek to argue that corruption could be legally considered as a human rights violation.

[105] Due to the international methodological approach applied in this thesis, this section refers to human rights that have been widely ratified by the international community, namely the UN instruments of protection of human rights. However, it is not represented a limitation because many of the rights recognized in the UN system are also found in regional human rights instruments.

3.1) The Link between the Corrupt Practice and the Human Rights Violation under International Law

At the international arena, on the one hand, the state benefits several advantages, such as the recognition of its sovereignty. It could be named as a benefit because, as it has been argued, "if states (and only states) are conceived of as sovereign, then in this respect at least they are equal, and their sovereignty is in a major aspect a relation to other states (and to organizations of states) define by law."[106] Thus, states held a set of rights that allow them to exercise control over its territory and its people by representing them at the international level.[107]

However, on the other hand, the state accepts corresponding legal obligations for its actions. In international law, it is named state responsibility.[108] It is a general principle of international law that a breach of an international obligation entails the responsibility of the state concerned.[109] As stated by Judge Huber as sole arbitrator in the *British Claims in the Spanish Zone of Morocco*, "responsibility is the necessary corollary of a right. All rights of international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation."[110] Within this framework, State responsibility arises from the violation by a State, or another international legal person, of an international obligation.[111] In other words, it must be the presence of an internationally wrongful act or activity.[112] Also regarding human rights, a state is responsible for human rights violation when it can be shown that its actions or omission to act are in contrast with the requirements of international human rights norms.[113]

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[106] Crawford, J. and Brownlie, I. (2012). *Brownlie's principles of public international law*. 8th ed. Oxford: Oxford University Press. p. 447.
[107] *Ibid*. p. 448.
[108] Dixon, M., McCorquodale, R. and Williams, S. (2016). *Cases & Materials on International Law*. 6th ed. Oxford: Oxford University Press. p. 399.
[109] Crawford, J. and Brownlie, I. *Brownlie's principles of public international law*. p. 540.
[110] *Spanish Zone of Morocco Claims*, (Great Britain v. Spain), 2 R.I.A.A. 615., (1924); See Spiermann, O. (2007). Judge Max Huber at the Permanent Court of International Justice. *European Journal of International Law*, [online] 18(1), pp.115-133. Available at: https://academic.oup.com/ejil/article/18/1/115/362819 [Accessed 17 Sep. 2019].; Dixon, M., McCorquodale, R. and Williams, S. *Cases & Materials on International Law*. p. 399.
[111] Dixon, M., McCorquodale, R. and Williams, S. *Cases & Materials on International Law*. p. 399.
[112] See Responsibility of States for Internationally Wrongful Acts, Art. 1.
[113] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 26.

Here, it became necessary to underline that the wrongful act is exclusively determined by international law and not by any domestic law. This peculiarity became essential for the focus of this present study, namely corruption at the international level. It allows avoiding the so-called cultural determinism in dealing with corruption. For example, what is considered as a form of corruption in the Western legal and political tradition could not constitutes a corrupt practice in Asia. Nonetheless, if a corrupt practice is not considered as such in domestic legislation, this will not preclude the fact that the same corrupt practice is considered as an internationally wrongful act, and hence, the State responsibility may arise.

Furthermore, it also deserves to be highlighted, from the point of view of this study, the fact that, concerning human rights, the material or moral damage is not considered as the constitutive element of the internationally wrongful act.[114] Naturally, this means that it is not necessary to identify any specific material or moral damage which falls to another international legal personality.[115] As a matter of fact, concerning breaches of human rights obligations, the damage falls to the citizens of the state responsible for the violation.[116] Thus, the identification of the material damage could be misleading. Likewise, due to the secretive nature of corruption and the lack of empirical evidence, under certain conditions, it may be arduous to establish a direct causal relationship between a state's corrupt actions or omissions and breaches of human rights.[117]

Although it is now generally accepted that the fundamental principles of human rights form part of customary international law[118], for practical reason, in this study, the

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[114] Bartolini, G. (2009). *Riparazione per violazione dei diritti umani e ordinamento internazionale*. Napoli: Jovene. p. 66.

[115] The commentary to Article 2 sets out by the International Law Commission (ILC) highlights how the "international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure." See International Law Commission. (2001). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*. p. 36, para. 9.

[116] De Hoogh, A. (1996). *Obligations Erga Omnes and International Crimes.* The Hague: Kluwer law international. p. 36, Cited in: Bartolini, G. *Riparazione per violazione dei diritti umani e ordinamento internazionale.* p. 67.

[117] Pearson, Z. An international Human rights approach to corruption. p. 31.

[118] This was one of the issues facing the ICJ in the *Barcelona Traction Case*. In 1970 the ICJ International included in the category of obligations *erga omnes* the principles and rules concerning the basic rights of the human person. (*Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Report No. 3, (ICJ, Feb. 5, 1970) para. 33,34).;Crawford, J. and Brownlie, I. Brownlie's principles of public international law. p. 540.

obligations that will be taken into consideration are those deriving from the ICCPR and the ICESCR. These two instruments contain the fundamental rights and freedoms that have been recognized universally, and hence, they constitute a detail "juridification" of human rights.[119]

According to the juridical basis of international law, since they are international treaties, the two Covenants produce legal binding effects on states that ratify them.[120] Despite their level of obligatoriness has been the subject of many interpretations, the diverse language used in the Covenants[121] does not indicate differences in terms of general obligation clause.[122] Indeed, it has been argued that a failure by a state to comply with an obligation both in the ICCPR and the ICESCR is a violation under international law of that treaty.[123] Hence, that state is responsible for violations of economic, social, and cultural rights as they are for violations of civil and political rights.[124]

These peculiarities are crucial to be considered in dealing with corruption and human rights. Together with the international human rights law in general, the Covenants establish the state's duty to provide an environment where human rights are guaranteed.[125] In other words, a situation in which the presence of corruption would be reduced to the minimum terms. However, this assumption would imply going one step further the liberal interpretation of the treaties. As it has been claimed on several occasions, corruption is not mentioned in human rights treaties, but at the same time, corruption may violate the core the Covenants.[126]

From the analysis of the conceptual link, it follows that corruption and human rights are intertwined. Nonetheless, although it has been argued that corruption undermines human rights, it is not the same to say that corrupt practice always causes a

[119] Crawford, J. and Brownlie, I. Brownlie's principles of public international law. p. 638.
[120] Pearson, Z. An international Human rights approach to corruption. p. 47.
[121] Article 2 of ICCPR provides that the state must respect and ensure the rights of individuals immediately. Article 2 of CESCR, by contrast, provides that the state must "take steps". However, this difference in obligations does not indicate that states are free to delay the implementation of the treaty. The confirm to the fact that states are required to move towards the full implementation of the Covenant's rights has been provided by both the 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights and the 1997 Maastricht Guidelines for Violations of Economic, Social, and Cultural Rights.
[122] Alston, P. and Goodman, R. (2013). *International human rights*. Oxford: Oxford University Press, p.284.
[123] Crawford, J. and Brownlie, I. Brownlie's principles of public international law. p. 638.
[124] Pearson, Z. An international Human rights approach to corruption. p. 48.
[125] *Ibid*.
[126] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.229

human right violation. The connection between the corrupt practice and the violation of human rights can be different. For that reason, it is necessary to classify corrupt act that directly violates human rights from corrupt practices that could lead in the long run to a violation of human rights, and especially from corrupt practices that have nothing to do with the human right violation. Once the main aspects of the state's responsibilities and human rights treaties effects have outlined, there is now the need to highlight the link between the corrupt practice and the human rights violation.

According to Julio Bacio Terracino and Magdalena Sepúlveda Carmona, a Chilean lawyer and United Nations Independents Expert on the Question of Human Rights and Extreme Poverty, the causal link between a corrupt act and a human rights violation can be distinguished between direct violations, indirect violations, and remote violations. [127]

A direct human rights violation occurred when a corrupt act is deliberately used as a means to violate a specific right. The scholars provide an example of a direct violation of corruption in the judiciary system. It is the case of a judge who receives a bribe. In this circumstance, the judge is no longer independent, and hence, the right to a fair trial is not guaranteed. On the other hand, a corrupt act can also directly violate a right when a state official or institution acts in a way that prevents one or more people from accessing that right. For example, when someone needs to bribe an officer to get a housing allowance or a doctor to access treatment in a public hospital.[128] Moreover, corruption could be a direct violation when the standard of due diligence is not met. If a violation of a human right is foreseeable, the state should exercise reasonable diligence. In other words, the state should imply all the means at their disposal to prevent the imminent violation. Finally, corruption may also violate a human right when a state acts or fails to act in a way that prevents individuals from having access to that right. [129]

An indirect violation takes place when corruption is an essential factor which contributes to a chain of events. These events may eventually lead to a violation of a right.

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[127] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. pp. 29-31.; See International Council on Human Rights Policy. (2009). *Corruption and Human Rights: Making the Connection*. Versoix: International Council on Human Rights Policy. [Online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222 [Accessed 17 Sep. 2019].

[128] Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p. 27.

[129] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 29.; Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.196.

In this sense, the right is violated by an act that derives from corrupt practice. Thus, corruption represents the necessary condition for the violation, without which the violation would not have taken in place. According to the scholars, this situation will arise if public officials allow the illegal importation of toxic waste from other countries in return for a bribe. After that, if these wastes are located next to a residential area, in such case, the rights to life and health of the inhabitants of the said area will be indirectly violated by the bribe. Without the corrupt practice, the right to life and to the health of the residents of that place would not be violated.[130] However, indirectly, corruption is a necessary condition for the violation of human rights. In this case, corruption is an essential contributing factor in a chain of events that leads to a violation.[131] Another example of indirect violation may also occur when corrupt civil servants seek to prevent the exposure of corruption by silencing someone investigating in a corrupt case. In such a case, the rights to liberty, freedom of expression, life, freedom from torture or cruel inhuman or degrading treatment may all be violated.[132]

A remote violation occurs when corruption will play a more faraway role, being one factor, among others. For example, it could be the case of an electoral corruption scandal that leads to societal protest. Consequently, social unrest may be repressed violently, causing other serious violation of human rights.[133]

Furthermore, analyzing corruption and human rights from the same point of view requires a revision of the rule of interpretation. Generally speaking, the rules of interpretation of the treaties, and any juridical act are largely derived from logic and common sense. According to the law doctrine, there are different legal standards on how to interpret obligations arising from human rights treaties. For example, the relevant international law principles on the interpretation of treaties are enshrined in the Vienna

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[130] Human Rights Council, General Assembly. (2015). *Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.* A/HRC/28/73. [Online] Available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_73_ENG.doc [Accessed 26 Sep. 2019]

[131] However, according to Boersma, this example constitutes a direct violation of the right to health under Article 12 ICESCR. The reason relies on the fact that under the right to health there is a state obligation to protect individuals against infringements by third parties. Thus, by allowing the waste to be dumped, the state breaches its obligation to protect. (Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.196)

[132] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 30.; Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.196.

[133] *Ibid*.

Convention on the Law of the Treaties (VCLT) from Article 31 to 33. Besides the objective tools, the interpretation of an article must lead to effective implementation. In this case, the interpretation of an article of a human right treaty must not remain on a theoretical framework only. Conversely, the interpretation of a treaty duty must take into consideration the final objective of that obligation and ensure its implementation.[134] This interpretation rule derives from Roman Law where it was expressed through the Brocard *ut res magis valeat quam pereat*.[135] As a matter of fact, this way of interpretation has been applied several times by the ECtHR. For example, in *Artico v. Italy*[136], *Airey v. Ireland*[137], or *Stafford v. the United Kingdom*[138] the Court held that human rights treaties have to be interpreted in a way that human rights become effective rights and not remain illusory. More to the point, since human right treaties, in this case, the two Covenants, do not mention corruption, an *effet util* and *dynamic* interpretation of these treaties would allow applying these principles against direct or indirect corrupt practices.[139]

In short, considering the basic notion of state responsibilities, outlining the main two Covenants obligations, and interpreting human rights treaties effectively may help to outline when a corrupt practice may directly or indirectly affect a human right. Thus, in the next section, in order to strengthen the argument of the substantive link between corruption and human rights, it will be argued whether, at the same time, the human rights duties involve an obligation to fight corruption.

3.2) The Human Rights Obligation to Fight Corruption

To correctly understand the reasons why of a reconceptualization of corruption based on human rights law, it is necessary to study what are the obligations that this

[134] Hemsley, R. Human Rights & Corruption - States' Human Rights Obligation to fight Corruption. p. 17.
[135] Carreau, D. and Marrella, F. *Diritto internazionale*. p. 139.
[136] "The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." See *Artico v. Italy*, Application no. 6694/74, (ECtHR, May 13, 1980). para. 33.
[137] "The Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals" *Airey v. Ireland*, Application no. 6289/73, (ECtHR, Oct. 9, 1979). para. 26
[138] "It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory." *Stafford v. the United Kingdom*, Application no. 46295/99, (ECtHR, May 28, 2002). para. 68.
[139] Hemsley, R. Human Rights & Corruption - States' Human Rights Obligation to fight Corruption. p. 24.

branch of international law imposes on states. This way of thinking will be crucial in order to verify whether there is a human rights obligation to fight or prevent corruption.

Concerning human rights obligation in general, the state has to consider three kinds of duties. They are better known as the "tri-partite typology of state obligations," namely the obligation to respect, to fulfill, and to protect human rights. It was first introduced by the American philosopher and Professor Emeritus of Politics and International Relations at Merton College of Oxford University Henry Shue.[140] It was later refined by other several scholars and then introduced into the UN human rights regime. Nowadays, it is considered to be a useful tool for analyzing positive as well as negative obligations which are inherent in all types of human rights.[141]

Once the conceptual link has been assumed, the tripartite obligations could also be applied to corruption. Concerning their application, these kinds of obligations extend to both the micro and macro level. Relating to the micro-level, these duties are attached to the specific corrupt conduct of a civil servant that is attributed to the state due to the official status of the individual.[142] On the other hand, regarding the macro level, the second recipient of the duties is the general anti-corruption policy of the state as a whole as an international legal person.[143]

It is now necessary to focus on the peculiarities of each duty. Firstly, according to the principle of the obligation to respect the state must abstain from any measure or conduct that could affect or hinder the will of individuals to the benefit of their rights. This type of obligation is equally applied to both the ICCPR and ICESCR Covenant. For example, any states should refrain from committing torture. In short, the obligation to respect imposes several negative obligations which imply the abstention from any types of violations.[144]

Concerning the obligation to fulfill, the state, in this case, is required to take positive actions or measures, such as legislative, administrative, budgetary, judicial and other actions towards the full realization of human rights.[145] Indeed, this duty involves

[140] See Shue, H. (1980). *Basic rights*. Princeton: Princeton University Press.
[141] Toebes, B. (2010). Health Sector Corruption and Human Rights: A Case Study. p. 110.
[142] Peters, A. Corruption as a Violation of International Human Rights. p.1259.
[143] *Ibid*.
[144] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 27.
[145] This positive obligation has been perfectly explained by the IACtHR in the landmark case *Velazquez Rodriguez v. Honduras.* In this case the Court held "The second obligation of the States Parties is to "ensure"

the state action in guaranteeing that people under its jurisdiction can enjoy of the basic needs recognized in human rights instruments. The obligation to fulfill is usually considered as a principal obligation in relation to economic, social, and cultural rights. However, it also extremely necessary in respect to civil and political rights. For example, providing the right of a fair trial, the state is at least required to take the necessary legislative measure or make considerable investments in courts and judges.[146]

At a later time, this kind of obligation has been further divided into the three subcategories by the UN Committee on Economic, Social, and Cultural Rights.[147] Indeed, it has been introduced the duty to facilitate, provide, and promote human rights. In this sense, under the obligation to fulfill, States have to take positive measures to enable and assist individuals in enjoying their rights. Moreover, the states have to provide "rights" whenever individuals or communities are unable to realize it. Finally, under the obligation to promote, states have to take actions that create, maintain and restore the full realization of human rights.[148]

Corruption, by definition, could be considered an impediment in the realization of the rights. Thus, since "states are obliged to take a step and to devote the maximum of available resources,"[149] an effective anti-corruption policy may be a way to remove the impediments in the realization of the rights. In other words, states are required to take anti-corruption measures. It could be considered a way to comply with one of these three aspects of the positive obligation to fulfill.[150] As a matter of fact, the Inter-American Commission on Human Rights in its *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights* includes the ratification of the Inter-American Convention Against Corruption and the anti-corruption efforts in the

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the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." *Velasquez Rodriguez v. Honduras,* Case No. 04, (IACtHR, Jul. 29, 1988). para. 166.

[146] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 28.

[147] CESCR. (2000). General Comment no. 14: The Right to the Highest Attainable Standard of Health. [Online] Available at: https://www.refworld.org/pdfid/4538838d0.pdf. para. 33.

[148] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p. 264.

[149] ICESCR, Art. 2.

[150] Peters, A. Corruption as a Violation of International Human Rights. p.1259.

monitoring progress in realizing economic, social, and cultural rights.[151] Other correlated cases could be regarded grand corruption scandals. For instance, a case in which public funds are misappropriated, and money intended for the realization of human rights are, instead, invested in order to take the advantage in the private pockets of public officials. This case constitutes a violation of the obligation to devote the maximum available resources.[152]

Conversely from the other facets of the state's obligation, the last duty has more implications with corruption than the other. Hence, regarding the obligation to protect, some particularities must be outlined. Shortly, the obligation to protect requires the state to take measures in order to prevent the interference or violation of human rights committed by third parties, such as businesses or armed groups. Thus, this obligation proves that the state responsibility does not only begin at the level of human rights violations but actually starts earlier.[153] The action of safeguarding individuals within the jurisdiction still represents a fundamental task for the state. This means that the government is deeply committed to taking effective action in order to prevent irreparable harm from being inflicted upon its citizens and others member of the society. As a matter of fact, it has been confirmed by the Human rights Committee in *E.W. et al. v. The Netherlands*. An immediate effect, which could adversely affect the enjoyment of a determined right can produce a human rights victim.[154] Thus, although it is not easy to detect the causal link between corruption and human rights, the only threat that corruption produces could be enough to argue that corruption violates human rights.[155]

In practice, since this obligation places emphasis on the state action, the duty to protect also requires a threefold intervention. Firstly, the state must prevent breaches by individuals or other non-State actors, for example, through inspection or monitoring of compliance. Secondly, the state is required to eliminate any incentives to breaches of human rights by third parties through the enforcement of administrative and judicial sanctions against non-compliant third parties. Finally, with the purpose to prevent any

[151] Inter-American Commission on Human Rights. (2008). *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights.* OEA/Ser.L/V/II.132 Doc. 14.
[152] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p. 231.
[153] Hemsley, R. Human Rights & Corruption - States' Human Rights Obligation to fight Corruption. p. 14.
[154] *E.W. et al. v. The Netherlands* (Decision), Communication No. 429/1990, (Human Rights Committee, Apr. 8, 1993), para. 6.4.
[155] Hemsley, R. Human Rights & Corruption - States' Human Rights Obligation to fight Corruption. p. 24.

further violations, the state must also provide access to legal remedies when any violations have occurred.[156]

In short, by the mere omission to act, the entire state apparatus could be responsible for the violation of human rights. As a matter of fact, this protective obligation is addressed to all branches of government. It obligates the legislative power to discuss and adopt effective laws. On the other hand, the executive power is committed to undertaking effective measures for the implementation of those norms. Finally, the judicial power shall be ready to guarantee effective legal prosecution in case of need.[157]

In corruption cases, this disrespect is a crucial feature in order to determine state responsibility. If the government is lacking the criminalization of certain corrupt practices, it will lead to a possible violation of human rights.[158] Likewise, the deficient implementation, application, and enforcement of effective anti-corruption policy constitutes an omission by the state, and hence a possible violation of human rights.

Furthermore, the obligation to protect can show that corrupt practices promoted by private actors may be imputed to the state. This dimension is strictly connected with the privatization of public services, such as health, transport, or communications. In the previous chapter, it has been argued that privatization processes may incentive the presence of corrupt actions. Consequently, the risk of human rights violations increases. In the privatization case, the state entrusts the management of a determined sector to private companies. However, since the obligation to protect refers to the defense from dangers emanating from third parties, the transfer of power does not correspond in a shift of responsibilities. Thus, under certain conditions, the state could be still responsible for violations of human rights committed by private actors, including multinational corporations. For example, the state could be liable if it fails to prevent the spread of corruption, favoring corrupt practices that may lead to a human rights violation.[159]

In fact, not only could the obligation to protect under human right law reduce the structural human rights risk caused by third actors, but it also affects the rights of those people who are involved in relationships with public officials. As Peters stated, “rampant

[156] Sepulveda Carmona, M. and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 27.
[157] Peters, A. Corruption as a Violation of International Human Rights. p.1259.
[158] Sepulveda Carmona, M. and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 28.
[159] *Ibid.*

corruption constitutes a permanent structural danger to numerous human rights of persons subject to the power of officials."[160] As a matter of fact, following this way of thinking in cases involving the deficient anti-corruption measures, the state should be responsible under international law for its failure to discharge its human rights obligations to prevent and protect.[161]

The nature of government's obligations in dealing with corruption has also been discussed in an already cited landmark case law, namely in *Hugh Glenister v. President of the Republic of South Africa*.[162] In brief, the case regards the constitutional validity of the legislation that separated the country's elite corruption-fighting unit, the Directorate of Special Operations (DSO) ("the Scorpions") and replaced it with the Directorate for Priority Crime Investigation (DPCI) ("the Hawks").[163] The court found the new anti-corruption structure unconstitutional. The main reason was that the new anti-corruption body was not able to create a fully and adequately independence anti-corruption unit.[164] The court held that the state was required to take account of its international obligations by ensuring the creation of an independent entity in order to combat corruption and organized crime. Indeed, according to the Court, "The state's obligation to respect, protect, promote, and fulfil‖ the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms."[165] Furthermore, the Court found other constitutional provisions as a source of obligation to fight corruption. Firstly, as stated in section 8 (1) of the Constitution of the Republic of South Africa of 1996, the rights outlined in the Bill of Rights bind all branches of government.[166] Secondly, as maintained by section 39 (1) (b), the Court must consider international law when interpreting the Bill of Rights and adopting a final decision.[167] Finally, by referring

[160] Peters, A. Corruption as a Violation of International Human Rights. p.1260.
[161] *Ibid*.
[162] *Hugh Glenister v. President of the Republic of South Africa*, Case CCT 48/10, (Constitutional Court of South Africa, Mar. 17, 2011).
[163] See Cameron, E. (2013). Constitutionalism, Rights, and International Law: The Glenister Decision. *Duke Journal of Comparative & International Law*, [online] 23(2), pp.389-409. Available at: https://scholarship.law.duke.edu/djcil/vol23/iss2/5/ [Accessed 20 Sep. 2019].
[164] See Cameron, E. Constitutionalism, Rights, and International Law: The Glenister Decision.
[165] *Hugh Glenister v. President of the Republic of South Africa*, Case CCT 48/10, (Constitutional Court of South Africa, Mar. 17, 2011). para. 177.
[166] *Ibid.* para. 190.
[167] *Ibid*., para. 192.

to UNCAC[168], the court reminds that, on the authority of section 231 of the constitution, an international agreement that the Parliament approves binds the Republic.[169]

Thus, this case highlights that if the anti-corruption measures are not sufficiently independent, the state had, therefore, failed to respect its obligations to respect, protect, and fulfill the rights, in this case, set forth in the Bill of Rights. Indeed, the Court explains that "the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretative significance in determining whether the state has fulfilled its duty to respect, protect, promote, and fulfill the rights in the Bill of Rights."[170]

Furthermore, this case is also of an important significance concerning the recognition of the impact of international law on the domestic set of laws. Indeed, at the same time, on the one hand, the Glenister case received several acclamations. On the other, it has been criticized by many law scholars.[171] However, this case provides a profound lesson that it is not always taken for granted. As the former judge on the Constitutional Court of South Africa and HIV/AIDS and gay-rights activist stated, "there should be consonance, not dissonance, between what governments say and do internationally and what they say and do domestically. Our role as lawyers, and our duty is to reduce the gap where it exists."[172]

More specifically, concerning the state's human rights obligations, it is necessary to analyze which specific conduct is required from the state concerning each right. Since this will also depend on the interpretation, application, object, and purpose of the human rights norm, each right may require a different and more specific kind of obligation. Thus, hardly could these categories include all methods of achieving the full enjoyment of a human right and all state acts or omissions. However, generally speaking, international legal obligations resulting from human rights and anti-corruption treaties exist. Therefore,

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[168] The article which regards the issue is Article 6. Specifically, the first provision requires each party state to guarantee the existence of a body tasked with the prevention of corruption. While, the second provision requires the state to grant the body the necessary independence. South Africa ratified the convention on 22 November 2004 and this ratification included formal adoption of the Convention by resolution of both houses of Parliament pursuant to the terms of section 231(2) of the Constitution. (See also Cameron, E. Constitutionalism, Rights, and International Law: The Glenister Decision. pp. 399-340.

[169] *Ibid*., para. 194.

[170] *Hugh Glenister v. President of the Republic of South Africa*, Case CCT 48/10, (Constitutional Court of South Africa, Mar. 17, 2011). para. 194.

[171] Cameron, E. Constitutionalism, Rights, and International Law: The Glenister Decision. p. 407.

[172] *Ibid*., p. 409.

concerning corruption, it is possible to claim that a violation of human rights occurs when a state's act or failure to act related to corruption do not conform with the state's obligation to respect, protect, and fulfill a recognized human right of a person that is under its jurisdiction.[173] Hence, it also exists an anti-corruption obligation under human rights law. Not only are corruption obligations established under criminal law, but there is also an anti-corruption obligation coming from international human rights law.

In this sense, the use of this tripartite typology is a practical analytical tool to understand the process better undertaken by the state in order to achieve protection of human rights. Indeed, although it does not directly relate to corruption, this conceptual framework to assess compliance has been of great importance in shaping the development of the jurisprudence of regional and international protection mechanisms.[174] As a matter of fact, for example, in the case of the right to housing, the state's obligation to respect, protect, and fulfill has been affirmed by the European Committee of Social Rights in the decision on the merits *European Roma Rights Centre v. Portugal*.[175]

To conclude, the recognition of the human rights obligations would considerably strengthen the preventive obligations under anti-corruption law, which will be analyzed with more in-depth attention in the final session of this study. Briefly, from a general international law perspective, the UNCAC obligations are slightly soft.[176] Hardly is it possible to hold a state that ratified the treaty internationally responsible when it fails to fulfill its obligations.[177] Nonetheless, applying an effect util and dynamic interpretation of the anti-corruption obligations with human rights law, it becomes more apparent that the anti-corruption obligations also find their source in human rights law. In this sense, in order to respect the obligations coming from human right treaties adopting an effective anti-corruption policy became necessary.[178] Here, it has become evident to recognize that the promotion of human rights and the fight against corruption are strictly intertwined. If

[173] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 28.
[174] International Commission of Jurists (2014). *Adjudicating Economic, Social and Cultural Rights at National Level - A Practitioners Guide*. Geneve: International Commission of Jurists. [Online] Available at: https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf [Accessed 17 Sep. 2019]. p. 53.
[175] *European Roma Rights Centre v. Portugal* (Decision on the Merits), Complaint No. 61/2010, (ECSR, Jun. 30, 2011).
[176] Peters, A. Corruption as a Violation of International Human Rights. p.1260.
[177] *Ibid*.
[178] *Ibid.*

government policies are not transparent or accountable, it will very hard to accomplish human rights purposes. Thus, although it may be complicated to claim that there is an international customary law containing the obligation to fight corruption, due to the interconnections that exist between corruption and human rights, it may be still possible to argue that there is a human rights law obligation to fight corruption.

3.3) The Causation in the Corruption and Human Rights Substantive Link

Causation can be briefly understood as the process of connecting an act or omission with an outcome as to cause and effect, in order to determine the state responsibility.[179] Although the human rights obligation to fight corruption is an opinion that could be shared by many, hardly is it the same for the causal link. Indeed, causation represents the most critical doctrinal obstacles among law scholars concerning this debate.[180]

However, at the same time, it assume a great significance for two reasons. It may be useful in explaining the correlation between high levels of corruption and human rights violations and in suggesting effective responses.[181] Nonetheless, as it has been clarified before in the *SERAP v. Nigeria* case, the question of causation is not regularly considered by international and regional courts. This also demonstrates that, the difficulties with causation not only regard corruption, but they are ubiquitous.[182]

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[179] Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. *European Journal of International Law*, [online] 26(2), pp.471-492. Available at: https://academic.oup.com/ejil/article/26/2/471/423021 [Accessed 23 Sep. 2019]. p. 472.

[180] See Peirone, F. (2018). Corruption as a Violation of International Human Rights: A Reply to Anne Peters. *European Journal of International Law*, [online] 29(4), pp.1297-1302. Available at: https://academic.oup.com/ejil/article/29/4/1297/5320157 [Accessed 23 Sep. 2019].; Davis, K. (2018). Corruption as a Violation of International Human Rights: A Reply to Anne Peters. *European Journal of International Law*, [online] 29(4), pp.1289-1296. Available at: https://academic.oup.com/ejil/article/29/4/1289/5320173 [Accessed 23 Sep. 2019].

[181] *Ibid*.

[182] In this sense, Peters explains that "the conceptual juridical work towards defining violations which trigger state responsibility and potentially reparation (as opposed to vague statements of noncompliance) is only in its infancy. Because social rights violations very often result from systemic governance deficiencies, based on political budgetary decisions, affect large groups of people, and pose threshold questions, the problem of causation is ubiquitous here – not only with regard to corruption." Peters, A. (2019). The Risk and Opportunity of the Humanization of International Anti-Corruption Law: A Rejoinder to Kevin E. Davis and Franco Peirone. [Blog] *Blog of the European Journal of International Law*. Available at: https://www.ejiltalk.org/the-risk-and-opportunity-of-the-humanisation-of-international-anti-corruption-law-a-rejoinder-to-kevin-e-davis-and-franco-peirone/ [Accessed 23 Sep. 2019].

One reason could be the fact that causation is not fully regulated under international law, and its treatments are considered by some scholars mostly rudimentary.[183] Generally speaking, the ILC Articles on State Responsibility deals with the casual link in relation to the obligation to provide reparation in three provisions. However, these previsions are classified as secondary rules. Thus, they are guidelines.[184] In Article 31, there is a clear connection between the obligation to make full reparation for the injury caused. The article establishes that "the State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[185] As it has been shown in the previous sections, it is essential to remind that the damage could also be immaterial and lies in the violation of the right itself.[186] Article 34 set forth that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."[187] Finally, Article 36 (1) establishes that the responsible state is "under an obligation to compensate for the damage caused."[188] Despite these provisions, the concept of causation in international law remains unclear.[189]

Furthermore, another reason for the complexity of the issue could be the fact that corruption and human rights interact in ways that exceed the one-way *but-for* model.[190] In short, this test posits that the act or omission of the defendant is the cause of the harmful outcome if the outcome would not have occurred without that act or omission.[191] The main problem of the but-for test is that it cannot cope in situations of overdetermination as well as in situations involving omission.[192] In other words, it is not suitable for understanding corrupt practices as causal factors.

According to the general state practice in the area of human rights violations and war damages, causation is recognized when there is a "proximity" between the legal

[183] Plakokefalos, I. Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. p. 473.
[184] *Ibid*.
[185] Articles on Responsibility of States for Internationally Wrongful Acts, Art. 31.
[186] Peters, A. Corruption as a Violation of International Human Rights. p.1268.
[187] Articles on Responsibility of States for Internationally Wrongful Acts, Art. 34.
[188] *Ibid*., Art. 36.
[189] Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. p. 472.
[190] Nadakavukaren Schefer, K. Causation in the Corruption – Human Rights Relationship. p. 398.
[191] Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. p. 477.
[192] *Ibid*.

breach and the damage. In this sense, proximity is determined because of an objective and subjective criterion. The former is set based on natural and normal consequences, while the latter on the criterion of foreseeability. Thus, applied to corruption, this implies that corrupts acts cause human rights violations in the legal sense only if the violations are not too far remote and foreseeable from the apparatus of the state.[193] However, putting in application this understanding of corruption might be misleading. This way of thinking could work only for cases of petty corruption. However, concerning cases of grand corruption, this attempt would not be able to include the legal breach and the damage. The distance between the cause and the human rights violations would be more extensive. In this sense, corruption is part of the so-called overdetermination, broadly defined as the existence of multiple causes contributing to a harmful outcome.[194] Following the Brigitte Bollecker-Stern's categorization, corruption could be multiple causes of the main three types of overdetermination.[195] In other words, corruption could be the cumulative, concurrent, or the overriding factor of the causation, and hence, of the human right violation.

In the first scenario, hereafter named "cumulative causation," corruption could be the conduct that in combination with other factors have brought about the human rights violation. For example, it could be an essential factor in the case of an earthquake which, therefore, cause the collapse of a school and the death of several students. After the incident, it became known that the school was built with poor-quality materials and the building inspector had been bribed, in order to get the fund destinated to the purchase of good-quality materials. In this case, indeed, corruption was not a sufficient condition. The embezzlement of the public money would have never brought about the collapse of the school building without the earthquake. However, corruption was still a necessary, but not sufficient condition in order to make the school collapse. In this first scenario, if corruption was considered as the *conditio sine qua non*, in the sense of law, corruption

[193] Peters, A. Corruption as a Violation of International Human Rights. p.1268.
[194] Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. p. 472.
[195] Stern, B. and Reuter, P. (1973). *Le préjudice dans la théorie de la responsabilité internationale*. Paris: A. Pedone, p.267. Cited in: Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. p. 473.

would have been taken into account as cumulative causation, and thus as a cause for human rights violations.[196]

In the second scenario, corruption could form part of the human rights violation as a concurrent cause, hereafter "concurrent causality." As it has been defined by the Article 3:102 of the Principles of European Tort Law, this would be the "case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim's damage."[197] Under the same example, this is the case in which the corruption practice, namely the use of poor-quality material instead of the high-quality material in order to save money for private gain, could have been so defective that the school would have broken down without an earthquake. Otherwise, despite the use of high-quality materials, the school would have collapsed because the earthquake was mighty. In this situation, both facts are no *conditio sine qua non* because the result would have come about both with high-quality and poor quality-materials and with or without the earthquake. Although in this case the cause seems impossible to find, under the legal umbrella the causality must be affirmed.[198] Therefore, likewise, for the concurrent causality, corruption should be regarded as a cause of the human rights violation.[199]

The last scenario developed is the case of the "overriding causation," where two causes pre-empt one another. It is the typical case of a judge who is bribed by a party to a civil trial in order to extend the proceedings. However, let us suppose that the court has insufficient resources, and hence the trial would have been delayed substantially even without the bribe. Thus, the delay would have violated the right of a party to a hearing within a reasonable time. The result is that the dysfunctionality of a given governmental sector has multiple causes; only one is corruption.

What all the three scenarios have in common is that considering corruption as a necessary causal factor in the violation of human right seems possible. However, the crucial point relies on the fact that even if it could be unworkable applying the but-for

[196] Peters, A. Corruption as a Violation of International Human Rights. p. 1269.
[197] Principles of European Tort Law, Art. 3:102.
[198] The landmark *Case Concerning United States Diplomate and Consular Staff in Tehran (United States of America v. Iran)* (Judgment), Report no.80, (International Court of Justice, May 24, 1980) is an exemplary situation where it could not be determined which factor led when and how precisely to the breach of international law. However, finally, the ICJ held the state of Iran responsible.
[199] Peters, A. Corruption as a Violation of International Human Rights. p.1270.

test, corruption might still be qualified as a legal cause that had brought about the violation of human rights.[200]

Furthermore, according to what results from the analysis of the state's obligations, the relevant human rights violations linked to corruption very often consists in case of omissions to act. Following the but-for test, in this case, the legal causation is affirmed if the legally required positive action would have eliminated the illegal result. However, as Peters states, in the case of omission, "this but-for test does not make any sense and cannot be applied because these obligations do not require the state to reach a particular result."[201] Despite the adoption of an effective anti-corruption policy, the state will not be sure to eradicate the entire presence of corruption from its territory. Nevertheless, the state cannot avoid responsibility by merely showing that corruption would have taken place despite the adoption of an effective anti-corruption policy to prevent it. For that reason, although the mere omission to act did not cause the undesirable event, in cases of violation of human rights, the non-performance of obligations still counts as a legal cause. Corruption must be considered as an "overdetermination" cause. In other words, as one of the multiple causes contributing to the harmful outcome. Thus, as Peters concludes, "a state can be held illegally responsible for a high level of corruption in the realm of its administration even if victims cannot prove that a particular corruption scandal would not have occurred the state pursued particular policies."[202]

3.4) The Rules of Attribution in the Corruption and Human Rights Substantive Link

The last principle that should be taken into account is the attribution of the corrupt conduct to the state. In order for a state to be considered responsible for breaching human rights due to corrupt practices, not only must exist the international wrongful act or omission, but this unlawful act or omission must be attributed to the state. Although according to domestic law, it could be different, the process of attribution to the state of an act or omission committed by institutions or individuals is a matter of international

[200] Peters, A. Corruption as a Violation of International Human Rights. p.1270.
[201] *Ibid*., p.1271.
[202] *Ibid*.

law.[203] In international law, the rules of attribution are set forth from Articles 4 to 11 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

The general rules establishes that whatever the unlawful act has been committed by the legislative, executive, or judicial organ, the conduct of any state organ shall be considered an act of that state.[204] This proceeding makes the state responsible for the activities of all its organs and civil servants, especially where corruption could be thrived, such as the army, the police, and the judiciary. Despite this is one of the cornerstones of the law of state responsibility, it is not like a walk in the park to determine concretely what state organ means in order to consider a state liable in international law. For that reason, analyzing ILC Articles 4 and 8, it is possible to identify three criteria which allow determining whether the state could be responsible internationally.[205] The first criterion is the structural one. It determines if the perpetrator of the offense has its legal personality, independent of the state. The second is the functional criterion. According to ILC Articles 6 and 7, the functional criterion determines if the organ is acting under the authority of the state. While the last criterion allows connecting to the state the behaviors of individuals, who acted following the guidelines provided by the state.[206]

From an anti-corruption perspective, according to the UNCAC, the public official is any person "who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party."[207]

Concerning human rights, the rules of attribution do not change in a particular way. In other words, not only criminal law but also international human rights law addresses state responsibility. Human rights obligations apply to all branches of government, such as the executive, legislative, and judicial, at all levels. Moreover, according to the human rights jurisprudence, an act or omission is attributable to the state when committed, instigate, incited, encouraged, or acquiesced in by any public authority or any other person acting in an official capacity. [208] In human rights cases, it is no

[203] Dixon, M. *Textbook on International Law*. p. 258.
[204] Articles on Responsibility of States for Internationally Wrongful Acts, Art. 4.
[205] Carreau, D. and Marrella, F. *Diritto internazionale*. p. 489.
[206] *Ibid*.
[207] UNCAC, Art. 2.
[208] Sepulveda Carmona, M and Bacio Terracino, J. Corruption and Human Rights: Making the Connection. p. 27.

necessary to prove that the violation has happened intentionally because human rights must be protected either way. It is also unnecessary to identify the organ that committed the human rights violation.[209]

For this present study, it became essential to analyze cases of petty corruption. Since it has been assumed that some instances of petty corruption can generate violations of human rights, what is now necessary is to understand whether the acts complained of are committed by specific individuals or organs within the state. In this sense, it essential to know whether the authors of the petty corrupt practice are acting or can be treated as acting on behalf of the state to give rise to international responsibility. If they are not, then no breach of international law has occurred for which the state is responsible.

Under the activities of organs of the state, the petty corrupt practices, by definition, can be classified as *ultra vires* acts, namely any act that exceeds the formal authority conferred. According to the norms of state responsibility, mainly Article 7, *ultra vires* acts are attributed to the state. Thus, a state shall be considered responsible under international law if any organ exceeds the state's authorities or instructions.[210] In other words, this indicates that a public official, who often are involved in corrupt practices, can be regarded as organs of the state when they are exceeding their capacities.[211] The particularity relies on the determination whether such exceeding conduct is a private behavior committed for a private gain. [212] Without any surprises, according to the landmark cases under international law that examines this distinction, what it matters is whether the official acted under cover of public office and also made use of special

[209] This has been also remarked in the IACtHR case of *Velasquez Rodriguez v. Honduras.* In this case, the Court held that "For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant - the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1 (1) of the Convention." *Velasquez Rodriguez v. Honduras,* Case No. 04, (IACtHR, Jul. 29, 1988). para. 173.

[210] Articles on Responsibility of States for Internationally Wrongful Acts, Art. 7.

[211] For example, in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) (Bosnia and Herzegovina v. Yugoslavia), Report No. 1, (ICJ Jul. 11, 1996), the Court accepted that in principle a state could be held liable for genocide through the acts of its functionaries, such as soldiers and police force.

[212] Peters, A. Corruption as a Violation of International Human Rights. p.1272.

powers of the office, only conferred to public officials for the exercise of their duty.[213] In other words, the crucial questions are whether the corrupt person "was purportedly or apparently carrying out their official functions and were acting with apparent authority."[214] Thus, according to these proceedings, it is the case of a public official that is using his or her position to perform or omit a measure that the official would be unable to do as a private person, such as granting an authorization or imposing a fine.[215]

To conclude, the substantive link between corruption and human right can be established. It has been highlighted how corruption can violate human rights, considering its direct and indirect implications. Progressively, the substantive legal link has been built. Firstly, the obligations deriving from human rights treaties have been broadly analyzed. This allows demonstrating how the protection of human rights and the fight against corruption are strictly interlinked. For that reason, it has been argued that the fight against corruption finds its legal source also in the international human rights law. Thus, it is possible to affirm that the state also has a human right obligation to tackle corruption. Since the content of such obligations had been specified, it was easier to understand how and to what extent corruption can violate human rights. Indeed, even though causation is viewed by several scholars as a controversial and debatable issue, it is still possible to consider corruption as a casual factor in the violation of human rights. Finally, according to the general rules of attribution, it has been explained in which way a breach of human rights can be attributed to corruption.

In any case, dealing with corruption and human rights is a complex and debatable issue. Above all, it is an arduous attempt to determine how and to what extent a corrupt act violates or leads to a violation of human rights. In these sections, it was necessary to deal with the present assumption in a general way, trying to consider its main essential dimensions. For this reason, the way of thinking developed above is not intended to be a complete analysis of all the possible interconnections. The next last part of this chapter will consider the corruption and human rights relation from a closer point of view. It will

[213] As examples, Peters reports the 1929 *locus classicus Estate of Jean-Baptiste Caire (France) v. United Mexican States* and Iran-US Claim Tribunal case of *Yeager v. Iran*, where in both cases the responsibility was justified because of the private purpose of the public official actions.
[214] United Nations. (2001). *Yearbook of the International Law Commission*. Vol. 2, Part two, New York: United Nations. para 8. p. 46.
[215] Peters, A. Corruption as a Violation of International Human Rights. p.1273.

deal with the direct impact of corruption with a recognized international human right, showing in a detailed manner how corrupt practices violates human rights.

4) Establishing the Substantive Link: Corruption and the Violation of The Right to a Fair Trial and to an Effective Remedy

Throughout all this chapter, it has repeatedly showed how corruption generates adverse conditions, which represent a threat and an obstacle to ensure the respect of human rights. It also became clear that the functional implementation of the human rights system requires several essential features. As a matter of fact, full-functioning democracy with an integrated sustainable economic development is required. Moreover, it is necessary to establish a system of the rule of law with a widespread sense of public ethic which respects the dignity of human beings.[216] Once the conceptual and substantive links between corruption and human right have been established, this section represents an attempt to show in a detailed manner, how the rights are breached by different corrupt practices. It is necessary to clarify the precise ways in which forms of corruption may violate human rights. Since it would be impossible for this present study to examines all the links in which an act of corruption violates a specific human right, this thesis will focus only on the right to equality before the courts and tribunals and the right to a fair trial and an effective remedy.[217] They both are outlined in several ratified international and regional human rights treaties. This attempt seeks to analyze a form of corruption accurately in human rights terms. Thus, it will help to narrow the focus of this present thesis down. As a result, it will become apparent in which sense states also have a human rights obligation to fight corruption.

According to Mary Noel Pepys, a US-based senior attorney, judicial corruption relates to "acts or omissions that constitute the use of public authority for the private benefit of court personnel, and results in the improper and unfair delivery of judicial decisions. Such acts and omissions include bribery, extortion, intimidation, influence peddling, and the abuse of court procedures for personal gain."[218] Also in this form of

[216] Burneo Labrín, J. A. Corrupción y Derecho internacional de los derechos humanos. pp. 344-345.
[217] See Article 14 of ICCPR; Articles 6 and 7 of the ECHR; Articles 8 and 9 IACHR; and Article 7 of the African Court on Human and Peoples' Rights (AfCHPR).
[218] Pepys, M. (2007). Corruption within the judiciary: causes and remedies. In: Transparency International, ed., *Global Corruption Report 2007*. [online] 3-14, Cambridge: Cambridge University Press, p.3. Available at:

corruption, "private benefits" can include both financial or material gain and non-material gain, such as the furtherance of professional ambition.[219]

It has been decided to take into consideration corruption in the judiciary system and its related human rights because of the judiciary system's fundamental role in the protection and enforcement of all human rights. Through the legal requirement of the due process, the judicial system allows protecting the individuals against the punitive and sanctioning power of the state. At the same time, it also represents a direct protection mechanism against the state's action or omission concerning other fundamental rights. Furthermore, it provides to vulnerable, poor, and marginalized groups a powerful tool to face the mighty. Thus, in a certain sense, it plays an important role in overcoming poverty and discrimination.[220]

Indeed, as stated in the opening statement by the High Commissioner for Human Rights, Navy Pillay, in the 22nd session of the Human Right Council on the negative impact of corruption and human rights, "Corruption in the administration of justice — which permits perpetrators to go unpunished so long as they pay bribes — creates a vicious cycle of crime. In human rights terms, it denies access to justice for victims, it exacerbates inequality, weakens governance and institutions, erodes public trust, fuels impunity and undermines the rule of law — in particular, the right to a fair trial, the right to due process, and the victim's right to effective redress."[221]

In short, corruption in the judicial system represents an obstacle to the respect of these principles and its related human rights. In this section, it is analyzed the cores of the right to equality before courts and tribunals and the right to a fair trial as settled in Article 14 of the ICCPR. It is composed of several standards that are necessary to provide a fair, effective, and efficient administration of justice.[222] Since these principles have been

https://www.transparency.org/whatwedo/publication/global_corruption_report_2007_corruption_and_judicial_systems [Accessed 3 Oct. 2019]. p. 3.

[219] Sepulveda Carmona, M and Bacio Terracino, J . Corruption and Human Rights: Making the Connection. p. 34.

[220] Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p. 40.

[221] Office of the United Nations High Commissioner for Human Rights. (2013). *The Human Rights Case Against Corruption.* Geneve: United Nation. [Online] Available at: https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf [Accessed 3 Oct. 2019]. p. 8.

[222] Sepulveda Carmona, M and Bacio Terracino, J . Corruption and Human Rights: Making the Connection. p. 34.

integrated into a ratified treaty, they produce binding effects on state parties and represent an international obligation for them.[223]

Furthermore, not only are these rights guaranteed by hard law prescriptions, but they can also find their sources in soft law instruments. For example, an important soft law instrument is the Bangalore Principles of Judicial Conduct. These principles are recommendations developed in 2001 by the Judicial Integrity Group. They identify the six core values of the judiciary and are intended to establish standards for the ethical conduct of judges.[224] The group was formed in early 2000 by the UN Global Program Against Corruption to address the public perception in large parts of the world that judicial integrity was in decline.[225] In April 2003, the Bangalore Principles were presented to the United Nations Commission on Human Rights by the United Nations Special Rapporteur on the Independence of Judges and Lawyers. In a resolution that was unanimously adopted, the Commission brought these Principles "to the attention of Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration."[226]

It is now time to consider the corrupt judicial practices that can directly violate the right to equality before the courts and tribunals and the right to a fair trial and effective remedy. Boersma provides a classification of the most common corruption forms that could lead to this type of violations.[227]

The first category is political interference. It is widespread that the executive and legislature sectors attempt to influence the action or decisions of the judge. In this sense, the executive or legislative power uses its authority to force the judge to act and rule by respecting their political interests, and hence, to deliberate not following the application

[223] Sepulveda Carmona, M and Bacio Terracino, J . Corruption and Human Rights: Making the Connection. p. 34.
[224] United Nations Office on Drugs and Crime. (2015). *The United Nations Convention against Corruption. Implementation guide and evaluative framework for article 11*. New York: United Nation. [Online] Available at: https://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf [Accessed 3 Oct. 2019]. p. 6.
[225] Sepulveda Carmona, M and Bacio Terracino, J . Corruption and Human Rights: Making the Connection. footnote 7, p. 34.
[226] Office of the High Commissioner for Human Rights, Commission on Human Rights. (2003). *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers.* UN Doc E/CN.4/RES/2003/43.
[227] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.206.

of the law.[228] This type of offenses could directly violate the right to a fair trial outlined in the second sentence of Article 14 (1). The purpose of this provision is to assure everyone the possibility to access fair and public hearing, which is ran by a competent, independent and impartial tribunal established by law.[229] As a consequence, this formulation requires states parties to take extensive, positive measures to ensure these guarantees.[230] Under these conditions, a corrupt practice could be detrimental to the independence of judges whenever they are appointed because of political loyalties. Likewise, the condition of impartiality of the judge could not be respected in a case in which the judgment is biased because of political or personal interests. In *Karttunen v. Finland*, the Committee held that impartiality of the court implies that "judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."[231]

Bribery represents the second category of corrupt practices. Without any surprises, even in the judicial system, bribery represents one of the most widespread forms of corruption. As a result, the rights of the parties involved are easily affected by this type of corrupt conduct. In this case, it is interesting to note that the judge can be the bribe-taker as well as the bribe-giver. Under this particular case, Boersma reported the example of a Croatian judge that was indicated for having accepted bribes from litigants to accelerate the legal proceeding.[232] In practice, this corrupt behavior would be detrimental to the individuals' right to equality before the court, as it is established in the first sentence of the first paragraph of Article 14. This provision guarantees that all individuals shall be equally treated before the courts and tribunals.[233] For example, this right is violated whenever a judge asks to pay bribes in order to get access to the Court or to merely modify the judicial proceeding. From a human right perspective, the fact of paying a bribe to receive a court service would undermine the poor and the most vulnerable and disadvantaged groups. In this sense, this part of the population would be obliged to renounce to a fundamental right because they cannot afford to pay a bribe in order to get

[228] Sepulveda Carmona, M and Bacio Terracino, J . Corruption and Human Rights: Making the Connection. p. 35.
[229] See ICCPR, Art. 14 (1).
[230] Nowak, M. *UN Convenant on Civil and Political Rights: CCPR Commentary*. p.314.
[231] *Karttunen v. Finland* (Decision), Communication No. 387/1989, (Human Rights Committee, Oct. 23, 1992).
[232] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.208.
[233] See ICCPR, Art. 14 (1).

justice. Of course, in so doing, they do not have equal access to courts compared to those who can afford to pay the bribes. Finally, the last category of corrupt practices that could violate the rights established under Article 14 of ICCPR is the embezzlement of funds destinated for the improvement of the judicial system.[234]

By definition, corruption undermines the core of the administration of justice, generating a substantial obstacle to the enjoyment of the rights set forth under article 14 of the ICCPR. Furthermore, as it has been underlined, according to these rights, states are under an obligation to provide an accessible, effective, enforceable and fair trial. To achieve this the state must ensure that the equality before the courts and the independence of the judicial officials are established by law and guaranteed in practice. In this sense, a state that fails to investigate allegations of violations constitutes a breach of article the ICCPR.[235] To sum up, it would constitute a violation of the right to equality before courts and tribunals and the right to a fair trial and effective remedy any inappropriate practice conducted by any actor, such as the judiciary, the police, and the prosecutors, that intends to influence the correct functioning of the legal proceeding.

However, not only is judicial corruption harming people's human rights, but also the entire judicial system. As the United Nations Special Rapporteur on the Independence of Judges and Lawyers Diego García-Sayán stated, corruption has direct damaging consequences on the administration of justice and the judicial system as a whole. It undermines confidence in the integrity of the judicial system of a state, decreasing public trust injustice. At the same time, corruption weakens the capacity of the judicial system to guarantee the protection of human rights, and it affects the tasks and duties of the judges, prosecutors, lawyers, and other legal professionals.[236] In other words, it impoverishes the correct functioning of the entire dispute resolution system.

Analyzing judicial corruption in the human rights term allows highlighting a possible strategic link between corruption and human rights. In this sense, independent

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[234] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.206.
[235] Sepulveda Carmona, M and Bacio Terracino, J . Corruption and Human Rights: Making the Connection. p. 37.
[236] UNODC. The Doha Declaration: Promoting a Culture of Lawfulness. (2017). *Corruption, Human Rights, and Judicial Independence*. [online] Available at: https://www.unodc.org/dohadeclaration/en/news/2018/04/corruption--human-rights--; United Nations, General Assembly. (2017). *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms.* UN Doc. A/72/150. para. 21.; Human Right Council, General Assembly. (2017). *Report of the Special Rapporteur on the independence of judges and lawyers*. UN Doc. A/HRC/35/31. para. 115.

judicial system could be considered as an instrument for fighting corruption *per se.* It is also enshrined in Article 11 of the UNCAC.[237] The article emphasizes the decisive role of judicial branch. In order to carry out this role effectively, the judicial branch itself must be independent, and hence, free of corruption.[238] Following this understanding, in a report presented on July 25 of 2017 Diego García-Sayán stated that an independent judiciary system is "a key tool to address corruption."[239] He suggests that recognizing that judicial corruption may violate the right enshrined in Article 14 of the ICCPR would allow considering the UNCAC as a fundamental international tool for the protection of human rights. Therefore, it warrants continued attention from the relevant competent bodies.[240]

An example of how corruption influences the judicial system, directly affecting the validity of the right to a fair trial and effective remedy, is the case of *Fornerón and Daughter v. Argentina.* Since a human rights approach to corruption has not been developed yet, the Inter-American Court does not refer to corruption specifically, but they are strictly related.

In this decision of April 27th of 2012, the Inter-American Court of Human Rights declared, with the unanimity of its members, that Argentina was responsible for the violation of several rights outlined in the American Convention of Human Rights. The Argentine Republic violated the right to a fair trial enshrined in Article 8(1)[241] and of the right to judicial protection enshrined in Article 25(1)[242] of the American Convention on Human Rights (ACHR), in relation to Articles 1(1) (obligation to respect rights), 2 (domestic legal effects), 17(1) (rights of the Family), and 19 (rights of the child) of the same convention.[243]

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[237] See UNCAC, Art. 11.
[238] UNODC. The Doha Declaration: Promoting a Culture of Lawfulness. *Corruption, Human Rights, and Judicial Independence*.
[239] United Nations, General Assembly. *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms.* para. 29.
para. 21
[240] *Ibid*.
[241] According to Art. 8 (1), "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."
[242] According to Art. 25 (1), "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."
[243] *Forneron and Daughter v. Argentina*, Case No. 242, (IACtHR, Apr. 27, 2012).

Briefly, the case concerns a child who was given up for adoption by the mother right after birth, but whose biological father, Mr. Leonardo Aníbal Javier Fornerón, fought for years to obtain recognition and custody.[244] Even though it was clear that Mr. Fornerón expressed his interest in taking care and raising the child, the State was denounced for having given up Mr. Fornerón's daughter for adoption to a married couple.[245] As a result, the father had no access to the child.

In fact, the Inter-American Court noted that Mr. Fornerón maintained a dynamic procedural behavior for about ten years in order to get the exclusive custody of his child.[246] More precisely, between the birth of the girl, on June 16th of 2000, and the presentation of the petition before the Inter-American Commission on Human Rights on October 17th of 2004, a series of judicial proceedings were implemented. Thus, the Court, declaring the State responsible, focused on how this unusual and unjustified delay in the resolution of the case affected the development of the legal proceeding. Indeed, the Inter-American Court focuses on the judicial guarantees of the petitioners and their right to judicial protection. In this sense, it has been argued that the alleged delay favored the give up for adoption. Thus, during this unjustified time, specific violations of the rights contained in the ACHR were committed, disfavoring the rights of the victims. Concerning the focus of this present section, in particular, it affected the right to judicial protection established in Article 25 concerning Article 8 (1) because the victims did not have access to judicial proceedings within a reasonable period. Moreover, the victims did not receive the due judicial guarantees. As a result, it was impossible to provide adequate protection of the rights of the girl as established in Articles 17 and 19 of the American Convention

[244] Follet, M. (2017). Fornerón and daughter v. Argentina. *Loyola of Los Angeles International and Comparative Law Review*, [online] 40.3, pp.1133-1155. Available at: https://iachr.lls.edu/sites/default/files/iachr/Cases/follett_forneron_and_daughter_v._argentina.pdf [Accessed 4 Oct. 2019].

[245] For more on the analysis of the facts see Rizik Mulet, L. (2015). Los derechos del niño y el principio de protección a la familia. El caso Fornerón e hija vs. Argentina de la Corte Interamericana de Derechos Humanos. *Revista de Derecho. Escuela de Postgrado*, [online] 0(6), pp.35-48. Available at: https://revistaderecho.uchile.cl/index.php/RDEP/article/view/35995 [Accessed 4 Oct. 2019].

[246] Adelaprat.com. (2012). *Breves consideraciones del Caso "Fornerón e Hija Vs. Argentina" de la Corte Interamericana de Derechos Humanos. La Responsabilidad de los Jueces intervinientes. El transcurso de años de trámites procesales actuó en contra del progenitor reclamante. Responsabilidad del Estado Argentino.*. [online] Available at: https://www.adelaprat.com/2012/06/breves-consideraciones-del-caso-forneron-e-hija-vs-argentina-de-la-corte-interamericana-de-derechos-humanos-la-responsabilidad-de-los-jueces-intervinientes-el-transcurso-de-anos-de-tramites-pro/ [Accessed 4 Oct. 2019].

of Human Rights.[247] In this way, the Argentinian Courts breached their obligation of due diligence, and there was an unexcused delay in the resolution of the process, which, as it has been noted, affected the rights of the victims. As a result, the Court held that the State violated the right to be heard within a reasonable time, established in Article 8(1) of the American Convention.[248]

Furthermore, the most critical peculiarity that deserves to be mentioned is the fact the petitioners alleged that the events were framed in a generalized context of corruption and trafficking of children. More specifically, the representatives indicated that in the Argentine Republic child trafficking is systematic, and the entire state merely is aware of this current situation.[249] In this way, the petitioners denounced the complicity of the corrupt judicial agents with a child trafficking network that operated in Rosario del Tala and with those who appropriated Fornerón's daughter.[250] He stated that he "never had the possibility […] to be heard apart from during the approval of the adoption procedure that had been initiated illegitimately, illegally [and] with clear indications that rather than adoption, […] it was a process of appropriation that was occurring."[251]

Since these allegations were only supported by the representatives, however, in determining the facts in the merits of the report, the Commission did not consider the alleged "existence of habitual or systematic practice of the sale or trafficking of children in Argentina."[252] Thus, the Inter-American Court could not deliberate concerning the fact that "M was surrendered by her mother in exchange for money," and hence, that the adoption was a result of an unlawful "sale" favored by a general background of judicial corruption.[253]

Although the courts acknowledged that Fornerón's daughter was surrendered by her mother in exchange for money and other illegal activities, the Inter-American Court could not rule on the issue of judicial corrupt background because of the lack of evidence. Fittingly, the lack of pieces of evidence was caused by a lack of investigation by the domestic authorities, which played a fundamental role in the failure to determine what

[247] Rizik Mulet, L. Los derechos del niño y el principio de protección a la familia. El caso Fornerón e hija vs. Argentina de la Corte Interamericana de Derechos Humanos. p. 37.
[248] *Forneron and Daughter v. Argentina*, Case No. 242, (IACtHR, Apr. 27, 2012). para. 77.
[249] *Ibid*., para. 18.
[250] *Ibid*.
[251] *Ibid*., para. 58.
[252] *Ibid*., para. 19.
[253] *Ibid*., para. 129.

really happened with the child.[254] However, the Court addressed the effects that these practices (omissions) conducted by the domestic courts caused on the rights of the victims.

Finally, the Inter-American Court deliberated on this case applying the *iura novit curia* principle. Hence, it acknowledged that there were significant indications that there had been a transaction involved in the birth of the infant. Thus, in this situation, according to international obligations, the state should have investigated. Moreover, the State failed to investigate this alleged "sale" of form of corruption because Argentina did not have criminal laws that punish the sale of children.[255] In this sense, Argentina did not comply with what indicated in Article 35 of the United Nations Convention on the Rights of the Child (UNCRC)[256], which forms part of the corpus juris incorporated into Article 19 of the American Convention.[257]

By adopting its final decision, the Inter-American Court considered the omissions and the improper delivery of domestic judicial decisions. In this sense, the Court took into account the lack of independence of the judicial officials of the Province of Entre Rios. Moreover, it analyzed the adverse effects caused by the unjustified delay on the rights of the victims and by the lack of investigation by the domestic authorities of the unlawful adoption. In other words, the Court considered behavior of the domestic courts caused by alleged allegations of corruption. Thus, the court ordered Argentine Republic to investigate and to apply the relevant measures or punishments to all the judicial officials involved in the procedural and investigative irregularities of the case.[258] Furthermore, the Court required the state to take the necessary measures to criminalize the sale of the children under the international obligations of the state.[259]

To sum up, this example is able to explain how corruption and human rights are conceptually and substantially link. First, it shows in which way a context of systemic judicial corruption jeopardizes the enjoyment of determined human rights. Second, it indirectly indicates how corrupt acts have violated the rights of the victims. In these

[254] *Forneron and Daughter v. Argentina*, Case No. 242, (IACtHR, Apr. 27, 2012). para. 129.
[255] *Ibid*. para. 144.
[256] UNCRC, Art. 35: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."
[257] *Forneron and Daughter v. Argentina*, Case No. 242, (IACtHR, Apr. 27, 2012). para. 125
[258] *Ibid.* para. 168-170.
[259] *Ibid*. para. 173-177.

specific events, the non-independence of the judiciary system and the alleged exchange of money created a vicious circle of human rights violations, starting from the right to a fair trial to the right of the child. Finally, this example anticipates how connecting human rights and corruption could also be strategical, an issue that will be developed in the next final chapter. More to the point, as Claudio Nash Rojas stated, by requiring Argentina to adopt the necessary legislative measures, the Court indirectly, and without referring to it, approved a measure to fight the effects of judicial corruption.[260]

[260] Nash, C., Bascur, M., Aguiló, P. and Meza-Lopehandía, M. *Corrupción y derechos humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos*. p. 80.

CHAPTER III

FIGHTING CORRUPTION AT THE INTERNATIONAL LEVEL WITH A HUMAN RIGHTS APPROACH

1) Corruption as a Transnational Issue: The Evolution of the Fight Against Corruption at the International Level

This chapter provides an overview of the current international legal framework against corruption. In particular, its primary focus concerns the way in which a human rights approach could be useful to improve the existing international anti-corruption strategy. For that reason, the first part of this chapter briefly presents the genealogy and the evolution of the current international legal framework regarding corruption, focusing on the political and legal history of the anti-corruption efforts of the 20th century. As a consequence of becoming an issue of international concern, corruption began to be regulated by international law. Progressively, the international anti-corruption regimes will be outlined, focusing, internationally, on the anti-corruption norm developed by the United Nations, while regionally, on the normative regime established by the Council of Europe and the Organization of American States. This analysis also includes the way in which international organization's human rights mechanism have dealt with corruption so far. In this sense, this section will address the work developed by the United Nations human rights mechanisms, by the Council of Europe, including the ECtHR, and by the Organization of American States, including the IACtHR. Finally, without advocating for an extreme change of the current practice, the concept of human rights approach to anti-corruption will be provided.

Nowadays, the international community strongly recognized the importance of tackling corruption at a global level. For example, with the resolution 58/4 of 31 October 2003, the UN General Assembly designated December 9th as the International Anti-Corruption Day. Nevertheless, the emergence of the international anti-corruption movement occurred only recently. For several decades, fighting corruption at the international level was not considered an issue that deserves to form part of the interests of international relations. As a matter of fact, even in the late 1980s, it would have been impossible to find international law literature concerning global anti-corruption policies

and instruments. It was only in the mid-1990s that anti-corruption efforts acquired the due importance to enter into the agenda of international organizations.[1]

However, the lack of corruption accusations regarded only at the international level. Indeed, since time immemorial, corruption has been condemned. It is only its form of criticism that has changed over the years, gradually emerging as a global issue of concern. Although it would be impossible to determine precisely when anti-corruption began to take shape, some evidence suggests that corruption condemnation began as early as 3000 B.C.[2] It started in the form of bribery. Something correlated with the prosecution of bribery can be found in the Code of Hammurabi. Article 4 outlines that "if a man (in a case) bears false witness concerning grain or money (as a bribe), he shall himself bear the penalty imposed in the case."[3] Another form of condemnation is the one provided by Kautilya, an Indian kingdom's prime minister, who had already written about corruption in the ancient Indian treaty Arthashastra two thousand years ago. Morally speaking, furthermore, even Dante put bribers in the deepest parts of Hell, representing the medieval frustration with corrupt behavior.[4]

As Bacio-Terracino specifies, it is essential to underline that this type of condemnation found its source in moral or religious values. It was only with the emergence of the modern state, the development of the concept of bureaucracy, and the introduction of the notion of public interest that corruption started to assume a different meaning giving great incentive to its condemnation. As a matter of fact, the idea that government officials should use power for public purposes and not only for private benefit created a need for anti-corruption measures to protect public interests. As a result, one of the first anti-corruption modern laws emerged, namely the 1804 French Napoleonic Code. Briefly, it instituted severe penalties for public office to combat bribery. [5]

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[1] Wolf, S. and Schmidt-Pfister, D. (2010). Between Corruption, Integration, and Culture: The Politics of International Anti-Corruption. In: S. Wolf and D. Schmidt-Pfister, ed., *International anti-corruption regimes in Europe*. [online] Baden-Baden: Nomos, pp.13-21. Available at: https://www.nomos-shop.de/_assets/downloads/9783832958466_lese01.pdf [Accessed 9 Oct. 2019]. p. 13.

[2] Bacio Terracino, J. *The international legal framework against corruption*. p.27.

[3] See The Code of Hammurabi 4. Available at: http://www.wright.edu/~christopher.oldstone-moore/Hamm.htm [Accessed 9 Oct. 2019].

[4] Tanzi, V. (1998). Corruption Around the World: Causes, Consequences, Scope, and Cures. *Staff Papers - International Monetary Fund*, [online] 45(4), pp.559-594.
Available at: https://www.jstor.org/stable/3867585?seq=1#page_scan_tab_contents [Accessed 10 Oct. 2019]. p. 561-566.

[5] Bacio Terracino, J. *The international legal framework against corruption*. p. 30.

Despite these early efforts, this anti-corruption tool was not trying to fight corruption itself. On the contrary, it only required radical changes in public service values and standards of integrity. In this sense, the fight against corruption still found its origins in ethical and moralistic connotations. Indeed, the first approaches to the study of corruption reflected these tendencies. For example, the causes of corruption were seen by social scientists as the mere result of evil and dishonest individuals gaining a position of power and public attention.[6]

As it has been analyzed in the first chapter, gradually, starting from the mid of the 20th century, social scientists' approach to the study of corruption began to change. It progressively became more objective and based on the empirical evidence of its negative consequences. In particular, this new objective study started to take into consideration the economic and political effects of corruption, braking away from the obsolete general moralistic and subjective approach. Thus, anti-corruption was no longer considered as principally an ethical issue. On the contrary, it transformed into an issue of economic development, competitiveness, and political accountability.[7] As a matter of fact, the 20th century has also been described by some scholars as the "end of the golden age" of corruption, at least internationally.[8] Since it is necessary to have a better comprehension of the evolution of the concept of corruption as a transnational issue, the internationalization process has been divided into three different phases.

First of all, although corruption started to be analyzed empirically and objectively, political historians of anti-corruption efforts defined the years until the mid-1970s as the "no transnational anti-corruption strategy" phase.[9] In fact, during this first stage, the fight against corruption was merely a national issue, and the research was scarce and only focused upon national and sub-nationals' aspects. While the current international public order was becoming a reality, many countries viewed the internationalization of the anti-corruption as a threat to their sovereign power. They considered the international anti-

[6] Bacio Terracino, J. *The international legal framework against corruption*. p. 30.
[7] Gadbaw, R. (1997). International Anticorruption Initiatives: Today's Fad or Tomorrow's New World?. *Proceedings of the ASIL Annual Meeting*, [online] 91, pp.111-115. Available at: https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/international-anticorruption-initiatives-todays-fad-or-tomorrows-new-world/47EBB9F98E8E238C6F1E3F22F1B79338 [Accessed 10 Oct. 2019]. p. 113. Cited in: Bacio Terracino, J. *The international legal framework against corruption*. p. 33.
[8] Burneo Labrín, J. A. Corrupción y Derecho internacional de los derechos humanos. p. 333.
[9] Wolf, S. and Schmidt-Pfister, D. Between Corruption, Integration, and Culture: The Politics of International Anti-Corruption. p. 14.

corruption policies as an illegitimate intrusion in sovereigns state's affairs. In other words, the Westphalian order was still having a high potential of influence.

Furthermore, the negative economic and political consequences of corruption were not taken for granted and shared by the entire social scientists' community. In particular, during the 1970s, a current of thinking, commonly known as corruption revisionists or functionalist, started to gain more and more importance.[10] In short, this "romantic view of corruption"[11] challenged the notion that all the effects of corruption are adverse. On the contrary, they claimed that corruption eliminates the rigidity imposed by the government. In this way, it would grease the wheels of commerce and better allocate resources and capital, acting as a political glue that holds a country together.[12] Accordingly, the corruption revisionists believed that in some instances, corruption could have positive effects on the general level of political or economic growth.

This situation changed in the mid-1970s. Due to the consequences caused by the Watergate Scandal, the anti-corruption debate entered into the US political agenda. Moreover, the publicity of several major corrupt scandals improved the awareness concerning corruption, altering the relevance and the importance of the issue. As a result, an important anti-corruption movement started to take form, and the popular and scholarly literature about corruption grew at almost an exponential rate.[13]

In March 1976, President Ford created a Cabinet-level task force to investigate and study overseas practices of American multinational corporations.[14] Successively, the Securities and Exchange Commission (SEC)[15] carried out further inquiries and finally found that more than 400 American based corporations, including some of the largest and

[10] As explained in the first chapter, these theories was strongly supported by the political scientists Samuel P. Huntington and the economist Nathaniel Leff.
[11] Tanzi, V. and Davoodi, H. (2000). Corruption, Growth, and Public Finances. *IMF Working Papers*, [online] 00(182), p.1. Available at: https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Corruption-Growth-and-Public-Finances-3854 [Accessed 10 Oct. 2019]. p. 3.
[12] *Ibid*.
[13] Mccoy, J. and Heckel, H. (2001). The Emergence of a Global Anti-corruption Norm. *International Politics*, [online] 38(1), pp.65-90.
Available at: https://link.springer.com/article/10.1057%2Fpalgrave.ip.8892613 [Accessed 10 Oct. 2019].
[14] The Presidential Campaign, 1976: President Gerald R. Ford. 2 v. (1979). Washington: United States Government Printing Office. p. 216.
[15] The U.S. Securities and Exchange Commission (SEC) is an independent agency of the United States federal government. The SEC's mission is to protect investors; to keep markets fair, orderly and efficient; and to encourage capital formation. The SEC aims to promote a market environment worthy of public confidence.

most widely held public companies, have admitted making, voluntarily, questionable, or illegal payments. Such companies have reported paying foreign government leaders, politicians, and political parties well over $300 million in corporate funds.[16]

Therefore, through the recognition of corruption's extensive impact, US took a pioneering role and developed a new awareness to advance anti-corruption legislation.[17] On December 19th 1977 President Jimmy Carter signed the US Foreign Corrupt Practices Act (FCPA) enacted by Congress. The first national law to criminalize overseas corruption was created.[18] However, it is essential to underline that this pioneering effort to internationalize actions against corruption was only motivated by commercial interests. Accordingly, it condemned corruption, particularly bribery, only concerning international business transactions. In other words, the corrupt practices outside of the commercial sphere, also listed in the previous chapters, were not covered.[19]

Yet, with this new provision, bribing a foreign official became a crime, and all the companies whose shares were quoted on the New York Stock Exchange were now required to meet specific accounting standards.[20] As a result, US companies started to feel threatened by the strict FCPA rules and worried that trade would be loosened. In other words, American multinationals found themselves at a disadvantage because the equivalent legislation did not exist in the rest of the world.

Thus, since the competition in question was international, the only way to ensure that all states played the same rules was to tackle the issue of corruption at the international level. For that reason, the US government began pushing for an international anti-corruption agreement in order to level the international playground.[21] In this way, the first discussion about fighting corruption at the international level started. Despite its transboundary peculiarities and purposes, however, the American anti-corruption norm

[16] House Committee on Interstate and Foreign Commerce. (1977). *H.R. Rep. 94-640 REPORT together with MINORITY VIEWS To accompany H.R.3815"*.
Available at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf [Accessed 10 Oct. 2019].
[17] Mccoy, J. and Heckel, H. The Emergence of a Global Anti-corruption Norm. p. 70.
[18] Wouters, J., Ryngaert, C. and Cloots, A. (2013). The international legal framework against corruption: Achievements and challenges. *Melbourne Journal of International Law*, [online] 14(1), pp.205-280. Available at:
https://limo.libis.be/primoexplore/fulldisplay?docid=LIRIAS1478253&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1 [Accessed 10 Oct. 2019]. p. 208.
[19] Bacio Terracino, J. *The international legal framework against corruption*. p. 42.
[20] Mccoy, J. and Heckel, H. The Emergence of a Global Anti-corruption Norm. p. 71.
[21] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 209.

failed to progress on a global scale.[22] As a matter of fact, scholars named this step of the process of anti-corruption internationalization as the phase of anti-corruption efforts characterized by US unilateral measures that lasted until the mid-1990s.[23]

As a matter of fact, the US called on other countries to adopt similar legislation to the FCPA, but at the United Nations, the negotiations failed. More precisely, at the UN level, the negotiations started within the UN Economic and Social Council (ECOSOC). They focused on providing bribes from developed countries through transnational corporations, rather than seeking bribes from government officials in (mainly) developing countries. On the contrary, states from the global South have recommended that anti-corruption talks be related to highly polarized discussions on a code of conduct for transnational corporations. In short, due to divisions between developed and developing countries, this highly sensitive political debate broke down in 1981.[24]

At this point, the US took to the OECD the issue of global anti-corruption policy, by pressuring most European and other member states to criminalize foreign public officials' bribery in international business transactions.[25] Nevertheless, the stringent anti-corruption requirements imposed on US firms, at the same time, advantaged non-US companies. Thus, other countries had little incentive to level the playing field by agreeing to global anti-corruption rules. Still in the 1970s, despite the significant efforts of a hegemonic actor like the US, anti-corruption could be viewed as an emerging norm that never became institutionalized. The majority of the nations merely avoided recognizing the problem and did not seek to address it. Only in 1997 with the adoption of the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* the policies of the United States have been successful. The US, through comparative technical studies on the legal frameworks of the various OECD member state, was able to convince the other members to approve an international anti-corruption treaty. Thus, at the beginning of the process of internationalization, the OECD exceeded the UN by releasing a range of recommendations, guidelines, and tools to tackle corruption. In a short time, the OECD became the leading international forum for anti-

[22] Mccoy, J. and Heckel, H. The Emergence of a Global Anti-corruption Norm. p. 71.
[23] Wolf, S. and Schmidt-Pfister, D. Between Corruption, Integration, and Culture: The Politics of International Anti-Corruption. p. 14.
[24] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 209.
[25] Bacio Terracino, J. *The international legal framework against corruption*. p. 43.

corruption instruments.[26] It is important to note that corruption was considered only from an economic point of view.

Political scientists argued that, until the fall of the Berlin wall, countries had other priorities and strategical interests, and for that reason, they were not committed to developing an international anti-corruption agenda. Conversely, during the so-called Cold War era, the superpowers on both sides were eager and committed to supporting their potential allies. Thus, democracy and anti-corruption measures were not as central to their foreign policy priorities as were their ideological goals to preserve the international relations symmetry.[27] Indeed, the official capital flows to developing countries did not take into account the level of corruption within those states because they were destinated to maintain the political influence of the superpowers.[28] In practice, for the US, countries that rejected communism no matter how corrupt and dictatorial were considered allies. On the other hand, for the Soviet Union, those countries that rejected the type of market-based approaches promoted by the United States were considered allies no matter their record on political and economic performance.[29] Furthermore, countries were strictly committed to economic growth, and there still was the belief that bribery facilitated development in regulated economies. Finally, it deserves to be considered that the number of authoritarian governments with restricted media and a weak civil society was still high. As a matter of fact, after this initial attempt the interest in corruption declined substantially and was not revived until the early 1990s.

Starting from the end of the 1980s and early 1990s, some structural changes in the global economic, political, and social environment created better conditions for the development of an international anti-corruption norm, and consequently, renewed anti-corruption efforts worldwide. During this period, which has been defined as the third step of the process of internationalization, corruption started to be considered as an international policy problem. Finally, the awareness of corruption and the efforts to

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[26] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 209.

[27] Robinson, W. (1996). *Promoting polyarchy Globalization, US intervention, and hegemony*. Cambridge: Cambridge University Press, pp.318-319.

[28] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 208.; Bacio Terracino, J. *The international legal framework against corruption*. p. 39.

[29] Gathii, J. (2010). Defining the Relationship between Corruption and Human Rights. *University of Pennsylvania Journal of International Law,*, [online] 31(125), pp.125-146. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342649 [Accessed 11 Oct. 2019]. p. 134.

address it increased. This trend has been described by the Venezuelan columnist and distinguished fellow at the Carnegie Endowment for International Peace Moisés Naim as the "corruption eruption."[30]

The causes of this sudden turnaround can be classified into two types. On the one hand, even though it has proved to be empirically challenging to demonstrate, cases of corruption increased. One factor might have been the rise in international business transactions, which offered multinationals new opportunities to use bribes. Similarly, in many developing countries, the new wave of privatization provided sufficient opportunities for politicians and business leaders to corrupt. Moreover, the advent of digital financial transactions facilitated quick communications and money exchanges. [31]

On the other hand, a combination of geopolitical and economic factors has caused the boom of the issue of corruption on the international agenda.[32] The superpowers' priorities changed entirely with the end of the Cold War. After the fall of the Berlin wall, many developing countries lost their strategic privileges. Therefore, they started to regulate better their economies in order to attract foreign direct investment. Moreover, more principles, such as democracy or human rights, acquired more value. Indeed, new democracies have been formed with an independent judiciary and freedom of the press. Between 1987 and 2000, the number of democracies grew from 69 to 120, representing 63 percent of the world population.[33] As a result, civil society also gained greater importance and widened its sphere of influence. In this way, the number of academic researches, articles, and reports on the issue notably increased. Therefore, along with the informational revolution, the real consequences of corruption became more transparent and more common.[34] Indeed, as McCoy and Heckle report, a Lexis-Nexis search of several leading publications reveals this increase in coverage of corruption-related issues between the early 1980s and 1990s.[35]

[30] See Naim, M. (1995). The Corruption Eruption. *Brown Journal of World Affairs*. [online] Available at: https://carnegieendowment.org/1995/06/01/corruption-eruption-pub-648 [Accessed 10 Oct. 2019].
[31] Gathii, J. Defining the Relationship between Corruption and Human Rights. p. 134.
[32] Bacio Terracino, J. *The international legal framework against corruption*. p. 39.
[33] *Ibid*., p. 41.
[34] Mccoy, J. and Heckel, H. The Emergence of a Global Anti-corruption Norm. pp. 72-73.
[35] *Ibid*., p. 74.

Year	New York Times (Published Daily)	Financial Times (London) (Published Daily)	The Economist (Published Weekly)
1982	191	188	19
1983	172	160	18
1984	186	229	12
1985	170	225	23
1986	517	299	19
1987	313	346	15
1988	343	451	30
1989	364	544	27
1990	240	476	24
1991	190	409	27
1992	319	740	48
1993	311	1121	50
1994	300	1116	67
1995	289	965	67
1996	287	905	80
1997	372	1137	104
1998	325	962	89
1999	343	1111	98

Table. 1 Coverage of Corruption - related Issues in Leading Publications[36]

Furthermore, the internationalization of the issue of corruption was also facilitated by the presence of "leaders" or "global players" who see their interest in focusing on the issue. They were able to raise awareness on the topic by coordinating the globalization changes and by taking advantage of the information revolution. One prominent example is Peter Eigen and his creation and management of the international non-governmental organization Transparency International.[37] This civil society organization has done much to draw worldwide attention to corruption, by organizing several conferences and by publishing the incidence of corruption in countries through its corruption perception index. Differently, another example is the quote of the former President of the World Bank James Wolfensohn. He was a key personality for raising awareness about corruption when, in the annual World Bank and IMF meeting of 1996, he opened the speeches by labeled corruption as a "cancer."

To sum up, all these changes and efforts listed above motivated the internationalization of the concern of corruption. Indeed, in the mid-1990s, the criminalization of corrupt actions started also at international level. It is not a case that in its end-of-year editorial on December 31, 1995, *The Financial Times* described 1995 as

[36] Mccoy, J. and Heckel, H. The Emergence of a Global Anti-corruption Norm. p. 74.
[37] *Ibid*., p. 76.

the year of corruption.[38] By the beginning of 2000 the anti-corruption norm was globally recognized.

State actors realized that domestic law to combat corruption might not be completely serviceable. Countries started to recognize that acts of corruption may also have transnational effects. For example, criminals may flee the country to avoid persecution or may launder corruption proceeds in a foreign country where laws on bank secrecy can help to conceal traces.[39] As indicated by the international law scholars James Crawford: "[Corruption] cannot be resolved at a regional level, if, for no other reason that the "black" money which results from these activities will always end up elsewhere. It can only be addressed at a general international level."[40] As a consequence of becoming an issue of global concern, as it will be analyzed in the next chapter, corruption began to be regulated by international law.

Furthermore, it became even more evident that the detrimental effects of corruption extend beyond the business transactions in general, taking into account by the FCPA, primarily, and by the OECD Convention, successively. Certainly, transnational business sector covered a substantial part of corrupt practices. However, these are not the only example of corrupt actions and effects. It also generates detrimental impact on the development of society. Many experts share this aspect. For example, in a message on the last International Anti-Corruption Day, the last December 9th 2018, UN Secretary-General António Guterres stated that corruption "robs societies of schools, hospitals, and other vital services, drives away foreign investment and strips nations of their natural resources."[41] Moreover, he specified that "one trillion dollars are paid in bribes annually, while another 2.6 trillion are stolen, all due to corruption."[42] In addition, in the previous sections of this present study, it has been also demonstrated how corruption affects and violates the enjoyment of human rights. Thus, the following sections, among the mere purpose to describe the main international legal strategy to curb corruption, aim to verify

[38] Tanzi, V. Corruption Around the World: Causes, Consequences, Scope, and Cures. p. 560.
[39] Bacio Terracino, J. *The international legal framework against corruption*. p. 45.
[40] Crawford, J. (1998). Prospects for the Codification and Development of International Law by the United Nations: The Work of the International Law Commission. *Finnish Yearbook of International Law.*, 9 (15). Cited in Bacio Terracino, J. *The international legal framework against corruption*. p. 45.
[41] UN News. (2018). *The costs of corruption: values, economic development under assault, trillions lost, says Guterres*. [online] Available at: https://news.un.org/en/story/2018/12/1027971 [Accessed 15 Oct. 2019].
[42] *Ibid.*

to what extent the current international legal framework is capable of tackling the multiple challenges of corruption also related to human rights.

2) The International Legal Framework Against Corruption

As with other transnational matters, since corruption started to receive international attention, it began to be regulated by international law. Corruption became a transnational issue and state actors realized that a multilateral approach would have been the best way to curb its enlargement. As a result, nowadays, the international legal framework against corruption is composed of numerous hard law and soft law anti-corruption instruments emerged from different international organizations.[43]

The internationalization of corruption reflects the important role that the new international legal system is acquiring. The global legal order is no longer characterized as an area for the competition among the national sovereignties. Conversely, the new international legal system emerged as the discussion arena for the development of converging policies among national sovereignties. Admittedly, this is the result of the evolution of the international order beyond Westphalia. Very briefly, the principle of state sovereignty is no longer the sole, absolute, and essential feature of the global order. It is also combined with the principle of legality at the international level. This implies that the state is no longer only responsible for safeguarding the respect of its sovereignty, but it also has to take into account other fundamental features of the new global order, such as peace, the rule of law, and international human rights.[44]

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[43] The category of hard law instruments is composed by the convention on the *Protection of the European Communities' Financial Interests* (1995); the *Inter-American Convention against Corruption* (1996); the *Protocol to the Convention on the Protection of the European Communities' Financial Interests* (1996); the Council of the European Union *Convention on the Fight Against Corruption Involving Officials of the European Communities or officials of Member States of the European Union* (1997); the Second *Protocol to the Convention on the Protection of the European Communities' Financial Interests* (1997); the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997); the Council of Europe *Criminal Law Convention on Corruption* (1998) and its *Civil Law Convention on Corruption* (1999); the UN *Convention against Transnational Organized Crime* (2000); the SADC *Protocol against Corruption* (2001); the *ECOWAS Protocol on the Fight Against Corruption* (2001); the *AU Convention on Preventing and Combating Corruption* (2003); and the *United Nations Convention Against Corruption* (2003).

[44] Parisi, N. (2019). La prevenzione della corruzione nel modello internazionale ed europeo. *Federalismi.it Rivista di diritto pubblico italiano, comparato, europeo*, [online] 9(2019). Available at: https://www.sipotra.it/wp-content/uploads/2019/05/La-prevenzione-della-corruzione-nel-modello-internazionale-ed-europeo.pdf [Accessed 29 Oct. 2019]. pp. 3-4.; Forsythe, D. (2012). *Human rights in international relations*. 3rd ed. Cambridge: Cambridge University Press, pp.24-30.

Generally speaking, despite the existence of a wide range of anti-corruption instruments, anti-corruption treaties have some aspects of their content and structure in common. As it will be demonstrated successively, following the line of the agreements on transnational crimes, the majority of anti-corruption conventions tend to define a list of corrupt practices that states should criminalize in their national law. Thus, this implies that they do not define corruption but a mere list of criminal offenses. Another easily verifiable common feature is the commitment to enhance international cooperation among states parties. Furthermore, anti-corruption treaties tend to set some rules to follow in order to combat corruption also thorough preventive measures. For example, inviting member states to set up anti-corruption monitoring bodies.[45]

As it will be showed, from a legal point of view, the provisions enshrined in the anti-corruption conventions generate three different levels of obligations. First, some requirements create legal binding obligations upon states. In general, these obligations required states to achieve a particular objective by legislating or taking action. For example, contracting parties are asked to criminalize in their domestic law certain types of corruption practices. However, it is essential to note that, due to the necessary to find a political compromise during the negotiation process, this kind of measure could be mandatory in one treaty and optional in another. Second, there are anti-corruption provisions that required states to consider putting in practice or to endeavor to adopt specific measures. In this sense, states are not obliged to achieve a particular result, but they only need to consider at least or endeavor an obligation of conduct. Finally, all the anti-corruption instruments contain many provisions that do not produce hard law legal obligations. On the contrary, they are mere recommendations. Specifically, this type of instruction contains soft law norms and is distinguished from the other by the use of the auxiliary verb *may*.[46]

[45] Bacio Terracino, J. *The international legal framework against corruption*. pp. 48-53.
[46] *Ibid*., pp. 54-56.

2.1) United Nations

2.1.1) United Nations Convention Against Corruption

Certainly, it is possible to consider the United Nations Convention Against Corruption (UNCAC) as the very first global anti-corruption treaty. Therefore, it is also often classified as the most comprehensive and most crucial anti-corruption legislation originated from the UN. Indeed, it provides a common language for all the anti-corruption movements.[47] At the same time, it is the first bind global agreement on corruption, which finally elevated the anti-corruption action to the international stage.[48]

The UNCAC was adopted by the UN General Assembly on 31 October 2003 and was opened for signatories in Merida, Mexico, from 9 to 11 December 2003. Finally, the UN Convention entered into force two years later on 14 December 2005 under article 68.[49] Nowadays, with the last ratification carried out by Chad on 26 October 2018, there is near-universal ratification of UNCAC with 186 states parties.[50] Once again, this high number of ratifications reflects the broad international consensus on the global fight against corruption.

Furthermore, the UNCAC is also opened for signature by regional economic integration organizations provided that at least one-member state of the organization has signed it. So far, the European Union, after its ratification on 12 November 2008, is the sole regional economic integration organization that is a party to the UNCAC. Generally speaking, this consensus is also actively shared among the international private sector and civil society.[51]

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[47] Bacio Terracino, J. *The international legal framework against corruption*. p.57.

[48] Webb, P. (2005). The United Nations Convention Against Corruption. *Journal of International Economic Law*, [online] 8(1), pp.191-229. Available at: https://academic.oup.com/jiel/article-abstract/8/1/191/822996 [Accessed 20 Oct. 2019]. p. 192.

[49] UNCAC, Art. 68. "This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization."

[50] Up to date (2019), countries that have not ratified the UNCAC are Andorra, Barbados (signatories), Democratic People's Republic of Korea, Eritrea, Monaco, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Somalia, Suriname, Syrian Arab Republic (signatories), and Tonga.

[51] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 213.

2.1.1.1) Background and Content

Not surprisingly, the United Nations' effort to address corruption commenced before the adoption of the UNCAC. There are important resolutions adopted as predecessors to the UNCAC, which allowed to offer an insight into how concern for corruption evolved into the organization.[52]

Accordingly, the development of the UN anti-corruption strategy commenced in 1996. During this year, the UN adopted two relevant Resolutions concerning the topic of anti-corruption. First, the UN General Assembly adopted the *International Code of Conduct for Public Official* (ICCPO).[53] Although it does not explicitly refer to corruption, it takes remarkably correlated issues into accounts, such as receiving gifts that may affect the practice of the function of a public official and conflicts of interest.[54] Second, the UN General Assembly adopted Resolution 51/191 contained the *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*.[55] Conversely, in this case, the UN General Assembly issued a resolution with substantial wording against corruption.[56] However, as it is easy to comprehend from its content, it deals only with the bribery of foreign public officials in international business transactions.[57]

Progressively, the UN General Assembly, in 1997, adopted the resolution *International Cooperation Against Corruption and Bribery in International Commercial Transaction* in order to urge member states to ratify the already existing international anti-corruption instruments.[58] Subsequently, in 1998, this resolution was taken further with the adoption of another settlement entitled *Action against Corruption.* More precisely, this document requested an Ad Hoc Committee to explore the desirability of international instruments against corruption, independent from the 2000 *United Nations*

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[52] Bacio Terracino, J. *The international legal framework against corruption*. p.57.
[53] Social, Humanitarian & Cultural Issues (Third Committee), General Assembly. (1996). *International Code of Conduct for Public Officials.* UN Doc. GA/SHC/3372 (Press Release).
[54] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 213.
[55] United Nations, General Assembly. (1996). *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*. UN Doc. A/RES/51/191.
[56] Bacio Terracino, J. *The international legal framework against corruption*. p.58.
[57] It is interesting to note that on 17 December 1997 the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
[58] Social, Humanitarian & Cultural Issues (Third Committee), General Assembly. (1997). *International cooperation against corruption and bribery in international commercial transactions.* UN Doc. A/C.3/52/L.7.; Bacio Terracino, J. *The international legal framework against corruption*. p.58.

Convention against Transnational Organized Crime (UNCTOC) (Palermo Convention).[59]

Finally, in 2001, the UN General Assembly adopted the resolution *An Effective International Legal Instruments against Corruption* in which it decided to begin the elaboration of the United Nations Convention against Corruption, which, as stated earlier, was adopted in 2003.[60]

Concerning its content, the UNCAC is an extensive instrument composed of 71 innovative articles, and it aims to promote and strengthen measures to combat corruption, both domestically and internationally.[61] Its obligations fall into four categories that represent the four pillars of the convention, namely prevention, criminalization, international cooperation, and asset recovery.[62] As stated earlier, chronologically speaking, the UNCAC is the last multilateral treaty against corruption adopted. For that reason, it has been built upon the achievements of earlier anti-corruption instruments. For example, the UNCAC requires state parties to prohibit the tax deduction of bribery, as the OECD Convention recommended.

Concerning the first category of corruption prevention, the UNCAC invites state parties to adopt several measures both in the public and private sectors. The fundamental preventive provisions lie in Article 5 that invites each state party to develop and maintain preventive anti-corruption policies and practices.[63] In this sense, Article 6 (1) of the Convention required, in accordance with the fundamental principles of its legal system, to ensure the existence of domestic corruption-preventing bodies.[64] Subsequently, the

[59] The Palermo Convention had already recognized the relationship between international organized crime and corruption. Even though it does not define or deal with corruption itself, the UNCTOC distinguishes between active and passive bribery of national public officials and active and passive bribery of foreign public officials or international civil servants. Moreover, it recognizes that corruption can be classified into several practices. (UNCTOC, Art. 8.; Boersma, M. (2009). Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. *Working Paper of the Department of International and European Law of Maastricht University.* Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1301602&rec=1&srcabs=1394227&pos=5 [Accessed 20 Oct. 2019]. p. 31.)

[60] United Nations, General Assembly. (2001). *An effective international legal instrument against corruption.* UN Doc. A/RES/55/61.

[61] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 214.

[62] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 32.

[63] UNCAC, Art. 5 (1).

[64] UNCAC, Art. 6 (1).

second paragraph of Article 6 specifies that each state party *shall* grant the local body the necessary independence.[65]

However, some peculiarities must be outlined. On the one hand, according to the kind of lexicon used in both Articles 5 and 6, these preventive measures are optional provisions.[66] Indeed, states parties *shall* adopt these measures. Furthermore, this requirement is also weakened by adding qualifiers such as "in accordance with the fundamental principles of the legal system."[67] On the other hand, it is not specified which conditions permit a domestic body to be an independent body. Following this line, it is interesting to report an OECD study, which provides some clarification concerning this matter.[68] One of the most important features is to ensure the existence of an adequate level of structural and operational autonomy through institutional and legal mechanisms aimed at preventing any political interference. In other words, according to the OECD Anti-Corruption Network, an independent body must be depoliticized. Furthermore, the study underlines that such agencies for being independent must have a clear legal basis and adhere to the principle of the rule of law and meet human rights standards.[69] Thus, this anticipated how human rights provide an essential tool to improve the criminal law fight against corruption. A landmark related case law concerning the independence of a state anti-corruption body is the already cited Glenister Case.

The second category regards criminalization, namely the obligation to criminalize certain corrupt practices. As stated in the first chapter, since an international legal definition of corruption is lacking, several offenses are listed. The most important aspect to note here is that state parties do not have the same obligations in respect of all corrupt practices. Therefore, the UNCAC makes a distinction between the corrupt practices that are mandatory to criminalize and the corrupt activities that are only optional to penalize, and hence it includes elements of choice.[70]

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[65] UNCAC, Art. 6 (2).
[66] Webb, P. The United Nations Convention Against Corruption. p. 206.
[67] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. footnote 72.
[68] See OECD. (2008). *Specialized Anti-Corruption Institutions. Review of Models.* [Online] Available at: https://www.oecd.org/corruption/acn/39971975.pdf [Accessed 20 Oct. 2019].
[69] *Ibid*., pp. 24-27.
[70] Carr, I. (2006). The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?. *Manchester Journal of International Economic Law*, [online] 3(3). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394227 [Accessed 21 Oct. 2019]. p. 19.

Concerning the first group, it consists of passive and active bribery of domestic public officials, which requires state parties to adopt legislative measures to make them criminal offenses when committed intentionally.[71] Progressively, Article 16 extends the bribery offense to active bribery of foreign public officials and officials of public international organizations when committed intentionally. According to the Professor of International Business Law at the School of Law at the University of Surrey at Indira Carr, "in drafting these offenses, it mimics, to some extent, the language found in other anti-corruption conventions."[72] The next corrupt practices that are mandatory to criminalize is embezzlement, misappropriation, or diversion of property by a public official.[73] Furthermore, Article 23 makes fall under the list of corrupt acts that are required to criminalize the laundering of proceeds of crime. In addition, although it is an unusual provision in a corruption convention, in order to strengthen the investigation and prosecution process when a case of corruption is alleged, Article 25 includes a mandatory offense the obstruction of justice. Finally, as stated by Article 27, participatory acts in any capacity such as that of an instigator, accomplice, or assistant are also made a criminal offense.

Conversely, the group of non-mandatory offenses is composed of other important criminal corrupt practices. Surprisingly, due to the fundamental need to find a compromise, the UNCAC positions bribery in the private sector as a non-mandatory corrupt offense.[74] Likewise, passive bribery of foreign public officials or an official of a public international organization in Article 16(2) is in the same corrupt practices category. In addition, abuse of function has also been introduced into this section.[75] Another offense that falls into this section, according to Article 20, is the already explained highly controversial practice of illicit enrichment. Finally, trading in influence[76], concealment[77] (Article 24), and attempt and preparation[78] all fall into this non-binding category.

[71] UNCAC, Art. 15.
[72] Carr, I. The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions? p. 20.
[73] UNCAC, Art. 17.
[74] UNCAC, Art. 21.
[75] UNCAC, Art. 19.
[76] UNCAC, Art. 20.
[77] UNCAC, Art. 24.
[78] UNCAC, Art. 27.

Despite this division and evident lack of a universal definition of corruption, it has been considered positive that the Convention adopts a comprehensive approach towards corruption. The inclusion of several types of corrupt practices could be serviceable and, certainly, goes beyond the standard clause against the prototypical form of corruption: bribery.[79] However, at the same time, the distinction between the separate levels of obligation arising from a political compromise can be considered as a weakness of the Convention.[80]

The third category of the Convention obligations regards international cooperation, which received a separate chapter.[81] According to Articles 6, 9, 11 states parties agree to collaborate in the processes of prevention, investigation, and prosecution of offenders. The Convention also requires parties to provide specific forms of mutual legal assistance in the processing and exchange of evidence for use in court and the extradition of criminals. Furthermore, countries need to take measures to support monitoring, freezing, seizing, and confiscating corruption proceeds. In short, it consists of articles concerning mutual legal assistance and extradition.[82] More importantly, contrary to the preceding provisions that required implementation through national laws of participating countries, most of the regulations concerning international cooperation are self-executive.[83]

Finally, the last obligation falls into the category of asset recovery. Due to the enormous amount of money misappropriated from developing countries, from the very beginning of the negotiation talks, the issue of asset recovery has been a high priority.[84] Indeed, chapter V that is wholly dedicated to it, forming a treaty within a treaty. In dealing with asset recovery, the UN Convention represents the first anti-corruption treaty in

[79] Low, L. (2006). The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards. *Conference of the International Bar Association, International Chamber of Commerce & Organization for Economic Cooperation and Development: The Awakening Giant of Anticorruption Enforcement*. [online] Available at: https://www.steptoe.com/images/content/1/6/v1/1600/2599.pdf [Accessed 21 Oct. 2019]. p. 13.
[80] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 32.
[81] UNCAC, Chapter IV.
[82] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 216.
[83] Low, L. (2006). The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards. p. 18.
[84] Webb, P. The United Nations Convention Against Corruption. p. 207.

addressing this issue.[85] For that reason, even though this topic generated a large number of political disorders among the negotiating party, the agreement on the asset recovery represents a strong point of the convention. In brief, chapter V seeks to align mostly developing countries' insistence on successful asset recovery with procedural safeguards sought by primarily developed countries. In other words, the UNCAC aims to strike a fragile balance. This corresponds, on the one hand, with comprehensive and robust anti-corruption laws demanded by developed countries. On the other hand, in exchange for good cooperation and guarantees on the recovery of property, developing countries are willing to accept these provisions.[86]

2.1.1.2) Implementation and Enforcement

Chapter VII deals with the "Mechanism for implementation." The UNCAC merely establishes a Conference of States Parties (CoSP) that has to monitor regularly the implementation and the ratification status of the convention. After three years of intense negotiations by state parties, at its third session, held in Doha in November 2009, the Conference adopted Resolution 3/1 entitled *Review Mechanism*, which introduced the Implementation Review Group.[87] The Implementation Review Group is an open-ended intergovernmental group of State parties, which is a subsidiary body of the CoSP. Its main task is to guide and oversee the functioning and the performance of the Implementation Review Mechanism (IRM). The IRM is a peer-review process that helps States Parties implement the Convention effectively. At the beginning of each year of the review cycle, each State party is reviewed by two peers, one from the same regional group, which are selected by a drawing of lots.[88]

The UNCAC monitoring system is not so developed like other anti-corruption implementation process. For that reason, it is considered less intrusive and potentially less effective than other existing mechanisms to monitor the implementation of anti-

[85] Low, L. (2006). The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards. p. 19.
[86] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 219.
[87] Conference of the States Parties to the United Nations Convention against Corruption. (2009). *Resolution 3/1 - Review mechanism*. UN Doc. V.10-51985 (E).
[88] UNODC. *Implementation Review Mechanism*. [online] Available at: https://www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html [Accessed 21 Oct. 2019].

corruption conventions. It is claimed to be overly respectful of the sovereignty of the states.[89] It represents a compromise reached after years of deadlock between parties.

To conclude, the UNCAC represents the most detailed and comprehensive international criminal law instruments against corruption to date. However, the UN Convention still is suffering from several imperfections. For example, although it is true that corruption is generally difficult to define, the UNCAC does not provide a clear, exhaustive definition of corruption and its various forms.[90] Furthermore, there is widespread usage of soft wording and safeguards clauses, such as *in accordance with the fundamental principles of the legal system.* In other words, several provisions are subjective to principles of domestic law or national constitutions. Consequently, the lack of self-executive regulations may harm the effectiveness of the instruments. Another critical drawback in the international fight against corruption is, as stated by Indira Carr, the "over-optimistic expectation on part of the policymakers that criminal legislation has the intended effect on human behavior."[91] Certainly, criminal law with the creation of a wide variety of offenses and sanctions provides important and essential instruments to the fight against corruption. However, to curb such a human activity it is also important to have other mechanisms in place that will work effectively alongside criminal law, and that must take into consideration social standards and realities. In this case, they would be preventive measures that are taken into consideration by the Convention. Indeed, according to some scholars, the UNCAC has not been classified entirely as a criminal law convention because it is going further the mere criminalization of corrupt acts and includes a chapter on prevention.[92] Moreover, the chapter concerning preventing measures precedes the one regarding criminalization, emphasizing its importance.[93] However, this chapter is predominantly phrased in non-mandatory terms. Finally, according to several legal scholars, maybe the major weakness of the convention is the

[89] Bacio Terracino, J. *The international legal framework against corruption*. p.309.
[90] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 34.
[91] Carr, I. The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions? p. 43.
[92] Kubiciel, M. and Rink, A. (2016). The United Nations Convention Agaisnt Courruption and its Criminal Law Provisions. In: P. Hauck and S. Peterke, ed., *International Law and Transnational Organised Crime*. Oxford: Oxford University Press. pp. 221-222.
[93] De Vido, S. (2018). Legal Issue related to Anti-Corruption in Asian Countries: The Case of US Companies in China. *Hitotsubashi Journal of Law and Politics*, 46, pp.61-74. p. 65.

lack of an effective monitoring and implementation mechanism. As Boersma stated in its critical analysis of the international legal framework against corruption, "it is a major downfall that the only truly global instrument is not endowed with a monitoring mechanism."[94] Without a monitoring system, it is left to the discretion of state parties how to implement the convention to fight against corruption. As a consequence, countries with a long history of political and grand corruption cannot fully implement the UNCAC because there will not the political will to do it. Thus, if guarantee the successful implementation of these laws is fundamental to curb corruption, all these considerations may give cause to think that the UNCAC runs the risk of remaining in a vacuum.[95]

2.1.2) UN Human Rights Mechanisms and Anti-corruption

Through the analysis of several UN legal documents, it is possible to affirm that, at the UN level, it is widely recognized that corruption and human rights are intrinsically correlated for two different reasons. On the one hand, the UN acknowledges the fact that corruption creates harmful conditions for the enjoyment of human rights. More specifically, the UN understands that the consequences of corruption go beyond the merely economic and political unipositive effects. For example, since the corrupt management of public resources compromises the state's ability to provide services, UN recognizes that corruption could undermine a state's human rights obligation to maximize available funds for the progressive realization of rights recognized in Article 2 of the ICESCR. Furthermore, at the UN level it became also clear that corruption can also affect the enjoyment of civil and political rights in all states by weakening public institutions and eroding the rule of law, two fundamental factors for the implementation of an efficient human rights system.

On the other hand, the UN comprehends the need to develop a strategic link between human rights and anti-corruption. Human rights principles represent an essential component of successful and sustainable anti-corruption strategies. The UN recognizes that the legal standards and objectives of human rights and anti-corruption instruments are, in many aspects, complementary. It is also committed to demonstrating that the

[94] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 34.
[95] *Ibid*., p. 237.

implementation of anti-corruption policies could be significantly enhanced if practitioners drew on this synergy between corruption and human rights.[96]

For these reasons, the Human Rights Council, its Special Rapporteurs, and the Human Rights Council Advisory Committee have addressed corruption and human rights on several occasions. First of all, in 2003, a Special Rapporteur was appointed by the former Sub-Committee on the Promotion and Protection of Human Rights to prepare a comprehensive study on corruption and its effect on the full enjoyment of human rights, in particular economic, social and cultural rights. The mandate came to an end in 2006 when the Advisory Committee replaced the Sub-Commission.[97]

In 2004, the United Nations Human Rights Office of the High Commissioner (OHCHR) arranged a conference, which was held in Seoul on 15 and 16 September 2004, with the United Nations Development Programme (UNDP) on the role of good governance practices in the promotion of human rights, including anti-corruption. In brief, the purpose of the seminar was to discuss examples of illustrative governance practices that have had an impact on the promotion of human rights and to draw lessons from them. The meeting concluded that there is a mutually reinforcing relationship between good governance, including combating corruption in the public and private sectors, and human rights.[98]

As a result of the previous successful meeting, the OHCHR in collaboration with the Government of the Republic of Poland and with the financial support of the Government of Australia organized in Warsaw on 8 and 9 November 2006 a Conference on anti-corruption measures, good governance, and human rights. The Conference's goal was to deepen the understanding of good governance practices that contribute to the fight against corruption by concentrating on human rights approaches. The Conference identified, discussed, and explained the linkages between corruption, human rights, and good governance and provided participants the opportunity to share concerns and

[96] Office of the United Nations High Commissioner for Human Rights. (2013). *The Human Rights Case Against Corruption.* Geneve: United Nations. [Online] Available at: https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf [Accessed 21 Oct. 2019]. p. 3.
[97] *Ibid*., p. 6.
[98] Economic and Social Council, Commission on Human Rights. (2004). *The role of good governance in the promotion of human right.* UN Doc. E/CN.4/2005/97.

experiences. Panelists, experts, and participants explained how human rights and good governance principles could help in fighting corruption.[99]

Subsequently, in 2012, the Human Rights Council adopted the first resolution entitled *Panel discussion on the negative impact of corruption and the enjoyment of human rights*, in which they decide to convene a debate on the issue of the negative effect of corruption on the enjoyment of human rights.[100] Therefore, following Human Rights Council resolution 21/13, the OHCHR summited a summary report of the dialogue at Human Rights Council at its twenty-second session. The panel discussion was held on 13 March 2013 in Geneva. Briefly, the summary report highlights that there is both an intellectual and practical evidence that corruption represents an obstacle to the realization of all human rights. They acknowledge that the denial of access to corruption constituted a human rights violation. At the same time, it has been concluded that anti-corruption activists and whistleblowers could be regarded as human rights defenders.

Furthermore, it stated that efforts to combat corruption would be more effective and sustainable when coupled with an approach that respected all human rights. Finally, there was a strong consensus that a link existed between corruption, anti-corruption, and human rights because they share the same principles. The summary report concludes by calling the attention of the Human Rights Council to address in a resolution the negative impact of corruption on the enjoyment of human rights.[101]

As underlined by the OHCHR, the Human Rights Council adopted in 2013 the resolution 23/9 entitled *The negative impact of corruption on the enjoyment of human rights.* In short, in this resolution, the Human Rights Council recognizes that all forms of corruption can have a serious negative effect on the enjoyment of human rights and that the link between anti-corruption and human rights must be analyzed to better utilize UN human rights mechanisms in this regard. Moreover, the Human Rights Council requested

[99] Human Right Council, General Assembly. (2007). *Implementation of General Assembly Resolution 60/251 Of 15 March 2006 Entitled "Human Rights Council."* UN Doc. A/HRC/4/71.
[100] Human Right Council, General Assembly. (2012). *Panel discussion on the negative impact of corruption on the enjoyment of human rights*. UN Doc. A/HRC/RES/21/13.
[101] Human Rights Council, General Assembly. (2013). *Summary report of the Human Rights Council panel discussion on the negative impact of corruption on the enjoyment of human rights*. UN Doc. A/HRC/23/26. para. 2-14-16-25-27.

its expert Advisory Committee to submit a research-based report to the Council at its twenty-sixth session in June 2014 on this issue.[102]

Therefore, after having presented a draft report, on the twenty-eight session on 5 January 2015, the Advisory Committee presented its Final Report on the issue of corruption and the enjoyment of human rights. The analyzed in a very detail manner the issue of corruption, showing in what respect corruption harms human rights and what is the value of linking the two discourses. More importantly, the Advisory Committee underlined that what is missing are strategies that can translate the substantive linkage into concrete measures and the establishment of criteria to recognize when an act of corruption leads to a violation of human rights.[103]

Subsequently, the Final Report was taken into consideration by the Human Rights Council. However, nothing, in particular, has been deliberated. The single action that the Human Rights Council undertook in its resolution 29/11 was to request the High Commissioner shall prepare a list of best practices[104] to counteract the negative effects of corruption on the enjoyment of all human rights established by States, national human rights organizations, national anti-corruption agencies, civil society, and academia.[105]

A different approach comes from the last Human Rights Council resolutions concerning corruption and human rights. In the resolution 35/25 of 14 July 2017, not only the Human Rights Council focused on the negative consequences of the enjoyment of human rights but also the prevention of these adverse effects. As a matter of fact, in the resolution, the Human Rights Council stresses that preventive measures, such as an anti-corruption education or the strength of international cooperation, are the most effective means for countering corruption and for avoiding its negative impact on the enjoyment of human rights. Finally, the resolution concludes by requesting the OHCHR to prepare a summary report to summit this report on the forty-first session.[106]

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[102] Human Rights Council, General Assembly. (2013). *The negative impact of corruption on the enjoyment of human rights.* UN Doc. A/HRC/RES/23/9.
[103] Human Rights Council, General Assembly. (2015). *Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights.* UN Doc. A/HRC/28/73. para. 48-50.
[104] Human Rights Council, General Assembly. (2016). *Best practices to counter the negative impact of corruption on the enjoyment of all human rights*. UN Doc. A/HRC/32/22.
[105] Human Rights Council, General Assembly. (2015). *The negative impact of corruption on the enjoyment of human rights*. UN Doc. A/HRC/RES/29/11. para. 9.
[106] Human Rights Council, General Assembly. (2017). *The negative impact of corruption on the enjoyment of human rights*. UN Doc A/HRC/RES/35/25.

As a consequence, in the forty-first session of the Human Rights Council held from 24 June to 12 July 2019, the OHCHR presented the *Summary of the expert of workshop on good practices of United Nations-system support to States in preventing and fighting against corruption, with a focus on human rights.* In brief, the experts discussed whether anti-corruption necessitates being also fought with a human right focus and how it would be possible to help states to adopt a rights-based approach to fighting corruption. First of all, the speakers agreed that there is a manifest relation between human rights and corruption, as human rights were designed to limit abuse of power by governments, while corruption was the abuse of power in the hands of the authorities.[107]

Specifically, they argue that fighting corruption requires a coherent and, especially, a holistic approach that seeks to prevent and suppress corrupt behavior. Moreover, while it may be true that corruption was not directly included as an issue in the international human rights instruments, they specified that international human rights law and international anti-corruption law share the same principles of integrity, transparency, accountability, and participation, which are also key principles of good governance and complement and reinforce each other. Therefore, they concluded by affirming that combating corruption is essential for ensuring the realization of human rights. At the same time, fighting corruption is inextricably linked to the exercise and enjoyment of human rights.[108]

To conclude, this on-going commitment by the United Nations to create a link between corruption and human rights reflects that there is a common understanding of the strategical importance of the interconnection of the two discourses. UN acknowledges that corruption could be a contributing factor in a human rights violation and that a human rights approach to anti-corruption is necessary. However, despite these resolutions are important in improving the conceptualization of corruption, the link between corruption and human rights is still laying within soft law and general instruments. As it is easily to comprehend from their titles, numerous resolution focus on the negative effects of corruption on the enjoyment of human rights. As a result, corruption is ineffectively

[107] Human Rights Council, General Assembly. (2019). *Summary of the expert of workshop on good practices of United Nations-system support to States in preventing and fighting against corruption, with a focus on human rights.* UN Doc A/HRC/41/20. para. 36.
[108] *Ibid*.

considered as an external factor that limit the state's success in protecting rights.[109] Furthermore, several critical issues regarding this connection are not merely taken into consideration. For example, the causal link or the rules of attribution, which are fundamental to delineate in which way a corrupt act may violate a recognized human right, are not analyzed in detail. Finally, what is still missing are strategies that can put into practice this alleged substantive link.

Indeed, rarely is corruption addressed in a comprehensive and systematic manner by the UN Treaty Bodies. According to a research conducted by the Centre for Civil and Political Rights, 39 out of 182 are the concluding observation adopted by the UN Treaty Bodies between 2007 and 2017 that deal with corruption.[110] The ten human rights treaties bodies that monitor implementation of the core international human rights treaties mention corruption in a very vague and imprecision way. They do not take into consideration what type of corrupt practices is or what should be the exact link between a corrupt practice and a human right violation. In general, corruption is put in addition to a sentence in the middle or towards the end of much longer paragraphs. For example, the Committee on the Elimination of Racial Discrimination in one of its concluding observations concerning Bulgaria stated that "[…] the Committee is aware of the efforts the State party must take, in particular to enhance the independence of the judiciary and eliminate corruption."[111] More recently, the Committee on Migrant Workers the Treaty-Based Body affirmed that "while welcoming the progress achieved by the State party in combating corruption, the Committee is concerned that the level of corruption remains high."[112] These references again demonstrate how corruption affect several types of human rights and the importance of the connection between corruption and human rights. However, its analysis remain weak and imprecise. More precisely, even if the Committees may take into analysis corruption, they do not provide on how to tackle this issue considering human rights. In addition, their reports are very important because they serve

[109] Raoul Wallenberg Institute of Human Rights and Humanitarian Law. (2018). *The Nexus between Anti-Corruption and Human Rights.* Lund: Raoul Wallenberg Institute. [Online] Available at: [Accessed 21 Oct. 2019]. p. 1.
[110] Eeckeloo, L. (2018). *Improving the Human Rights Dimension of the Fight against Corruption. How UN Treaty Bodies address the issue of corruption?*. Geneva: Centre for Civil and Political Rights – CCPR. p. 3.
[111] Committee on the Elimination of Racial Discrimination. (CERD). (2009). *Concluding observations of the Committee on the Elimination of Racial Discrimination.* UN Doc. CERD/C/BGR/CO/19. para. 3.
[112] Committee on Migrant Workers. (2015). *Concluding observations on the initial report of Kyrgyzstan*. UN Doc. CMW/C/KGZ/CO/1. para. 22.

as a basis for civil society organizations and national human rights institutions to push for action or reforms at domestic level.[113]

Finally, according to a keyword research, conducted by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, corruption, up to 2018, is mentioned in only 80 cases out of a total of 2619. More precisely, 52 of which were examined by the CCPR, 27 by CAT, and 2 by CEDAW. However, this jurisprudence does not determine how corruption is considered by the Committees because none of them examined whether corrupt practices had violated the rights of complaints.[114] Despite the several submissions of individual cases on corruption, the jurisprudence of UN Treaty Bodies remains weak.[115]

3) The Regional Legal Framework Against Corruption

3.1) Organization of American States

3.1.1) Inter-American Convention Against Corruption

Dealing with corruption, among other international and regional organizations, the Organization of American States (OAS) had a pioneering role. Not only was the OAS one of the early movers overall, but it also adopted the first binding international agreement.[116] More precisely, it is also important to consider that both the European Union and the OECD were drafting and negotiating documents at similar points in time.[117] On 29 March 1996, at the third plenary session of the Specialized Conferences, which took place in Venezuela's capital Caracas from 27 to 29 March, it passed the Inter-American Convention Against Corruption (IACAC). Following Article XXV of the treaty, the OAS Convention entered into force on 3 June 1997, the thirtieth day following

[113] Raoul Wallenberg Institute of Human Rights and Humanitarian Law. *The Nexus between Anti-Corruption and Human Rights*. p. 3.
[114] *Ibid*. p. 5.
[115] Universal Rights Group. (2018). *How UN Treaty Bodies can better address corruption and its negative impact on human rights | Universal Rights Group*. [online] Available at: https://www.universal-rights.org/blog/how-un-treaty-bodies-can-better-address-corruption-and-its-negative-impact-on-human-rights/#_ftn1 [Accessed 4 Nov. 2019].
[116] Lohaus, M. (2015). Ahead of the Curve: The OAS as a Pioneer of International Anti-Corruption Efforts. In: T. Börzel and V. van Hüllen, ed., *Governance Transfer by Regional Organizations*. London: Palgrave Macmillan. p. 162.
[117] *Ibid.*

the date of deposit of the second instrument of ratification.[118] With the last ratification carried out by Barbados on 1 May 2018, the OAS Convention has been ratified by all 34 active members of the organization.[119]

Since it is the most important Inter-American anti-corruption tool, this session deals only with the IACAC. On the other hand, in order to increase the implementation of the Convention, the OAS has issued several resolutions and declarations to address corruption. Although they represent soft law instruments, these provisions undoubtedly form part of the Inter-American legal framework against corruption.[120] Among the most comprehensive, these resolutions are: the *Inter-American Democratic Charter*, the *Declaration of Nuevo Leon*, the *Declaration of Managua*, the *Declaration on Security in the Americas*, the OAS General Assembly Resolution 2222 *Cooperation among the Member States in the Fight against Corruption and Impunity*, and the *Declaration of Quito on Social Development and Democracy, and the Impact of Corruption*.

3.1.1.1) Background and Content

In the American continent, the first attempt to bring corruption at the international level was carried out in 1990 by the Chilean government. The Chilean delegation suggested to include ethics and corruption on the OAS agenda. However, contrary to the Chilean expectation, this first attempt did not succeed because, at that time, corruption was still regarded as an internal domestic issue.[121]

Gradually, four years later, at its 24th regular session, the OAS General Assembly decided to establish a Working Group on Probity and Public Ethics. It was charged with the compilation and the study of national legislation regarding matters of public ethics, the discussion of experiences in the control and oversight of existing administrative institutions, the development of a checklist of crimes related to public ethics as defined in national laws, and with the preparation of recommendations on juridical mechanisms to control the aforesaid-problem.[122]

[118] IACAC, Art. XXV.
[119] The Convention has not even signed and ratified by Cuba that represent the sole non-participating member of the organization.
[120] Bacio Terracino, J. *The international legal framework against corruption*. p.59.
[121] Lohaus, M. Ahead of the Curve: The OAS as a Pioneer of International Anti-Corruption Efforts. p. 165.
[122] OAS General Assembly. (1994). *Probity and Public Ethics.* OAS Doc. AG/RES. 1294 (XXIV-O/94).

As a result, the issue of anti-corruption started to gain new attention. Indeed, representatives of 34 OAS Member States (excluding Cuba) met at the First Summit of the Americas in Miami in December 1994. This conference was aimed at revitalizing local cooperation and setting the agenda for the years to come. The summit resulted in a statement signed by all the delegations of the countries. In short, the signed declaration addressed the need to coordinate a comprehensive attack on corruption to protect democracy, developing a hemispheric approach to tackle corruption in both the public and private sectors.[123]

Almost immediately after the Summit of the Americas, on 16 December 1994, the Venezuelan Government submitted its first draft convention to the Working Group and the other Member States intending to collect comments.[124] In turn, at its 25th regular session held in July 1995, the OAS General Assembly charged Working Group on Probity and Civic Ethics chairman Ambassador Eklmundo Vargas Carreiio with preparing a draft of the Inter-American Convention against Corruption based on the Venezuelan proposal, as well as comments made by the governments.[125] Moreover, the resolution also charged the Inter-American Juridical Committee, the Permanent Council, and General Secretariat to with providing comments on the draft convention prepared by the Working Group. Finally, the Assembly included also the participation of experts to discuss the draft and comments originating from the various sources mentioned above. This process was the result of the Specialized Conferences of Caracas from 27 to 29 March 1996, which adopted the final text of the Inter-American Convention against Corruption.[126]

Taking into analysis its primary content, even the Inter-American instrument does not define corruption.[127] On the contrary, as it will be analyzed, by corruption the convention refers to series of corrupt practices. Concerning the types of the issue, the OAS Convention takes into consideration corruption occurring at any level of the state's

[123] Summit of the Americas. (1994). *First Summit of the Americas – Declaration of Principles* (Miami). [Online] Available at: http://www.summit-americas.org/i_summit/i_summit_dec_en.pdf [Accessed 20 Oct. 2019].
[124] Manfroni, C. and Werksman, R. (2003). *The Inter-American Convention Against Corruption: Annotated with Commentary*. Lanham, Md.: Lexington Books. p. X.
[125] OAS General Assembly. (1995). *Probity and Public Ethics.* OAS Doc. AG/RES. 1346 (XXV-O/95). pp. 123-125.
[126] Lohaus, M. Ahead of the Curve: The OAS as a Pioneer of International Anti-Corruption Efforts. p. 166.; Manfroni, C. and Werksman, R. *The Inter-American Convention Against Corruption: Annotated with Commentary*. p. X.
[127] Manfroni, C. and Werksman, R. *The Inter-American Convention Against Corruption: Annotated with Commentary*. p. 38.

hierarchy. As a matter of fact, there is no distinction between grand and petty corruption.[128] Moreover, reminiscent of Latin America's former dictatorial regimes, the OAS Convention's preamble focuses on the integrity of democratic institutions, the moral fiber of society, and fairness, rather than purely economic considerations.[129] Not surprisingly, the convention makes the connection between drug trafficking and corruption.[130]

Concerning its scopes, as it is clearly stated in Article II, the purpose of the Inter-American Convention is twofold. First of all, the anti-corruption treaty aims to strengthen the state's mechanism to prevent, detect, punish, and eradicate corruption. Since corruption requires an activity by a state agent, in this case, strengthening means to make more effective the existing mechanisms of who is responsible for their enforcement.[131] On the other hand, section 2 of Article II states that the second goal of the convention is to promote, facilitate, and regulate cooperation among parties.[132] To make this effort more effective, the preamble of this present convention defines corruption as a problem of different natures that claim a certain level of international notice and commitment.[133]

As it has been done with the analysis of the UNCAC, the IACAC states obligations can be grouped into three pillars: criminalization, preventive measures, and regional cooperation. Concerning the first group of states' duties, the most common strategy promoted by the convention in order to achieve the objectives described above is domestic legal change.[134] In brief, the agreement requires states parties to establish jurisdiction over corruption. In other words, this means to force the states to prosecute crimes of corruption.[135] However, this obligation to criminalize certain corrupt practices has a different level of compulsoriness.

The first level of compulsoriness is composed by the corrupt practices included into Article VI, namely passive and active bribery, any act or omission in the discharge

[128] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 11.
[129] IACAC, Preamble para. 2-3.; Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 230.
[130] IACAC, Preamble para. 8; *Ibid*.
[131] Manfroni, C. and Werksman, R. *The Inter-American Convention Against Corruption: Annotated with Commentary*. p. 17.
[132] *Ibid*., p. 18.
[133] *Ibid*., p. 6.
[134] Lohaus, M. Ahead of the Curve: The OAS as a Pioneer of International Anti-Corruption Efforts. p. 164.
[135] IACAC, Art. V.

of duties by a government official or a person performing public functions in order to illegally obtain benefits, the fraudulent use of property derived from corrupt acts, and several modes of participation in corrupt offences. [136] This list of corrupt practices that need to be criminalized represents the sole unconditionally binding part of the treaty without any "safeguards" clause.[137] This level of compulsoriness can be detected by the use of the wording *shall adopt* and Article VII of the Convention, which requires state parties "that have not yet done so" to criminalize the specific acts of corruption listed in Article VI(1).[138]

The second group of states' duties is composed by the corrupt practices of active transnational bribery[139] and illicit enrichment.[140] However, even though these practices shall be considered as corrupt acts, the obligation imposes on states to criminalize foreign bribery, and illicit enrichment is limited by a potentially significant condition. Indeed, the state party's obligation is *subject to its constitution and the fundamental principles of its legal system*.[141] In other words, states may use this "safeguard clause" to avoid implementing Articles VIII and IX without having to make a reservation to the Convention, and hence, by limiting the agreement of the convention.[142]

Lastly, in the first place, the IACAC contains a set of corrupt practices which members states undertake to consider criminalizing in their national laws. Due to the lexicon used, however, states parties do not have a strict legal obligation to criminalize these acts.[143] Indeed, Article XI has been defined as "aspirational."[144] Among these offenses, the corrupt practices included are the improper use of classified information and the state's property, the illicit acquisition of a benefit, and the diversion of property including embezzlement or misappropriation.

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[136] IACAC, Art. VI.
[137] Lohaus, M. Ahead of the Curve: The OAS as a Pioneer of International Anti-Corruption Efforts. p. 164.
[138] Grossman, C. (2000). The Experts Roundtable: A Hemispheric Approach to Combating Corruption. *American University International Law Review*, [online] 15(4), pp.759-811. Available at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1274&context=auilr [Accessed 22 Oct. 2019]. p. 771.
[139] IACAC, Art. VIII.
[140] IACAC, Art. IX.
[141] IACAC, Art. VIII; Art. IX.
[142] Grossman, C. The Experts Roundtable: A Hemispheric Approach to Combating Corruption. pp. 772-773.
[143] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 11.
[144] Grossman, C. The Experts Roundtable: A Hemispheric Approach to Combating Corruption. p. 774.

Furthermore, not only the convention deals with the criminalization of corrupt practices, but it also considers the application of preventive measures.[145] More specifically, Article III presents a list of eleven measures that aim to prevent rather than punish or criminalize corruption.[146] Five of those clauses are directly related to the conduct and the responsibility of the public officials by presenting a set of standards of behavior. Briefly, these preventive standards center on two key elements: eliminating impunity by public officials and increasing transparency and accountability of the public sector. Moreover, this part of the convention is also closely related to civil society and the entire population of each member state. In this sense, this article directly involves civil society and the NGOs in the fight against corruption. In particular, they are asked to monitor government's compliance with its commitments under the convention.[147] Finally, since the language of Article III is arguably weak, it is essential to specify that these clauses are less imperative and their implementation is discretionary.[148] In other words, they generate not-mandatory obligations on the parties and states can merely consider their applicability.[149] However, as Altamarino highlights, preventive measures could be regarded as essential to deter corrupt practices and ensure good governance. As a result, countries that take action in adopting preventive measures referred in this article will show a high level of commitment to combating corruption.[150]

Due to the recognized international nature and extension of corruption, the convention also contains several tools to ensure international cooperation among member states. According to Article XIII, countries have to consider corruption under extradition treaties. However, according to section 5 of the present Article, there is the possibility that a state may refuse extradition. Furthermore, the convention in its Article XIV promotes the most extensive measures of mutual assistance among the member states for

[145] IACAC, Art. III.
[146] All these measures are grouped into Article III: adoption of codes of conduct for public officials and enforcement mechanisms, instructions to government personnel, registration and disclosure of the income of public officials, open, equitable and efficient hiring and procurement systems, revenue collection and control systems that deter corruption, abolishment of favorable tax treatment of corruption, whistleblower protection, establishment of anti-corruption bodies, book- and recordkeeping requirements, civil society and NGO participation and the study of further preventive measures.
[147] Manfroni, C. and Werksman, R. *The Inter-American Convention Against Corruption: Annotated with Commentary*. p. 19
[148] Altamirano, G. (2007). The Impact of the Inter-American Convention Against Corruption. *University of Miami Inter-American Law Review.*, [online] 38, pp.487-547. Available at: http://repository.law.miami.edu/umialr/vol38/iss3/2 [Accessed 22 Oct. 2019]. p. 503.
[149] Lohaus, M. Ahead of the Curve: The OAS as a Pioneer of International Anti-Corruption Efforts. p. 164.
[150] Altamirano, G. The Impact of the Inter-American Convention Against Corruption. p. 503.

the prevention, detection, and prosecution of corrupt practices. For example, this could be the case of a state that requires information from another country. In this event, a judge must request information and another judge must submit its reports.[151] Other international cooperation measures are those established under Article XV concerning standards regarding properties and in the field of asset recovery. Specifically, this article extends the cooperation between state parties and applies to the tracing and forfeiture of illegally obtained property.[152] Finally, Article XVI concerning Bank Secrecy represents within the context of investigation on corruption one of the most important clauses of the IACAC.[153] As a matter of fact, it provides the impossibility of claiming bank secrecy in case of requests for assistance from the authority of another state.[154]

3.1.1.2) Implementation and Enforcement

Since the IACAC itself does not provide for a monitoring procedure, the OAS in 2001 established a follow-up mechanism named MESICIC (*Mecanismo de Seguimiento de la Implementación de la Convención Interamericana contra la Corrupción).* Its purpose is threefold. First, the MESICIC aims at promoting the implementation of the convention to contribute to attaining the objectives outlined in Article II of the IACAC.[155] Second, the follow-up mechanism monitors on the commitments of the state parties and studies their implementation.[156] Third, the MESICIS monitor procedure has as a purpose to facilitate technical cooperation activities; the exchange of information, experience, and best practices; and the harmonization of the legislation of the States Parties.[157]

Concerning its structure and responsibilities, the MESICIC has been organized into two bodies. On the one hand, it is composed of the Conference of the Parties. This first body aims at representing all state parties in the monitoring processes, and it meets at least once of each year.[158] It is the political body of the mechanism and deals with the

[151] Manfroni, C. and Werksman, R. *The Inter-American Convention Against Corruption: Annotated with Commentary*. p. 86.
[152] Lohaus, M. Ahead of the Curve: The OAS as a Pioneer of International Anti-Corruption Efforts. p. 164.
[153] Manfroni, C. and Werksman, R. *The Inter-American Convention Against Corruption: Annotated with Commentary*. p. 93.
[154] IACAC, Art. XVI.
[155] OAS General Assembly. (2001). *Mechanism for Follow-Up of Implementation of The Inter-American Convention Against Corruption.* OAS Doc. AG/RES. 1784 (XXXI-O/01). para. 1.
[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid*., para. 5.

most important decisions and guidelines to set the mechanism in motion.[159] On the other hand, the MESICIC is composed of the Committee of Experts. In brief, it is the technical body and consists of experts who are appointed by the states parties to the mechanism. The experts are representatives of organizations in their respective countries that exercise legal or political accountability in the fight against corruption.[160] Its primary duties are to provide technical analysis of the implementation of the IACAC by states in different rounds.[161]

In short, the process of peer review can be summarized into three distinct phases. First, the Committee selects some parts of the provisions of the IACAC that will be analyzed. By doing so, it adopts a specify review methodology and mainly reviews the legislation of states parties. During the second step of the peer review, the Committee draws up a questionnaire. Thus, in this phase, states are invited to submit the answers to the survey. Finally, the follow-up mechanism processes conclude with the issue of the final report on each state party by the Committee. Moreover, the report contains also a list of recommendations to improve the situation of a given country.[162]

Despite this well-structured peer review process, however, according to some legal scholars, the present follow-up mechanism presents several weaknesses. First of all, it has been claimed that the analysis mechanism's length is questionable, and each of the three steps is time-consuming.[163] The work of the Committee of Experts has also been criticized. It has been argued that it may not be so independent. Each member state is requested to appoints its experts. Consequently, due to this process of unregulated appointment, this implies that experts might be selected based on political loyalty lacking the necessary expertise required. In addition, the experts' period is not set, rendering the experts open to replacement at the state party's discretion. The state party has to notify the Secretariat when there is a change in its representation to the Committee.[164] Furthermore, it has been noted that there are some difficulties concerning the participation of the civil society in the review process. This is caused by the fact that there are states

[159] Bacio Terracino, J. *The international legal framework against corruption*. p.305.
[160] *Ibid*.
[161] OAS General Assembly. *Mechanism for Follow-Up of Implementation of The Inter-American Convention Against Corruption.* para. 5, 7.
[162] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 14.
[163] *Ibid*.
[164] Altamirano, G. The Impact of the Inter-American Convention Against Corruption. p. 506.

parties without NGOs that can help the monitoring mechanism by providing information. In other words, this means that, under this condition, the experts must rely only on the information provided by the government.[165] Finally, the application of the final report of the Committee of Experts is not supervised. Thus, if no action is taken by the State concerned, the consequences will remain merely political. Neither does the system require the adoption of sanctions, which is understandable considering the intergovernmental essence of the operation. In short, this feature makes the MESICIC a method of peer review lacking in authority.[166]

To conclude, since the IACAC has been the first regional instrument tool against corruption ever adopted, one of its immediate results was to contribute to raising awareness of the problem of corruption. Moreover, its sphere of application could be considered extended. As a matter of fact, not only is the instruments fighting against bribery, but it also takes into account several corrupt practices. However, encouraged by the will to criminalize corruption internationally, the process of drafting is the result of unavoidable political compromises. Indeed, the Convention presents some critical points. Despite, it was acknowledged that preventive measures are essential in order to curb corruption, and to establish good governance, their provision in the Convention is not imperative. Furthermore, considering the criminalization of corrupt practices, the convention envisages different levels of compulsoriness. In other words, the several corrupt acts identified are merely treated in different ways. For instance, embezzlement, transnational bribery, and illicit enrichment are not entirely obligatory to criminalize. Furthermore, it has been noted that in the OAS Convention there is no reference to the ambiguous political party financing.[167] Finally, also the Convention Follow-up mechanism presents some shortcomings. Due to its organization, the MESICIC lacks a robust method of enforcement. As a result, its effective functioning is mostly dependent on the political will of each member state.

[165] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 14.
[166] *Ibid*., p. 15.
[167] *Ibid.,* p. 13.

3.1.2) OAS Human Rights Mechanisms and Anti-Corruption

Within the OAS, the Inter-American Commission on Human Rights recognizes the critical connection between corruption and human rights. As stated by the Executive Secretary for the Inter-American Commission on Human Rights of the OAS Paulo Abrão in the *Summary of the expert workshop on good practices of United Nations-system support to States in preventing and fighting against corruption, with a focus on human rights*, "a human rights-based approach to fighting corruption is focused on victims; such a focus had to be a priority in designing effective anti-corruption strategies."[168]

Recently, the IACHR had also adopted two resolutions on the issue. The first resolution concerning human rights and corruption is the resolution 1/17 *Human Rights and the Fight against Impunity and Corruption* approved 12 September 2017. In its resolution 1/17, the Commission underlined that the fight against corruption was inextricably linked to the exercise and enjoyment of human rights. Moreover, the Commission pointed out that the establishment of effective mechanisms to eradicate corruption was an urgent obligation in order to achieve adequate access to independent and impartial justice and to guarantee human rights. Finally, the Commission highlighted how the consequences of corruption profoundly affect the national treasury, which makes it impossible for the state to meet the needs of citizens concerning food, health, work, education, a decent life, and justice. In addition, these consequences are graver for the collective groups historically excluded, namely those who live in situation of extreme poverty.[169]

The second resolution concerning this matter is the resolution 1/18 *Corruption and Human Rights* adopted in March 2018. Even though this resolution is chronologically speaking the second resolution, it marks the very first comprehensive approach developed by the OAS on the issue of corruption and human rights.

In this situation, the Commission reminds how corruption is a complex phenomenon able to affects human rights in their entirety. Then, the Commission acknowledged that due to the multiple causes and consequences of corruption, any anti-

[168] Human Rights Council, General Assembly. (2019). *Summary of the expert of workshop on good practices of United Nations-system support to States in preventing and fighting against corruption, with a focus on human rights.* UN Doc A/HRC/41/20. para. 9.
[169] Inter-American Commission on Human Rights. (2017). *Human Rights and the Fight against Impunity and Corruption.* Resolution 1/17.

corruption tools must take into consideration the important aspect of human rights. Indeed, the resolution states that the objective of any public policy to fight corruption *should be* focused on the light of the following principles: "the central role of the victim; universality and inalienability; indivisibility; interdependence and interaction of human rights; non-discrimination and equality; gender perspective and intersectionality; participation and inclusion; accountability; respect for the rule of law; and strengthening of cooperation between States."[170] Therefore, the human rights approach must be applied in all anti-corruption strategies in the region. In this sense, the resolution also highlights that under the Inter-American legal framework, states have the duty to adopt legislative, administrative and other measures to guarantee the exercise of human rights against the violations and restrictions caused by the phenomenon of corruption.

Finally, the resolution formulates recommendations and highlights some core elements to address corruption from a human rights approach to be addressed to the States members of OAS. First, the Commission underlines the importance of the independence, impartiality, autonomy, and capacity of judicial systems.[171] Second, the Commission recognizes Article 13 of the American Convention on Human Rights as one of the main tools in the fight against corruption. Therefore, it recommends to the states to ensure transparency, access to information, and freedom of information.[172] Third, the resolution recognizes the impact on civil and political rights, as well as economic, social, cultural and environmental rights. In this sense, besides the adverse effects analyzed in the resolution 1/17, the resolution 1/18 affirms that corruption jeopardizes the capacity of governments to comply with their social rights obligations, including health, education, water, transportation, or sanitation. Moreover, it takes into account the particular effect on the most vulnerable population and groups, including women, social leaders, land rights defenders, Afro-Descendant peoples, indigenous peoples, migrants, and LGBTI persons.[173] Lastly, the Commission invites member states to increase international cooperation among countries to prevent and combat corruption, including also the collaboration of individuals and groups of civil society.[174]

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[170] Inter-American Commission on Human Rights. (2018). *Corruption and Human Rights.* Resolution 1/18.
[171] *Ibid*.
[172] *Ibid*.
[173] *Ibid*.
[174] *Ibid*.

Concerning the work of the IACtHR, corruption is discussed in several cases, but the Court does not develop a human rights approach to corruption. However, in these cases, the Court generally recognizes that corruption affects the enjoyment of human rights. For example, in the case of *Tibi v. Ecuador* opens the discussion for corruption in place of detention, highlighting how in "jail everything has a price."[175] Moreover, in the cases *of Xákmok Kásek Indigenous Community v. Paraguay*, *Yajke Axa Indigenous Community v. Paraguay*, or in *Sawhoyamaxa Indigenous Community v. Paraguay* the Inter-American Court addressed the adverse effects of corruption on the enjoyment of the rights for indigenous people. Finally, similarly to the CoE efforts, the IACtHR in the cases of *Memoli v. Argentina* or *Valle Jamarillo v. Colombia* reaffirmed the need to defend those denouncing corruption.

3.2) Council of Europe

The Council of Europe institutionalized its international fight against corruption at the Conference of the European Ministers of Justice held in Malta on 14-18 June 1994. At this meeting, it was recognized that corruption was a serious threat to democracy, the rule of law, and human rights. For these reasons, the Council of Europe was required to respond to this menace. As a result, resolution No. 1 adopted at this Conference promoted the need to implement a multidisciplinary approach. This means dealing with corruption from a criminal, civil, and administrative law of point of view. On this occasion, it was also recommended the setting up of a Multidisciplinary Group on Corruption (GMC). The aims of the GMC were, on the one hand, the examination of the measures that could be included in a program of action at the international level, on the other hand, the possibility to draft international conventions on this subject.[176] In consideration of these recommendations, in September 1994, the Committee of Ministers decided to finally set up the GMC under the joint responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ).[177]

[175] *Tibi v. Ecuador*, Case No. 114, (IACtHR, Sept. 7, 2004).
[176] Conference of European Ministers of Justice. (1995). *Resolution N°1 on Civil, Administrative and Criminal Law Aspects of Corruption.* CM(94)117-Appendix III.
[177] Ministers' Deputies. (2000). Multidisciplinary Group on Corruption (GMC)- GMC's Activity Report (1994-2000). CM Documents, CM(2000)158.

In the course of 1995, the GMC prepared the Programme of Action against Corruption (PAC). It was adopted in November 1996 by the Committee of Ministers with the deadline of its implementation on 31 December 2000. In short, the PAC represents an ambitious effort to address all facets of the international fight against corruption. Moreover, the Committee of Ministers welcomed the proposed drafting of an anti-corruption convention and the intention to implement a follow-up process for enforcing the international anti-corruption treaties.[178]

Subsequently, on the 21st Conference of European Ministers of Justice held in Prague in June 1997, the GMC submitted a progress report emphasizing the link between corruption and organized crime. In this sense, it was also stated that the fight against corruption was a preliminary move to fight organized crime at a general level. Moreover, even on this occasion, the Ministers declared that corruption is a significant threat to the stability of the democratic institutions and the moral values of the society.[179] Therefore, the Conference concluded with a recommendation to the Committee of Ministers to intensify the efforts to adopt a framework agreement that provide a common criminalization of corrupt offenses.[180]

At the Second Summit of the Heads of State and Government of the member states of the Council of Europe, which was held in Strasbourg on 10-11 October 1997, it was decided that the challenges posed by corruption and organized crime should be addressed jointly. For that reason, they instructed the Committee of Ministers to adopt guiding principles to be applied in the development of domestic legislation and practice, to conclude the elaboration of international legal instruments, and to establish an appropriate and efficient mechanism for monitoring.[181]

Therefore, based on the draft prepared by the GMC, in November 1997, the Committee of Ministers, at its 101st Session held on 6 November 1997, adopted the Resolution (97) 24 on the Twenty Guiding Principles for the fight against corruption.

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[178] Group of States against Corruption. *Historical Background*. [online] Available at: https://www.coe.int/en/web/greco/about-us/background [Accessed 26 Oct. 2019].
[179] Conference of European Ministers of Justice. (1997). *Resolution N°1 On the Links between Corruption and Organized Crime.* Available at: https://www.coe.int/en/web/human-rights-rule-of-law/mju21-1997-prague#{%2218278298%22:[1]} [Accessed 26 Oct. 2019].
[180] Group of States against Corruption. *Historical Background*. [online] Available at: https://www.coe.int/en/web/greco/about-us/background [Accessed 26 Oct. 2019].
[181] Ministers' Deputies. (2000). Multidisciplinary Group on Corruption (GMC)- GMC's Activity Report (1994-2000). CM Documents, CM(2000)158.

These principles are aimed at combining the forces of the member states in the fight against corruption. The resolution asked states for the adoption at the domestic level of a comprehensive set of measures to implement a coherent and effective anti-corruption strategy, such as limiting immunity for corruption charges, denying tax deductibility for bribes, and ensuring free media and preventing the shielding of legal persons from liability.[182] It also instructed the GMC to complete the development of international legal instruments and to submit a draft text proposing the establishment of a suitable and effective monitoring mechanism.[183] These principals are not legally binding. However, they are politically significant because they carry the political weight of their masters since their elaboration was issued by the Head of States and Government.[184]

3.2.1) Criminal Law Convention on Corruption and Additional Protocol

The first CoE binding instrument against corruption is the Criminal Law Convention on Corruption. It was adopted in 1999 and entered into force in July 2002, after the date on which 14 states have expressed their consent to be bound by the Convention.[185] On 27 January 1999, the very first day for signature, 21 states signed it.[186] Nowadays, the CoE Convention has been ratified by all the members of the organization. The Criminal Law Convention is also open for signature by non-European countries. As a matter of fact, it has been ratified by one non-member state, namely Belarus, and it has been signed, but not yet ratified, by Mexico and the US.[187]

Concerning its content, the Criminal Law Convention on Corruption is considered the most CoE comprehensive instrument. This exhaustiveness was the product of rigorous researches that aims to identify and define the most common types of corruption in all

[182] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 225.
[183] Committee of Ministers. (1997). *On the Twenty Guiding Principles for the Fight Against Corruption.* Resolution (97) 24.
[184] Bacio Terracino, J. *The international legal framework against corruption*. p.63.
[185] Criminal Law Convention on Corruption, Art. 32 (3).
[186] De Vel, G. and Csonka, P. (2002). The Council of Europe Activities against Corruption. In: C. Fijnaut and L. Huberts, ed., *Corruption, Integrity and Law Enforcement*. [online] The Hague: Kluwer Law International, pp.361-380. Available at: https://www.researchgate.net/publication/254816879_Corruption_integrity_and_law_enforcement [Accessed 26 Oct. 2019].
[187] Council of Europe. *Criminal Law Convention on Corruption- Signatures and Ratifications.* Available at: https://www.coe.int/en/web/conventions/full-list/ /conventions/treaty/173/signatures?p_auth=DtJnMPp3 [Accessed 26 Oct. 2019].

member states.[188] Its two pillars are the criminalization of a broad range of corruption offenses and the international cooperation during the prosecution of the recognized corruption offenses.

Regarding criminalization, the Convention obliges state parties to criminalize in their legislations several corrupt practices. In other words, it does not provide a uniform definition of corruption, but it deals with substantive and procedural law matters.[189] Specifically, it covers the following forms of corruption: active and passive bribery of domestic and foreign public officials;[190] active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies;[191] active and passive bribery in the private sector;[192] active and passive bribery of international civil servants;[193] active and passive bribery of domestic, foreign and international judges and officials of international courts.[194] Furthermore, in order to make the sphere of corrupt practices more extensive, the Convention also covers active and passive trading in influence,[195] money-laundering of proceeds from corruption offenses,[196] and even accounting offenses connected with corruption offenses.[197] Even though the list of corrupt practices is extensive, the Convention does not take into consideration other forms of corruption, such as embezzlement. According to Boersma, it can be considered as a weakness of the Convention.[198]

Therefore, as stated by the Explanatory Report, such a process of harmonization of the types of corruption aims to make easier to meet the requirement of dual criminality by the parties of the Convention.[199] Furthermore, due to this broad conceptualization of corrupt practices, the Convention does not establish narrow confines, but it has a wide

[188] De Vel, G. and Csonka, P. The Council of Europe Activities against Corruption. p. 368.
[189] Council of Europe. (1999). *Explanatory Report to the Criminal Law Convention on Corruption.* European Treaty Series - No. 173. para. 21.
[190] Criminal Law Convention on Corruption, Art. 2, 3, 5.
[191] *Ibid*., Art. 4, 6, 10.
[192] *Ibid*., Art. 7, 8.
[193] *Ibid*., Art. 9.
[194] *Ibid*., Art. 11.
[195] *Ibid*., Art. 12.
[196] *Ibid*., Art. 13.
[197] *Ibid*., Art. 14, 15.
[198] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 24.
[199] Council of Europe. (1999). *Explanatory Report to the Criminal Law Convention on Corruption.* European Treaty Series - No. 173. para. 21.

scope, which perfectly reflects the CoE's comprehensive approach to the fight against corruption.[200]

Concerning its second pillar, the present Convention seeks to improve international cooperation. In this sense, the Criminal Law Convention on Corruption provides that parties have to cooperate in respect of investigations and proceedings. In order to enhance international cooperation, the Conventions deals with mutual assistance, extradition, and the provisions of information in the investigation and prosecution of corruption offenses.[201]

Finally, in order to extend the scope of the Convention, in May 2003, it has been adopted the *Additional Protocol to the Criminal Law Convention on Corruption*, which entered into force in 2005. Up to now it has been ratified by all the CoE's member states, except for Estonia, Russia, and Italy. It is also a treaty open for signature by states signatories to treaty ETS 173 (Criminal Law Convention on Corruption). As a matter of fact, it has been signed and also ratified by Belarus. Regarding its function, the Protocol extends the scope of the Convention to arbitrators in commercial, civil, and other matters. Furthermore, it complements the Convention's provisions aimed at protecting judicial authorities from corruption.[202] Therefore, state parties are under the obligation to criminalize in their national laws, also active and passive bribery of both domestic and foreign arbitrators and jurors.[203]

3.2.2) Civil Law Convention on Corruption

According to a feasibility study conducted in 1997, the use of civil law remedies might be effective in combating specific forms of corruption.[204] As a result, in the *Twenty Guiding Principles for the Fight Against Corruption* of 1997, principle 17, for the first time, indicated that states should "ensure that civil law takes into account the need to fight corruption and in particular provides for effective remedies for those whose rights and

[200] Council of Europe. (1999). *Explanatory Report to the Criminal Law Convention on Corruption.* European Treaty Series - No. 173. para. 25.
[201] Council of Europe. *Criminal Law Convention against Corruption – Details of Treaty No. 173.* Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173 [Accessed 26 Oct. 2019].
[202] Council of Europe. *Additional Protocol to the Criminal Law Convention on Corruption – Details of Treaty No. 191.* Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/191 [Accessed 26 Oct. 2019].
[203] Additional Protocol to the Criminal Law Convention on Corruption, Art. 2-6.
[204] De Vel, G. and Csonka, P. The Council of Europe Activities against Corruption. p. 364.

interests are affected by corruption".[205] Subsequently, at the 22nd Conference of European Ministers of Justice held in 1999 in Chisinau, Moldova, in the Resolution No 3 on the fight against corruption, it was urged the Committee of Ministers to adopt the draft Convention on civil aspects of corruption and open it for signature before the end of 1999.[206]

Therefore, in the same year, the Council of Europe drafted another convention on the same topic. It is the case of the Civil Law Convention on Corruption. It was adopted on 4 November 1999 and entered into force 1 October 2003, after the date on which 14 states have expressed their consent to be bound by the Convention.[207] Up to date, it has been ratified by 34 member states. Furthermore, it has been signed but not ratified by the following member states: Andorra, Denmark, Germany, Iceland, Ireland, Luxemburg, and the UK.[208]

In brief, the Civil Convention finalized an international legal instrument aiming at fighting corruption through civil law remedies. Indeed, it focuses on effective remedies for any damage caused by corrupt acts.[209] In other words, it represents another approach to fight corruption developed by the Council of Europe.[210] Specifically, it requires contracting parties to adapt their domestic legislation in order to provide "effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."[211] The Convention is divided into three chapters, namely measures to be taken at a national level, international cooperation and monitoring, and final clauses. It is a non-self-executing Convention. Thus, this implies that states Parties shall transpose into their domestic law the principles and rules embodied in the

[205] Committee of Ministers. (1997). *On the Twenty Guiding Principles for the Fight Against Corruption.* Resolution (97) 24.
[206] Conference of the European Ministers of Justice. (1999). *Resolution No 3 on the Fight Against Corruption.*
[207] Civil Law Convention on Corruption, Art. 15.
[208] Council of Europe. *Civil Law Convention on Corruption- Signatures and Ratifications.* Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174/signatures?p_auth=OFDpaJof [Accessed 26 Oct. 2019].
[209] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 226.
[210] Council of Europe. (1999). *Explanatory Report to the Civil Law Convention on Corruption.* European Treaty Series - No. 174. para. 10-11.
[211] Civil Law Convention on Corruption, Art. 1.

Convention, taking their specific circumstances into account.[212] Moreover, it has been claimed that the Civil Convention is not entirely clear concerning to what extent the parties are required to put such legislation in place.[213]

3.2.3) Soft Law Instruments

In addition to these international treaties, the Council of Europe has also issued other two soft law instruments.

First, at its 106th Session on 11 May 2000, the Committee of Ministers adopted the *Model Code of Conduct for Public Officials*. This soft law instrument recommends to CoE Member states to adopt national codes of conduct for public officials, which are based on a model code of conduct annex to the recommendation.[214] According to its Article 3 of the Appendix to Recommendation, the purpose of this document is to "specify the standards of integrity and conduct to be observed by public officials, to help them meet those standards and to inform the public of the conduct it is entitled to expect of public officials."[215] In short, it contains general provisions that establish general principles regarding the fact that public officials should be honest, impartial, courteous, and not act arbitrarily.[216] Moreover, it contains detailed provisions concerning the reporting of unlawful acts, improper unethical conduct, conflicts of interest, and the expected attitude to gifts.[217] Finally, they apply to persons employed by public institutions but do not apply to elected civil servants of any type.[218]

Second, with the adoption of the Recommendation Rec(2003)4, the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies adopted the *Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns*.[219] This document recommends member states to adopt in their national

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[212] Council of Europe. (1999). *Explanatory Report to the Civil Law Convention on Corruption.* European Treaty Series - No. 174. para. 23.
[213] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 24.
[214] Committee of Ministers. (2000). Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials.
[215] Model Code of Conduct for Public Officials, Art. 3.
[216] *Ibid*., Arts. 5, 6.
[217] *Ibid*., Arts. 12, 13, 18, and 19.
[218] *Ibid*., Art.
[219] Committee of Ministers. (2003). *Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns.*

legislation rules regarding the funding of political parties and electoral campaigns. For example, in the appendix of the Recommendation is highlighted the need for state financial support to political parties to be objective, fair, and reasonable. [220]

3.2.4) GRECO: The Council of Europe's Anti-Corruption Implementation Mechanism

Compliance with the Council of Europe's anti-corruption conventions and soft-law instruments is monitored by the Group of States Against Corruption (GRECO). GRECO was established with the resolution (99) 5 in 1999, and its objective is to improve the capacity of its members to fight corruption through a dynamic process of mutual evaluation and peer pressure.[221] It helps identify gaps in national anti-corruption policies. Consequently, it requires legislative, structural, and functional changes. GRECO also provides a platform for sharing best practices on corruption prevention and detection.[222] According to Article 4 (3) of the GRECO Statute, any State that ratifies the Criminal or Civil Convention on Corruption automatically accedes to GRECO. Consequently, GRECO is not only limited to Council of Europe member states. For example, the US is a member state of GRECO. Currently, GRECO has 49 members, and each state appoints two delegates, who participate in GRECO plenary meetings with a right to vote; each member also provides GRECO with a list of experts available for taking part in GRECO's evaluations.[223]

The GRECO monitoring mechanism consists of a horizontal evaluation procedure and a compliance procedure. The evaluation procedure takes place in rounds and each round is dedicated to a particular theme. Within an evaluation round, all members are evaluated. Then, this process leads to recommendations, written under a report, aimed at furthering the necessary legislative, institutional, and practical reforms. Therefore, it starts the compliance procedure that has been designed to assess the measures taken by its members to implement the recommendations. The decision whether or not the country

[220] Common Rules against Corruption in the Funding of Political Parties and Electoral Campaign, Art. 1.
[221] Committee of Ministers. *(1999). Establishing the Group of States Against Corruption* (GRECO). Resolution No 5.; GRECO Statute, Art. 1.
[222] Group of States against Corruption. *About GRECO*. [online] Available at: https://www.coe.int/en/web/greco/about-greco [Accessed 27 Oct. 2019].
[223] GRECO Statute, Art. 6.

has implemented the recommendation is based on written situation reports submitted by the country.[224]

It is important to note that the reports developed by GRECO are published on the Internet. This is to say that they are public and accessible to everyone. However, like the other monitoring mechanism analyzed so far, the compliance procedure is *soft.* In other words, these procedures do not contain any forceful measures which can be imposed on states that do not implement the evaluation report. As a result, the political will of the participating countries will influence the overall effectiveness of GRECO intervention and the consequences of non-compliance will remain merely political.[225]

3.2.5) CoE Human Rights Mechanisms and Anti-Corruption

Up to date, differently from the other international organizations analyzed in this section, the Council of Europe appears to be legally less involved in creating the linkage between corruption and human rights. As a result, it is impossible to develop a chronological analysis of the Council of Europe's efforts in dealing with corruption and human rights.

One attempt to put together the two discourses relies on the Preamble of the Criminal and Civil Law Convention on Corruption. In these sections, it has been noted that corruption threatens human rights. More specifically, Preambles emphasize that "corruption threatens the rule of law, democracy, and human rights, undermines good governance, fairness, and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society."[226] It is important to underline that the preamble is regarded as legally non-binding. Thus, it is not giving rise to any practical legal effects under international law. As a matter of fact, "its role is generally considered to be largely metaphysical.[227]

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[224] Group of States against Corruption. *About GRECO*. [online] Available at: https://www.coe.int/en/web/greco/about-greco [Accessed 27 Oct. 2019].
[225] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 26.
[226] Criminal Law Convention on Corruption and Civil Law Convention on Corruption, Preamble.
[227] Klabbers, J. (2018). Treaties and Their Preambles. In: M. Bowman and D. J. Kritsiotis, ed., *Conceptual and Contextual Perspectives on the Modern Law of Treaties*. Cambridge: Cambridge University Press, pp.172–200. p. 183.

More recently, in 2017, the Parliamentary Assembly revived the fact that anti-corruption is an essential element to guarantee an effective system of human rights protection.[228] In addition, there is another situation in which corruption and human rights have been jointly taken into consideration. It is the case of a factsheet edited by GRECO entitled *Human Rights and Corruption.* In this event, it is underlined how corruption can lead or cause a human right violation. Moreover, they pointed out that the relationship between corruption and human rights is evident in a number of areas such as the independence of the judiciary, freedom of expression of journalists and whistleblowers, freedom of assembly, detention facilities, social rights, discrimination in the enjoyment of fundamental rights, and the trafficking of human beings. However, this relationship may only be partially considered by the Council of Europe's human rights bodies and not least by the European Court of Human Rights.[229]

Concerning the work of the Council of Europe's human rights bodies, according to a research conducted by the Raoul Wallenberg Institute, the European Committee on Racism and Intolerance, the Committee for the Prevention of Torture, and the European Committee for Social Rights have addressed corruption in their state reports.[230] However, the only specific mentions of corruption have been carried out by the European Committee for Social Rights regarding corruption and child trafficking in the case of Moldova[231] and regarding corruption in the health sector in the cases of Romania, the Slovak Republic, Albania, and Lithuania.[232]

On the other hand, concerning the work of the ECtHR, despite the several judgments that contain the word corruption, the Court has not examined any cases where complainants claimed that their rights were violated by a corrupt act. Nevertheless, from a human rights perspective, the Court have taken into consideration in a very detailed way the protection of whistle-blowers. For example, in the already cited case of *Guja v.*

[228] Council of Europe, Parliamentary Assembly. (2017). *Promoting integrity in governance to tackle political corruption.* Resolution 2170.
[229] Group of States against Corruption (GRECO) (2018). Corruption and Human Rights. [online] Council of
Europe. Available at: https://rm.coe.int/factsheet-human-rights-and-corruption/16808d9c83 [Accessed 27 Aug. 2019].
[230] Raoul Wallenberg Institute of Human Rights and Humanitarian Law. *The Nexus between Anti-Corruption and Human Rights.* pp. 8-9.
[231] Council of Europe, European Committee of Social Rights (2016). *European Social Charter-Conclusions 2015.*
[232] Council of Europe, European Committee of Social Rights. (2018). *European Social Charter-Conclusions 2017.*

Moldova and in the case of *Heinish v. Germany* the Court outlined the criteria to decide whether a whistle-blower were effectively protected.[233]

4) The Strategic Link: Fighting Corruption with a Human Rights Approach

The second chapter presents and seeks to clarify the way in which corruption and human rights could be jointly conceptualized. It follows that they are connected conceptually and substantially. On the one hand, corruption and human rights are conceptually connected because corruption represents a human rights issue. On the other hand, the substantial link has been developed. Despite the fact that it has resulted in being extremely challenging, the previous chapter seeks to legally demonstrate how some corrupt practices correspond to a human rights violation under international law.

Progressively, in the previous section of this chapter, the internationalization process of the fight against corruption has been outlined. Therefore, the main anti-corruption measures under the form of international and regional conventions have been presented. However, despite there is no shortage of attention to the issue of corruption, there is still the need to work on the effectiveness of its anti-corruption methods. As a matter of fact, according to some law scholars, these strategies present several shortcomings.

Concerning international anti-corruption instrument failures, it is often claimed that the corruption criminal law measures are too soft. As a result, they experienced a low rate of implementation. This is due to the widespread presence of safeguards clause. According to the criminal legal theory, criminal legislation that aims to control such a human's behaviors necessitate an effective way of enforcement.[234] Conversely, the usefulness of the legal instruments would be limited. This weakness is further exacerbated by the lack of binding review mechanisms and the lack of robust enforcement possibilities

[233] Raoul Wallenberg Institute of Human Rights and Humanitarian Law. *The Nexus between Anti-Corruption and Human Rights.* p. 10.
[234] Carr, I. (2007). Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?. *European Journal of Crime, Criminal Law and Criminal Justice*, [online] 15(2), pp.121-153. Available at: https://brill.com/view/journals/eccl/15/2/article-p121_1.xml?lang=en [Accessed 7 Nov. 2019]. p. 142.

for states that do not comply. As a result, the fight against corruption becomes more of a political issue than a matter of legality. [235]

With regard to the political will to prosecute corruption cases, John Hatchard, Barrister, and Professor of Law at the Buckingham Law School, UK, provides as an example the BAE/Al Yamamah case. It consisted of an investigation conducted by the Serious Fraud Office (SFO) in England into allegations of corruption. More specifically, the BAE System was accused of having paid massive bribes to Saudi royals in order to close the deal.[236] However, as Professor Hatchard reported, in December 2006, due to political reasons, the director of the SFO decided to discontinue the investigation in order to safeguard national and international security.[237]

Furthermore, the previous analysis of the international legal framework against corruption suggests that the fight against this issue boasts several international and regional institutions. However, the presence of a wide range of anti-corruption instruments is not always a positive message. On the contrary, it could be the result of a lack of coherence. It also may be misleading because some provisions could overlap or duplicate the efforts. Indeed, as stated by Indira Carr, the conventions diverge in terms of both substantive and procedural provisions and comprehensiveness. This brings about the production of disharmony and a lack of a unified international approach against the transnational issue of corruption.[238] Moreover, it will be up to the state to decide which convention to ratify and implement.[239]

This section does not want to criticize the usefulness of these approaches *per se*. Certainly, these strategies are entirely valid and necessary. Nevertheless, the anti-corruption measures in the form of international and regional conventions provide only a partial answer. Thus, at this point, what is necessary is to provide the last link of the conceptualization of corruption as a human rights issue. In this sense, the conceptual and

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[235] Boersma, M. Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties. p. 35.
[236] For more on the case see Leigh, D. and Evans, R. (2007). *BAE Files: The al-Yamamah deal*. [online] the Guardian. Available at: https://www.theguardian.com/world/2007/jun/07/bae15 [Accessed 7 Nov. 2019].
[237] Hatchard, J. (2010). Adopting a Human Rights Approach towards Combating Corruption. In: M. Boersma and H. Nelen, ed., *Corruption & Human Rights: Interdisciplinary Perspectives*. Antwerp-Cambridge-Portland: Intersentia, p. 16.
[238] Carr, I. Fighting Corruption Through Regional and InternationalConventions: A Satisfactory Solution?. p. 129.
[239] *Ibid*., p. 141.

the substantive link developed between corruption and human rights must be translating into practice, integrating international human rights law and anti-corruption. In this sense, the strategic link will be presented, and its added values will be outlined. To conclude, this section also aims to identify which actors could be responsible for putting into practice the strategic link.

4.1) The Added Values of the Human Rights Integration into the Anti-Corruption Agenda

According to the legal theory, the integration of human rights law and anti-corruption law represents a common effort that could be classified into the broad general recent trend of the humanization of international law.[240] By systemic integrating sub-fields of international law with human rights consideration, this tendency seeks to place the individual at the center of the stage, underlining how far international law had come since it was concerned only with the relations between sovereign states.[241] Thereby, the proposal to combat corruption through international human rights law lens represents another case of this so-called humanization of global governance.[242]

Despite the process of "human rightism" is well developed in other areas of international law, concerning corruption, it represents a very recent trend. As a matter of fact, for too long, the international human rights mechanism has paid little attention to the way in which corruption adversely affects the enjoyment of human rights. According to some scholars, it could be the consequence of the widespread conceptualization of corruption as cancer.[243] This understanding of the issue frames corruption as a lethal disease. Surprisingly, this perception is misleading and unhelpful to combat corruption. It merely reduces any efforts or attempt that aim to curb it, since it gives a sense of fatality.[244] Also, according to Paul Heywood, Professor of European Politics at the School of Politics and International Relations at University of Nottingham, comparing corruption

[240] See Meron, T. (2006). The Humanization of International Law. Leiden: Martinus Nijhoff Publishers.
[241] For example, the humanization of international law took place in armed conflict, the law of development, environmental law, international labor law, and refugees law. Peters, A. Corruption as a Violation of International Human Rights. p. 1278.
[242] Peters, A. The Risk and Opportunity of the Humanization of International Anti-Corruption Law: A Rejoinder to Kevin E. Davis and Franco Peirone. p. 4.
[243] Raoul Wallenberg Institute of Human Rights and Humanitarian Law. *The Nexus between Anti-Corruption and Human Rights*. p. 21.
[244] *Ibid*.

as pathology that is susceptible to treatment reflects a "broader series of generic and frankly unhelpful assumptions."[245] In this sense he invites to move beyond some of the standard clichés that characterized the field.[246] Nonetheless, as this section seeks to demonstrate, this perception of the fight against corruption is losing ground, and the integration of human rights with the anti-corruption could result to be a positive move.

Morally speaking, the "classical" added value of anti-corruption strategies that integrate human rights is empowerment.[247] If corruption is framed as a violation of human rights that harm public and individual interests, people will change their attitudes towards corruption. In this sense, human rights offer their moral, political, and social support in order to help to change public attitudes towards fighting corruption. It would result in the creation of a more significant social and political response, involving public officials, the judicial system, the business sector, and the media.[248] Thus, people and civil society organizations would become more aware concerning which rights can be affected by corruption. Consequently, this would empower people to claim their rights and to denounce corrupt practices in order to seek remedies in case of violation.[249] In practice, by getting back to the so-called "shades of corruption" explained in the first chapter of the present work, a human rights integration could vary the public opinion perspective, transforming all the corrupt practices in "black corruption."[250] In addition, as stated by Professor C Raj Kumar, the social, moral, and political reaction of a human rights violation would be more powerful than the merely criminal law violation.[251] Thus, framing corruption as a human rights violation would make corrupt practice more serious. Corruption would no longer be a threat to economic and political stability but also a menace for the enjoyment of human rights.

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[245] Heywood, P. (2017). *Why We Need to Kill the 'Corruption is Cancer' Analogy*. [online] CDA Collaborative Learning Projects. Available at: https://www.cdacollaborative.org/blog/need-kill-corruption-cancer-analogy/ [Accessed 8 Nov. 2019].
[246] *Ibid*.
[247] Peters, A. Corruption as a Violation of International Human Rights. p. 1276.
[248] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.268.
[249] Raoul Wallenberg Institute of Human Rights and Humanitarian Law. *The Nexus between Anti-Corruption and Human Rights*. p. 15.
[250] The theory of the "shades of corruption" has been developed by the American political scientist Arnold Heidenheimer. See Chapter I paragraph 1.3 of this present thesis.
[251] Kumar, C. (2011). *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance*. Oxford: Oxford University Press, p.4. Cited in: Figuereido, A. (2017). *Corruption and Human Rights. Beyond the Link*. AH Oisterwijk: Wolf Legal Publishers. p. 45.

Although this argument is often criticized for lack of empirical evidence[252], it would be misleading to do not consider the weight that international human rights law has accomplished in the current international system. As Figureido reminds in his study, regardless of the current existence of several human rights violations, it is impossible to deny the general positive effect of international human rights law.[253] By citing the theoretical model (also called "spiral model") developed by Thomas Rippe and Stephen Roppe, he argues that transnational human rights pressures and policies have made a very significant difference in bringing about improvements in human practice in several countries around the globe. Following this way of thinking, Rippe and Roppe stated that without the development of international human rights regimes and norms, all the human rights changes in the sense of improvements that they documented in their book would not have occurred.[254]

Secondly, a human rights approach to fighting corruption would allow considering the issue not only as the so-called victimless economic and political crime. Indeed, the integration of international human rights law would help to shift the focus from the sole economic and political consequences to the adverse effects corruption has on people. Consequently, there would be the possibility to pay more attention to the effects of corruption on people's rights, and hence, the status of the victims would notably improve.[255] More specifically, the criminal approach that conceptualizes corruption as the mere misappropriation of funds and resources allows taking into analysis the only effects that it will produce on the economic and political stability of a country. However, re-framing corruption and the tolerance of corruption by states as a violation of human rights allow also analyzing the deleterious effects it has on people and the state's ability to guarantee the respect of these rights.[256]

Therefore, taking into consideration the human rights consequences of corruption would highlight the discriminatory position and the risks corruption exposed the most

[252] Wouters, J., Ryngaert, C. and Cloots, A. The international legal framework against corruption: Achievements and challenges. p. 270.
[253] Figuereido, A. (2017). *Corruption and Human Rights. Beyond the Link*. AH Oisterwijk: Wolf Legal Publishers. p. 45.
[254] Risse, T. and Ropp, S. (1999). International human rights norms and domestic change: conclusions. In: T. Risse, S. Ropp and K. Sikkink, ed., *The Power of Human Rights: International Norms and Domestic Change*, 1st ed. Cambridge: Cambridge University Press, p.275.
[255] Peters, A. Corruption as a Violation of International Human Rights. p. 1276.
[256] Pearson, Z. An international Human rights approach to corruption. p. 46.

vulnerable groups of the society, such as women, children minorities, indigenous people, migrants, and poor. In this sense, it would be acknowledged that the most vulnerable and marginalized groups of the society deserve more protection. Indeed, the impact on marginalized groups is completely different from the one of all the individuals of society, because they are more exploited and less able to defend themselves. After the corrupt practices, they resulted in being more excluded and with an exacerbation of their pre-existing human rights problems.[257] A significative example is the case of Roma people. The UN Special Rapporteur on the sale of children, child prostitution and child pornography highlights how the enjoyment of human rights is affected by stigmatization and discrimination suffered by Roma. Unsurprisingly, a group of Roma people reporting cases of corruption in the health and education sectors have stated that: "As soon as they see our color, it is clear that we have to pay to get the service."[258]

Above all, not only focusing on the effects of corruption on people's rights is advantageous for corruption victims, but it is also a good practice for the general part of fighting corruption. Since combating the effects of corruption is also part of fighting corruption, focusing on the victim could result as relevant in order to address more effectively this issue.[259]

Thirdly, a human rights law re-framing of corruption would enhance the integration of some essential human rights principles into the anti-corruption strategies. This approach has been well developed by the International Council on Human Rights Policy (ICHRP).[260] According to their research, the principles of participation, transparency, and accountability could be constructive in strengthening the anti-corruption programs. More precisely, these principles have been already recognized by the anti-corruption movement. However, what is lacking is their application through a human rights approach, which, following their research, is resulted to be a potential.[261]

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[257] International Council on Human Rights Policy. (2009). *Corruption and Human Rights: Making the Connection*. Versoix: International Council on Human Rights Policy. [Online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222 [Accessed 17 Sep. 2019]. p. 6.

[258] Commission on Human Rights, Economic and Social Council. (2006). *Report submitted by the Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit.* UN DOC. E/CN.4/2006/67/Add.2

[259] Figuereido, A. *Corruption and Human Rights. Beyond the Link*. p. 50.

[260] It was an independent think tank that used to conduct applied research into problem and dilemmas concerning the field of human right.

[261] International Council on Human Rights Policy. (2010). *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. Versoix: International Council on Human Rights Policy. [Online] Available at:

Participation is considered a fundamental principle for both human rights and anti-corruption discourse. According to the anti-corruption theory, participation is a necessary condition for the decision-making process and the implementation of public policies. As a matter of fact, this principle is enshrined in Article 13 of UNCAC[262] and Article III of IACAC[263], which, shortly, highlights the state's obligation to promote the active participation of individuals and groups of the society. Furthermore, not only is participation necessary for the implementation of anti-corruption policies, but also it allows preventing abuse of power and detecting corruption.[264] Regrettably, despite its significance, according to the ICHRP, some participation processes are often *pro forma*, namely limited in scale and disrespectful to vulnerable groups and power structures.

In this sense, human rights practice could be overpowering. Due to the fact that participation is incapsulated in several human rights treaties[265] and it has been the content of several human rights courts' decisions[266], a human rights approach would make participation in anti-corruption more functioning, involving a more comprehensive range of people.[267] In effect, people, in order to participate effectively to the development of anti-corruption strategies, need to exercise their human rights. More specifically, they need to organize themselves freely, communicate their opinions frankly, and to inform themselves. In other words, people shall exercise their right to freedom of association, expression, and their right to information.[268] Therefore, enhancing participation as a human right more than as the mere instrument of the anti-corruption policy would have a qualitative improvement on the citizens' participation, which would also involve the

https://assets.publishing.service.gov.uk/media/57a08b34e5274a27b2000a0f/integrating-humrights_.pdf [Accessed 17 Sep. 2019]. p. 1.

[262] UNCAC, Art. 13: 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.

[263] IACAC, Art. III: [the States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen:]11. Mechanisms to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption.

[264] International Council on Human Rights Policy. *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. p. 2.

[265] Figuereido indicates: UDHR, Art. 21; ICCPR, Art. 25; CEDAW, Arts. 7 and 14 (2); ICERD, Art. 5.

[266] As relevant case law, Figureido provides *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia,* (Decision), Communication No. 760/1997, (Human Rights Committee, July 7, 1998).

[267] Figuereido, A. *Corruption and Human Rights. Beyond the Link*. p. 51.

[268] International Council on Human Rights Policy. *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. p. 5.

marginalized group. As a matter of fact, the analysis of the political consequences developed in the paragraph 4.1 of the first chapter of this present study highlights how citizens will not mobilize themselves against corruption when it is systemic in the political system. As a result, the political and democratic participation will automatically decrease, exacerbating the situation. Conversely, a human rights re-conceptualization of the anti-corruption could reactivate citizens' trust in the rule of law and increase the participation rate.

The second principle that should be re-conceptualized under the human rights framework in order to strength anti-corruption is transparency[269], namely the cornerstone of most anti-corruption strategies. As a matter of fact, the principle of transparency is incapsulated into the UNCAC. According to Article 10, each state party shall take necessary measures in order to enhance transparency in its public administration.[270]

Surprisingly, the term "transparency" is not literally written in any international human rights treaties. However, it can be extracted from the concept of freedom of expression.[271] It is the case of the right to have access to public information, which became to be the most striking advance in the norms of freedom of expression. As a result, democracies realized that transparency affords government and public administration legitimacy in the eyes of the public world. Thus, through the implementation of specific legislation, governments are also committed to guaranteeing the called "right to know."[272]

Under the case *Claude Reyes and other v Chile*, the Inter-American Court of Human Rights became the first international court to claim that any government must ensure the right to access information arising from the guarantee of freedom of expression.[273] More precisely, the Court held that "the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all

[269] Despite a common agreement on its definition is still lacking, transparency can be described as the degree to which governments, companies, organizations, and individuals are open in the clear disclose information, rules, plans, processes, and actions. (Transparency International. (2009). *The Anti-Corruption Plain Language Guide.* Berlin: Transparency International. [Online] Available at: https://www.transparency.org/whatwedo/publication/the_anti_corruption_plain_language_guide. [Accessed 25 Jun. 2019]. p. 44.)
[270] UNCAC, Art. 10.
[271] International Council on Human Rights Policy. *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. p. 16.
[272] Boyle, K. and Shah, S. (2013). Though, Expression, Association, and Assembly. In: D. Moeckli, S. Shah and S. Sivakumaran, ed., *International Human Rights Law*, 2nd ed. Oxford: Oxford University Press, pp.217-237. p. 228.
[273] *Ibid*.

persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately."[274] Gradually, transparency and the right to access to public information became essential human rights guaranteed under international law.

As the ICHRP claims in its research, integrating the human rights expertise into anti-corruption programs can help to strengthen its effectiveness. Firstly, human rights principles and norms can provide key mechanism for the enforcement of legislative and domestic laws. In this sense, human rights can also assist in enacting access to information laws in countries where they still not exist.[275] Secondly, the principles of human rights could raise public demand for information. Since those in power have little motivation to disclose sensitive information, some pressure from below, especially from the victims of corruption, can be necessary for a change.[276] Through the application of human rights practice, citizens would become more aware of their rights and how to exercise them. Gradually, they can apply the link between corruption and human rights into their daily lives and comprehend what the real cost of corruption is.[277] Finally, human rights principles can provide better access to vulnerable and disadvantaged groups. For example, it could imply the translation of more information into indigenous and minority languages.[278]

Figueiredo provides an excellent example of the practice of Kenya National Commission on Human Rights (KNCHR) with the projects *Living Large* and *Unjust Enrichment*. In short, the former was a series of publication which quantified the cost of the luxurious vehicles of civil servants, while the latter consisted in a series of report indicating the public figures who profited from free public land allocations. Through these publications, the KNCHR was able to translate the corruption scandals into concepts that citizens could easily understand, and that increase public awareness concerning corruption and human rights.[279]

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[274] *Claude-Reyes et al. v. Chile*, Case No. 151, (IACtHR, Sept. 19, 2006). para. 86.
[275] International Council on Human Rights Policy. *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. p. 20.
[276] *Ibid.*
[277] Kiai, Maina. (2007). The Role of National Human Rights Institutions in Combating Corruption. *Review Meeting Corruption and Human Rights (Geneva, 28-29 July 2007).* [Online] Available at: http://www.ichrp.org/files/papers/133/131_-_Maina_Kiai_-_2007.pdf. [Accessed 10 Nov. 2019]. p. 3.
[278] International Council on Human Rights Policy. *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. p. 21.
[279] Figuereido, A. *Corruption and Human Rights. Beyond the Link*. p. 52.

Finally, the last human rights principle that could gain advantages from a re-conceptualization under the human rights lens is accountability. In political science, accountability could be understood as the relationship between those that are entrusted with and wield power and those affected by their actions. Due to the nature of this relationship, the power-holders must follow the law and the public interests, rendering account for their action to those who conceded them the power.[280] Applying accountability to corruption means that individuals and organizations are held responsible for executing their powers properly. In this sense, corruption, by way of bribing, undermines these mechanisms leaving those with limited access to power unprotected. [281]

Conversely, under the human rights framework, the notion of accountability is developed differently. It rests on the possibility for individuals to seek recourse if their rights are denied. In this sense, it follows that states have a positive obligation to protect the rights of individuals and provide recourse and justice if rights are violated. Thus, states could be responsible for any acts or omissions concerning this duty.[282] Accordingly, applying human rights practice would deepen the understanding of the notion of accountability. As it has been already seen, human rights can emphasize the role of civil society in monitoring the behavior of the state. This would be innovative because the controlling of government behavior would also come from below, namely by the victims of corruption.[283] This approach is also known as social accountability. In brief, it seeks to build accountability through civic engagement. This requires the directly or indirectly participation of the ordinary citizens and the civil society in exacting accountability.[284] Thus, a human right approach would help to identify who is entitled to a right and who must respect, protect, and fulfill these rights. Consequently, the civic engagement would improve, and the official public practice would be more visible and accountable to their constituencies.[285]

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[280] International Council on Human Rights Policy. *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. p. 26.
[281] *Ibid*. p. 27.
[282] *Ibid.* p. 26.
[283] *Ibid*.
[284] Malena, C. Forster, R. and Singh, J. (2004). Social Accountability: An Introduction to the Concept and Emerging Practice. *Social Development Papers Participation and Civic Engagement.* [Online] Available at: http://documents.worldbank.org/curated/en/327691468779445304/pdf/310420PAPER0So1ity0SDP0Civic0no1076.pdf [Accessed 10 Nov. 2019]. p. 2.
[285] International Council on Human Rights Policy. *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*. pp. 38-39.

Finally, the last added value that a conceptualization of anti-corruption under a human right framework can provide is the possibility to enhance the protection of anti-corruption advocates. Practically, integrating human rights into the anti-corruption programs would allow to consider who denounce cases of corruption as human rights defenders. Since anti-corruption treaties do not have specific provisions to protect who is facing threats because of the denunciation of corruption practices, the application of the human rights law can be useful to protect the whistleblower.

According to some case-law cited in the previous chapter, those who campaign against corruption and call for transparent government often themselves become victims of human rights violations. Besides the already cited jurisprudence, another more recent example is the case of *Magnitskiy and Others v. Russia.*[286] Sergei Magnitisky was a Moscow tax auditor that uncovered a fraud of $230 million involving public officials. After having reported the fraud by Russian tax officials, those same policemen opened a spurious investigation against him. For that reason, he was detained. However, due to ill-treatment and terrible conditions, he died in custody in 2009. On 27 August 2019, the ECtHR found unanimously that Russia had committed several violations of the whistleblower Sergei Magnitisky's human rights.[287]

4.2) The New Actors Involved in the Anti-Corruption Agenda

The added values explained above could be put into practice by new anti-corruption actors, namely UN human rights actors, regional human rights courts, domestic courts, and National Human Rights Institution (NHRI). As a consequence, at the same time, a human rights framework of corruption would indirectly allow increasing the number of actors involved in the fight against this issue.

At the UN level, as it has been demonstrated in the previous section, corruption is now an official concern for the UN human rights actors. However, UN human rights mechanism can further improve its strategy against corruption through the Treaty Bodies and the Human Rights Council activities.

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[286] *Magnitskiy And Others V. Russia*, Applications nos. 32631/09 and 53799/12, (ECtHR, Aug. 27, 2019).

[287] Justiceinitiative.org. (2019). *Magnitsky v. Russia*. [online] Available at: https://www.justiceinitiative.org/litigation/magnitsky-v-russia [Accessed 10 Nov. 2019].; BBC News. (2019). *Dead Russian lawyer wins 10-year rights battle*. [online] Available at: https://www.bbc.com/news/world-europe-49481471 [Accessed 10 Nov. 2019].

Concerning the Treaty Bodies practice, each of them examines the progress made by any states in the implementation of rights and guarantees provided in the respective treaty. For that reason, they can be understood as additional actors to address corruption. In reporting procedures, they can provide clear and authoritative guidance on addressing corruption under a human rights focus.[288] Within this framework, Concluding Observations and General Comments can provide practical insights. On the one hand, Concluding Observation could represent the first way to develop a human right approach to corruption. Since they are based on the responses of states, the Treaty Bodies would have the chance to review the states' party anti-corruption measure concerning the rights established in each treaty. Thereby, they can develop a basis for the interpretation of how corrupt acts interfere with states' human rights obligations.[289] On the other hand, Treaty Bodies can rely on the fact that General Comments carry more significance. Hence, a joint General Recommendation on human rights and corruption together could be developed.[290]

Concerning the Human Rights Council activity, corruption and human rights violations could be addressed under the Universal Periodic Review (UPR) and the special procedures. Regarding the former instrument, since it basically is an inter-state mechanism in which states make comments on the human rights situation of other states, UPR can be used to increase states' cooperation and exchange of experience of how to address the issue.[291] On the other hand, special procedures can be used to develop a comprehensive approach to fight corruption using human rights law. Specifically, special procedures can develop recommendations with good practices on how to apply human rights. One close example is the Report of the Special Rapporteur on the Independence of Judges and Lawyers.[292]

Furthermore, the linkage between corruption and human rights could be put into practice by regional human rights courts. For example, the ECtHR, the IACtHR, and the African Commission on Human Rights could examine complaints from an individual, claiming that a corrupt practice constitutes a violation of their rights under the applicable

[288] Raoul Wallenberg Institute of Human Rights and Humanitarian Law. *The Nexus between Anti-Corruption and Human Rights*. p. 21.
[289] *Ibid*. p. 22.
[290] *Ibid*.
[291] Figuereido, A. *Corruption and Human Rights. Beyond the Link*. p. 70.
[292] *Ibid*.

regional instruments.[293] In this sense, the intervention of international human rights tribunals could provide substantives remedies to corruption victims. However, as it has been analyzed in the paragraph concerning the causation, the problem lies in the fact that it could be difficult to demonstrate the causal link between the corrupt practices and the human rights violation. Despite this difficulty and the fact that up to know there are not many international human rights cases dealing with corruption and human rights issues, as also demonstrated by the already cited case *SERAP v. Nigeria*, this must not prevent individuals addressing corruption cases before human rights courts. Still, as stated by Figueiredo, the growth of academic researches on the topic of corruption and human rights will undoubtedly help to increase and make clear the legal arguments for dealing with corrupt cases before regional human rights court. Therefore, with more cases being brought before those courts, a stronger jurisprudence will emerge. It will help to lead to public policies in the fight against corruption.[294]

Since human rights are recognized in the domestic constitutions, what explained above could also be applied at the national level. Thus, in many countries, domestic courts could result in being new actors in the fight against corruption under a human rights framework. According to Hatchard, viewing the combating of corruption from a human rights perspective and tackling it as a constitutional issue has several advantages. For example, since the government cannot prevent the case from going to trial, it can reduce the change of political interference. Moreover, the involvement of constitutional rights allows the case to be judged by the Constitutional Court, which should be less inclined to unethical judicial behavior. Finally, the admissibility of evidence will be more relaxed than criminal judgments and the persons bringing the case usually receive more assistance in constitutional cases.[295]

Besides the landmark cases cited in the previous chapter from the Constitutional Court of South Africa, another example of constitutional litigation regarding corruption, both cited by Boersma and Figuereido, is the case *Vineet Narain v. Union of India* from the Supreme Court of India. In brief, after the inaction of the Central Bureau of Investigation (CBI), the journalist Narain and three other persons filed a petition claiming that the CBI should have proceeded with a corruption case involving high-ranking

[293] Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p.270.
[294] Figuereido, A. *Corruption and Human Rights. Beyond the Link*. p. 76.
[295] Hatchard, J. (2010). Adopting a Human Rights Approach towards Combating Corruption. p. 18.

politicians and bureaucrats. Finally, the Supreme Court held that the CBI should continue with the investigation. This resulted in 34 charges against 54 persons involved.[296] More importantly, this case also created public awareness regarding the issue of corruption that is essential for the sustainable realization of economic and social rights.[297] Thus, this inspired people to denounce corrupt practices through the process of public interest litigation.[298]

Finally, the last actors that could put into practice the fight against corruption under a human rights framework are the National Human Rights Institutions (NHRI). According to Sepulveda Carmona, the NHRIs, which could be briefly defined as state bodies with constitutional and/or legislative mandate to protect ad promote human rights, are in a unique position to strengthen the impact of anti-corruption and to enhance the promotion and protection of human rights. Indeed, although the majority around the world do not have an express anti-corruption mandate, some NHRIs have the dual mandate of human rights and anti-corruption work.[299] Thus, NHRIs should be reinforced and jointed in one institution because they have great potential in the fight against corruption by providing additional accountability channels.[300]

Accordingly, NHRIs should work more on the promotion of transparency and access to information. In this sense, through their competences concerning the review of existing and proposed legislation, they can promote human rights principles or make these provisions more accessible. Progressively, they can implement a budget analysis in order to understand how social budgets are spent and then publish the results. One practical example is the already cited *Living Large* projects, which explains how the purchase of luxury cars affect the living condition of the rest of the population.[301]

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[296] *Vineet Narain & Others vs Union Of India & Another*, SCC 226, (Supreme Court, 18 Dec. 1997).; Figuereido, A. *Corruption and Human Rights. Beyond the Link*. p. 76.; Boersma, M. *Corruption: a violation of human rights and a crime under international law*. p. 271.

[297] ESCR-Net. (n.d.). *Vineet Narain & Others vs. Union of India & Another, 1 SCC 226 | ESCR-Net*. [online] Available at: https://www.escr-net.org/caselaw/2015/vineet-narain-others-vs-union-india-another-1-scc-226 [Accessed 11 Nov. 2019].

[298] *Ibid*.

[299] For example, the India National Human Rights Commission, the National Human Rights Commission of Nigeria, and the Commission on Human Rights and Administrative Justice of Ghana have a dual mandate.

[300] Sepúlveda Carmona, M. (2017). The Role of National Human Rights Institutions in the Fights Against Corruption. Liber Amicorum – In honour of a Modern Renaissance Man, His Excellency Gudmundur Eiriksson, O.P. Jindal Global University, Universal Law Publishing. pp. 415-429.

[301] *Ibid*.

To conclude, this section aims to demonstrate the fact that there is a need to improve the effectiveness of anti-corruption methods. As a matter of fact, it has been shown that the sole criminal approach is not entirely functioning in curbing corruption. Due to the ambiguous essence of the issue, the mere criminalization of corrupt practices and the imposition of effective, proportionate, and dissuasive sanctions are only partially functioning. Thereby, there is the necessity to integrate the criminal approach with other additional measures. For that reason, this concluding paragraph proposes to leave behind the conceptualization of corruption as a cancer and to translate into practice the conceptual and substantive link of corruption and human rights developed in the previous chapter. This allows to develop another level of the conceptualization of corruption through human rights lens, namely the strategic link.

As a result, it has been demonstrated in which way the integration of human rights into anti-corruption programs could strengthen the currently fight against corruption. In this sense, the strategic link consists in the application to anti-corruption of the principles, standards, and mechanisms for the protection of human rights. Therefore, people would be empowered as right-holders, would be recognized as the primary victims of corrupt practice, contrary to the currently common practice, and hence, they would be put at the center of all anti-corruption efforts. It also comprehends who denounce corruption practices. In this case, whistleblower would be considered as human rights defenders. Furthermore, the anti-corruption legal framework would be enriched by the human rights expertise concerning the application of the principles of participation, transparency, and accountability, which resulted in being essential both for human rights and anti-corruption discourse.

Progressively, this section identified which actors could be entitled as the responsible for the fight against corruption under a human right approach. As a result, it has been presented in which way Treaty Bodies, Human Rights Council, international human rights courts, domestic constitutional courts, and NHRIS could translating into practice the strategic link. Since human rights are considered as universally imposed upon states, a human rights approach could also produce harmony and unify the international approach against the transnational issue of corruption.

Finally, applying human rights to anti-corruption, in order to develop the strategic link, provides a new international legal framework, which permits to clarify and to monitor the right entitlements of the rights-holders and the responsibility of the duty-bearers. In this sense, as it has been demonstrated in the second chapter, if corrupt practices impede states to guarantee the total enjoyment of human rights, the international human rights law should take part in the normative standards. Besides modelling the legal aspect of the definition of this issue, it aims at reducing corruption, and, at the same time, with the help of the human rights monitoring mechanisms, it improves the implementation rate of the anti-corruption legislation. Progressively, under specific conditions and regardless of its difficulties, corruption could be conceptualized as the abuse of entrusted power for private gain, which is also breaching international human rights law. As a consequence, since the state is the entity responsible for human rights, without precluding the employment of the criminal approach, the human rights perspective would also allow creating the state's responsibility for corrupt practices under the international human rights law.

CONCLUSIONS

Nowadays, corruption scandals are still producing adverse effects in every corner of the globe. The international community has now understood that this human challenge requires a multilateral response. The International Anti-Corruption Day, which occurs on December 9th, and the current well-developed international legal framework against corruption prove this sense of awareness. However, corruption still threatens our contemporary society. The law enforcement of the current anti-corruption instruments resulted to be fragile and must be retaken into consideration. Without criticizing the criminal law approach *per se*, the present study has tried to go further to the common repression strategies adopted to cope with corruption.

Despite international anti-corruption system thrived during the 1990s, the use of international human rights law has started to be analyzed very recently. Therefore, the main focus of this thesis has been the study of corruption and its implication with the human rights law discourse. It aims at exploring new ways to fighting the global societal problem of corruption. By analyzing this complex issue and examining the current anti-corruption instruments, this dissertation has explored a threefold linkage between corruption and human rights. Demonstrating how corruption and human rights are conceptually, substantially, and strategically interlinked, this final thesis has investigated the added values that a human rights law conceptualization of corruption provides to the current international anti-corruption agenda. In other words, it has tried to show whether making an explicit threefold linkage with human rights has added value when developing strategies to fight corruption.

Corruption is an age-old problem that all human societies have experimented and condemned. Paradoxically, it still represents a "hot topic" of the current affairs. Corruption's hidden essence makes it a complex societal phenomenon difficult to define it mainly because of three reasons. First, its human nature is without any limits. Therefore, corrupt practices arrive to include a wide range of human activities under the same broad concept. Second, corruption is heavily influenced by the cultural interpretation that could distort its real comprehension. Third, it has been the object of academic research from several disciplines, such as philosophy, sociology, law, political science, and economics, which developed an extensive literature. For these reasons, by analyzing the most

influential approach to the definition of corruption, it resulted to be impossible to provide a single comprehensive and universally accepted definition of corruption.

Although there is no consensus among scholars, due to methodological reasons, it was imperative to develop a useful working definition and a brief understanding of corruption. Aiming at linking corruption with human rights, the legal approach resulted to be the most effective. As Julio Bacio Terracino theorized, the term corruption can be split into two parts: the descriptive core and the normative element. This approach allows delimiting the descriptive core of corruption to a specified set of normative frameworks. With the purposes to determine whether corrupt practices can constitute a violation of human rights, the normative element must be composed of international law and international human rights law. Moreover, this approach could provide a sort of cohesion among all the domestic legal systems.

Dealing with corruption and human rights requires a deep methodological analysis in order to grasp corruption real essence. Thus, it must be classified into several types. Focusing on where it can occur, it is possible to talk about public and private corruption. Dealing with its intensity, corruption can be further divided into grand and petty. Progressively, corruption must be also categorized in base of who initiates, and hence, benefit the most from the corruption process, namely the officeholder and the favor seeker. As it has been demonstrated, conceptually speaking, corruption *per se* can constitute a human rights violation. However, since the state is solely responsible for any violation of human rights protected by international law, in order to develop the substantive link, the present study has considered public and extractive corruption.

From a legal point of view, corruption has been categorized in a different way. Indeed, a real legal definition of corruption is still lacking, and its theoretical legal understanding derives from a mere process of classification. More precisely, corruption in a legal language gathers different criminal activities that correspond its descriptive core (the abuse of entrusted power for private gain). The ordinary criminal acts related to corruption are bribery, embezzlement, illicit enrichment, trading in influence, and abuse of power. Despite the fact that corruption involves several criminal activities and has different shades, this process of categorization into different types allows dismantling its vagueness. In other words, it makes professionals more powerful in tackling it effectively. The more it has been possible to get relevant analysis concerning corruption, the more

accessible it has been the understanding of corruption causes and consequences. Concerning the factors leading to corruption, its determinants must not be understood as isolated factors directly linked to corruption. On the contrary, corruption to thrive requires a combination of several aspects, which interact and overlap each other. In this sense, corruption can be caused by political, economic, and cultural factors. As a result, it affects in a different way the political, economic, and social development of every state.

Although history has witnessed some revisionist schools of thought that has defended the positive values of corruption, nowadays, its adverse consequences are universally recognized. Indeed, the need to develop efforts and instruments aimed at combating corruption rest on the premise that corruption is destructive. While it could be beneficial for some of the parts involved in the corruption relationship, corruption *per se* is harmful and implies a departure from the law. It jeopardizes, thwarts, and halts the development of society, damaging individuals, groups, and organizations. However, corruption is still considered as victimless economic and political-legal transgression and institutional decencies. This final thesis has highlighted how corruption is more than just misappropriation of money or abuse of power. It has also underlined how it is deleterious on people.

Concerning human rights, they have become firmly enmeshed within international politics and international law. Nowadays, they are universally imposed upon the states that actively participate in the contemporary international law regime. Even though history appeared to be "not completed" and the representative democracy system is facing a global crisis, human rights are still at the central stage of the contemporary liberal narrative.[1] As a consequence, the human rights discourse became a central matter of the international legal concern, becoming a significant branch of international law.

Herein lies the question concerning human rights and corruption. If corruption produces a deleterious effect on the rights of people and if the fight against corruption has been globalized, international human rights law should be integrated within the international anti-corruption instruments, dominated by international criminal law. Thus, the study claims that, currently, corruption is regulated by several law branches and that there is a wide range of treaties applicable to various corrupt practices. However, seldom have human rights and corruption been addressed as connected domains of knowledge in

[1] It is referring to the protection of human rights at domestic level.

academic and practical work. Thus, the human rights law discourse, as an integral part of international law, needs to be incorporated into the international fight against corruption.

Before supporting the idea that re-framing corruption under international human rights law could strengthen the international fight against corruption, this present work shows how corruption and human rights praise a threshold connection. Firstly, they are conceptually linked. Corruption simply represents the negation of the idea of human right because corrupt practices alter the correct establishment of human rights. Giving some people advantages that others do not have, they create distinctions. Thus, corruption perpetuates discrimination, and hence, the principle of equality and non-discrimination, which is considered as the foundation principle of human rights law and therefore essential for the effective protection of the rest of human rights, is undermined. They also share the same roots and environment. Combating corruption means establishing favorable conditions for the realization of human rights. As a matter of fact, denouncing corruption supposes the exercise of the right to freedom of expression. Thus, the concept of human rights also is by itself an essential tool for the fight against corruption. Corruption and human rights are two sides of the same coin. Moreover, corruption circumvents the respect of the rule of law, a necessary condition for the establishment of a human rights law. Thus, corruption should be recognized as a human rights issue because it can be the cause of a human rights violation. Therefore, re-framing corruption under the human rights law lens would allow going further the mere conceptualization of corruption as a victimless economic crime, advocating for the human rights costs of corruption and not only for the political and economic ones.

Secondly, corruption and human rights are substantially linked because a corrupt practice may involve international legal responsibilities of the state for having breached a human right obligation. Without arguing for the recognition of a separate new human right to a corrupt-free society, the substantive link demonstrates how various forms of corruption may violate directly or indirectly the human rights contained in the existing international human rights treaties. Analyzing the obligations deriving from human rights treaties, it is possible to understand how the fight against corruption finds its legal sources in the international human rights law. Thus, states also have a human right obligation to tackle corruption. Progressively, going further the merely one-way *but-for* model, it is possible to consider corruption as a casual factor in the violation of human rights. Finally,

according to the general rules of attribution, it became clear in which way a breach of human rights can be attributed to corruption.

The substantive link has been also demonstrated by connecting corruption with the right to a fair trial and an effective remedy. The case of *Fornerón and Daughter v. Argentina* shows in which way a context of systemic judicial corruption jeopardizes the enjoyment of determined human rights. It indirectly indicates how corrupt acts have violated the rights of the victims. In these specific events, the non-independence of the judiciary system and the alleged exchange of money created a vicious circle of human rights violations.

The previous levels of the connection between corruption and human rights are only partially recognized within the current international legal framework against corruption. In fact, even though the organizations analyzed in this study started to demonstrate their commitment in trying to develop a human rights strategy to cope with the issue, a human rights approach to tackle corruption is still lacking. Rarely is corruption addressed in a comprehensive and systematic manner. There have been some early commitments that prove that there is a common understanding of the strategical importance of the interconnection of the two discourses. However, political acceptance is not enough. It is not an indicator of a practical strategy. For example, the causal link or the rules of attribution, which are fundamental to delineate in which way a corrupt act may violate a recognized human right, are not analyzed in detail. What is missing are approaches or plans of actions that can put into practice the conceptual and substantive link developed in this study. As subjects of international law, international organizations should have started to critically consider the conceptual and substantial relationship between corruption and human rights. More precisely, they should have taken into account the strategic link of fighting corruption with a human rights approach. Certainly, criminal law with the creation of a wide variety of offenses and sanctions provides important and essential instruments to the fight against corruption. However, to curb such a human activity it is also important to have other mechanisms in place that will work effectively alongside criminal law, and that must take into consideration social standards and realities.

Despite there is no shortage of attention to the issue of corruption, there is still the need to work on the effectiveness of its anti-corruption methods. Re-framing corruption

under the international human rights law lens can reduce the gap of the current anti-corruption legal framework. Herein lies the third type of the connection. The human rights integration could be strategic. The application to anti-corruption of the principles, standards, and mechanisms for the protection of human rights would empower people as right-holders. It would change the public attitude towards corruption creating a common sense of awareness concerning which rights can be affected by corruption. Citizens would be more interested in claiming their rights denouncing corruption because they, recognized as the primary victims of corrupt practices, will be placed at the center stage of all anti-corruption efforts. In other words, the status of the victims would notably improve. The anti-corruption legal framework would be also enriched by the human rights expertise concerning the application of the principles of participation, transparency, and accountability, which resulted to be essential both for human rights and anti-corruption discourse. Not only are corruption obligations established under criminal law, but there is also an anti-corruption obligation coming from international human rights law. Furthermore, the recognition of the human rights obligation would strengthen the commitment of the states in their fight against corruption. This effort would be the mere representation of the recent trend of the humanization of international law and of the global governance, namely placing individuals at the center of the stage. As a matter of fact, it could be put into practice by existing human rights actors, such as Treaty Bodies, Human Rights Council, international human rights courts, domestic courts, and the National Human Rights Institutions (NHRI). Therefore, the human rights law framework of corruption would also allow increasing the number of actors involved in the fight against this issue. Indeed, they would be responsible for translating into practice the strategic link.

Developing a conceptual, substantive, and strategic link means to apply human rights to anti-corruption. It would provide a new international legal framework that aims to clarify and to monitor the right entitlements of the rights-holders and the responsibility of the duty-bearers. If corrupt practices impede states to guarantee the total enjoyment of human rights, the international human rights law should take part in the normative standards. Progressively, under specific conditions, corruption could be conceptualized as the abuse of entrusted power for private gain, which is also breaching international human rights law. As a consequence, since the state is the entity responsible for human

rights, without precluding the employment of the criminal approach, the human rights perspective would also allow the creation of the state's responsibility for corrupt practices under the existing international human rights law.

To conclude, this thesis represents rights-based advocacy against corruption. It is by no means the end of the discussion concerning human rights and corruption. Certainly, arguing for a human rights conceptualization of corruption requires further reflections on the topic. Establishing the link between corruption and human rights represents a thematic challenge to the current anti-corruption framework. This present study argues that the link between corruption, anti-corruption, and human rights is threefold. While the negative effects of corruption on human rights are widely recognized and appreciated, the potential of the human rights approach to the fight against corruption is less often examined and sometimes criticized. Since the current research on corruption tends to focus only on the political and economic consequence, re-framing corruption under international human rights law allow also to consider the effects that this issue has on ordinary people. Therefore, recognizing this multidimensional link between human rights and corruption enables us to complete the theoretical research on the issue. Even though this final thesis has tried to summarize the link between corruption and human rights and its added values, there is still the need for further research on this matter. Future research on this subject should deeply focus on simplifying the causal link, which is very difficult to demonstrate. As a result, once the causation will be easier to identify, the value of the strategic link could increase, involving a wide range of new actors. This is the case of the work of the international human rights courts, which are still struggling to demonstrate the exact link between the two discourses. Therefore, the jurisprudence can increase, and hence, support the human rights approach to the fight against corruption.

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