THE LIMITATIONS OF A HUMAN RIGHTS APPROACH TO CORRUPTION

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Abstract International human rights law may serve as a language through which lawyers and others describe the harms resulting from corruption, but this approach has significant limitations as a legal framework. Despite a growing emphasis among scholars and practitioners on a human rights approach to the problem of corruption, this body of law does not provide a strong basis for addressing such conduct. International human rights treaties make no mention of corruption, and human rights treaty bodies have not brought conceptual clarity to the question of how corruption violates or undermines human rights. Given that human rights law binds States alone, it is also ill-suited to a phenomenon that typically occurs at the intersection of the public and private sectors. Even as a language for describing how corruption harms social and economic rights, human rights law has its limitations, some of which come into relief when compared with the field of development economics.

Keywords: bribery, development economics, embezzlement, human rights, non-State actors.

I. INTRODUCTION

In early 2003 Wal-Mart de Mexico had its sights set on building a medium-sized supermarket in an alfalfa field on the edge of San Juan Teotihuacán, a Mexican town of 50,000 people.[1] The site is barely one mile from the town's ancient pyramids and temple complex, a major tourist attraction that lies just 30 miles north east of Mexico City. In ancient times Teotihuacán was a metropolis of between 100,000 and 200,000 people, called the 'city of the gods' by the Aztecs.[2] This ancient city now lies buried under farm fields and

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[1] D Barstow and A Zanic von Bertrab, 'How Wal-Mart Used Payoffs to Get Its Way in Mexico' *The New York Times* (San Juan de Teotihuacán, 17 December 2012). See also D Barstow, 'Wal-Mart Hushed up a Vast Mexican Bribery Case' *The New York Times* (Mexico City, 21 April 2012); JC McKinley, 'No, the Conquistadors Are Not Back. It's Just Wal-Mart' *The New York Times* (San Juan de Teotihuacán, 28 September 2004).

[2] The Metropolitan Museum of Art, 'Heilbrunn Timeline of Art History: Teotihuacan' <http://www.metmuseum.org/toah/hd/teot/hd_teot.htm>.

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small pueblos, but the pyramids and the temple complex still stand as a central part of Mexico's cultural heritage and is one of the most impressive archaeological sites in the world.[3] In order to protect this legacy and maintain Teotihuacán as an attractive tourist destination, the town began working on a new zoning plan in 2001. In August 2003, the municipality voted on a new zoning map that only allowed the construction of housing in the alfalfa field identified by Wal-Mart de Mexico as the location of its Bodega Aurrera.

Before the zoning plan became law through publication in the government's Gazette, however, Wal-Mart de Mexico allegedly paid a US$52,000 bribe to the director of the urban planning office in order to ensure that the published version of the new zoning map included an altered zoning boundary to allow for a commercial centre in this location. The director of the urban planning office also assisted Wal-Mart de Mexico in obtaining the necessary zoning certificate from a separate Office of Urban Operations. Wal-Mart de Mexico additionally allegedly paid a US$114,000 bribe to the mayor of Teotihuacán, who then pushed the municipal council in June 2004 to allow Wal-Mart de Mexico to begin construction on Bodega Aurrera without all of the required permits, so that it could open in time for Christmas shopping. Another US $25,000 bribe allegedly went to traffic regulators for a permit to build the supermarket at the entrance to the town in an area that already suffered from traffic congestion to such an extent that the town had planned to build a bypass road through the very same alfalfa field.

Finally, Wal-Mart de Mexico allegedly paid a total of US$81,000 in bribes to senior officials at the National Institute of Anthropology and History (INAH), whose approval was required for building anything inside the protected archaeological zone, which included the site for Bodega Aurrera. INAH required excavations to be done with picks and shovels to prevent damage to ancient ruins, and the discovery of significant remains could delay or scuttle building projects. In the case of Wal-Mart de Mexico, INAH issued a construction permit without conducting the necessary survey and without verifying that construction would not destroy valuable archaeological remains, and construction of the supermarket went ahead with bulldozers and backhoes. Protests against the supermarket grew when INAH's archaeologists uncovered evidence that Wal-Mart was indeed building on ancient ruins, as they found the remains of a wall, clay pottery, an altar, a plaza, and nine graves. Wal-Mart de Mexico nevertheless opened in time for Christmas shopping in 2004. Investigative journalism by *The New York Times* led to the publication of articles in 2012 which revealed the alleged corruption linked to Bodega Aurrera in Teotihuacán, as well as alleged bribery by Wal-Mart de Mexico on a vast scale throughout Mexico. These revelations prompted investigations by the US Department of Justice and the US Securities and

[3] ibid.

Exchange Commission into possible violations of the Foreign Corrupt Practices Act.

This story points to violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by Mexico, and in particular a violation of the obligation on States Parties to take steps to conserve culture so as to achieve the full realization of the right of everyone to take part in cultural life.[4] By failing to prevent, and in fact permitting, Wal-Mart de Mexico to bulldoze ancient remains in Teotihuacán, Mexico violated its obligation to conserve the cultural heritage of its people. Even though international human rights treaties such as the ICESCR make no mention of bribery or corruption in general, it may still be argued that passive corruption on the part of Mexican public officials led to a violation of the right to culture. An international human rights approach to the corruption surrounding Bodega Aurrera thus focuses almost entirely on the State of Mexico rather than Wal-Mart de Mexico, which was hardly 'the reluctant victim of a corrupt culture', but instead is said to have 'insisted on bribes as the cost of doing business'.[5] Because international human rights law binds only States, non-State actors such as Wal-Mart de Mexico remain outside of the direct reach of treaties such as the ICESCR. While Mexican officials, as the alleged passive bribers, had an obligation to conserve Mexico's cultural heritage (in part by regulating the conduct of private actors), Wal-Mart de Mexico, as the alleged active briber, was bound only under domestic anti-bribery laws in both Mexico and the United States. International human rights law fails to capture not only the conduct of private actors, but also the other harms that Wal-Mart de Mexico caused in Teotihuacán, including continued or worsened traffic congestion and the elimination of economic competition, in the form of local merchants at the market in the centre of town.[6]

The case of Wal-Mart de Mexico's Bodega Aurrera reveals some of the limitations of international human rights law as a language for describing the harms resulting from corruption and for dealing with such conduct. Although corrupt conduct undoubtedly contributes to human rights violations in various ways, international human rights treaties make no direct mention of corruption, and the human rights treaty bodies have done little to bring conceptual clarity to the question of how, exactly, corruption violates human rights. Thus, as a language for describing the harms caused by corruption, international human rights law generally lacks explicit legal provisions or helpful guidance by authoritative bodies. Moreover, the State-centred character of human rights law minimizes its utility with respect to a phenomenon that often takes place at the intersection of the public and private sectors. Although controversy persists about the extent to which this

[4] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 15(2).

[5] Barstow and Zanic von Bertrab (n 1).

[6] ibid.

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body of law may reach the conduct of non-State actors, the reality remains that private actors are not bound by the human rights obligations that constrain States. Finally, a review of the economics literature on the subject of corruption reveals that the link between corruption and social and economic welfare is more complex and varied than a human rights perspective would allow.

This article argues that international human rights law serves as a language through which lawyers and others may describe the harms resulting from corruption, but this approach has significant limitations, some of which come into relief when compared with the field of economics. Because legal reform typically forms part of any robust anti-corruption effort, lawyers benefit from having a language for articulating why corruption is harmful. Yet, in the search for a legal framework to address such conduct, human rights law does not represent the way forward. Since the late 1990s, however, a growing number of legal scholars has pressed for a human rights approach to corruption despite these limitations—some of which they have acknowledged, to varying degrees. Some scholars have grounded their arguments in existing international human rights treaties, while others have argued for a new human right to a corruption-free society.[7] Some have even claimed that corruption could qualify as a crime against humanity.[8]

Amidst this growing body of literature, there have been very few dissenting voices by scholars questioning the efficacy of a human rights approach to the problem of corruption.[9] This approach to the subject of corruption merits a response. This article begins by briefly surveying the existing scholarly literature on this subject (Part II), before explaining that human rights law addresses corruption only indirectly (Part III) and does not reach the conduct of the private actors who engage in bribery or other corrupt conduct (Part IV). The final section briefly explores the economics literature on corruption and explains how international human rights law functions as a limited language, but not as a legal framework (Part V).

[7] M Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Intersentia 2012); M Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff 2004) 81–95; C Raj Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (OUP 2011).

[8] Boersma (n 7) 319–38; S Starr, 'Extraordinary Crimes at Ordinary Times: International Justice beyond Crisis Situations' (2007) 101 Northwestern University Law Review 1257; I Bantekas, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies' (2006) 4 JICJ 466; N Kofele-Kale, 'The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law' (2000) 34 IntlLaw 149.

[9] M Goodwin and K Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse' in M Boersma and H Nelen (eds), *Corruption and Human Rights: Interdisciplinary Perspectives* (Intersentia 2010).

II. PREVAILING SCHOLARLY VIEWS ON CORRUPTION AND HUMAN RIGHTS

Much of the existing commentary on the subject of corruption and human rights appears to assume that linking corruption to human rights will advance the protection of human rights, without considering the problems involved in connecting the two. Commentators have advocated for the notion that corruption is or ought to be a human rights issue, but with little reflection on the relative merits of this approach. Books and articles on the topic rarely delve into the conceptual link between corruption and human rights, nor do they examine the practical utility of this approach.

The turn towards a human rights approach to corruption, which began in the late 1990s, appears to be motivated in part by a perceived need to focus greater attention on the victims rather than the perpetrators of corruption, who are the targets of transnational criminal law treaties that address corruption.[10] Commentators tend to make strongly worded claims about corruption's harmful impact on victims,[11] which they usually support by reference to anecdotal rather than empirical evidence of corruption's damaging consequences.[12] Some commentators view human rights law as an empowering paradigm for victims as well as civil society and domestic judges, though they have not offered detailed explanations of how exactly this body of law would empower these constituencies.[13] Others consider a human rights approach to be necessary because of the perceived ineffectiveness of transnational criminal law treaties in reducing corruption, despite the absence of adequate empirical evidence that would support such claims.[14] Calls for a greater focus on corruption and other economic crimes have also emanated from the transitional justice field, in which corruption has

[10] L Hensgen, 'Corruption and Human Rights – Making the Connection at the United Nations (2013) 17 Max Planck Yearbook of United Nations Law 197, 200–1. For early literature on the subject of corruption and human rights see L Cockroft, 'Corruption and Human Rights: A Crucial Link', Working Paper, 19 October 1998; Kofele-Kale (n 8); Z Pearson, 'An International Human Rights Approach to Corruption' in P Larmour and N Wolanin (eds), *Corruption and Anti-Corruption* (Australian National University E Press 2001).

[11] Boersma describes it as a 'vicious practice' and a 'multi-headed monster'. M Boersma, 'Corruption as a Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education' in Boersma and Nelen, *Corruption and Human Rights* (n 9) 53; M Dowell-Jones describes corruption as 'exceptionally damaging' and as having 'nefarious' and 'pernicious' effects on the enjoyment of rights under the ICESCR. Dowell-Jones (n 7) 87, 91, 93.

[12] But see D Kauffman, 'Human Rights and Governance: The Empirical Challenge' in P Alston and M Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005).

[13] Raj Kumar, *Corruption and Human Rights in India* (n 7); book review by M Goodwin in (2013) 11 ICON 265. See also K Asamoa Acheampong, 'Combating Grand Corruption: The Potential Impact of a United Nations Convention on the Prevention and Punishment of the Crime of Economic Genocide' (1998) 7 Review of the African Commission on Human and Peoples' Rights 38, 48–9.

[14] Boersma (n 7) 98–9; Pearson (n 10) 42–3; Starr (n 8) 1292–3; J Hatchard, 'Adopting a Human Rights Approach Towards Combating Corruption' in Boersma and Nelen, *Corruption and Human Rights* (n 9) 14–16.

not been viewed as a human rights violation that ought to be addressed by transitional justice mechanisms such as truth and reconciliation commissions.[15]

Those who have embraced a human rights approach to corruption have, for the most part, done so by reference to existing regional and international human rights treaties, in particular the ICESCR and the International Covenant on Civil and Political Rights (ICCPR).[16] Commentators generally de-emphasize the fact that none of the regional or international human rights treaties makes any reference to corruption.[17] Instead, they tend to focus on describing how corrupt conduct may violate or undermine the range of civil, political, economic, social, and cultural rights set out in these instruments. Due to the myriad ways in which corrupt conduct may negatively impact a large range of human rights, literature on this topic can effectively take the form of lengthy lists that illustrate how corruption affects human rights.[18] Only a few commentators have gone further by examining the practice of human rights treaty bodies, which in their view ought to do a better job of addressing corruption in their concluding observations.[19] Even though acts of corruption often represent only one of many factors that negatively impact the enjoyment of human rights, the issue of causality rarely features in discussions of the relationship between corruption and human rights.[20] Finally, commentators have devoted some attention to the fact that anti-corruption measures may also violate human rights, such as the right to a fair trial.[21]

Arguments about the existence of a right to a corruption-free society lie at the fringes of the body of scholarship on corruption and human rights. A small number of commentators have argued that such a right ought to exist, or is already a part of the right to self-determination.[22] But most commentators dismiss this idea in light of the fact that the existing human rights treaties are

[15] R Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 The International Journal of Transitional Justice 310; R Duthie, 'Toward a Development-Sensitive Approach to Transitional Justice' (2008) 2 The International Journal of Transitional Justice 292, 305–8. But see L Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 Socio & Legal Studies 171.

[16] Boersma (n 7); International Council on Human Rights Policy, 'Corruption and Human Rights: Making the Connection' (2009). International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[17] Boersma (n 7) 2.

[18] See eg International Council on Human Rights Policy, 'Corruption and Human Rights' (n 16); K Olaniyan, *Corruption and Human Rights Law in Africa* (Hart 2014) 202–76.

[19] Dowell-Jones (n 7); Boersma (n 7) 103–34. Boersma also discusses the consideration of corruption within the Universal Periodic Review proceedings and the special procedures of the UN Human Rights Council. Boersma (n 7) 135–76.

[20] Pearson (n 10) 58–9; International Council on Human Rights Policy (n 18) 27–9.

[21] Boersma (n 7) 193; B Rajagopal, 'Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship' (1999) 14 Connecticut Journal of International Law 495, 506.

[22] Kofele-Kale (n 8); C Raj Kumar, 'Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India' (2004) 17 Columbia Journal of Asian Law 36.

capable of capturing corrupt conduct.[23] Although arguments that grand corruption[24] constitutes a crime against humanity are equivalently weak, these have gained more traction, especially with the advent of the International Criminal Court (ICC).[25] Commentators who argue that corruption ought to be prosecuted at the international level appear to be motivated at least in part by the perception that domestic courts are unwilling or unable to prosecute cases of grand corruption due to political sensitivities and bias, a claim that again requires empirical support.[26]

The idea that grand corruption may qualify as the crime against humanity of extermination or other inhumane acts has gained a surprising degree of support given that the requisite *mens rea* of *dolus directus* would most likely never be met in such cases. Article 30 of the ICC Rome Statute provides that a person has the requisite intent for crimes against humanity where he or she means to cause a particular consequence 'or is aware that it *will* occur in the ordinary course of events'.[27] While public officials who embezzle large sums of money, for example, may be aware that such conduct *could* negatively impact the enjoyment of human rights, they are highly unlikely to be aware that it necessarily *will* have this result, given the often remote link between corruption and its consequences, which will be discussed below. Moreover, embezzlers generally intend to enrich themselves, not to cause harm among the populace by diverting funds away from health care or education, for example. In light of these difficulties, some commentators have instead advocated for an amendment to the Rome Statute that would include grand corruption as a crime against humanity or as a separate offence.[28]

The existing body of literature on corruption and human rights includes very few dissenting voices.[29] Morag Goodwin and Kate Rose-Sender have articulated the most forceful critique of the human rights approach to corruption, arguing in part that 'anti-corruptionism', as they call it, has ideological roots in a neo-liberal approach to economic development that

[23] Boersma (n 7) 264–7.

[24] Grand corruption is a term of art and may be defined as 'acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.' Transparency International, 'FAQs on Corruption' <https://www.transparency.org/whoweare/organisation/faqs_on_corruption/9/>. For a definition of petty corruption see below (n 37).

[25] Starr (n 8); Bantekas (n 8); PD Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 LJIL 749. See also E Davidsson, 'Economic Oppression as an International Wrong or as Crime against Humanity' (2005) 23 Netherlands Quarterly of Human Rights 173; ME Webster, 'Fifteen Minutes of Shame: The Growing Notoriety of Grand Corruption' (2008) 31 Hastings International and Comparative Law Review 807; Ndiva Kofele-Kale (n 8); Acheampong (n 13); Carranza (n 15) 327–8. But see Boersma (n 7) 338.

[26] Boersma (n 7) 302, 313.

[27] Emphasis added. ICC Rome Statute Art 30(2)(b).

[28] Boersma (n 7) 340–7; Ocheje (n 25) 777–9.

[29] Goodwin and Rose-Sender (n 9); Rajagopal (n 21). See also M Buckley, 'Anti-Corruption Initiatives and Human Rights: The Potentials' in H-O Sano and G Alfredsson (eds), *Human Rights and Good Governance: Building Bridges* (Nijhoff 2002) 178–9.

diverts attention from other, more nuanced explanations of development failures.[30] Goodwin and Rose-Sender have also argued that human rights law does little to help us understand the phenomenon of corruption and its role in development failures and social inequality.[31] While the present article takes a different perspective, it may be situated within this minority of more sceptical commentators who question the merits of a human rights approach to corruption.

III. INTERNATIONAL HUMAN RIGHTS LAW AND THE ISSUE OF CORRUPTION

Both binding and non-binding human rights instruments provide a weak framework for dealing with the issue of corruption. International human rights treaties do not directly address corruption, though it may still be argued that corrupt conduct violates the enjoyment of rights under these treaties. The human rights treaty bodies have not added any conceptual clarity to this situation, as they have repeatedly expressed concern about corruption in various countries, but have done so without explaining how exactly corruption violates human rights. In addition, a number of non-binding instruments address corruption as well as human rights, but as largely separate, unrelated issues. Thus, although corruption represents a human rights issue, as demonstrated by the case of Wal-Mart de Mexico, this body of law is relatively ill-suited as a legal framework for dealing with this phenomenon.

A. International Human Rights Treaties: An Indirect Approach to Corruption

In light of the fact that many international organizations only began directing sustained attention to the problem of corruption in the early or mid-1990s, it is unsurprising that none of the core international human rights treaties makes any express mention of corruption. Only two of the ten core international human rights treaties were concluded after this shift took place.[32] Yet, corruption can conceivably have a negative impact on the enjoyment of a very wide range of human rights, from civil, political, economic, social, and cultural rights, to the rights of children, migrant workers, and the disabled. The Subcommittee on the Prevention of Torture, for example, has observed that high levels of corruption within a State correlate with more instances of torture and ill-treatment, as in prisons where inmates bribe custodial staff in order to receive basic necessities.[33] These observations leave questions, however, about whether

[30] Goodwin and Rose-Sender (n 9) 223–9.

[31] See book review of Kumar (n 13) by Morag Goodwin in (2013) 11 ICON 265, 268.

[32] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) A/RES/61/177; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[33] Subcommittee on the Prevention of Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, CAT/C/52/2, 20 March 2014, paras 72–100.

corruption typically causes such violations (or vice versa), or whether high levels of corruption, torture, and ill-treatment all tend to stem from other factors such as the level of economic development and the absence of democracy.

Corruption in the context of customs and immigration has also prompted comment by a different treaty body, the Committee that monitors the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. In April 2012, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families expressed concern about allegations that migrant workers and their families often become victims of corruption when leaving or entering Tajikistan.[34] In its discussion of legislative and other measures necessary to implement the Convention, the Committee explained that it was concerned by reports of corruption among the staff of some of Tajikistan's consulates, and by reports that customs and border officials had been 'involved in extorting money for services that are normally free of charge'.[35] The Committee did not discuss which provisions would be violated by such conduct, but it appears that it would at least violate Article 8, which provides that the right to leave any State (including one's State of origin) must not be subject to any restrictions, apart from certain specified exceptions, which would not encompass illegal conduct such as corruption. The Committee recommended, among other things, that Tajikistan 'take immediate measures to address any instances of corruption'.[36]

The remainder of this article focuses on corruption within the framework of the ICESCR because most, if not all, of the rights set forth in this instrument are commonly affected by petty as well as grand corruption.[37] The ICESCR therefore represents a highly relevant legal instrument for exploring the impact of corruption on the protection of human rights. A comprehensive study of how corruption affects the rights embodied in other human rights treaties lies beyond the scope of this article. Corrupt conduct arguably raises questions about compliance by States Parties with their 'minimum core' obligation under Article 2(1) to ensure the satisfaction of 'at the very least, minimum essential levels of each of the rights' in the Convention.[38] According to Article 2(1), States Parties must undertake 'to take steps … to

[34] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Concluding Observations: Tajikistan' (2012) UN Doc CMW/C/TJK/CO/1, para 21.

[35] ibid. [36] ibid, para 22.

[37] Petty corruption may be defined as 'everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies'. Transparency International, 'FAQs on Corruption' <https://www.transparency.org/whoweare/organisation/faqs_on_corruption/9/>.

[38] UN Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties Obligations (Art. 2, para 1 of the Covenant)' (14 December 1990) E/1991/23, para 10.

the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized' in the Covenant. The Committee has explained that a State Party can only attribute its failure to meet its minimum core obligations to a lack of resources if it can show that it has made every effort to use all resources available to it to satisfy these minimum obligations.[39]

Article 2(1) imposes a highly qualified obligation on States Parties, such that they need only undertake to take steps. States Parties to the ICESCR may not necessarily be required to immediately realize the rights recognized in the Covenant, as they arguably only bear an obligation to do so on an incremental basis. The qualified character of this language comes into relief when compared with the ICCPR, which imposes a more immediate obligation on each State Party 'to undertake to respect and to ensure' the rights recognized in the ICCPR.[40] The difference in language reflects the fact that the ICESCR imposes a relatively greater number of positive obligations on States Parties to fulfil rather than just respect various rights.

Although the Covenant establishes a notably low bar for compliance with its provisions, it may nevertheless be argued that corruption runs contrary to the obligations of States Parties under Article 2(1) of the Covenant. While the Committee on Economic, Social and Cultural rights did not directly address the issue of corruption in its General Comment on the nature of States Parties' obligations under Article 2(1), it did introduce the relevant concept of 'deliberately retrogressive measures'.[41] In light of the obligation of States Parties to move as 'expeditiously and effectively as possible' towards the full realization of the rights in question, the Committee explained that 'deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[42] In essence, States Parties bear the burden of justifying how the ICESCR would not be violated by measures that detract or move away from the realization of Covenant rights. Retrogressive measures thereby create a rebuttable presumption that a State Party has violated Article 2(1) of the Covenant. The Committee does not provide any examples of 'deliberately retrogressive measures', but corrupt conduct arguably falls within the scope of this concept, as will be explained below.

The 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights complement the Committee's General Comment by providing a somewhat more detailed understanding of how States Parties

[39] ibid.

[40] ICCPR art 2(1); B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 134. See also BTC Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression' (2016) 65 ICLQ 249.

[41] UN Committee on Economic, Social and Cultural Rights, 'General Comment No 3' (n 38) para 9.

[42] ibid.

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may violate economic, social, and cultural rights. Because the Guidelines were developed by a group of 30 experts independent from the Committee, they have no formal relationship with the ICESCR, and serve only as a useful, but not authoritative interpretation of the Covenant. The Guidelines indicate that States Parties could violate the Covenant through 'the reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone'.[43] The diversion or reduction of public expenditures could be due to budget cuts or reallocations, or to illegal, corrupt conduct. Embezzlement, for example, entails the diversion of public funds, while bribery could involve either the reduction or the diversion of public expenditures.[44]

When a high-level government official of a State Party embezzles and launders State oil revenues for the purpose of purchasing foreign real estate, for example, such conduct could arguably represent a violation of the rights set forth in Articles 5–16 of the ICESCR, as understood in light of Article 2(1).[45] The embezzlement of State oil revenues necessarily runs contrary to the obligation to work towards realizing Covenant rights to the maximum of available resources. Embezzlement entails the diversion of public funds for private benefit, not just diversion or reallocation towards other public expenditures that do little to advance economic and social rights, such as military equipment. Embezzlement completely eliminates the possibility that public funds are contributing to the realization of any human rights, let alone economic and social rights. The use of public funds for private gain thus represents a step away from, rather than a step towards the progressive realization of social and economic rights. To use the language of the Committee, such corrupt conduct is retrogressive rather than progressive.

This example, however, raises questions about the causal link between embezzlement and a violation of the obligation of progressive realization under Article 2(1). If a government has failed, in the first place, to allocate oil revenues towards social programmes, then the embezzlement of these funds arguably constitutes only one of a number of factors that may contribute to the State's failure to progressively realize social, economic, and cultural rights. Budgetary decision-making may be a far more significant factor. Even where oil revenues remain in the public coffers, safe from would-be embezzlers, they still may not go towards social programmes, as has been the

[43] International Commission of Jurists *et al*., 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (January 1997) UN Doc E/C.12/2000/13, para 14(g).

[44] Art 17 of the United Nations Convention against Corruption defines embezzlement as: 'the misappropriation of property or funds legally entrusted to someone in their formal position as an agent or guardian'.

[45] See eg allegations that Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, embezzled and laundered Equatoguinean oil revenues. M de la Baume, 'A French Shift on Africa Strips a Dictator's Son of His Treasures' *The New York Times* (Paris, 23 August 2012).

case in so many natural resource-rich States. In other words, embezzlement may not be the factor, but for which oil revenues would go towards progressively realizing the rights to health care or education.

Corrupt conduct in the form of bribery can also arguably represent a violation of Article 2(1) of the ICESCR. High-level government officials of a State Party may, for example, misallocate or divert public funds towards military expenditures rather than education or health care because the former represents a better opportunity to extract bribes from companies tendering bids for a public contract.[46] The receipt of a bribe by a public official can also impact the quality of the goods or services being delivered by the briber. A bribing company may, for example, construct public housing with inferior building materials in order to compensate for the cost of the bribe that it paid to obtain the public contract.[47] In these cases, corrupt conduct leads not to the outright theft of public funds, but to their suboptimal, inefficient use. The payment of a bribe results not in misallocation, but in a reduced or less than efficient use of public funds, as the briber provides a substandard product on account of the cost of the bribe. These examples do not represent a total failure on the part of a State Party to use public funds for public rather than private purposes, but they do involve a State's failure to use the maximum of its available resources for the realization of economic and social rights.

Problems of attribution may, however, arise where the acceptance of a bribe by a public official results in the bribing company (a non-State actor) using substandard building materials that negatively impact the right to housing. In such instances, the bribing company may fail to make maximal use of public funds as a result of its payment of a bribe, but the State itself has not taken deliberately retrogressive steps. While the use of substandard materials by the bribing company may be traced back to the corrupt conduct of the public official, this does not necessarily entail a violation by the State of its obligation to progressively realize the right to housing.

In light of the fact that corruption manifests itself in a number of different forms and has a range of consequences, these examples of embezzlement and bribery highlight just a few ways in which corrupt conduct may or may not violate the ICESCR. Although neither the ICESCR nor the Committee makes any express mention of corruption, the obligation of progressive realization in Article 2(1) is relevant to this conduct. Yet, problems of causality and attribution may significantly limit the extent to which the obligation of progressive realization may be applied in practice to various forms of corrupt conduct.

[46] See below (n 119).

[47] V Tanzi and H Davoodi, 'Corruption, Public Investment and Growth' (1997) IMF Working Group Paper WP/97/139, 7.

B. The Committee on Economic, Social and Cultural Rights: A Lack of Conceptual Clarity

The concluding observations of the Committee on Economic, Social and Cultural Rights reveal that acts of corruption give the Committee cause for concern, but these observations lack conceptual clarity about why such conduct violates the Covenant. The Committee's concluding observations go no further than noting the existence of corruption and providing a list of relatively generic recommendations about how corruption could be addressed. While the concluding observations indicate that corruption is on the Committee's agenda, and it regards such conduct as a violation of Covenant rights, the reports do little to advance an understanding of how corruption and human rights are interlinked, and how exactly anti-corruption measures would further the enjoyment of economic, social, and cultural rights. The Committee's approach to the issue of corruption raises questions about whether this treaty body has gone beyond its mandate, and about whether its expressions of concern and accompanying recommendations have a useful role to play in anti-corruption efforts.

In its concluding observations on States Parties, the Committee confines itself simply to expressing its regret or concern about the existence of corruption and its negative or adverse impact on the realization or full enjoyment of economic, social, and cultural rights. In its report on the Philippines, for example, the Committee merely noted 'with concern that, despite the efforts undertaken by the State party to curb corruption, including the establishment of a number of anti-corruption bodies such as the anti-corruption court, this phenomenon continues to be widespread'.[48] The Committee did not, however, explain how, exactly, corruption constitutes a violation of the Covenant, even though Article 2(1) provides a basis upon which the Committee could ground its concerns. The concepts of 'progressive realization' and 'deliberately retrogressive measures' do not feature in the Committee's concluding observations. In these documents the Committee instead limits itself to brief descriptions of the existence of corruption, without any sort of legal analysis of why such conduct falls under the scope of the Covenant. By contrast, the Committee on the Rights of the Child at least discusses corruption in the specific context of 'insufficient budget allocations to children' and 'the diversion of resources', although it still makes no reference to any specific provisions of the Convention on the Rights of the Child.[49]

In addition to the fact that the Committee addresses the issue of corruption without reference to provisions of the Covenant, it appears at times that both

[48] Committee on Economic, Social, and Cultural Rights, 'Concluding Observations: Philippines' (1 December 2008) E/C.12/PHL/CO/4, para 14.

[49] Committee on the Rights of the Child, 'Concluding Observations: Thailand' (17 February 2012) CRC/C/THA/CO/3-4, para 21; Committee on the Rights of the Child, 'Concluding Observations: Nigeria' (11 June 2010) CRC/C/NGA/CO/3-4, para 16.

its observations and recommendations on corruption fall outside of the scope of the Covenant and therefore outside the Committee's mandate. According to the Covenant, the Committee's concluding observations may address the measures taken by States Parties and their progress in achieving 'general observance of the rights recognized in the present Covenant'.[50] Yet, in its concluding observations on Cambodia, for example, the Committee noted 'with concern the reports on the lack of independence and effectiveness of the judicial system, which hinders the full enjoyment of human rights, including economic, social and cultural rights'.[51] The Committee also expressed its alarm at reports that, 'despite the efforts undertaken by the State party, corruption continues to be widespread, including in the judiciary'.[52] While corruption in the judiciary could conceivably violate economic, social, and cultural rights, it would fall most logically under the ambit of the International Covenant on Civil and Political Rights, and in particular Article 14, which concerns the right to a fair trial, among other things. The Committee, however, omitted any explanation of how corruption in the judiciary violates economic, social, and cultural rights, as opposed to (or as well as) civil and political rights, and the concluding observations seem to assume that this issue falls within the scope of the ICESCR. Altogether, it appears that the Committee has missed important opportunities to articulate the link between corruption and human rights, such that its concluding observations leave doubts about the connection between the two, and how corruption specifically relates to the Committee's mandate.

In its recommendations on how States Parties should address corruption, the Committee tends to prescribe a broad and generic set of anti-corruption measures that go beyond the Committee's expertise or ability to monitor effectively. In its concluding observations on the Democratic Republic of Congo (DRC), for example, the Committee noted 'with concern that corruption remains endemic', and it called on the DRC to 'recognize the urgency of eradicating corruption within all government agencies'.[53] The Committee recommended a series of measures, including awareness raising among police forces; anti-corruption training for judges, prosecutors, the police and other law enforcement officers; a review of the sentencing policy for corruption-related offences; adequate salaries for civil servants; and transparency in the public sector.[54] All of these recommendations are

[50] ICESCR art 21. The United Nations Economic and Social Council established the Committee on Economic, Social and Cultural Rights, and assigned the Committee its monitoring functions under the Covenant. ECOSOC, 'Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (28 May 1985) Res 1985/17.

[51] Committee on Economic, Social and Cultural Rights, 'Concluding Observations: Cambodia' (12 June 2009) E/C.12/KHM/CO/1, para 14.

[52] ibid.

[53] Committee on Economic, Social and Cultural Rights, 'Concluding Observations: Democratic Republic of Congo' (16 December 2009) E/C.12/COD/CO/4, para 11(a).

[54] ibid.

appropriate and any country seriously pursuing the reduction of corruption could reasonably be expected to adopt these measures. Yet, this list of measures would comprise only part of a serious anti-corruption effort, which would have to be continuous and long-standing in order to be successful, as will be discussed below. Moreover, success in the DRC, or in any other country, would realistically be measured not by the eradication of corruption, but by a significant reduction in the level of corruption.

In essence, the problem of corruption in States like the DRC is highly complex, and would require a large and sustained effort on the part of the Congolese government and civil society, as well as the involvement of international organizations. By prescribing an incomplete set of remedies for such an intractable problem, the Committee has overlooked these complexities, perhaps due to its lack of expertise in this area. This relatively generic set of recommendations also neglects particular factors that may contribute to high levels of corruption in the DRC, such as armed conflict and the weakness of its central government.[55] While the Committee's approach to corruption may not be effective, it may still be argued that it does no harm, though with different treaty bodies, UN agencies, and international organizations all prescribing various anti-corruption measures, these repeated and overlapping messages could begin to ring hollow, or lose their meaning.

C. Major Non-Binding Instruments: Separate Treatment of Human Rights and Corruption

Unlike the ICESCR and the other core international human rights treaties, the United Nations Global Compact and the OECD Guidelines for Multinational Enterprises explicitly address corruption, but do not frame corruption as a human rights issue.[56] While these two non-binding instruments directly address the conduct of corporations, rather than States, and they impose no binding obligations on these non-State actors, they nevertheless refer to or draw on binding instruments in the human rights and anti-corruption fields. In doing so, these non-binding instruments miss an opportunity to make the link between corruption and human rights, but they also underscore the fact that anti-corruption treaties represent the most robust framework for dealing with this issue.

The section on human rights in the OECD Guidelines provides that while the duty to protect human rights lies with States, enterprises should, nevertheless,

[55] A Shleifer and R Vishny, 'Corruption' (1993) 108 Quarterly Journal of Economics 599.

[56] The 1995 Copenhagen Declaration on Social Development also addresses corruption and human rights separately, but because it focuses on the private sector to a lesser extent than the UN Global Compact and the OECD Guidelines for Multinational Enterprises, these two instruments form the subject of this discussion. 'Report of the World Summit for Social Development (19 April 1995) A/CONF.166/9, Annex I: Copenhagen Declaration on Social Development.

respect human rights and avoid causing or contributing to adverse human rights impacts, among other things.[57] The OECD Guidelines indicate that enterprises should do so 'within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations'.[58] This very general reference to binding international human rights instruments could be interpreted as a call for enterprises to avoid corrupt conduct that contributes to adverse human rights impacts. Yet, the commentary to this section never makes this connection, and the section on corruption provides a stronger basis for addressing the involvement of the private sector in corrupt conduct.

The section on combating bribery, bribe solicitation and extortion includes relatively detailed anti-bribery provisions that largely track the 'core OECD instruments' that target the supply side of bribery transactions.[59] These instruments include the binding OECD Anti-Bribery Convention, as a well as a number of other non-binding Recommendations. The Guidelines thus address the issue of corruption not by reference to human rights law, but by reference to a body of anti-bribery instruments developed by the OECD. In keeping with these instruments, the anti-bribery section provides that enterprises should refrain from offering, promising, or giving undue pecuniary or other advantages to public officials or the employees of business partners; develop and adopt adequate internal controls, ethics, and compliance programmes or measures for preventing and detecting bribery; prohibit or discourage the use of small facilitation payments; undertake due diligence regarding the hiring and oversight of agents (also known as intermediaries); enhance transparency; promote employee awareness of and compliance with anti-bribery policies; and refrain from illegal political contributions.[60]

The commentary to the anti-bribery section recognizes the link between corruption and economic and social welfare, but makes no reference to human rights. The Commentary notes that 'the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social, and environmental welfare, and it impedes efforts to reduce poverty. Enterprises have an important role to play in combating these practices'.[61] The Commentary thereby acknowledges that corruption has a

[57] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 edn) section IV, paras 1–2.
[58] ibid, chapeau.
[59] ibid, para 76. The 'core OECD instruments' are: the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997, entered into force 15 February 1999) (1998) 37 ILM 1 (OECD Anti-Bribery Convention); OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (26 November 2009, amended on 18 February 2010) C(2009)159/Rev1/FINAL, C(2010)19; OECD, Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (25 May 2009) C(2009)64; and OECD, Recommendation on Bribery and Officially Supported Export Credits (18 December 2006) TD/ECG(2006)24.
[60] 'OECD Guidelines for Multinational Enterprises' (n 57) section IV, paras 1–7.
[61] ibid, para 74.

negative impact on economic and social welfare, although it does not actually use the language of rights. The Commentary also does not appear to invoke the broader framework of human rights, as this passage refers to attempts by citizens to achieve higher levels of economic, social, and environmental welfare, rather than the legal obligation of the State to progressively realize these rights. The Commentary notes that corrupt practices impede efforts to reduce poverty, but it does not identify the actor engaged in or responsible for such efforts. Perhaps because of the Guidelines' focus on non-State actors, the drafters chose to emphasize not the obligations of the State, but the goals of civil society and the role that enterprises can play in combating bribery. Thus, to the extent that the Guidelines address corruption and social and economic welfare as related issues, they do so outside of the framework of international human rights law.

The UN Global Compact similarly addresses human rights and corruption as distinct issues. The UN Global Compact, which was launched in 2000, is a voluntary 'strategic policy initiative' for businesses that commit to aligning their operations and strategies with ten principles in the areas of human rights, labour, the environment, and anti-corruption.[62] The first two principles provide that '[b]usinesses should support and respect the protection of internationally proclaimed human rights [] and make sure that they are not complicit in human rights abuses'.[63] The tenth and final principle provides that '[b]usiness should work against corruption in all its forms, including extortion and bribery'.[64] The UN Global Compact Leaders Summit adopted this principle against corruption in 2004, years after the adoption of the first nine principles.[65] The inclusion of this principle followed the UN General Assembly's adoption of the United Nations Convention against Corruption (UNCAC) in 2003, which represents the 'underlying legal instrument' for Principle 10, and 'an important global tool' for fighting corruption.[66] UNCAC obligates States Parties to undertake a wide range of measures involving the prevention and criminalization of corrupt conduct, as well as law enforcement, international cooperation, and asset recovery. Thus, like the OECD Guidelines, the Global Compact addresses the issue of corruption by reference to one of the major international legal instruments on this subject. While the foreword to UNCAC recognizes that corruption 'leads to violations of human rights' and 'hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services', the Global Compact itself makes no

[62] United Nations Global Compact, 'Overview of the Global Compact' <http://www.unglobalcompact.org/AboutTheGC/index.html>.

[63] United Nations Global Compact, 'Global Compact Principle 1' <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>.

[64] United Nations Global Compact, 'Global Compact Principle 10' <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10>.

[65] ibid.

[66] ibid.

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mention of this connection.[67] Thus, both the OECD Guidelines and the UN Global Compact overlook the link between corruption and human rights, but by turning to mainly binding instruments that specifically address acts of corruption, they have embraced the strongest legal approach to the issue of corruption.

IV. HUMAN RIGHTS LAW AND NON-STATE ACTORS

Given the often very powerful economic position of many private sector entities, particularly in relation to developing countries that may lack the ability or willingness to protect human rights when doing so could have economic or political costs, there is a strong rationale for directly imposing human rights obligations on these non-State actors. Yet, the content of human rights law may not necessarily be easily transposable from States onto non-State actors, and the State-centred character of international human rights treaties has remained the normative reality. Moreover, customary international law has not evolved beyond holding individuals liable for violations of international criminal law and international humanitarian law.

Some human rights lawyers and academic commentators have observed that a normative evolution in international human rights law may be underway, and they anticipate that this body of law will eventually bind private actors like multinational corporations.[68] For instance, Robert McCorquodale, writing in the early 2000s, noted the 'strong possibility' that international law could, in the coming years, attach international human rights obligations directly to transnational corporations, which may have limited international legal personality just as individuals do.[69] August Reinisch has also argued that 'a contemporary reading' of certain non-binding human rights instruments shows that non-State actors are already addressees of human rights norms and could become the subjects of legally binding codes of conduct embodied in treaties in the future.[70]

Other commentators have gone further by arguing that such a shift has already taken place.[71] In support of this understanding, some have pointed to existing transnational criminal law treaties as well as 'soft law' like the UN Global Compact and the OECD Guidelines. Steve Ratner has, for example, argued that the OECD Anti-Bribery Convention creates international legal

[67] UNCAC Foreword, para 1.

[68] See eg R McCorquodale, 'Human Rights and Global Business' in *International Law beyond the State: Essays on Sovereignty, Non-State Actors and Human Rights* (Cameron May 2011) 200–22 (originally published in S Bottomley and D Kinley (eds), *Commercial Law and Human Rights* (Ashgate 2002)) 89; A Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' (2005) 13 Non-State Actors and Human Rights 37, 69–72.

[69] McCorquodale (n 68) 221–2.

[70] Reinisch (n 68) 72.

[71] See eg D Weissbrodt and M Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors' (2005) 13 Non-State Actors and Human Rights 315, 329–30; J Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 Vanderbilt Journal of Transnational Law 801.

obligations that are directly binding on transnational corporations.[72] Transnational criminal law treaties, however, only regulate the conduct of private actors indirectly, through States, such that private liability exists under domestic law, not international law. In addition, the UN Global Compact and the OECD Guidelines apply directly to private entities, but only on a non-binding basis, and without creating criminal or civil liability for these actors. By contrast to this strand of academic commentary, the framework for business and human rights developed by UN Special Representative John Ruggie represents an acceptance of the State-centred character of international human rights law, and a serious attempt to work within and improve upon this system.[73]

A. Treaties and Custom

The human rights violations caused by corruption usually involve private actors, as corruption often, although not always, occurs at the intersection of the public and private sectors. Government officials normally solicit or accept bribes from private actors, such as corporations seeking public contracts, and once they have received bribes or embezzled public funds, they often launder this illicit money through domestic and/or foreign banks. Private actors thereby play an integral role in corruption that can harm economic, social, and cultural rights. Without the provision of the bribe or the ability to launder stolen funds, these acts of corruption might not occur at all. The involvement of private entities in corruption may be compared to other more regularly cited examples of corporate involvement in violations of civil and political rights.[74]

The application of international human rights law directly to private actors has therefore generated much discussion as a potential solution to this sort of legal vacuum.[75] David Weissbrodt and Muria Kruger have, among others, argued that the Universal Declaration of Human Rights (Declaration) creates binding legal obligations for States as well as non-State actors.[76] But the Declaration provides only limited support for the notion that human rights law has direct relevance for non-State actors.[77] While the Declaration is technically a non-binding instrument, it has significance as the precursor to the International Covenants, and parts of it represent 'general principles of

[72] S Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 YaleLJ 443, 482; see also Weissbrodt and Kruger (n 71) 329.

[73] For a discussion of the Ruggie Principles see below Part IVC.

[74] See eg *Presbyterian Church of Sudan v Talisman Energy*, 582 F 3d 244 (2nd Cir 2009).

[75] For further discussion of protection and governance 'gaps' see J Wouters and A-L Chané, 'Multinational Corporations in International Law' in M Noortmann, A Reinisch and C Ryngaert, *Non-State Actors in International Law* (Hart 2015) 237–8.

[76] Weissbrodt and Kruger (n 71) 330; See also D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 VaJIntlL 931, 948–9; Reinisch (n 68); Schabas (n 78) cxviii.

[77] UNGA Res 217(III) (10 December 1948).

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law or elementary considerations of humanity'.[78] In the preamble to the Declaration, the General Assembly proclaimed that 'every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms'.[79] The term 'every organ of society' may be broadly interpreted to encompass both the State and non-State actors, such as banks and corporations. While this passage supports the idea that private entities have an important role to play in promoting respect for human rights, it does not actually indicate that private actors bear obligations under human rights law, as some commentators have suggested.[80]

Within the main body of the Declaration, Article 29 provides that '[e]veryone has duties to the community', but the term 'everyone' does not clearly encompass legal persons such as corporations. Similarly, Article 30 refers to 'any State, group or person', but this phrasing also appears to exclude legal persons. The preamble to the Declaration instead appears to situate Member States as the obligation holders, who have '*pledged themselves to achieve*, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms'.[81] Thus, while the preambular language of the Declaration indicates that private actors, as well as States, should promote the enjoyment of human rights, it does not appear to upend the role of States as the sole bearers of obligations under international law.

International human rights treaties unquestionably impose obligations on States as opposed to other organs of society, as these instruments explicitly obligate each State Party to respect, protect, and remedy certain human rights. Nearly every provision of the ICESCR, for example, specifies what States Parties must undertake or recognize in order to bring about the enjoyment of economic, social, and cultural rights. States Parties have an obligation to ensure, through legislation or other measures, that private actors do not infringe upon the Covenant rights and their failure to do so may constitute an internationally wrongful act that generates State responsibility. The ICESCR thus applies indirectly to non-State actors, via domestic measures, and any liability for private entities has its basis in domestic, not international law. The international human rights treaties make no mention of how other organs of society might go about promoting human rights, nor do they provide an appropriate basis for formulating obligations for non-State actors. As Jan Wouters and Anna Luise Chané have noted, the absence of direct, binding obligations for multinational corporations under international human rights

[78] J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 636; W Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, vol 1 (CUP 2013) cxv–xix.

[79] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) para 8 (emphasis added). [80] See (n 76). [81] UDHR para 6 (emphasis added).

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law has generated a great deal of criticism among scholars and human rights lawyers.[82]

Yet, the obligations set forth in the ICESCR, in particular, are not easily transposed onto non-State actors, as many of the human rights in this Covenant involve questions of how the State should allocate limited resources so as to achieve progressive realization.[83] As Larissa van den Herik has noted, corporations do not enjoy full control over territory, nor do they exercise full public power; moreover, they are ill-positioned, as inherently undemocratic institutions, to make decisions about the implementation of economic and social rights.[84] Many economic, social, and cultural rights require affirmative action on the part of the State, in the form of government programmes, as well as legislation and other measures. Thus, the obligations incumbent upon States would not be relevant or applicable to corporations or banks, which normally play no role in budget allocation or in the creation or reform of government programmes. International human rights treaties are, in essence, premised upon the unique role that States play in society, such that these instruments cannot be viewed as templates that are ready for application to other, non-State actors.

Looking beyond international human rights treaties, customary international law does not currently impose any form of liability on private sector entities, such as banks and multinational corporations. As Markos Karavias has concluded, 'no general and uniform practice has emerged with regard to corporate obligations in the fields of international human rights law and criminal law', perhaps reflecting normative concerns about how far these bodies of law may be extended.[85] While individual liability exists under customary international law in the fields of international humanitarian law and international criminal law, this development does not extend to other forms of non-State actors. Customary international law could, in principle, develop so as to extend liability to corporations and banks, but State practice provides no evidence of such a shift at present. The fact that international criminal tribunals have no jurisdiction over legal persons could be considered to reflect the reality of State practice. Alternatively, the limited personal jurisdiction of these tribunals could help to explain why customary international law has not evolved so as to impose liability on non-State actors other than individuals. In other words, the evolution of individual liability under customary international law may be attributed not only to State practice and *opinio juris*, but also to the body of jurisprudence developed by international criminal tribunals over the last two decades.

[82] Wouters and Chané (n 75) 237.

[83] L van den Herik, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again' (2010) 8 JICJ 725; C Rose, 'The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption' (2011) 24 LJIL 715.

[84] van den Herik (n 83).

[85] M Karavias, *Corporate Obligations under International Law* (OUP 2013) 115.

The drafting history of the Rome Statute of the International Criminal Court arguably supports this understanding of how customary international law has evolved with respect to the liability of non-State actors.[86] The drafting history reveals that the wide range of domestic legal approaches to corporate liability represented one of the primary obstacles to extending the Court's jurisdiction to legal persons. Concerns about domestic complementarity, rather than more conceptual concerns about international legal liability, prevented the drafters from reaching an agreement on this issue. Thus, it appears that the disparity between individuals and legal persons under customary international law may be traced back, in part, to the limited personal jurisdiction of the ad hoc tribunals, and to problems of complementarity in the ICC context.

B. *'Teachings of the Most Highly Qualified Publicists'*

Despite the apparent absence of liability for corporations and banks under conventional as well as customary international law, some international legal scholars have argued that liability nevertheless exists for these actors under public international law.[87] These arguments have appeared in academic articles as well as *amici curiae* briefs submitted to US federal courts in cases under the Alien Tort Statute. These scholars have based their arguments on, among other things, transnational criminal law treaties, general principles of international law, historical examples, and the jurisprudence of US federal courts under the Alien Tort Statute. This section will focus on the arguments regarding transnational criminal law treaties, which have the most relevance for the regulation of corruption.

In one of the many *amici curiae* briefs submitted to the US Supreme Court in the case of *Kiobel v Royal Dutch Petroleum*, a significant number of international legal scholars argued that '[a] diverse array of treaties reveals the accepted understanding that corporations have international obligations and can be held liable for violations of international law as translated into domestic law'.[88] In support of this statement, the scholars cited a number of

[86] Ambassador David J Scheffer, Northwestern University School of Law, Brief as Amicus Curiae in Support of the Petitioners, *Kiobel et al v Royal Dutch Petroleum Co., et al*, Supreme Court of the United States, No 10-1491 (20 December 2011) 5-7; Per Saland, 'International Criminal Law Principles' in R Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 1999) 189, 199; K Ambos, 'Article 25: Individual Criminal Responsibility' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck 2008) 474.

[87] See Paust (n 71); Ratner (n 72); B Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of International Law 45; P Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P Alston (ed), *Non-State Actors and Human Rights* (OUP 2005); Weissbrodt and Kruger (n 71).

[88] Alston *et al*., Brief of *Amici Curiae* International Law Scholars in Support of Petitioners, *Kiobel et al v Royal Dutch Petroleum Co, et al*, Supreme Court of the United States, No 10-1491

treaties that give rise to liability for legal persons, including the United Nations Convention against Transnational Organized Crime (UNCTOC) and the OECD Anti-Bribery Convention, both of which address the issue of bribery.[89] UNCTOC, for example, provides that: 'Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with … this Convention', one of which is bribery.[90] Similarly, the OECD Anti-Bribery Convention provides that: 'Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official'.[91]

This understanding of transnational criminal law treaties as instruments that directly regulate corporations is questionable because such treaties do not, in fact, create international obligations for corporations (or their CEOs).[92] These treaties only create international obligations for States, which must criminalize certain conduct in accordance with the treaties.[93] Corporations, as well as corporate officers, may only be held liable for violations of domestic law which implements the treaty obligations of the States, not, as they claim, 'for violations of international law as translated into domestic law'.[94] While the existence of domestic liability for corporations results from the ratification by States of these treaties, the source of the corporate obligation lies in domestic law, not international law. While the agreement among States to criminalize

(21 December 2011) 17. The scholars are Philip Alston, Jose Alvarez, Cherif Bassiouni, Gaspar Biro, Douglass Casel, Andrew Clapham, Lori Fisler Damrosch, John Dugard, Richard Goldstone, Ryan Goodman, Vaughan Lowe, Chip Pitts, Dinah Shelton, Constance de la Vega, and David Weissbrodt. For more on *amici curiae* briefs submitted in this case, see U Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute' (2014) 63 ICLQ 665.

[89] Council of Europe Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 December 2009) CETS No 196, art 10(1); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57; International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 3 November 1973, entered into force 18 July 1976) 1015 UNTS 243, art I(2); International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3; Convention on Third Party Liability in the Field of Nuclear Energy (adopted 29 July 1960, entered into force 1 April 1968) 956 UNTS 251.

[90] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNCTOC) arts 8, 10(1).

[91] Art 2.

[92] See generally Karavias (n 85) (ch 2 on corporate obligations under treaty law).

[93] van den Herik (n 83); E De Brabandere, 'Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of the Corporations as Participants in the International Legal System' in J d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011).

[94] Brief of *Amici Curiae* International Law Scholars in Support of Petitioners (n 88) 17.

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certain conduct occurs at the international level, the actual criminalization of this conduct occurs at the domestic level.

Many other international lawyers, especially outside of the United States, have rejected or shown discomfort with this sort of aspirational approach to the question of liability for corporations under international law.[95] A significant number of international legal scholars have adopted a more positivist perspective, that emphasizes the importance of the law as developed by States through treaties and customary international law, which must be derived from State practice and *opinio juris*. In a more positivist tradition, scholars play a role in analysing the law, but not in creating it. By granting authority only to the law that States themselves have actually created, this approach maintains a State-centred understanding of international law, despite the increasing importance of non-State actors in the global economy and world affairs. Some have argued, however, that such a State-centred approach not only recognizes the persistent reality of international law, but also acknowledges the critical role that States play in the domestic enforcement of international legal norms, such as those formulated in the OECD Anti-Bribery Convention.[96] This article adopts such a perspective, as the reality of international human rights law, as it stands today, precludes liability for non-State actors like banks and corporations. Transnational criminal law treaties represent one of the most viable and promising paths by which liability for private actors may be achieved, albeit through domestic law.

C. UN Guiding Principles on Business and Human Rights

A positivist approach appears to have prevailed in the framework developed by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.[97]

[95] See De Brabandere (n 93); E de Brabandere, 'Non-State Actors, State Centrism and Human Rights Obligations' (2008) 22 LJIL 191; E de Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4 Human Rights & International Legal Discourse 66; van den Herik (n 83); J Knox, 'Horizontal Human Rights Law' (2008) 102 AJIL 1; R McCorquodale, 'Human Rights and Global Business' in *International Law Beyond the State: Essays on Sovereignty, Non-State Actors and Human Rights* (Cameron May 2011); R McCorquodale, 'Over-Legalizing Silences, Human Rights and Non-State Actors' (2002) 96 ASIL Annual Conference Proceedings 384. For more critical perspectives on this divide among international lawyers, see Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 Leiden Journal of International Law 339; R Bachand, 'Non-State Actors in North American Legal Scholarship: Four Lessons for the Progressive and Critical International Lawyer' in J d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011).

[96] De Brabandere (n 93) 276.

[97] J Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) A/HRC/17/31 (UN Guiding Principles). For the endorsement of the Framework

It could perhaps even be argued that the *amici curiae* briefs in the *Kiobel* case are out of step with developments in thinking on the subject. The 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles) represent a definitive shift away from the approach taken by an earlier UN-based initiative, the Norms on Transnational Corporations and Other Business Enterprises, drafted by an expert subsidiary body of the then Commission on Human Rights.[98] As noted in Ruggie's final report, which was endorsed by the UN Human Rights Council in 2011, the Norms 'sought to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves under treaties they have ratified'.[99] After the Norms 'triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments', the Commission declined to act on the proposed Norms, and in 2005 it mandated a Special Representative to undertake a new examination of the subject of business and human rights.[100]

The three pillars of the UN Guiding Principles developed by Ruggie reflect a positivist understanding of international law.[101] Under the first pillar, the State has a 'duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication'.[102] Under the second pillar, corporations have a 'responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved'.[103] Finally, the third pillar provides that as part of their duty to protect, States must provide 'greater access by victims to effective remedy, both judicial and non-judicial'.[104] The UN Guiding Principles ground the first and third pillars in the duty of the State to protect rights under international human rights law.[105] In the context of business and human rights, this entails the duty of States to 'prevent, investigate, punish and redress' the human rights abuses of private actors.[106] The UN Guiding Principles specifically indicate that a failure to enforce

by the UN Human Rights Council see UN Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises' (6 July 2011) A/HRC/RES/17/4. See generally R Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Nijhoff 2012). On the aftermath of the Guiding Principles, see SA Aaronson and I Higham, 'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' (2013) 35 HumRtsQ 333; M Addo, The Reality of the United Nations Guiding Principles on Business and Human Rights (2014) 14 HRLR 133.

[98] R Mares, 'Business and Human Rights after Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in R Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Nijhoff 2012) 9–11; J Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Mares, *The UN Guiding Principles on Business and Human Rights* 52–4, 60–1.

[99] UN Guiding Principles para 2. [100] ibid, para 3.

[101] See also Knox (n 98) 64 (the UN Guiding Principles are 'avowedly consistent with the law *as it is* rather than the law as it might someday be'). [102] UN Guiding Principles para 6.

[103] ibid. [104] ibid. [105] ibid. [106] ibid 7.

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existing anti-bribery laws could, for example, constitute a failure to protect because these laws indirectly regulate the respect of businesses for human rights.[107]

The second pillar of the UN Guiding Principles also reveals a positivist approach due to its implicit acknowledgement that international law does not govern the responsibility of businesses to respect human rights.[108] The UN Guiding Principles specifically note that they should not be read 'as creating new international obligations', as was attempted with the earlier UN Norms.[109] The second pillar is premised on a distinction between the responsibility of business enterprises to respect human rights, and their legal liability, as 'defined largely by national law provisions in relevant jurisdictions'.[110] The second pillar's use of the word 'should' signals the absence of a binding legal obligation on business enterprises, and points instead to the role of non-legal standards. Corporate responsibility, as opposed to legal liability, thus stems not from law, but from 'the basic expectation society has of business in relation to human rights'.[111] This 'global standard of expected conduct for all business enterprises … exists over and above compliance with national laws and regulations protecting human rights'.[112] The UN Guiding Principles nevertheless indicate that business enterprises should 'comply with all applicable laws and respect internationally recognized human rights', and 'treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue'.[113] Thus, while urging business enterprises to respect human rights, the UN Guiding Principles never indicate that this body of law actually binds these private actors. Their reliance on somewhat vague 'global standards' appears to be a consequence of this legal gap at the international level.

V. HUMAN RIGHTS LAW AS A LIMITED LANGUAGE RATHER THAN A LEGAL FRAMEWORK

Human rights law provides a language that allows lawyers to explain why corruption damages society. The language of human rights law is limited, however, as this body of law only captures some of the harms that result from corruption. A review of the economics literature on corruption reveals a large range of potential damage, well beyond the diversion or reduction of public expenditures. Human rights law is also limited in that it provides no framework for understanding the causes of corruption, an issue that has largely been left to economists and other social scientists. Finally, the inherently State-centred character of human rights law limits its capacity to address such conduct. Corruption often occurs at the intersection of the

[107] ibid 8.
[108] See also Knox (n 98) 65 (noting that the responsibility to protect is grounded in societal expectations rather than human rights law).
[109] UN Guiding Principles 6.
[110] ibid 13–14.
[111] ibid, para 6.
[112] ibid 13.
[113] ibid 21.

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public and private sectors, but, as discussed above, international human rights law itself creates no obligations for private actors. In order to reach the conduct of private actors, lawyers must look to the domestic implementation of transnational criminal law treaties, such as the OECD Anti-Bribery Convention, and to the implementation of other non-binding instruments, like the 40 Recommendations of the Financial Action Task Force. While corruption undoubtedly represents a human rights issue, the limitations of this body of law require a broader legal approach as well as an awareness of the policy prescriptions of economists and others.

A. Human Rights Law as a Language for Describing the Harmfulness of Corruption

By comparison to international human rights law, the field of development economics has the potential to capture a much broader range of harms linked to corruption. Human rights law provides a vocabulary for articulating why corruption violates legal norms, but this language is inherently limiting, such that lawyers can benefit from looking elsewhere for a fuller understanding of why and how States and the international community should address the issue of corruption. While the economics literature on corruption provides such a perspective, it also introduces complexity and uncertainty, as this body of research is relatively recent and much work is yet to be done. Economists only began doing empirical, as opposed to more theoretical, research on corruption in the mid-1990s, and debates have persisted since this time about how (or whether) corruption negatively affects economies.[114] The economics literature in this area reveals not only that we still have much to learn about corruption, but also that human rights law provides a somewhat oversimplified understanding of its consequences.

Most development economists agree that corruption is an impediment to economic growth, but the details of this negative relationship are still being elaborated, and there are a few contrary voices.[115] One the one hand, microeconomic research, based on field experiments and surveys of firms, has demonstrated, for example, a 'strong, robust and negative relationship' between bribery rates and short-term growth rates of firms in Uganda.[116] This research lends support to the theory that corruption slows development to a greater extent than taxation. On the other hand, macroeconomic research,

[114] P Mauro, 'Corruption and Growth' (1995) 110 Quarterly Journal of Economics 681, 682. For earlier, more theoretical research see N Leff, 'Economic Development through Bureaucratic Corruption' (1964) 8 The American Behavioral Scientist 8; S Rose-Ackerman, 'The Economics of Corruption' (1975) 4 Journal of Public Economics 187; MS Alam, 'Some Economic Costs of Corruption in LDCs' (1991) 27 The Journal of Development Studies 89; Shleifer and Vishny (n 55).

[115] See eg Leff (n 114); for a rebuttal see T Aidt, 'Corruption, Institutions and Economic Development' (2009) 25 Oxford Review of Economic Policy 271.

[116] R Fisman and J Svensson, 'Are Corruption and Taxation Really Harmful to Growth? Firm Level Evidence' (2007) 83 Journal of Development Economics 63.

based on cross-national data, shows a negative relationship between corruption and contributors to growth, like investment and public spending. Yet, the empirical evidence of the link between corruption and economic growth as measured by gross domestic product is, however, inconclusive at this time.[117]

The macroeconomic literature on corruption and economic development specifically provides empirical support for the apparent assumption made by some human rights lawyers that acts of corruption are connected to the diversion of public funds, especially away from social services.[118] In 1998, IMF economist Paolo Mauro published a study showing that corruption is negatively associated with government expenditure on education, as well as health care (though to a lesser extent).[119] Mauro found that these results were consistent with his hypothesis that government spending on education provides fewer opportunities for rent-seeking because education requires widely available, mature technology, as opposed to specialized, high-technology goods produced by a limited number of oligopolistic firms.[120] In other words, the exact value of highly sophisticated defence equipment, like military aircraft, is more difficult to monitor than textbooks or teachers' salaries, and is therefore more susceptible to secrecy and corrupt conduct such as bribery.[121] Mauro also found tentative evidence that the causal relationship flows from corruption to the composition of funding, meaning that corrupt conduct appears to cause 'less-than-optimal composition' of government spending.[122] Because educational attainment is an important determinant of economic growth, Mauro concluded that these findings point to the importance of encouraging governments to shift the composition of their expenditures to categories that are less susceptible to corruption.[123] As a practical matter, however, governments would have to specify composition in a way that prevents corrupt officials from substituting 'publicly unproductive but privately lucrative projects for publicly productive but privately non-lucrative ones within the various expenditure categories'.[124]

[117] Aidt (n 115).

[118] Tanzi and Davoodi (n 47); V Tanzi, 'Corruption around the World: Causes, Consequences, Scope and Cures' (1998) 45 IMF Staff Papers 559; S Gupta, H Davoodi, and E Tiongson, 'Corruption and the Provision of Health Care and Education Services' (2000) IMF Working Paper WP/00/116; S Gupta, L de Mello, and R Sharan, 'Corruption and Military Spending' (2001) 17 European Journal of Political Economy 749; C Delavallade, 'Corruption and Distribution of Public Spending in Developing Countries' (2006) 30 Journal of Economics and Finance 222.

[119] P Mauro, 'Corruption and the Composition of Government Expenditure' (1998) 69 Journal of Public Economics 263. Economic 'rent-seeking' refers to 'the extra amount paid (over what would be paid for the best alternative use) to somebody or something for something useful whose supply is limited either by nature or through human ingenuity'. While some forms of rent-seeking are legal, other forms, including corruption, are illegal. Government bureaucrats engage in rent-seeking by creating artificial limits, for example, on the supply of licenses needed to conduct certain economic transactions. P Mauro, *Why Worry About Corruption?* (IMF 1997) 2.

[120] Mauro, 'Corruption and the Composition of Government Expenditure' (n 119) 277.

[121] ibid 264. [122] ibid 277. [123] ibid 278. [124] ibid.

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Subsequent research provides evidence of the converse, that is, a positive association between corruption and higher military spending as a share of GDP and total government expenditures.[125] According to Sanjeev Gupta, Luiz de Mello, and Raju Sharan, the evidence suggests that countries perceived as being more corrupt do indeed tend to spend more on the military as a share of GDP and total government spending.[126] On a policy level, these economists concluded that increasing the transparency of defence contracts and subjecting them to standard budgetary oversight procedures could reduce corruption by changing the composition of government spending towards more productive, non-military outlays.[127] The authors reached these findings and policy conclusions despite facing substantial data limitations, which perhaps explain the seemingly limited number of economics papers on the topic of corruption and government expenditures. This sort of empirical research is constrained by a number of factors, including a lack of data on all channels through which corruption may affect military spending; the difficulty involved in obtaining information on military assets and engagements in commercial activities; the lack of publicly available budgetary data fully specifying all military outlays; and the fact that using arms trade flows as a proxy for military procurement excludes purchases of military equipment produced domestically.[128]

This body of empirical research suggests that not only does corruption involve the diversion of public funds away from social spending, but it specifically entails diversion towards outlays that are less productive in terms of human development because of their potential for rent-seeking.[129] These findings provide an empirical basis for the assumptions that underpin legal arguments about how corrupt conduct contributes to the violation of economic, social, and cultural rights. Corruption impedes the progressive realization of rights under the ICESCR because bribe-seeking government officials may channel government spending away from the promotion of education and health, towards expenditures that fall outside the scope of this Covenant, such as unnecessary infrastructure projects or military equipment. Yet, the economics literature on corruption also suggests that the human rights perspective is over-simplistic, as economists are only beginning to identify and understand the causal relationship between corruption and government expenditure on the military rather than education. Human rights lawyers seem to presume that corruption negatively impacts social spending, but the economics literature raises questions, for example, about the extent to which this link between corruption and government spending is causal as opposed to correlative.[130]

[125] Gupta, de Mello and Sharan (n 118); Mauro, 'Corruption and the Composition of Government Expenditure' (n 119); Delavallade (n 118); G d'Agostino, JP Dunne and L Pieroni, Corruption, 'Military Spending and Growth' (2011) <http://carecon.org.uk/DPs/1103.pdf>.

[126] Gupta, Davoodi and Tiongson (n 118) 771. [127] ibid. [128] ibid 757–8.

[129] Paolo Mauro, *Why Worry About Corruption?* (n 119) 2. [130] See (n 118).

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The economics literature on corruption also reveals that human rights law highlights only one of the many ways in which corruption harms human development. Corruption not only affects the composition of government expenditure, but it can also have a range of other effects on the economy, some of which have been quantified by economists.[131] Corruption can create higher costs and uncertainty, which can lower domestic investment and thereby reduce the rate of economic growth. Corruption can similarly reduce foreign direct investment, as corruption creates unpredictability for investors and acts like a random tax.[132] Corruption can also diminish the productivity of public investments and infrastructure, as well as expenditures on operation and maintenance.[133] Corruption can further result in the misallocation of talent towards rent-seeking rather than more productive work, and it can increase income inequality and poverty.[134] In light of the challenges involved in gathering data on corruption, economists are still in the midst of determining how, and the degree to which, corruption gives rise to these negative effects, among others. The economics literature on corruption is still emerging, at the macroeconomic or cross-country level, as well as the microeconomic or firm level.[135]

Human rights law is ill-suited as a framework for discussing many of the negative consequences of corruption. The ICESCR easily captures the way in which corruption alters the composition of government expenditure, but the rest of the harms outlined above lie beyond the scope of this treaty. Economists have been able to show that corruption slows growth by deterring investors, but international human rights law does not provide a useful framework for understanding or addressing how the corrupt conduct of a government official then influences the conduct of private actors such as investors. While international human rights law may require States to protect economic, social, and cultural rights by implementing and enforcing anti-corruption laws, it does not address how the failure to do so may affect the economic incentives of private actors in general. Human rights law also does not provide a framework for discussing how corruption alters economic

[131] See eg Tanzi (n 118); Mauro, *Why Worry about Corruption?* (n 119).

[132] B Smarynska and Shang-Jin Wei, 'Corruption and Composition of Foreign Direct Investment: Firm-Level Evidence' (2000) National Bureau of Economic Research Working Paper 7969; Shang-Jin Wei, 'How Taxing is Corruption on International Investors?' (2000) 82 Review of Economics and Statistics 1; KN Hakkala, P-J Norbäck, and H Svaleryd, 'Asymmetric Effects of Corruption on FDI: Evidence from Swedish Multinational Firms' (2008) 90 Review of Economics and Statistics 627; E Asiedu and J Freeman, 'The Effect of Corruption on Investment Growth: Evidence from Firms in Latin America, Sub-Saharan Africa, and Transition Countries' (2009) 13 Review of Development Economics 200.

[133] Tanzi and Davoodi (n 47).

[134] V Tanzi and H Davoodi, 'Corruption, Growth, and Public Finances' (2000) IMF Working Paper, WP/00/182; S Gupta H Davoodi and R Alonso-Terme, 'Does Corruption Affect Income Inequality?' (2002) 3 Economics of Governance 23.

[135] A Hodge, S Shankar, DS Prasada Rao and A Duhs, 'Exploring the Links Between Corruption and Growth' (2011) 15 Review of Development Economics 474, 475; Asiedu and Freeman (n 132).

incentives, such that talented individuals would tend to gravitate towards positions that allow for rent-seeking, rather than entrepreneurship.

Finally, international human rights law provides no framework for discussing the causes, as opposed to the consequences, of corruption. Focusing on the duty of States to prevent human rights violations by enforcing anti-corruption laws effectively precludes a broader enquiry into the causes of this phenomenon, and in particular the structure of the economy. Economists have identified a range of factors that contribute to rent-seeking behaviour, including trade restrictions; industrial policies that involve subsidies; price controls that lower the price of some goods below market value; multiple exchange rate practices and foreign exchange allocation schemes; low wages in the civil service; natural resource wealth, the extraction and sale of which tends to be subject to government regulations; and sociological factors such as societal divisions along ethnic and linguistic lines (also known as 'ethno-linguistic fractionalization').[136]

All of these factors, apart from the last one, stem from government intervention in the economy, which creates opportunities for rent-seeking, particularly when government officials have discretion in applying regulations. While economists point to government intervention in economies as one of the root causes of corruption, human rights lawyers characterize States as duty-bearers, responsible for the provision of social services that work towards fulfilling economic, social, and cultural rights. The tendency of human rights lawyers to advocate for more government action therefore contrasts, on a general level, with the fact that economists view various forms of government intervention as causes of corruption. As will be discussed in the following section, however, economists and lawyers may not hold entirely disparate views on the role of States in causing and combating corruption, as economists have found that anti-corruption efforts require deregulation in certain sectors, as well as State-driven implementation and enforcement of anti-corruption laws.

B. The Need for Other Tools, Based in Both Law and Policy

Unsurprisingly, lawyers and economists have produced notably different recommendations on how to combat corruption, with lawyers predominantly focusing on the need for legal reform, and economists largely focusing on policy-based recommendations. The Committee on Economic, Social and Cultural Rights has, for example, called for legal reform to address the harmful effects of corruption, and in particular, the implementation and enforcement of anti-corruption laws as required by UNCAC.[137] In turning to transnational criminal law treaties such as UNCAC to address corruption, human rights lawyers have implicitly acknowledged that international human

[136] Mauro, *Why Worry About Corruption?* (n 119) 5–6; Gupta, Davoodi and Alonso-Terme (n 134); Tanzi (n 118).

[137] See n 53.

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rights law has its limitations, and that other bodies of international law help to fill this legal gap. As mentioned above, the Committee on Economic, Social and Cultural rights has, however, also made other, policy based recommendations, such as the provision of adequate salaries for civil servants in order to prevent extortion, as well as campaigns to raise awareness of the negative effects of corruption.[138] For the most part, however, it appears that academic commentators on the subject of corruption and human rights have focused more attention on drawing the connection between corrupt conduct and human rights violations, rather than on making legal or policy prescriptions.[139]

Economists, by contrast, typically include policy recommendations in the concluding sections of their papers on corruption, but these recommendations generally do not mention law reform as a potential path forward. Mauro, for example, determined that economists should 'encourage governments to improve the composition of their expenditure by increasing the share of those spending categories that are less susceptible to corruption'.[140] Tanzi and Davoodi recommended, in particular, that economists 'should be more restrained in their praise of high public sector investment spending' because of its link with corrupt conduct due, in part, to the opportunities that such projects create for rent-seeking.[141] Deregulation may also help to reduce corruption, as government regulations represent barriers to entry that often exist to give public officials the ability to demand and collect bribes.[142] Increasing wages can reduce bribery, but only under certain conditions, which include proper monitoring and enforcement.[143]

A number of economists have noted more generally that reducing corruption requires ambitious, comprehensive, and long-term campaigns. Some have argued that corruption may be particularly persistent in certain societies because younger generations may have little incentive to behave honestly themselves due to the group or 'collective reputation' of older generations.[144] Temporary shocks to the economic system, such as armed conflict, may result in an increase in corruption that has lasting effects because collective reputations

[138] ibid.

[139] See eg B Rajogopal, 'Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship' (1999) 496 Connecticut Journal of International Law 495; JT Gathii, 'Defining the Relationship between Human Rights and Corruption' (2009) 31 University of Pennsylvania Journal of International Law 125; M Sepúlveda Carmona and J Bacio-Terracino, 'Corruption and Human Rights: Making the Connection' in Boersma and Nelen, *Corruption & Human Rights: Interdisciplinary Perspectives* (n 9); M Boersma, 'Corruption as a Violation of Economic, Social and Cultural Rights: Reflections on the Rights to Education' in Boersma and Nelen (n 9).

[140] Mauro, 'Corruption and the Composition of Government Expenditure' (n 119) 278.

[141] Tanzi and Davoodi (n 47) 21.

[142] P Bardhan, 'Corruption and Development: A Review of Issues' (1997) 35 Journal of Economic Literature 1320; J Svensson, 'Eight Questions about Corruption' (2005) 19 Journal of Economic Perspectives 19.

[143] Svensson (n 142) 33.

[144] Bardhan (n 142); J Tirole, 'A Theory of Collective Reputations (With Applications to the Persistence of Corruption and to Firm Quality)' (1996) 63 Review of Economic Studies 1.

can be difficult to rebuild once they have been shattered.[145] As a consequence, effective anti-corruption campaigns must be credible and sustained.[146] Anti-corruption campaigns that resemble periodic 'spring cleaning' are unlikely to be successful because 'a critical mass of opportunist individuals have to be convinced over a long enough period that corruption is not cost effective'.[147] Mauro has similarly concluded that when countries are trapped in a 'vicious circle' of persistent corruption, 'gradual reforms are less likely to work than more ambitious, comprehensive reforms', and outside intervention by NGOs may, for example, be necessary.[148]

Apart from occasional discussions of the OECD Anti-Bribery Convention, most economists appear to give little consideration to legal norms, and in particular how the enactment and enforcement of domestic anti-corruption laws may help to reduce corruption. One fascinating exception to this trend, however, is the work of Raymond Fisman and Edward Miguel, who studied corruption and legal enforcement in the context of diplomatic parking tickets in New York City.[149] Fisman and Miguel determined that the number of parking violations by diplomats in New York City between 1997 and 2002 bore a strong correlation to existing levels of corruption in the home countries of the diplomats.[150] This correlation suggests that cultural or societal norms regarding corruption are persistent and serve as strong determinants of corrupt behaviour, even when a diplomat is far away from his home country.[151] After New York City began enforcing parking tickets against diplomats in 2002, however, parking violations fell by over 98 percent.[152] Thus, while cultural or societal norms were an important determinant of corrupt behaviour, legal enforcement was also highly influential. Fisman and Miguel concluded that the success of anti-corruption reforms, such as those by the World Bank, depends on understanding how corruption norms evolve.[153] This study suggests that anti-corruption campaigns would benefit from focusing not only on legal reform, but also on the importance of the enforcement of existing or newly created anti-corruption laws.

VI. CONCLUSION

The language of international human rights law could have lent some force to the 2004 protests against Wal-Mart de Mexico's construction of Bodega Aurrera in a protected archaeological zone. The protestors could have characterized the conduct of Mexican public officials as a human rights

[145] Bardhan (n 142). [146] ibid 1337. [147] ibid.
[148] P Mauro, 'The Persistence of Corruption and Slow Economic Growth' (2004) 15 IMF Staff Papers 1, 4, 16.
[149] R Fisman and E Miguel, 'Corruption, Norms and Legal Enforcement: Evidence from Diplomatic Parking Tickets' (2007) 115 Journal of Political Economy 1020.
[150] ibid 1026. [151] ibid 1022. [152] ibid. [153] ibid 1046.

violation, in light of Mexico's obligation to protect the cultural heritage of its people. International human rights law had the potential to serve as a powerful vocabulary for articulating why the corrupt conduct of the Mexican officials was harmful to society.

Yet, in the context of corruption, the language of human rights law has its limits. The ICESCR, for example, makes no mention of corruption, although corrupt conduct appears to frustrate, if not violate, the obligation of States to progressively realize economic, social, and cultural rights. While corruption regularly features in the concluding observations of the Committee on Economic, Social and Cultural Rights, this treaty body has not advanced our understanding of how corruption and human rights are linked. Further conceptual problems result from the fact that private actors, like Wal-Mart de Mexico, remain outside of the direct application of international human rights law, despite some claims to the contrary by human rights activists and international legal scholars. International human rights law cannot function as a method for directly regulating the conduct of banks and corporations engaged in corrupt conduct. Finally, an interdisciplinary understanding of the causes and consequences of corruption shows the narrowness of a human rights perspective, which focuses not on economic actors, but on the relationship between the State and the people.

Because human rights law has its limitations as a vocabulary for describing the harms that result from corruption, there is potential for lawyers and activists to overuse or misappropriate this rhetoric. By claiming, for example, that there is a right to a corruption-free society, or insisting on a human rights approach to the issue of corruption, lawyers and activists may push this rhetoric beyond its limits, with the possible effect of weakening the fabric of this body of law.[154] While the protestors in Teotihuacán might have benefited from describing the harms resulting from Wal-Mart de Mexico's alleged conduct through the lens of human rights law, they would have had to turn to other areas of public international law in order to find appropriate legal tools for addressing this problem. The protestors could, for example, have highlighted the fact that Mexico had signed UNCAC in December 2003, and ratified it in July 2004.[155] They could also have pointed out that Wal-Mart de Mexico, as a subsidiary of the US corporation Wal-Mart International, fell under the ambit of the Foreign Corrupt Practices Act, which implements the OECD Anti-Bribery Convention in the United States. These two transnational criminal law treaties represent more robust legal approaches to the issue of corruption, though they are not without their own set of challenges.

[154] See eg Kofele-Kale (n 8).

[155] United Nations Convention against Corruption, 'UNCAC Signature and Ratification Status as of 1 December 2015' <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.