



## **The human rights-based approach to combating corruption: An improper rights overreach?**

Bonavero Discussion Group

Bonavero Institute of Human Rights, 11 February 2020

### **Introduction**

- Maltese Prime Minister resigned in Jan 2020. Investigative journalist Daphne Anne Caruana Galizia had been murdered in 2017.
- Agenda 2030, Goal 16.4. is to “substantially reduce corruption and bribery in all their forms”.
- Special Rapporteur (Manfred Nowak) on torture, report of 16 January 2019: “patterns of interaction”.

### Research Questions:

States perceived to be highly corrupt are at the same time those with a poor human rights record. There seems to be a negative feedback loop between both harms.

Are human rights the proper normative framework to denounce and combat corruption?

What is the legal quality of the assumed ‘link’ between corruption and human rights violations?

1. Positive analysis: Whether and under what conditions *can* corrupt acts or omissions technically be qualified as an actual violation of international human rights?
2. Normative analysis: *Should* corruption be conceptualised as a human rights violation?

### **I. Positive Analysis: Corruption as a human rights violation?**

- Corruption as umbrella term: Abuse of entrusted power for undue advantage.
- “**Victimless crime?**” Whose human rights? Which human rights?
- Real human rights “violation”? or only negative impact/environment conducive to abuses?
- Three state human rights obligations: respect, protect, fulfill (facilitate, provide, promote).
- Procedural and result-independent obligations
- Violation of Art. 2(1) ICESCR: take steps; achieving progressively; maximum of available resources.
- Corruption as discrimination: Art. 2(2) ICESCR and Art. 2(1) ICCPR.
- Causation: “Proximity” and “foreseeability”.
- Attribution: Art. 7 ILC Articles on state responsibility (ultra vires action): Under cover of public authority.

#### **But against rationale?**

- Margin of appreciation: “all *appropriate* means” (Art. 2(1) ICESCR); “reasonableness” (Art. 8(4) OP ICESCR).

### **III. Normative Analysis: Added value of complementary human rights based approach?**

#### Opportunities

- (1) Empowerment of victims.
- (2) Systemic responsibility of the state
- (3) From repression to prevention; thus less political abuse for elimination opponents.
- (4) Burden of proof /exoneration on state.

#### Risks

- (1) Distrust towards rule-of-law based (neo-)liberal state and institution of rights.
- (2) Does state responsibility unduly burden tax-payers?

#### IV. Practical recommendation of complementary human rights-based approach

(1) In the work of the human rights treaty bodies:

- Guidelines for all country reports
- Country-specific concluding observations of the committees
- Mandates of the human rights special rapporteurs

(2) Human Rights Council UPR:

- Voice for specialized anti-corruption NGOs

(3) A "General Comment on Corruption and Human Rights" that would apply to all treaties.

(4) An anti-corruption mandate could be included in the international standards for the National Human Rights Institutions.

→ **Mutual mainstreaming** (systemic integration of two subfields of public international law).

- Human rights institutions do not overstep their mandate.
- Only complementary approach, not to substitute criminal law approach.
- Could help to close implementation gap.

**Key objection:** "Human-rightism"? Overstretch of human rights?

- Strategic framing to reach human rights courts.
- Systemic problem artificially "forced" into a human rights mould ?  
Disregard of the "engine room" of the polity?

Response: Rights transform victims into citizens. Citizens build institutions that work.

#### Legal bases

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997, in force since 15 February 1999 (44 parties as of February 2020).
- United Nations Convention against Corruption of 31 October 2003 (UNCAC), in force since 14 December 2005, UNTS vol. 2349, p. 41 (UN Doc. A/58/422), 186 States parties (as of February 2020).

#### Further documents

- UN HRC, "Torture and other cruel, inhuman or degrading treatment or punishment", Report of the Special Rapporteur (Manfred Nowak), 16 January 2019 (UN Doc. A/HRC/40/59) on the relationship between corruption and torture or ill-treatment.
- Inter-American Human Rights Commission, Resolution 1/18 of 2 March 2018 "Corrupcion y Derechos Humanos".
- Final Report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights (UN Doc. A/HRC/28/73) of 5 January 2015.

#### Literature

- Anne Peters, "Corruption as a Violation of International Human Rights", *European Journal of International Law* 29 (2018), 1251–1287.
- Anne Peters, "The Risk and Opportunity of the Humanisation of International Anti-Corruption Law: A Rejoinder to Kevin E. Davis and Franco Peirone", *EJIL Talk! Blog of the European Journal of International Law*, 18 February 2019.
- Cecily Rose, 'The Limitations of a Human Rights Approach to Corruption', 65 *International and Comparative Law Quarterly* (2016) 405.
- Lys Kulamadayil, 'When International Law Distracts: Reconsidering Anti-Corruption Law', *ESIL reflections* vol. 7 issue 3 of 7 May 2018