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Corruption as a Violation of International Human Rights: A Reply to Anne Peters

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Professor Anne Peters engages in her thought-provoking article with the challenging question of 'which value does corruption harm in a legal system?'[1] She claims that, from an empirical and doctrinal standpoint, corruption *may* constitute a human rights violation, and that, from a normative standpoint, it *should* be classified as such. However, the author's first claim could be seen to be framed incorrectly and the arguments for her second claim, I would respectfully suggest, may not be completely satisfactory.

Peters' empirical claim, I believe, encounters a twofold structural problem. The underlying assumption is controversial, and, leaving aside its veracity or not, is not able to fully answer the research question posed by the article. Peters argues that factual evidence shows that countries with high rates of corruption have poor human rights records. While this is undoubtedly true in many contexts – in countries such as Afghanistan, North Korea, and Somalia, as indicated in the article – it is not the case everywhere. Countries such as Italy, Mexico or Japan, with high rates of corruption on many indexes, are not known to be great violators of human rights. Other countries, including South Africa, Israel or Hong Kong, have remarkable anti-corruption standards and, at the same time, show below-par human rights scores. It would therefore appear that this data cannot sufficiently explain why corruption counts as a human rights violation.

Furthermore, the article focuses on the cause/effect relationship between corruption and human rights, rather than on that which explains the violation of a legal value, which in this author's opinion is the only one that can answer the question of whether corruption constitutes a human rights violation. Corruption is surely one of the causes of human rights violations: for instance, corruption in healthcare, which leads to the use of low-quality drugs, affects the right to the highest standards

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[1] Peters, 'Corruption as a Violation of International Human Rights', in this issue, 1251.

of health;[2] corruption in the judiciary endangers the human right to a fair trial.[3] However, these constitute the effects of corruption.[4]

Peters' article, as I read it, does not articulate a chain of causation capable of establishing that corruption *is* a human rights violation from a legal point of view.[5] The paper does not bridge the gap between the consequences of corruption, be they human rights or otherwise, and the legal explanation underlying the machine of corruption. The imperatives of 'do not bribe' and 'do not be bribed' in reality represent the legal value that the research question is seeking to answer. They correspond to a simple principle: the duty of all members of a legal order to obey the law. This duty applies to both the briber, usually a citizen, and the bribee, usually a public official. This value is the legal rationale behind the state's obligation to engage in anti-corruption actions, and to be accountable for its failures. This obligation is centred on the expectation that the state's law will be obeyed by all, which is a value that primarily regards the rule of law, and only secondarily human rights. Indeed, the rule of law appears to be a more appropriate legal value to consider when examining violations caused by corruption. I would humbly suggest that there is a conceptual misperception underlying the article: it is hard to see the forest for the trees. The effects of corruption on human rights are visible and clear to all, but the legal value that is violated is the internal and invisible rule of law value of having the law obeyed. It is to this value that I believe corruption represents a real danger, whilst human rights violations represent an external manifestation. Everyone may rightly be alarmed to see trees in a forest burning, but the trees are made of wood and it is wood that is the fuel for the fire. Fire and wood go together, while trees belong to a different conceptual category. This misperception inevitably affects the whole analysis. If we focus on the final outcome, or the external manifestation, of the complex fabric of corruption we are not able to gain an understanding of the legal value at the core of the problem.

Another assumption that the article rests upon is that the creation of the state is only justified to the extent that it protects human rights. But would it not follow, if we accept this interpretation of state-building and justification, in conjunction with corruption as a violation of human rights, that the state's anti-corruption obligation is discharged where human rights are not infringed? I would argue that this would be unacceptable precisely because the state's anti-corruption obligation derives from its commitment to the rule of law, and not to human rights. The duty of the state to ensure that its laws are respected, to the benefit of its citizens, is a duty positioned

2 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICPRR) Art. 12(1).

3 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1979) 999 UNTS 171 (ICPRR) Art. 14(1).

4 See in Peters, *supra* note 1, Report of the Special Rapporteur', UN Doc. A/72/137, 14 July 2017; UNGA 'Preventing and combating corrupt practices' UN Doc. A/RES/69/199, 5 February 2015; UN Human Rights Commission, 'Corruption and Its Impact on the Full Enjoyment of Human Rights', (2005) UN Doc. E/CN.4/Sub.2/2005/L.24/Rev.1.

5 Rose, 'The Limitation of a Human Rights Approach to Corruption', 65 *International & Comparative Law Quarterly* (2016) 417.

outside the human rights struggle. Peters acknowledges this risk of *human rightism*, particularly when it comes to applying human rights to anti-corruption measures in non-Western countries. Nevertheless, the object of her critique is surprisingly not the human rights discourse, but rather the very conception of the rule of law which is actually not an object of mistrust in those same countries. It would seem that Peters adheres to an interpretation of the rule of law as the unique legacy of Western liberalism, which has actually been the subject of criticism.[6] Corruption does not thrive because of the adoption of the rule of law and the creation of state structures for a happy and free society. Rather, corruption flourishes where these elements are weak.

Peters' approach, it would appear, pictures a human rights society where any governmental interference is undesirable. This human rights approach seems to be grounded in peculiar doctrinal assumptions. Citizens are exclusively regarded as the victims: they cannot be the briber. If they are shown as the latter, it must be that they have been compelled to assume that role. Conversely, the state and its officials are consistently portrayed as the bad guys to be blamed. However, I would argue that the worldwide trend in anti-corruption legislation and practice leans in the opposite direction. In fact, the briber is increasingly considered not as a victim but as part of the corruption agreement. This has been incorporated in international conventions against bribery, such as the United Nations Convention against Corruption (UNCAC),[7] and suggested in reports and policy statements of the OECD Working Group and the Group of States against Corruption (GRECO).[8] Most legal systems today (save for the cases of 'duress') recognize this relationship between the briber and bribee,[9] even in countries where the private person has been exempted from responsibility under certain conditions.[10] In conclusion, I would respectfully suggest that there is not enough data to prove that corruption is a violation of human rights.

Peters' second claim, that corruption *should* be considered a human rights violation, faces similar structural difficulties, in my opinion. The 'victim' approach consists of mirrored individual rights of the victims of corruption. Accordingly, classifying corruption as a human rights violation would raise citizens' awareness of their status of victim and empower them to report incidences of corruption. However, I do not believe that this approach helps to attain the author's goal of improving anti-corruption measures.

6 Horwitz, 'The Rule of Law: An Unqualified Human Good?', 86 *Yale Law Journal* (1977) 561.

7 See UN Doc. A/RES/69/199, *supra* note 4, Art. 15(a); Council of Europe, 'Criminal Law Convention on Corruption' ETS No. 173, Art. 3.

8 See OECD Working Group on Bribery in International Business Transactions, 'Annual Report 2011', at 57; Council of Europe/GRECO, 'Third Evaluation Round, Evaluation Report on Italy Incriminations' (22 March 2012), at 32.

9 See Germany, Criminal Code, Art. 332; Spain, Criminal Code, Arts 419–420; France, Criminal Code, Arts 432(11), 433(1); United States, Department of Justice and Enforcement Division of the U.S. Securities and Exchange Commission, 'FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act' (14 November 2012), at 27; United Kingdom, Ministry of Justice, 'Bribery Act 2010 Guidance', §§ 6–9, para. 48.

10 See Italy, Law No. 190 (2 November 2012) Art 1, § 75(g).

Firstly, the normative theory proposed by Professor Peters is not balanced. It works only under certain conditions and for certain purposes, by neglecting others. On the one hand, the human rights approach may work exclusively for some human rights, such as the right to attainable standards of health, violations of which may be understood as petty corruption.[11] The legal chain of causation to hold the state liable in such circumstances is too fragmented: *should* an individual be unable to pay a bribe, *should* the context be that of petty corruption, and *should* the state not take any counter-measures, only then is corruption a human rights violation. However, were this the case, two other categories of rights violations would be jeopardized. Human rights violations provoked by poverty or incompetence, rather than corruption, would not receive the same consideration. Furthermore, other rights violations would be unfairly treated because they failed to capture the attention of the human rights' eye: a contractual or property right would be unjustly put aside if violated by corruption. There is simply no individual claim against the state for violations of human rights due to corruption. There is one for the violation of human rights in general, in which corruption has no specific place. Yet another claim addresses the victim of corruption, without a specific qualification of the right at stake.

On the other hand, Peters' considerations regarding large infrastructure projects and defence procurements presented in the article do not match well with its focus and findings on petty corruption. The idea of identifying citizens as victims of corruption in a one-to-one relationship with the state is particularly problematic in these cases. How is it possible to maintain that an individual has suffered a human rights violation because of state corruption? Let us imagine a highway collapse due to a contractor using poor-quality materials because of the need to finance kickbacks. Would it be appropriate to call the other bidders' claim to a fair public procurement a human rights plea? Or would their rights be ignored because they are not human enough? At the same time, one downside of such a system is that it would produce a huge volume of litigation, much of it without merit, which would place substantial burdens on the courts. Anyone who had used that highway at any time could claim to have suffered a human right violation, and therefore be considered a victim of that corrupt procurement. Surely administrative law, which was conceived to give consideration to third parties' expectations, interests and rights, is the functional law for this purpose, not human rights. Administrative law rules are precisely constructed to enable people to question the integrity of the public function without claiming an actual infringement of his or her individual right. Indeed, the strongest trend in studies and practice is towards establishing an anti-corruption administrative law, independent of criminal considerations and rights violations.[12]

[11] S. Rose-Ackerman and B. J Palifka, *Corruption and Government: Causes, Consequences and Reforms* (2nd edn, 2016), at 11.

[12] Gordon, 'Protecting the Integrity of the U.S. Federal Procurement System: Conflict of Interest Rules & Aspects of the System That Help Reduce Corruption', in J, B, Auby, E, Breen, and T, Perroud (eds), *Corruption and Conflicts of Interest. A Comparative Law approach* (2014) 42.

Secondly, I find Peters' calls for greater international attention to the problem of corruption and for the expansion of preventive measures against corruption quite troublesome as well. Peters argues that corruption upsets the whole national legal framework and that, therefore, international action should be taken. The article takes a huge step towards holding the state liable for high levels of corruption. If corruption is a violation of human rights, a (systematically) corrupt state is inconsistent with human rights. Therefore, the state is legitimate only and to the extent that it enforces human rights. A corrupt state would no longer be legitimate and, consequently, an international law sanction should apply. While the reasons for making corruption a matter of international concern seem clear, the mechanism to fight it at the international level is not developed in the article.[13] In particular, it remains unclear how such a reconceptualization towards human rights could close the implementation gap in the international anti-corruption tools. Theoretically, an international criminal court against corruption could only successfully deal with cases of grand corruption, and not the type of corruption mainly addressed in the article. It is also questionable that such a court would be qualified to judge on domestic corruption practices at all. In practice, those countries truly dominated by corruption would have great difficulty in deciding to join such a court, no matter the incentive or threat. Finally, the costs of the state being internationally liable would be on citizens themselves, resulting in the population of the corrupt state being ultimately affected.[14]

With regard to the issue of prevention, I would argue that the normative theory lacks internal and external coherence. It is indeed doubtful that the human rights approach could facilitate the desired preventive course of action in anti-corruption measures. After all, a trial is needed to establish a human rights violation, which is an *ex post facto* tool. At the same time, surprisingly, Peters is unsatisfied with the criminal law approach, arguing that a purely criminal law strategy for anti-corruption is particularly unsuitable in repressive states, where judicial proceedings can be misused. However, in such a scenario, this would hold true for the use of any legal device, not just anti-corruption measures. Generally, it remains unclear why resorting to human rights could help to avoid the misuse of anti-corruption instruments. It is rather easy to claim to have suffered a human rights violation due to state corruption. This becomes even more evident when the author gives the example of the luxurious lifestyle of high-ranking politicians in under-developed countries. But how could the true victims of this type of despicable behaviour be identified, and how could it be argued

[13] Rose, *supra* note 5, at 417; Von Bogdandy and Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51 *Common Market Law Review* (2014) 59; Rose-Ackerman, 'International Actors and the Promises and Pitfalls of Anti-Corruption Reform', 34 *Pennsylvania Journal of International Law* (2013) 3; Dugard, 'Corruption: Is There a Need for a New Convention', in S. Rose-Ackerman and P. D. Carrington (eds), *Anticorruption Policy: Can International Actors Play a Constructive Role?* (2013).

[14] M. L. Wolf, 'The Case for an International Anti-Corruption Court', available at https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf; M. Stephenson, 'The Case against an International Anti-Corruption Court', available at https://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/.

that their rights have been violated by corruption? Does it not in the end amount to watering the trees – and perhaps losing them too, since it is difficult to protect human rights through this approach – while the wood burns?

Professor Peters is certainly to be commended for her work in seeking to shed light on the suffering of victims of corruption. However, I believe that her article raises as many questions as it answers. While the impact of corruption on human rights is illuminated in the article, the more pressing questions of why and how corruption could and should count exclusively or primarily as a human rights violation remain unanswered.