

---

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

Kevin E. Davis\*

Anne Peters proposes to use international human rights law as a lens for analysing corrupt acts or omissions.<sup>1</sup> Her proposal fits squarely within the tradition of thinking that ‘every little bit helps’ when it comes to combatting corruption.<sup>2</sup> Peters does not offer, however, any convincing reason to believe that human rights analysis is helpful in this context. In other words, she fails to explain how human rights analysis adds value, especially given the considerable effort required to show that any given corrupt act qualifies as a human rights violation and the sophistication of the existing anti-corruption regime. In this reply, I sketch an answer to this question that emphasizes the informational role of human rights analysis. I argue that human rights analysis plays a valuable role in anti-corruption efforts to the extent it helps to produce information about the incidence and moral significance of corruption.

## 1 The Connection between Corruption and Human Rights Violations

I begin with a point of clarification; corruption does not necessarily lead to human rights violations. Peters’ generally clear and careful legal analysis obscures this point with the bald assertion that a state that maintains ‘evidently deficient anti-corruption measures’ violates its obligations under international human rights law.<sup>3</sup> The premise

\* Beller Family Professor of Business Law, New York University School of Law, USA. Email: [davisk@mercury.law.nyu.edu](mailto:davisk@mercury.law.nyu.edu). I am grateful to Edefe Ojomo and Christopher Roberts for helpful comments on an earlier version of this reply and to the Filomen D’Agostino and Max E. Greenberg Research Fund for support. All errors remain my own.

<sup>1</sup> Peters, ‘Corruption as a Violation of International Human Rights’, in this issue, 1251. The article also contains extensive references to prior literature discussing similar proposals.

<sup>2</sup> For a general critique of the every-little-bit-helps approach, see K.E. Davis, *Between Impunity and Imperialism: Regulation of Transnational Bribery* (forthcoming).

<sup>3</sup> Peters, *supra* note 1, at Sections 2.E.1 and 2.F.

appears to be that widespread corruption necessarily creates a significant threat to the enjoyment of human rights.<sup>4</sup> That is not correct.

To be fair, there are certain instances in which corruption – by which I mean mainly bribery and embezzlement involving public officials<sup>5</sup> – necessarily diminishes the enjoyment of a human right.<sup>6</sup> Internationally recognized human rights protect against arbitrary arrest, detention, exile,<sup>7</sup> deprivation of life<sup>8</sup> or interference with privacy, family or correspondence.<sup>9</sup> There is also a right to have criminal charges adjudicated by an independent and impartial tribunal.<sup>10</sup> Corrupt decision-making will often qualify as arbitrary decision-making, and it definitely involves the opposite of impartiality. Therefore, it seems reasonable to presume that corrupt actions on the part of officials who make decisions about life, liberty, privacy or the disposition of criminal charges diminish the enjoyment of human rights. This is in turn highly likely to lead to violations of states' obligations to respect, protect or fulfil the rights in question, either because the state (i) is attributed with the responsibility for a violation by the corrupt official or (ii) has violated an obligation to adopt a policy that prevents or provides redress for the relevant form of corruption.

The more complicated cases are ones in which corruption indirectly affects the enjoyment of international human rights. Since virtually any type of state action can be undertaken with a corrupt motive, virtually any state action that negatively impacts human rights can be undertaken corruptly. The list of possible impacts of this kind is as long as the list of human rights. It is not difficult to see how bribery or embezzlement might cause officials, for example, to neglect obligations to enforce laws against child labour or to provide adequate funding for education, health care

<sup>4</sup> The article is not entirely clear on this point. In several places, Peters appears to deny that there is a necessary connection between corruption and human rights violations. For instance, she acknowledges that bribery and other forms of corruption do not necessarily result in any specific harmful consequences besides undermining trust in the public service (at Section 2.E.2) and that 'a key problem for determining a human rights violation through corrupt conduct is causation'. *Ibid.*, at 1267.

<sup>5</sup> The United Nations Convention against Corruption requires states to criminalize bribery and embezzlement. United Nations Convention against Corruption (UNCAC) 2003, 2349 UNTS 41, Art. 15 (bribery of national public officials), Art. 16 (bribery of foreign public officials and officials of public international organizations), Art. 17 (embezzlement). It encourages, but does not require, states to criminalize conflicts of interest, influence peddling, nepotism, illicit enrichment or bribery of private sector actors. Peters cites Transparency International's widely used definition of corruption: '[A]buse of entrusted power for private gain.' This definition is both less precise than the legal terms used above, and too narrow because it focuses on the conduct of public officials and ignores the roles of private actors such as bribe payers and money launderers. The World Bank's definition also ignores conduct such as offers to pay bribes or the solicitation of bribes or illicit enrichment that involves potential, but not necessarily actual, misuse of public office. See Davis, *supra* note 2; Spalding, 'Corruption, Corporations, and the New Human Right', 91 *Washington University Law Review* (2014) 1365, at 1393.

<sup>6</sup> Like Peters, I set aside the question of whether freedom from corruption ought to be treated as a human right.

<sup>7</sup> Universal Declaration of Human Rights (UDHR), GA Res. 217, 10 December 1948, Art. 9; International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Arts 9, 12.4.

<sup>8</sup> ICCPR, *supra* note 7, Art. 6.1.

<sup>9</sup> UDHR, *supra* note 7, Art. 12; ICCPR, *supra* note 7, Art. 17.1.

<sup>10</sup> UDHR, *supra* note 7, Art. 10; ICCPR, *supra* note 7, Art. 14.1.

or policing. Less obviously, corruption might discourage profitable business activities that would tend to reduce poverty and thereby promote economic rights.

In this second class of cases, any connections between corruption and diminution of human rights are contingent rather than necessary. Suppose, for example, that a high-level official allows a contractor to overbill the state, either because he has received a bribe or because he has an interest in the firm. Assume that the national health care system is so underfunded that the state has clearly failed to satisfy its obligation to fulfil the right to health. This does not necessarily mean that corruption is the cause of the human rights violation. For instance, it is possible that, if the funds had not been diverted, they would have been allocated to the military or to higher education. In this case, it cannot be said that the corruption has caused the failure to realize the right.<sup>11</sup> In general, corrupt diversion of funds has indeterminate effects on enjoyment of human rights.<sup>12</sup> The only exceptions are when the funds have already been allocated, or almost certainly would have been allocated, to compliance with human rights obligations. The impact of bribery on the enjoyment of human rights is similarly indeterminate – except in the aforementioned cases in which the bribe undermines a right to non-arbitrary or impartial decision-making – because it depends on what the official does in return for the bribe.

The indeterminate nature of the connection between corruption and human rights violations means that failure to adopt anti-corruption policies is not automatically a violation of a state's responsibility to protect and fulfil human rights. This conclusion is buttressed by the fact that implementation of anti-corruption policies can cause, rather than prevent, human rights violations. It is not uncommon for anti-corruption law to be used to violate due process rights or to persecute champions of human rights.<sup>13</sup> In addition, the need to combat public sector corruption might be used to justify privatization and deregulation programmes that ultimately diminish the enjoyment of human rights.<sup>14</sup>

In short, analysis of whether corruption violates human rights must be careful and context-specific. This takes us to the interesting policy question: what is the value of undertaking such an analysis? In other words, what is the value of trying to determine whether a particular human rights violation was caused by corruption? Why make an effort to determine whether the consequences of corruption include human rights violations?

<sup>11</sup> As Peters explains, corruption can only be the legal cause of a human rights violation if it is necessary for the realization of the prohibited state of affairs, a *conditio sine qua non*, a factor in the absence of which the damage would not have occurred. Peters, *supra* note 1, at Section 2.H.1.

<sup>12</sup> Rose, 'The Limitations of a Human Rights Approach to Corruption', 65 *International and Comparative Law Quarterly* (2016) 405, at 415–416.

<sup>13</sup> A recent worldwide survey of human rights violations features more allegations of corruption brought against human rights actors than corrupt acts on the part of public officials. See Human Rights Watch, *World Report 2018: Events of 2017* (2017).

<sup>14</sup> For a related concern, see Rose-Sender and Goodwin, '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* (2010) 221, at 228: 'Focusing on the corruption of bureaucrats and government officials ... conveniently shields free market ideology from any responsibility for the failure to live up to its claim of wealth creation.'

## 2 Human Rights Analysis as a Direct Trigger for Sanctions

Peters argues that human rights analysis might be valuable in efforts to close the well-known ‘implementation gap’ that exists between the aspirations and the reality of anti-corruption policy. Curiously, in discussing this possibility, she only considers how human rights analysis might complement the components of the anti-corruption regime that criminalizes misconduct. She neglects to mention the sophisticated peer-review mechanisms that the major anti-corruption treaties employ to hold states accountable for their decisions about anti-corruption measures.<sup>15</sup>

In assessing the value of human rights analysis, Peters focuses on whether it will trigger the imposition of sanctions by human rights actors or their allies. I believe that she is simultaneously too pessimistic and too optimistic about this possibility.

It is well known that the formal sanctions for violation of international human rights are very weak. Consequently, as Peters seems to acknowledge, the value of human rights analysis of corruption is unlikely to lie in the fact that it triggers the application of formal sanctions by human rights tribunals.<sup>16</sup> There are, however, other sanctions that might be triggered by a pronouncement that a human rights violation has occurred. Proponents of the human rights regime frequently boast that its influence stems from the impact of naming and shaming violators.<sup>17</sup> The basic claim, which finds support in the social scientific literature,<sup>18</sup> is that publishing information about human rights violations affects states’ behaviour through a variety of mechanisms that have nothing to do with the deterrent effects of formal sanctions imposed by human rights institutions. A partial list of those mechanisms includes incentives to avoid losing foreign aid conditioned on compliance with human rights norms; incentives to avoid losing investment from firms afraid to risk their reputations by doing business in or with states known to violate human rights; incentives to avoid being prejudiced in investor–state arbitration and other legal proceedings on account of being viewed as a human rights violator; mobilization of domestic interest groups; persuasive effects of reframing policy debates in terms of clashes of rights instead of

<sup>15</sup> Organisation for the Economic and Co-operation Development (OECD), Country Monitoring of the OECD Anti-Bribery Convention, available at [www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm](http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm); United Nations Office on Drugs and Crime, *Mechanism for the Review of Implementation of the United Nations Convention against Corruption: Basic Documents* (2011).

<sup>16</sup> Peters, *supra* note 1, at 1285–1286: ‘[T]he human rights lens does not necessarily empower individual victims of corruption in the practical sense of opening up new pathways of access to justice for them.’

<sup>17</sup> Risse and Sikink, ‘The Socialization of International Human Rights Norms into Domestic Practices: Introduction’, in T. Risse, S. Ropp and K. Sikink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999) 1.

<sup>18</sup> See, e.g., Chaitanya Vadlamannati, Janz, and Berntsen, ‘Human Rights Shaming and FDI: Effects of the UN Human Rights Commission and Council’, 104 *World Development* (2018) 222; Murdie and Davis, ‘Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs’, 56 *International Studies Quarterly* (2012) 1; R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (2013); B.A. Simmons, *Mobilizing Human Rights: International Law in Domestic Politics* (2009). Cf. E.A. Posner, *The Twilight of Human Rights Law* (2014).

the balancing of political or economic interests and the desire of public officials or voters to conform to international norms.<sup>19</sup>

Human rights violations linked to corruption will not necessarily engage these mechanisms. Moreover, corrupt behaviour is subject to more potent formal sanctions than simple violations of human rights, and it also attracts significant reputational sanctions. Consequently, it is far from obvious that there is any incremental value in announcing that a violation of anti-corruption norms also amounts to a violation of human rights. What is the added value of naming and shaming a person who has already been determined to have engaged in corruption? Can they really experience more shame?

Even if human rights analysis did trigger meaningful incremental sanctions for corruption, there would not necessarily be reason to celebrate. The problem is that human rights sanctions are aimed virtually exclusively at states and, to a lesser extent, their officials. This is a problem because many of the most pernicious forms of corruption, such as bribery, conflicts of interest and nepotism, involve transactions between state officials and private actors.<sup>20</sup> Sanctions that target only one side of the transaction are not necessarily the best responses to the problem. In fact, in many instances, it will be positively undesirable to sanction states for corruption. Suppose, for example, that a particular state can reasonably expect foreign investment in its territory to decline significantly if it is labelled a human rights violator. In this scenario, human rights analysis will trigger a meaningful sanction. To the extent that the purpose of imposing sanctions is retribution or compensation, sanctioning a state is problematic because it is a victim, rather than a perpetrator, of the official's crime.

This becomes especially clear when we recognize that sanctions nominally imposed on states often end up burdening members of the general population. For example, a reduction in foreign investment only has a direct effect on workers and businesspeople, not on politicians or civil servants. Sanctions might also be imposed in an effort to deter corruption. For instance, human rights advocates might hope that the fear of losing foreign investment will encourage states to prevent corruption by doing more to screen out, monitor and punish dishonest officials. The problem with this reasoning is that the state may not respond as predicted. For instance, sanctions are often touted for their ability to create economic incentives. However, states are controlled by governments, which generally respond primarily to political incentives. As a consequence of their political interests, some governments have very short time horizons; others are biased towards the interests of particular classes or ethnic groups, regions or industries. Sanctions imposed on such governments will not necessarily induce efforts to prevent corruption.<sup>21</sup> In fact, sanctions might provoke resistance to anti-corruption

<sup>19</sup> This listing of the variety of ways in which international law can affect domestic outcomes draws on Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127.

<sup>20</sup> Rose, *supra* note 12, at 422–431.

<sup>21</sup> Davis, 'Contracts Procured through Bribery of Public Officials: Zero Tolerance versus Proportional Liability', 50 *New York University Journal of International Law and Policy* (2018) 1261.

initiatives by creating, for instance, economic and political instability that could lead a government to resort to corruption in an effort to maintain power.

A more general concern is that human rights actors lack the expertise either to evaluate states' anti-corruption measures or to craft sanctions that respond appropriately to individual acts of corruption. Anti-corruption measures, including punitive sanctions, aim to achieve multiple objectives, including retribution, compensation and prevention. Effectiveness depends on how the enforcement strategies of multiple enforcement agencies combine to affect multiple actors, including states, officials, bribe payers, money launderers and firms that employ bribe payers or money launderers.<sup>22</sup> There is no reason to believe that human rights actors possess the knowledge and expertise required to play a helpful role in either evaluating or implementing these measures.<sup>23</sup> Anti-corruption agencies that are subject to the scrutiny of international peer reviewers seem much better qualified.

### 3 The Value of Human Rights Fact-Finding

Although there is reason to be sceptical about the value of human rights analysis as a trigger for sanctions for corruption, the information it produces is likely to be valuable in other ways. Some of that value resides in purely factual information about government wrongdoing. For instance, human rights fact-finders have documented and publicized instances in which bribery or embezzlement have led to police abuse;<sup>24</sup> inhumane treatment of prisoners;<sup>25</sup> failures in the provision of health care;<sup>26</sup> land acquisitions that displace communities and result in food shortages<sup>27</sup> and impunity for a range of human rights violations.<sup>28</sup> These accounts often cover not only the experiences of the relevant population but also the causal roles played by public officials and governmental policies or practices.

The human rights regime has considerable capacity for fact-finding, keeping in mind that it encompasses not only international commissions and tribunals but also special rapporteurs, national agencies and non-governmental organizations. Some of

<sup>22</sup> Davis, *supra* note 2.

<sup>23</sup> Rose, *supra* note 12.

<sup>24</sup> *Ibid.*, at 58: 'Police [in Azerbaijan] ill-treated [many people presumed to be gay, bisexual or transgender] to coerce bribes and information about other gay men' (at 58); '[P]olice [in Papua New Guinea] target young people for "snake bails," where children are not charged but must pay a bribe for their release' (at 420).

<sup>25</sup> IACtHR, *Matter of the Penitentiary Complex of Curado Regarding Brazil*, Provisional Measures (Order), 7 October 2015, para. 20 (recommending state investigate allegations of corruption).

<sup>26</sup> Human Rights Watch, *supra* note 13, at 265: 'In a deadly outcome resulting from state corruption and neglect, over 60 children died in a public hospital in Uttar Pradesh state in August when a private supplier cut off the oxygen supply after government officials failed to pay long pending dues.'

<sup>27</sup> Klopp, 'Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya', 47 *Africa Today* (2000) 7, at 21 (describing creation of 'Operation Firimbi' by a network of local organizations that included the Kenya Human Rights Commission).

<sup>28</sup> Inter-American Commission on Human Rights, 'IACHR Wraps Up Onsite Visit to Honduras,' 5 December 2014, available at [www.oas.org/en/iachr/media\\_center/PReleases/2014/146.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/146.asp).



these engage in regular monitoring of particular public entities or topics, while others operate on an ad hoc basis. These actors have varying capacity, expertise and claims to legitimacy, but, collectively, they can bring impressive resources to bear. There is a caveat here; more fact-finding is not necessarily better. If human rights fact-finders tend to collect the same information as anti-corruption organizations, and tend to disseminate it through the same channels, then human rights analysis will add little value to the process. Even in this scenario, however, the human rights actors might be playing a useful role in checking information gathered from other sources. A more troubling possibility is that their involvement will do affirmative harm. For example, being interviewed multiple times might place an undue burden on witnesses. Alternatively, poorly gathered information might contradict information gathered by anti-corruption agencies and undermine their prosecutions.<sup>29</sup>

On balance, however, the benefits of adding human rights actors to the set of actors producing information about corruption and its consequences seems like a net benefit. Corruption is inherently difficult to detect. It occurs in secret, out of the presence of the people who are ultimately harmed, and evidence of the transaction often is concealed in intricate multinational financial dealings.<sup>30</sup> Under these circumstances, any measures that enhance the ability to detect corruption seem worthwhile, and this includes increased involvement of human rights actors.

## 4 The Value of Moral Assessments Implicit in Human Rights Analysis

International human rights can be interpreted as statements about moral priorities. Efforts to respect, protect and fulfil certain human rights might conflict with other important interests, including interests in safeguarding other human rights. Human rights analysis takes these sorts of competing considerations into account in determining whether a state has committed a violation, and there is ample scope for disagreement about how any tensions ought to be resolved. However, the moral premise of the analysis is that states should make it a priority to avoid violations of human rights. By implication then, states should give higher priority to combating corrupt transactions that result in human rights violations than to combating other forms of corruption. They also should make it a priority to avoid anti-corruption initiatives that result in violations of human rights.

These twin moral insights can serve as useful guides to anti-corruption policy. They suggest, for instance, that all other things being equal, states that regulate transnational bribery ought to focus on transactions involving countries where bribery

<sup>29</sup> Similar concerns arise in interactions between human rights actors and bodies charged with the enforcement of international criminal law. See Stahn and Jacobs, 'The Interaction between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (New) Typology', in P. Alston and S. Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (2016) 255.

<sup>30</sup> OECD, *The Detection of Foreign Bribery* (2017), at 9, available at [www.oecd.org/corruption/the-detection-of-foreign-bribery.htm](http://www.oecd.org/corruption/the-detection-of-foreign-bribery.htm).

results in violations of human rights. They also suggest that some forms of corruption, such as in health care or the criminal justice system, ought to be higher priority targets than others. Peters raises the possibility that the moral priorities established through human rights analysis will be imposed in an imperialistic fashion on people in the global South. This may be a valid concern; however, as Peters notes, the risk of imperialism is an inherent feature of modern international anti-corruption law. The United Nations Convention against Corruption, which has attracted almost universal support in the global South, explicitly permits potentially imperialistic states both to regulate extraterritorially and, through peer-review processes, to sit in judgment of other states' efforts to regulate their own public officials.<sup>31</sup> Against the backdrop of this regime, human rights law poses little additional risk of imperialism.

## 5 Conclusion

Impunity for corruption is a serious problem. It also is a complex phenomenon whose causes and consequences can be difficult to unravel. For this reason it is important not to overstate either the extent to which the consequences of this form of impunity necessarily entail human rights violations or whether human rights actors can be helpful in addressing the problem. At the same time, human rights analysis is a process that mobilizes a large number of dedicated and skilled people to deliberate about the causes of suffering and injustice. If that process can be used to generate additional credible information about the consequences and moral implications of corruption it will make a valuable contribution to anti-corruption law and policy. Professor Peters' article provides a helpful guide to that kind of analysis.

<sup>31</sup> UNCAC, *supra* note 5, Art. 42 (jurisdiction); United Nations Office of Drugs and Crime, *supra* note 15; Davis, *supra* note 1, ch. 10.