

Strengthening the Fight Against Corruption through the Principle of Accountability

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Abstract

As much as rising inequalities, extreme poverty, unemployment, terrorism, and the disastrous effects of climate change, corruption is a global phenomenon with widespread consequences. The impact that corruption has on the resources and development of countries has been well documented. Recently the effects of corruption on human rights have also been noted. Specifically, it has been demonstrated that corrupt acts or omissions can violate states' duties to respect, protect, and fulfil human rights. Direct and indirect violations of human rights can be identified. The traditional approaches that have been employed in the fight against corruption, particularly the criminal law approach, have been critiqued for their limitation in practice. Specifically, human rights advocates have emphasised the lack of focus on the victims of corruption and the harm caused by violations of their recognised rights. This article examines a people-centred human rights-based approach as a possible response to this caveat. It is argued that human rights provide a "normative framework and legally-binding imperative" for anti-corruption strategies. In particular, the article analyses the principle of accountability as contained in the international human rights framework under which states, as duty bearers, are obliged to protect the rights of rights-holders in their jurisdiction from possible violations, either through their conduct or omission or those of third parties. In the event of an alleged violation of rights, the state must investigate, impose suitable punishment, and ensure equal access to remedies for holders of the violated rights. It is argued that this principle contributes several strengths to anti-corruption strategies. They include the empowerment of individual and collective rights-holders to hold states accountable for corrupt acts or omissions that have violated recognised and legally binding human rights. However, human rights procedures and enforcement mechanisms are not without their weaknesses, despite their accepted moral value. Their practical limitations are also examined to determine the actual efficacy of adopting this approach. The article concludes with some recommendations on how the human rights-based principle of accountability can be employed to overcome these challenges and contribute to the global fight against corruption.

Keywords

Corruption; human rights; accountability; human rights-based approach; socio-economic rights.

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1 Introduction

At present South Africa is reeling from the testimonies and evidence presented at the Zondo Commission¹ on state capture and the involvement of several high-level government officials, including former president Jacob Zuma, in corrupt activities. Even though corruption has been around as long as humans have existed, it is only in the last decades that it has been recognised as a global problem that contributes to widespread poverty.² Together with rising inequalities, extreme poverty, unemployment, terrorism, and the disastrous effects of climate change, corruption is presently at the top of the agenda of various international and regional fora.³ For example, Goal 16.5 of the 2030 Agenda for Sustainable Development calls for a substantial reduction of corruption and bribery in all their forms.⁴

A traditional criminal law approach has been employed in the fight against corruption with several successes.⁵ However, it seems as though those who are fighting against corruption are engaged in a losing battle, which fact suggests the need to adopt a new approach to anti-corruption strategies.⁶ It is argued that one of the primary deficits of the traditional approach is that it overlooks the widespread economic, social, and human harms caused by corruption.⁷

Bearing in mind that corruption is essentially about the abuse of power, and the human rights framework primarily focusses on how power is used, the latter's contribution to the anti-corruption movement seems quite apparent.⁸ Moreover, it has been argued that the two concepts are closely interrelated, as most countries with high levels of corruption have a poor human rights record and vice versa.⁹ It can therefore be argued that a human rights-based approach (HRBA) to combat corruption could be employed to

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¹ The Judicial Commission of Inquiry into Allegations of State Capture led by Deputy Chief Justice Raymond Zondo.

² Brown "Foreword" ix; Olaniyan *Corruption and Human Rights Law* 1; Holmes *Corruption* 1.

³ Holmes *Corruption* xiii.

⁴ UN date unknown <https://sustainabledevelopment.un.org/sdg16>.

⁵ Transparency International 2019 https://www.transparency.org/news/feature/25_corruption_scandals.

⁶ ICHRP and Transparency International *Corruption and Human Rights* 1.

⁷ Olaniyan *Corruption and Human Rights Law* 4.

⁸ ICHRP and Transparency International *Integrating Human Rights in the Anti-Corruption Agenda* viii.

⁹ Boersma *Corruption* 197; Peters 2018 *EJIL* 1252.

overcome the deficits of the traditional criminal law approach. In his 2017 report,¹⁰ the Special Rapporteur on the Right to Health demonstrates the link between corrupt practices and the violation of the state's obligation to make health care accessible, available and acceptable in line with General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR).¹¹ As one example he describes how the draining of resources through embezzlement or procurement fraud can impact on the quality of health care provided as a result, for example, of having fewer members of staff available to provide care and fewer resources available for the performance of maintenance.¹² He argues for the employment of human rights "as a normative framework and legally binding imperative" in creating anti-corruption laws and policies.¹³

One of the foundational principles of the HRBA is the principle of accountability. This principle enables holders of human rights to hold governments accountable for their failure to fulfil legally binding human rights obligations under domestic, regional or international law. This article will focus on two research questions. Firstly, how can the principle of accountability be employed to curb corruption? Secondly, what is the value of employing a human rights-based approach, specifically the principle of accountability, in combatting corruption?

As a starting point the article will provide a brief overview of corruption, whereafter the nexus between corruption and human rights will be examined. Specific attention will be paid to how corrupt acts or omissions can impact on the human rights obligations of duty bearers. An overview will be provided of the definition and content of an HRBA. After that, the content of the principle of accountability will be fleshed out. This will be followed by a discussion of the benefits of adopting the principle of accountability. The article will end with a discussion of critiques raised against the purported value of this principle, including its limitations in practice. Some recommendations will be provided to assist in overcoming these challenges.

¹⁰ *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health - Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* UN Doc A/72/137 (2017).

¹¹ *CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* UN Doc E/C.12/2000/4 (2000).

¹² *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health - Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* UN Doc A/72/137 (2017) para 14.

¹³ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 6-7.

2 The nexus between corruption and human rights

2.1 Corruption: A brief overview

The word corruption is derived from the Latin word *corruptiō*, meaning "to spoil, pollute, abuse, or destroy".¹⁴ However, there have been numerous debates on the term's exact definition.¹⁵ The difficulties in defining corruption are usually the result of several "discrete and differing social practices".¹⁶ The World Bank has defined corruption as "the abuse of public office for private gains".¹⁷ Many international organisations (for example, Transparency International) and scholars have adopted a similar definition.¹⁸

However, it has been argued that this definition is limited as it does not consider corruption in the private sphere.¹⁹ Moreover, it does not sufficiently recognise the impact of corruption on human well-being. To make a case for a connection between human rights violations and corruption (which is one of the central themes of this article), it is argued that a proper definition should include a victim element.²⁰ Olaniyan²¹ relies on the following definition:

[T]he deliberate, intentional mass stealing of public wealth and resources by senior state officials entrusted with its fair and honest management for the common good and achievement of human rights, whether carried out individually or collectively, but with the support, encouragement, or acquiescence of the state, combined with a refusal to genuinely, thoroughly and transparently investigate and/or prosecute the mass stealing and recover stolen assets, which violates the human rights of the economically and socially vulnerable.

This definition is also in line with the focus of this article. Corruption can take on numerous forms and can occur on various levels of society. This article will focus on forms of "grand" corruption (i.e., "an act which is widespread and systemic in scale"²²) by those who act on behalf of the state, whether

¹⁴ Holmes *Corruption* 1. Also see Olaniyan *Corruption and Human Rights Law* 39.

¹⁵ Caiden "Corruption and Governance" 19-21; Arnone and Borlini *Corruption* 1-6; Olaniyan *Corruption and Human Rights Law* 25, 40.

¹⁶ Bracking "Political Development and Corruption" 3-4.

¹⁷ World Bank *Helping Countries Combat Corruption* 8.

¹⁸ See, for example, Bracking "Political Development and Corruption" 4; Holmes *Corruption* 2-3; Peters 2018 *EJIL* 1254; Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* executive summary.

¹⁹ Bracking "Political Development and Corruption" 4.

²⁰ Olaniyan *Corruption and Human Rights Law* 25, 51.

²¹ Olaniyan *Corruption and Human Rights Law* 20.

²² Okojie and Momoh "Corruption and Reform in Nigeria" 103. Also see Rose-Ackerman *Corruption and Government* 27.

in an appointed or elected capacity, and private actors providing services on behalf of the state.²³

Corruption has traditionally been viewed as a criminal act against the state.²⁴ Criminal prosecution has so far been employed as the most popular anti-corruption strategy. Several challenges concerning a criminal law approach can be identified. These include the weak enforcement of anti-corruption laws, immunity clauses in legislation and national constitutions protecting high-level government officials, lack of independence in anti-corruption mechanisms and judicial systems, disagreements in defining corruption and the criminalisation of various acts, and lack of information or evidence due to high levels of secrecy, etc.²⁵ Moreover, criminal law perceives corruption as a "victimless phenomenon", which has resulted in "obscuring the effects and consequences of corruption on individuals or groups of people".²⁶ However, corruption undoubtedly has a significant impact on the welfare of society. This includes the failure to protect and fulfil fundamental human rights, especially those of the most vulnerable.

2.2 *Corruption and human rights obligations*

Whether the corrupt act is a single act or an element in a systemic climate of dishonesty, the effects of corrupt practices are vast. In a democratic society, corruption by government officials is seen as abuse or destruction of the public's trust in elected officials, and the legitimacy of government structures is significantly undermined.²⁷ This causes moral decay that can spread through all levels of society, like cancer.²⁸ High-level corruption distorts democracy and equal political participation and violates the rule of law.²⁹

For this article, the impact of corruption on human lives is significant. Corruption has the unfortunate consequence of diverting or limiting

²³ This contrasts with "petty" corruption, which includes "the kinds of corruption that people experience in their encounters with public officials and when they use public services". See Holmes *Corruption* 10-11.

²⁴ Olaniyan *Corruption and Human Rights Law* 8.

²⁵ Olaniyan *Corruption and Human Rights Law* 74, 115-116, 147-148, 161; Holmes *Corruption* 36.

²⁶ Olaniyan *Corruption and Human Rights Law* 51.

²⁷ Boersma *Corruption* 41; Olaniyan *Corruption and Human Rights Law* 3, 21, 109, 211; Holmes *Corruption* 19; Hope "Analytical Perspective on Police Corruption" 11-13.

²⁸ See Memmi *Decolonization and the Decolonized* 9; Olaniyan *Corruption and Human Rights Law* 54, 109; Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* executive summary.

²⁹ Olaniyan *Corruption and Human Rights Law* 109; Holmes *Corruption* 30.

resources meant for economic and social development and fulfilling human rights.³⁰ It also decreases the quality and provision of public services and the infrastructure essential to protecting and fulfilling human rights.³¹ The Supreme Court of Appeal of South Africa has recognised that corruption negatively affects development and human rights.³²

The purpose of creating and adopting human rights norms and principles is to "regulat[e] the domestic relationship between governments and their nationals".³³ This is especially relevant when considering the impact of corruption on societies, as shown above. Numerous international and regional organisations have affirmed the interrelatedness of human rights and corruption. For example, the CESCR has concluded in several observations that

corruption has a negative impact upon the (equal) enjoyment, implementation, realisation, or (full) exercise of economic, social and cultural rights.³⁴

The negative impact referred to by the CESCR includes direct and indirect violations of human rights. An example of a direct violation of human rights is when a government official embezzles resources meant for the building of a new school. An indirect violation of a human right will occur where a corrupt act or omission is part of a chain of events that leads for example to the insufficient provision of adequate housing to a community.

Human rights obligations can create either positive or negative duties for states according to the tripartite framework of obligations as envisioned by Asbjørn Eide.³⁵ These include: (a) the obligation to respect, i.e. to refrain from interfering in the enjoyment of human rights; (b) the obligation to protect, i.e. to ensure that the actions of others do not threaten rights and to bring violators of human rights to account; and (c) the obligation to fulfil, which is divided into two separate duties: first, the obligation to facilitate

³⁰ Brown "Foreword" x; Søreide and Williams "Introduction" 3; Holmes 25; Mbaku "Confronting Police Corruption" 33, 44-45.

³¹ *Economic, Social and Cultural Rights: Corruption and its Impact on the Full Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights. Working Paper Submitted by Ms Christy Mbonu in Accordance with Sub-Commission Decision 2002/106 UN Doc E/CN.4/Sub.2/2003/18 (2003) 14-15; Fitzsimons "Economic Models of Corruption" 57.*

³² *S v Shaik* 2007 1 SA 240 (SCA) para 223. Also see Hatchard *Combating Corruption* 109.

³³ Olaniyan *Corruption and Human Rights Law* 291.

³⁴ Boersma *Corruption* 116-120. Also see Peters 2018 *EJIL* 1258; Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 1, 18.

³⁵ Darrow and Tomas 2005 *Hum Rts Q* 529. For a detailed explanation of these obligations, see Eide "International Human Rights System" 162-174.

access to rights fulfilment by establishing an enabling environment under which a particular right can be progressively realised or to

engage proactively in activities that would strengthen people's ability to meet their own needs.³⁶

And secondly, the obligation to provide

a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by means at their disposal.³⁷

Below it will be discussed how these obligations should be interpreted in relation to corruption, with a specific focus on socio-economic rights because of their direct link to human welfare.

The obligation to respect can be violated when a state official denies a person access to social services, such as a school or a hospital, if that person is unwilling to pay a bribe. Under the obligation to protect, states must adopt legislation and policies that curb corruption in providing social services by their agents or third parties.³⁸ Inadequate due diligence over the utilisation of available resources and the lack of implementation of anti-corruption measures and strategies can be viewed as an omission on the part of the state in terms of its duty to protect human rights.³⁹ The Special Rapporteur on the Right to Food has also stated that the obligation to protect imposes a duty on states to fight corruption.⁴⁰ In terms of economic, social, and cultural rights, the obligation to protect requires states to

develop targeted, legally consistent, and sufficiently progressive policies toward securing those rights.⁴¹

This includes addressing any regressive policies or harmful practices (such as corruption) that hamper the full realisation of rights.⁴²

Moreover, states that fail to investigate alleged violations of human rights and prosecute violators are in breach of this right.⁴³ The same applies to

³⁶ Darrow and Tomas 2005 *Hum Rts* Q 529-530.

³⁷ Darrow and Tomas 2005 *Hum Rts* Q 529-530.

³⁸ Leckie 1998 *Hum Rts* Q 106; ICHRP and Transparency International *Corruption and Human Rights*: 54.

³⁹ ICHRP and Transparency International *Corruption and Human Rights* 25; Peters 2018 *EJIL* 1259.

⁴⁰ *Report of the Special Rapporteur on the Right to Food* UN Doc E/CN.4/2001/53 (2001) s 28; Boersma *Corruption* 157, 160-161.

⁴¹ Leckie 1998 *Hum Rts* Q 93-94.

⁴² Leckie 1998 *Hum Rts* Q 93-94.

⁴³ Leckie 1998 *Hum Rts* Q 109; ICHRP and Transparency International *Corruption and Human Rights* 42.

states that fail to properly investigate claims of corrupt acts or omissions. In *Glenister v President of the Republic of South Africa*⁴⁴ the Constitutional Court of South Africa found the Hawks (South Africa's Directorate for Priority Crime Investigation with the mandate of investigating corruption) not to be sufficiently independent. Therefore, the Court found that the state had failed to protect the rights contained in the South African Bill of Rights as required by section 7(2) thereof and that it had thereby infringed on several civil, political, and socio-economic rights.⁴⁵

In terms of the obligation to fulfil, the proper management of state resources is essential in ensuring that rights are fulfilled in a manner that is available (both in terms of quantity and quality), accessible (in terms of equal economic and physical access) and acceptable (under local values, traditions, and customs) to, for and by rights-holders in a manner that is adaptable to changing social and cultural circumstances.⁴⁶ Furthermore, according to article 2(1) of the *International Covenant on Economic, Social and Cultural Rights*:⁴⁷

Each State Party to the present Covenant undertakes to *take steps*, individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively the full realisation* of the rights recognised in the present Covenant *by all appropriate means*, including particularly the adoption of legislative measures (my emphasis).

"To the maximum of its available resources" requires the equitable and effective use of all available resources towards realising socio-economic rights.⁴⁸ Corrupt acts can cause essential funds to be diverted away from essential development programmes through which socio-economic rights could have been fulfilled.⁴⁹ For example, regarding the right to food, the duty to fulfil will be violated in the event of a misappropriation of the funds meant for foodstuffs or food aid.⁵⁰

⁴⁴ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

⁴⁵ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) paras 175-176.

⁴⁶ ICHRP and Transparency International *Corruption and Human Rights* 48, 58-60; ICHRP and Transparency International *Integrating Human Rights in the Anti-Corruption Agenda* 59; Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 7.

⁴⁷ *International Covenant on Economic, Social and Cultural Rights* (1966).

⁴⁸ *Note Verbale Dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights ("Limburg Principles")* UN Doc E/CN.4/1987/17 (1987) s 27; Boersma *Corruption* 231.

⁴⁹ ICHRP and Transparency International *Corruption and Human Rights* 46.

⁵⁰ Boersma *Corruption* 238. Also see Leckie 1998 *Hum Rts* Q 98.

Moreover, according to General Comment 3 of the CESCR,⁵¹ the duty of "progressive realisation" imposes upon states the obligation to continuously improve conditions; and they are prohibited from taking deliberate retrogressive steps without compensation. Any unjustified decrease in public expenditure aimed at fulfilling socio-economic rights would violate this obligation.⁵² Furthermore, and as mentioned above, the duty related to using "all appropriate means" includes adopting anti-corruption measures and legislation to combat the theft and mismanagement of state resources.⁵³

In addition to the specific duties outlined above, international and regional treaties on human rights can be interpreted creatively by the appropriate monitoring bodies to establish a link between corruption and the violation of one or more human rights to hold states accountable.⁵⁴ Authoritative interpretations of the obligations set out above provide a detailed framework to keep states accountable and ensure the full enjoyment of human rights.

3 A human rights-based approach and the principle of accountability

3.1 Definition and overview of a human rights-based approach in relation to corruption

There is no single or exclusive definition of a HRBA.⁵⁵ Different agencies, actors, and organisations have varying interpretations of this concept and differing methodologies and practices in implementing it.⁵⁶ However, it is generally agreed that the main objective of this approach is to

integrate the norms, standards, and principles of the international human rights system into ... plans, policies and processes.⁵⁷

The idea of a HRBA was originally formulated as a development approach in the 1990s to address growing inequalities and rising poverty statistics. Although there are varying definitions of a HRBA, they share several core principles anchored in human rights law: (a) equality and non-discrimination,

⁵¹ *CESCR General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)* UN Doc E/1991/23 (1990).

⁵² Leckie 1998 *Hum Rts Q* 107-108; Boersma *Corruption* 232-233.

⁵³ *Human Rights Committee General Comment No 27: Article 12 (Freedom of Movement)* UN Doc CCPR/C/21/Rev.1/Add.9 (1999) s 12, 19; Boersma *Corruption* 228, 230, 233.

⁵⁴ Olaniyan *Corruption and Human Rights Law* 108, 196, 274.

⁵⁵ Gready 2008 *Development in Practice* 736; Gauri and Gloppen 2012 *Polity* 486.

⁵⁶ Frediani 2010 *Development in Practice* 181-182; Miller 2010 *Intl J Hum Rts* 916.

⁵⁷ Mokhiber 2001 *Statistical Journal of the United Nations Economic Commission for Europe* 158.

(b) accountability, (c) participation, (d) empowerment, and (d) the indivisibility and interdependence of rights.⁵⁸

In combatting corruption, a HRBA can provide a normative lens to analyse the impact of corruption based on legally recognised human rights and corresponding obligations. By reformulating problems related to corruption as violations of human rights, corruption is turned into "something that need not and should not be tolerated" under international human rights law.⁵⁹ At its core, a HRBA is a "people-centered" approach focussing on the individual human being "as the central object".⁶⁰ The difference between a HRBA and a criminal justice approach is the former's focus on people; in other words, on the victims of corruption (individually or collectively) and on how damages can be remedied.⁶¹ The focus shifts from the act or omission to the consequences thereof. A HRBA advocates institutions, policies, and processes that are people-centred and based on participatory opportunities, including recognising and respecting individual agency.⁶²

Moreover, a HRBA seeks "to give tangible expression to human rights 'principles'".⁶³ Former United Nations (UN) High Commissioner for Human Rights, Navi Pillay, has stated that

[c]orruption violates the core human rights principles of transparency, accountability, non-discrimination, and meaningful participation in every aspect of the life of the community. Conversely, these principles, when upheld and implemented, are the most effective means to fight corruption.⁶⁴

The human rights that underpin each of these principles are anchored in the international human rights framework. Therefore, the core principles of a HRBA are legally binding upon the states that have voluntarily ratified the treaties in which the specific rights are included.⁶⁵ To fight corruption, the principle of accountability stands out for its possible contribution and will be fleshed out below. It should be borne in mind that based on the

⁵⁸ Oppong 2006 *AHRLJ* 126.

⁵⁹ Ely Yamin 2008 *Health and Human Rights* 48.

⁶⁰ Fukuda-Parr, Ely Yamin and Greenstein 2014 *Journal of Human Development and Capabilities* 107. Also see Alston 2004 http://pacific.ohchr.org/docs/A_HR_perspective_on_MDGs_P_Alston.doc para 105; Oppong 2006 *AHRLJ* 127.

⁶¹ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 15, 18.

⁶² OHCHR *Frequently Asked Questions* 7.

⁶³ Darrow and Tomas 2005 *Hum Rts Q* 497.

⁶⁴ OHCHR 2013 <https://www.ohchr.org/EN/NewsEvents/Pages/HRCCaseAgainstCorruption.aspx>. See also Olaniyan *Corruption and Human Rights Law* 65-66.

⁶⁵ Cornwall and Nyamu-Musembi 2004 *TWQ* 1417; Frediani 2010 *Development in Practice* 182.

interconnectedness of human rights, the foundational principles of a HRBA approach are also closely interrelated. A discussion of one will inevitably touch on other principles.

3.2 The principle of accountability

The principle of accountability is based on the argument that in the human rights framework, states as duty bearers are obliged to protect the rights of rights-holders in their jurisdiction from possible violations, either through their own conduct or omission or through the actions or omissions of third parties. In the event of an alleged violation of rights, the state has an obligation to investigate, impose suitable punishment, and ensure equal access to remedies for holders of the violated rights.⁶⁶ On the other hand, where states themselves are the perpetrators, they are required to justify their actions under international human rights law; otherwise they will be subjected to possible sanctions.⁶⁷

In contrast to a criminal law approach, where the focus is on determining the criminal culpability of the perpetrators of a corrupt act or omission, a HRBA seeks to establish the accountability of all responsible parties.⁶⁸ International, regional and national human rights instruments, including authoritative interpretations, provide a framework for holding those responsible to account by explicitly setting out the duties that rest on different actors.⁶⁹ These obligations can be legally binding depending on the nature of the source they are contained in. Obligations set out in international and regional treaties have in many instances been incorporated into domestic law, such as the *Constitution of the Republic of South Africa*, 1996, which provides rights-holders with clearly defined avenues to hold duty-bearers accountable for their actions or failures.

The principle of accountability also requires effective and equally accessible remedies to be put in place for victims of corruption. This is supported by article 35 of the *UN Convention Against Corruption*.⁷⁰ Additionally, a HRBA calls for the empowerment of vulnerable groups to demand and exercise

⁶⁶ *Velásquez Rodríguez Case* Inter-American Court of Human Rights (Series C) No 4 (1988).

⁶⁷ ICHRP and Transparency International *Integrating Human Rights in the Anti-Corruption Agenda* 26.

⁶⁸ ICHRP and Transparency International *Integrating Human Rights in the Anti-Corruption Agenda* 34-35; Olaniyan *Corruption and Human Rights Law* 299.

⁶⁹ ICHRP and Transparency International *Integrating Human Rights in the Anti-Corruption Agenda* 34-35; Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 18.

⁷⁰ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 15.

their rights against duty bearers.⁷¹ Through effective accountability measures a HRBA empowers individuals to use local mechanisms, whether political, administrative, judicial or quasi-judicial, to hold duty-bearers accountable.⁷² International pressure through human rights mechanisms such as UN and regional bodies can also be employed to hold officials to account.

To summarise, the principle of accountability holds that in the human rights framework human rights have corresponding obligations. When a HRBA is followed, rights-holders have the opportunity to hold relevant duty-bearers accountable for not fulfilling their legally recognised obligations.

Based on the link between corruption and human rights outlined in section 2 above, it is clear that human rights norms and principles do have a role to play in anti-corruption strategies. What thus needs to be questioned further is what the value is that these principles, in this case the principle of accountability, can bring to anti-corruption strategies and whether there are any limitations or challenges that can impede the strength of this principle. The following section will focus specifically on the advantages that can be gained when the human rights-based principle of accountability is employed in anti-corruption strategies.

4 Advantages of adopting the principle of accountability

4.1 Strengthened accountability measures

According to the UN High Commissioner for Human Rights

human rights law provides a value system, a legal framework, monitoring mechanisms and realistic tools that can strengthen the effectiveness of the implementation of these goals. ... The elaborate system of the [Commission's] special rapporteurs ... as well as the expert [treaty] bodies ... provide a wealth of information that could usefully assist in assessing to what degree ... goals have been fulfilled.⁷³

Even though the statement above was made regarding development goals, it can be argued that the same can apply to anti-corruption goals and indicators. By linking rights to anti-corruption strategies, the entire international infrastructure of human rights accountability can be employed

⁷¹ OHCHR *Frequently Asked Questions* 24; O'Dwyer and Unerman 2010 *Accounting and Business Research* 457.

⁷² Darrow and Tomas 2005 *Hum Rts Q* 512. Also see Uvin 2007 *Development in Practice* 603.

⁷³ As cited in Alston 2004 http://pacific.ohchr.org/docs/A_HR_perspective_on_MDGs_P_Alston.doc para 174.

in the fight against corruption. Linking legally binding human rights to anti-corruption strategies creates innovative opportunities to monitor and hold states accountable for the outcome of anti-corruption initiatives. Obligations can be established under these strategies that meet the standards of international human rights law.⁷⁴

Human rights treaty monitoring bodies have also expanded their focus from being concerned only with the human rights violations committed by states to the positive acts a state can perform towards the recognition of human rights, such as improved transparency, which will aid in bringing corrupt acts to light.⁷⁵ Notably, under the strengthened accountability framework of human rights, responsibility is placed on all actors involved in managing state resources to uphold human rights. This includes private sector organisations providing services on behalf of the state.⁷⁶

4.2 Explicit monitoring framework

International, regional, and national human rights monitoring mechanisms provide valuable oversight over state institutions. By providing an explicit framework of the duties states are obliged to fulfil, legally or otherwise (e.g. due to morality or political pressure), monitoring the fulfilment of these duties, including those related to anti-corruption measures, is made easier. Moreover, continuous monitoring can highlight situations or countries where corruption is rampant and needs particular attention. When these institutions consistently enforce accountability, this can have a deterrent effect on acts of corruption.⁷⁷

The human rights framework provides defined standards for measuring the process and objectives of anti-corruption strategies. Specific standards bring the advantages of "objectivity, determinacy, and the definition of appropriate legal limits".⁷⁸ This has the potential to reduce subjectivity and arbitrariness influenced by prevailing power structures.⁷⁹ Moreover, as mentioned above, the clarification of human rights obligations through legal and other means (e.g. reports and authoritative interpretations from UN treaty bodies and Special Rapporteurs, rulings by domestic courts) is an

⁷⁴ Uvin 2007 *Development in Practice* 602-603; Gready 2009 *Journal of Human Rights Practice* 387.

⁷⁵ Alston 2005 *Hum Rts Q* 823.

⁷⁶ McInerney-Lankford "International Development Actors and Human Rights" 162.

⁷⁷ ICHRP and Transparency International *Corruption and Human Rights* 6.

⁷⁸ Darrow and Tomas 2005 *Hum Rts Q* 485, 520.

⁷⁹ Darrow and Tomas 2005 *Hum Rts Q* 520.

ongoing process that ensures that formulated aims take account of changing circumstances.

A HRBA also goes further than the criminal law framework by placing an obligation on states to combat or work towards preventing corruption as part of its duty to protect.⁸⁰ An obligation to monitor the realisation of economic and social rights can also be found in various human rights instruments, which include anti-corruption indicators.⁸¹

4.3 Authoritative value system

Based on the idea of respect for human dignity, the human rights framework provides a higher set of moral values upon which anti-corruption strategies can be based.⁸² These normative standards can form the basis

for implementing long-term, durable, sustainable, and broad legal and institutional reforms.⁸³

They include the reform of the judicial systems currently employed to fight corruption in response to the critiques presented in section 2.1 above.⁸⁴

4.4 Victim empowerment

The human rights agenda emphasises the importance of developing the agency and capabilities of individual rights-holders.⁸⁵ Individuals or groups are empowered to hold states accountable for violating their legally-binding rights through judicial mechanisms.⁸⁶ Moreover, when a case is brought to court based on human rights, it is usually in front of a constitutional or appeals court with a higher level of scrutiny over judges' decisions and less opportunity to influence judges and decisions.⁸⁷ Moreover, poorer victims of corruption can rely on the funding available for public interest litigation based on human rights.⁸⁸

⁸⁰ Olaniyan *Corruption and Human Rights Law* 63, 293. Also see *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria* African Commission on Human and Peoples' Rights Communication No 155/96 (2001); Shelton 2008 *Denv J Int'l L & Pol'y* 130.

⁸¹ Boersma *Corruption* 230. See also *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) s 15(f).

⁸² Olaniyan *Corruption and Human Rights Law* 348.

⁸³ Olaniyan *Corruption and Human Rights Law* 13.

⁸⁴ Olaniyan *Corruption and Human Rights Law* 346.

⁸⁵ Frediani 2010 *Development in Practice* 183; Mitlin and Hickey "Introduction" 15-16.

⁸⁶ Olaniyan *Corruption and Human Rights Law* 46.

⁸⁷ Hatchard *Combating Corruption* 112.

⁸⁸ Hatchard *Combating Corruption* 112.

Corruption reproduces itself when elites can perpetuate their privileges while disadvantaged groups have no means to defend their interests. Under a HRBA, the focus is on those most vulnerable to the effects of corruption.⁸⁹ This aids in ensuring equal access to remedies without social, political, and economic barriers (e.g. location, poverty, gender).⁹⁰ Citizens' access to accountability measures can help to redistribute power and resources while reducing opportunities for corruption.

4.5 Strengthened advocacy measures

Linking human rights to corruption can also aid in pushing anti-corruption strategies higher up on the agendas of prominent international and regional fora and shine the spotlight directly on corrupt acts detrimental to human well-being.⁹¹ One of the strengths of a HRBA lies in its advocacy function. Specifically, at the UN level, the Universal Period Review process, Special Procedures and Thematic and Country mandates can be employed to expose systemic corruption and put pressure on states to remedy the situation.⁹² Although the recommendations made because of these processes are non-binding, it is agreed that a HRBA carries specific moral and political value.⁹³

Analysing corruption through a human rights lens highlights the harm caused to individuals or groups.⁹⁴ This could inform the severity and form of punishment or sanctions to an appropriate degree.⁹⁵ Moreover, bringing in a "human face" could aid in changing political perspectives and put pressure on duty bearers to remedy the consequences of corruption appropriately.⁹⁶ Through participation by all interested parties, all victims of corruption would be given an equal voice to challenge the existing power structures.⁹⁷

Moreover, the full force of the human rights community would be gained, which would provide additional strength in advocating anti-corruption

⁸⁹ ICHRP and Transparency International *Corruption and Human Rights* 5.

⁹⁰ ICHRP and Transparency International *Integrating Human Rights in the Anti-Corruption Agenda* 6.

⁹¹ ICHRP and Transparency International *Corruption and Human Rights* 6.

⁹² For examples of the contributions these processes can make, see Boersma *Corruption* 135-174.

⁹³ Boersma *Corruption* 146.

⁹⁴ ICHRP and Transparency International *Corruption and Human Rights* 23.

⁹⁵ As quoted in Olaniyan *Corruption and Human Rights Law* 65.

⁹⁶ Olaniyan *Corruption and Human Rights Law* 14, 114; Hatchard *Combating Corruption* 110.

⁹⁷ Flynn-Schneider 2014 *Human Rights Brief* 67; Olaniyan *Corruption and Human Rights Law* 329.

programmes.⁹⁸ Mobilising a robust civil society would assist in putting pressure on governments in holding them accountable and achieving social justice.⁹⁹

4.6 Cross-border cooperation

As corruption reaches across borders, international cooperation is vital in the fight against it. The *Maastricht Principles on Extraterritorial Obligations* could be employed to place obligations on various states to address any actions or omissions that could contribute to corruption in their own country or others.¹⁰⁰ This is specifically important if one considers the use of foreign banking accounts to hide stolen assets.

Although the above advantages seem impressive, it would be detrimental to blindly follow any new approach without considering possible challenges and criticisms. The foundation of a HRBA is the set of international and applicable regional and national human rights frameworks. This approach thus inevitably is subject to the same critiques that have been raised against human rights and their realisation. Moreover, some challenges specific to the link between corruption and human rights can also be identified.

5 Limitations and critiques of a human rights-based approach

5.1 Moral legitimacy of human rights

Human rights procedures and enforcement mechanisms are not without their own critiques. These include the question of moral legitimacy. Human rights are seen as universal moral values with distinct legal, moral and political components. However, the "universalism critique", including that of "cultural relativism", is one of the main arguments that have been brought against the moral value of human rights. This critique holds that human rights are an expression of liberal, Western values, and no space is allowed for "multi-culturalism", "relativism", or "contextualism".¹⁰¹ However, individuals from various political beliefs, cultures, and ideologies have globally accepted the values contained in the international human rights

⁹⁸ Doyle 2009 *Intl J Hum Rts* 7; Schmidt-Traub 2009 *Intl J Hum Rts* 79.

⁹⁹ Cornwall and Nyamu-Musembi 2004 *TWQ* 1419; Nelson 2007 *World Development* 2046.

¹⁰⁰ Olaniyan *Corruption and Human Rights Law* 174.

¹⁰¹ Brown 1997 *Intl J Hum Rts* 54. See also Habibi 2007 *Journal of Human Rights* 7; Mutua 2007 *Hum Rts Q* 575; Hopgood *Endtimes of Human Rights* 19; Vandemoortele "Limits of the MDGs' Design" 58.

framework as the highest moral authority, highlighting the strength of the human rights framework and its usefulness in anti-corruption strategies.

5.2 Strength of monitoring bodies and enforcement mechanisms

Existing human rights enforcement mechanisms have also been critiqued for not being effective.¹⁰² UN treaty bodies have adopted a practice of only mentioning concern over possible human rights violations in recommendations and observations and have been cautious (it could be argued overly so) in explicitly identifying serious situations as violations.¹⁰³

Moreover, the "views" adopted by review committees capable of receiving individual complaints are non-binding, regardless of their authoritative strength.¹⁰⁴ Various international and regional treaties depend on states adopting international and regional obligations into national legislation. Organisations and governments in charge of this are sometimes already riddled with corruption.¹⁰⁵ In addition, most monitoring mechanisms have no real sanctioning power for non-compliance with findings or recommendations.¹⁰⁶ This has the unfortunate consequence of watering down their ability to hold states accountable for violations of their human rights obligations:

The contribution of human rights enforcement mechanisms, such as courts and treaty monitoring bodies, to challenging corruption is dependent on and thus limited to the information they receive from states and non-governmental organisations and the cases received.¹⁰⁷ Cases brought to them must be based on "concrete evidence", which will most likely be very difficult to provide, given the secrecy that surrounds corruption.¹⁰⁸ Moreover, individuals and non-governmental organisations have limited ability to bring cases or complaints to treaty monitoring bodies without their state's assistance or approval.¹⁰⁹

Questions around the justiciability of second-generation rights are also challenging. However, arguments that these rights do not fall under the auspices of courts and other accountability mechanisms have been

¹⁰² Boersma *Corruption* 268-270

¹⁰³ Boersma *Corruption* 105-108, 109-111.

¹⁰⁴ Boersma *Corruption* 108-109.

¹⁰⁵ Boersma *Corruption* 91, 98.

¹⁰⁶ Boersma *Corruption* 84-85, 91-92, 98.

¹⁰⁷ Boersma *Corruption* 111; Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 22.

¹⁰⁸ Olaniyan *Corruption and Human Rights Law* 301.

¹⁰⁹ Olaniyan *Corruption and Human Rights Law* 302.

disproven. Domestic courts, especially the South African Constitutional Court, have clarified state obligations under these rights and have held states accountable for failures to fulfil socio-economic rights.¹¹⁰

5.3 Determination of victims

Considering the widespread impact of systemic corruption, as shown in section 2 above, it can sometimes be challenging to identify one particular individual or group of individuals who are the victims of a specific corrupt act or omission and have appropriate legal standing.

The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides guidance by defining a victim as

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.¹¹¹

Manifestations of harm caused by corruption can be seen in various ways; for example, the widespread violation of the rule of law, systemic human rights violations, increases in poverty, and inequalities.¹¹² Bearing in mind the definition above, it can be argued that society as a whole could be a victim. As stated by Bracking,¹¹³

all diversion of resources in a socialised space to a private pocket is at the expense of the public as a whole.

In addition, even though "victims are not necessarily immediately apparent", this does not make them less real. However, it is most likely that the most vulnerable and marginalised in society (individually or as a group) will be disproportionately affected by corrupt acts.¹¹⁴ Moreover, the principles of fairness and justice should be deployed in determining and overcoming the legal complexities of the standing, causation, and identification of the victim.

5.4 Establishing causation

Determining causation between a particular corrupt act or omission by the state and the violation of a specific human right/s (i.e., between a predetermined obligation and damage) could be challenging. Where a

¹¹⁰ See, for instance, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

¹¹¹ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985).

¹¹² Olaniyan *Corruption and Human Rights Law* 340-341.

¹¹³ Bracking "Political Development and Corruption" 4.

¹¹⁴ Olaniyan *Corruption and Human Rights Law* 339-340.

school principal employed by the state steals money meant to buy textbooks for a school, the link between the corrupt act and the violation of the right to education is evident. However, it could be more challenging to link the long-term and systemic syphoning from funds meant for social services programmes by several public officials in already poor and resource-constrained countries to a particular harm caused to a particular victim.

If a direct link between a corrupt act or omission and a violation cannot be established, the test of due diligence comes into play. According to Peters,¹¹⁵ this requires the human rights violation to be "foreseeable and not too far removed" from the corrupt act or omission. In other words, did the state act or fail to act in a way that prevented the respect for, protection of and fulfilment of a right.¹¹⁶ Sometimes there are several reasons for human rights violations, which makes establishing a link between corruption and a specific violation difficult.¹¹⁷ In these instances, corruption can also indirectly lead to a rights violation. This is the case where the corrupt act or omission is

an essential factor contributing to a chain of events that eventually leads to the violation of a right.¹¹⁸

The high level of secrecy surrounding corruption also makes determining a causal link difficult.¹¹⁹ Olaniyan¹²⁰ argues for applying the principle of *res ipsa loquitur* for inferring negligence (especially related to due diligence obligations) from circumstantial evidence that may not usually be sufficient to establish causation. Indexes and measurement tools like Transparency International's Corruption Perception Index can be used to demonstrate *prima facie* breach of due diligence obligations. Determining whether a public official is acting on behalf of the state or in his capacity as a state agent can also be problematic but not an insurmountable task.

5.5 Limited value of advocacy

Unfortunately, acknowledgement of the impact of corruption on human rights has been limited to vague and general rhetoric with limited use and effect in practice.¹²¹ To date, concerns regarding corruption have been

¹¹⁵ Peters 2018 *EJIL* 1268. Also see Peters 2018 *EJIL* 1267-1272.

¹¹⁶ ICHRP and Transparency International *Corruption and Human Rights* 27.

¹¹⁷ Boersma *Corruption* 195; Olaniyan *Corruption and Human Rights Law* 195.

¹¹⁸ ICHRP and Transparency International *Corruption and Human Rights* 27.

¹¹⁹ Olaniyan *Corruption and Human Rights Law* 315.

¹²⁰ Olaniyan *Corruption and Human Rights Law* 310.

¹²¹ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 1-2. See, for example, CESCR's *Concluding Observations on the Initial Report of Burundi*

raised only as part of a list of general concerns by UN Special Procedures, with no direct mention of the effects of corruption on a specific human right.¹²² Moreover, practical guidelines to help non-governmental organisations and civil society to challenge corrupt practices are lacking.¹²³

5.6 Lack of political will

At the international level the human rights framework can be trumped by global politics, economic needs and security concerns. States can refuse to take on or fulfil voluntary obligations. Furthermore, the implementation of recommendations, sanctions, and judgements of human rights mechanisms (including courts) are complex and depend mainly on political will and pressure from other states, civil society, and human rights organisations.¹²⁴

6 Conclusion

This article has aimed to examine the value that a HRBA to anti-corruption strategies could add to the fight against corruption. Specifically, the strengths and weaknesses of the principle of accountability as contained in the international human rights framework were analysed.

A criminal law approach has been the most popular anti-corruption strategy to date. However, as shown above, this approach has several limitations, including the lack of an appropriate remedy for victims of corruption. This supports the argument that other approaches should be considered to aid in the fight against corruption.

It has been demonstrated that corruption could lead to various violations of a state's duties to respect, protect and fulfil human rights. This creates the space for the human rights principle of accountability to become relevant. The principle of accountability forms part of a set of principles that are the foundation of a HRBA. It is argued that the latter approach provides a normative lens to anti-corruption strategies and legally binding obligations to which states can be held accountable. Specifically, in terms of corruption, the principle of accountability holds that states have a duty to respect, protect and fulfil rights. In the case of an alleged violation of rights, they must

UN Doc E/C.12/BDI/CO/1 (2015) art 2 para 1; *Concluding Observations of the Initial Report of Kyrgyzstan* UN Doc CMW/C/KGZ/CO/1 (2015).

¹²² Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 5.

¹²³ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 6.

¹²⁴ Olaniyan *Corruption and Human Rights Law* 257-258, 347.

investigate, prosecute and provide an effective remedy. If a state fails to fulfil this duty, rights-holders can hold it accountable.

However, the human rights framework upon which the principle of accountability is based faces numerous critiques. Implementing this principle in practice also faces some challenges, but a few suggestions can be made to overcome them.

A HRBA to corruption should be employed at all levels, international, regional and local. The UN should take the lead in this regard and develop a solid anti-corruption strategic framework that considers different strategies to fight corruption. This article does not call for the employment of a HRBA approach instead of the traditional criminal law approach. To effectively fight corruption, all available strategies should be employed comprehensively. The mandate of the United Nations Development Programme makes it the most appropriate organisation to take the lead in formulating and implementing a legally binding international protocol or convention that explicitly recognises corruption as a possible human rights violation and provides mechanisms and remedies to victims of corruption and human rights violations.¹²⁵

Even though the building blocks for a comprehensive human rights-based framework for anti-corruption strategies are there, a lot still needs to be done to align these two structures.¹²⁶ Statements and findings in reports of UN treaty monitoring bodies and Special Procedures can be employed to add weight to the work of civil society and provide guidance to government oversight bodies on a HRBA to anti-corruption.¹²⁷ However, general observations will not be sufficient. It is recommended that these organisations draw direct links between proven corrupt acts and human rights violations. In conclusion to its study on the contribution of a HRBA to corruption, the Raoul Wallenberg Institute advocates a "stand-alone special procedure" on human rights and corruption.¹²⁸ Treaty monitoring bodies can do more to link corruption to the violation of a specific right, although based on their observations this could be inferred.¹²⁹ Human rights and their corresponding obligations should be interpreted broadly to operationalise

¹²⁵ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 16, 21.

¹²⁶ Olaniyan *Corruption and Human Rights Law* 110.

¹²⁷ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 21.

¹²⁸ Raoul Wallenberg Institute *Nexus Between Anti-Corruption and Human Rights* 22.

¹²⁹ Boersma *Corruption* 132-133.

the link between corruption and human rights.¹³⁰ This should be done by explicitly keeping in mind the goals and aims of human rights instruments.¹³¹

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
CESCR	Committee on Economic, Social and Cultural Rights
Denv J Int'l L & Pol'y	Denver Journal of International Law and Policy
EJIL	European Journal of International Law
HRBA	human rights-based approach
Hum Rts Q	Human Rights Quarterly
ICHRP	International Council on Human Rights Policy
Intl J Hum Rts	International Journal of Human Rights

OHCHR Office of the United Nations High
Commissioner for Human Rights
TWQ Third World Quarterly
UN United Nations