Obligation to Combat Corruption as *Erga Omnes* Obligation in Customary International Law and *Jus Cogens*

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Abstract

In the era of globalization, international trade and cooperation, the era of human rights, rule of law and equality as universal values of the civilized world, corruption is most inimical to the peaceful and sustainable development of mankind. This article deals with the nature of corruption under international law and suggests possible solutions to the issue of corruption on the international level.

Corruption in any form amounts to material or procedural deviations from norms of law that lead to unpredictable behavior of all subjects of law, chiefly all state bodies, and thus states. This unpredictability is an obstacle to international trade, investments, migration, tourism, protection of human rights, cooperation, etc.

This article studies the most recent scholarly works and analyzes, from a comparative perspective, the general features of corruption, anticorruption laws of several states with different legal systems, demonstrating that the notion of corruption has common features in different nations and cultures and in different international conventions, such as the United Nations Convention against Corruption.

The article also studies the nature of states' obligation to combat corruption as an obligation under customary international law, as obligation erga omnes, and as the jus cogens norm. A separate section is devoted to the study of a nonrecognized human right to freedom from corruption.

The aim of the article is to explore the possibility of creating international tools of joint combat on corruption in a given specific state through the recognition of the erga omnes nature of the obligation to combat corruption.

Provided that all states have an ipso facto positive obligation to combat corruption, we may look at this obligation from the point of view of state responsibility for its violation.

As corruption damages the state mechanism and results in the state's inefficiency in performing its tasks, both in domestic and foreign affairs, corruption in one state leads to complications for all other states in matters related to this one state. And in a globalized world the scale of such complications is enormous.

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Thus, the perception of the obligation to combat corruption as obligation erga omnes is valid and leads to the necessity of creating effective international tools to combat corruption and to bring states to international responsibility for ineffective or hypocritical combat on corruption to the specified extent. Finally, the article examines the existing international mechanisms of cooperative combat of corruption on the international level.

Keywords: International Anticorruption Law, international responsibility, jus cogens.

1 Introduction

1.1 Dangers of Corruption

Every period in the history of mankind has had its specific problems and challenges for humanity. Of course, there has always been more than just one problem, but there are always major challenges that oppose the development of mankind. These challenges may be of different kinds: economic, social, political, cultural, legal, philosophical, environmental, military, and so on. While solving these issues may occur through different approaches, an effective legal regulation is always required to ensure a stable and consistent problem-solving process. Effective legal regulation is very important because the law is the only set of norms that is mandatory and enforceable, at least by a sovereign power on the national level. However, the turn of the 20th century has brought one of the most dangerous challenges to humanity. Its name is corruption. Although corruption is not a new phenomenon,[1] in the era of globalization, of international trade, of cooperation, in the era of human rights, of the rule of law and equality as universally accepted values, corruption is the strongest threat to the peaceful and sustainable development of mankind as it directly influences the enjoyment of human rights, one of the core values of today's world.[2] For example, owing to the globalized market, the effects of a state's institutional corruption go beyond its economic borders.[3] The preamble of the United Nations Convention against Corruption emphasizes that corruption is a transnational phenomenon.[4]

Corruption affects the most important aspects of a state's (or even the world's) political life. It damages state bodies, thus leading to a lack of equality, to a weak economy, and social malfunction of a state.[5] A corrupt state cannot operate in a legally prescribed, and thus predictable, way. This unpredictability leads to unclear behaviors of states in relation to people and in relation to each

1 Nazkhanov 2016, p. 6.
2 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court 2016, p. 16.
3 Miller 2004, p. 55.
4 United Nations Convention against Corruption (adopted on 31 October 2003, entered into force on 14 December 2005), preamble.
5 Gurina 2016.

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other, to international organizations, and multinational corporations, which is an obvious obstacle to international trade, investments, migration, tourism, protection of human rights, cooperation, etc.

Clearly, today corruption has become a very serious problem on the international level. States tend to fight against corruption, and some are more successful in this effort than others. Corruption does not take the very same form in all states but varies from country to country. Arman Shaikenov, Professor of the KazGUU University, the guest expert in anticorruption strategies of the Institute of Political Solutions Club, has defined three levels of corruption that a state can experience: casual, systematic, and total. A casual level of corruption appears in the form of day-to-day, casual cases. A systematic level of corruption is characterized by the damage to the state apparatus in general, as a single state body alone cannot be corrupted. For example, a corrupted law-enforcement body is impossible with an honest and fair judicial system. The total level of corruption means a tolerant attitude of people to corruption as if it were a normal aspect of life. While a casual level of corruption is impossible to eliminate, but only to suppress, the systematic and total levels of corruption are amenable to complete elimination in an ideal state.[6] Arman Shaikenov sees an effective solution to corruption only in the development of civil society through education.[7]

1.2 Definitions and the Concept of Corruption

As with every complicated matter, there is no universally accepted definition of corruption. It is defined by the Oxford English Dictionary as "dishonest or fraudulent conduct by those in power, typically involving bribery."[8] Transparency International defines corruption as "the abuse of entrusted power for private gain"[9] and differentiates between grand, petty, and political corruption. A fictional character, Padawan Ahsoka Tano describes corruption as follows:

> corruption happens when someone in power puts his interests before the interests of the people they represent. It is a result of greed. A leader sacrifices moral integrity for the sake of money or power. Entire star systems have collapsed into chaos or revolution because their greedy politicians got caught in a cycle of bribery and blackmail, while their people suffered.[10]

The Law on Combating Corruption of the Republic of Kazakhstan defines corruption as

> illegitimate use of powers and related to them opportunities by persons, who occupy important state positions, persons who perform state functions and

6 Ibid.
7 Radionov 2016.
8 Definition of *corruption* in English (2016) Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/corruption.
9 How Do You Define Corruption? (2022) Transparency International, https://www.transparency.org/en/what-is-corruption/#define.
10 Lucas et al 2010

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> persons equal to them, for the purpose of obtaining material or immaterial benefits for personal use or for third parties, directly or through third parties, as well as bribing such persons through provision of benefits and advantages.[11]

Thus, the definitions of corruption vary depending on states, purposes of documents, and other variables. Even the United Nations Convention against Corruption does not provide the definition of corruption. However, there are common elements in those definitions that allow one to clarify the concept of corruption. These elements are "accepting or providing something of value to person, entrusted with certain powers (could be state powers, or corporate powers) for action or omission in violation of his/her duties."

1.3 Hypothesis

Thus, the notion of corruption is clear. The necessity to combat corruption is clear. And the necessity of the societal effort to fight against corruption is clear. As put by Padawan Ahsoka Tano:

> the temptation is always there, and citizens must be vigilant, so corruption can't take root. The deadliest enemies of the society dwell within its borders. And from these internal threats the people need to be protected. Its every citizens duty to challenge their leaders, to keep them honest, and to hold them accountable if they're not. By exposing corrupt officials for what they are. Lasting change can only come from within.[12]

But what if corruption is deeply entrenched in a society and therefore cannot be identified and rooted out? Tair Nazkhanov, LLM, summarizing his research on corruption in the Republic of Kazakhstan, characterizes Kazakhstani society as "the society having a long history of bribery and corruption."[13] Or what if a state is so corrupted that it doesn't allow civil society to appear and to combat corruption? Is it possible to apply mechanisms of international law to bring such a state to responsibility and to force the elimination of corruption without violating the principle of sovereign equality of states? And what international legal instruments should be applied to do so?

This article argues that a state's obligation to effectively combat corruption is a norm of customary international law and that this obligation comprises the *jus cogens* norm and happens to be the *erga omnes* obligation. Confirming this hypothesis, the article studies the possibility to apply different international mechanisms to bring a state to international responsibility for violation of this obligation.

11 Law of the Republic of Kazakhstan No. 410-V of 18 November 2015 "On Combating Corruption," Art. 1.

12 Supra note 10

13 Nazkhanov 2016, p. 46.

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2 Fighting Corruption as International Custom

2.1 Nature of International Custom

International custom is one of the main sources of international law. Article 38 of the Statute of International Court of Justice (ICJ) defines international custom "as evidence of general practice accepted as law."[14] Thus, international custom consists of two major components: (1) practice of states and (2) *opinio juris* – the attitude as to the law.

Thus, there are two requirements to emphasize that the obligation to fight corruption is an international custom:

1 the vast majority of states criminalize corruption and express the desire to eliminate it;
2 such states' behavior occurs owing to the states' perception of these actions as legally binding.

2.2 State Practice

It is hard to find any state that accepts corruption as good or a state that openly refuses to condemn corruption. And as states' claims and statements are the major means of communication between each other, it is logical that such claims and statements are considered to be the representation of states' practices.[15] On the other hand, it is also maintained that mere claims without physical acts cannot constitute state practice.[16] D'Amato states that without concrete enforcement actions it is impossible to predict a state's behavior.[17] However, Akehurst demonstrates that it is a minority's view.[18] Shaw cites the example of the *Scotia case* to assert that a state's national law "may form the basis for customary rules."[19] To sum up the nature of the state practice, it is logical that the existence of internationally taken obligations and the creation of national laws definitely creates and proves the existence of a certain state's practice.

The world's first global effort to oppose corruption was the United Nations General Assembly Resolution No. 3514 (XXX) of 15 December 1975: "Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved." The 2003 United Nations Convention against Corruption has 189 parties to it.[20] The Council of Europe has established its own organization for combating corruption – the Group of States against Corruption – and this organization has 49 member states.[21]

14 Statute of the International Court of Justice (adopted 26 June 1945, entered into force on 24 October 1945), Art. 38.
15 Shaw 2003, p. 79.
16 Ibid.
17 D'Amato 1971, p. 88.
18 Akehurst 1975, pp. 2-3.
19 Shaw 2003, p. 79.
20 UN Office on Drugs and Crime, United Nations Convention against Corruption Signature and Ratification Status as of 11 April 2022, UNODC website, https://www.unodc.org/unodc/en/corruption/ratification-status.html.
21 Group of States against Corruption, GRECO: Members and Observers, Council of Europe website, https://www.coe.int/en/web/greco/structure/member-and-observers.

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Clearly, the states' practice in fighting against corruption can be witnessed worldwide and is supported by the absolute majority of states and other actors in international law.

2.3 Opinio Juris. Comparative Analysis of National Anticorruption Laws

It is hard to prove objectively that states condemn and criminalize corruption owing to a sense of being obliged by law. However, there is a clear logic in this statement. Shaw claims that the global community should be able to distinguish between a state's legal and nonlegal practices, for example political or moral actions, and that states should clearly show that a certain course of action is taken as it is regarded as law.[22] D'Amato's view supports this statement and claims that a certain practice should be followed by rule that will show that this practice will have legal effects.[23] The existence of national anticorruption laws and their development proves the *opinio juris* nature of the international custom in fighting corruption.

2.4 Anticorruption Laws of the Republic of Kazakhstan

Kazakhstan is ranked 102nd of 180 states in 2021[24] in terms of Corruption Perception Index by the Transparency International. It acceded to the United Nations Convention against Corruption in 2008[25] and has since successfully implemented the Convention in most parts.

The anticorruption legislation of Kazakhstan consists mainly of the Criminal Code, the Law on the State Service, and the Law on Combating Corruption, which was adopted in 2015 and which has replaced the previous Law on Fighting Corruption.

The legislation thus prescribes the good-faith and honest behavior for state officials and provides a wide range of acts that amount to corruption. The newly adopted Law on Combating Corruption introduces the new measures aimed at preventing corruption, including the anticorruption monitoring, analysis of corruption risks, formation of anticorruption culture and standards, and measures of financial control.[26] It has also established a state body entrusted with combating corruption.[27] A new feature that came to the anticorruption legislation of Kazakhstan is that the new law deals with corruption in the private sector.[28] However, the United Nations Convention against Corruption is not implemented in full, yet. Despite the 14 years after the adoption of the aforementioned convention, Kazakhstan did not introduce criminal liability for illicit enrichment, as provided by the Article 20 of the convention.[29]

22 Shaw 2003, p. 84.
23 D'Amato 1971, p. 75.
24 Corruption Perception Index (2021). Transparency International, https://www.transparency.org/en/cpi/2021.
25 Supra note 20.
26 Supra note 11, Art. 6.
27 Ibid., Art. 18-19.
28 Ibid., Art. 16.
29 Supra note 4, Art. 20

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2.5 Anticorruption Laws of Singapore

Singapore is ranked as one of the least corrupt countries, according to Transparency International.[30] It ratified the United Nations Convention against Corruption in 2009. The national anticorruption legislation of Singapore consists of the Prevention of Corruption Act of 1960 and the Penal Code.[31]

The Prevention of Corruption Act contains a list of corruption-related offenses and establishes the Corrupt Practices Investigation Bureau.[32] An interesting feature of the Prevention of Corruption Act is the "presumption of corruption" established in Section 8 of the Act, according to which any gratification received by a public servant from a person who is going to have dealings with this servant is received corruptly until proven otherwise.[33] The Prevention of Corruption Act has separated articles relating to the bribery of the Members of Parliament.[34]

The Penal Code criminalizes the receipt of gratification by public servants for performance of their official duties if such gratification is not the legal remuneration.[35]

The Corrupt Practices Investigation Bureau has three main objectives:

a investigate cases of corruption in public and private sectors;
b raise awareness of the consequences of corruption;
c check on malpractices by public officers.[36]

The process of investigation is very strict. The Director of the Corrupt Practices Investigation Bureau and any special investigator may arrest any person without a warrant on the basis of reasonable complaint, credible information, or reasonable suspicion.[37] The penalties for corruption-related offenses may be one or a combination of the following:

a imprisonment for up to 7 years;
b fine for up to $100 000;
c confiscation of property, if this property is received in a corrupt manner;
d monetary penalty equivalent to the amount of bribe received.[38]

2.6 Anticorruption Laws of the United States of America

The United States of America (USA) considers itself as the world's leader in anticorruption legislation.[39] It ratified the United Nations Convention against Corruption in 2006.

30 Nicholls et al. 2011, p. 642.
31 Ibid.
32 Prevention of Corruption Act (adopted on 17 June 1960), section 1.
33 Ibid., section 8.
34 Nicholls et al. 2011, p. 643.
35 Ibid.
36 Ibid., p. 644.
37 Supra note 32, sections 15-18.
38 Nicholls et al. 2011, p. 643.
39 Ibid., p. 568.

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In the USA every state may impose its own anticorruption legislation. The federal anticorruption laws, among other things, consist of the US Criminal Code and Foreign Corrupt Practices Act.

The US Criminal Code addresses issues of active bribery and passive bribery.[40] The Code prohibits giving, offering, and promising to give anything of value to a public official for specified violation of his or her duties, as well as prohibits public officials to seek, request, demand, receive, or agree to receive anything of value for specified violation of his or her duties.[41] The US Criminal Code also contains separate provisions for specific groups, including Congressmen, federal judges, officers, and employees of the executive branch of power, and others.[42]

The Foreign Corrupt Practices Act of 1977 was enacted to ensure the world's confidence in US business integrity. The Foreign Corrupt Practices Act contains provisions that address two issues: antibribery and accounting.[43]

The antibribery provisions prohibit all US corporations and their representatives and US nationals or residents from corruptly paying, promising to pay, or authorizing the payment of anything of value to any foreign official directly or indirectly, for the purpose of obtaining or retaining business.[44]

Accounting provisions require companies to maintain accurate books, records, and accounts and to have internal accounting controls.[45]

As Tanzi mentions in his study on *Corruption around the World*, "corruption is a complex phenomenon that is almost never explained by a single cause."[46] For this reason, he notes, the solution to the issue of corruption is not simple, and the fight against corruption must occur on many fronts.[47] For the same reasons, taking into consideration the differences in cultures, traditions, and history, different states have different legislation in place. However, although varying in the details, for example in the level of coverage of the private sector or in the range of acts that comprise corruption-related offenses, the anticorruption legislation in many states is essentially very close and almost the same. Thus, global integration in anticorruption activities can lead to an effective and cooperative fight against corruption in every single state.

3 The Criminalization of Corruption in International Law. The Analysis of International Anticorruption Law

There are varied initiatives on criminalization of corruption in contemporary international law, and almost every international organization has its own

40 Ibid., pp. 645-646.
41 Ibid., p. 646.
42 Ibid.
43 Foreign Corrupt Practices Act of 1977, §78m, section (b) and §78dd-1, section (a).
44 Ibid., §78dd-1, section (a).
45 Ibid., §78m, section (b).
46 Tanzi 1998, p. 30.
47 Ibid., p. 34.

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instruments to combat corruption. The Council of Europe, for example, has established the Group of States against Corruption.[48] This chapter studies the major international treaty against corruption, which became revolutionary for its time.

3.1 United Nations Convention against Corruption

The text of the Convention had been negotiated for almost a year with the participation of 120 states. The global support of the Convention proves the necessity of a systematic and cooperative approach to combating corruption. Not only is the Convention an anticorruption treaty, but it also promotes good governance.[49]

The implementation of the Convention is based on the four pillars: prevention, criminalization, international cooperation, and asset recovery.[50]

The Convention requires states to introduce preventive mechanisms of anticorruption activity through a wide range of measures, from the creation of a specific anticorruption body to the promotion of rule of law, transparency, and other features of good governance. A significant part of the Convention is aimed at promoting the participation of civil society and the population's awareness about the corruption issue.[51]

Preventive measures that the Convention requires include the following:

a developing anticorruption policies and practices;
b creating anticorruption agencies;
c maintaining integrity in the public sector;
d addressing the issue of post-public office employment in the private sector;
e avoiding conflict of interest;
f providing access to relevant information;
g promoting the participation of civil society.[52]

The Convention requires state parties to criminalize:

a bribery of national public officials;
b bribery of foreign public officials;
c misappropriation of property by public officials and other violations of public functions.[53]

The Convention requires state parties to criminalize a range of offenses provided by the Convention and also to consider additional offenses. A distinctive feature of the Convention is that it addresses not only traditional acts of corruption, but also all collateral offenses, including money laundering, and injustice. Another feature is that the Convention deals with corruption in the private sector.[54]

48 Council of Europe Resolution No. (99) 5 "Establishing the Group of States against Corruption (GRECO)" (adopted on 1 May 1999), p. 2.
49 Nicholls et al. 2011 p. 390.
50 Ibid., p. 391.
51 UN Office on Drugs and Crime 2006, p. 2.
52 Supra note 4, Art. 5-14.
53 UN Office on Drugs and Crime 2006, pp. 16-17.
54 Ibid., p. 2.

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The Convention stresses the necessity of international cooperation for the success of all other measures. The Convention, primarily, requires concrete forms of international cooperation, including mutual legal assistance in the collection and transfer of evidence, extradition, and freezing and seizing of property.[55]

Asset Recovery became one of the most significant innovations of the Convention. The Convention addresses issues of procedures for requesting of the proceeds of corruption and the procedures for returning of these proceeds to a requesting state, as well as dealing with other legitimate owners and victims of corruption.[56]

It should be stated separately that the Convention, in its Article 4, emphasizes that nothing in the Convention shall infringe the principle of the sovereign equality of states and that under no condition can any state-party exercise jurisdiction or perform functions on the territory of another state party that are exclusive for the authorities of that other state-party.[57]

Thus, the United Nations Convention against Corruption is a very strong international document in the area of international cooperation in anticorruption activities. The Convention tells states how to organize their domestic anticorruption legislation, act separately against corruption, and help each other in the struggle against corruption by subsidiary means. These steps are necessary to unify the principles of anticorruption legislation and to promote international cooperation and trust in anticorruption activities between states. However, effective and legitimate international involvement in a state's anticorruption activities with no prejudice to the principle of sovereign equality is still a demand in the International Anticorruption Law.

4 The *Erga Omnes* Nature of the Obligation to Fight Corruption as *Jus Cogens*

The existence of an international obligation to fight corruption for all states has now been demonstrated. The vast majority of states are parties to the United Nations Convention against Corruption, which imposes a legal obligation to oppose corruption. Those states that are not parties to any anticorruption treaty are obliged to fight corruption under international customary law. But where does this obligation stand in the hierarchy of sources of international law? And how can this obligation be the concern of all other states?

There is no universal consent on the norms that are to be considered as *jus cogens*. Akehurst emphasizes that in order to be accepted as a *jus cogens* the norm of international law should be accepted by "the overwhelming majority of states" and cannot be imposed "over a significant minority."[58] A very rare rule can satisfy this criterion. In the *Barcelona Traction case*, the ICJ stated that the basic human

55 Ibid., p. 3.
56 Ibid.
57 Supra note 4, Art. 4.
58 Malanczuk 1997, p. 58.

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rights are the concern of all states.[59] It is thus commonly agreed that the human rights listed in the Universal Declaration of Human Rights are considered to be the *jus cogens*. Shaw mentions that the principle of *jus cogens* is similar to the principles of public order or public policy in national laws.[60] The *jus cogens* norms are defined in Article 53 of the Vienna Convention on the Law of Treaties as "[the] norm from which no derogation is permitted."[61]

The International Covenant on Civil and Political Rights in Article 4 lists the following nonderogable rights: right to life, freedom from torture, freedom from slavery, freedom from imprisonment for the breach of contractual obligations, *nullum crimen sine lege*, right to be recognized as a person, freedom of thought.[62]

The issue of corruption affects all of the aforementioned human rights, especially the *nullum crimen sine lege* principle. A corrupted state cannot operate in accordance with the principle of the rule of law and thus cannot guarantee the nonviolation of these human rights. By simple logic we can derive the human right to freedom from corruption that is hidden in the nature of all other human rights, as it implies that these rights are to be respected and protected by a state. States have a positive obligation to protect human rights and a negative obligation not to violate human rights. Thus, states have a positive obligation to fight corruption and a negative obligation not to be corrupted in order to ensure effective and actual performance of both positive and negative obligations relevant to human rights. Clearly, these obligations are linked to each other, as without the protection of the right to freedom from corruption the protection of all other human rights is impossible, which, among other things, violates the principle of *pacta sunt servanda*.

But what makes this very important obligation to fight corruption an *erga omnes* obligation? First of all, as stated previously, it is agreed that respect for fundamental human rights and freedoms is a concern of all states and that this is impossible without a fight against corruption.

Second, when states are tolerant to corruption in other states, they create a dangerous environment in the international arena. When speaking about corruption on the national level, Arman Shaikenov links the corrupting behavior of people with terrible consequences, for example when a person bribes traffic police officer or buys a driver's license, they increase their chances of dying in a car accident.

> Crying over a body of a relative, who died in a car accident, we don't see connection between our corrupting behavior and the grief that came to our family. But such link is direct and obvious.[63]

59 *Barcelona Traction case (Belgium v. Spain)*, ICJ Rep. 1970, p. 3.

60 Shaw 2003, p. 117.

61 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), Art. 53.

62 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), Art 4.

63 Supra note 5.

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The same approach can be taken on the international level. When states tolerate and do not act against corruption in other states, do not care about unfair competition, illegal arrests and arbitrary detentions, unfair trials and unjust court decisions, they create an environment of unpredictable state's behavior in international relations. Although contemporary theory of international relations sees states as rational actors, in some respects this rationality may be lost. Diplomats detained in violation of international diplomatic law, investors whose property was expropriated and who cannot enforce the investment arbitral award in foreign states, people who are treated as slaves abroad and cannot be protected by their states – all of these are the direct and obvious consequences of states' tolerant attitude to corruption in other states.

The suggestion of the implication of international instruments to fight corruption in one state on an international level is not prejudicial to the principle of sovereign equality of states, and, thus, such international instruments shall be drafted accordingly.

4.1 Freedom from Corruption as a Human Right

Although the International Human Rights Law does not consider corrupt acts as a violation of human rights, the attempts to shift the view of freedom from corruption as to the human right has already been noticed in the rhetoric of international law scholars.[64] Furthermore, the freedom from official corruption is suggested to be considered as a fundamental and inalienable right.[65]

The prevailing view in today's theory of international law is that acts of corruption are tools for violation of other persons' already existing human rights.[66] Even Transparency International considers corruption only as a means of violation of human rights.[67]

However, the idea of freedom from official corruption as an inalienable right may go far into history. It is logical to say that John Lock's concern with protecting people from the abuse and misuse of public powers that resulted in the inalienable right to liberty actually appears to be a right to be free from official corruption as well.[68] It is worth noting that Lock was not the only philosopher who was concerned about corruption. A whole range of scholars and religions in the history of political and legal thought condemned the acts of theft from the public.[69]

Clearly, there are reasonable grounds for reconsidering the view on the acts of corruption and for beginning to regard them as a direct violation of a stand-alone human right – right to the freedom from official corruption. Considering corruption as a human rights violation gives the anticorruption legislation, on both the national and international levels, greater importance and normative weight. Acknowledging freedom from corruption as a universal human right

64 Murray and Spalding 2015, p. 1.
65 Ibid.
66 Ibid., p. 6.
67 Ibid.
68 Ibid., p. 8.
69 Ibid., p. 14.

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breaks the most common argument against anticorruption initiatives, namely, that corruption is a cultural feature.[70]

5 International Mechanisms of Enforcement of Fighting against Corruption

The necessity of combating corruption on the international level arises from the fact that corruption damages the very functioning of a state. Arman Shaikenov stated that spending the state budget on the fight against corruption by state bodies is akin to fighting a fire and extinguishing it with gasoline.[71] Tanzi concludes his comparative research on corruption by emphasizing that the only way governments can reduce corruption is to significantly reduce some of their functions.[72] The Global Programme against Corruption proposed by the United Nations Office for Drug Control and Crime Prevention acknowledges that any national initiative will be insufficient without appropriate measures on the international level[73] and specifies that one of such measures is to promote international legal instruments focusing on corruption issues.[74]

5.1 Draft Articles on State Responsibility

One of the mechanisms to enforce states' obligation to fight against corruption is bringing violators of this obligation to international responsibility. In theory, it is feasible under international law.

According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, an internationally wrongful act is an action or omission that is attributable to a state and constitutes a breach of international obligation of the state.[75] All states have an international obligation to fight corruption, either by being a party to international treaty or by virtue of international custom. Article 4 and Article 5 of the Draft Articles on State Responsibility state that an act or omission is attributable to a state if it is committed by state organs or persons exercising state authority.[76] As it is a function and obligation of a state to fight against corruption, to exercise law-enforcement activities, violation of this function in the form of an action or omission is obviously attributable to a state.

Even though the *Barcelona Traction case* showed that the obligation to respect fundamental human rights and freedoms are concerns of all states, in the *East Timor case* the ICJ ruled that even if the obligation in question is an obligation *erga omnes*, the rule of consent to jurisdiction is a separate issue.[77]

Thus, the Draft Articles on State Responsibility may be used to enforce the fight against corruption, but its practical implementation is problematic as it will

70 Ibid., p. 5.
71 Gurina 2016.
72 Tanzi 1998, p. 33.
73 UN Office on Drugs and Crime 1999, Art. 33.
74 Ibid., section 3.
75 UN General Assembly Resolution 56/83 "Responsibility of States for Internationally Wrongful Acts" (adopted on 12 December 2001), Art. 2.
76 Ibid., Art. 4-5.
77 *East Timor case (Portugal v. Australia)*, ICJ Rep. 1995, p. 90.

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require the ICJ to study the implementation of states' national laws and their compliance with international laws.

5.2 Human Rights-Related Mechanisms

The International Anticorruption Law is similar to the International Human Rights Law in terms of the involvement of the state as a subject and potential violator and people as subjects and potential victims. In International Human Rights Law, a state is held responsible before people to respect their rights, and the state is the only entity that may be accused of the violation of human rights. In the International Anticorruption Law, a state is opposed to the law itself, to the nature of the law, and to the principle of the rule of law. Although corruption and corruption-related offenses and crimes may be committed by any subject of law on the national level, only states have the international obligation to fight against corruption, and thus only states can be responsible for the violation of this obligation. Owing to these similarities, the application of mechanisms similar to the International Human Rights protection mechanisms seems adequate.

The International Covenant on Civil and Political Rights has established the UN Human Rights Committee consisting of 18 members that do not represent any particular state. This Committee monitors the implementation of the Covenant. There is one mandatory mechanism to be implemented by states – periodic reports. That means that all states are supposed to submit the reports on the implementation of human rights and reaction on human rights abuses. Although the Committee can only issue recommendations on the report, the mechanism proved to be quite efficient owing to its procedure. In addition to the report submitted by state bodies, every state is represented by the members of NGOs, international organizations, social activists, and other nonstate representatives who submit their so-called "shadow reports." This procedure allows the Committee to receive the objective and adequate view on the situation in a state. Another article allows an optional mechanism, according to which states can file complaints against each other to the Committee. However, owing to the considerable variety of various and different reservations and the fact that both states should agree to the procedure of interstate complaints, it became clear that this mechanism is not very efficient.[78] The Optional Protocol to the Covenant allows for individual complaints. The individual complaint may be submitted by any citizen of a state party to the Optional Protocol provided that all domestic remedies were used. But this mechanism lacks efficiency as well. Out of 1000 complaints per year, only 40 to 50 are officially registered, and about half of all submitted complaints in the past 20 years are rejected as inadmissible.[79] In addition, the absence of binding decisions by the Committee makes this mechanism insufficient to fully satisfy the need in protecting human rights.

78 Malanczuk 1997, p. 215.
79 Ibid., p. 216.

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5.3 Study of the Malabo Protocol

Another type of human rights protection mechanisms is regional instruments of protection of human rights. These mechanisms are usually more efficient and better implemented as they consider regional features and specific distinctive characteristics of every region, such as history, culture, religion, public morals, and so on. One such mechanism was the African Court on Human and People's Rights, established by the African Charter on Human and People's Rights.[80] The court had jurisdiction over all human rights issues related to the state parties to it, and the right of submission of claims belonged to individuals and NGOs of the state parties to the court. In 2008, it was decided at the African Union Summit that the African Court on Human and People's Rights would be merged with the African Court of Justice, which had not yet been established until then. The African Court of Justice was supposed to be the regional version of the ICJ with the authority to resolve disputes between the states of the African Union related to the treaties of the African Union and interpret the treaties of the African Union. The merged African Court of Justice and Human Rights is now supposed to implement functions of both courts and to have two sections, one devoted to human rights issues and the other to the interpretation of treaties of the African Union and to resolving disputes over those treaties.

The turning point in the issue of corruption was the signing of the Malabo Protocol. In June 2014, heads of state and governments of the African Union in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The Malabo Protocol extended the jurisdiction of the Court over 14 crimes under international law and transnational crimes.[81] Thus, the Malabo Protocol has actually introduced the third section to the Court – the criminal law section. In addition to the four crimes under international law, the Court will have jurisdiction over 10 transnational crimes, including corruption.[82]

It is a huge advance in the International Anticorruption Law as it gives jurisdiction over persons that have committed corruption-related offenses to international authority. As with crimes under international law, for which individuals may be brought to personal liability, the crime of corruption under the Statute of the African Court of Justice and Human Rights (amended by the Malabo Protocol) is considered to be committed by individuals.

Furthermore, although the Court lacks jurisdiction over acting heads of state and government and persons acting in such capacities during their tenure of office, the fact of occupying such positions does not relieve them from responsibility or mitigate punishment.[83] Moreover, if the crime is committed by a subordinate public officer, his or her superior still bears responsibility if he or she knew or had reasons to know about the act and was unable to prevent the act or

80 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), Art. 30.

81 Supra note 2, p. 5.

82 Ibid.

83 Protocol on the Statute of the African Court of Justice and Human Rights (amended by the Malabo Protocol), (signed on 1 July 2008, amended on 27 June 2014), Art. 46A *bis* and 46B.2.

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punish his or her subordinate for the act.[84] The Court has jurisdiction over legal entities as well.[85]

The Court has territorial, personal (including active personality and passive personality) and extraterritorial jurisdiction over state parties to the statute.[86]

Although the cases related to human rights might be submitted to the Court by African individuals and African NGOs,[87] according to Article 29 of the Statute (amended by the Malabo Protocol), cases related to the international and transnational crimes may be submitted only by the following entities:

a State-parties to the Protocol;
b The Assembly, the Peace and Security Council, the Parliament, and other organs of the Union authorized by the Assembly;
c A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union; and
d The Office of the Prosecutor.[88]

Even though the list of entities that can submit cases to the criminal law section of the Court is exhaustive and limited, compared with the human rights section, the efficiency of the Court will not suffer from it. The Office of the Prosecutor has sufficient authority to initiate investigations and submission of cases to the court on its own initiative if it receives reasonable information about the crime committed.[89]

Furthermore, although the Court's jurisdiction is complementary to that of domestic judicial systems of state parties, it may hear cases that are or were investigated and prosecuted by states' domestic judicial systems if it considers that the state in question was unwilling or unable to carry out the investigation or procedure or if the decision issued resulted from unwillingness or inability of the state to investigate or prosecute. Inability and unwillingness to investigate or prosecute for the purpose of the Statute means the shielding of the accused person, violation of the due process, unreasonable delays, lack of independency and impartiality, and any illegitimate action that is inconsistent with an intent to bring the accused person to responsibility.[90]

Clearly, such a strong mechanism to fight international and transnational crimes seems very efficient. Perhaps it is a reason for the low number of ratifications,[91] but it creates a strong legal mechanism to combat corruption on the supranational level. The question of ratifying such a mechanism is a question of a state's political will to fight international and transnational crimes, in

84 Ibid., Art. 46B.3.
85 Ibid., Art. 46C.
86 Ibid., Art. 46E *bis*.
87 Ibid., Art. 30.
88 Ibid., Art. 29.
89 Ibid., Art. 46G.
90 Ibid., Art. 46H.
91 Supra note 2, Annex II.

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general, and corruption, in particular. The application of such a strong mechanism on the global level is necessary.

5.4 Application of the Principles of the Malabo Protocol on the Global Level

The Malabo Protocol, though not yet operative, already serves as a precedent for the creation of effective mechanisms with the involvement of the international community in the anticorruption activity of a single sovereign state. Such an initiative should definitely seek implementation on the international level. It will be fair to notice that the international and transnational crimes section of the African Court of Justice and Human Rights is a regional version of the International Criminal Court,[92] established by the Rome Statute.

The International Criminal Court has jurisdiction over crimes under international law.[93] The court exercises jurisdiction over cases submitted by the state parties and by the UN Security Council and initiated by the Prosecutor.[94] The Court has jurisdiction over cases that are or were investigated and prosecuted by a state's domestic judicial system if it considers that the state in question was unwilling or unable to carry out the investigation or prosecution or if the issued decision resulted from unwillingness or inability of a state to investigate or prosecute. Unwillingness to investigate or prosecute, for the purpose of the Rome Statute, means the shielding of the accused person, violation of the due process, unreasonable delays, lack of independence and impartiality, and any illegitimate action that is inconsistent with an intent to bring the accused person to responsibility.[95] The Rome Statute has 123 state parties to it.[96]

On the one hand, it is unclear whether it is reasonable to extend the jurisdiction of the International Criminal Court that deals only with the gravest crimes in international law with corruption. On the other hand, the International Criminal Court is a ready-to-go mechanism to implement provisions such as those the Malabo Protocol has introduced to the Statute of the African Court of Justice and Human Rights. Furthermore, one of the primary needs in the International Criminal Court is "… to achieve justice for all."[97] The International Criminal Court is about cooperating and uniting to bring individual criminals to responsibility. As a matter of fact, such criminals are most likely to be high-ranking state officials, by virtue of the gravity of crimes over which the International Criminal Court has jurisdiction. Clearly, corruption-related offenses will always accompany such criminals. However, it is worth noting that expanding the jurisdiction of the International Criminal Court to crimes of corruption may lead to the overwhelming of the Court and decreasing its efficiency.

92 Ibid., p. 5.
93 The Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002), Art. 5.
94 Ibid., Art. 13.
95 Ibid., Art. 17.
96 International Criminal Court, "State Parties to the Rome Statute," ICC Website, https://asp.icc-cpi.int/states-parties.
97 The overview of the Rome Statute of the International Criminal Court, UN website, http://legal.un.org/icc/general/overview.htm.

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The idea of creating an international anticorruption court as part of the International Criminal Court, or as a separate organization, was developed previously by the US Federal Judge Mark L. Wolf at the 2014 World Forum on Governance.[98] In 2018, Mark L. Wolf confirmed the necessity of establishing an international anticorruption court.[99]

Establishing the ideal international mechanism to fight corruption in a single state is a challenge of contemporary International Anticorruption Law. On the one hand, the creation of a mechanism that will issue nonbinding decisions and recommendations may have very little effect, while, on the other hand, a mechanism that will issue binding decisions, initiate investigations and bring individuals to criminal responsibility may not achieve a significant number of ratifications.

The combination of the mechanisms seems to be the best solution on the global international level. The creation of an international body that will require the periodic report by states on the issue of corruption with the addition of "shadow reports" by the NGOs, advocates, social and other activists, will make it possible to constantly monitor the situation in states in addition to the existing KPIs, like the Corruption Perception Index by the Transparency International. It is a perfect addition, if the results of such reports are subject to consideration by international financial institutions, like the World Bank Group or the International Monetary Fund, when issuing grants and loans.

The possibility to file individual complaints against states by people is necessary, especially in anticorruption activities. Such complaints may be possible after the exhaustion, or absence, of domestic remedies and may result in a binding decision for domestic judicial systems to reconsider the case in question accompanied by the general recommendation on the situation in terms of anticorruption legislation and law implementation in a responding state.

While the aforementioned mechanisms will help to accelerate the fight against casual or petty corruption, the creation of an international tribunal with jurisdiction over the crime of corruption based on the Statute of the African Court of Justice and Human Rights (amended by the Malabo Protocol) will make it possible to bring individuals to criminal responsibility in cases of grand and political corruption. Such a tribunal should have jurisdiction only in the high-gravity scale of cases to ensure that it is not overwhelmed with complaints. However, it would be wise to give the committee that deals with individual complaints the right to submit cases to the tribunal in certain cases, for example, if repeated reconsideration of a case in domestic courts is constantly conducted corruptly in the opinion of the committee.

It should be noted that the international community is working actively toward the creation of such an international mechanism. Mark L. Wolf confirmed, in his interview to BBC Ukraine, that the coalition for the campaign

98 Wolf 2014.
99 Wolf 2018.

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for creation of an international anticorruption court is being formed and that the initiative is progressing rapidly.[100]

6 Conclusion

Corruption, unfortunately, is inseparable from human nature. It is our desire to obtain good in the short term despite our losses in the long term. It is like burning clothes to get warmer when it is cold.[101] And casual corruption will always accompany mankind. But when corruption occurs systematically on the institutional and transnational levels, it becomes the greatest obstacle to any development and any good initiative. No economic growth with sustainable development and cooperation in education is possible when corruption is involved. Defeating it is not a challenge; it is the challenge. Defeating corruption is a key step in any modernization and development plan, because without it, the plan will not be implemented. Just like the HIV damages the system that is responsible for protection from viruses, corruption damages institutes and mechanisms that are responsible for protection of the world, states, and people from malfunctioning. That is why collective action is required. That is why the cooperation in combating corruption should go far beyond joint declarations and separate improvements of national legal systems. And contemporary international law addresses this challenge accordingly.

The fight against corruption is an obligation under customary international law indeed. All states and interstate organizations are obliged to put up an effective fight against corruption, to apply preventive measures, and to promote anticorruption culture effectively.

Corruption should be treated more seriously than merely as a tool of violation of law and human rights. Acts of corruption are a violation of human rights themselves. The concept of the human right to freedom from corruption should be recognized by the international community for a very simple and obvious reason: corruption means malfunctioning of a state, and malfunctioning of a state means no protection of any human right at all.

The fight against corruption means the reduction of the possibilities of violations of international law. The fight against corruption means the strengthening of the implementation of international law. The fight against corruption is a fundamental principle of law, as it means fighting against nonoperation of the law, or of justice. The fight against corruption is therefore the *jus cogens*.

For every single foregoing reason cited, and for all of them combined, the creation of a strong and efficient international mechanism of cooperative combat against corruption is vital for the development of international society. It should be a mechanism that allows states to monitor and evaluate each other on the means of combating corruption. This mechanism should allow for individual

100 Chervonenko 2018.
101 Gurina 2016.

complaints on the cases of corruption in states with the possibility to issue binding decisions on states. The mechanism should provide for individual criminal responsibility for acts of corruption, and criminals should be able to be brought to liability by the international community. The creation of such an effective mechanism with no violation of the principle of sovereign equality and strong jurisdiction that will be ratified widely by the vast majority of states is the next challenge for the International Anticorruption Law.

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