

“Corruption and Human Rights—Improving Accountability”

Testimony Before The Human Rights Commission United States Congress

June 16, 2016

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Introduction

Thank you, Chairman McGovern. It is my distinct honor to participate in this hearing today and to have an opportunity to discuss how to improve accountability for corruption and human rights. It is a privilege to be a member of this esteemed panel of experts. I also want to thank my colleague Andrew Spalding from the University of Richmond Law School, with whom I have been conducting research and development of the ideas that I would like to present to you today.

As you know, both corruption and human rights are matters of increasing global concern; both are subjects that are treated by international law. It has long been agreed that no single nation can either uphold human rights or fight corruption effectively without the cooperation and support of other nations. Under prevailing international law, many nations have signed and are obligated to implement treaties and conventions both to protect human rights and to criminalize acts of official corruption.

Yet, the anti-corruption architecture is not working as planned whether to assure effective enforcement or to protect the victims. And, there is increasing concern that official corruption provides both the incentive and the means to violate human rights. The abuse of public office for private gain – as corruption is now defined – often results in patterns of repeated violations of human rights.

Mr. Chairman, the challenge that you and the Human Rights Commission pose today -- how to strengthen accountability for corruption and human rights -- raises a fundamental question of whether and how international law links these two goals effectively? My goal today is to identify what might be deemed an “accountability gap” in the current international legal architecture on this subject.

I will make the case that in order to increase accountability for both corruption and human rights, we must first place anti-corruption norms upon a stronger conceptual foundation, elevate enforcement as a matter of public policy, and focus enforcement on

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improving the lives of corruption's victims. To fill the accountability gap, freedom from official corruption should be established as a fundamental and inalienable human right.

The Relationship in International Law Between Corruption and Human Rights

First, let me start by describing the current state of interplay between the two areas of international law. As a starting premise, the global community now widely recognizes corruption involving public officials as a principal cause of human suffering and deprivation, but not as a violation of a human rights. The major rights conventions, including the *United Nations Universal Declaration of Human Rights* and regional conventions adopted in Europe, the Americas, Africa and Asia, do not include freedom from official corruption among their enumerated rights.

In addition, the prevalent international anti-corruption agreements, such as the *United Nations Convention Against Corruption* and the *Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, do not frame official corruption as a rights violation.

Mr. Chairman, instead, as you and the hearing witnesses have pointed out today, official corruption is typically understood as a means by which established human rights are violated. As stated by former head of the United Nations Kofi Annan in the Forward to the *United Nations Convention Against Corruption* (UNCAC):

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

When adopted in 2005, the *United Nations Convention Against Corruption*, went beyond previous international agreements to require signatories to criminalize not only basic forms of corruption such as bribery and embezzlement of public funds, but also trading in influence and concealment and laundering of the proceeds of corruption. The document also makes references to various discrete human rights, and highlights the collateral impact of anti-corruption enforcement measures on other rights.

As a sign of how dynamic the interplay between human rights and anti-corruption law can be, to facilitate political freedom and economic development, both the United Nations and regional multilateral bodies have continued to expand upon the "first-generation" civil and political rights, such as freedom of speech and religion. They have created "second generation" economic and social rights, such as rights to property, education, and health, and beyond. These bodies seek to uphold these rights by, *inter alia*, requiring governments to adopt and enforce laws that prohibit corruption. They have not, however, recognized freedom from official corruption itself as a human right.

Framing Corruption as a Direct Violation of a Human Right

Not permit me to return to my thesis, which is that there is a strong case that freedom from corruption is an inalienable, universal right belonging to all humans. Though current international treaties do not recognize the right, international law experts have long acknowledged that these instruments are but one of several bases for making a rights argument. And, there are at least three legal lines of reasoning that argue for considering creation of a stand-alone right.

First, and historically the most foundational, is natural law, particularly the writings of John Locke. Though Locke did not use the term corruption, the concern with protecting citizens from the abuse of public office pervaded his rights theory.

What Locke calls liberty is “to have a standing rule to live by, common to every one of that society, and made by the legislative power . . . not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.” That is, our natural right to liberty can only exist where government exists and its officials do not abuse their public office for private gain, where they do not act corruptly. Locke defines tyranny as “making use of the power any one has in his hands not for the good of those who are under it, but for his own private, separate advantage,” he is describing what we today call official corruption.

This distinctly Anglo-American intellectual tradition, however, cannot provide the sole basis for a universal human right. Thus, a second promising basis for identifying the existence of a human right is cross-cultural research that discovers fundamental values shared by all cultures, or “cross-cultural universals.” In such diverse traditions as East Asian Confucianism, and Middle Eastern Islamic law, freedom from corruption is deemed among the first principles of government. Indeed, of the various candidates for a universal moral principle, one that all persons have by virtue of being human, the freedom from corruption may well be one of the strongest and most fundamental.

Third, despite controversy, the international rights regime has formed a human right to enjoy possession of one’s property. Though this right stems in part from western philosophy, including Locke’s right to liberty, it has increasingly been embraced as an international norm. Starting with the UDHR in 1948, a right to property has since been adopted in one form or another in the human rights agreements of the regions of Europe, Africa and the Americas. Generally, the right is not absolute and the state has a right to limit it; but, it entitles individuals to private property and provides certain protections.

In 1952, for example, after much debate, the Council of Europe amended the European Convention on Human Rights (ECHR) to provide for the “peaceful enjoyment of one’s possessions” under Protocol 1, Article 1. The European Court of Human Rights has since adjudicated thousands of individual claims against national governments under Protocol 1, Article 1. A careful reading of these cases shows citizens bringing claims against public officials for corruptly taking or expropriating private property. The standard set

by the ECHR invites us to consider how establishing freedom from corruption as a stand-alone right would help protect other human rights, including property rights.

A Rights Paradigm Increases Accountability

A “rights paradigm” would increase political will to take the difficult steps required by both government and citizens to counter official corruption in important ways.

First, deeming corruption a rights violation gives international and domestic laws greater normative weight, heightening their importance in public policy. Rights violations have long been understood as more egregious, and a higher enforcement priority, than torts or even crimes. Rights violations are “more resistant to trade-offs,” or, as the prominent legal philosopher Ronald Dworkin famously said, rights are “trumps.”

Second, acknowledging a universal human right to be free from corruption effectively counters the most oft-heard objection to international anti-corruption initiatives: that corruption is cultural.

Third, it could provide a basis for citizens to bring corruption cases not only in their own countries but in international tribunals that could be established in the future to adjudicate these issues, such as special tribunals that are being set up in various countries to hear and adjudicate cases of corruption.

Time to Re-Design the International Legal Architecture

In summary, Mr. Chairman, it is time to re-evaluate the argument that it is more constructive to promote anti-corruption as a means to protect other human rights than to create a stand-alone right. In fact, as mentioned, the Universal Declaration of Human Rights establishes a range of human rights, including civil and political rights as well as economic, social and cultural rights. This inclusive approach was based on the principle of indivisibility—that by combining the different rights, they could be more successfully upheld. It has since become widely recognized that better enforcement of one set of human rights is imperative to protect other rights and freedoms.

A freedom from corruption would have an essential role in upholding and enforcing other human rights. And here I am not talking solely about protections against torture, slavery, trafficking and other basic human rights. In societies where corruption is endemic, it can permeate every dimension of daily life—from obtaining a public education, to seeing a doctor, to obtaining a driver’s license, to starting a business, to paying taxes.

Unless and until freedom from official corruption is ensconced as a stand-alone human right, however, the state of governance envisioned in the UDHR, UNCAC and other human rights and anti-corruption conventions will remain elusive.

Conclusion

In summary, reframing corruption as a rights violation would send an unequivocal message to both the victims of official corruption and the perpetrators: that corruption is neither cultural nor human nature; that the state might violate that right but cannot take it away; and that the vigorous enforcement of anti-corruption measures is not only possible, but essential.

Thank you again Mr. Chairman for this opportunity to testify before the Human Rights Commission and for continuing to highlight and elevate this important area of public policy.