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When International Law Distracts: Reconsidering Anti-Corruption Law

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1. Introduction

The millennium was the pivotal moment for the development of international anti-corruption law. The legalization of the anti-corruption norm contributed to its universalization and to the evolution of its purpose, namely to serve not only the promotion of the rule of law and good governance but also distributive justice.[1] In light of the ever-growing body of international legal frameworks of anti-corruption, I caution that the international law focus of the global anti-corruption campaign distracts from less obvious legal strategies of tackling the adverse impacts of corruption. Unlike other concerned voices, I do not take issue with the idea of corruption itself, but rather with its legalization.[2] My critique of international anti-corruption law is that: (1) it conceptualizes corruption only as the moment of the unlawful transactional encounter between a public official and a private citizen; (2) the strategies it proposes to combat corruption have a liberal bias and; (3) it distracts from the potential of legal reform and enforcement in jurisdictions where stolen wealth is managed, or spent.

I suggest that it is time that this norm is taken at least as seriously by governments and constituencies of liberal states in the Global North as by those elsewhere. The reasons for this are simple. Corruption is not only practiced in the Global South or in non-liberal states. It is a global phenomenon, yet the label of corruption is primarily reserved for them, suggesting that all conditions to prevent corruption already exist in liberal states from the Global North. This

idea is reflected in international anti-corruption law's strategies to combat corruption, which heavily rely on the promotion of liberal European public and criminal law principles. This creates the impression that corruption and non-liberalism, or badly executed liberalism are directly linked and that international anti-corruption efforts are less relevant to countries with strong liberal democratic institutions. It also nips in the bud any doubts about the causality between the strength and weakness of liberal domestic institutions and the occurrence of corrupt practices, which and this leaves little room to question whether international anti-corruption law's strategies are adequate. Similarly, with respect to the problem of "grand corruption" in the Global South, international anti-corruption law primarily seeks to combat it by changing legal conditions in the Global South, thereby distracting from the potential of legal solutions that lie within First World jurisdictions.[3] Rather than the norm itself, it is this hypocrisy of its implementation and enforcement that stultifies anti-corruption efforts. And this hypocrisy is now reinforced through, and solidified in, international law.

To explain the nature of my concerns, I will now give a brief overview of the international anti-corruption regime and highlight the peculiarity of its concept of corruption and the liberal political thought underlying its counter-strategies. Subsequently, I will problematize the relationship between liberalism and corruption. This will be followed by a discussion on the distinction between "lawful" and "unlawful" or "corrupt" practices that international law makes and reinforces. This, I will conclude, distracts from the impact of corrupt practices in liberal states in the Global North on global and local wealth and power distribution, and it has been an obstacle to explore the potential of the consequential enforcement of existing laws, strategic litigation and domestic legal reform.

2. International Anti-Corruption Law

Efforts to outlaw corruption include the 1997 OECD Anti-Bribery Convention and the Inter-American Convention against Corruption, the 1999 Criminal and Civil Law Conventions of the Council of Europe, and finally, the 2003 Conventions of the African Union and the United Nations. In addition, a number of multi-stakeholder initiatives have been adopted to close the gap between the widely accepted nature of the norm, and the rampant occurrence of corruption in practice. What all these frameworks have in common is that they rely on liberal governance principles, in particular individual and public accountability processes, to combat corruption.[4] More concretely, despite their common understanding that the fight against corruption requires coordination, cooperation and assistance between states, they, for the most part, propose

solutions to corruption that lie in jurisdictions of countries where corruption occurs, in particular through changes in their political and legal systems. This assumes that the practice of corruption can be localized and that it can therefore be eradicated by changing conditions in corrupt countries.

The European Civil Law Convention for example, pursues the objective of harmonizing domestic private law accountability standards, thereby suggesting that part of the strategy to combat corruption should be to strengthen judicial access rights of citizens affected by corruption and to deter potential perpetrators by creating a system of civil liability.[5] Its counterpart, the European Criminal Law Convention as well as the Inter-American Convention complement this approach by mandating all signatory parties to adopt provisions criminalizing corruption.[6] And, the Extractive Industries Transparency Initiative seeks to eliminate the illicit flow of public revenues to privately-owned offshore accounts by creating domestic consolidation processes where information on the fiscal flows in the natural resources sector is disclosed by donors and recipients in order to compare accounts and uncover where exactly money went missing.[7]

These frameworks are part of the arsenal of international legal institutions that have become the backbone of international anti-corruption efforts.[8] Beyond deterrence and remediation, the anti-corruption strategy embedded in these frameworks is one of combating corruption with democratic institutions and the rule of law. The rule of law principles that these frameworks have internationalized are principles of European modernity, hence principles that have their origins in the Enlightenment and the advent of the European liberal nation-state model.[9]

One would think this as a positive development. After all, the rule of law was successfully used in Europe to contain despotism, which often coincides with grand corruption. It also supports an argument recently made by Eyal Benvenisti that international law still has a role to play in promoting justice domestically and globally, namely through the political empowerment of weak constituencies by creating inclusive institutions and venues where they, provided that international rule of law principles are observed, guarantee access to information, which can then be used to steer political bargaining.[10]

3. The Concept of Corruption and its Critics

Yet, early American critics of the international anti-corruption campaign have cautioned that compared to the interpretation of the scope of the constitutional right to free speech in the

context of democratic elections by the United States Supreme Court, global anti-corruption norms applied a double-standard by shaming developing countries for practices that are perfectly legal in the United States.[11] For example, according to the Inter-American Convention, corruption occurs, *inter alia,* when a government official or a person who performs public functions solicits or accepts, directly or indirectly, any material benefit or the promise of an advantage for "himself or for another person or entity, in exchange for any act or omission in the performance of his public functions" and when such benefits and promises are made "in exchange for any act or omission in the performance of his public functions".[12] And, the European Civil Law Convention refers to corruption as "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof."[13] It is clear that the concept of corruption includes *quid pro quo* arrangements, but also extends to other distortions of the principle of equality in democratic bargaining processes.

In contrast, while under U.S. constitutional law large direct contributions to political campaigns that result in *quid pro quo* arrangements are unlawful[14], the boundaries between the lawful exercise of the right to free speech and the unlawful practice of corruption have shifted over time as the First Amendment right expanded and the concept of corruption became narrower. In 1978, the Court, faced with the issue of independent expenditures[15], still contemplated that they may pose "a danger of real or apparent corruption"[16]. However, by 2003, in his famous concurring opinion in the decision *McConnell vs. Federal Election Commission* Judge Kennedy held that:

> in the context of the real world only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad that is *quid pro quo*."[…] It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.[17]

And, as the Court ruled in later decisions, democracy was also premised on the freedom of speech and this was never truer than in the context of general elections; therefore putting any restrictions on independent expenditures by individuals or corporate entities would be at odds

with the Constitution. Any limitations of independent expenditures used for corporate speech for the purpose of political bargaining were equally unconstitutional.[18]

By comparing what we know about the concept of corruption under international law with the means by which U.S. citizens can exercise their right to free speech for political bargaining, it becomes evident that the double-standard lies not in the practice itself, but rather in the delimitations of legality.[19] In 2016 alone, the American National Rifle Association was able to lawfully spent 83.913,732 USD on “legislative programs”, hence on offering support to persons and entities – legislators, public officials and political parties – who will only benefit from this support as long as their performance of their public functions reflects the interests of the organization.[20] It is hard to see why this practice, which in the rationale of international anti-corruption law constitutes a threat to democracy elsewhere, is necessary to protect democracy in the United States. It is this double-standard which led primarily American critical voices to conclude that corruption “works against and reinforces an idea about the "normal" arrangement of entitlements”[21] which condemns elites from elsewhere for practices which enjoy constitutional protection at home.[22]

Yet, I do not think that the validity of international anti-corruption law should be measured by the embeddedness of its underlying concepts in domestic constitutions. In other words, whether or not the creation of conditions of just and equal bargaining power for all is reflected in the American practice, does not invalidate international anti-corruption law. So, rather than the double-standards of legality, I wonder about the contradicting views on the relationship between “corrupt practices” and democracy.

4. International Law Promotes Liberalism as Anti-Corruption Strategy

Another critique made about international anti-corruption law is that it perpetuates the idea that injustice in the Third World is self-inflicted by the bad choices of its peoples electing bad leaders who are too easily corrupted by big cash of evil multinationals and that their rent-seeking behavior is somehow enabled by a lack of vigilance of their constituencies. Accordingly, one counter-strategy inherent to international anti-corruption is the promotion of liberal public law principles such as transparency, accountability and participatory decision-making processes. For example, according to the United Nations Convention, “effective coordinated anti-corruption policies that promote the participation of society and reflect the

principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability" can help prevent corruption.[23]

International law has internalized these principles, but at their heart, they are core public law principles of liberal democratic nation-states. But, thinking back to the U.S. context, the democratic control of government, facilitated by *Rechtsstaatsprinzipien* (rule of law principles), have not been decisive in enabling or containing the practice that the international anti-corruption norm condemns. Possibly, this is a question of socialization.[24] And, while the legality of a norm certainly affects processes of socialization, the causality between transparent and accountable institutions and the internalization of anti-corruption norms is less straightforward than international law makes it out to be. Yet, because the causality is simply assumed, international anti-corruption law sets up a straw man (non-liberalism), which it fights as rigorously as the practice of corruption itself.

By now, it is evident that the efforts of international institutions to promote the implementation of liberal public law principles in countries where grand corruption is rampant have not been crowned with success. The Democratic Republic of the Congo for instance, despite being a compliant party to the EITI framework and despite a reasonably well-developed legal framework to govern its natural resources sector, *de facto* still does poorly on distributing the enormous wealth generated by the exploitation of its resources. And, according to recent reports, this can be linked with the rampant occurrence of grand corruption and the detrimental business transactions it led to.[25] Yet, through legalization, the idea that the promotion of liberal public law principles was somehow effective has become solidified and limits the imaginative scope for exploring alternative strategies.

5. International Law Localizes Legal Responses

Grand corruption is a concept developed by the World Bank, which refers specifically to practices that involve international business transactions. While the causal link between grand corruption and unjust distributive outcomes is well established, it is not just the practice of corruption itself, *i.e.* the transactional encounter between the corrupter and the corrupted, but also all subsequent transactions resulting from it that sustain this practice.[26] Yet, for the most part, international anti-corruption law only targets the moment that a public official unlawfully accepts economic advantages from a private citizen in exchange for rendering favors. Under international law, this encounter is localized and therefore governed by primarily by the

domestic laws of the country where corruption occurs and by international law.[27] In practice however, most fiscal transactions occur in the jurisdiction of countries from the Global North. This point has been made by J. C. Sharman who, in his recent book compares the domestic regulatory contributions to the international anti-corruption campaign. His work rebuts the presumption that grand corruption is contained to the relationship between the corrupter (presumably a national of a wealthy nation) and the corruptible public official of a developing country. Instead, he points out that "dirty" money passes through clean channels and is mostly spent on goods and services sold in the jurisdictions of powerful states that have ironically invested fervently in the international law of anti-corruption. Despots, he points out, fancy driving German sports cars, owning real estate in London and Paris, going on shopping sprees in Miami, wearing Swiss watches and having their wealth managed by New York-based lawyers.[28] Most of this spending requires overt fiscal transactions, which could be used as effective entry points for a counter-strategy to combat grand corruption. Yet, international anti-corruption law has nothing to say on this point. Grand corruption is nothing less than stolen public wealth. And knowingly receiving stolen goods is a criminal offense in almost all domestic legal systems but regrettably, this norm has not found its way into international anti-corruption law.

6. Conclusion

This comment set out to challenge two myths that have stymied efforts to follow the traces of dirty money: (1) that corruption is primarily a problem of non-liberal states and; (2) that the success of international anti-corruption law is dependent on its implementation and enforcement, rather than the reconsideration of its implicit assumptions. It has questioned to what extent international anti-corruption law proposes sensible strategies for tackling corruption. Firstly, because international anti-corruption law draws the geographical scope of corruption too narrowly, leaving all transactions which enable and reward this practice out of consideration, and secondly, because it primarily seeks to combat corruption with liberal public law principles, even though there is some indication that there is in fact no direct causality between *Rechtsstaatlichkeit* and eradication of corrupt practices. My concern is that by doing so, international anti-corruption law distracts from pursing alternative legal strategies, including the consequential application of existing international and domestic laws and regulations on money-laundering, on financial background checks and on ethical conduct of the legal profession in jurisdictions where these laws could be effectively implemented by willing forces.

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[1] These goals are named in the preambles of the various international anti-corruption frameworks. See for instance "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," (1997), preamble; "United Nations Convention against Corruption," (2003), preamble, Art. 5.
Here, I refer to justice in its political sense. “A political community that exercises dominion over its own citizens, and demands from them allegiance and obedience to its laws, must take up an impartial, objective attitude toward them all, and each of its citizens must vote, and its officials must enact laws and form governmental policies, with that responsibility in mind.” Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard university press, 2000), p. 6.
[2] See generally: Kenneth W. Abbott et al., "The Concept of Legalization," *International Organization* 54, no. 3 (2000).
[3] “Grand corruption is often associated with international business transactions and usually involves politicians as well as bureaucrats. The bribery transaction may take place entirely outside the country. Petty corruption may be pervasive throughout the public sector if firms and individuals regularly experience it when they seek a license or a service from government.” See: "Helping Countries Combat Corruption: The Role of the World Bank," (World Bank, 1997), pp. 9-10.
[4] By this, I mean individual criminal responsibility, transparency and the concept of popular sovereignty.
[5] "Civil Law Convention on Corruption," (1999), Art. 1.
[6] It should be noted that both conventions are open to non-European countries as well.
[7] "Eiti Principles," (EITI International Secretariat, 2003), principles, 4-6, 8, 9; See generally "Eiti Standard 2016," (EITI International Secretariat, 24 May 2017).
[8] Other Initiatives include: The Open Contracting Data Standard, Publish What You Pay and the Fisheries Transparency Initiative
[9] Martti Koskenniemi, "The Politics of International Law," *European Journal of International Law* 1, no. 1 (1990); Also see: Anthony Carty and Janne Nijman, "The Moral Responsibility of Rulers: Going Back Beyond the Liberal Rule of Law for World Order," in *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order*, ed. Anthony Carty and Janne Nijman (Oxford University Press, 2018).
[10] Eyal Benvenisti, "Ensuring Access to Information: International Law's Contribution to Global Justice," *University of Cambridge Faculty of Law Research Paper No. 17/2018* (2018): pp. 3-4.
[11] Taken from Kennedy's summery of a symposium organized at Harvard Law School. See: David Kennedy, "The International Anti-Corruption Campaign," *Connecticut Journal of International Law* 14, no. 2 (1999): p. 358.
[12] "Inter-American Convention against Corruption," (1996), Art. VI(1).
[13] Art. 2 Council of Europe Civil Law Convention on Corruption.
[14] *First National Bank of Boston V. Bellotti*, 435 U.S. 765 (26 April 1978).
[15] Independent expenditures are expenditures for a communication that: (1) expressly advocates the election or defeat of a clearly identified political candidate; and (2) is not coordinated with a candidate, candidate’s committee, party committee or their agents. Definition taken from the Federal Election Commission (last visited 13 Mach 2018)
[16] *First National Bank of Boston V. Bellotti*, fn. 26.
[17] *Mcconnell V. Federal Election Commission*, 540 U.S. 93, pp. 13-14 (10 December 2003).Opinion Judge Kennedy
[18] *Citizens United V. Federal Election Commission*, 558 US _ (2010), p. 39 (21 January 2010); Citing *First National Bank of Boston V. Bellotti*, p. 792; Citing *California Motor Transport Co. V. Trucking Unlimited*, 404 U.S. 508, pp. 510-11 (13 January 1972); Citing *Eastern Railroad Presidents Conference V. Noerr Motor Freight, Inc.*, 365 U.S. 127, pp. 137-38 (20 February 1961).
[19] The term legality is used here as it is understood by Joseph Raz. See: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), pp. 211-26.

[20] See Financial Statements of the National Rifle Association of America as of 31 December 2016, 8 March 2017, p.3. Available here.
[21] Kennedy, p. 462.
[22] *Citizens United V. Federal Election Commission*.
[23] Art. 5(1) United Nations Convention against Corruption
[24] I use the term socialization to refer to the internalization of norms and values of society. See John Scott and Gordon Marshall, *Oxford Dictionary of Sociology* (Oxford University Press, 2009).
[25] "A State Affair: Privatizing Congo's Copper Sector," (Carter Center, 2017); Katrin Petra Blum et al., "The Broken Heart of Africa: A Power-Hungry President, a Cunning Businessman, an Influential Ex-Minister and the Secretive Swiss Mining Giant Glencore: Why Congo Remains Dirt Poor Despite Its Abundant Riches," *Süddeutsche Zeitung*, 05 November 2017.
[26] In this context, I refer to socio-economic justice.
[27] Exceptions to this rule are asset recovery schemes and money-laundering law. For early work on the international enforcement of anti-money-laundering please refer to Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000). This comparative study offers a comprehensive overview of the emergence of anti-money-laundering frameworks in international law and in the Benelux countries, Switzerland, the United Kingdom and the United States. It reviews the development of the institutionalization and legalization of anti-money-laundering efforts, including its criminalization. It also sheds light on the development of international cooperative efforts and the struggle with jurisdictional limitations.
[28] Jason Campbell Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press, 2017).