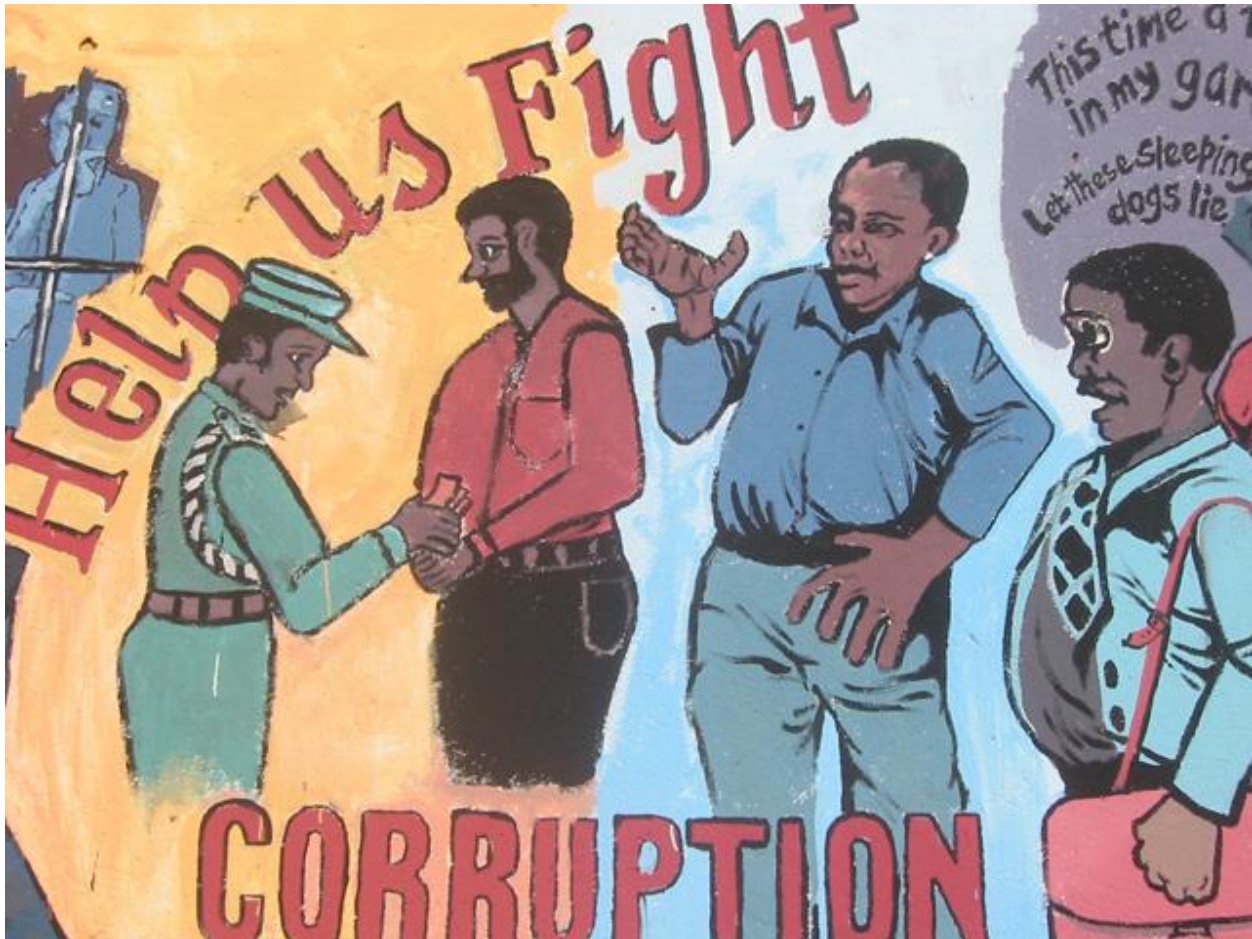


# ETOs and Transnational Corruption: Applying the Maastricht Principles to ESC Rights



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## ETOs and Transnational Corruption: Applying the Maastricht Principles to ESC Rights

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Objective: Applying extraterritorial obligations to prevent, combat and restore the cross-border transfer of property<sup>1</sup> derived from acts of corruption that constitute abuses and violations of ESCR.

### Problem statement and normative issues

Corruption has been defined as “the misuse of entrusted power for private gains,” which “hurts everyone whose life, livelihood or happiness depends on the integrity of people in a position of authority.”<sup>2</sup> However, corruption that violates economic, social and cultural rights (ESCR) extends beyond illicit “private” acquisitions by individual natural persons. Rather, corruption could entail any “abuse of the public interest by narrow sectional interests.”<sup>3</sup> Commercial abuses could amount to corruption between private-sector parties that hurt the public interest, as financial corruption recently has demonstrated. Mechanisms of corruption can amount to an “act by which ‘insiders’ profit at the expense of ‘outsiders’,”<sup>4</sup> also invoking cases insider trading and its consequences as corruption as a subject of international human rights law.

The proceeds of corruption are generally considered to be material, as in the form of money or property.<sup>5</sup> Some definitions would limit references to corruption to those cases subject to a ruling of a court in a dispute determining that illicitly acquired assets represent (1) proceeds from a crime or assets of an equivalent value, or (2) the instrumentalities of a crime.<sup>6</sup> For the purpose of this concept note, corruption denotes cases not yet proved in a court of law. However, law courts and strategic litigation form part of a proposed diverse strategy that could involve tactics other than litigation, including cross-border administrative and diplomatic means, and international economic and technical cooperation. Thus, both remedial and preventive efforts are considered here as functions of extraterritorial state obligations in the ESCR domain.

Corruption of various types impedes development and contributes to the perpetuation and deepening of poverty. Surveys of the very poor in developing countries reveal that corruption has a significant and detrimental impact on impoverished people’s lives. For an impoverished household, the bribe randomly extorted by a police officer may force a family to forego paying school fees for their children, or to buy nutritious food or goods to maintain their small business and livelihood. Also at larger scales and across national borders, corruption not only reduces the net income of the poor, but also wrecks havoc with programs aimed at meeting their basic

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<sup>1</sup> Defined as assets, meaning “money and assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets and legal documents or instruments evidencing title to or interest in such property.” United Nations Convention against Corruption (UNCaC), Article 2(d), at: [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf).

<sup>2</sup> “UK needs new powers to freeze stolen assets and more proactive action to help victim countries,” *Transparency International* (25 February 2011), at: [http://www.transparency.org/news/pressrelease/20110225\\_UK\\_freeze\\_stolen\\_assets](http://www.transparency.org/news/pressrelease/20110225_UK_freeze_stolen_assets).

<sup>3</sup> Philippe Le Billon, “Corrupting Peace? Peacebuilding and Post-Conflict Corruption,” *International Peacekeeping*, Vol. 15, No. 3 (June 2008), 344–61, at 355.

<sup>4</sup> Bryan Evans, “The Cost of Corruption,” *Tearfund*, 1999, p. 1, at: <http://www.tearfund.org/webdocs/Website/Campaigning/Policy%20and%20research/The%20cost%20of%20corruption.pdf>.

<sup>5</sup> See note 1 above.

<sup>6</sup> “Agreement between the Government of the Republic of Austria and the Government of the United States of America concerning the sharing of confiscated proceeds of crimes” of 29 June 2010, Article 1(b), at: <http://www.state.gov/documents/organization/161800.pdf>. UNCaC refers also to “other instrumentalities used in, or destined for use in offences established in accordance with this Convention,” Article 31, op. cit.

needs, from sanitation to education to housing and healthcare. It results in the misallocation of resources to the detriment of poverty reduction programs.

Many political leaders and social movements, especially of the developing world, also view corruption as a grave impediment to the overall development of their countries. Corruption threats and risks are costly and increasingly taken into account in the design of national development programs. While corruption also may involve transnational agents in the very acts of corruption, even local corruption often ends with proceeds held in the transnational financial institutions within States having ever-clearer treaty obligations to trace, freeze, confiscate and repatriate such proceeds to their original country and rightful owners. The growing global consensus on the importance of corruption as an impediment to development is reflected in the development of corresponding norms over the past two decades.

### **ETO basis in international law**

With the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, every ratifying state party is required “to take steps...to the maximum of its available resources” in implementing the state obligation to respect, protect and fulfill the enshrined rights (paragraph 2.1), in order to achieve their progressive realization. The same article sets out the principle of “international assistance and cooperation, especially economic and technical” as essential and over-riding the state’s implementation of state obligations corresponding to each right. The set of complementary and integral over-riding principles of state obligation embodied in the first articles of the Covenant provide a formula for meeting obligations to engage internationally to realize ESCR. To the extent that corruption violates ESCR, states are required to combat corruption domestically, as well as through international cooperation.

Among the first efforts to codify ETOs to fight such illicit acquisitions was the Organization of American States (OAS) adoption of the *Inter-American Convention against Corruption* at a specialized conference at Caracas on 27–29 March 1996. In 2002, OAS instituted a procedure that evaluates its implementation. Since then, that Convention and its Follow-Up Mechanism for its Implementation (MESICIC) have represented the principal cooperation instruments for preventing, detecting, punishing and eradicating corruption in the Americas. While focusing on public-sector corruption, the Convention identifies a specific offense as “transnational bribery: (Article VIII).

European States adopted the European *Criminal Law Convention on Corruption* in 1998, which represents a regional consensus on what states should do in the areas of criminalization and international cooperation to combat corruption.<sup>7</sup> The Convention covers public-sector and private-sector corruption, including a broad range of specific offences, including bribery (domestic and foreign), trading in influence, money laundering and accounting offences. The *Criminal Law Convention*, which entered into force in July 2002, is complemented by an additional Protocol covering bribery offences committed by and against arbitrators and jurors.<sup>8</sup> Those two classes of persons did not legally qualify as public officials and, therefore, were not covered by the *Criminal Law Convention*.

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<sup>7</sup> Criminal Law Convention on Corruption, CETS No.: 173, at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=173&CM=8&DF=2/19/2009&CL=ENG>.

<sup>8</sup> Additional Protocol to the Criminal Law Convention on Corruption, at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/191.htm>.

The European *Civil Law Convention on Corruption* was adopted in 1998, and came into force in November 2003.<sup>9</sup> It provides for remedy by compensation for damages resulting from corruption, invalidity of corrupt contracts and whistleblower protection.

In the most-recent regional initiative of this kind, the African Union adopted *The African Charter on Values and Principles of Public Service and Administration*, at Addis Ababa, on 31 January 2011. Every two years, State parties to the AU Charter are required to report to the Commission of the African Union on their implementation of the Charter. The Charter has 19 signatures, but only two ratifications to date (Kenya and Mauritius) of the 15 required for entry into force.

African Charter on Values and Principles of Public Service and Administration to promote the values and principles of democracy, good governance, human rights and the right to development. Article 4.1 stipulates that “The Public Service and Administration and its agents shall respect the human rights, dignity and integrity of all users.”

States thus formally have recognized that corruption threatens the stability and security of societies, undermines the institutions and values of democracy, ethical values and justice and jeopardizes sustainable development and the rule of law. A series of General Assembly resolutions enabled the development of a legal instrument to pursue the return of illegally transferred funds to the countries of origin.<sup>10</sup> In the same year as the adoption of the OAS *Convention against Corruption*, the UN General Assembly adopted the *International Code of Conduct for Public Officials* by its resolution A/RES/51/59, “Action against corruption,” on 12 December 1996.

These culminated in the adoption of resolution A/58/4 of 31 October 2003 with its annex: *United Nations Convention against Corruption*. The UN Convention entered into force on 14 December 2005 with 30 ratifications, which currently total 159.<sup>11</sup>

The *UN Convention against Corruption* (UNCaC) covers the acts of “public officials,” “foreign public officials” and “officials of a public international organization.” Under the Convention, States have an obligation to collaborate with each other, and with relevant international and regional organizations, in promoting and developing the measures to prevent and combat corruption (Article 5.4). States also are obliged to “prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures”(Article 12.1).

Each State Party has an obligation, within its domestic legal system, to identify, trace freeze, seize or confiscate proceeds property, equipment or other instrumentalities, income or benefits obtained through, used in, or destined for corruption, fraud or crime (Article 31).

States are obliged to ensure victims are able to pursue legal means to obtain “compensation” (Article 36). However, the reparations framework of UNGA resolution A/RES/60/147 may be more relevant and applicable.

<sup>9</sup> Civil Law Convention on Corruption, CETS No.: 174, at: <http://www.business-anti-corruption.com/about-corruption/coe/>.

<sup>10</sup> General Assembly resolutions 55/61 of 4 December 2000, 55/188 of 20 December 2000, 56/186 of 21 December 2001, 57/244 of 20 December 2002 and 56/260 of 31 January 2002. Economic and Social Council resolution 2001/13 of 24 July 2001. Also Monterrey Consensus, adopted by the International Conference on Financing for Development, held in Monterrey, Mexico, 18–22 March 2002, resolution 1. Johannesburg Declaration on Sustainable Development, adopted by the World Summit on Sustainable Development, held in Johannesburg, South Africa, 26 August–4 September 2002, in particular paragraph 19 declaring corruption as a threat to the sustainable development of people.

<sup>11</sup> “UNCaC Signature and Ratification Status as of 6 January 2012,” at: <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

States are obliged to ensure appropriate mechanisms within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws, in the case of domestic criminal investigations of offences (Article 40). States parties also have emphasized this need by resolution, encouraging States to remove barriers to asset recovery.<sup>12</sup>

The State must apply its jurisdiction when an offense is committed by, or against a national of that State, or a stateless person who has his/her habitual residence in its territory, or, if it involves laundering, or if the offense is against the State. The State may apply its jurisdiction over the alleged offender within its territory, if not extradited.

The term “fraud” commonly refers to activities such as theft, corruption, conspiracy, embezzlement, money laundering, bribery and extortion. Although legal definitions vary from country to country, fraud essentially involves using deception to make a dishonest personal gain for oneself, or to cause a loss to another.

UNCaC addresses 11 categories of corruption, including:

1. Bribery of national public officials (Article 15)
2. Bribery of foreign public officials and officials of public international organizations (Article 16)
3. Embezzlement, misappropriation or other diversion of property by a public official (Article 17)
4. Trading in influence (Article 18)
5. Abuse of functions (Article 19)
6. Illicit enrichment (Article 20)
7. Bribery in the private sector (Article 21)
8. Laundering of the proceeds of crime (Article 22)
9. Embezzlement in the private sector (Article 23)
10. Concealment (Article 24)
11. Obstruction of justice (Article 25)

States parties to UNCaC have noted the “close connection between corruption and the fulfillment of human rights and, in particular, social and economic rights.”

The urgent need to trace and recover assets has been underscored by the “Arab Spring,” in which popular uprisings seek to redress decades of corruption and recover national assets to their countries of origin as a transitional justice measure and to contribute to the welfare of long-deprived citizens.<sup>13</sup> Some States recently have introduced new legislation and procedures to facilitate the fight against corruption such as Canada’s “Corrupt Foreign Officials Act” and the “Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations,” in response to formal requests from States.

### **Human Rights Issues Involved and Values at Stake**

Certain human rights may be affected in all cases of corruption:

*Right to information:* the transparency of public institutions and ethical disclosure of private enterprise corresponds to the human right to information (ICCPR, Article 19). The UNCaC

<sup>12</sup> Resolution 4/4 “International cooperation in asset recovery,” para. 10.

<sup>13</sup> N.B.: Intervention of the representative of Egypt at the Conference of States Parties to UNCaC, 26 October 2011, “Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fourth session, held in Marrakech, Morocco, from 24 to 28 October 2011,” CAC/COSP/2011/14, 11 November 2011, p. 35, para. 79.

recognizes the right and “freedom to seek, receive, publish and disseminate information concerning corruption” (Article 13.1(d)) subject to other rights.

*Participation in public life:* Whether by lack of information or other exclusion, participation is performe proscribed.

*Security of person:* Protection of witnesses, experts and victims is essential to the effective measures required to combat corruption.

Additional ESC rights affected in specific cases may include:

- Food
- Water
- Livelihood and decent work
- Equitable access to public goods and services
- Adequate housing and equitable access to land
- The highest attainable standard of mental and physical health

Over-riding principles affected:

Of the seven over-riding principles of treaty implementation enshrined in the first three articles of the International Covenant on Economic, Social and Cultural Rights (ICESCR), certain of them are affected in all cases of transnational corruption, including:

*Nondiscrimination:* whereas the generally accepted anticorruption principles involve a strict avoidance of favoritism, nepotism, or other forms of arbitrary discrimination, especially in the conduct of public service.

*Rule of law:* States are obliged to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, and to guarantee fair treatment.

*International cooperation* (Chapter IV): collaboration in the exchange of information, technical assistance and return of assets subject to offenses.

*Maximum of available resources:* Often, public assets are subject to fraudulent transactions, thus having untold consequences for a range of rights.

### **Violations and emblematic cases**

Cases that have become renowned in recent years for their transnational dimensions and, consequently, ETOs are those involving “grand corruption.” These commonly feature high officials illicitly enriching themselves at public expense and socking those ill-gotten assets in foreign banks, overseas properties and financial instruments (off-shore havens-OSH). With the recent global financial crises, high-level deception and corrupt practices in investment trading (trade and investment—TI) also joins these emblematic cases with their damaging cross-border consequences.

Other high-profile cases have private-sector actors and businesspersons bribing foreign officials (BFO) for favorable commercial conditions and/or contracts. In recent diplomatic relations, related cases even involve charges of foreign banks colluding with tax evaders by concealing assets under protection of secrecy provisions.<sup>14</sup>

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<sup>14</sup> Jessica Dacey, “Ambassador believes worst may be over in tax row,” swissinfo.ch (14 February 2012), at: [http://www.swissinfo.ch/eng/specials/expat\\_woes/Ambassador\\_believes\\_worst\\_may\\_be\\_over\\_in\\_tax\\_row.html?cid=32123062](http://www.swissinfo.ch/eng/specials/expat_woes/Ambassador_believes_worst_may_be_over_in_tax_row.html?cid=32123062).

### *Overseas development assistance*

Overseas development assistance (ODA) can form another occasion of transnational corruption. ODA supports millions who struggle daily to survive. In 2006, donor countries gave almost US \$104 billion in official development assistance to lower-income countries, a figure estimated at US \$130 billion for 2010. The potential is great for corruption to compromise the outcomes of development programs.

Corruption within recipient countries also can seriously undermine the achievement of intended ODA results. Directly, it diverts a percentage of aid away from intended purposes and beneficiaries. Indirectly, it promotes the inappropriate use of aid. Demand-side corruption by public administrations entrusted with development resources is particularly damaging to poverty reduction and development goals, governance and public interests at both ends of international cooperation. Where corruption is pervasive and economic survival and opportunities are dependent on a system of bribe giving and taking, the effectiveness of aid initiatives is “dampened.” Efforts to build capacities within regulatory and service-providing institutions and improve the livelihoods of the poor are undermined. Empirical research points to a direct link between the quality of governance in recipient countries and positive aid outcomes.<sup>15</sup>

### *Corruption in Public Contracting and Privatization*

Public contracting (PC) is an enormous and lucrative area of business that provides one way to implement public policy. Transnational involvement in public-contracting corruption can take several forms. For example, it could involve pharmaceutical companies bidding to supply a government vaccination program; the privatization of a State-owned water utility; a foreign public contractor implementing a housing project; the award of a contract to a private firm to construct a hydroelectric dam; or contracts to reconstruct destroyed infrastructure in an occupied, disaster-affected, or war-torn territory. All such works have implications for ESCR in the target country and corresponding ETOs.

Few activities create greater temptation or offer more opportunities for corruption than public-sector procurement. On the other hand, such contracts are vehicles for implementing policies and, therefore, have a high impact on their outcomes. A good contracting procedure will ensure that the best quality works, goods or services will be acquired, at the best value and in transparent and accountable ways.

Genuine efforts to serve the public interest should motivate the contracting decisions. In most countries, contracting activities are performed by all levels of government, from municipalities and towns, to provinces and national or federal governments. While federal- or national-level contracting often involve larger values per contract, local government contracts are also significant in their number and impact, especially in the context of neoliberal decentralization schemes that leave municipalities at the mercy of private international finance institutions and privatizing public goods and services in partnership with transnational corporations. Theoretical ideals aside, such contracting processes also can involve bribery and other illicit practices to influence self-interested outcomes that lead to negative human rights consequences. Major international contractors may have been exposed to international partnership agreements (IPAs) in other locations, making it easier for them to understand, accept and compete for IPAs.

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<sup>15</sup> Stephen Knack, *Aid Dependence and the Quality of Governance: A Cross-Country Empirical Analysis*, The World Bank, July 2000, at: [wbi0018.worldbank.org/research/workpapers.nsf/0/30529397228d0a778525691c006768c7/\\$FILE/wps2396.pdf](http://wbi0018.worldbank.org/research/workpapers.nsf/0/30529397228d0a778525691c006768c7/$FILE/wps2396.pdf).



### *Corruption in the Water Sector*

Corruption in the water sector (WS) affects lives and livelihoods, slowing development and poverty-reduction efforts. Two billion people in the world still have no access to water, and 2.6 billion lack sanitation, in part due to corruption.

Corruption can occur in various scenarios, at different places and different occasions. Most corruption in public contracting involves public-policy decisions requiring contracts to implement them. Public contracting activities, meaning procurement, privatizations, licensing, concessions and other forms of contract, therefore, have a double function. Contracts become vehicles for implementing public policies, and for using, spending and distributing resources. This is the case for water-sector activities and programs, whether they relate to water for energy, for food (irrigation) or for consumption and sanitation.

Vehicles for spending large sums of public funds are constantly susceptible to corruption. Losses through public procurement of goods, works and other services alone amount to an average 15–30% of Gross Domestic Product, in some countries even more.<sup>16</sup>

### *Land and Real-estate Fraud (LF)*

The term “fraud” commonly refers to activities such as theft, corruption, conspiracy, embezzlement, money laundering, bribery and/or extortion. While specific legal definitions vary from country to country, fraud essentially involves a dishonest party using deception as a means to acquire material or other advantage for her/himself, or to create a loss for another party.

Land fraud occurs when a fraudster attempts to, or succeeds in inserting changes in the land register through fraudulent activity, with the goal of making some financial gain through criminally acquired property or interest in property.<sup>17</sup>

Mortgage lending and fraudulent investment banking causing cross-border harm result in a bundle of human rights violations. States and their jurisdictions sometimes provide haven to illegal and corrupt assets accumulated by public officials in the process of violating human rights domestically.

Land registration fraud occurs when a fraudster attempts to or succeeds in inserting changes in the land register through fraudulent activity, with the goal of making some financial gain through criminally acquired property or interest in property. This could include mortgage fraud and other fraud, involving the forgery or other misuse of land-registration or cadastral data.<sup>18</sup>

On matters of international cooperation, generally, most authorities in a recent European study reportedly thought that a cohesive region-wide strategy to combat land-registration fraud would prove to be more successful at thwarting land and real-estate fraud. Some said that, in the absence of harmonized land-registration systems, it might be difficult to fully align anti-fraud strategies. When surveyed, authorities across Europe who thought that their systems allowed for little or no fraud expressed doubts about the viability of region-wide strategies to counteract

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<sup>16</sup> Simon Evenett and Bernard Hoekman, “International Cooperation and the Reform of Public Procurement Policies,” World Bank Policy Research Working Paper 3720, World Bank, Trade Team, September 2005.

<sup>17</sup> “Terminology Corner,” *Land Times* No. 3 (July 2012), Housing and Land Rights Network – Habitat International Coalition website, at: <http://landtimes.landpedia.org/termpage.php?newsid=qQ==&counter=5>. See also “Study on the Challenges of Fraud to Land Administration Institutions” (Geneva and New York: United Nations, 2011), ECE/HBP/165, pp. 2–3.

<sup>18</sup> United Nations Economic Commission for Europe (UNECE), “Study on the Challenges of Fraud to Land Administration Institutions,” ECE/HBP/165, 2011.

it. In general, however, the spread of good practice and cross-border assistance in combating land-registration fraud was perceived to be desirable.

Potential cases/contexts	Drivers/Features	Obligation	Dimensions to address
<b>Iraq reconstruction</b>	US spent \$23 billion via sole-sourced contracts. \$9 bil+ "lost." 2007: Iraq #2 most-corrupt	Respect, protect, fulfill as occupier (nonstate ICESCR duties)	IPA – litigation, admin
<b>El Cajón &amp; La Yesca dams (Mexico)</b>	Comisión Federal de Electricidad (CFE) contracting	Respect, protect, fulfill	IPA, WS, BO -
<b>Recovery of Tunisian assets from foreign banks</b>	Swiss & other European & off-shore banks	Respect, protect	OSH - litigation, diplomacy, ADR
<b>Mortgage crisis resolution</b>	Domestic & IFIs	"nonstate" ICESCR duties	TI – litigation, ADR

### Strategic challenges and opportunities

OECD countries report that only about 1% of total development aid goes to fighting corruption.<sup>19</sup> However, UNDP has reported that technical assistance in support of anticorruption forms a high priority for the organization, represented by programs ongoing in over 50 countries.<sup>20</sup> Other initiatives pose opportunities for engagement such as the OECD/Asia Development Bank anticorruption initiative for the Asia-Pacific region, The Council of Europe Anti-Corruption Instruments and the Group of States against corruption (GRECO Group) and the G20 Anti-Corruption Working Group chaired by Indonesia and France with its 2010 *Anti-Corruption Action Plan*. Another, nongovernmental global effort is the World Economic Forum Partnering against Corruption Initiative (PACI).

A great challenge and need remain actually to recover assets. Some successes have been realized, but restitution is often slow, prolonged, complex and claimants, including prosecutors, may lack the capacity and/or stamina to achieve complete or precise outcomes.

Adopting emblematic corruption cases as ETO subjects would likely attract other CSOs engaged in transnational corruption and asset recovery. These include: ICTJ, Open Society, Transparency International, Association Tunisienne pour la Transparence Financière, Chr. Michelsen Institute, etc.

The link to a Middle East/North Africa ETO strategy lies in the States' efforts, however incomplete, to trace, freeze and recover stolen assets, in particular those States parties in the region.<sup>21</sup> Addressing ETOs in the context of anticorruption and asset recovery may provide an additional basis for addressing ETOs in a timely way in MENA.

<sup>19</sup> "Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fourth session, held in Marrakech, Morocco, from 24 to 28 October 2011," CAC/COSP/2011/14, 11 November 2011, p. 32, para. 57.

<sup>20</sup> *Ibid.*, para. 59.

<sup>21</sup> Resolution 4/4 "International cooperation in asset recovery," preambular para. 7.

International Anticorruption Academy (IACA) has been established, in Austria, as a training institution, as well as a new regional anticorruption academy in Panama for Central American and Caribbean States. Those institutions might find interest in the ETO arguments in addressing transnational corruption and asset recovery.

The Convention against Corruption does not explicitly provide for a treaty body to monitor compliance and/or adjudicate cases. The Convention provides that “Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption” Article 5.3).

That prospect has been reserved to the current process of negotiation to establish a “Mechanism for the Review and Implementation” within the Conference of the State Parties to the Convention, as provided in Chapter VII of the Convention. The parties convene periodically, according to the procedures adopted at the Conference (Article 63.7) and, in their most-recent session, resolved to establish such a review mechanism.<sup>22</sup>

The selection of the States parties to be reviewed is carried out pursuant to paragraph 3 of Conference resolution 3/1 and paragraph 14 of the terms of reference of the Review Mechanism. Lots are drawn to select the States parties to be reviewed in each of the first four years of the first review cycle. States are then paired with another State from the same regional group for a peer review procedure that involves a third country selected at random.<sup>23</sup>

The Government of Panama will host the fifth session of the Conference of the State Parties to the United Nations Convention against Corruption in 2013, followed by the sixth session in Russian Federation, in 2015. That meeting will coincide with the second cycle of the Implementation Review Mechanism, where State party-appointed candidates for nomination to the Implementation Review Mechanism.

NGOs should be able to observe and address the issues at those sessions in the form of “briefings” on the margins of the Implementation Review Group’s sessions. NGOs will take part in such briefings at the invitation of the president of the Conference, and no specific country situation is to be mentioned during the briefings.<sup>24</sup>

However, at the previous UNCaC meeting at Marakesh in 2011, some States rallied around a Russian initiative to block participation of NGOs in the Implementation Review Group.<sup>25</sup> The UNCaC website hosts NGO/CSO submissions on its website.

Besides the challenges and opportunities at broadening partnerships in this aspect of ETOs, transnational corruption forms some obvious links to other ETO cases, and/or add further

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<sup>22</sup> Resolution 3/1, entitled “Review Mechanism,” adopting terms of reference, and resolution 4/1 “Mechanism for the Review of Implementation of the United Nations Convention against Corruption.”

<sup>23</sup> For a schedule of the first four-year cycle of reviews by country, see “UNCaC Review Mechanism - Country Pairings,” at: [http://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/Country\\_pairings\\_-\\_Year\\_1-4\\_rev2011\\_IRG\\_rev-FINAL\\_October\\_2011.pdf](http://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/Country_pairings_-_Year_1-4_rev2011_IRG_rev-FINAL_October_2011.pdf). Deferred from the first year in the first cycle, Switzerland’s review comes up in the second year.

<sup>24</sup> Resolution 4/6 “Non-governmental organizations and the Mechanism for the Review of Implementation of the United Nations Convention against Corruption,” para. 1.

<sup>25</sup> “UN Anti-Corruption Body Resists Transparency,” freedominfo.org (11 November 2011), at: <http://www.freedominfo.org/2011/11/un-anti-corruption-body-resists-transparency/>; and “Civil Society Locked out at UN Anti-Corruption Summit, Calling Effectiveness of Global Convention into Question,” press release and statement of Slagjana Taseva, chair of the UNCA Coalition a network of 310 civil society organizations, 28 October 2011, at: <http://www.uncacoalition.org/en/home/186-civil-society-locked-out-at-un-anti-corruption-summit-calling-effectiveness-of-global-convention-into-question.html>.

dimensions to them so as to bolster certain ESCR-violation cases involving corruption, fraud, bribing of foreign officials, etc. Such cases cover a range of possibilities, from establishing ETOs in the mortgage crisis, to land grabbing and pillaging of natural resources, under-regulated privatization, and/or fraud in conflict situations.

Some ETO Consortium partners entered into tentative discussions at Heidelberg in 2008 about the prospects of applying ETOs to the then-fresh subprime lending crisis (and to global warming). While proof and investigative capacities seemed elusive then, legal challenge ensued in the United States to establish liability. Those efforts have led, among others, to a \$26 billion multistate mortgage settlement in February 2012. The ultimate settlement had many shortcomings,<sup>26</sup> not least of which was the lack of any effect across a national border.

Addressing the ETOs involved in other transnational corruption cases—and certain domestic corruption with transnational consequences—poses an opportunity also to apply explicit international civil and/or criminal law as an additional point of ETO argument. Reciprocally, the ETO dimension adds to the normative argument that seeks remedy, at least by way of asset recovery.

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<sup>26</sup> Yves Smith, "The Top 12 Reasons Why You Should Hate the Mortgage Settlement," *Huffington Post* (26 February 2012), at: <http://www.hlrn.org/news.php?id=o21nYw==>.