***DRAFT – NOT FOR QUOTATION***

**FOUNDING A NEW HUMAN RIGHT TO FREEDOM FROM CORRUPTION[[1]](#footnote-1)\***

**~**

**DAVID KINLEY[[2]](#footnote-2)♣**

**Paper presented in Corporate Power and Human Rights Event Series,**

**School of Advanced Study, University of London,**

**5 December 2013**

**INTRODUCTION**

This topic emanates from my work over the past three to four years on global finance and HRs that has lead me to conclude not just that finance and HRs are intimately connected (no matter how awkward that may seem to some), but also, their level of interdependency is such that they ought to learn to love each other … or at least, to appreciate and respect each other’s virtues.[[3]](#footnote-3)

This intimate dependency is apparent not only in the fact that finance is an essential input into the many institutional means by which HRs are protected and promoted - accountable governments; functioning courts; health and education services; and public order, safety and security, it is also very plainly evident when that finance is lacking - whether by design or by negligence.

One of the most significant and serious causes of financial absence or inadequacy is when corruption or fraud leaches funds from public purse to private wallet, or prevents funds from ever reaching the public purse in the first place.

“Corruption”, as Susan Rose-Ackerman puts it, “is a symptom that something has gone wrong with the management of the state”.[[4]](#footnote-4) As such, its many and various negative consequences have been long recognized.[[5]](#footnote-5) Correspondingly, there are many and varied legal and institutional responses to this situation – the OECD Bribery Convention; UN Convention Against Corruption; the Financial Action Task Force; regional anti-corruption conventions; domestic criminal laws; and national anti-corruption Commissions, as well as a swathe of political responses, from G8 and G20 statements and UN resolutions, to international and national civil society campaigns and the establishment of the topic-specific and worldwide, Transparency International initiative, and business campaigns, such as the World Economic Forum’s Partnering Against CorruptionInitiative.[[6]](#footnote-6) In terms specifically of HRs, however, the response has not progressed far beyond baseline analyses of the negative HRs impacts of corruption and calls for that much to be recognized in efforts designed to combat corruption.[[7]](#footnote-7) What, in particular, is missing is any concerted effort to assess what precisely international human rights law could do to advance those efforts and what added value such a HRs dimension might offer.

The proposal advanced in this paper is intended to fill that gap. While it takes the form of an international human rights law response it is nevertheless one that is meant to supplement, not replace or oppose, these other responses. What I am suggesting is that there ought to be recognized a specific, free-standing HR combatting corruption – that is a “right to freedom from corruption” (RFFC) - at the level of international law. As such, and like all international human rights laws, it would demand implementation in domestic jurisdictions, while providing normative guidance and supervision at the international level.

It is an argument that is not yet fully formed. The bones of the idea are there, and there are some important fleshy bits attached, but the product is, as yet, more super-model than super-sized. I am trying it out on you (listener or reader), as it were, and am, therefore, genuinely keen to hear people’s views – their comments, criticisms questions or suggestions.

The paper is in two main parts. In the first I investigate the form and substance of the relationship between HRs and corruption, and, above all, its fundamental importance. Here I use the matters of illicit finance and tax injustice as vehicles to illustrate the extent and seriousness of the issue. In the second part, I mount my case for the establishment of the new RFFC right. In this second part I ask, and seek to address, three questions:

1. *Why* do we need a RFFC?
2. *What* would it look like?
3. *Would* it do any good?

**PART 1 – Linking corruption and human rights**

**The illicit and the illegal**

The British Virgin Islands (BVIs) are a British protectorate. A set of island dots in the Caribbean, with a population of 28,000, and a GDP of (an impressive) $850 million. But, what makes the BVIs truly remarkable is that in recent years they has consistently ranked second in the world for FDI outflows, with, for example, $214 billion FDI in China alone in 2010. What is more, much of this total originatesin China itself (via Hong Kong). Given the shady and likely nefarious characters of the creditors in BVI’s very accommodating financial services sector it is fair to ask how much of the deposited funds are illicit and how much legitimate? In truth, and precisely because of the closely guarded nature of banking details, the answer is we just don’t know. But what we doknow that when these monies flow out of BVI, they are, very effectively, laundered squeaky clean.[[8]](#footnote-8)

Other tax havens are, like BVI, small, but with a bigreputation (Andorra, Caymans, and the Seychelles, as well as Singapore, Hong Kong, Luxembourg and Switzerland). Others are big, but their tax haven roles less well known – including all major European states, North America and Australia, indeed the permissive regulatory environmental of just about all OECD states make an art of sailing very close to the winds of outright fraud by effectively turning a blind eye to the provenance of vast sums deposited in banks within their jurisdiction.[[9]](#footnote-9) Jason Sharman’s illuminating study of the behavior of many offshore banking institutions showed just how casually extensive this phenomenon is in Western states. Posing as a wealthy investor seeking anonymity, tax ‘minimization’ and asset protection he approached more than 200 offshore providers from both classically perceived, small state, tax haven jurisdictions and from OECD countries. Of the latter, 47 providers gave valid responses (ie were prepared to discuss options), and of those, no fewer than 35 “agreed to form shell companies without requiring any identification documents”. Twenty-four of those were from the US and 8 from the UK. All were in direct contravention of the FAFT’s recommendation 33 requiring states to establish and enforce rules that identify ‘beneficial ownership’ in company structures.[[10]](#footnote-10)

Even staying on the right side of the law can attract moral outrage. This is well illustrated by the tax minimization practices of Starbucks and Google in UK, for example, which may indeed be zealously perused by the companies, but which are not in fact illegal. In this context, Warren Buffet tells the story of asking the people working in his office to declare their individual marginal tax rate (management; analysts; administrative assistants and receptionists etc). It turned out that he that had the lowest (17.7%), with the average being 32.9%. Why? Because, as Buffet explains, this is precisely what is made available to a wealthy tax-payer like him in the horrifyingly complex US federal tax code (all 3.8 million words of it).[[11]](#footnote-11) “I have no tax planning”, he points out, “I just follow what the US Congress tells me to do”.[[12]](#footnote-12)

Communist and Socialist governments – despite their pretentions of supplicating the private interests to public needs - are no better than democratic, and maybe even worse. Witness the China’s extraordinary tax system, which taxes workers heavily (much more than most OECD states) and taxes its State Owned Enterprises hardly at all, but rather subsidizes them with the taxes raised from workers. This system effectively, efficiently and legally, shifts enormous levels of wealth from the poor and not so rich, to the rich and very rich.[[13]](#footnote-13)

How these laws came to be so skewed in favour of the rich and powerful and against those least able to protect and provide for themselves is a classic demonstration of the power of lobbying of vested political interests. ‘Legal corruption’ is how Danny Kaufmann calls the end result of such perversion of the traditional idea of the ‘social contract’.[[14]](#footnote-14)

Whether illegal or legally sanctioned, the (i) preclusion of private wealth ever getting into public coffers, and/or (ii) the diversion of public funds to particular private interests have manifest impacts on governance, the governed and the governors, including in respect of standards of HRs protection.

**Missing billions**

A recent report from a UN HRs Council Panel on Anti-Corruption (April 2013) estimated that between 2000 and 2009 developing countries lost some US$8.44 trillion “to illicit financial flows”.[[15]](#footnote-15) This is, as the report notes, ten times what they received in Official Development Assistance (ODA), (and is, incidentally, also about the same the developing world received in global FDI flows). And while the loss to developing countries of more than US$1 trillion each year is significant on its own, it also represents immense failures in the government’s delivery of political, social and economic goals and expectations, including in respect of the realization of HRs.

Public and private finance is needed for the realization of the most straight-forward and the most complex of HRs. Public finance is needed to enable the state to affect their direct provision of rights fulfilment in, for example, public education, health care, housing and sanitation. It is also vital to the state’s rights-based regulation of private sector providers of these and other services, through representative legislative bodies, public sector bureaucracies, enforcement agencies including police and courts,

The critical importance of both effective and fair governance is well recognized in development circles. Over the past decade or so, the proportion of total global annual ODA dedicated to governance and rule of law capacity-building projects has grown to some 25%. The latest figures from the World Bank’s Governance and Public Sector Management programs for the fiscal year 2103, for example, reveals that 11.7% (US$3.85bn) of total Bank lending was to targeted at improving core public sector institutions, focusing especially on combatting corruption.

This anti-corruption dimension to aid and development was also stressed in October 2013 *Report of the IBA’s Task Force on Illicit Financial Flows, Poverty and HRs*,[[16]](#footnote-16) which notes the increasingly attention paid in development programs to strengthening good tax governance in developing countries, thereby reducing dependency on foreign aid and improving development outcomes.[[17]](#footnote-17)

National budgets - the raising and expenditure of public funds - are nearly always critical to the realization of the HRs of the poorest and vulnerable in any society, especially when one considers, for example, the requirement under Art.2(1) of the ICESCR to realize HRs “to the maximum available resources”. Broad-based local taxation systems are therefore essential. They need to cover labour taxes; income tax; corporations tax; export tax; property taxes; and even (eventually) consumption tax. The difficulties faced by governments in developing states in establishing even the rudiments of such comprehensive fiscal regimes are manifest.

They are, what is more, especially problematic when, at the same time, these countries are seeking to attract private investment in their economies including from overseas (ie FDI). The Financial Times, in its 2013 FDI Report, points out that for developing countries there is a direct correlation between increasing levels of corporation tax, and decreasing FDI projects.[[18]](#footnote-18) To put it another way - the lower you tax foreign businesses, the more they will be attracted to invest in your country.

But of course the establishment of a broad-based taxation system is only half the battle. For once it is there, the challenge for many taxpayers is how to minimize its impact. Economists have been commenting for years on how tax departments in many transnational corporations, far from being loss-making (ie paying out to the tax man), are in fact profit centres - soaking up costs from other parts of the organization and finding ways to make them tax deductible.[[19]](#footnote-19)

The immense grey between tax evasion and avoidance in many rich world jurisdictions (made bigger and greyer by the forensic skills and ingenuity of tax professionals whose services are avidly sought by the wealthy), provides ample evidence of instances of ‘legal corruption’. That is where tax is legally avoided, but unethically evaded.

Today, the problem is at least well recognized, if not easily corrected. Thus, the Oxford Martin Commission’s recent (summer 2013) Report on *Future Generations* observes that both the June 2013 G8 and July 2013 G20 declarations on tax evasion, expressly challenge longstanding practices of shifting profits to avoid taxes, the lack of transparency on tax havens, insufficient clarity on company ownership, and the non-reporting of payments made by extractive companies to governments. These economic realities combine to exacerbate the governance gap and prevent much-needed growth within developing countries.

Tax dodging is, at base, a corrupt practice. What is useful and important about the analysis of tax skullduggery is that shows clearly the significant extent to which the fulfillment of a state’s HRs obligations are reliant on tax dollars filling the public coffers.

**The Scourge of Corruption**

Corruption is however a problem of much wider and deeper proportions than denying the State its rightful ‘pound of flesh’. Corruption is also about the misappropriation of public monies *and* misuse of public powers for the illegitimate benefit of private interests.

Through its two main forms - petty and grand[[20]](#footnote-20) – corruption can have enormous and malign influence on just about every aspect of a society’s existence and on the daily lives of its people. Petty corruption – police bribes – is relatively small scale, based on duress and involves a victim and a perpetrator. Grand corruption - a mining TNC bribing a Mines Minister to sign off on a substantially reduced royalty rate - is large scale, consensual, and based on mutual gain for both perpetrators (the victims here are ‘the state’ and its people).[[21]](#footnote-21)

Critically also, corruption’s breadth is such that it is by no means unique to developing countries. “As a country becomes industrialized, its governance and corruption challenges do not disappear. They simply morph and become more sophisticated”.[[22]](#footnote-22) They become deeper and more subtle, focussing on exerting influence and the “capture” of public power, when for example, private sector lobbyists can exert direct influence on public policy choices, or - as was vividly demonstrated in the GFC - where the public regulators are blinded by the very financiers they are supposed to be regulating with enticements of future lucrative jobs in their companies.[[23]](#footnote-23)

**Corruption and human rights**

What work has been undertaken in this field has focused almost exclusively on the detrimental impact corruption has on existing HRs. How corruption operates as a *means* by which existing rights – across the broad spectrum of CP and ESC rights - are often violated, whether intentionally and inadvertently.[[24]](#footnote-24) The UN,[[25]](#footnote-25) regional HRs bodies, the OECD,[[26]](#footnote-26) the World Bank[[27]](#footnote-27) and the Asian Development Bank,[[28]](#footnote-28) NGOs,[[29]](#footnote-29) think-tanks and academics[[30]](#footnote-30) have catalogued the social, political and (to greater or lesser extents) the rights implications of corruption. At the individual country level, India has attracted particular attention,[[31]](#footnote-31) but other countries have also been scrutinized, especially in SEA[[32]](#footnote-32) and Africa.[[33]](#footnote-33) Even in China an academic analysis of the human rights implications of corruption (the first of its kind) has recently been published by an international law professor from the Chinese Academy of Social Sciences.[[34]](#footnote-34)

What is less discussed and debated in human rights circles is whether the very fact of corruption is itself a violation of a right? That is, the violation of an (as yet) unspecified right. That is, the right to freedom from corruption, which would be proclaimed in international law implemented and enforced domestically.

Surprisingly, perhaps, one can find at least as much to support this idea in the body of international anti-corruption agreement as in international human rights law. The UN’s CAC, the (1996) Inter-American CAC, and especially, the AU’s 2003 Convention on Preventing and Combatting Corruption, all make contextual references to the political and social dimensions of corruption in their respective Preambles.

* The UN CAC refers to corruption “undermining” ... “democracy, ethical values and justice”, and “jeopardizing sustainable development and the rule of law”.
* The Inter-American CAC notes how corruption “undermines the legitimacy of public institutions and strikes at society, moral order and justice as well as the sustainable development of peoples”. And that combating corruption is vital to upholding “representative democracy … stability, peace and development”.
* Most explicitly of all, the Preamble to the (2003) AU Convention harks back to the origins of the AU by stressing its essential respect for “freedom, equality, justice, peace and dignity” and the AU’s call upon states to “promote and protect human and peoples’ rights”, consolidate democracy and ensure good governance and the rule of law. Furthermore, Art.3 in the body of the Convention itself binds state parties to abide by five key principles in combatting corruption, three of which are (i) to respect human and peoples’ rights, and (ii) the promotion of social justice; and (iii) to respect the institutions and practice of democracy.

The international anti-corruption instrument least conversant with its broader context is the OECD Bribery Convention which proclaims its focus to be on the impact of corruption on international business transactions,[[35]](#footnote-35) and limits its broader ‘social’ references to bribery raising “serious moral and political concerns”.

While international HRs bodies have not been silent on the matter, the fact that corruption is not expressly provided for in any of the major international HRs instruments has meant that the issue has had to be inferred. UN Treaty bodies have increasingly made references to the need for Governments to combat corruption in order to deliver upon basic HRs. The HRs Committee, the Committee on ESCR and the Committee on the Rights of the Child in particular, have urged states to tackle corruption, especially in respect of a state’s stewardship of private sector enterprise and its formal and informal dealings with government.[[36]](#footnote-36) These treaty bodies tell us that without serious and effective domestic laws, policies and practices for combatting corruption – that almost always involves collusion between government officials and private actors - then the realization of rights for many people is significantly compromised.[[37]](#footnote-37)

The UN Council on HRs, and the UN Commission before it, have conducted baseline research and passed a number of relevant resolutions concerning the links between corruption and HRs over the past decade,[[38]](#footnote-38) but without - it must be said - evident enthusiasm or widespread support from member states. That said, over the past two years or so there has been a discernable increase of pressure from certain quarters within the Council. Morocco is leading a group of states[[39]](#footnote-39) advocating that the Council take more seriously the issue, which determination was flagged in the 2012 Statement of the HRC (sponsored by Morocco), and the current HRs Council Advisory Committee project on the negative impact of corruption on HRs whose report (due in June 2014)[[40]](#footnote-40) may include a recommendation for a Special Rapporteur on the topic that could serve to give the matter greater impetus and a higher profile.[[41]](#footnote-41)

**PART 2 – Establishing a new right to freedom from corruption**

Thus far, these UN efforts have stopped short of any consideration of a free-standing RFFC, let alone advocating that one be established. Corruption is viewed exclusively as a vehicle for the infringements of other HRs, rather than being seen as a breach of the essential structure, or skeleton, of the HRs law itself.[[42]](#footnote-42) The former might best be viewed as ‘substantive breaches’, whereas the latter can be seen as a ‘systemic breach’. Notably, substantives breaches can be and often are rights plural, whereas the ‘systemic breach’ of the RFFC is singular – a breach of its own, distinct right.

**Three key questions**

So, if you are to at least willing to entertain my idea that there ought to be an RFFC, we must address the three questions alluded to at the start:

1. ***Why do we need a RFFC?***

First and foremost, we need it in order to recognize the importance of corruption; to appreciate its immensely corrosive impact on very nature of the HRs project - namely, that all are equal in dignity and worthy of equal respect regardless of one’s position, power or wealth. A free-standing right highlights these essential qualities and focusses attention on states’ obligation to govern fairly, equitably and legally,[[43]](#footnote-43) and thereby to eliminate, or at least minimize, corruption. This is not to deny the importance of combatting corruption in order to address all the ‘substantive breaches’ of HRs that it causes – to fair trial, non-discrimination, participation in government, access to health care or education or housing and more – rather it is to underscore that importance. For without an RFFC, the impact of corruption is reduced to just one of a number of contributory factors to the infringement of various HRs. A RFFC would replace the diffusion of interest with a precision of purpose for tackling corruption as a HRs issue.

Another reason, closely linked this first one, is that a discrete RFFC will assist in the broader HRs concern of bolstering governance - to enhance the capacity, efficiency and fairness of government. By mandating states to recognize freedom from corruption as a HRs issue, a new and powerful normative dimension would be added to the argument for why states need to act against corruption, which is presently dominated by the concern to criminalize such conduct. Illicit state-capture by private interests is indeed a criminal matter - but it is also one of political, social and economic importance,[[44]](#footnote-44) and in pronouncing that such actions constitute a systemic breach of a basic HR, these broader concerns are made more emphatic.

A third reason why we need a RFFC is that such a focus on states’ HRs obligations to combat corruption regarding, in particular, the misuse of public power by private actors provides a new foothold in the debate over the extent states must be required to make corporations responsible for their HRs abusing actions,[[45]](#footnote-45) both infra- and extra-territorially.[[46]](#footnote-46) That is, the RFFC would extend the reach of the UN’s 2011 Guiding Principles on Business and HRs which have – at least in any explicit sense – balked at making clear states’ obligations under international human rights law to ensure that corporations within their jurisdiction are bound by domestic laws that incorporate those international obligations.

And finally, the boldest claim I might make of a new RFFC is that it might be seen as a sort of ‘missing link’ between ESC and CP rights. Its subject matter recalls how the UDHR (the mother to the fraternal twins that are the Covenants) saw open, free and representative government as integral to the protection and promotion of all HRs (in UDHR, Art.21). The RFFC is a more useful and convincing vehicle through which to forge an argument for interdependence of the two sets of rights than the oft-made proclamations of the ‘indivisibility’ of HRs,[[47]](#footnote-47) which although profound and well-meaning, are demonstrably not borne out in HRs practice.

1. ***What would it look like?***

In terms of international law, the RFFC could take a number of forms. These range from the grand – the establishment a new HRs treaty to combat corruption,[[48]](#footnote-48) or recognition of its status as crime under international criminal law,[[49]](#footnote-49) through to the minimalist – that different aspects of the RFFC may be inferred in various existing treaty rights, such as fair trial, participation in government, non-discrimination and (economic) self-determination.

At the ‘softer’ end of the spectrum, it is argued that an individual’s (and society’s) expectation to be free from corruption constitutes a part of corporate social responsibility (CSR). At the global level, this is represented, for example, by (i) the inclusion of combatting corruption as the 10th principle in the UN Global Compact; (ii) the requirements under the UN Framework and Guiding Principles on Business and HRs for corporations to exercise due diligence in all their commercial dealings including with governments (the second pillar of the Framework), and that there be access to remedies for HRs violations including as a result of corrupt corporate practices (third pillar of the Framework); and (iii) the OECD Guidelines for MNCs (under Part vii) press states to “encourage” corporations within their jurisdiction not to engage in bribery. There is, however, some doubt as to how far these various exhortations reach into traditional CSR practice as it operates on the ground. As one study of the matter concludes: “those hoping to see corruption swept up and addressed by a wave of traditional CSR activity are likely to be disappointed.”[[50]](#footnote-50)

For me, however, the most effective and practicable option would be to incorporate the right in a pair of Optional Protocols – one to be appended each of the two Covenants. Not the least attractive aspect of this option would be the unequivocal statement it would make about its capacity to bridge the two sets of rights. Being framed in OPs to existing Covenants would also emphasize the *systemic* nature of the RFFC – that is something integral to the realization of full breadth of CP and ESC rights that States are bound to uphold under international human rights law. As a pair of OPs, what is more, this model would also avoid many of the ‘start up’ problems that plague entirely new HRs treaties.

*Suggested structure of the proposed OP:[[51]](#footnote-51)*

* Preamble: (i) recognition of all the major existing international anti-corruption instruments and initiatives, as well as the various resolutions/reports of the UN Commission on HRs and HRs Council; and (ii) recognition of the negative impact of corruption on the realization of existing HRs.
* Pronouncement of a RFFC – eg: “State Parties shall prohibit corrupt practices within their respective jurisdictions, whether undertaken by public officials or private actors, by all appropriate means including criminalization through legislation.”
* Specific reference to the scope of the RFFC and the attendant obligations of states – that is, to encompass bribery (both giving and receiving parties); “illicit enrichment” (ie unexplained gain as per the Inter-American CAC); and jurisdiction to be both infra- and extra-territorial.
* An obligation on states to identify and indemnify victims of corruption - both individuals and groups - and to establish appropriate means by which to secure compensation for identifiable victims from disgorged funds.

1. ***Would it do any good?***

Any positive answer to this question hinges on the strength of the nexus between the *promise* embedded in a state’s ratification of an international instrument, and the *facts* of its willingness and capacity to implement that promise in domestic law and policy.[[52]](#footnote-52)

That said, one of the strongest factors in favour of potential acceptance of a RFFC is existing evidence of significant uptake across states of the necessity to combat corruption at IL – witness the 168 parties to the UN CAC (as well as the spread of regional anti-corruption initiatives: the Inter-American and African Union Conventions, and the OECD Bribery Convention), and sector-specific agreements, such as the Extractive Industries Transparency Initiative,[[53]](#footnote-53) which now has 25 compliant countries, 16 candidate countries and 4 suspended countries.[[54]](#footnote-54) Adding an international human rights law dimension to the existing armory employed in the battle against corruption would be both politically attractive and practically useful.

Further evidence of such support can also be obtained from those domestic anti-corruption regimes that have had some success in terms of both securing prosecutions and being prophylactic. Such regimes it must be admitted are few and far between, for while a great many states outlaw corruption and related nefarious conduct, few do so unambiguously and with robust and effective enforcement. But certainly the trail-blazing US *Foreign and Corrupt Practices Act* 1977 is one such regime, and the UK’s (still new) *Bribery Act 2010* promises to be another. The FCPA has been characterized as operating effectively as a HRs-protecting statute, in that it deters overseas corporate human rights abuses by forcing American-based or listed corporations to be more honest brokers in their dealings with governments and communities.[[55]](#footnote-55) Indeed, an essential aspect of the domestic application that would be expected of a RFFC if it was in place would be precisely the sort of criminalization of corrupt conduct that the FCPA (and Bribery Act) provide.[[56]](#footnote-56)

Also, to the considerable extent that sustainable development depends on protection of HRs (both CP & ESC rights), then the RFFC is far more likely to assist in that objective than the misconceived right to development, which is not only politically naïve, but fatally compromised precisely because it is expressed as an international HRs norm (viz: the Declaration on the Right to Development 1986), thereby injecting ill-fitting and unrealistic legal obligations into an already heated and often polarized debate.

Finally, on the question of what good a RFFC might do, I’d like to focus on the ‘good’ that (one sincerely hopes and believe) sits alongside the ‘bad’ in human nature. Michael Sandel tells an interesting tale of people’s fidelity to an inner moral code in his book, *What Money Can’t Buy.[[57]](#footnote-57)*  A study of Swiss villagers attitudes towards the prospect of a potential nuclear waste dump in their village revealed a surprising majority in favour (51%), representing – apparently – a strong sense of civic duty (‘it has to go somewhere’ attitude). But far more intriguing was the fact that in a follow-up survey in which they were offered a financial sweetener to consent to the site, the number of villagers in favour went down – indicating, apparently, a sense of disquiet that their decision-making was being inappropriately influenced by a financial inducement.

One might respond by saying, that this represents a peculiarly middle-class, Western (or at any rate Swiss) attitude. However, the Swiss especially (and the West generally) are also, at the same time, the most eager and successful exponents of ‘secrecy banking’, which is widely and well understood as a legal cloak that hides many financial misdeeds. So perhaps what Sandel’s tale exposes is the differences between those who make the rules and those who are ruled by them.

Rose-Ackerman in her seminal work on corruption homes in on this nexus between government and the governed, seeing it as a point of potential positive leverage and not just one of weakness and exploitation.[[58]](#footnote-58) “Ideas and moral commitments matter” she declares.[[59]](#footnote-59) And with the right leadership, facilitated by incentives borne of the appropriate political circumstances, social moods and legal or institutional tools, corrupt governments and corrupted societies can change. Thereby, Rose-Ackerman argues, the necessary cultural changes may be instigated and sustained by a ‘virtuous cycle’ of well-meaning people (‘merit employees’ she calls them) and good deeds. An RFFC enshrined in international law might add weight to that cycle.

**Conclusion**

I want to conclude by pointing to an opportunity that lies before us, and suggest that it might conceivably provide catalyst to get this idea over the line. The MDGs are nearing their 2015 deadline and amid all the discussion that is already building serious momentum, as to what should follow them, loud calls are being made for the explicit recognition of: (i) the importance of HRs and (ii) promoting just and accountable governance, alongside the rule of law - including and especially, tackling corruption[[60]](#footnote-60) - to the achievement of development goals.

The somewhat tired argument for a ‘human rights-based approach to development’, might receive a much needed transfusion of new perspective, vigour and relevance if it sought to back the idea of a RFFC. The shared concerns of development practitioners and HRs advocates to enhance governance and combat corruption – inboth the developing and developed worlds – provides a welcome bridge between the two disciplines.

To be sure, the RFFC is no panacea. The political problems that it will face its endorsement let alone the practical problems facing implementation, will be enormous, to say nothing of the powerful vested interests that will oppose the idea tooth and nail. Cultural arguments will also certainly be raised in opposition – that one man’s corruption is another’s culture. But the mouths from which such arguments come are nearly always those whose interests are being served by corruption. Time and time again, when “ordinary” folk are asked about what ails them about their governments that rule them and the corporations that employ them you get the same lament. Consider this from a recent public survey conducted in Tanzania,[[61]](#footnote-61)

“The corruption in our country is so discouraging. We know from the newspapers that money is coming into the country… When we go to the capital we see big cars on the streets. But in rural areas? Nothing. That money is not reaching us. Our children are dying while others have more than they can eat.”

This scene and sentiment of failed development and human rights denied is so familiar that much the same could be said of just about any developing country, and many emerging and developing countries as well.[[62]](#footnote-62)

Corruption is not a new phenomenon. It is as old as society itself. And so it is perhaps somewhat puzzling that a sincere proclamation set against it and seeking its eradication did not form any part of the modern, post-WWII era of international human rights law. The many (too many?) international human rights instruments we have seen established over the past 70 years have addressed an enormous variety of the social, economic and political ills of human society, but not corruption.

Maybe it was considered too prosaic a matter? Or too complex? Or maybe just shunted off into the “too hard” basket? A cynic might say there were too many vested interests, especially as tied up in the decolonization decades following the War, to raise sufficient support for the idea, even within the international HRs community. Whatever the reason, surely its time has now come. The long missing right to freedom from corruption is ripe for debate and - one sincerely hopes - ready for enactment, and above all enforcement.

1. \* Originally, at the time of delivery, entitled, ‘Missing Billions and Missing Rights: Corruption and its Impact on Human Rights’. [↑](#footnote-ref-1)
2. ♣ Chair of Human Rights Law, Sydney University; Academic Panel Member of Doughty Street Chambers, London. [↑](#footnote-ref-2)
3. Which relationship is explored in my forthcoming book: *An Awkward Intimacy: Why human rights and finance must learn to love each other*. [↑](#footnote-ref-3)
4. Rose-Ackerman, *Government and Corruption* (1999), 9. [↑](#footnote-ref-4)
5. For an overview of the undesirable dimensions of bribery (and corruption), see, for example, Alexandra Addison Wrage, *Bribery and Extortion: Undermining Business, Governments and Security* (2007), chap.1. [↑](#footnote-ref-5)
6. The leading business voice against corruption, as it claims to be; [www.weforum.org/issues/partnering-against-corruption-initiative](http://www.weforum.org/issues/partnering-against-corruption-initiative). [↑](#footnote-ref-6)
7. For example, ICHRP, *Integrating HRs in the Anti-Corruption Agenda* (2010). [↑](#footnote-ref-7)
8. 2013 data available from *fDI Intelligence* - www.fdiintelligence.com/. [↑](#footnote-ref-8)
9. See Nicholas Shaxson, *Treasure Islands: Tax Havens and the Men Who Stole the World*, chap. 1. [↑](#footnote-ref-9)
10. JC Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy,* (2011), chap. 3. Notably, Sharman’s experiment revealed only 2 of 36 providers located in tax haven jurisdictions who were prepared to establish companies without proper identification documentation. Consider also, HSBC’s (headquartered in the UK) recent $1.9billion settlement with the SEC over allegations of it role in facilitating the laundering of proceeds from Mexican drug cartel money; <http://www.bloomberg.com/news/2013-07-02/hsbc-judge-approves-1-9b-drug-money-laundering-accord.html>. [↑](#footnote-ref-10)
11. Eric Tawney, “Simplification of the US Tax Code: A Growth Opportunity” *Chicago Business* (Oct. 2013); Tawney notes that “from 2001 to 2010, the tax code increased from 1.4 million words to 3.8 million words.” [↑](#footnote-ref-11)
12. Interview with Tom Brokaw, NBC, 29 October 2007; <http://www.youtube.com/watch?v=Cu5B-2LoC4s>. [↑](#footnote-ref-12)
13. World Bank, *China 2030* (2013), pp.328-9. [↑](#footnote-ref-13)
14. Kaufmann, “Corruption and the Global Financial Crisis”, *Forbes*, (21 Jan 2009). [↑](#footnote-ref-14)
15. A/HRC/23/26, para.5 – drawing on data compiled in Global Financial Integrity, *Illicit Financial Flows from Developing Countries Over the Decade Ending 2009* (2011). [↑](#footnote-ref-15)
16. *Tax Abuses, Poverty and HRs.* [↑](#footnote-ref-16)
17. See also Tax Justice Network (Germany) 2012 Report on Tax & HRs. [↑](#footnote-ref-17)
18. At p.16 [↑](#footnote-ref-18)
19. See Sikka & Hampton, he Role of Accountancy Firms in Tax Avoidance: Some Evidence and Issues” *Accounting Forum* 29 (2005) 325–343, and also SOMO, *Private Gain – Public Loss*: Mail-box companies, tax avoidance and human rights (July 2013). [↑](#footnote-ref-19)
20. As the pressure group *No Bribe* puts it, “There are two main types of Corruption based on its quantum – Petty Corruption faced by common man in his day to day life and Grand Corruption which takes place at higher levels. While the former is based predominantly on duress, the latter is more consensual and is driven by expectations of mutual gain. Direct Measurement of Corruption is a daunting task because of the cloud of secrecy and fear associated with it. The victims [of petty corruption] fear retaliation and the [joint] perpetrators [in grand corruption] have a vested interest in secrecy, leading to a quiet burial of the incident”; at <http://www.nobribe.org/how-to-measure-corruption>. The former can be seen as an affront and sometimes dangerous; the latter as egregious and catastrophic. Somewhat like the difference between a leaky bucket and syphoning off at the source. [↑](#footnote-ref-20)
21. Although as Kofele-Kale points out this does not cover all types of corruption – such as his example of a dictator’s wife raiding the public purse for overseas extravagancies: “The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law” (2000) 34 (1) *The* *International Lawyer,* at 157 [↑](#footnote-ref-21)
22. Kaufmann, *op cit.* [↑](#footnote-ref-22)
23. Simon Johnson, “The Quiet Coup”, *Atlantic Magazine* (May 2009). [↑](#footnote-ref-23)
24. See for example, the research conducted by the ICHRP and published in a pair of reports in 2009 (*Corruption and Human Rights: Making the Connection*), and 2010 (*Integrating Human Rights into the Anti-corruption Agenda*). [↑](#footnote-ref-24)
25. See OHCHR, *The human rights case against corruption* (2013) [↑](#footnote-ref-25)
26. Especially the work of the OECD’s Working Group on Bribery; see its annual reports at <http://www.oecd.org/corruption/crime/oecdworkinggrouponbribery-annualreport.htm>. [↑](#footnote-ref-26)
27. See the activities and publications emanating from its Governance and Anti-Corruption strategy: <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0,,menuPK:1740542~pagePK:64168427~piPK:64168435~theSitePK:1740530,00.html>. [↑](#footnote-ref-27)
28. See the ADB/OECD Anti-corruption Initiative for Asia-Pacific, see <http://www.oecd.org/site/adboecdanti-corruptioninitiative/>. [↑](#footnote-ref-28)
29. Including *Transparency International* which publishes an annual global ‘Corruption Index’ measuring countries’ levels of corruption. [↑](#footnote-ref-29)
30. See for example, Boersma & Nelen (eds), *Corruption and Human Rights: Interdisciplinary Perspectives* (2010). [↑](#footnote-ref-30)
31. Raj Kumar, *Corruption and Human Rights in India* (2011). [↑](#footnote-ref-31)
32. See for example, Butt, *Corruption and Law in Indonesia* (2012). [↑](#footnote-ref-32)
33. See, in respect of Africa, for example, Pearson *Human Rights and Corruption* (2001). [↑](#footnote-ref-33)
34. Prof Sun, Shiyan (article on file). China ratified the UN CAC in 2006. [↑](#footnote-ref-34)
35. … to “prevent and combat the bribery of public officials in connection with international business transactions”. [↑](#footnote-ref-35)
36. For a survey of these and other relevant comments by UN HRs bodies, see Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (2012), Part B. [↑](#footnote-ref-36)
37. For example, private enterprise illegally colluding with appropriate government ministers/bureaucrats to evict people from their lands without any/adequate compensation or relocation/housing and as a consequence leaving the evictees without proper housing, health care, education, social welfare or work rights – no matter what domestic laws and policies might provide. This is a classic example of issues that the three above committees (and CEDAW, CERD, CRPD and even CAT) have all pronounced in the country report concluding observations. [↑](#footnote-ref-37)
38. See OHCHR, *The Human Rights Case Against Corruption* (2013), p.6. [↑](#footnote-ref-38)
39. Comprising Austria, Brazil, Indonesia and Poland, as well as Morocco. [↑](#footnote-ref-39)
40. See A/HRC/RES/23/9. [↑](#footnote-ref-40)
41. The idea of an anti-corruption rapporteur was aired in the *Summary report of the Human Rights Council panel discussion on the negative impact of corruption on the enjoyment of human rights* (18 April 2013), para.26. [↑](#footnote-ref-41)
42. Ndiva Kofele-Kale approaches the issue in the same fundamentalist manner by noting that “the right to a society free of corruption is inherently a basic human right because life, dignity, and other important human values depend on this right”, *The International Lawyer* (2000), at 163. And while Kofele-Kale recognizes that such a claim might substantiate the “right to a corruption-free environment … as a freestanding, autonomous right” (at 152), he chooses not to explore that avenue any further. Rather, he chooses to use this essentialist argument as contributing to his proposition that “that there is sufficient state practice to support a claim for an emerging international customary law prohibiting corruption in all societies” (at 152), which proposition he details in his article. [↑](#footnote-ref-42)
43. That is while not overlooking Mary Dowell-Jones’ chilling note that as endemic corruption is the very inversion of the rule of law, thus no legal fix for corruption is likely to work; Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (2004), 96. [↑](#footnote-ref-43)
44. The World Bank estimates that there is a “400% governance dividend” in a country’s per capita income where it manages successfully to combat corruption; see <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>. [↑](#footnote-ref-44)
45. The connections between battling corruption on the one hand, and the business and human rights debate on the other, as well as the lesson that the latter can learn from the legislative history of the former, are mapped out by Anita Ramasatry, “Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-corruption Movement”, in Diva & Bilchitz (eds)  *Human Rights Obligations of Business* (2013), p.183. See also and more specifically to the question of complicity, Cecily Rose “The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption” 24(3) (2011) *Leiden Journal of International Law* 715-40. [↑](#footnote-ref-45)
46. Augenstein & Kinley , “When Human Rights ‘Responsibilities’ Becomes ‘Duties’: The Extra-territorial Obligations of States that Bind Corporations” in Diva & Bilchitz , op cit. [↑](#footnote-ref-46)
47. As per the Vienna Declaration and Programme of Action (1993), para.5. [↑](#footnote-ref-47)
48. That is, by drawing on the ‘subject matter templates’ of international law treaties as represented by the CAT, CERD & CEDAW in human rights, and the state/corporate responsibilities regimes established under certain environmental treaties such as the Convention on Biological Diversity (Nagoya Protocol); the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. [↑](#footnote-ref-48)
49. As argued by Ndiva Koefele-Kale (op cit), who holds that there is already sufficient state practice to support the claim that just such a customary rule is “emerging” in international law. [↑](#footnote-ref-49)
50. Carr & Outhwaite, “Controlling Corruption Through CSR ….”, *Journal of Corporate Law Studies* (2011), 299, at 341. Though to this conclusion, the authors add “however, it seems that corporate governance structures may provide a more effective route”. [↑](#footnote-ref-50)
51. Being the same for both Covenants. [↑](#footnote-ref-51)
52. On this point, and especially in the context of advocating for a new HR, I am mindful of Philip Alston’s cry for the dire need of ‘quality control’, see Alston, “Conjuring up new human rights: a proposal for quality control”,(1984) *Am. J. Int'l Law*. 607-621 [↑](#footnote-ref-52)
53. Which stresses the importance of transparency and accountability on the part of *both* governments and companies in the sector if revenue from extractive industries is to enhance and detract from economic and social development . [↑](#footnote-ref-53)
54. See <http://eiti.org/countries>. [↑](#footnote-ref-54)
55. Andrew Spalding, “Corruption, Corporations and the New Human Right”, *Wash Uni Law Review* (forthcoming; 2014) [↑](#footnote-ref-55)
56. Alongside such corporate transparency requirements as the new Security and Exchange Commission’s rules issued pursuant to s.1504 of the US’s *Dodd-Frank* *Wall Street Reform and Consumer Protection Act*, requiring the disclosure of payments made by corporations in regarding the commercial development of oil, natural gas, or minerals: see new Rule 13q-1 and an amendment to new Form SD under the *Securities Exchange Act 1934*. [↑](#footnote-ref-56)
57. At pp.114-7 [↑](#footnote-ref-57)
58. Corruption and Government (1999), esp. chap 11. [↑](#footnote-ref-58)
59. At p.198. [↑](#footnote-ref-59)
60. *Just Governance,* Post-2015 MDGs Report, (2013), p.2. [↑](#footnote-ref-60)
61. Quote taken from Civil society consultations in Tanzania, undertaken in preparation of *Just Governance,* Post 2015 MDGs Report, (2013), p.12. [↑](#footnote-ref-61)
62. Innovative examples of grassroots responses to rampant corruption include the issuing of ‘fake money’ to bribers and extortionists (with the bearer promising “ neither to accept or give a bribe” printed on its face), and blogs and apps dedicated to publically exposing those who demand bribes; see *The Economist,* “Small change”, 7/12/13 and “Squeezing the sleazy”, 15/12/13. [↑](#footnote-ref-62)