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ECONOMIC WRONGS AND SOCIAL RIGHTS: ANALYZING THE IMPACT OF SYSTEMIC CORRUPTION ON REALIZATION OF ECONOMIC AND SOCIAL RIGHTS IN KENYA AND THE POTENTIAL REDRESS OFFERED BY THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL RIGHTS AND CULTURAL RIGHTS

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I. KENYA has been consistently ranked as one of the most corrupt countries in Africa and in the world. In the 2016 Transparency International's Corruption Perception Index (CPI), the country ranked 145th out of 176 countries with a score of 26 out of 100.² The ranking was equally dismal in 2017 at 143rd out of 180 countries with a score of 28 out of 100³ and 144th out of 180 countries in 2018 with a score of 27 out of 100.⁴ Based on expert opinion, the CPI measures perceived levels of public sector corruption worldwide. Despite the enactment of various anti-corruption legislations in Kenya in the recent past, the situation on the ground remains grim with allegations of corruption having been levied against various sectors of the government⁵ and very few prosecutions being successfully mounted against the culprits⁶; a clear case of the government preaching water while wrongdoers are able to drink wine with the proceeds of corrupt dealings. Defendants in corruption cases have been argued to benefit from the lack of political will that underlies attempts to prosecute high-level corruption suspects.⁷

Corruption and inequality are inextricably linked. Where there is an unequal distribution of power and resources in any given society as a result of factors such as corruption, it is very likely that the poor will bear the brunt of this state of affairs. This is especially the case where public resources are misappropriated for private gain. This has dire implications for the ability of

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² Transparency International, *Corruption Perceptions Index 2016* (January 2017), online: <https://issuu.com/transparencyinternational/docs/2016_cpireport_en?e=2496456/43483458>.

³ Transparency International, *Corruption Perceptions Index 2017* (January 2018), online: <https://www.transparency.org/news/feature/corruption_perceptions_index_2017>.

⁴ Transparency International, *Corruption Perceptions Index 2018* (January 2018), online: <<https://www.transparency.org/cpi2018>>.

⁵ The Ethics and Anti-Corruption Commission (EACC), *Report of Activities and Financial Statements for the Financial Year 2017/2018* (December 2018) at 7-11, online: <<http://www.eacc.go.ke/wp-content/uploads/2019/01/EACC-Annual-Report-2017-2018.pdf>>.

⁶ Samuel Kimeu, "TI-Kenya Statement on the Fight against Corruption in the Country", *Transparency International* (June 2018), online: <<https://tikenya.org/ti-kenya-statement-on-the-fight-against-corruption-in-the-country/>>.

⁷ James Gathii, "Defining the Relationship between Corruption and Human Rights" (2009) 31: 125 U Pa J Intl L 1.

right holders to realize their Economic and Social Rights (hereinafter ESRs). This article does not advocate for a (new) human right to a corruption-free society. Such a right is neither acknowledged by legal practice nor is there a need for it, despite the fact that some academics have called for the recognition of precisely this kind of new human right.⁸ Rather, the key premise of the present research is that systemic corruption coupled with an inadequate anti-corruption framework is a violation of the human rights codified by the UN human rights covenants, with particular emphasis on ESRs. After outlining how ESRs are violated in contexts where corruption is rampant, I posit that victims of violations ought to and can have redress within the international human rights framework.

The *2010 Constitution of Kenya* has been lauded for its entrenchment of ESRs.⁹ However, progress has been slow in terms of ensuring that the holders of these constitutionally enshrined rights are able to enjoy their real life, tangible effects. As with many other jurisdictions, the Government of Kenya has argued that ESRs are subject to the caveat of progressive realization. For instance, in its Combined second to fifth periodic reports to the Committee on Economic, Social and Cultural Rights (hereinafter, the CESCR), the Kenyan Government specifically highlighted the fact that the Constitution of Kenya in article 21 requires the State to take legislative, policy and other measures to *progressively achieve* (emphasis added) the realization of ESRs.¹⁰ Article 2 of the ICESCR provides that state parties to the covenant have a duty to take steps subject to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized.¹¹ A government that fails to take suitable measures to deal with systemic corruption could, arguably, be said to have failed to meet the “maximum of available resources” requirement. This is because resources that could have been utilized towards the realization of ESRs are diverted to corrupt ventures that benefit the few at the expense of the many. The corrupt get richer and the poor get poorer.

⁸ Ndiva Kofele-Kale, “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 Intl Lawyer 149.

⁹ *The Constitution of Kenya*, 2010, Art 43, online: <<http://www.refworld.org/docid/4c8508822.html>>.

¹⁰ Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C/12/KEN/2-5 (2013), online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/KEN/2-5&Lang=en>.

¹¹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, online: <<http://www.refworld.org/docid/3ae6b36c0.html>>.

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This paper analyzes how the existence of corruption and an ineffective anti-corruption framework can be conceptualized as a violation of ESRs generally, and of specific ESRs particularly. The paper will then proceed to interrogate whether, if the failure of the government to combat corruption amounts to a breach of state obligations under the ICESCR, and whether there is any avenue for redress to victims at the international level. On 10 December 2008, coinciding with the 60th anniversary of the *Universal Declaration of Human Rights*, the United Nations General Assembly adopted the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (hereinafter, the OP-ICESCR)¹² This was a watershed moment in protecting the ESRs, as the Protocol injected much-needed optimism in the debate about the equal status of ESRs and the right of claimants to access justice. The OP-ICESCR came into force in May 2013 after the required number of state ratifications was obtained. I will argue in this paper that the OP-ICESCR could be harnessed as a useful instrument to hold governments such as the Government of Kenya to account, where they fail to properly address systemic corruption in their jurisdictions, because this has ramifications for realization of ESRs.

II. ECONOMIC WRONGS AND THE LAW: AN OUTLINE OF CORRUPTION AND ANTI-CORRUPTION EFFORTS IN KENYA

Corruption may be defined as the misuse of entrusted power for private gain. It is often linked to the misuse of public funds.¹³ Kenya has been described as having a culture of corruption, with the public institutions designed for the regulation of the relationship between citizens and the State being used instead for the personal enrichment of public officials (politicians and bureaucrats) and other corrupt private agents (individuals, groups, and businesses).¹⁴ Corruption persists in Kenya to the detriment of a majority of the citizenry. A compelling argument can be made for the inverse proportionality of corruption to the level of protection of human rights in a country. Countries with high levels of corruption (or high levels of corruption perception) tend to also have poor human rights track records.¹⁵ Kenya is no exception. Corruption and human rights violations thrive in the

¹² *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63rd Sess, Supp No 49, UN Doc A/63/117 (2009).

¹³ Stephen Mutula, Wilson Muna & Geoffrey Koma, "Leadership and Political Corruption in Kenya: Analysis of the 2010 Constitutional Provisions on the Presidency" (2013) 38:3 J Soc Political Econ Stud.

¹⁴ Sr. Kempe Ronald Hope, "Kenya's corruption problem: causes and consequences" (2014) 52:4, *Commonwealth Comparative Politics* 493.

¹⁵ Todd Landman, Carl Jan & Willem Schudel, "Corruption and Human Rights, Empirical Relationships and Policy Advice" (2007), International Council on Human Rights Policy Working Paper.

same environment and probably have the same root causes, such as poverty and weak institutions.¹⁶

Kenya, ironically, was the first country in the world to sign and ratify the *United Nations Convention Against Corruption*, UNCAC, when it was opened for signature in December 2003.¹⁷ The then Government had just been elected on an anti-corruption platform assuring Kenyans that corruption would cease to be a way of life in the country.¹⁸ Almost 16 years later, Kenya is still considered to be among the most corrupt countries in Africa and in the world¹⁹ and arguably suffers from systemic or endemic corruption. Systemic corruption has been defined as a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which most people have no alternatives to dealing with corrupt officials.²⁰ Corruption in Kenya can thus be viewed as both systemic and generalized, systemic since it is more the rule rather than an exception, and generalized since it is not limited to just one sector. It spans various sectors of the economy.

There is nothing novel in the idea of corruption in Kenya. The only novelty may lie in the increasingly ingenious schemes that malefactors in successive regimes have devised to loot the public coffers. Corruption has bedeviled Kenya since independence.²¹ Both the founding President Jomo Kenyatta (who was in office between 1963 and 1978) and his successor Daniel Arap Moi (who was in office between 1978 and 2002) arguably established and sustained an increasingly corrupt one-party authoritarian rule under the then Kenya African National Union (KANU).²² Through KANU the two former Presidents and their collaborators were able to amass wealth at the expense of the populace. A system of patronage allowed certain ethnically identifiable elites to benefit from public funds. While the third President of Kenya, Mwai Kibaki, was elected in

¹⁶ Anne Peters, "Corruption and Human Rights" (2015), Basel Institute on Governance Working Paper No 20.

¹⁷ Ibolya Losoncz and Augustine Kakeeto, "When Corruption Violates Human Rights: The Right to Food in Kenya" (27 March 2015), *Regarding Rights*, online: <<http://asiapacific.anu.edu.au/regarding-rights/2015/03/27/when-corruption-violates-human-rights-the-right-to-food-in-kenya/>>.

¹⁸ Diane Riley, "KENYA: UN Convention against Corruption Gap Analysis Report and Implementation Plan" (October 2009), *Ethics and Anti-Corruption Commission*, online: <<https://docplayer.net/48859206-Kenya-un-convention-against-corruption-gap-analysis-report-and-implementation-plan.html>>.

¹⁹ Transparency International, *Corruption Perceptions Index 2018*, online: <<https://www.transparency.org/cpi2018>>.

²⁰ Elaine Byrne, *The Moral and Legal Development of Corruption: Nineteenth and Twentieth Century Corruption in Ireland* (PhD Thesis, University of Limerick, 2007) [unpublished].

²¹ Stephen Mutula, Wilson Muna & Geoffrey Koma, "Leadership and Political Corruption in Kenya: Analysis of the 2010 Constitutional Provisions on the Presidency" (2013) 38:3 J Soc Political Econ Stud, online: <http://www.jspes.org/Sample_MutulaMunaKoma-Kenya.pdf>.

²² Thomas Lansner, "Countries at the Crossroads 2012: Kenya" (2012), *Freedom House*, online: <<https://freedomhouse.org/sites/default/files/Kenya%20-%20FINAL.pdf>>.

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2002 on an anti-corruption platform, the optimism that heralded his coming into power could not withstand the winds of corruption that had plagued the country since independence. Barely two years after coming to power, President Kibaki's government became engulfed in several corruption scandals, chief of which was the Anglo-Leasing Scandal.²³ As alleged, the scam began under the administration of President Moi and continued under President Kibaki.²⁴ This and other scandals dealt a severe blow to the credibility of the administration's anticorruption commitment. Despite President Kibaki's subsequent victory in the hotly contested 2007 elections, allegations of corruption dogged his government throughout his second term in office.

Kenya experienced a new wave of buoyancy in 2010 with the promulgation of a new Constitution that strengthened the existing system of checks and balances. The new Constitution also significantly constrained executive powers and increased the protection of fundamental rights and freedoms.²⁵ The Constitution specifically identifies national values and principles of governance that are binding on all State organs and officers in the discharge of their functions. These values and principles include good governance, integrity, transparency and accountability.²⁶ Unfortunately, these more than meritorious provisions of the Constitution remain largely aspirational. Their implementation has been slow and inconsistent specifically with regards to anticorruption efforts that seem to have yielded little fruit in the fight against corruption.

The fourth President of Kenya, Uhuru Kenyatta, and his government came into power in 2012. The administration has since been bedeviled by several allegations of corruption. In the Auditor-General's report for the fiscal year 2014/2015, it was documented that at least 16% of the financial statements, including revenue and spending statements from government ministries, were misleading. Massive corruption and excessive and unaccounted-for spending were the hallmarks of the report.²⁷ Other major corruption scandals under the Uhuru Kenyatta presidency include but are not limited to the following:

- The Eurobond scandal which erupted in June 2014 when the government floated a bond on the Irish stock exchange to raise money for infrastructure development in

²³ *Ibid.*

²⁴ "Kenyan Officials charged over Anglo Leasing Scandal", *BBC News* (4 March 2015), online: <<http://www.bbc.com/news/world-africa-31733052>>.

²⁵ *Lansner, supra* note 22.

²⁶ *Ibid.*

²⁷ Government of Kenya, Office of the Auditor-General, *County Government Reports 2014/2015*, online: <http://www.oagkenya.go.ke/index.php/reports/cat_view/2-reports/11-county-governments/138-county-government-reports-2014-2015>.

Kenya. The Auditor General in his 2013/2014 fiscal year report declared that Sh. 215 billion from the controversial Sh. 280 billion Eurobond funds were not adequately accounted for, two years after the Government claimed the cash was allocated to ministries.²⁸

- The Standard Gauge Railway (SGR) Scandal involving the Mombasa to Nairobi SGR, the largest infrastructural project undertaken by the Kenyan government since independence. However, top bureaucrats offered contradictory and insufficient information on key features of the mega project including its cost to the taxpayer. There was a failure to comply with the requirements of the Public Procurement and Disposal Act in the contract awarding process. Instead of utilizing a competitive bidding process the successful contractor, China Roads and Bridges Corporation (CRBC), was awarded the contract on the basis of direct procurement. It was also alleged that the SGR construction cost was grossly overestimated to the detriment of the Kenyan taxpayers.²⁹
- The National Youth Service Scandal occurred in the Ministry of Devolution and Planning where conservative estimates showed that the ministry could not account for Sh. 791 million shillings. A special audit thereafter commissioned by the National Assembly's Public Accounts Committee revealed that the amount of unaccounted for funds was almost double this original estimates.³⁰

In response to the myriad allegations of corruption levied against the current government, President Kenyatta reiterated his stand against corruption. He also stated that anti-corruption efforts are not a war against individuals or communities, rather, they are a war against a crime that threatens the very fabric of the nation.³¹ However, “war on graft” statements like these are no more than rhetoric as new corruption cases are consistently reported. For instance, as recently as March

²⁸ Government of Kenya, Office of the Auditor-General, *Report of the Auditor General on the Financial Statements for the National Government For the Year 2013/2014*, online: <http://www.oagkenya.go.ke/index.php/reports/doc_download/243-report-2013-2014>.

²⁹ Victor Juma, “The Making of a Mega Scandal - Why Railway Figures Do not Add Up”, *Daily Nation* (25 January 2014), online: <<https://www.nation.co.ke/news/g-of-a-mega-scandal/1056-2160724-ht3ijq/index.html>>.

³⁰ Edwin Mutai, “Auditor General Says Sh. 1.9 Billion lost in NYS Scandal”, *Business Daily* (7 June 2016), online: <<https://www.businessdailyafrica.com/news/Auditor-says-Sh1-9bn-lost-in-NYS-scam/539546-3237014-m5av1yz/index.html>>.

³¹ Mercy Asamba and Jael Mbogo, “Uhuru: Corruption war not targeting individuals, communities”, *The Standard* (5 March 2019), online: <<https://www.standardmedia.co.ke/article/2001315339/uhuru-the-dead-will-not-aid-war-against-corruption>>.

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2019 major dam projects valued at Ksh.188 billion were put on hold over allegations of corruption.³²

As the above examples show, corruption in Kenya is multi-sectoral and affects all levels of government. A lingering question therefore persists. What is the reason behind these high levels of systemic corruption? Is it a cultural problem, manifesting the “it’s our turn to eat” mentality that has been argued to plague ethnic cabals once they assume the reins of government after every election cycle³³? Or is it a question of institutional failure, where corruption can be attributed to the predominance of arbitrary power and a failure of the existing institutions to obey the rule of law³⁴? I posit that while there are numerous reasons for the proliferation of corruption in Kenya, one of the biggest hindrances to effectively dealing with corruption is a lack of a coherent piece of legislation that consolidates anti-corruption laws in Kenya, and a failure to adequately enforce the existing laws and policies.

There is no comprehensive national anti-corruption legislation or policy in Kenya. Instead, there currently exists a hodgepodge of policies and Acts that have been passed over the years in an attempt to curb corruption. The first Act of Parliament dealing with corruption was the now repealed 1956 *Prevention of Corruption Act* passed by the British colonial authorities in an effort to provide a legal framework for combating public corruption. This Act was amended several times during its lifetime. Notably, a 1997 amendment established the now defunct *Kenya Anti-Corruption Authority* (KACA). KACA was disbanded in 2000 after its existence was declared unconstitutional by the High Court. This decision was based on a finding that the powers of KACA to prosecute violated Section 26 of the then Constitution which gave powers of prosecution only to the Attorney General.³⁵ There are numerous legislations that have been enacted since then to deal with corruption. The most important of these are indicated below.

³² Samuel Owino, “MPs suspend dam projects over corruption”, *The Daily Nation* (6 March 2019), online: <<https://www.nation.co.ke/news/Dam-projects-put-on-hold-over-graft/1056-5011088-51jegc/index.html>>.

³³ Michela Wrong, *It’s Our Turn to Eat: The Story of a Kenyan Whistle Blower*, Reprint ed (London: Harper Perennial, 2010).

³⁴ Migai Akech, “Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability” (2011) 18:1 IJGLS, online: <<http://www.repository.law.indiana.edu/ijgls/vol18/iss1/15>>.

³⁵ *Gachiengo v Republic* [2000] 1 EA 52 (CAK) at 4.

In 2003, the *Anti-Corruption and Economic Crimes Act*³⁶ and the *Public Officer Ethics Act*³⁷ were enacted. The former Act established the Kenya Anti-Corruption Commission (KACC) as the main legal body mandated to fight corruption in Kenya. The latter Act hoped to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and required financial declarations from certain public officers in order to enhance transparency and accountability of holders of public office. In 2005 the *Public Procurement and Disposal Act*³⁸ was enacted in order to establish procedures for effective public procurement, an important objective in light of the fact that most public funds in Kenya are lost in the context of public procurement. This Act was however repealed by the coming into force of the *Public Procurement and Asset Disposal Act of 2015*.³⁹ On March 3, 2017 the President signed into law the *Proceeds of Crime and Anti-Money Laundering (Amendment) Bill*⁴⁰ which is the latest amendment to the *Proceeds of Crime and Anti-Money Laundering Act*.⁴¹ During the signing ceremony, he reportedly noted that “this is a major tool in our sustained efforts to fight corruption. It means that no proceeds of theft and corruption are beyond the reach of the State.”⁴²

The 2010 Kenya Constitution required Parliament to enact legislation that establishes an independent body to ensure compliance with and enforcement of its Chapter Six requirements on Leadership and Integrity.⁴³ Pursuant to this Article, Parliament enacted the *Ethics and Anti-Corruption Commission Act*⁴⁴ which came into effect on 5th September 2011. The Act amended the *Anti-Corruption and Economic Crimes Act* by repealing the provisions establishing KACC and its Advisory Board, while retaining all other provisions relating to corrupt offences and economic

³⁶ *Anti-Corruption and Economic Crimes Act* (KEN) No 3 of 2003, online: <<http://www.eacc.go.ke/wp-content/uploads/2018/06/aceca.pdf>>.

³⁷ *Public Officer Ethics Act* (KEN), No 4 of 2003, ch. 183, online: <<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicOfficerEthicsAct.pdf>>.

³⁸ *The Public Procurement and Disposal Act* (KEN), 2005, ch. 412C, online: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicProcurementandDisposalAct_Cap412C_.pdf>.

³⁹ *Public Procurement and Asset Disposal Act* (KEN), No 33 of 2015, online: <<http://ppoa.go.ke/202-the-public-procurement-and-disposal-act-2015>>.

⁴⁰ *Proceeds of Crime and Anti-Money Laundering (Amendment) Act* (KEN), 2017, online: <<http://frc.go.ke/downloads/category/2-acts-and-regulations.html>>.

⁴¹ *The Proceeds of Crime and Anti-Money Laundering Act* (KEN), No 9 of 2009, online: <<http://frc.go.ke/downloads/category/2-acts-and-regulations.html>>.

⁴² Maryanne Gicobi, “Kenyan president signs anti-money laundering Bill to law”, *The East African* (3 March 2017), online: <<https://www.theeastafrican.co.ke/business/Kenyan-president-signs-anti-money-laundering-Bill-to-law/2560-3836038-3ec523z/index.html>>.

⁴³ *The Constitution of Kenya*, 2010, art. 79, online: <<http://www.refworld.org/docid/4c8508822.html>>.

⁴⁴ *The Ethics and Anti-Corruption Act* (KEN), No 22 of 2011, online: <<http://extwprlegs1.fao.org/docs/pdf/ken128408.pdf>>.

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crimes, their investigation and prosecution. A new body, the Ethics and Anti-Corruption Commission (EACC) was created and charged with the mandate previously granted to the KACC. However, as a result of numerous challenges, the EACC has been unable to live up to expectations in the fight against corruption and impunity.⁴⁵

Despite this panoply of Anti-Corruption legislations and the broadened scope of the mechanisms for corruption prevention and punishment, Kenya remains one of the most corrupt countries in the world with a culture of impunity that continues to fuel the embers of corruption already existing in the country. Within the context of human rights and accountability, impunity refers to the failure by society to bring perpetrators of human rights violations and economic crimes to justice.⁴⁶ The legal framework currently in place to battle corruption is clearly inadequate. As such, ‘it has been argued that there is a need to consolidate the various laws into a new, comprehensive and coordinated legal framework in order to enhance anti-corruption efforts.’⁴⁷ In addition, there is a need to strengthen the implementation of the existing laws and policies.

III. SOCIAL RIGHTS AND CORRUPTION: WHY SYSTEMIC CORRUPTION IS A BAR TO PROGRESSIVE REALIZATION OF ESCRS

Article 2 (1) of the ICESCR imposes an obligation on state parties to the covenant as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁸

The reference to “resource availability” reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time. However, the emphasis must be on a genuine lack of resources in a given state. If state resources

⁴⁵ Grace K. Injene and Catherine Ngahu, “Challenges Faced By the Kenya Ethics and Anticorruption Commission in Implementing the Strategies Recommended By United Nation Convention against Corruption in Kenya” (2016) 1:1 EJBSM, online: <<https://www.iprjb.org/journals/index.php/EJBSM/article/view/18>>.

⁴⁶ Kenya Human Rights Commission, “Lest we Forget: The Faces of Impunity in Kenya” (2011), online: <<https://www.khrc.or.ke/publications/30-lest-we-forget-the-faces-of-impunity-in-kenya/file.html>>.

⁴⁷ Institute of Chartered Public Accountants Kenya, “The Current Challenges in Enforcing the Anti-Corruption and Economic Crimes Act”, online: <<https://www.icpak.com/wp-content/uploads/2015/09/THE-Challenges-In-Enforcing-the-Anti-Corruption-and-Economic-Crimes-Act.pdf>>.

⁴⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 3 UNTS 993 (entered into force 3 January 1976), online: <<https://www.refworld.org/docid/3ae6b36c0.html>>.

have been misappropriated through corruption an assessment whether the state in question is acting subject to the requirement of resource availability may be difficult to prove.

While it has hindered the ability of numerous governments to meet their obligations, corruption was not specifically addressed by the CESCR in its General Comment on the nature of state obligations (or in fact, in any of the later General Comments).⁴⁹ The only reference to “maximum of its available resources requirement” was the explanation that these resources include those generated within a State and those from the international community through international cooperation and assistance. However, to its credit, the CESCR has noted the challenge of corruption in some of its concluding observations on state reports. For example, in its concluding observations on the initial report presented by Kenya in 2008, the CESCR noted that corruption affects the realization of ESCRs in Kenya and that there have been few prosecutions. The Committee recommended:

that the State party intensify its efforts to prosecute cases of corruption and review its sentencing policy for corruption-related offences. It also recommends that the State party train the police and other law enforcement officers, prosecutors and judges on the strict application of anti-corruption laws, conduct awareness-raising campaigns, and ensure the transparency of the conduct of public authorities, in law and in practice.⁵⁰

Corruption reduces the resources available for a state to meet its obligations under the covenant. The failure by a state to adequately deal with corruption, for instance by putting in place an efficient anti-corruption policy and implementing it, could amount to a violation of human rights in general and ESCRs in particular. In the following sections I will give concrete examples of how corruption has been and continues to be an impediment to the realization of ESCRs in Kenya.

A. THE TRIPARTITE NATURE OF STATE OBLIGATIONS

Human Rights have been said to give rise to three types of obligations; the obligations to respect, protect, and fulfil human rights.⁵¹ In turn, the obligation to fulfil contains the obligations to

⁴⁹ Committee on Economic, Social and Cultural Rights (CESCR), “General Comment No. 3: The Nature of States Parties’ Obligations”, E/1991/23, (1990), art 2, para 1, online: <<http://www.refworld.org/docid/4538838e10.html>>.

⁵⁰ Committee on Economic, Social and Cultural Rights, *Concluding Observations, Kenya*, UNESCOR, 2008, UN Doc E/C.12/KEN/CO/1, online: <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.KEN.CO.1_EN.pdf>.

⁵¹ This tripartite division was introduced for the first time in UN Committee on Economic, Social and Cultural Rights (CESCR), “General Comment No. 14: The Right to the Highest Attainable Standard of Health”, E/C.12/2000/4, (2000), art 12, para 37, online: <<http://www.refworld.org/docid/4538838d0.html>>.

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facilitate, provide and promote.⁵² The obligation to respect is essentially a negative obligation to refrain from infringements. It requires states to refrain from direct or indirect interference with the enjoyment of rights. On the other hand, the obligation to protect primarily requires the government to protect individuals from third party violations. A state is expected to establish measures that prevent third parties from interfering with the rights in question. Finally, the obligation to fulfil requires positive action by the State. In this regard a state should adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the rights in question. Within the sphere of ESRs I would argue that a government that fails to deal with corruption inevitably breaches the three types of obligations outlined above.⁵³

With reference to the obligation to respect, there is an expectation that the government will not interfere with enjoyment of rights, whether directly or indirectly. In a situation where corruption is unchecked, the ability of ESRs right holders to enjoy these rights is impinged upon. This may happen in two ways. First, corrupt state officials with control over resources may require an illegal tax, such as a bribe, before allowing right holders to enjoy access to health, education or even government housing. This is a direct interference with the enjoyment of rights because an individual who is unable to pay the illegal tax will be denied the opportunity to access the social amenity in question.

Secondly, when a state fails to put in place adequate anti-corruption policies, thereby letting corruption thrive undeterred, it inadvertently creates a situation where ESRs right holders are unable to benefit from the real-life tangible effects of the rights in question. For instance, of what value is a constitutionally guaranteed right to health if money meant for the health sector is diverted to private uses rather than public ones through corrupt activities? This amounts to an indirect interference with the rights in question.

The obligation to protect requires the state to ensure that third parties do not interfere with rights holders' ability to enjoy their rights, and to provide effective remedies when interferences occur. However, in a country plagued by systemic corruption it may be possible for third parties to ride roughshod over right holders thereby infringing their ESRs. By tilting the scales of justice, corruption in the judiciary or in the executive branch of government could translate into a failure

⁵² *Ibid.*

⁵³ *Hugh Glenister v President of the Republic of South Africa and others* [2011], CCT 48/10 (ZACC) para 177: "The state's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms"

by the authorities to take legal action against such third parties to the detriment of rights holders. As such, an omission by the state to regulate the activities of individuals, groups or even corporations may result in a violation of ESRs because rampant corruption constitutes a permanent structural danger to numerous human rights.⁵⁴

The obligation to fulfil demands certain positive actions from the state in question. Where a state fails to tackle corruption, this may mean violations on several fronts. From a legislative and judicial perspective this may imply that the state has failed to put in place adequate legislation to prevent corruption or to ensure a properly functioning judiciary that will punish wrong-doers once caught. From a budgetary standpoint, public funds may be diverted to corrupt ventures thereby diminishing the government's ability to deliver on the promise of ESRs.

B. CORRUPTION AND ARTICLE 2 (1) OF THE ICESCR

Article 2 (1) of the ICESCR, already reproduced above, is crucial because it sets out the fundamental obligations of the States parties in enforcement of ESRs. It has been argued to contain four key components that are subject to monitoring by the CDESCR.⁵⁵ I posit that a state that fails to put in place and/or implement adequate anti-corruption measures inadvertently violates each of those four requirements.

The first duty of states in this regard is "to take steps". These steps, according to the CDESCR, must be deliberate, concrete and targeted⁵⁶. States are given room to determine which measures will be suitable for ensuring that ESRs are realized. These may be legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights.⁵⁷ If a government fails to put in place and implement an effective anti-corruption policy within its jurisdiction this implicitly creates an obstacle to the achievement of ESRs. In this sense therefore such a government can be said to be breaching its article 2 (1) obligation to take steps.

The second component of the obligation of states is that the State party in question must take these steps "with a view to achieving progressively the full realization of the rights

⁵⁴ *Peters, supra* note 16.

⁵⁵ *Ibid.*

⁵⁶ *CDESCR, supra* note 49.

⁵⁷ UN Commission on Human Rights, *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 1987, E/CN.4/1987/17, online: <<https://www.refworld.org/docid/48abd5790.html>>.

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recognized”.⁵⁸ This means that states should move as expeditiously as possible to ensure that ESRs are realized within their respective jurisdictions. The obligation of progressive achievement exists independently of the availability of resources. The obligation requires the effective use of resources available.⁵⁹ When systemic corruption leads to the looting of public coffers, resources that could otherwise have been utilized in realization of ESCRs are significantly diminished. This ineffective use of state resources could amount to a failure by the state to meet its obligations under the ICESCR.

The third element is to exhaust all possibilities that the State has at its disposal “to the maximum of its available resources”.⁶⁰ How are the available resources in a state party determined? The onus is upon the State party itself to make this determination and to set out what the maximum is. The CESCR has acknowledged that states have a wide margin of appreciation to determine the optimum use of their resources and to adopt national policies and prioritize certain resource demands over others.⁶¹ However, as part of its mandate, the CESCR has the authority to assess whether a state has made equitable and effective use of available resources. While the CESCR has not yet made a determination that the existence of runaway corruption is a violation of the obligation to take steps subject to the maximum of available resources requirement, it is not inconceivable that in a situation where the OP-ICESCR is invoked in order to allege that ESRs have been violated because of the existence of systemic corruption they could very well do so. In my opinion, this opens the door for the CESCR to validly assert that a state party that has allowed corruption to run rampant has failed to equitably and effectively use its available resources thereby breaching its obligations under the ICESCR. It is interesting to note that even though the CESCR has been lauded as being the UN treaty body that has paid most attention to questions of corruption when issuing concluding observations⁶² it has thus far failed to specifically address the impact of corruption on ESRs. It’s recommendations have more often than not been of a general nature

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ UN Committee on Economic, Social and Cultural Rights (CESCR), “An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ Under an Optional Protocol to the Covenant”, Statement, (2007), E/C.12/2007/1, online: <https://www2.ohchr.org/english/issues/escr/docs/e_c12_2007_1.pdf>.

⁶² Patrick Mutzenberg, “How UN Treaty Bodies can better address corruption and its negative impact on Human Rights” (20 September 2018), *Universal Rights Group*, online: <<https://www.universal-rights.org/blog/how-un-treaty-bodies-can-better-address-corruption-and-its-negative-impact-on-human-rights/>>.

related to the state obligations under article 2.⁶³ Perhaps it would be useful for the committee to devote some time to the question of the relationship between corruption and ESRs.

The fourth component of the fundamental obligations set out in article 2 (1) of the ICESCR requires states to employ all appropriate means “individually and through international assistance and co-operation especially economic and technical”. The conduct of the state in question should be reasonably calculated to realize the enjoyment of a particular right (s).⁶⁴ Within the context of the fight against corruption it may be argued that article 2 (1) obligates the state to seek international assistance in combating corruption, or dealing with perpetrators, if it is unable to do so on its own. For instance, Kenyan law requires the existence of a bilateral extradition treaty between Kenya and other States in all criminal cases, including corruption related matters.⁶⁵ The Government could seek the assistance of other states in ensuring that these treaties are enacted and implemented in order to guarantee that culprits who divert state funds to the detriment of ESRs realization can be held to account.

Given the above analysis, a State party which fails to comply with any of the four requirements under article 2(1) of the ICESCR can be said to be in breach of its treaty obligations. The existing CESCR monitoring procedures can be used to make the authoritative determination that a State like Kenya burdened by systemic and rampant corruption is violating its fundamental obligations arising from the ICESCR by pursuing a deficient anti-corruption policy.

IV. CORRUPTION AND ITS IMPACT ON SPECIFIC ESRs IN KENYA

A. “STARVING FOR JUSTICE” - CORRUPTION AND THE RIGHT TO FOOD

Article 43(1) (c) of the *Constitution of Kenya* provides that every person has the right to be free from hunger, and to have adequate food of acceptable quality. The CESCR has elaborated upon the nature of state obligations in the context of the right to food in their General Comment No. 12.

⁶³ *Ibid.*

⁶⁴ International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997, online: <<http://www.refworld.org/docid/48abd5730.html>>.

⁶⁵ Cabo Verde and Papua New Guinea, “Country Review Report of the Implementation by Kenya of articles 15 – 42 of Chapter III, “Criminalization and law enforcement” and articles 44 – 50 of Chapter IV, “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 – 2015”, online: https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2015_09_28_Kenya_Final_Country_Report.pdf

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Many Kenyans suffer as a result of a lack of adequate food. The root cause of hunger and malnutrition are not always lack of food *per se* but lack of access to available food. Access to food may be limited by factors such as corruption.

According to the CESCR, rights holders should have physical and economic access at all times to adequate food or the means for its procurement. Where a State party argues that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.⁶⁶ This means that where corruption reduces the state's ability to provide access to food (for example by creating an artificial resource shortage) there will, *ipso facto*, be a breach of the ICESCR.

Corrupt governments are unlikely to create and implement sound long-term agricultural policies, including land tenure and water management, because of the institutional instability that thrives in such situations.⁶⁷ Corruption widens the already cavernous gap between the “haves” and the “have-nots” in countries such as Kenya. It inhibits social and economic development, impacting negatively on attempts by international as well as regional development institutions to fight hunger and famine coherently and systematically.⁶⁸ Corruption may also distort the working of the price mechanism characteristic of free market economic systems where artificial shortages push prices of foodstuffs upwards.

In 2012, officials of the Kenya National Federation of Agricultural Producers (KENFAP) accused the government of economic sabotage. According to KENFAP, government corruption led to artificial food shortages in the Rift Valley province. Specifically, the government was accused of deliberately and consistently delaying the disbursement of funds to the National Cereals and Produce Board (hereinafter, the NCPB) for the buying of maize. KENFAP alleged that such delays forced farmers to sell their produce at throwaway prices to agents working with high

⁶⁶ Committee on Economic, Social and Cultural Rights (CESCR), “General Comment No. 12: The Right to Adequate Food”, (1999), art 2, para 1, online: <<http://www.refworld.org/docid/4538838c11.html>>.

⁶⁷ Florence Ngozi Uchendu and Thaddeus Olatunbosun Abolarin, “Corrupt Practices Negatively Influenced Food Security and Life Expectancy in Developing Countries” (2015) 20 PAMJ, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4458312/>>.

⁶⁸ *Ibid.*

powered syndicates connected to government operatives. The maize was then sold by the syndicates at inflated prices in times of scarcity or exported at high prices.⁶⁹

Corruption in relation to the right to food in Kenya also occurs in the context of food assistance programs in times of drought relief. Food assistance programs have represented the largest component of humanitarian assistance in Kenya for many years, and have been the most consistently funded.⁷⁰ In the 2011 drought response, food aid was identified as one of the areas most vulnerable to corruption and diversion. This was primarily due to the scale of food aid programs, scattered dispersion as well as weaknesses in transparency and accountability mechanisms. Food meant for relief efforts was diverted physically through transport and storage, and indirectly through manipulation of targeting and registration.⁷¹ In West Pokot County, a District Commissioner was arrested in September 2011 and charged with stealing 280 bags of maize worth KSh1.2million that was part of a food aid program and employees of the NCPB were also charged with selling relief food. When public officers (mis)use their positions for private gain in this way this can be classified as corruption. Specifically, section 45 of the *Anti-Corruption and Economic Crimes Act*⁷² defines corruption to include any fraudulent or unlawful acquisition of public property. Section 46 thereafter provides that any person who uses his office to improperly confer a benefit on himself or anyone else is guilty of a corruption offense. In situations such as these, corruption deprives ordinary citizens of the constitutionally enshrined rights that should accrue to them, such as right to food, and condemns right holders to suffer unjustifiable violations.

B. “AN UNHEALTHY STATE OF AFFAIRS” - CORRUPTION AND THE RIGHT TO HEALTH

Article 43(1) of the *2010 Kenyan Constitution* provides that every person has a right to the highest attainable standard of health which includes the right to healthcare services. The content of the right to health has been elaborated upon by the CESCR to include availability (functioning public

⁶⁹ Ibolya Losoncz and Augustine Kakeeto, “When Corruption Violates Human Rights: The Right to Food in Kenya” (27 March 2015), *Regarding Rights*, online: <<http://asiapacific.anu.edu.au/regarding-rights/2015/03/27/when-corruption-violates-human-rights-the-right-to-food-in-kenya/>>.

⁷⁰ Adele Harmerand and Nicolas Seris, “Kenya 2011 Drought Response: Corruption Risks in Food Assistance Programmes” (October 2012), *Humanitarian Practice Network*, online: <<https://odihpn.org/magazine/kenya%C2%92s-2011-drought-response-corruption-risks-in-food-assistance-programmes/>>.

⁷¹ *Ibid.*

⁷² *Anti-Corruption and Economic Crimes Act*, *supra* note 36.

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health and health-care facilities, goods and services, as well as programs, have to be available in sufficient quantity within the State party), accessibility (health facilities have to be both physically and economically accessible) and quality (As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality).⁷³

Unfortunately, the enjoyment of the right to health in Kenya is compromised by many factors including poor governance and corruption. Corruption affects all health systems, whether public or private, with the poor bearing a disproportionate portion of the poor service delivery burden. It reduces the resources needed for healthcare and lowers the quality, equity and effectiveness of health care services.⁷⁴ In extreme cases, corruption in the healthcare system can degenerate into a life or death scenario for vulnerable right holders, for instance, where sick persons have to pay a bribe in order to be treated at health facilities.⁷⁵

Corruption also impacts the right to health in other discrete and interconnected ways. A Kenya Anti-Corruption Commission report has identified examples of corrupt practices within the public health sector that are likely to impede the realization of the right to health⁷⁶. They include manipulation of the tendering system, misappropriation of drugs and other supplies, procurement of sub-standard/poor quality commodities and equipment, hoarding of supplies and inflation of prices. Other malpractices include bribery, embezzlement of funds, favoritism/tribalism/nepotism, unnecessary referrals to private clinics, extortion and misappropriation of procurement funds.⁷⁷ The report confirmed that as resources are drained from health budgets, less funding is available for operations and maintenance, leading to de-motivated staff, poor quality of care, and reduced service availability and use. The informal user payments increase the cost of accessing health care services, rendering them inaccessible to the poor which has serious implications for their ability to enjoy the right to health⁷⁸.

In 2012, the *National Health Insurance Fund* (NHIF) corruption saga revealed the depth of corruption in the Kenyan health sector. Millions of shillings released by the NHIF allegedly

⁷³ CESCR, *supra* note 51.

⁷⁴ Kenya Anti-Corruption Commission, *Sectoral Perspectives on Corruption in Kenya: The Case of the Public Health Care Delivery* (February 2010), online: <<http://www.eacc.go.ke/docs/health-report.pdf>>.

⁷⁵ Vincent Achuka, "Bribes You Have to Pay to Survive in Kenya" (20 March 2016), *Sunday Nation*, online: <<https://www.nation.co.ke/news/Bribes-you-have-to-pay-to-survive-in-Kenya/1056-3125294-db8l6bz/index.html>>.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

disappeared down the drain of phantom hospitals.⁷⁹ Episodes like this have obvious implications for access public health care services in terms of availability and economic accessibility. Diversion of funds means that there are fewer public health facilities than there should be, and that for the existing facilities the costs of service provision are higher. Invariably, it is difficult for low income earners to be able to access these services.

As recently as 2017, the U.S. government suspended \$21 million in direct aid to Kenya's Ministry of Health amid concerns over corruption⁸⁰. In a statement justifying their action, the US Embassy said, "We took this step because of ongoing concern about reports of corruption and weak accounting procedures at the Ministry". The Embassy further stated that they were "working with the Ministry on ways to improve accounting and internal controls." The so-called *Afya* House scandal, named after the building housing the Ministry of Health, was based on an audit report leaked to Kenyan media in October. The audit showed the ministry could not account for 5 billion Kenyan shillings (US\$49 million) and that funds meant for free maternity care had been diverted.⁸¹ *Afya* means health in Swahili, which would be a misnomer given that the ministry of health is clearly not in good health because of this and other scandals that have plagued it.

C. "WHO TAUGHT YOU TO STEAL?" - CORRUPTION AND THE RIGHT TO EDUCATION

The right to education is a fundamental human right guaranteed under section 43(1) (f) of the *Kenyan Constitution*. In delineating the ambit of the right to education, the CESCR has urged that education should be available which means that functioning educational institutions and programs have to be available in sufficient quantity within the jurisdiction of the State party. It should also be accessible. This encompasses non-discrimination, as well as physical and economic accessibility. Education should also be acceptable. This means that the form and substance of education, including curricula and teaching methods, should be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases to the parents as well. Finally,

⁷⁹ James Macharia, "Kenya Minister urged to Resign over Medical Scam", (8 May 2012), *Reuters*, online: <<https://www.reuters.com/article/ozatp-kenya-corruption-20120508-idAFJ0E84709Z20120508>>.

⁸⁰ Katharine Houreld, "U.S. suspends aid to Kenyan health ministry over corruption concerns", (9 May 2017), *Reuters*, online: <<https://www.reuters.com/article/us-kenya-health-corruption/u-s-suspends-aid-to-kenyan-health-ministry-over-corruption-concerns-idUSKBN1851RY>>.

⁸¹ *Ibid.*

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education should be adaptable, meaning that it should be flexible so it can adapt to the needs of changing societies and communities.⁸²

Corruption in the Kenyan education sector manifests itself in many ways. This includes collection of illegal/extra school fees, embezzlement and misappropriation of funds allocated to the education budgets, fraud in academic performance assessment, among others.⁸³ As a consequence of these and other corrupt activities in the education sector, children lose opportunities to attend school. The high burden of illegal school fees for families leads to high dropout rates. Corruption in management, selection and recruitment of teachers leads to lower teaching quality. And corruption in procuring educational equipment and supplies leads to shortages of classrooms, teaching equipment, textbooks and other supplies.⁸⁴

Free Primary Education, FPE is probably one of the best as well as worst things to have happened in the Kenya education sector in recent times. Launched in 2003 by the then President Mwai Kibaki's government, FPE offered hope to millions of poor children in Kenya who had before then been unable to attend school. However, since its inception, the FPE has been marred with irregularities including misappropriation and embezzlement of its funds. For instance, in 2011, donors such as the UK government demanded refunds of their FPE contributions due to large scale theft by public officials.⁸⁵ More recently, a 2015 report by the Ethics and Anti-Corruption Commission, titled Examination into the Disbursement and Utilization of Free Primary Education Funds, unearthed massive fraud in the procurement of school supplies.⁸⁶ The Ministry of Education ironically fails the test when it comes to proper use of public funds for purposes of actualizing the right to education in Kenya.

⁸² Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 13: The Right to Education", E/C.12/1999/10, (1999), art 13, online: <<http://www.refworld.org/docid/4538838c22.html>>.

⁸³ Claries Gatwiri Kariuki, *Towards A Human Rights Based Approach to Fighting Corruption In Kenya* (LLM thesis, University of Nairobi 2010), online: <<http://erepository.uonbi.ac.ke/bitstream/handle/11295/59224/Towards%20a%20human%20rights%20based%20approach%20to%20fighting%20corruption%20in%20Kenya.pdf?sequence=3>>.

⁸⁴ Ibid.

⁸⁵ Jared Odero, "Donors demand refund of FPE money", (29 December 2011), *Kenya Stockholm Blog*, online: <<http://kenyastockholm.com/2011/12/29/fpe-fraud-kibakis-legacy-of-corruption-part-4-final/>>.

⁸⁶ Parliament of Kenya, *National Assembly Debate* (30 November 2016), online: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjK_Fw8HZAhWF6RQKHU2dBu8QFggwMAE&url=http%3A%2F%2Fwww.parliament.go.ke%2Fthe-national-assembly%2Fhouse-business%2Fhansard%2Fitem%2Fdownload%2F3247_0decfa7d15825f02b3d439339da4dd0c&usg=AOvVaw3x81xDZUZjUudtqC31tJ0t>.

V. HOPE SPRINGS ETERNAL: THE OP-ICESCR AND THE POTENTIAL IT HOLDS FOR REDRESS

To date, 166⁸⁷ states have ratified the ICESCR and are therefore obliged to respect, protect and fulfil the rights protected by the Covenant. Before the coming into force of the OP-ICESCR, the only international mechanism monitoring the implementation of ESRs under the ICESCR was the state reporting procedure. Every five years, a state party was expected to submit a report to the CESCR outlining how it is fulfilling its treaty obligations. In turn, the CESCR would issue concluding observations on the basis of matters raised in the state reports. While civil society had the opportunity to present alternative information to the Committee in the form of shadow reports, the CESCR lacked the mandate to deal with individual complaints of rights violations. However, with the coming into force of the OP-ICESCR, states that ratify the Optional Protocol grant the CESCR the individual complaints mandate, allowing it to assess whether a state has complied with its human rights obligations in specific cases. This may explain the reluctance of states to ratify the OP-ICESCR and accounts for the current low number of only 23 state parties to the OP-ICESCR.⁸⁸

Kenya has not ratified the OP-ICESCR. However, the government has indicated that it is actively considering its ratification.⁸⁹ The following analysis is conducted on an assumption of what could transpire in the event that the Kenyan Government does ratify the OP-ICESCR. The point is to show that the OP-ICESCR is a powerful tool that could and ought to be utilized in the on-going national and global fight against corruption.

The OP-ICESCR includes three procedures: an individual communications procedure, an inquiries procedure and an inter-states procedure. During ratification, each state has to indicate which of these procedures it will adhere to. I will argue that either the individual communications procedure or the inquiries procedure has potential to allow for CESCR involvement in cases of systemic corruption. In these instances, the CESCR will assess the case before it and make suitable recommendations. Granted, the CESCR is not a Court and therefore lacks the power to compel

⁸⁷ UN Treaty Collection: *International Covenant on Economic, Social and Cultural Rights*. UN. 3 January 1976, online: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en>.

⁸⁸ UN Treaty Collection: *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN 10 December 2008, online: <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en>.

⁸⁹ United Nations, Human Rights Office of the High Commissioner, News Release, “Committee on Economic, Social and Cultural Rights considers report of Kenya” (26 February 2016), online: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17098&LangID=E>>.

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states to comply with these recommendations. Nevertheless, recommendations by the CESCR made pursuant to the invocation of any of the procedures under the OP-ICESCR can strengthen the public and legal struggles of right holders. By treating corruption related ESRs violations cases with the gravitas they deserve, and imbuing the claims of ESRs violation with a much-needed legitimacy, the Committee could pressure recalcitrant governments to take necessary actions.

The paper deliberately excludes from its scrutiny the potential use of the inter-state procedure in cases where the existence of corruption and an ineffective anti-corruption framework is argued to be a violation of ESRs. This is because similar mechanisms in other international human rights law treaties are notorious for their under usage.⁹⁰ Of specific concern is the fact that for the inter-state procedure to apply there is a “double opt-in” requirement. Both the state alleging that another state is in violation of its ESRs obligations, as well as the errant state must recognize the competence of the CESCR to hear inter-state complaints. The double opt-in requirement conceivably makes it difficult for a state to “cast the first stone”, because this may likely open it up to similar actions or reactions. As argued elsewhere, the implementation of the inter-state procedure is often perceived to be politically motivated and as a result potentially too damaging and threatening for a state’s interests.⁹¹ This undoubtedly reduces the utility of this particular mechanism by increasing the chances of non-use by concerned state parties.

A. THE COMPLAINTS OR INDIVIDUAL COMMUNICATIONS PROCEDURE UNDER THE OP-ICESCR

There are two key procedural concerns that need to be considered in order to understand the potential application of the individual communications mechanism. These are questions of jurisdiction and the requirements for admissibility.

Regarding jurisdiction, Article 2 of the OP-ICESCR delineates the scope of the communications procedure in a number of ways. It elucidates upon the subject matter jurisdiction

⁹⁰ Malcolm Langford, Cheryl Lorens & Natasha Telson, “The Inter-State Procedure” in Malcolm Langford et al eds, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, (Pretoria: Pretoria University Law Press, 2016) 147.

⁹¹ Scott Leckie, “The Inter-state Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?” (1988) 10 Hum Rts Q 249.

of the CESCR as well as identifies who has *locus standi* to bring communications before the CESCR.⁹²

On subject matter jurisdiction, article 2 provides that communications may be submitted by or on behalf of any individuals and/or groups claiming to be victims of “a violation of any of the ESRs set forth in the covenant...”⁹³ The rights holders may claim violations of any and all of the rights of the covenant without restriction. During the working group sessions for the drafting of the OP-ICESRC, a suggestion to include an *à la carte* approach under which each state party to the protocol would have the option to choose which rights would come under the discretion of the CESCR was rightfully rejected.⁹⁴ This approach, if it had been adopted, would arguably have created a hierarchy amongst the various ESRs and lent credence to the mistaken notion that human rights are not interdependent and indivisible. It would implicitly suggest that while the protection of Civil and Political Rights does not allow exceptions (Since the OP-ICCPR does not have an opt-in procedure for certain rights), states have discretion as to which ESRs can and ought to be protected.⁹⁵

On the question of *locus standi*, the operative section is article 2 which provides that: Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.⁹⁶

An analysis of the above provision reveals that the following categories of persons will be able to lodge complaints with the CESCR:

- i. Individuals who claim to be victims of violations of the covenant
- ii. Groups of individuals who claim to be victims of violations of the covenant
- iii. Third parties acting on behalf of the persons in (i) and (ii) above with their consent

⁹² UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, para 2, online: <<http://www.refworld.org/docid/49c226dd0.html>> [accessed 8 February 2018].

⁹³ *Ibid.*

⁹⁴ Christian Curtis and Julieta Rossi, “Individual Complaints Procedure” in *Langford et al, supra* note 90.

⁹⁵ *Ibid.*

⁹⁶ UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, para 3, online: <<http://www.refworld.org/docid/49c226dd0.html>> [accessed 8 February 2018].

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- iv. Third parties acting on behalf of the persons in (i) and (ii) above without their consent but without justification for the lack of such consent.⁹⁷

The latitude given to third parties in the above instances is in recognition of the fact that victims of rights violations may not always be in a position to act for themselves or to appoint representatives. It is therefore a necessary flexibility device aimed at ensuring justice.

In terms of admissibility, for communications to the Committee to be admissible, the complainants must have exhausted all available domestic remedies.⁹⁸ However, this requirement may be dispensed with where the procedure to obtain such remedies is unreasonably prolonged. It has been argued that the CESCR should also consider situations where remedies do not exist or where they exist are not effective.⁹⁹ It would be unreasonable and contrary to the spirit of the communications procedure for the CESCR to insist upon the exhaustion of remedies known to be ineffective.

The OP-ICESCR contains a novel provision not found in other universal treaty mechanisms. It places a temporal limit of one year from the date of exhaustion of remedies to presentation of a complaint unless the applicant can explain the failure to submit within this deadline.¹⁰⁰ Additionally, the jurisdiction *ratione temporis* of the CESCR is limited to matters that take place after the entry into place of the OP-ICESCR for the state in question.¹⁰¹ However, an important caveat exists; the CESCR is allowed to investigate violations of ESRs that may have begun prior to the entry into force of the OP-ICESCR for the state party involved but which continued thereafter. This issue was canvassed by the CESCR in the first case dealt with under this procedure.¹⁰² Specifically, the CESCR noted that some of the facts that gave rise to the violations alleged by the complainant occurred before but continued after the May 5, 2013 which is the date the OP-ICESCR came into force for Spain.¹⁰³

⁹⁷ *Courtis and Rossi*, *supra* note 94.

⁹⁸ UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, para 3, online: <<http://www.refworld.org/docid/49c226dd0.html>> [accessed 8 February 2018].

⁹⁹ *Supra* note 90.

¹⁰⁰ UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, para 3, online: <<http://www.refworld.org/docid/49c226dd0.html>> [accessed 8 February 2018].

¹⁰¹ *Ibid.*

¹⁰² *I.D.G v Spain* (Communication No. 2/2014) [17.06.2015].

¹⁰³ *Ibid.*

Of concern on the question whether the CDESCR can deal with cases where the existence of corruption and an ineffective anti-corruption framework can be argued to be a violation of ESRs is the provision in article 3(2)(e) of the OP-ICESCR. That article states that a communication is inadmissible where it is not sufficiently substantiated or is exclusively based on reports disseminated by mass media. This is because within the Kenyan context, information about the myriad corruption scandals has mostly been made public through mass media. The Government has been unsurprisingly tight lipped in issuing information about the seedy details of the numerous instances where taxpayer's funds have been misappropriated by corrupt government officials. However, a practical reality that can circumvent this apparent difficulty exists. It is difficult to imagine a complaint submitted by the alleged victim (s) on the sole basis of media reports. The whole point of being called a victim or alleging to be one is that the individual (s) in question must have personally suffered as a result of the action or inaction alleged. The existence of proximity between the legal breach complained of (existence of corruption and a failure to implement an effective anti-corruption framework in a particular case) and an injury (the violation of a specified ESRs as proven on the basis of evidence) may indicate a sufficient causal link allowing the victim to seek redress under the OP-ICESCR.¹⁰⁴

The CDESCR also has the power to decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless it considers that the communication raises a serious issue of general importance.¹⁰⁵ This is an unprecedented clause in communications procedures established under human rights treaties within the universal system.¹⁰⁶ In my opinion, cases where systemic corruption undermines the very fabric of a society, thus threatening the well-being of rights holders, serious issues of general importance are raised.

B. THE INQUIRIES PROCEDURE UNDER THE OP-ICESCR

Article 11 of the OP-ICESCR provides for an inquiry procedure as another potential mechanism to spur the CDESCR into action. In these instances, the CDESCR can receive reliable information indicating grave or systematic violations by a state party of any of the ESRs under the ICESCR.

¹⁰⁴ *Supra* note 16.

¹⁰⁵ UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, para 4, online: <<http://www.refworld.org/docid/49c226dd0.html>> [accessed 8 February 2018].

¹⁰⁶ *Supra* note 94.

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The CDESCR will invite the state party in question to cooperate in the examination of the information received. The process will culminate with the CDESCR conducting a confidential inquiry and transmitting its results to the state party together with any comments and recommendations. Within six months of receiving the communication from the CDESCR the state party in question shall submit its observations to the committee.

It would seem that the inquiries procedure offers an easier route to invoke the jurisdiction of the CDESCR as compared to the complaints procedure discussed above. This is because article 11 does not elucidate upon any admissibility criteria. The information before the CDESCR need not identify the victims of the alleged violations. This allows information to be given anonymously, which in turn increases chances that potential victims may share information with the CDESCR without fear of reprisals. Additionally, there is no requirement that domestic remedies must be exhausted before the CDESCR can launch such an inquiry. The exhaustion of domestic remedies rule, which is a significant procedural obstacle under the communications procedure, does not apply here. Information may therefore be submitted and considered at any time after the date on which the alleged violation occurred.¹⁰⁷ Two major definitional issues are raised by the wording of article 11 and are worthy of further discussion. They will be considered in turn.

C. “GRAVE OR SYSTEMATIC VIOLATIONS”

The choice to give mandate to the CDESCR only in cases where violations are grave or systematic may appear deliberate, in order to foreclose the use of the inquiry procedure in frivolous or vexatious cases. The CDESCR is permitted scrutiny of only the most severe, persistent or widespread violations of the ICDESCR.¹⁰⁸ The inquiry procedure is investigatory and fact-finding in nature and allows the CDESCR to visit the territory of the state in question in order to carry out *in situ* inspections of sites connected to the alleged violations and to interview any persons with pertinent information. Such visits can only occur if the state party alleged to be in violation consents.¹⁰⁹ This differs from the debatably quasi-judicial role played by the CDESCR under the communications procedure highlighted above.

The term “grave” has been frequently used by various UN bodies in the context of all human rights without distinction on the basis of CPRs or ESRs. It is sometimes interchanged with

¹⁰⁷ Donna Sullivan, “The Inquiry Procedure” in *supra* note 90.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

the words “serious” or “severe”. Gravity in this context denotes the aggravated nature of the violations in question, the extremity of their consequences as well as the vulnerability of the victims of the rights violation. In analyzing whether a violation may be considered to be grave, the following factors may be considered: the degree to which rights are infringed, the nature of the rights infringed, the number and status of the victims affected by the violations, the immediate and long-term consequences of the violations including effects on other rights.¹¹⁰

On the other hand, the term “systematic” could imply regularity of the violation, and may include elements of planning, organization and structure. More specifically, a systematic violation is one that occurs repeatedly on a large scale and that is authorized and/or sanctioned by the state in question through its action or inaction as the case may be. A state’s failure to put in place measures to end violations in such instances breeds a culture of impunity that belies arguments of a lack of complicity on the part of the state. Repeated occurrence means that the violations are not isolated or random, but take place recurrently over a period of time that is sufficient for the state to be aware of their persistent nature and take effective action to end them. On the other hand, large or wide scale could mean that the violations involve a significant number of victims or are geographically widespread.¹¹¹

Article 11 provides for the violations in question to be either grave or systematic by using the disjunctive “or” as opposed to the conjunctive “and”. This implies that victims of rights violation need to prove the existence of one or the other factor, but not both. This implicitly reduces the burden of proof borne in such instances. In reality the violations complained of could be either grave or systematic or a combination of both. The intricacies of the situation will thus dictate the evidence necessary.

D. “RELIABLE INFORMATION”

The inquiry procedure is initiated when the CESCR exercises its discretion to begin inquiries after receiving reliable information. The notion of reliability of information is an objective or intrinsic characteristic of evidence. Information is reliable when it is logically probative or dis-probative of a fact which is in issue. A number of factors may aid the analysis of whether information can be considered to be reliable or not. These include: the internal consistency of the information provided

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

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by a single source, the consistency among accounts of the situation from different sources, whether the evidence is corroborated by independent sources, the specificity of the allegations in question, the source's record (where one exists) of reliability and fact finding and the extent to which they are independent and non-partisan.¹¹² It must be appreciated that a prior record of communication of reliable information is not a mandatory requirement for a source to be considered to be credible. Information may still pass muster even if it comes from a new source who has had no previous contact with the CDESCR and lacks an established record in fact-finding and reporting.

The inquiries procedure has been praised for its potential to allow analysis of systemic and structural inequalities that go beyond the circumstances of individual cases, to address causal factors and thus proffer structural solutions. It can accommodate attention to the wider economic, social, political and cultural context at the national level and to the transnational dimensions of violations, thereby encouraging a holistic understanding of the violations claimed.¹¹³ It is precisely for this reason that the inquiries mechanism under the OP-ICESCR is a formidable tool that may be added to the arsenal of countries and institutions that are struggling to wage a battle against systemic corruption.

VI. LET'S PUT IT TO THE TEST: HOW THE OP-ICESCR POTENTIALLY ALLOWS RIGHTS HOLDERS TO CHALLENGE SYSTEMIC CORRUPTION WITHIN THEIR JURISDICTIONS

In 2013 an interesting case was brought before the Constitutional and Human Rights Division of the High Court of Kenya sitting in Nairobi.¹¹⁴ The petitioners, an association of concerned residents in the town of Githunguri brought a case against the Cabinet Secretary in the Ministry of Education, the Attorney General and the District Education Board of Githunguri among other respondents. Petitioners averred that a number of irregularities and malpractices had marred the running of the public schools in the Githunguri school district therefore resulting into a violation of the constitutionally enshrined right to education for the affected students. The hallmark of the petition was allegations of corruption in the running of the various schools in the district to the detriment of free primary education recipients. It was further argued that the matter was first

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others* (KEN), No 4 of 2013, online: <<http://kenyalaw.org/caselaw/cases/view/109726/>>.

brought before the attention of the District Education Board without any remedial action being taken and then to the Commission on Administrative Justice (commonly referred to as the office of the Ombudsman) without any tangible resolution of the grievances raised.

This failure to secure adequate remedies precipitated the entreaty of the High Court's jurisdiction. The High Court ruled in favor of the petitioners but only on the ground of levying of illegal fees. The court declined to consider all the other grounds that had been raised in the petition such as allegations of election malpractices in the Boards of Governors of the various schools, nepotism, illegal and corrupt tendering processes, receipt of unauthorized money for use of school grounds, disappearance of school resources such as books among other enumerated grounds. Had the petitioners in this case chosen to pursue the matter within the context of the OP-ICESCR (assuming Kenya was a state party) I believe that they would have been able to satisfy the jurisdictional and admissibility requirements under the ICESCR.

First, the right to education is one of the rights enshrined by the ICESCR and as such allegations that corruption has led to infringement of this right would give the CESCR the mandate to listen to the complaints. Secondly, the Githunguri Residents Association was made up of the parents and guardians of students who had suffered in one way or another as a result of corrupt practices. For instance, students who were unable to pay the illegal fees were not allowed to access the school premises. These petitioners would therefore fit the bill of third parties acting on behalf of victims of violations whether with or without consent as provided for under the OP-ICESCR.

On the question of exhaustion of domestic remedies, it is apparent that the rights holders attempted to seek redress within the municipal framework but were only minimally successful even after going through the court process. An argument could therefore be made that having exhausted domestic remedies in that case, the CESCR is the next logical forum for raising their grievances. The sentiments raised in the above case as regards the administration of the Free Primary Education System in Kenya have been echoed by other persons.¹¹⁵ It is widely accepted that cases of corruption and embezzlement have been emblematic since the program was started in 2003. Schools all over the country have been affected as a result and the enjoyment of the right

¹¹⁵ Adrienne Chuck, "Disparities in the System: The Effects of Free Primary Education (FPE) on the Quality of Education in Nairobi's Public Schools" (2009), online: <https://digitalcollections.sit.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1715&context=isp_collection>.

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to education compromised for the millions of students who depend on the program. As such, this is certainly a serious issue of general importance that could warrant the committee's attention.

A. INQUIRING FOR TRUTH – SYSTEMATIC CORRUPTION AS A GRAVE VIOLATION OF ESCRS

Over the past couple of years, the Kenya Auditor General's reports of the financial performance of both the National and County Governments have revealed shocking levels of multi-sectoral corruption. For the financial year ended June 2016, an audit of the Nairobi County Assembly Board Mortgage Scheme Fund resulted in an adverse opinion as a result of missing monies, inaccurate balances and doubtful loans extended to members of the assembly in dubious circumstances.¹¹⁶ In the report for the financial year 2014/2015, the Auditor General said that government spending worth 450 Billion shillings was not properly accounted for, demonstrating "persistent and disturbing problems in collection and accounting for revenue."¹¹⁷ Corruption appears to be a way of life in most national and county government entities with the chairman of the Ethics and Anti-Corruption Commission arguing that Kenya loses a third of its state budget to corruption every year.¹¹⁸

The examples of corruption scandals highlighted in this paper paint a grim picture of a country that is struggling under the weight of corruption, and yet seems unwilling or unable to put the load down. Despite the existence of numerous anti-corruption laws, the number of successful prosecutions especially where high ranking government officials are alleged to have been involved in corruption are minimal. Assuming that Kenya ratifies the OP-ICESCR, would it be possible for the CESCR to turn its inquiring gaze on this sad state of affairs?

In a country like Kenya where corruption is systemic and multi-sectoral spanning both the national and the county governments, the article 11 requirement of grave or systematic violations could be easily met. Corruption in Kenya is not an isolated incident. It is a series of widespread

¹¹⁶ Auditor General, *Report on the Financial Statements of Nairobi County Assembly* (2017), online: <<https://nairobiassembly.go.ke/ncca/wp-content/uploads/paperlaid/2018/The-Report-of-the-Auditor-General-on-the-Financial-Statements-of-Nairobi-City-County-Assembly-Service-Board-Mortgage-Scheme-Fund-for-the-Year-ended-30th-June-2017.pdf>>.

¹¹⁷ Auditor General, *Report of the Auditor-General on the Financial Statements for National Government for the Year 2014/2015* (2015), online: <www.oagkenya.go.ke/index.php/reports/doc_download/676-report-2014-2015>.

¹¹⁸ Duncan Miriri, "Third of Kenyan budget lost to corruption: anti-graft chief" (10 March 2016) *Reuters*, online: <<https://www.reuters.com/article/us-kenya-corruption/third-of-kenyan-budget-lost-to-corruption-anti-graft-chief-idUSKCN0WC1H8>>.

and repeated occurrences affecting all areas of the public service. The failure of successive regimes to properly prosecute offenders has bred a culture of impunity that implies state toleration of corruption despite its adverse impact on achievement of ESRs. Additionally, the sheer number of victims who have suffered violations as a result of corruption shows that this is a grave issue worthy of the CDESCR's investigation. Corruption in Kenya has impaired the achievement of the right to education, the right to food, the right to social security, and the right to health. In the long term, these rights will never be truly realized if resources that could have been used in providing them keep getting siphoned off to corrupt ventures. Progressive realization in this case may very well be a journey without a destination.

Finally, there is a wealth of evidence from the office of the auditor-general and other dependable sources, such as the Kenya National Human Rights Commission, illustrating the high levels of corruption in both levels of government. It is therefore plausible that as required by article 11 there is a sufficient amount of reliable information available for the CDESCR to turn its spotlight on Kenya in order to assess the real-life impact of runaway corruption on the achievement of ESCRs in the country.

VII. POSTSCRIPT: SOME FINAL THOUGHTS

It is anticipated under the OP-ICESCR that the CDESCR will subject state actions to a "reasonableness" inquiry in order to decide on the existence or non-existence of violations. For this reason, article 8(4) of the OP-ICESCR has been referred to as the heart and pulse of the protocol.¹¹⁹ The incorporation of the reasonableness criterion into the OP-ICESCR is an acknowledgement that there should be a clear demarcation between the adjudicative role granted to the CDESCR and the policy design and implementation role granted to states. Echoing separation of powers concerns, the aim is to equip the CDESCR with the power to adjudicate and remedy claims addressing serious and systemic violations of ESRs under the OP-ICESCR which is critical to ensuring access to justice for victims of the most widespread and egregious violations.¹²⁰

In a country like Kenya where successive regimes have consistently and defiantly failed to tackle systemic corruption resulting in billions being pilfered from the public coffers, it is undoubted that long-suffering ESRs holders will continue to suffer as a result of the failures of the

¹¹⁹ Bruce Porter, "Reasonableness and Article 8(4)" in *supra* note 90.

¹²⁰ *Ibid.*

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state. In these circumstances it is certainly not unreasonable to expect the CESCR to find that such governments have failed the reasonableness test outlined in article 8(4). This is so especially because the failure to implement an adequate anti-corruption framework allows the seeds of corruption to flourish unchecked, and is the very antithesis of what reasonable state behavior ought to be in this context.

Admittedly, the number of cases submitted to and considered by the CESCR under the OP-ICESCR is currently very low. This may be attributed less to the difficulty in invoking the jurisdiction of the CESCR and more to the few number of ratifications currently enjoyed by the OP-ICESCR. Perhaps this hesitance by countries such as Kenya to ratify the protocol is a sign of a rebirth in the ESRs sphere with states that have relied on the progressive realization caveat as a crutch to evade their obligations under the ICESCR now realizing that the chickens are on the way home to roost, and that more accountability is now demanded from state parties of the ICESCR. Nevertheless, the list of pending cases before the committee indicates that the grievances that the CESCR is willing to look into are as varied as they are unpredictable. They range from matters of access to complementary compensation established by collective bargaining agreement¹²¹ to discrimination of women domestic workers in access to the national social security system¹²² and even further to donation of embryos produced by in-vitro fertilization for scientific research¹²³. Corruption related ESRs violations may very well find themselves on the CESCR's agenda sooner rather than later. With public sector corruption alleged to be siphoning off \$ 1.5 trillion to \$ 2 trillion annually from the global economy¹²⁴ it is clear that corruption is not a unique Kenyan or African problem. It is a global challenge that must be fought on all fronts, including the ESRs sphere, until it is finally won, however long that will take.

¹²¹ CESCR, Communication 7/2015, online: <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx?utm_source=CESCR+Alert&utm_campaign=42640460d5-EMAIL_CAMPAIGN_2017_12_07&utm_medium=email&utm_term=0_688271303a-42640460d5-329711053>.

¹²² *Ibid*, Communication 10/2015.

¹²³ *Ibid*, Communication 22/2017.

¹²⁴ International Monetary Fund Fiscal Affairs Department and Legal Department, *Corruption: Costs and Mitigating Strategies*, (May 11, 2016) IMF Staff Discussion Note No. 16/05, online: <<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888>>.