

SYMPOSIUM ON NEW DIRECTIONS IN ANTICORRUPTION LAW

STATE CAPTURE THROUGH CORRUPTION: CAN HUMAN RIGHTS HELP?

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Until recently, the United Nations and regional systems of human rights protection had shown considerable reluctance to address human rights violations resulting from corruption. Instead, these actors would underline the negative impacts of corruption on human rights without identifying corruption itself as a violation of human rights. Since 2017, however, this has begun to shift. The UN, regional human rights institutions, and civil society have begun to devise concrete ways for human rights institutions and instruments to better contribute to the fight against corruption. The Inter-American Court of Human Rights (“the Court”), in particular, has taken preliminary steps to establish a legal link between corruption and human rights violations.

This essay calls for further steps. Specifically, it argues that the UN and regional systems for the protection of human rights should contribute to the transnational fight against corruption by enhancing state accountability in cases of systematic corruption. The international anticorruption conventions, crafted in isolation from the domain and concepts of human rights, lack mechanisms through which state responsibility can be triggered if a state fails to fight against corruption. The involvement of human rights systems would be particularly useful in cases where a state structure is captured through systematic corruption, preventing the state from fulfilling its obligation to guarantee the enjoyment of human rights.

The Corruption Loophole

Acts of corruption, defined as the abuse of public or entrusted power for private gain, can violate human rights. Looking at key universal and Inter-American human rights conventions, scholars such as Bacio Terracino¹ and Nash Rojas² have shown ways in which corruption can violate substantive human rights covered by those treaties. For example, when a person is detained for the sole purpose of extracting a bribe from her, her right to liberty and security is violated through corruption. These scholars focus mostly on cases of petty corruption—that is, acts by ordinary citizens on a small scale.

The question of whether there is also a path to establishing a legal link between corrupt acts and human rights violations in the case of systematic corruption is more complicated. Indeed, it is increasingly common in Latin America for powerful actors—such as organized crime groups, kleptocratic elites, or corporations—to organize covert networks to illegally enrich themselves, either at the expense of the state or through complicity of the state in

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¹ Julio Bacio Terracino, *Hard Law Connections Between Corruption and Human Rights* (Int’l Council on Human Rights Policy, 2007).

² CLAUDIO NASH ROJAS, PEDRO AGUILÓ BASCUÑÁN & MARÍA LUISA BASCUR CAMPOS, *CORRUPCIÓN Y DERECHOS HUMANOS: UNA MIRADA DESDE LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS* 129 (2014).

the commission of crimes.³ From 2009 to 2012 in Coahuila, Mexico, for example, the Zeta cartel was able to gain control of the regional public forces, as well as members of the executive and judiciary, through bribery, thereby influencing them to collaborate with or tolerate the crimes committed by this illegal group.⁴ The crimes included hundreds of forced disappearances committed by the police jointly with the Zeta cartel.

In terms of establishing a factual causal link between human rights violations and corruption, acts of corruption such as those described above are a condition sine qua non of the state forces' participation in the forced disappearances. Currently, however, human rights courts would focus only on the forced disappearances without considering the corruption that contributed to their occurrence. This loophole creates a form of impunity for corrupt acts that lead to human right violations even if they do not directly violate human rights. The existence of this loophole calls for the Court to adapt its case law, as I argue below.

Inter-American Case Law on Corruption

The Court has referred to corruption notably in eight different cases.⁵ In three of these cases, the Court took into account acts of corruption in the contextual section of the judgments, a section that does not constitute a part of the Court's legal analysis *stricto sensu*.⁶ In two cases, the Court referred to corruption in the section on proven facts, as part of a larger set of facts constituting the violation of a right.⁷ The Court also ordered a state to investigate facts of corruption in at least two cases.⁸

The Court has never explicitly held that an act of corruption alone constitutes a violation of an obligation or a right derived from the American Convention on Human Rights (ACHR). In 2018, however, in the *Ramírez Escobar* case, the Court recognized a scheme of corruption as a proven fact and recalled that states must adopt measures to prevent, punish, and eradicate corruption effectively and efficiently.⁹ On this occasion, the Court detailed the acts of corruption at length in the section describing the proven facts. The decision explicitly recognized the negative impact of organized corruption on the enjoyment of human rights, even if the Court did not qualify the corruption itself as a breach of a human rights obligation. The Court stated:

The Court recalls that States must adopt measures to prevent, punish and eradicate corruption effectively and efficiently. . . . The Court highlights that the international adoptions took place within a framework of corruption, in which a set of actors and public and private institutions operated under the mantle of the protection of the best interest of the child, but with the real purpose of obtaining their own enrichment. In

³ See Jimena Reyes, *State Capture Through Corruption: How Can Human Rights Help?* 9–19 (Human Rights Program: Harvard Law Sch., Working Paper No. HRP 19-002, 2019) (suggesting a definition for the concept of state capture through corruption that we consider more useful for human rights analysis than the concept of “grand corruption”).

⁴ INTERNATIONAL FEDERATION FOR HUMAN RIGHTS ET AL., *MEXICO, COAHUILA: ONGOING CRIMES AGAINST HUMANITY* 72 (2017).

⁵ For a full description, see *Corte IDH Cuadernillo23 | Corrupción y Derechos Humanos*, SCRIBD (2019).

⁶ *Comunidad Indígena Sawhoyamaya v. Paraguay*, Fondo, Reparaciones y Costas, Sentencia, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Montero Aranguren y otros (Retén de Catia) v. Venezuela*, Excepción Preliminar, Fondo, Reparaciones y Costas, Sentencia, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006); *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114 (Sept. 7, 2004).

⁷ *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Fondo y Reparaciones, Sentencia, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); *“Instituto de Reeduación del Menor” v. Paraguay*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia, Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004).

⁸ *A Respeito do Brasil Assunto do Complexo Penitenciário de Curado*, Medidas Provisórias, Resolução da Corte (Inter-Am. Ct. H.R. Oct. 7, 2015), *Forneron e Hija v. Argentina*, Fondo, Reparaciones y Costas, Sentencia, Inter-Am. Ct. H.R. (ser. C) No. 242 (Apr. 27, 2012).

⁹ *Ramírez Escobar y otros v. Guatemala*, Fondo, Reparaciones y Costas, Sentencia, Inter-Am. Ct. H.R. (ser. C) No. 351 (Mar. 9, 2018).

this sense, the machinery that was mounted and tolerated around illegal adoptions, which affected particularly poor sectors, had a strong negative impact on the enjoyment of human rights of children and their biological parents.¹⁰

This obiter dictum may indicate the Court's willingness to put greater emphasis on the role of corruption in human rights violations. It could also signal a first step towards recognizing corruption as an operative factor in the breach of the obligation to guarantee human rights as set out in Article 1 of the ACHR. Such an argument could be made through the duty to prevent human rights violations or even, more pointedly, through the recognition of a special obligation to prevent corruption that causes human right violations.

The Duty to Prevent Human Rights Violations in Contexts of Corruption

The ACHR, like other human rights treaties, simultaneously establishes individual rights and state obligations. Thus, Article 1 of the ACHR, which sits in the opening chapter entitled "General Obligations," mandates that states parties respect the rights and freedoms recognized in the Convention and guarantee their full and free exercise by those subject to their jurisdiction.

The Court has identified several specific obligations or duties derived from the general obligation to guarantee the full and free exercise of these rights and freedoms.¹¹ Among those specific obligations is the obligation to prevent human rights violations:

As a consequence of the obligation of guarantee, the States must prevent, investigate and punish any violation of the rights recognized by the Convention.... [This] duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts.¹²

The state bears responsibility for preventing human rights violations by non-state actors as well as by state actors. This can take two forms. On the one hand, there is the doctrine of complicity of the state, establishing the direct responsibility of the state for actions that tolerate, accept, or support human rights violations committed by private actors. On the other, there is indirect state responsibility for breaching the obligation to guarantee the enjoyment of human rights, and in particular, of the specific duty to prevent human rights violations.

Of course, the state does not have unlimited responsibility for all the acts of private actors. Rather, the Court has limited indirect responsibility to cases of foreseeable and avoidable risk. Three elements must be met: (1) the state must have "awareness of a situation of real and imminent danger"; (2) the danger must threaten "a specific individual or group of individuals"; and (3) there must be "reasonable possibilities of preventing or avoiding that danger."¹³ Using the foreseeable and avoidable risk criteria described above, the Court has also established the responsibility of the state for a breach of its duty to prevent and protect human rights in cases where the state has itself contributed to creating the risk of human right violations.¹⁴

The main legal issue at stake in the analysis of the link between acts of corruption and a violation of human rights is causality. As Bacio and Nash have shown, it is possible to identify examples where the causal link is immediate

¹⁰ *Id.*

¹¹ *Velásquez-Rodríguez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 04 (July 29, 1988).

¹² *Id.* at para. 166.

¹³ *Gonzalez y otras ("Campo Algodonero") v. México*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2006).

¹⁴ Víctor Abramovich, *Responsabilidad Estatal por Violencia de Género: Comentarios Sobre el Caso "Campo Algodonero" en la Corte Interamericana de Derechos Humanos*, 6 ANUARIO DE DERECHOS HUMANOS 167, 176 (2010).

enough for the acts of corruption to violate human rights. For example, when a judge receives a bribe to convict an innocent person and he does convict the person, the reception of the bribe acts both as evidence of the violation of the right and as a direct cause of the violation of the right to a fair trial.

However, when the corrupt act is not itself a direct cause of the human rights violation, the Court could shift to an analysis based on the breach of the obligation to prevent human rights violations by the state. The doctrine of foreseeable and avoidable risk enables the Court to analyze the causal link between the facts of corruption and a human rights violation. In this way, it can overcome the above-described loophole and look at the whole picture. For example, in the case of Coahuila, in addition to finding that the state was directly responsible for the forced disappearances, the Court also would seek to ascertain whether the authorities had engaged in corrupt acts with the Zetas as evidence of a foreseeable and avoidable risk that the enforced disappearances would occur.

Proposal for a Duty to Prevent Corruption

In addition to the Court's dictum in the *Ramírez Escobar* case, which may mark the Court's first step toward bridging the legal obligations of the Inter-American Convention Against Corruption (IACAC) and the ACHR, there are other steps the Court could take. Moving forward, the Court could also develop a new duty, which the Inter-American System of Human Rights could monitor: the duty to prevent corruption that leads to human rights violations.¹⁵

Besides the preamble and the section on preventive measures against corruption of the IACAC, the sources of such a duty could be the UN Convention Against Corruption, the Inter-American Democratic Charter (in particular Article 4), and the UN treaty bodies' observations on the issue of corruption. Indeed, the Inter-American Court understands its interpretive mandate to include instruments beyond the American Convention.

If the Court were to recognize a duty to prevent corruption that causes or contributes to human rights violations, the Court would be able to focus on the content of the obligation to prevent corruption. That is, it would be able to articulate what a state must or must not do to fulfill its obligation to prevent corruption and whether it has complied with this obligation. As the Court cannot require that states prevent all corruption, this obligation would necessarily be a requirement of means, not of result. In the case of Coahuila, for example, in addition to deciding on the direct responsibility of the state for the enforced disappearances, the Court would evaluate whether the state did enough to prevent this network of corruption in light of the systematic corruption of public forces that led to the disappearances. In the case of the obligation to prevent human rights violations in context of corruption, the Court would ascertain the existence of corruption as evidence of the creation of a risk of a violation of human rights. In this case, there would be an implicit obligation to prevent corruption as part of preventing the risk of a human rights violation.

There are several reasons why either of the two moves described above would be a positive step. First, they would allow the Court to describe and acknowledge the existence of systematic corruption, and perhaps help states hold actors accountable. The standard of proof in Inter-American human rights law is more flexible than in national criminal law. Moreover, the Court has frequently admitted as evidence the existence of acts that could also constitute criminal offences, such as enforced disappearance, even in the absence of a domestic legal judgment qualifying those acts. For example, with regard to crimes against humanity committed during Latin American dictatorships, the Court's case law condemning states for those crimes included descriptions of the acts, which

¹⁵ *Glenister v. President of the Republic of S. Afr.*, 2011 (3) SA 347 (CC) at para. 177 (S. Afr.) has made a similar link: "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."

contributed not only to breaching the wall of impunity at a national level but also to advancing the search for the truth about what happened to the victims of these crimes.

Second, the analysis of the foreseeable and avoidable risk would give visibility to the link between corruption, on the one hand, and a specific victim or group of victims harmed by human rights violations, on the other. Establishing a clear legal link between facts of corruption and the violation of substantive right(s) would demonstrate that corruption is not victimless. In a nutshell, when corruption directly violates a human right, the possessor of that right would also be a victim of corruption. Similarly, if the duty to prevent human rights violations is breached because the state disregards the existence of a foreseeable and avoidable risk of a violation due or partly due to corruption, the victims of that human rights violation are also victims of corruption. In both cases, the Court could identify those victims. Indeed, the Court recognizes the victims of human rights violations by name.

In most national legal systems, criminal and civil cases involving corruption do not provide standing for or the identification of the victims of that corruption. This is due both to the difficulty of analyzing causation in corruption cases and to the historic treatment of corruption offenses in both civil and common law criminal systems, which conceive of corruption as an offence against public order, where victims have no standing.

Finally, such a doctrine would contribute to the creation of public policy standards in the fight against corruption. The Court could contribute to standard-setting both when establishing the responsibility of the state for its breach of the duty to prevent human rights violations and when deciding on the guarantees of nonrepetition. For both, the Court could develop and detail the actions that a state must take to prevent networks of corruption that cause human rights violations and to ensure that its structures comply with its obligations. This would resemble the work the Court has done in the area of gender violence crimes, for example.

Conclusion

It is imperative and urgent to acknowledge the responsibility of the state when it contributes to or tolerates opaque networks of corruption that create a risk of human rights violations. Indeed, two very concerning trends in Latin America are closely linked to this systematic corruption. The current sense that corruption has invaded the highest spheres of the state significantly is contributing to the rise of populist politicians. Many have the impression that there is no other solution to the scourge of corruption than to make a clean sweep of all elites and replace them with populist leaders who promise simple solutions to complicated problems. We also seem to be entering an era of new dictatorial regimes, this time resulting not from military coups but from elected governments that enrich themselves through systematic corruption, and then entrench themselves and retain power, as in the cases of Nicaragua and Venezuela.