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I. Introduction

In Latin America, the early 2000s marked a democratic renewal with the end of internal conflicts and dictatorships, except in Colombia and Cuba. However, today, almost twenty years later, the basis of democratic regimes—an independent judiciary, free and transparent elections, respect for rule of law and the state-controlled monopoly on violence—is being profoundly undermined in most Latin American countries.

This paper examines one cause of this undermining: the takeover of the public sphere by private interests through corruption. This threat is not new; it is even inherent to the existence of democracy.

However, it is useful to gain a better understanding of how this corruption occurs today in Latin American democracies. Indeed, among the various acts which may be described as corrupt, the ones that intend to capture State institutions particularly damage democracy and the fulfillment of the State's obligation to respect and guarantee human rights. This negative impact is reinforced by the considerable levels of impunity surrounding cases of corruption in the region.

But how can this capture through corruption be characterized? How can we move from empirical description to operational characterization? And finally, could human rights help fight State capture through corruption?

This paper argues that there is a need to develop the concept of State capture through corruption. It hypothesizes that the prism of inter-American human rights can contribute to a more fully realized description of State capture through corruption and reveal its detrimental impact on the functioning of the State and its population. It also hypothesizes that Latin American States' responsibility to guarantee the free and full exercise of human rights could be triggered where State capture through corruption occurs. In these cases, inter-American case law could contribute to the development of regional standards for States' anti-corruption obligations.

The first section of this paper summarizes the state of play between the United Nations (UN), the inter-American systems of human rights protection and the fight against corruption. In particular, it shows that the anti-corruption consensus was built in isolation from the world and concepts of human rights. Likewise, the UN and inter-American systems of human rights protection have shown considerable timidity in dealing with human rights violations resulting from corruption.

In the second section, the paper develops the concept of State capture through corruption. State capture through corruption is a relatively new and underdeveloped concept and needs to be defined and distinguished from related notions such as regulatory capture, grand corruption and kleptocracy. The concept is further developed by examining the characteristics common to the following three case studies: 1) Nicaragua and the awarding of megaprojects to a Chinese company, 2) Mexico and organized crime in Coahuila and Texas and 3) embezzlement in Guatemala's customs and duty service.

These three examples are emblematic of State capture through corruption in Latin America. Indeed, they illustrate the different groups involved in this kind of corruption—organized crime (Mexican example), a foreign company (Nicaragua example) and top-level State representatives (Guatemala example) —as well as the main methods of corruption (bribes and embezzlement) and give examples of the impact these corrupt acts may have on human rights violations.

In the third and final section of this paper, we show how inter-American human rights case law could help to better describe State capture through corruption and to address its human rights impact by engaging the State's responsibility under international human rights law.

Indeed, there are many academic articles on the question of the negative impact of corruption on human rights, but very few articles deal with issues of hard law and how corrupt acts can engage the responsibility of the State.

We will argue that the duty to prevent human rights violations resulting from the obligation to guarantee to all persons the free and full exercise of the rights and freedoms contained in the American Convention on Human Rights (ACHR) could constitute a basis for engaging the State's responsibility for acts of State capture through corruption.

II. The fight against corruption and the international system for protecting human rights: a slow awakening

While a broad consensus exists today within international governance bodies of the need to fight corruption, this does not translate into powerful, effective international instruments for monitoring cases of corruption, and even less for sanctioning States that fail to vigorously fight corruption. Until 2015, international and regional systems for safeguarding human rights played a purely rhetorical role when it came to countering the negative impact of corruption on human rights.

A. Weak consensus and fragmented international law in the fight against corruption

As a number of academics have shown, the need to fight corruption in the twentieth century was not always self-evident.[1] It is therefore worth noting that at the moment when the two principal treaties on protecting human rights were being negotiated and ratified—the International Covenant on Civil and Political Rights (CCPR) and the International Covenant

[1] SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (Second edition. ed. 2016); Robin Theobald, *So what really is the problem about corruption?*, 20 THIRD WORLD QUARTERLY 491–502 (1999); Gathii, James, *Defining the Relationship between Human rights and Corruption,* 31 U. PA. J. INT'L L. 78 (2009).

on Economic, Social and Cultural Rights (ICESCR)—the international community perceived the phenomenon of corruption as inevitable and even, in the view of some, as useful.

Thus, in 1968 Samuel Huntington in *Political Order in Changing Societies* wrote:

> "In terms of economic growth, the only thing worse than a society with a rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy. A society which is relatively uncorrupt —a traditional society for instance where traditional norms are still powerful—may find a certain amount of corruption a welcome lubricant easing the path to modernization."

It is only from the 1990s that one can talk of the birth of an anti-corruption consensus. This consensus arose notably from the evolving agenda promoted by the Bretton Woods institutions, which from 1992 placed good governance at the center of development policies and considered corruption as an indicator of poor governance and thus an obstacle to the proper functioning of the economy. Rose-Ackerman[2] explained the emergence of this consensus through the end of the Cold War, which reduced the incentives for more powerful countries to tolerate corruption in their allies, and the transition from a centrally planned economy to market economies, which opened up new opportunities for both licit and illicit profits. Other factors included the 1977 U.S. Foreign Corrupt Practices Act (FCPA), which criminalized overseas bribery and pressured governments to reduce unfair dealing and firms to re-examine their overseas practices, in addition to accelerating globalization.[3] The founding of Transparency International (TI) and the publication of its corruption perception index, which caused alarm and anger among poorly rated countries is also considered a relevant factor. Finally, the intellectual underpinnings of development policy began to recognize the key role of public institutions, and development economists began to look to the field of political science and sociology and incorporated work on the functioning of institutions into their conceptual frameworks. In doing so development economists began confronting corruption as a particularly obvious pathology.[4]

A socioeconomic vision of corruption prevailed in this period and still does. It is no coincidence that Transparency International, the principal civil society organization fighting corruption on a global level, was founded in 1993 by a former executive of the World Bank.

The beginnings of this consensus in the 1990s led to the negotiation and subsequent ratification of various international anti-corruption texts,[5] including two ratified by most Latin

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[2] ROSE-ACKERMAN, *supra* note 1 at 6.

[3] Gathii also recalls the importance of the non-aligned will in the 1970s to curb multinational corporation bribery within the UN, in a context of discussions on a "New International Economic Order" that was then rejected in particular by the US, but led to the FCPA. James Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 125, 138–141 (2009).

[4] ROSE-ACKERMAN, *supra* note 1.

[5] EUROPEAN UNION, CONVENTION DRAWN UP ON THE BASIS OF ARTICLE K.3 OF THE TREATY ON EUROPEAN UNION, ON THE PROTECTION OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS, EUR-LEX - 31995F1127(03) - EN - EUR-LEX 49–57 (1995), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31995F1127(03) Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 Dec. 1997, entered into force 15 Feb. 1999, OECD/DAFFE/- IME/BR(97)16/FINAL (18

American countries: the Inter-American Convention Against Corruption[6] (IACAC), which came into force on 6 March 1997 and was ratified by 33 States, and the United Nations Convention against Corruption[7] (UNCAC), which came into force in 2005 and has been ratified by almost every country in the world.

The negotiations for these two conventions clearly prioritized a broad consensus on the strength of the obligations.[8] In a nutshell, the conventions deal mostly with the obligation or possibility of a ratifying State to include a certain number of offences as acts of corruption in its criminal code. They set out how cooperation between States operates (particularly through extradition and mutual legal assistance), and they provide options for preventative action and mandatory rules on asset recovery. The mechanisms for verifying that the obligations contained in the conventions are respected are weak and the sanctions for lack of respect non-existent.[9]

In addition to the international conventions, the past fifteen years have seen the emergence of numerous voluntary initiatives, including those issued by international financial institutions, company initiatives—for example, relating to extractive businesses ('publish what you pay')—and also individual sanction mechanisms introduced by countries like the United States. All of this has led to an anti-corruption global governance that is still embryonic and highly fragmented.

B. The slow awakening of human rights

The universal system: The Human Rights Council and treaty bodies

In 2003, at a time when discussions on the United Nations Convention Against Corruption were reaching their final stages, the United Nations Human Rights Commission, superseded by the Human Rights Council, began considering corruption and its impact on the full enjoyment of human rights, notably through a three-year mandate for a Special Rapporteur on corruption and human rights.[10] This was followed by a new Advisory Committee of the Human Rights Council, founded to explore the question of the negative effect of corruption

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Dec. 1997), 37 I.L.M. 1 (1998); Council of Europe, Criminal Convention on Corruption, 27 Jan. 1999, ETS No. 173; Civil Law Convention on Corruption, 4 Nov. 1999, ETS No. 174; Additional Protocol to the Criminal Law Convention on Corruption, 15 May 2003, ETS No. 191; Southern African Development Community, Protocol against Corruption, opened for signature 14 Aug. 2001; African Union Convention on Preventing and Combating Corruption, opened for signature 11 July 2003.

[6] ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN CONVENTION AGAINST CORRUPTION (1997), http://www.oas.org/en/sla/dil/docs/inter_american_treaties_B-58_against_Corruption.pdf.

[7] UNITED NATIONS CONVENTION AGAINST CORRUPTION, (2003), http://www.unodc.org/unodc/fr/treaties/CAC/.

[8] MARTINE BOERSMA, CORRUPTION: A VIOLATION OF HUMAN RIGHTS AND A CRIME UNDER INTERNATIONAL LAW? 64 (2012); Peter Schroth, *The United Nations Convention Against Doing Anything Serious About Corruption*, 12 JOURNAL OF LEGAL STUDIES IN BUSINESS 1–21 (2005). Schroth considers that the provisions of the UN Convention on asset recovery are close enough to what they should be but the remainder of the articles does not provide international standards, many of the mandatory clauses will have little impact either; consensus was achieved to make them mandatory in the UN convention because they only reiterate obligations already existing in other international agreements. .

[9] The follow up mechanism of inter-American Convention Against Corruption: Is the glass half empty? South Western Journal of Law and Trade in the Americas, 10, 2004, 464.

[10] REPORT OF MS. CHRISTY MBONU, SPECIAL RAPPORTEUR ON CORRUPTION AND ITS IMPACT ON THE FULL ENJOYMENT OF HUMAN RIGHTS, (2009), https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/A_HRC_11_CRP_1.pdf.

on the enjoyment of human rights.[11] The three key cross-cutting messages contained in the documents produced by these bodies were:

- Corruption is an enormous obstacle to the fulfilment of all human rights—civil, political, economic, social and cultural—as well as the right to development.

- The fundamental principles of human rights of transparency, accountability, non-discrimination and meaningful participation, when defended and implemented, are the most effective means of fighting corruption.

- There is an urgent need for greater synergy in intergovernmental efforts to implement the United Nations Convention Against Corruption and international conventions on human rights. This demands greater policy consistency and collaboration between the intergovernmental procedures in Vienna, Geneva and New York, and within the UNODC, UNDP, OHCHR and civil society.[12]

The most recent document issued in the context of the above-mentioned analysis—the 2015[13] final report of the Advisory Committee on the question of the negative impact of corruption on the enjoyment of human rights—is the most thorough. Even if its title only refers to the negative impacts of corruption on human rights, unlike previous documents it explicitly recognizes that acts of corruption may constitute violations of human rights, thus making the State accountable, and incorporates these into the 'respect, protect, fulfil' framework:

> "Corruption in the public sector can occur in government, in administration, in the legislature and in the judiciary. In those contexts, the State is clearly accountable for any violation of human rights resulting from the conduct of persons acting in their public capacity.
>
> The State has a duty to protect against any adverse human rights impacts arising from acts of corruption by non-State actors, including corruption by the private sector. The duty of States to protect against human rights abuses by third parties obliges States to take effective regulatory or other measures to prevent such acts by third parties, to investigate violations that occur, to prosecute the perpetrators as appropriate, and to provide redress for victims."[14]

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[11] Human Rights Commission Res. E/CN.4/Sub.2/2005/18; Human Rights Council Res. 17/23, Rep. of the Human Rights Council, 17th Sess., A/HRC/RES/17/23, at 2 (19 July, 2011); Human Rights Council Res.19/38, Rep. of the Human Rights Council, 19th Sess., A/HRC/RES/19/38, at 2 (19 Apr., 2012); Human Rights Council Res. 22/12, Rep. of the Human Rights Council, 22nd Sess., A/HRC/RES/22/12, at 2 (10 Apr., 2013), Human Rights Council Res 23/9, Rep. of the Human Rights Council, 23rd Sess., A/HRC/RES/23/9 (7 June, 2013).

[12] *Human Rights and Anti-Corruption,* United Nations Human Rights Office of the High Commissioner, http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx (last visited February, 2018).

[13] U.N. General Assembly, *Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights*, UN Doc. A / HRC / 28/73 (January 5, 2015).

[14] U.N. General Assembly, *Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights*, UN Doc. A / HRC / 28/73, para 7 and 9 (January 5, 2015).

Boersma[15] provides an exhaustive list of the references made between 1994 and 2012 to the links between corruption and human rights by the different Human Rights thematic or country-based special procedures and the UN treaty bodies monitoring the implementation of human rights conventions. Treaty bodies have referred to the negative impact of corruption on the enjoyment of human rights 131 times, and stressed in their recommendations the importance of combating this scourge. No reference has been made to human rights violations as a result of corruption, but the vocabulary used by these bodies rarely refer to violations and instead describe the negative impacts of corruption and their concerns regarding them.

A more detailed examination of one of the committees which has most often mentioned corruption in its observations, namely the Human Rights Committee (HRC) reveals that, for the HRC,[16] out of the 182 States reviewed between 2007 and 2017, 39 Concluding Observations mention corruption (21%). Of those 39, 32 fall under Article 14 (rights relating to the judiciary). Most of these reviews mention systemic corruption in the judiciary, judges' lack of independence and the appointment, selection, dismissal and promotion procedure within the judiciary. In seven[17] of the 32 reviews, the HRC combines Article 14 with Article 2 of the CCPR.[18] Article 2 has been invoked on its own three times. On two occasions,[19] the Committee used the same formulation in both Concluding Observations: that "general corruption has a negative impact on the full enjoyment of the rights guaranteed in the Covenant". Article 2 was also invoked alone in the review of Macao, China in 2013: the Committee was then concerned about the mandate of the Commission Against Corruption (Macao).

Compared to the UN system, the inter-American system of human rights protection has made very few references to the links between acts of corruption and human rights violations. Prior to 2017, the only mention of this link was to be found in two inter-American Commission of Human Rights (IACHR) reports.[20] The country report on Paraguay[21] and a chapter on the situation in Ecuador in its 2005 annual report both refer to the preamble of the Inter-American Convention Against Corruption and condemn corruption, particularly in the judicial sphere. The Paraguay report devotes an entire chapter to the question of corruption, particularly underlining the link with impunity and the impact of corruption on the fulfilment of social, economic and cultural rights. As we will see in section III of this paper, the inter-American Court of Human rights (IACrtHR) mentions corruption eight times in its rulings but never acknowledges the violation of human rights or an obligation by facts of corruption alone.

There are multiple reasons why universal and regional human rights bodies only slowly and infrequently adopted a position prior to 2015-2017 on the impact of acts of corruption on

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[15] BOERSMA, *supra* note 8 at chapter 3.

[16] This section relies heavily on Làzarie Eeckeloo, *The Human Rights Committee and its approach to corruption* (2018).

[17] Azerbaijan (2016), Kazakhstan (2016 and 2012), Benin (2015), Indonesia (2013), Paraguay (2013), Turkmenistan (2012) and Russian Federation (2009).

[18] Article 2-1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[19] Macedonia (2008) and Chad (2009).

[20] Table of Contents - Annual Report 2005, http://www.cidh.org/annualrep/2005eng/toc.htm (last visited Aug 19, 2018); Tercer Informe sobre la Situación de los Derechos Humanos en Paraguay 2001, http://www.cidh.org/countryrep/Paraguay01sp/indice.htm (last visited Aug 19, 2018).

[21] Tercer Informe sobre la Situación de los Derechos Humanos en Paraguay 2001, *supra* note 20.

human rights and why there is still an absence of case law acknowledging the fact that acts of corruption potentially violate human rights.

- Civil society has failed to raise this issue (other than inexpertly) either during examinations by UN committees or during inter-American litigation or in spaces for dialogue with the IACHR.
- Timidity of human rights bodies to speak out about the existence of acts of corruption, when there is no legal judgment at a national level to confirm its existence, that is, other than for judicial corruption.
- Civil society donors and human rights bodies have not seen it as a priority.
- As referred to above, before the end of the 1990s, there was no global consensus to speak of the need to fight corruption.

Since 2017, an awareness seems to have emerged within inter-American and universal human rights systems of the need to take a more systematic account of the impact of corruption on human rights. Since then, the IACHR has made this issue one of its priorities for action and analysis. Thus, the forum of the inter-American system, co-organized with the IACrtHR in December 2017[22] and December 2018,[23] which dealt particularly with the future of the inter-American system, included a panel on the link between corruption and human rights violation. The IACHR also issued two resolutions in 2017 and 2018 dealing with the links between corruption and human rights. The first[24] was in support of the Commission Against Impunity in Guatemala (CICIG). The second,[25] issued one month prior to the meeting of the General Assembly of the Organization of American States (OAS), where the central theme was the fight against corruption, recommended that OAS Member States should include the human rights dimension in public policy designed to tackle corruption. The recommendation drew attention to the links between human rights and the fight against corruption and stated:

> "Considering that corruption is a complex phenomenon that affects human rights in their entirety—civil, political, economic, social, cultural and environmental—as well as the right to development; weakens governance and democratic institutions, promotes impunity, undermines the rule of law and exacerbates inequality. [...]
>
> Dismayed because corruption prevails**, the actors involved establish structures that capture state entities**, through different criminal schemes, [...]
>
> Aware [...] That **under the inter-American legal framework, States have the duty to adopt legislative, administrative and other measures to guarantee the exercise of human rights against the violations and restrictions caused by the phenomenon of corruption**."

[22] Foro-Sidh, https://cidhoea.wixsite.com/foro-sidh (last visited 19 Aug. 2018).

[23] see the report on Venezuela CIDH, INSTITUCIONALIDAD DEMOCRÁTICA, ESTADO DE DERECHO Y DERECHOS HUMANOS EN VENEZUELA (2018), http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf.

[24] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RESOLUCIÓN 1/17 DERECHOS HUMANOS Y LUCHA CONTRA LA IMPUNIDAD Y LA CORRUPCIÓN (2017), http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-17-en.pdf.

[25] Inter-American Commission on Human Rights, RESOLUTION 1/18 CORRUPTION AND HUMAN RIGHTS (2018), http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-18-en.pdf.

Similarly, in 2018, the Center for Civil and Political Rights organized a seminar with leading experts on "Anti-corruption Strategies for UN Human Rights Treaty Bodies, Improving the Human Rights Dimension of the Fight Against Corruption."[26] The principal objective was to provide a forum to discuss further how the issue of corruption, in particular through the lens of victims of corruption, could be taken into consideration by UN human rights treaty bodies. Last, in June 2018, a consultation of experts held in Geneva brought together the IACHR executive secretariat and a range of United Nations experts to discuss "Good Practices on United Nations-system support to States in preventing and fighting against corruption, with a focus on human rights."

Since 2015, and especially 2017, we have clearly reached a turning-point, or at least the point where the UN and OAS human rights institutions and civil society are discussing the issue of how human rights can contribute to the fight against corruption. It is in this context that this paper seeks to develop the notion of state capture through corruption and then to reflect on how inter-American case law might chart the impact of this corruption on human rights.

III. State capture through corruption: developing the concept

The objective of this section is to contribute to the definition of the social sciences concept of State capture through corruption by examining recent examples from Latin America. As this concept is relatively new and little developed, it will first be distinguished from related concepts.

A. Existing concepts and definitions of Grand corruption, kleptocracy and State capture through corruption

International anti-corruption conventions do not give a definition of corruption. What these conventions do contain is a list of offences occasionally included under the explicit umbrella of the concept of corruption. The offences differ between conventions but always include bribery and embezzlement. The precise definition of corruption (even beyond the legal sphere) is subject to much debate. In this paper we do not engage in this debate. We acknowledge the fluidity inherent in the overarching concept of corruption at the international level and use the term corruption in accordance with the basic social science definition where corruption is the abuse of public or entrusted[27] power for private gain.[28] In the academic literature, this definition is often presented together with numerous typologies which lend greater precision. One of the most common is the distinction between grand corruption and petty corruption.

The standard example of petty corruption is the police officer who demands a bribe in return for not imposing a fine. The standard example of grand corruption is the embezzlement of

[26] OHCHR | Workshop on preventing and fighting against corruption, https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/WorkshopPreventingFightingAgainstCorruption.aspx (last visited 3 Nov. 2018).

[27] There is a debate, which we will not get into, as to whether it should be 'entrusted power,' thus including possible corruption in private relations, or 'public power.' This article deals here only with cases of corruption involving public agents, thus we hereafter refer to 'public power.'

[28] First formulated in 1931 as "Corruption is the misuse of public power for private gain." J.J. Senturia, Encyclopaedia of Social Sciences, Vol. VI 1967.

important amounts of public funds by a high-ranking public official or politician. Most definitions of these two notions base the distinction between grand and petty corruption on the amounts of private gain (i.e. scale) and/or on the public official corrupted (i.e. high level/low level). For example, Rose-Ackerman[29] defines grand corruption as high-level payments to government officials in the procurement process or as embezzling of State funds, and petty corruption as small payments to public officials that citizens hand over in the process of everyday public affairs.[30] Transparency International distinguishes between these two notions in terms of both their scale and impact.[31] The organization finds that grand corruption occurs when "A public official or other person deprives a particular social group or substantial part of the population or a State of a fundamental right; or causes the State or any of its people a loss greater than 100 times the annual minimum subsistence income of its people; as a result of bribery, embezzlement or other corruption offence." This paper argues that this definition of grand corruption is less useful for human rights entities, despite its mention of fundamental rights. State capture is an easier concept to leverage for vindicating rights.

The World Bank developed the concept of State capture at the beginning of the twenty-first century to evaluate the governance of Eastern European countries transitioning from communism. After 2005, it was only used sporadically by the World Bank.

The World Bank defined State capture as firms shaping the formation of the basic rules of the game (i.e. laws, rules, decrees and regulations) through illicit and non-transparent private payments to public officials and politicians[32] to obtain unjustified revenue from the State.[33] The World Bank contrasts this with administrative corruption, which it defines as private payments to public officials to distort the prescribed implementation of official rules and policies.[34] This classification, by distinguishing between State capture and administrative corruption, places the emphasis on the objective of corruption. In the case of State capture, the content of the rules of the game must be influenced, while for administrative corruption the application of those rules is distorted.

World Bank officials have made clear that although they focus solely on businesses, other actors can also be behind State capture.[35] They consider that executive, legislative and judicial

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[29] Susan Rose-Ackerman, Corruption and Government: Causes, Consequences and Reform (Second edition ed. 2016).

[30] See also Johann Lambsdorff, The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy (2007).

[31] Grand_Corruption_definition_with_explanation_19_August_2016_002_1.pdf.

[32] Joel S. Hellman, Geraint Jones and Daniel Kaufmann, Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition 6 (2000), http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-2444 (last visited 7 May 2018).

[33] JAMES ANDERSON ET AL., ANTICORRUPTION IN TRANSITION : A CONTRIBUTION TO THE POLICY DEBATE 1–0 xvi (2000), http://documents.worldbank.org/curated/en/825161468029662026/Anticorruption-in-transition-a-contribution-to-the-policy-debate (last visited May 22, 2018).

[34] Hellman, Jones and Kaufmann, *supra* note 32; James Anderson et al., Anticorruption in Transition: A Contribution to the Policy Debate 1–0 xvii (2000), http://documents.worldbank.org/curated/en/825161468029662026/Anticorruption-in-transition-a-contribution-to-the-policy-debate (last visited 22 May 2018) In this first document, the World Bank equates administrative corruption with petty corruption but it later explained that at the root of this form of corruption is public officials' discretion to grant selective exemptions, to prioritize the delivery of public services, or to discriminate in the application of rules and regulations. As scale is not the distinguishing criterion, administrative corruption seems to us wider than petty corruption.

[35] Hellman, Jones and Kauffman, *supra* note 32 in footnote 3.

power are equally likely to be captured and that the concept of State capture may be included in the wider one of grand corruption.[36]

Lastly, the World Bank explains that the definition of State capture is derived from the concept of regulatory capture, already well established in the economics literature: State regulatory agencies are said to be captured when they regulate businesses in accordance with the private interests of those regulated as opposed to the public interest for which they were established.[37] The economist George Stigler is acknowledged as having developed the concept regulatory capture in the field of economics.[38]

State capture, as defined by the World Bank, is a broader concept than regulatory capture in that it encompasses the formation of law, rules and decrees by a wider range of State institutions than simply regulatory agencies, i.e., the executive, the legislature and the judiciary. At the same time, it has a narrower definition in that it focuses exclusively on the illicit and non-transparent provision of private benefits to public officials to influence the formation of laws, regulations, decrees and other government policies to their own advantage.[39]

When this paper refers to State capture or State capture through corruption, it is referring to the same concept as that defined by the World Bank as State capture. It is important to make this clear as, in addition to the neighboring concept of regulatory capture, Transparency International and civil society often use the concept of State capture as encompassing both State capture through corruption and through other means. Transparency International thus explains in its glossary:

> "As such, state capture can broadly be understood as the disproportionate and unregulated influence of interest groups or decision-making processes, where special interest groups manage to bend state laws, policies and regulations through practices such as illicit contributions paid by private interests to political parties and for election campaigns, parliamentary vote-buying, buying of presidential decrees or court judgments, as well as through illegitimate lobbying and revolving door appointments. State capture can also arise from the more subtle close alignment of interests between specific business and political elites through family ties, friendship and the intertwined ownership of economic assets."[40]

State capture through corruption must also be distinguished from the notion of kleptocracy. Kleptocracy comes from the Greek *klepto* meaning to steal and *cratie* meaning authority. It is used to refer to a political system founded entirely on the corruption of a leader or group of leaders. The first mention of the term in its current accepted form seems to originate in Stanislav Andreski's 1966 work *Parasitism and Subversion: The Case of Latin America*, in which he called it a "self-explanatory neologism." Subsequently, in his 1968 book *The African Predicament*, he described a system where "the ruling classes of the recently

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[36] Hellman et al., *supra* note 3 in 7.

[37] ANDERSON ET AL., *supra* note 33 at 3.

[38] DANIEL P. CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (2014).

[39] ANDERSON ET AL., *supra* note 37 in 18.

[40] Transparency International, *State capture an overview* 8 (2014).

independent ex-colonies had little if any loyalty to the countries for which they worked, instead prioritizing ties to their tribes or families. [41][...] Fabulous sums were obtained for granting concessions to foreign companies, and fortunes were made from sales of lands belonging to the state," he wrote. More recently, Rose-Ackerman[42] categorized highly corrupt States under four types based on economic analysis and political economics, stressing the differences in opportunities and bargaining power. The nature of corruption depends not only on the organization of government but also on the organization and power of private actors. For Rose-Ackerman, the critical issue is how much bargaining power the government and the private sector have in dealing with one another. The four categories are: 1) kleptocracy, 2) bilateral monopolies, 3) mafia-dominated states and 4) competitive bribery. In short, when speaking of kleptocracy, she refers solely to dictatorships and distinguishes between the strong kleptocrat, who runs a brutal but efficient state limited only by his or her own ability to make credible commitments, and the weak kleptocrat, who runs an intrusive and inefficient State organized to extract bribes from the population and the business community.[43]

This paper argues that three elements differentiate the concept of State capture through corruption from the notion of kleptocracy. Firstly, while kleptocracy is used to describe dictatorial regimes, State capture through corruption refers to democratic albeit dysfunctional regimes. Secondly, the notion can also be used when only a structure of the State is captured, which is not the case with a kleptocracy. Thirdly, the notion of kleptocracy focuses more on the leader or leaders who accumulate wealth by plundering the State, while State capture concentrates particularly on third parties who succeed in capturing part of the State. The line between the two notions may however be blurred, and one may imagine a state where many structures are captured by the same kleptocratic elites, thereby becoming a kleptocracy.

A typology that differentiates between the concepts of state capture through corruption and administrative or petty corruption should have a greater presence in social sciences and in debates about corruption and human rights. It seems more useful for human rights analysis than, for example, the typology based on petty and grand corruption. Firstly, because for State capture through corruption, the elements of gravity come not from the importance of the amount of money involved in the corruption or how high in the hierarchy is the person corrupted, but from a precise impact: the capture of a state structure. This also points to one of the possible links between corruption and human rights: the impact corruption has on the functioning of the State and, in some cases on the obligation of the State to guarantee the full and free enjoyment of human rights that belong to citizens. Secondly, the measurement of capture and its description gives a more detailed view of the organization and responsibilities not only for the facts of corruption but also for the capture of the state or a structure of it. Finally, the concept of State capture through corruption is also useful to distinguish between systematic (organized) corruption (which may lead to State capture) and widespread (uncoordinated) corruption. Both have a negative impact on the functioning of the State but this distinction may help refine public policies against those phenomena and accountability strategies.

We will examine examples of state capture through corruption in Latin American to develop the current definition.

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[41] As explained in Oliver Bullough, *The Dark Side Of Globalization*, 29 JOURNAL OF DEMOCRACY 25–38 (2018).

[42] ROSE-ACKERMAN, *supra* note 31 in chapter 8.

[43] *Id.* at 282. When describing kleptocracies, Rose-Ackerman gives the examples of the following dictatorships: Alfredo Stroessner in Paraguay 1954-1989, Mobutu Sese Seko in Zaire 1965-1997, Jean-Claude Duvalier in Haiti 1957-1986, Hosni Mubarak in Egypt 1981 and Zine El Abidine Ben Ali in Tunisia 1987-2011.

Case 1: Corruption and forced disappearances in Coahuila, Mexico

Coahuila is one of the five northern Mexican states bordering the United States and, as such, is an important and contested zone for criminal organizations involved in trafficking activities.

In 2008, the Gulf Cartel entered the scene with their armed branch known as the Zetas in order to lay claim to the territory of Coahuila.[44] Soon after the Zetas became a cartel of their own. The Zetas comprised a group of army deserters who had been trained in counter-insurgency tactics for use against the Zapatista uprising. They adopted a strategy designed to eliminate their perceived enemy and display their violence—a method that had not previously been used by criminal groups in Mexico. This method became the hallmark of the Zetas' actions and transformed them into the most violent group in the country.[45] To the Zetas, the enemy was any member of another organized crime group or drug-trafficking group that disputed their territorial control. Anyone could be considered their enemy, including those who did not collaborate with the Zetas' activities and any innocent person whose disappearance could contribute to reinforcing their control.[46] The Zetas' strategy was also to take control of institutions by corrupting municipalities, their police, the government of Coahuila, the security forces and the judiciary.[47]

In trials in San Antonio, Austin and Del Rio in Texas, testimonies against members of the Zetas have demonstrated that the whole chain of public forces from the state of Coahuila supported this criminal group in exchange for money.[48] High-level government, security and judicial officials profited from millions of dollars in return for helping or allowing the Zetas to commit their crimes without being prosecuted. Low-level security forces worked for the Zetas, and some formed part of their hierarchy receiving monthly salaries from the cartel.[49]

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[44] Aguayo Quezada Sergio, EN EL DESAMPARO. LOS ZETAS, EL ESTADO, LA SOCIEDAD Y LAS VÍCTIMAS DE SAN FERNANDO, TAMAULIPAS (2010), Y ALLENDE, COAHUILA (2011) 11–14, http://eneldesamparo.colmex.mx/ (last visited Feb 21, 2018). La batalla de Torreón - El Diario de Coahuila, http://www.eldiariodecoahuila.com.mx/locales/2008/2/24/batalla-torreon-88075.html (last visited 21 Feb. 2018).

[45] Jan Martínez Ahrens, *Silencio, aquí se mata*, EL PAÍS, 8 June 2016, https://elpais.com/internacional/2014/07/05/actualidad/1404594964_269006.html (last visited 21 Feb. 2018).

[46] INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, CENTRO DIOCESANO PARA LOS DERECHOS HUMANOS FRAY JUAN DE LARIOS, FAMILIAS UNIDAS PARA NUESTROS DESAPARECIDOS, MEXICO, COAHUILA: ONGOING CRIMES AGAINST HUMANITY 72 (2017), https://www.fidh.org/IMG/pdf/angmexico_coahuila_ongoing_crimes_against_humanity_fidh-final_a_revisar-1.pdf.

[47] El dominio del miedo | Nexos, https://www.nexos.com.mx/?p=21671 (last visited 21 Feb. 2018). See also, Guillermo Vázquez Del Mercado, "Los Zetas", available at: http://research.ridgway.pitt.edu/wpcontent/uploads/2012/05/LosZetas PROFILEFINAL.pdf , p. 3. Regarding the Zetas' objective of obtaining territorial control; also see the report, "Atrocidades Innegables. Confrontando crímenes de lesa humanidad en México", The Open Society Foundation (OSF), 2016 pp. 97-98. Available at: https://www.opensocietyfoundations.org/sites/default/files/undeniable-atrocities-esp-20160602.pdf.

[48] CONTROL...OVER THE ENTIRE STATE OF COAHUILA, AN ANALYSIS OF TESTIMONIES IN TRIALS AGAINST ZETA MEMBERS IN SAN ANTONIO, AUSTIN AND DEL RIO, TEXAS, (2017), https://law.utexas.edu/wp-content/uploads/sites/11/2017/11/2017-HRC-coahuilareport-EN.pdf.

[49] *Id.*

Between 2009 and 2016, 1,886 persons disappeared in Coahuila.[50] Most of the disappearances that occurred between 2009 and 2011 had the same *modus operandi*: they began with arbitrary detentions by state forces, without any judicial order or warrant, and led to persons being handed to the Zetas and never seen again.[51] Also, between 2009 and 2012, the prison of Piedras Negras became a center of operation for the Zetas, in addition to operating as a detention facility. The Zetas took control of the prison and brought at least 150 people to this facility, where they would dismember the individuals and burn or dissolve them in steel tanks. This could not have happened without cooperation from the authorities.[52]

Another emblematic case is referred to as the "Allende Massacre." In March 2011, the Zetas destroyed 30 houses. They abducted between 60 and 300 persons and put them into trucks in broad daylight with the cooperation of the local authorities.[53] The victims never reappeared.

Case 2: Nicaragua, the concession awarded to Wang Jing[54] for several megaprojects

In 2013, the Chinese entrepreneur, Wang Jing, through a network of 15 shell companies he owned, obtained a rare multiple concession agreement with the Nicaraguan government. This concession agreement allowed for the development and operation of different megaprojects including canals, railways, an oil pipeline, deep-water ports, free trade zones, airports and a hydroelectric plant, with unrestricted rights for at least 116 years over priceless land, territories and natural resources, including majestic Lake Nicaragua (Cocibolca), Central America's primary freshwater reserve. The absence of competitive tendering, the inexperience of the investor who was awarded the concession agreement, in conjunction with the leonine character of the contracts that were signed with the Nicaraguan State and the existence and indirect involvement of a web of at least 15 shell companies (registered in Nicaragua, the Cayman Islands, the Netherlands, Hong Kong and Beijing) all point to the possibility of a corrupt scheme centered on the canal concession agreement. According to the Executive Summary of the Environmental and Social Impact Study released by the HKND Group, at the time of approval, the project was estimated to cost $50 billion.[55]

The HKND Group obtained the vote of a special legal framework created by Law 840 and executed different agreements between the various companies and the Nicaraguan

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[50] MÉXICO, ASESINATOS, DESAPARICIONES Y TORTURA, (2017), https://www.fidh.org/es/region/americas/mexico/audiencia-cidh-sobre-crimenes-de-lesa-humanidad-en-mexico.

[51] INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, CENTRO DIOCESANO PARA LOS DERECHOS HUMANOS FRAY JUAN DE LARIOS, FAMILIAS UNIDAS PARA NUESTROS DESAPARECIDOS, *supra* note 46 at 40–60.

[52] SERGIO AGUAYO, JACOBO DAYÁN, EL YUGO ZETA, NORTE DE COAHUILA 2010-2011 (2017).

[53] INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, CENTRO DIOCESANO PARA LOS DERECHOS HUMANOS FRAY JUAN DE LARIOS, FAMILIAS UNIDAS PARA NUESTROS DESAPARECIDOS, *supra* note 46. How the U.S. Triggered a Massacre in Mexico, , https://www.nationalgeographic.com/magazine/2017/07/making-of-a-massacre-mexico/ (last visited Feb 21, 2018). According to these documents, the mayor, governor, police and fire service all knew this was happening and did nothing to prevent it or to condemn it afterwards.

[54] According to the documents available, Wang Jing is the sole or main shareholder (and other minority shareholders appear to comply only with the commercial regulations of the country of registration) in the 15 companies relating to the canal concession. Henceforth we will refer to 'the investor', meaning any company affiliated to Wang Jing or Wang Jing himself.

[55] Canal de Nicaragua Estudio de Impacto Ambiental y Social ERM, http://hknd-group.com/portal.php?mod=list&catid=46.

government that governed the concession.[56] The legal framework excludes the application of the constitutional and legal guarantees that protect the interests of the Nicaraguan State and its citizens, including in respect to property rights, water concessions and free, prior and informed consent. This framework facilitates massive land grabs by the investor. One clear example of possible violations is the expropriation legislation that would apply to areas chosen by the investor for carrying out any one of the sub-projects. Law 840 explicitly excludes the guarantees contained in the 1976 expropriation law. It denies any right to appeal against the expropriation decision and provides for a derisory level of compensation.

Since 2013, the State has criminalized several leaders opposed to the construction of the inter-oceanic canal or to the whole concession agreement. Violent repression, criminal charges, arrest warrants and public vilification have been used to delegitimize communities' mobilizations against the canal.[57] The State also intensified the police and military presence in the affected areas, with checkpoints, searches and other measures reinforcing the continual presence of armed government agents. A migration policy was also put in place permitting the expulsion of foreign nationals with any links to the area affected by the concession, whether they were researchers, journalists or human rights campaigners.[58]

Since April 2018, following an important demonstration unrelated to the canal project, this same repressive policy has been extended to the entire territory and State violence has dramatically intensified. In three months, 300 demonstrators have been shot dead by soldiers or militias while more than 500 people are arbitrarily detained.[59] Many mark April 2018 as the date when the State of Nicaragua became a dictatorship.[60]

Today, the concession agreement to the HKND Group is still valid, even though the canal will probably never be built.

Case 3: **Corruption and the diverting of funds in the Línea case in Guatemala**

This case relates to a corrupt network that facilitated a multimillion-dollar customs fraud. It led to the 2015 indictment of Guatemala's former Vice-president Roxana Baldetti, former President Otto Pérez Molina and more than 20 other persons for the crimes of passive bribery, conspiracy and customs fraud. An outraged public forced the resignation and indictment of the President and Vice-President of Guatemala after months of demonstrations. Indeed, from April to August 2015, a very diverse population including groups not usually present in demonstrations, ranging from the middle class, working class, families, trade unions, indigenous and active civil society took the streets, angered by the government corruption that

[56] http://legislacion.asamblea.gob.ni/SILEG/Gacetas.nsf/5eea6480fc3d3d90062576e300504635/f1ecd8f640b8e6ce06257b8f005bae22/$FILE/Ley%20No.%20840.pdf

[57] MÕNICA LÓPEZ BALTONADO, VILMA NUÑEZ, JIMENA REYES, NICARAGUA : GOVERNMENT MUST REVOKE THE INTEROCEANIC CANAL CONCESSION 57 (2016), https://www.fidh.org/en/region/americas/nicaragua/nicaragua-government-must-revoke-the-interoceanic-canal-concession (last visited Jun 24, 2019).

[58] http://confidencial.com.ni/ortega-ha-expulsado-de-nicaragua-a-25-extranjeros/

[59] MESENI, NICARAGUA: GROSS HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF SOCIAL PROTESTS (2018), https://www.oas.org/en/iachr/reports/pdfs/Nicaragua2018-en.pdf.

[60] Texto íntegro de la carta de renuncia de Rafael Solís, NICARAGUA INVESTIGA (2019), https://www.nicaraguainvestiga.com/nicaragua-investiga-reproduce-de-manera-integra-la-carta-de-renuncia-de-rafael-solis/ (last visited Jan 17, 2019).

was made public through a judicial investigation from the International Commission Against Impunity in Guatemala's (CICIG). [61]

In the corruption network, corrupted customs staff would reduce the amount of the tariffs paid by companies calling a special phone number in exchange for bribes.[62] Importers with goods being processed through the fairly long bureaucratic process of customs taxes would be able to use this scheme. The corruption network would offer an express service: a notable decrease in taxes in exchange for a bribe. "The Cola," they called it. The importers had to call a telephone number, "The Linea," to use this service.

The leaders of the network would share the money. Middle and lower management took 39% of the profits, and the high commands, composed by the former president, Otto Pérez Molina, the former vice president, Roxana Baldetti, the private secretary of the Vice Presidency, Juan Carlos Monzón, and the head of the external structure, Estuardo González, took 61% of the profits.[63] The network earned approximately $300,000 every week.

In the indictment of Otto Pérez Molina, the judge stressed that in the Superintendency of Tax Administration (SAT) an internal and an external structure was formed, composed of approximately 50 people whose objective was to monetarily benefit through customs processes by undervaluing merchandise and facilitating the entry of containers. The judge added that the purpose of this structure was to control the SAT and its dependencies, which included technicians, heads of customs, human resources and the Superintendent of Customs, so that the members of the corrupt network obtained a percentage of the money.[64]

The judge listed evidence describing an organizational chart of the corrupt network within the SAT, distribution tables for the bribes, a memorandum addressed to former President Otto Pérez Molina, and an intercepted conversation where the former president asked personally to expedite the immediate change of the head of human resources of the SAT. In this latter piece of evidence, the President was constantly referred to as "the one," the "high sir," or the "owner of the hacienda."[65]

B. How these examples contribute to the notion of State capture through corruption

The three cases reinforce Hellman's definition of State capture through corruption. They also help articulate additional criteria for identifying certain practices as State capture through corruption.

Who is behind the capture of the State structure: Hellman specifies that actors other than companies may be behind the capture of State structures. In the three examples, these actors

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[61] Azam Ahmed & Elisabeth Malkin, *Otto Pérez Molina of Guatemala Is Jailed Hours After Resigning Presidency*, THE NEW YORK TIMES, September 3, 2015, https://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html (last visited Jun 25, 2019); A PRISIÓN PREVENTIVA EX PRESIDENTE OTTO PÉREZ MOLINA, CICIG (2015), https://www.cicig.org/casos/a-prision-preventiva-ex-presidente-otto-perez-molina/ (last visited May 17, 2019).

[62] Caso la línea: A juicio expresidente y exvicepresidenta, CICIG (2017), https://www.cicig.org/casos/caso-la-linea-a-juicio-expresidente-y-exvicepresidenta/ (last visited Jun 25, 2019).

[63] A PRISIÓN PREVENTIVA EX PRESIDENTE OTTO PÉREZ MOLINA, *supra* note 61.

[64] Otto Pérez Molina o la resignación del expresidente, PLAZA PÚBLICA, http://www.plazapublica.com.gt/content/otto-perez-molina-o-la-resignacion-del-expresidente (last visited May 15, 2019).

[65] A PRISIÓN PREVENTIVA EX PRESIDENTE OTTO PÉREZ MOLINA, *supra* note 55.

are the Zetas' cartel, the HKND Group and the Guatemalan President and Vice-president and customs staff. The actors constitute organized crime, kleptocratic elites and companies.

How was the State capture through corruption effected: In answer to the question how, one needs to distinguish between the following three elements: the corruption facts, the capture and the link between the first and the second.

Hellman's original definition refers to only one category of corruption—namely illicit and non-transparent payments to public officials and politicians.

The three Latin American examples offer a broader range of acts of corruption. There are the monthly or one-off payments to the police and governor respectively in the Mexican example, and the embezzlement of public funds in the Guatemalan example. In contrast, in the Nicaraguan example, as often happens in corruption cases, there are elements that point to the possible existence of acts of corruption but no proof, and thus, no information on the nature of the possible corruption.

This paper suggests that the definition of State capture through corruption should include the embezzlement of public funds and any other offence mentioned in international anti-corruption conventions, in addition to illicit and non-transparent payments to public officials and politicians (as contained in Hellman's original definition).

Besides the acts constituting criminal offences, the existence of a covert, coordinated network is at the heart of the notion of capture; this also distinguishes it from generalized, uncoordinated corruption, which can weaken a State or a public structure (like a prison where most guards are corrupted for their own interest, for example) but is different from capture. However, the original definition does not mention the existence of a network; instead, it refers to illicit and non-transparent private payments (i.e. to the corruption offences) and capture is only characterized by the effect or aim of corruption.

The existence of a covert, coordinated network is an important part of the process of State capture through corruption, and an element that should be added to the prevailing definition. This covert network can, but does not have to be, an element of the corruption offence, i.e. the network may concern only the process of capture.

The Guatemalan case involved a secret network of at least 20 people, each of whom played a part in the embezzlement and the capture. In the Coahuila example, the cartel members judged in Texas have given information on how the coordination between State representatives and the Zeta cartel would function, describing in particular the distribution of bribes and the contribution or inaction of the police during the commission of the crimes.[66]

While we have very little information as to how the Nicaraguan case transpired, we do know that the executive power made the main decision to grant the concession and Ortega's son led the negotiation with the HKND Group. A legislative assembly dominated by Orteguists also voted on Law 840, and the Supreme Court rejected all the actions challenging both the law and the concession. In 2016, it seemed that the HKND Group was looking to capture various State structures probably through corruption in favor of the Orteguist, in order to obtain

[66] Caso la línea, *supra* note 62.

favorable conditions for revenue and control over key territories. In early 2019,[67] it seemed that the Ortega Murillo network(s) had become a dictatorial regime.[68] It is as if, in 2016, we were at the frontier between State capture through corruption and kleptocracy with an operating network functioning well beyond the HKND concession and, now, we are in a clear kleptocracy.

What the corruption is for: The original definition considers that State capture through corruption is about being able to decisively influence how the rules of the game are formulated to obtain unjustified revenue from the State. However, State capture through corruption goes beyond this. For example, in cases of State capture by organized crime, as in the case of Coahuila, the ultimate objective is not to extract revenue from the State but from a criminal activity. The corruption buys the complicity of the State in the commission of crimes and the control over a territory, which in principle the State should exert. Here capture seeks to ensure the State acts in the interests of a third-party captor, through its complicity in the commission of crimes in order for the captor(s) to obtain money illegally.

More generally, the aim of State capture through corruption is durably deflecting the State or a structure of the State from its objective of acting in the general interest. Most acts of corruption are intended to deflect state action from the public interest. One of the elements that distinguishes State capture through corruption is the durability of this deviation or the lasting impact on the general interest that State capture will have. This is an element that expresses the capture and a clear feature in the examples of Coahuila, Guatemala and Nicaragua.

The exact definition of 'general interest' is subject to much debate; however, it does not need definition when the State is making individuals disappear, diverting customs duties on a massive scale or awarding a leonine contract that harms State interests. These are clearly acts contrary to the general interest.

Suggesting a new definition of State capture through corruption

The three Latin American examples demonstrate gaps in Hellman's original definition of State capture through corruption, thus four elements could be considered to define the phenomena:

1. Owing to acts of corruption (bribery, embezzlement or any offence defined in the international conventions against corruption or any act of abuse of public or entrusted power for private gain);

2. committed through a covert coordination at least among State representatives who benefit from the acts of corruption;

3. captor(s) decisively influence the formulation of the State's rules of the game to ensure them unjustified revenue from the State or make the State complicit in criminal activities in order for the captor(s) to obtain money illegally; and

[67] EUROPEAN PARLIAMENT RESOLUTION OF 14 MARCH 2019 ON THE SITUATION IN NICARAGUA (2019/2615(RSP), European Parliament resolution of 14 March 2019 on the situation in Nicaragua (2019/2615(RSP) (last visited Apr 3, 2019).

[68] See for example the letter of resignation of Rafael Solis, Judge from the Supreme Court of Nicaragua Texto íntegro de la carta de renuncia de Rafael Solís, *supra* note 60.

4. these three elements result in a State structure or the whole State diverting durably or through a durable impact from the general interest.

These elements can be used to identify the possible existence of State capture. However, more precise instruments of measurement of this capture or the degree of this capture are needed. Indeed, just as the notion of State capture through corruption has not been much studied by scholars, the question of methodology and criteria for measuring the degree of capture of a structure of a State or the State itself is even more underdeveloped. The World Bank itself recognized the limitations of the business survey method it had used in the early 2000s.[69]

Some scholars have presented methods for identifying and measuring State capture through corruption that concentrate on a specific category of captor.[70] For example, Fazekas and Tóth developed an analytical framework for gauging state capture based on microlevel contractual networks in public procurement analyzing the likelihood of corruption occurring in a given tender by screening a wide range of microlevel "red flags" such as a short deadline for submitting bids, only one candidate in a competition, eligibility criteria, change to the bidding conditions, etc.[71] The development of methods for assessing or measuring the capture of a state structure through corruption that focuses on sectoral or captors through a "red flags" approach would be extremely useful to the fight against corruption. Although a more comprehensive assessment such as one put forward by Sarah Chayes, who analyses sophisticated corruption networks that cross sectoral and national boundaries in their drive to maximize returns for their members, also constitute an interesting path forward.[72] As demonstrated in the next section, inter-American case law on this issue could also be useful to describe the processes and its impact on persons and on the human rights obligations of the State.

IV. The role of inter-American litigation in the fight against State capture through corruption

This third section seeks to show how acts of corruption and particularly systematic corruption involving State officials or representatives, which has the effect of diverting the State or a structure of the State away from their primary obligation to guarantee the free and full exercise of human rights can entail the State's responsibility under inter-American human rights law. It begins by describing the current inter-American case law and the position of academia on the link between corruption and human rights. Then, it considers a way forward for the Inter-American Court for Human Rights (IACrtHR) to contribute to the fight against corruption.

A preliminary remark concerning the vocabulary of this section: in the second section of this paper it is suggested that it would be useful for social sciences to further develop the concept of State capture through corruption and the means to measure it. In this third section, the terms corruption or systematic corruption are used, when in fact referring to similar facts that

[69] HELLMAN, JONES, AND KAUFMANN, *supra* note 32 at 3.

[70] LA CAPTURA Y RECONFIGURACIÓN COOPTADA DEL ESTADO EN COLOMBIA, (Luis Jorge Garay Salamanca ed., 1. ed ed. 2008); Mihály Fazekas & István János Tóth, *From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary*, 69 POLITICAL RESEARCH QUARTERLY 320–334 (2016).

[71] Fazekas and Tóth, *supra* note 70 This paper develops a new conceptual and analytical framework for gauging state capture based on microlevel contractual networks in public procurement. .

[72] https://carnegieendowment.org/files/Chayes_Corruption_Final_updated.pdf; she does not speak of state capture but of corrupted networks.

we earlier called State capture through corruption. Indeed, this section argues that the Court, could contribute to the description of the processes of State capture through corruption using case law on the duty to prevent human rights violations; the Court would not need to demonstrate the existence of State capture through corruption to be able to engage in the State's responsibility for breach of its duty to prevent human rights violations.

A. The current inter-American case law and legal doctrine

A significant proportion of academic studies of corruption and human rights has focused on the fact that corruption has a negative impact on human rights. This has fed into and been supplemented by the positions adopted by the United Nations Human Rights Council.

Scholars have also addressed the need to respect human rights in legal proceedings linked to corruption, anti-corruption policies and the protection of whistle blowers and other anti-corruption actors. Some scholars have examined whether a human right to live free from corruption exists, whether acts of corruption can constitute crimes against humanity under the terms of the Rome Statute and whether an international court to try cases of corruption should be created.[73] Instead of focusing on these issues, this section examines the line of inquiry taken by Bacio Terracino and Nash Rojas regarding hard law connections between corruption and human rights.

In *Hard law connections between corruption and human rights*[74] (centered particularly on the universal human rights system) and in *Corrupcion y derechos humanos : una mirada desde la jurisprudencia de la Corte interamericana de derechos humanos*[75] (centered on IACrtHR case law), Bacio and Nash, respectively, examine the circumstances in which facts of corruption can constitute direct or indirect violations of human rights and which rights are susceptible to violation.[76] In doing so, they provide concrete examples of acts of corruption capable of violating human rights either directly or as a material factor in the chain of events leading to the violation. In the words of Terracino:

> "Corrupt practices may constitute a violation of human rights in and of themselves. As evidenced through several examples, corruption is clearly and directly linked to a violation of human rights when the corrupt act is expressly used as a means to violate the right, or when the corrupt practice

[73] Ramasastry, Anita, *Is There a Right to Be Free from Corruption?* 37.

[74] Bacio Terracino, Julio, *HARD LAW CONNECTIONS BETWEEN CORRUPTION AND HUMAN RIGHTS*, Working Paper INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 57 (2007).

[75] 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).

[76] *supra* note 65; PEDRO AGUILÓ BASCUÑÁN AND MARÍA LUISA BASCUR CAMPOS, *supra* note 66, Bacio Terracino analyzes in particular examples involving the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, to liberty and security, to liberty of movement, to a fair trial, to an effective remedy, to freedom of opinion, expression and information, to freedom of thought, conscience, religion, and belief, to privacy and family life, of the child, to work and to social security, to freedom of association and political participation, of minorities, to food, to water, to adequate housing, to health , to education, to self-determination, to equality and non-discrimination. And Nash Rojas concentrates on examples of the rights to life, to personal integrity, to fair trail, access to justice and to effective remedy, to indigenous common property, to self-determination, to equality and non-discrimination.

> is an essential factor in the chain of events that eventually violates the human right."[77]

The examples used by these two authors relate mostly to administrative or petty corruption, such as in a case where police arrest individuals with the sole purpose of obtaining bribes. Here corruption is the act that violates the right to liberty and security.[78] Nash also mentions widespread corruption within an institution (e.g., a prison). Both authors then elaborate on the utility of linking corruption and the principle of equality and non-discrimination. For Bacio:

> "The utility of linking corruption with the rights to equality and non-discrimination in the fight against corruption is paramount. Inequality and discrimination are almost a necessary consequence of corruption. Corrupt practices are usually highly secretive and can be extremely difficult to discover and prove. Therefore, if corruption is suspected but unable to be proven, the next best option to hold accountable the perpetrator is to focus on the consequences of the suspected corrupt act and highlight the violation of the right to equality and the right to non-discrimination. While correlating the preferential treatment with the acts of bribery might result impossible to prove, if patients under equal situation are treated differently and such difference in treatment does not have a reasonable and objective justification, there clearly exists a violation of the right to equality and the right to non-discrimination."[79]

Nash also emphasizes the link between the phenomena of structural discrimination highlighted by the Inter-American Court in recent years and corruption that is often widespread or systematic in Latin America.[80] For him, these two phenomena are mutually reinforcing and the legal mechanisms used by the Inter-American Court to combat this discrimination on the basis of human rights could highlight a potential human rights basis for the fight against systematic (or generalized) corruption.[81]

The Inter-American Court referred to corruption in eight cases but never explicitly considered that facts of corruption constituted by themselves alone are a violation of an obligation or a right derived from the American Convention on Human Rights.

In three cases, the plaintiffs, the Inter-American Court, or both have explicitly denounced corruption, whether in terms of specific acts or in context but without requesting those facts to be considered as the main cause of a human right violation; thus, the Court has not made any decisions about them.[82]

In two other cases, the Court explicitly considered corrupt acts or corrupt contexts as part of facts proven that contributed to a human rights violation. In the case *Instituto de Reeducación del Menor v. Paraguay,* the Court determined that the Republic of Paraguay had violated the

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[77] *supra* note 74.
[78] *supra* note 54 at 20.
[79] *supra* note 65 at 15.
[80] PEDRO AGUILÓ BASCUÑÁN AND MARÍA LUISA BASCUR CAMPOS, *supra* note 75 at 69.
[81] *Id.* at 111.
[82] Caso Tibi v. Ecuador, (2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_114_esp.pdf; Case Montero Aranguren y otros (Retén de Catia) Vs. Venezuela, (2006); Caso Comunidad Indígena Sawhoyamaxa v. Paraguay, (2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_esp2.pdf.

right to life and physical integrity of inmates, among other issues, because they were made to live permanently in inhumane and degrading conditions, exposing them to a climate of violence, insecurity, abuse, corruption, distrust and promiscuity.[83] In the case *del Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, the Court considered that the Republic of Ecuador violated the right to collective property of the Kichwa de Sarayaku people by not conducting a free, ex-ante and informed consultation before starting actions of oil exploration and by delegating the consultation to a petroleum company. When concluding that the consultation was not free, the Court took the following into account: the consultation was delegated[84] to the company without independent monitoring, leaving room for acts of corruption, and thus to the violation of the rights to property and cultural integrity of the indigenous community.[85]

The Court has also at least twice ordered the State to investigate facts of corruption. In 2015, the Court issued a wide-ranging resolution related to a request for precautionary measures on the situation of the prison of Curado.[86] It included an order that the State of Brazil diligently investigate the complaints of corruption and arms trafficking on the part of staff and prisoners and inform the Court with respect to this.

In the case *Forneron e Hija v. Argentina*, concerning the adoption of a girl despite the opposition of her biological father, the Court did not consider whether there was enough proof of the existence of a payment for this adoption and/or of a case of child trafficking. [87] It did, however, request the State explain what it had done to investigate those issues. Following the lack of response from the State when setting the reparation, the Court ordered the State to investigate disciplinarily, administratively or criminally the possible involvement in illegal activities by the different actors intervening in the adoption.

B. Addressing the gap in the legal framework

As mentioned, the hard law link between corruption facts and human rights has not been widely analyzed. The main issue at stake is the question of the causal link between facts of corruption and human rights. We consider that there are at least three ways to make a hard law link between facts of corruption and human rights. The first one was detailed by Bacio[88] and Nash:[89] As already mentioned, they have taken most substantive human rights present respectively in the International Covenant on Civil and Political Rights, in the International Covenant on Economic, Social and Cultural Rights and in the ACHR, and have given concrete examples where corruption facts violate human rights i.e. examples of direct and immediate causal link between corruption facts and human rights violations. The second one that we will not address here is: whether corruption facts can be said to breach—in cases of major embezzlement for example—the obligation to fulfill social and economic rights. And a third one explored in this paper: where corruption facts fueled the act(s) that directly violate a right.

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[83] Case "Instituto de Reeducación del Menor" v. Paraguay, (2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_112_esp.pdf par. 170, 171.

[84] The Court also acknowledges that it is not certain that such delegation is compatible with the standards on consultation in the first place.

[85] Case del Pueblo Indígena Kichwa de Sarayaku v. Ecuador, (2012) par. 73,74,75,178,186,194,232.

[86] Resolucion Medidas Provisionales Respecto de Brasil Asunto del complejo Penitenciario de Curado, (2015), http://www.corteidh.or.cr/docs/medidas/curado_se_02_por.pdf par. 20.

[87] Forneron e hija v. Argentine, (2012), http://corteidh.or.cr/docs/casos/articulos/seriec_242_esp.pdf par. 125, 144, 172.

[88] , *supra* note 74.

[89] PEDRO AGUILÓ BASCUÑÁN AND MARÍA LUISA BASCUR CAMPOS, *supra* note 75.

This paper argues that in some of these cases, those corruption facts breach the duty to prevent human rights violations and that this could be used to address situations where corruption involves an organized network of State officials or representatives.

In the example of Coahuila, a local state in Mexico, a drug cartel has bribed members of regional public forces and the executive and judiciary powers to tolerate or collaborate in criminal activities. Among these crimes are hundreds of enforced disappearances committed by the police jointly with the drug cartel. In terms of a factual causal link, the acts of corruption described are a condition *sine qua non* of the State's contribution to the enforced disappearances. However, this is not an element necessary to demonstrate the existence of human rights violations constituting an enforced disappearance. Yet there is a legal loophole—a situation of impunity for corruption facts that are the factual cause of human right violations (here, as serious as enforced disappearances). This gap in the law is rendered more paradoxical because all Latin American States are legally committed to fighting corruption through the ratification of the Inter-American Convention to Combat Corruption and the UN Convention against Corruption. As we will see, the need to fill this gap does not mean that all cases of systematic corruption breach the duty to prevent human rights violations. The three examples explored in this paper show different causal links between corruption and potential human rights violations. The existence of this loophole or situation of impunity calls for the Inter-American Court of Human Rights to adapt the law to remedy it. The ability of the Court to adapt the scope of States' treaty-based human rights obligations to ensure they protect human rights holders in practice is a well-established principle.[90]

As mentioned, the Court referred to corruption in eight cases but never explicitly considered that facts of corruption in and of themselves are a violation of an obligation or a right derived from the American Convention on Human Rights. The Court, however, went one step further in February 2018, when it 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.[91] On this occasion, the Court detailed the acts of corruption in the section describing the proven facts—the subject of the Court's legal discussion.[92] The Court explicitly recognized organized corruption's negative impact on the enjoyment of human rights, even if it was not qualified as a breach of a human rights obligation:

> "240. In addition, the Court reiterates that these adoptions took place in the context in which institutional weakness and regulatory flexibility facilitated the formation of organized crime networks and structures dedicated to the business of irregular adoptions.
>
> 242. The Court recalls that States must adopt measures to prevent, punish and eradicate corruption effectively and efficiently. [...] The Court highlights that

[90] Case of the Pueblo Bello Massacre v. Colombia, para.116, 117 (2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf.

[91] INTER-AMERICAN COURT OF HUMAN RIGHTS, RAMÍREZ ESCOBAR Y OTROS V GUATEMALA (2018), http://www.corteidh.or.cr/docs/casos/articulos/seriec_351_esp.pdf.

[92] In fact, the State of Guatemala was, in this judgement among others, condemned for not having evaluated or taken any action to rule out the possibility that adoptions of the Ramirez brothers were generating undue economic benefits. This was done pursuant to art 21(d) of the Convention on the rights of the Child. Article 21 (d) states that the State must "Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;" https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

> 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 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." [93]

This *obiter dictum* expresses the Court's willingness to give greater importance to the role of corruption in human rights violations and in particular, to systematic corruption. This *obiter* 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 1.1 of the American Convention on Human Rights. This could be done through the duty to prevent human rights violations or even through the recognition of a special obligation to prevent corruption that could negatively impact human rights or cause a human rights violation.

C. Proposal for developing inter-American case law where corruption facts could constitute a breach of the obligation to guarantee human rights

The American Convention on Human Rights, like other human rights, simultaneously establishes individuals' rights and states' obligations. Thus, Article 1.1 of the Convention in its opening chapter on General Obligations provides for States Parties to undertake to respect, without discrimination, the rights and freedoms recognized within the Convention and to guarantee the full and free exercise of these by all people subject to their jurisdiction.[94]

Since its first decision, parallel to acknowledging the existence of human rights violations, case law has identified several specific obligations or duties derived from the general obligation to guarantee the full and free exercise of these rights and freedoms recognized within the Convention. It has thereby made the State an active guarantor of human rights by acknowledging, in special circumstances, those duties and their breach. Several authors have tried to systematize the circumstances in which the court has identified such duties. The Court seems to take into account the particular categories of victims and or the seriousness of the violation and or the patterns of violations. One of the effects of those duties is to include a legal analysis on the causes or effects of the human rights violations, such as the absence of public policy, the lack of proper investigation, sanction or of prevention of the human rights violations and its relation to the obligations of the state. [95]

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[93] Authors' translation

[94] AMERICAN CONVENTION ON HUMAN RIGHTS, ADOPTED AT THE INTER-AMERICAN SPECIALIZED CONFERENCE ON HUMAN RIGHTS, SAN JOSE, COSTA RICA, 22 NOVEMBER 1969, (1969), http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.ht (last visited Aug 25, 2018) Article 1.1 Obligation to Respect Rights states that: 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[95] EDUARDO FERRER MAC-GREGOR & CARLOS MARÍA PELAYO MÖLLER, *LAS OBLIGACIONES GENERALES DE LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS (Deber de respeto, garantía y adecuación de derecho interno)*, 7 172, 28–44 (2017).

The duty to prevent human rights violations is a special obligation, which is derived from the obligation to guarantee and is referred to in the first judgment issued by the Court:[96]

> "As a consequence of the obligation of guarantee, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. [97]
>
> 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."

This special obligation to prevent is an obligation of means, and requires States to take "*reasonable steps to prevent human rights violations.*"[98]

D. The obligation to prevent human right obligations, the risk created theory and corruption

This section articulates how the Inter-American Court for Human Rights could establish the responsibility of the State to address systematic corruption by proving that facts of corruption are inconsistent with its obligation to prevent human rights violations.

When human rights violations are committed by non-State actors, at one end of the spectrum of State responsibility is the doctrine of complicity; this establishes the direct responsibility of the State for actions of tolerance, acceptance or support of those violations. At the other end of the spectrum is when the State bears indirect responsibility for a breach of the obligation to guarantee, and in particular the specific duty, to prevent human rights violations. To establish the indirect State responsibility, the Court uses the doctrine of foreseeable and avoidable risk. This theory originated in the European system of the protection of human rights and its criteria. As explained by the Court, there are three components that must all be present: 1) the awareness of a situation of real and imminent danger; 2) the danger threatens a specific individual or group of individuals; and 3) reasonable possibilities of preventing or avoiding that danger.[99]

In these situations, the Court analyzes both the violation of substantive rights committed by non-State actors and the State's failure to prevent the human rights violation through criteria that establishes the existence of a foreseeable and avoidable risk of the violation.

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[96] Case of Velásquez-Rodríguez v. Honduras, para. 164-177 (1988), http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

[97] *Id.* at para.166.

[98] *Id.* at para. 174.

[99] Osman and Osman v. United Kingdom, Judgment, merits and just satisfaction, App no 23452/94, Case No 87/1997/871/1083, ECHR 1998, 116, http://opil.ouplaw.com/view/10.1093/law:ihrl/3148echr98.case.1/law-ihrl-3148echr98 (last visited Mar 7, 2019).[100] Case of Valle Jaramillo et al. v. Colombia, para.76-81 (2008), http://www.corteidh.or.cr/docs/casos/articulos/seriec_192_ing.pdf; Case of the Ituango Massacres v. Colombia, (2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf; CASE OF THE PUEBLO BELLO MASSACRE V. COLOMBIA, *supra* note 94; Case of the "Mapiripán Massacre" v. Colombia, (2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf.

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 create the risk of human right violations using the foreseeable and avoidable risk criteria.[100] It is what Victor Abramovitch calls the intermediate theory of the "doctrine of the risk created,"[101] where the State has, through public actions, norms, practices or policies, objectively created this risk. There is a strong analogy with the situation where the State, through the existence of a scheme of corruption within its structures, has created a foreseeable and avoidable risk of a human rights violation. Thus this "doctrine" could be used to establish the State responsibility for breach of its duty to prevent human rights violations in cases of corruption involving authorities, where that corruption has created a foreseeable and avoidable risk of a human right violation.

The analysis of the criteria to establish a breach of the obligation to prevent human rights violations would contribute to the description of facts of corruption and of their link with human rights violations and victims. This is the key issue of the hard law link between corruption facts and human rights violations or breach of obligations: the causal link between them.

Indeed, in situations dealing with a risk of human rights violations, the degree the State contributes in creating or maintaining the risk is a key criterion when evaluating whether the risk was avoidable and foreseeable.[102] Thus this analysis would encompass first proving the existence of corruption (and/or of a corrupted network within the State) that contributes to creating a risk for human rights violations of a specific individual or group of individuals, then the reasonable possibilities of preventing or avoiding that danger (the human rights violation). This type of analysis by the Court would articulate the link between corruption and a specific victim or group of victims of a human rights violation due or partly due to corruption. It would contribute to significantly developing the jurisprudence on what the State must do to prevent networks of corruption that cause human rights violations and to ensure that State structures are organized in keeping with its obligations as it has done for example for gender violence.[103]

This paper does not detail what a court ruling could say on what the State should have done to prevent the human rights violation and therefore to prevent the corruption that created a risk for violation. The main point is that through the acknowledgement of State responsibility for a breach of its duty to prevent human rights violations due to corruption, the court would indirectly set standards on this issue.

E. The obligation to prevent corruption

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[100] Case of Valle Jaramillo et al. v. Colombia, para.76-81 (2008), http://www.corteidh.or.cr/docs/casos/articulos/seriec_192_ing.pdf; Case of the Ituango Massacres v. Colombia, (2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf; CASE OF THE PUEBLO BELLO MASSACRE V. COLOMBIA, *supra* note 94; Case of the "Mapiripán Massacre" v. Colombia, (2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf.

[101] 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, https://anuariocdh.uchile.cl/index.php/ADH/article/view/11491.

[102] *Id.* at 176.

[103] Since the Cotton-field case the Court has constructed a broad and varied legal framework through an innovative interpretation of classical rights and the application of the Convention of Belém do Pará on the eradication of violence against women in order to protect women from human rights violations see LAURENCE BURGORGUE-LARSEN, AMAYA UBEDA DE TORRES & ROSALIND GREENSTEIN, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 440 (2011).

As stated in its *obiter dictum* by the Inter-American Court for Human Rights in *Ramirez Escobar v. Guatemala*, States must adopt measures to prevent, punish and eradicate corruption effectively and efficiently. It is the first time an international court acknowledged the existence of this obligation, even if implicitly, within the *corpus iuris*. This is the first contribution of the Court toward standard setting in the fight against corruption and toward bridging the legal obligation of the Inter-American Convention Against Corruption with the American Convention on Human Rights.

Unfortunately, the Court does not enter into great detail as to the origin of the obligation to adopt measures to prevent, punish and eradicate corruption effectively and efficiently except by mentioning the preamble of the Inter-American Convention against Corruption. That said, the obligation to adopt measures to prevent, punish and eradicate corruption effectively and efficiently could reinforce the imperativeness of the obligation to prevent human rights violations when they are caused or partly due to corruption (that should also have been prevented). At this point, the Court could go further. The *obiter dictum* of *Ramirez Escobar v. Guatemala* could also be a first step towards the development of a new duty monitored by the Inter-American System of Human Rights: the duty to prevent corruption that causes human rights violations. This would be another possible bridge between the obligation to prevent human rights violations and the obligation to prevent corruption.

Besides the preamble of the Inter-American Convention Against Corruption, mentioned by the Court, its sources could be the IACC itself with its section on preventive measures against corruption, as well as the preamble and the UN Convention against corruption, the Inter-American Democratic charter (in particular article 4), the UN treaty bodies' observations on the issue of corruption, and some Supreme Court cases that have addressed the issue of the existence of such an obligation.[104]

If a duty to prevent corruption that causes or contributes to human rights violations were recognized, the Court would focus on the content of the obligation to prevent corruption—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 one could not require from the State to prevent all corruption, this obligation would necessary be of means like the obligation to prevent human rights violations.

Whereas in the case of the obligation to prevent human rights violations due or partly due to corruption, the Court would seek to ascertain the existence of corruption as evidence of the creation of a risk of a violation of human rights due or partially due to this corruption. In this case there would be an indirect obligation to prevent corruption as part of the prevention of a risk of a human rights violation.

F. Proving the facts of corruption and giving a description to State capture through corruption

The analysis of the breach of the obligation to prevent human rights violations through the criteria that establish the existence of a foreseeable and avoidable risk of the violation, would encompass the proof of the facts of corruption. As shown in the *Ramírez Escobar y otros v.*

[104] Constitutional Court of South Africa, Glenister (n. 21), 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."

Guatemala case, the Court can recognize the existence of an organized network of corruption within a State structure or within the State.

The standard of proof in inter-American human rights law is more flexible than in national criminal law. Moreover, the Court has frequently acknowledged the existence of acts which could also constitute a criminal offence, such as torture or enforced disappearance, even in the absence of a domestic legal judgment. The freedom of the Court to act in the absence of a decision of domestic law represents an essential instrument of the Court. It has played a key role in the fight against impunity for serious crimes and human rights violations. For example, as regards crimes committed under Latin American dictatorships, the Court's case law condemning States for those crimes included a narrative about these acts, which made it possible not only to breach the wall of impunity that existed at a national level, but to also advance the search for truth for victims of these crimes.

The rigorous study of the facts, various sources of evidence, access to expertise and the Court's independence could play a key role in addressing State capture through corruption. It would increase the visibility and understanding of the functioning of networks of corruption, and it would help fight against impunity. This potential is demonstrated in the case *Ramirez Escobar v. Guatemala*, where the testimony of the experts described the process of corruption in the Guatemalan adoption framework.

G. Giving visibility to the victims of corruption through human rights

Inter-American case law could help further define the victims of corruption. The Court considers that the victim or injured party as the possessor of the legally protected interest safeguarded by the right established in the American Convention on Human Rights such as life, liberty, safety, property or integrity.[105] The Court makes a hard law link between facts of corruption and the violation of substantive rights and could demonstrate that corruption is not victimless. 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 of 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. And in both cases, those victims would be identified by the Court. Indeed, the Inter-American Court recognizes by name the victims of the violation of human rights.

The Court's recognition of victims of corruption is important because national legal systems have not translated into legal terms the existence of victims of corruption. This is due both to the difficulties of the analyses of causation in corruption cases and also because historically both in civil and common law criminal systems, bribery offences were conceived as offences against public order where victims had no standing.[106] Today, national judicial proceedings in criminal or civil cases still give very little space to alleged victims of corruption.[107]

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[105] CASE OF THE ITUANGO MASSACRES V. COLOMBIA, *supra* note 107.

[106] Guy Stessens, *The international fight against corruption'*, Vol. 72 REVUE INTERNATIONALE DE DROIT PENAL 891–937 (2001).

[107] See for example on the standing in anticurrption litigations MATTHEW C. STEPHENSON, STANDING DOCTRINE AND ANTICORRUPTION LITIGATION: A SURVEY (2016).

H. Contributing to setting standards of public policies

The Court maintains a delicate balance between ordering the State to take action (including enacting public policy) pursuant to its international obligations, and the risk of infringing on State sovereignty.

There are two moments when the Court could be called upon to contribute to the content of public policies in the fight against corruption: 1) when establishing the responsibility of the State for its breach of the duty to prevent human rights violations, and 2) through guarantees of non-repetition. This is in addition to the Court being called upon to establish the responsibility of the State for the breach of the duty to prevent human rights violations.

Guarantees of non-repetition are based on Article 63 (1) of the American Convention. Indeed the Court has stated that any breach of an international obligation which has caused damage entails the obligation to make adequate reparation for it[108] and that this provision constitutes one of the fundamental principles of contemporary international law on State responsibility.[109]

Among the various reparation measures included in the concept of full reparation is the guarantees of non-repetition which the Court defines as:

> "...measures intended to ensure the non-recurrence of human rights violations such as those that occurred in the case examined by the Court. These guarantees are of public scope or impact and, in many cases, resolve structural problems, so that not only the victim in the case benefits but also other groups or members of society. The guarantees of non-repetition can be divided into three groups, according to their nature and purpose, namely: (a) measures to adapt domestic law to the parameters of the Convention; (b) human rights training for public officials, and (c) adoption of other measures to guarantee the non-repetition of violations."[110]

When considering other measures to guarantee the non-repetition of violations, the Court has dictated measures that have a corrective/transformative purpose,[111] often to eradicate structural contexts that allow or facilitate human rights violations.[112] This could be done in cases of breach of the duty to prevent human rights violations due or partly due to corruption.

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[108] CASE OF VELÁSQUEZ-RODRÍGUEZ V. HONDURAS, *supra* note 103 at 25.

[109] Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala. Excepciones Preliminares. / Casos / Corte Interamericana de Derechos Humanos / Documentos / Sistema Interamericano / Sistemas Principales / Sistema Derechos Humanos / Home - Centro de Documentacion de Derechos Humanos, 62, https://cd3.uniandes.edu.co/sistema_derechos_humanos/sistemas_principales/sistema_interamericano/documentos/corte_interamericana_de_derechos_humanos/casos/caso_de_los_ninos_de_la_calle_villagran_morales_y_otros_vs_guatemala_excepciones_preliminares (last visited Aug 26, 2018).

[110] 2011 ANNUAL REPORT INTER-AMERICAN COURT OF HUMAN RIGHTS, 19, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2011.pdf.

[111] Campo Algodonero 450, Attala 305

[112] CLAUDIO NASH ROJAS & VALESKA DAVID, LAS REPARACIONES ANTE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS (1988-2007) (2009).

V. Conclusion

Despite the existence of several international anti-corruption conventions, there are no mechanisms through which State responsibility can be engaged when States do not fight against corruption or do not fulfill their obligation to prevent corruption. The inter-American mechanism for the protection of human rights could contribute to achieving greater accountability in those cases.

The Court could acknowledge the responsibility of the State that breach its duty to prevent human rights violations contributing to or tolerating opaque networks of corruption that create an avoidable and foreseeable risk of human rights violations, highlighting thereby that corruption is not victimless. This could also contribute to standard setting on what the State should do to prevent the creation of such risk.

This would be particularly useful when a State structure is captured through systematic corruption and does not fulfill its duty to prevent human rights violations.

To date, the phenomenon of State capture through corruption has not been described and analyzed enough in the academic literature.

Prevailing accepted definitions of State capture through corruption do not adequately describe this type of corruption as it takes place on the ground, as the three Latin American case studies described in this paper demonstrate. Therefore, a revised definition could be considered.

This paper proposes the following new definition:

1. Owing to acts of corruption (bribery, embezzlement or any offence defined in the international conventions against corruption or any act of abuse of public or entrusted power for private gain);

2. committed through a covert coordination at least among State representatives who benefit from the acts of corruption;

3. captor(s) decisively influence the formulation of the State's rules of the game to ensure them unjustified revenue from the State or make the State complicit in criminal activities in order for the captor(s) to obtain money illegally; and

4. these three elements result in a State structure or the whole State diverting durably or through a durable impact from the general interest.

It would also be useful to further develop methods that make it possible to evaluate the level of capture through corruption of State structures or powers to better understand and fight this phenomenon. The Inter-American Human Rights System could contribute to this description in particular by analyzing the existence of a breach of the duty to prevent human rights violations.

It is urgent to intensify the fight against corruption and in particular to give visibility and refine the fight against State capture through corruption. Indeed, there are very concerning trends in democratic governance in Latin America closely linked to State capture though corruption. On the one hand, the current feeling that there is widespread corruption in most structures and at the highest spheres of the State certainly influences the rise in populism in Latin America. This perception gives 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 leaders like President Bolsonairo who promise simple solutions to complicated problems. On the other hand, we may be entering an era of new dictatorial regimes but this time resulting, not from military coup but from elected governments who enrich themselves through systematic corruption, then illegally stay in power as in the case of Nicaragua and Venezuela.