

## Corruption and Human Rights in the Case Law of Inter-American Human Rights Treaty Bodies

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**Abstract:** The first attempts to combat corruption date back to ancient times and had mainly moral connotation. Despite being an old phenomena, nowadays it takes new shapes and becomes a more common feature of social life, especially in the Latin America region. Corruption is a complex, and multidimensional phenomenon that negatively impacts human rights on many levels. Therefore, serious effort have long been made at global, regional and state levels to combat corruption. The United Nations and regional organizations have adopted numerous non-binding and binding documents with a view to stifling this phenomenon but none of them refer to the issue of impact of corruption on human rights. But it should be stressed that it is very hard to establish a link between corruption and human rights violations. Some efforts has been made by the Inter-American Court of Human Rights (IACHR) and the Inter-American Commission on Human Rights (IACoMHR). This article considers whether and how the IACHR and the IACoMHR establish the link between corruption and violation of human rights in the inter-American system. It also determines which groups of people are, according to the IACHR and the IACoMHR, particularly affected by corruption, what measures should be taken to protect those exposed to acts of corruption, what obligations are incumbent on States with a view to preventing, combating and eradicating corruption.

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## 1. Introduction

Due to its multi-dimensional character, corruption is a complex phenomenon that not only affects the economic sphere, but also undermines the principle of rule of law, is a threat to social well-being, has negative impact on enjoyment of human rights<sup>1</sup>. Considering the nature of violation, it is even hard to prioritize, which human rights are the most affected by this phenomenon<sup>2</sup>. The awareness of importance and relevance of this problem is demonstrated by the fact that corruption was for the first time the theme of the 32 (2021) special session of the General Assembly held from 2 to 4 June<sup>3</sup>. This issue is not only recognized at the global level, but also at the regional level. When opening the Judicial Year 2022, the President of the IACHR pointed to corruption among the urgent problems facing the Court and stressed that States are responsible for combating corruption<sup>4</sup>. Furthermore, during the 9 Summit of the Americas in June 6–10, 2022, the participating heads of States and Government of Americas committed to fighting corruption, protect human rights defenders, environmental defenders, including journalists; anti-corruption reporting and oversight<sup>5</sup>. There are a few reasons why combating corruption, especially in Latin America, is a common goal of all States in region. First of all, it has negative impact on economy; secondly, fighting corruption is essential for the proper functioning of democratic institutions of the State and thirdly, it causes enormous social costs<sup>6</sup>. Therefore, there is no doubt that corruption has direct impact on human rights as it deprives people of their means of existence and erodes

<sup>1</sup> See e.g.: Indira Carr, “Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?,” *European Journal of Crime, Criminal Law and Criminal Justice* 15, no. 2 (2007): 131.

<sup>2</sup> General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017.

<sup>3</sup> A/RES/S-32/1, 7 June 2021, § 20.

<sup>4</sup> “The President of the Inter American Court of Human Rights Judge, Ricardo C. Pérez Manrique in the Opening of the 2022 Inter-American Judicial Year,” accessed November 7, 2022, [https://www.corteidh.or.cr/mensaje\\_presidencia.cfm?lang=en](https://www.corteidh.or.cr/mensaje_presidencia.cfm?lang=en).

<sup>5</sup> See “Summit of the Americas,” U.S. Department of State, accessed November 7, 2022, <https://www.state.gov/summit-of-the-americas/>.

<sup>6</sup> Jorge Garcia-Gonzalez, “The OAS and the fight against corruption in the Americas,” accessed November 7, 2022, <https://www.oecd.org/corruption/ethics/2731127.pdf>.

the democratic institutions of the states but corruption mostly has a devastating impact on judicial system<sup>7</sup>.

The aim of this article is to examine the practice of the IACHR and the IACoMHR in order to determine whether any of these bodies has found a direct or indirect link between corruption and human rights violations. This paper indicates that the IACHR and the IACoMHR in their jurisprudence have consistently shown that there is a link between corruption and human rights. They analyze the impact of corruption on human rights through the lens of vulnerable groups i.e.: persons deprived of liberty, including children in foster care; children; indigenous people human rights defenders, including environmental defenders, journalists; personnel of the justice system, but also moving persons, women, LGBTI persons, Afro-descendants, persons with disabilities and the elderly<sup>8</sup>. To this end, the article examines documents adopted in the inter-American system to combat corruption. Then, the phenomenon of corruption was characterized and classified. This paper presents also examples from the case law of the IACHR and IACoMHR on how both bodies establish links between corruption and human rights.

## 2. Characteristics of corruption

One of the characteristic features of corruption is its very flexible nature so it is difficult to predict when and where it occurs<sup>9</sup>. According to IACoMHR, the main factors that facilitate corruption are of an institutional weakness and cultural nature<sup>10</sup>. Due to its complexity and elastic characteristic, there is no uniform definition of corruption. It means different things for

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<sup>7</sup> Report of the Special Rapporteur on the independence of judges and lawyers, A/72/140, 25 July 2017, § 18–22.

<sup>8</sup> Corrupción y derechos humanos: Estándares interamericanos, Comisión Interamericana de Derechos Humanos, OAS/Ser.L/V/II, Doc. 236, 6 diciembre 2019, Original: Español, § 432–438.

<sup>9</sup> Donna M. Goldstein and Kristen Drybread, “The Social Life of Corruption in Latin America,” *Culture, Theory and Critique* 59, no. 4 (2018): 300.

<sup>10</sup> Corrupción y derechos, § 116.

different disciplines and cultures<sup>11</sup>. Corruption has many forms<sup>12</sup>, actors – private or public, and consequences, which are devastating for both public or private sector<sup>13</sup>.

The IACoMHR characterized corruption as an abuse or detour of power, whether public or private, that displaces the public interest for private benefit (personal or a group one), undermines and weakens both administrative controlling and judicial review institutions, the rule of law and human rights<sup>14</sup>. In view of the above, corruption is closely intertwined with power, which is delegated to a public authority. What is more, an abusive use of authority is the main factor linking corruption with human rights. Another specific characteristic of corruption is placing private interests ahead of public interest. The benefits thus obtained have not only an economic dimension, but also a social and cultural one. Above all, corruption undermines the domestic institutions that allow for the efficient functioning of the state and as a consequence the rule of law and human rights<sup>15</sup>.

Scholars classified corruption as “petty” or “street” corruption, when it affects people who interact with State officials when using public services. On the other hand, grand corruption is carried out by high-level government officials, presidents, ministers, etc., and involves a large amount of assets<sup>16</sup>. This is the most dangerous kind of corruption because it undermines the legitimacy of high level officials<sup>17</sup>. The scholars also distinguish further subtypes of corruption i.e.: political one, defined as a the abuse of

<sup>11</sup> Kolawole Olaniyan, “The Implications of Corruption for Social Rights,” in *Research Handbook on International Law and Social Rights*, ed. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, and Amaya Úbeda de Torres (Cheltenham–Northampton: Edward Elgar Publishing, 2020), 356–357.

<sup>12</sup> See for e.g. Łukasz Dawid Dąbrowski, “Typy przestępstw korupcyjnych w świetle dokumentów międzynarodowych,” *Studia Prawnicze KUL* 60, no. 4 (2014): 45–75.

<sup>13</sup> Corrupción y derechos, § 83–90.

<sup>14</sup> See Corruption and Human Rights, Resolution 1/18, March 2, 2018.

<sup>15</sup> Corrupción y derechos, § 90.

<sup>16</sup> Claudio Nash Rojas, Pedro Aguiló Bascuñán, and María Luisa Bascur Campos, *Corrupción y Derechos Humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos* (Chile: Centro de Derechos Humanos Facultad de Derecho Universidad de Chile, 2014), 16–17.

<sup>17</sup> Cecily Rose, “Corruption and Global Security,” in *The International Global Security*, ed. Robin Geiß and Nils Melzer (Oxford: Oxford University Press, 2021), 144.

common authority and power for the purpose of obtaining private benefits to the detriment of the collective and non-political one – the purpose of the violation of normative system is not the achievement of a goal of the political collectivity as a whole but the objective of a particular collectivity<sup>18</sup>. Unfortunately, all these definitions focus on passive than active side of these phenomena. It mainly encompasses conduct of public not private officials<sup>19</sup>. Some scholars distinguish personal (non-institutional) and institutional corruption. The former takes place outside institutional framework. The latter is characterized by the casual character and deliberate intention of the corruptor and corruption undermines to a non-negligible extent an institutional purpose, the corrupt action involves the corruptor and the person being corrupted<sup>20</sup>. Taking into account the place where corruption occurs, it is private or public sector. Another criteria include how it occurs: either by extortion or consent. Considering its intensity, it is high or low levels of intensity and given its prevalence – it involves isolated or systemic occurrences<sup>21</sup>. The IACoMHR distinguished a situation when corruption can cause a direct violation of human rights – corruption constitutes or contributes to failure to comply with international obligations and such wrongdoing is attributable to State, and cases in which corruption only facilitate and/or encourage the violation of human rights<sup>22</sup>.

As to Latin America, the key characteristic feature of corruption is that there may be cases of corruption that are unpunished, and there may be cases of false accusations of corruption that are also proceeded improperly<sup>23</sup>. Accusation of alleged corruption against officials is a very useful instrument to fight political rivals. The so-called “Latin America anti-corruption

<sup>18</sup> Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 17.

<sup>19</sup> Rose, “Corruption,” 142. See Terracino Julio Bacio, *The International Legal Framework against Corruption: States’ Obligations to Prevent and Repress Corruption* (Cambridge–Antwerp–Portland: Intersentia, 2012), 82–88.

<sup>20</sup> Seumas Miller, *Institutional Corruption: A Study in Applied Philosophy* (Cambridge: Cambridge University Press, 2017), 64–72.

<sup>21</sup> Zoe Pearson, “An international human rights approach to corruption,” in *Corruption and Anti-Corruption*, ed. Peter Larmour and Nick Wolanin (Canberra: ANU Press, 2013), 33.

<sup>22</sup> *Corrupción y derechos*, § 137–138, 163–164.

<sup>23</sup> Cecilia M. Baillet, *The Construction of the Customary Law of Peace: Latin America and Inter-American Court of Human Rights* (Chetelnham–Northampton: Edward Elgar Publishig, 2021), 69.

wave” put political leaders in prison or they face trials, and even some of them committed suicide<sup>24</sup>. The most spectacular corruption investigation is a Brazilian case known as Operation Car Wash (*Operação Lava Jato*) launched in 2014, concerning money laundering related to the state oil company Petrobras, which in 2018 led to the arresting of ex-president Luiz Inácio Lula da Silva<sup>25</sup>. Unfortunately, all these efforts did not eradicate corruption from public life and it occurs that prosecution and conviction is not a sufficient instrument to do that<sup>26</sup>. Latin America still lacks transparency and during the pandemic there was an outbreak of corruption and bribery as a common occurrence<sup>27</sup>. Unfortunately, human rights instruments neither *expressis verbis* refers to corruption neither it prohibits. The practice of the UN treaty bodies is also not helpful in this matter<sup>28</sup>.

In a nutshell, corruption in the broad sense can be defined as an unpredictable, complex phenomenon, with various forms involving the use of power by public officials regardless of their position, and private persons as well, for private, political and non-political purposes, which has negative consequences for individuals, private entities and the functioning of the state.

### 3. Legal instruments

In the inter-American system there were a lot of initiatives aiming at combating corruption. First of all, the General Assembly of the OAS adopted

<sup>24</sup> See Benjamin Russell, “Anti-Corruption: Legal Trouble for Latin American Presidents,” accessed May 9, 2019, <https://www.americasquarterly.org/article/legal-trouble-for-lat-in-american-presidents/>.

<sup>25</sup> Fernando Limongi, “From birth to agony: The political life of Operation Car Wash (*Operação Lava Jato*),” *University of Toronto Journal* 71, Suppl.: 1 (2021): 160–173.

<sup>26</sup> Gaspard Estrada, “Opinion, Operation Car Wash Was No Magic Bullet: The largest anti-graft effort in the world couldn’t stop endemic corruption in Brazil,” *The New York Times*, accessed February 26, 2021, <https://www.nytimes.com/2021/02/26/opinion/international-world/car-wash-operation-brazil-bolsonaro.html>.

<sup>27</sup> Benjamin N. Gedan and Santiago Canton, “Radical Transparency: The Last Hope for Fighting Corruption in Latin America,” *Georgetown Journal of International Affairs*, accessed April 1, 2022, <https://gjia.georgetown.edu/2022/04/01/radical-transparency-the-last-hope-for-fighting-corruption-in-latin-america%EF%BF%BC/>.

<sup>28</sup> Cecily Rose, “The Limitations of Human Rights Approach to Corruption,” *International and Comparative Law Quarterly* 65, no. 2 (2016): 412–419.

resolution entitled “Corrupt International Trade Practices”<sup>29</sup>, Declaration of Montrouis: A New Vision of the OAS<sup>30</sup>, San José Declaration<sup>31</sup>, Declaration on Security in Americas<sup>32</sup>, Inter-American Democratic Charter<sup>33</sup>, Declaration of Nuevo León<sup>34</sup>, follow-up mechanism<sup>35</sup>, Inter-American Program of Cooperation to Fight Corruption<sup>36</sup>, Lima Commitment<sup>37</sup>, and many others. It is also worthy to note the latest actions: The Joint Summit Working Group Action Plan 2019–2020<sup>38</sup>, the task of which is to implement the Lima Commitment. The Summits of the Americas Secretariat, the School of Governance and the Department for Effective Public Management of the OAS developed an initiative for the implementation of the Inter-American Open Data Program to Prevent and Fight Corruption<sup>39</sup>. All these instruments and initiatives recognized negative impact of corruption on democratic governance and encouraged increased cooperation among states, international organizations, NGOs and society in order to combat corruption. The Organization also reiterated its commitment to fighting corruption<sup>40</sup>. Furthermore, the IACoMHR adopted numerous documents on corruption and human rights<sup>41</sup> but since 2017 it has further developed the study on impact of corruption on human rights<sup>42</sup>. In 2019, the IACoMHR issued very

<sup>29</sup> AG/RES.1159 (XXII-0/92), 22 de mayo de 1992.

<sup>30</sup> AG/DEC. 8 (XXV-O/95), June 7, 1995, § 21.

<sup>31</sup> A/CONF.157/LACRM/15, A/CONF.157/PC/58, 11 February 1993, § 10.

<sup>32</sup> OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1, 28 October 2003, Original: Spanish, § 4(m).

<sup>33</sup> Lima, September 11, 2001, accessed November 7, 2022, [https://www.oas.org/en/democratic-charter/pdf/demcharter\\_en.pdf](https://www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf).

<sup>34</sup> Monterrey, Nuevo Leon, Mexico, January 13, 2004, accessed November 7, 2022, [https://www.oas.org/xxxivga/english/reference\\_docs/CumbreAmericasMexico\\_DeclaracionLeon.pdf](https://www.oas.org/xxxivga/english/reference_docs/CumbreAmericasMexico_DeclaracionLeon.pdf).

<sup>35</sup> AG/RES. 1784 (XXXI-O/01), 5 junio 2001, Original: español.

<sup>36</sup> AG/RES. 1477 (XXVII-O/97), 5 de junio de 1997.

<sup>37</sup> OEA/Ser.E CA-VIII/doc.1/18, 14 April 2018 Original: Spanish.

<sup>38</sup> OEA/Ser.E GTCC/doc.63/20 rev.2, 18 October 2021, Original: Spanish.

<sup>39</sup> AG/RES. 2931 (XLIX-O/19), June 27, 2019. § vii.

<sup>40</sup> Garcia-Gonzalez, “The OAS”, 2.

<sup>41</sup> See e.g.: Human Rights and the Fight Against Impunity and Corruption, Resolution 1/17, September 12, 2017; Resolution 1/18.

<sup>42</sup> Claudio Nash Rojas, “Nuevos desarrollos sobre corrupción como violación de Derechos Humanos. El Informe “Derechos Humanos y Corrupción” de la Comisión Interamericana de Derechos Humanos”, *Revista Mexicana de Derecho Constitucional*, no. 45 (Julio-Diciembre 2021): 207–208.

comprehensive report entitled “Corruption and human rights: Inter-American standards”. But the so-called road map for collective actions against corruption is provided by the Inter-American Convention against Corruption adopted on 29 March 1996 in Caracas (IACC)<sup>43</sup>. It is the very first one anti-corruption treaty in the world<sup>44</sup>, whose aims are twofold: promotion and strengthening of the development of the state mechanism to prevent, deter, punish and eradicate corruption as well as promotion and regulation of the cooperation among states in order to wipe out corruption from the public sphere (Article II). Furthermore, Member States of the OAS adopted treaties for legal and judicial cooperation<sup>45</sup>.

The most important binding document on human rights adopted by the OAS is the American Convention on Human Rights signed on 22 November 1969 (ACHR). According to Article 1 of the ACHR, the State Parties are obliged to respect rights and freedoms enshrined in the Convention. This obligation must be fulfilled without any form of discrimination<sup>46</sup>. The obligation to respect means refraining from violation of human rights established in the ACHR (the negative obligation). On the other hand, the obligation to ensure (fulfil) is positive one and means that state is obliged to take all necessary action to guarantee full enjoyment of rights and freedoms recognized in the ACHR i.e.: to create institutional, organizational and procedural conditions for individuals subjected to the States’s jurisdiction in order to comply with this duty<sup>47</sup>. Based on the provisions of the ACHR, the IACHR and IACoMHR have examined how corruption affects the enjoyment of the rights guaranteed by the ACHR and have identified the obligations incumbent on the states-parties to the Convention.

<sup>43</sup> Conferencia Especializada sobre el proyecto de Convención Contra Corrupción, Caracas, Venezuela, del 29 al. 29 de marzo de 1996, Acta Final, Secretaría General, Organización de los Estados Americanos, Washington, D.C. 20006, 1998.

<sup>44</sup> Bacio Terracino, *The International*, 48–49.

<sup>45</sup> See “Hemispheric Network for Legal Cooperation on Criminal Matters,” accessed November 7, 2022, <http://web.oas.org/mla/en/Pages/default.aspx>.

<sup>46</sup> See Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 23–24.

<sup>47</sup> Ann Peters, “Corruption as a Violation of International Human Rights,” *European Journal of International Law* 29, no. 4 (2019): 1258–1259.

#### 4. Case Law of the Inter- American Human Rights Treaty Bodies

In its case law, the IACHR and IACoMHR have focused on analyzing the impact of corruption on the enjoyment of human rights guaranteed by documents adopted in the inter-American system with regard to persons particularly vulnerable to these violations, such as children, adolescents and adults deprived of their liberty; children in the context of adoption procedures, so-called street children, or indigenous peoples. Furthermore, the Court, as well as the Commission, analyzed in what way corruption affects the exercise of freedom of expression by those who report on acts of corruption such as journalists or human rights advocates. To what extent corruption affects the functioning of the judiciary, its independence and impartiality, as well as people on the move, women, LGBTI persons, Afro-descendants, persons with disabilities and the elderly.

##### 4.1. Persons Deprived of Liberty

In its decisions, the Court has drawn attention to the poor conditions of detainees. In the case involving Daniel Tibi, who was detained at the Penitenciaría del Litoral in Ecuador, the IACHR noticed that cells are overcrowded, without proper ventilation and light, no food was provided and therefore inmates had to pay other prisoners to bring them something to eat<sup>48</sup>. Therefore, the IACHR established indirect link between corruption and the right to bodily integrity<sup>49</sup>. In its case law, the Court found also a violation of the right to humane treatment in detriment of the children and adolescents which were kept in prisons and centers for juveniles. First of all, the IACHR pointed out that the living conditions in the centres, in which children and adolescents were kept were inhumane and exposed them inter alia: both to violence, abuse, and corruption<sup>50</sup>. Both the IACHR and the IACoMHR concluded that corruption and abuse of power was a widespread feature in the penitentiary system. Corruption has become the main source of the so-called prison self-government for e.g. in Brazil where inmates are

<sup>48</sup> I/ACourt H.R., Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004, Series C, No. 114, § 90.46.

<sup>49</sup> Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 39.

<sup>50</sup> I/ACourt H.R., Case of the “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004, Series C, No. 112, § 25, 170.

keeping order, have keys to entrance gates<sup>51</sup>. Another problem is the lack of transparency in the management of penitentiaries and misallocation of resources to the penitentiary system which led to corruption and weakens the system of social integration for persons deprived of liberty<sup>52</sup>. Forms of corruption include also disproportionate allocation of funds which could lead to malnutrition, like in Guatemala<sup>53</sup>.

#### 4.2. Children

Corruption affects also the child adoption process. In the case concerning alleged violation of the right to protect family, including biological daughter, due to transferring a child to a married couple by the mother without father's consent, the Court pointed out that the applicant (IAComHR) did not prove that a systematic practice of trafficking or sale of children exists in Argentina<sup>54</sup>. Nonetheless, in this case the IACHR says that corruption may directly affect human rights. The petitioners alleged also that the facts were part of a generalized context of corruption and child trafficking and that the trafficking of children used to occur. The Court noted also that there are important indications that M was surrendered by her mother in exchange for money<sup>55</sup>. What is more, irregularities in adoption proceedings and improper institutional oversight resulted in the creation of an organized crime group that profited from international adoptions<sup>56</sup>. In the case concerning adoption of two brothers Ramirez, the Court found particularly regrettable the failure of the State to examine whether the adoption brings illegitimate material advantages. In addition, adoption takes place in the context of weakness of State institutions, regulatory flexibility, which facilitated the formation of organized crime syndicates that profited from adoption. This illegal adoption not only took advantage of the institutional and legal weaknesses of the Guatemalan State, but also of the vulnerable situation of

<sup>51</sup> Corrupción y derechos, § 434.

<sup>52</sup> Ibidem, § 438, 442.

<sup>53</sup> Ibidem, § 460–467.

<sup>54</sup> I/ACourt H.R., Case of Fornerón and daughter v. Argentina. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C, No. 242, § 18–19.

<sup>55</sup> Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 42–43.

<sup>56</sup> I/A Court H.R., Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs. Judgment of March 9, 2018. Series C, No. 351, § 236–24.

mothers and children living in poverty in Guatemala<sup>57</sup>. In this regard, the Court emphasizes the negative consequences of corruption and the obstacles it represents for the effective enjoyment of human rights. Corruption not only affects the rights of individuals, but also has a negative impact on society as a whole<sup>58</sup>. In order to enhance its argument, the Court referred to both the binding regional instrument e.g. IACC and the instruments issued by the UN Human Rights Council and its Advisory Committee on the issue of negative impact of corruption on the enjoyment of human rights<sup>59</sup>. What is more, the IACHR identified positive obligations incumbent on States – adoption measures effectively preventing and eradicating corruption. In the adoption process, private and public actors have acted to enrich themselves rather than with the fundamental principle of child protection – acting in accordance with the best interests of the child. The entire adoption mechanism was designed to disadvantage poor people<sup>60</sup>, preventing children and their biological parents from exercising their human rights<sup>61</sup>. Simplification of voluntary adoption procedures must not lead to turning the process into child trafficking<sup>62</sup>. Eventually, the Court ruled that Guatemala had failed to comply with its obligation to supervise and oversee institutions such as the Asociación Los Niños de Guatemala where the Ramírez brothers were staying. The IACHR also identifies measures, which State had to take in order to comply with judgment i.e.: to provide constant, periodic and updated training to State officials, as well as employees of private institutions to whom the children were entrusted; ensure that the National Adoption Council has the necessary economic and logistical resources to deal effectively with the new modalities in which trafficking and smuggling networks operate; guarantee, through periodic reviews, that the institutionalization of children does not lead to an abusive restriction of their liberty; implement progressive deinstitutionalization of the children and adolescents under their care and apply alternative measures for institutionalization<sup>63</sup>. In its judgments, the

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<sup>57</sup> Ibidem, § 237.

<sup>58</sup> Ibidem, § 241.

<sup>59</sup> Ibidem.

<sup>60</sup> See *Corrupción y derechos*, § 97.

<sup>61</sup> I/A Court H.R., Series C, No. 351, § 242.

<sup>62</sup> Ibidem, § 244.

<sup>63</sup> Ibidem, § 408.

Court also addressed the important issue of the trafficking of children for sexual exploitation<sup>64</sup>. Unfortunately, the IACHR did not consider that corruption constituted part of a structural violation of human rights<sup>65</sup>. Similar can be said with regard to so-called street children<sup>66</sup> were some children and young people were kidnapped, abducted and killed by police officers due to homicide, systematic harassment, persecution against street children. Authorities failed to carry out any investigation into the crimes of kidnapping and torture of marginalized children. The judicial authorities failed to comply with their duty to carry out a proper investigation and judicial process that would lead to the punishment of those responsible<sup>67</sup>. In this regard, the IACoMHR stressed the importance of the right of children and adolescent to live in a family and stated that measures of protection implemented by States should be in accordance with international standards, including principle of the best interest of the child<sup>68</sup>.

#### 4.3. Indigenous peoples

The IACHR and the IACoMHR also referred to the phenomenon of corruption concerning violations of the rights of indigenous peoples in regard to right to property, and a free, prior and informed consent<sup>69</sup>. It requires that consent from indigenous community must be obtained before authorizing a project concerning their territories<sup>70</sup>. In the opinion of the IACoMHR, one

<sup>64</sup> See for e.g.: Sheldon X. Zhang and Samuel L. Pineda, "Corruption as a Causal Factor in Human Trafficking," in *Organized Crime: Culture, Markets and Policies*, ed. Diana Siegel and Hans Nelen (New York: Springer, 2008), 45–52.

<sup>65</sup> Nash Rojas, "Nuevos," 223–224.

<sup>66</sup> Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 44.

<sup>67</sup> I/ACoMHR, Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, Merits. Judgment of November 19, 1999, Series C, No. 63, § 189, 229–230.

<sup>68</sup> *Corrupción y derechos*, § 467.

<sup>69</sup> See Salvador Herencia Carrasco, "The rights of indigenous peoples in the jurisprudence of the American Court of Human Rights: A 'Third World Approaches to International Law' assesment to advance their protection in the Inter-American Human Rights System," in *Critical Indigenous Rights Studies*, ed. Giselle Corradi, Koen de Feyter, Ellen Desmet, and Katrijn Vanhees (London–New York: Routledge, 2018), 160–177.

<sup>70</sup> Monica Yriart, "Jurisprudence in a Political Vortex: The Right of Indigenous Peoples to Give or Withhold Consent to Investment and Development Projects – The Implementation of *Saramaka v. Suriname*," in *The Inter-American Court of Human Rights: Theory and Practice*,

of the manners in which human rights of indigenous people are violated by corruption is omission by States to adopt special measures in order to guarantee the rights of indigenous people in accordance with their cultural identity<sup>71</sup>. What is more, States not only fail to duly protect indigenous people rights but also legalize such violations e.g.: in the case of territory dispossession. Indigenous communal property on their lands and territories needs to be protected because it constitutes the fundamental basis of their cultures, spiritual life, integrity and economic survival. The right to be consulted guarantees that indigenous communities participate in matters of their interest<sup>72</sup>. This right may be violated when it is not carried out or is unreasonably delayed<sup>73</sup>. The Court identified an unwarranted delay in the territorial claim process that the petitioning community had initiated under domestic law. According to the testimony of one of the experts, the land restitution system suffered from dishonest practices in the pricing and selection of land. Furthermore, dishonest practices were verified on the part of the company, which had fraudulently obtained the signatures from community members in order to discredit the restitution procedure<sup>74</sup>. Unfortunately, the IACHR did not refer to the consequences of deceitful practice affecting the community. On the other hand, it addressed private corruption more directly<sup>75</sup>. In a similar case, the State did not carry out any type of consultation with the Sarayaku people, in particular about construction of heliports, destruction of areas of great significance to their culture and self-identification<sup>76</sup>. The Court pointed to both the duty to consult and the

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*Present and Future*, ed. Yves Haeck, Oswaldo Ruiz-Chiriboga, and Clara Burbano-Herrera (Cambridge–Antwerp–Portland: Intersentia, 2015), 477.

<sup>71</sup> Corrupción y derechos, § 445–446.

<sup>72</sup> See Dinah Shelton, “The Right of Indigenous People: Everything Old is New Again,” in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, ed. Andreas von Arnould, Kerstin von der Decken, and Mart Susi (Cambridge: Cambridge University Press, 2020), 230–231.

<sup>73</sup> I/ACourt H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations and Costs. Judgment of March 29, 2006, Series C, No. 146, § 120.

<sup>74</sup> Ibidem, § 73 (31–34), 73 (74), 104–108, 112.

<sup>75</sup> Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 47–48.

<sup>76</sup> I/ACourt H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations. Judgment of June 27, 2012, Series C, No. 245, § 184.

duty to obtain consent without any further elaboration<sup>77</sup>. The IACHR clarified what it means to negotiate in good faith<sup>78</sup>. These malpractices on the part of an oil company were tolerated by the State by means of a military agreement with the oil companies to ensure the safety of the exploration infrastructure for the people working there<sup>79</sup>. The community was deprived of the right to be consulted on plans and programs of exploration and exploitation of non-renewable resources on their land<sup>80</sup>. In the case *Lhaka Honhat v. Argentina* the IACHR also referred to the right of consultation and stated that the Convention No. 169 could not be interpreted in a manner which prevents the State from carrying out, alone or through third parties, work in the indigenous territory<sup>81</sup>. In these judgments, the IACHR pointed out difficulties and limitations in exercising human rights by vulnerable groups<sup>82</sup> and the Court established only an immediate link between corruption and human rights of indigenous peoples<sup>83</sup>. In comparison to *Sawhoyamaxa* case, the IACHR has moved from the “duty to obtain consent” to duty “to refrain” from restricting indigenous communities’ land rights, which could deprive them of the capacity to survive<sup>84</sup>. In all these cases, the common future is that all violations of human rights of indigenous peoples affects these communities as collectives<sup>85</sup>.

<sup>77</sup> Maria Victoria Cabrera Ormaza and Martin Oelz, “The State’s Duty to Consult Indigenous Peoples: Where Do We Stand 30 Years after the Adoption of the ILO Indigenous and Tribal Peoples Convention No. 169?,” *Max Planck Yearbook of United Nations Law Online* 23, (2019): 95.

<sup>78</sup> I/ACourt H.R., Series C, No. 245, § 185–186, 203. In the literature this phenomenon is so-called “moral corruption of indigenous people,” Goldstein and Drybread, “The Social,” 303.

<sup>79</sup> I/ACourt H.R., Series C, No. 245, § 192.

<sup>80</sup> Ibidem, §195–197; Cabrera Ormaza and Oelz, “The State’s,” 72.

<sup>81</sup> I/A Court H.R., Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020, Series C, No. 400, § 14, 95.

<sup>82</sup> Herencia Carrasco, “The rights,” 165.

<sup>83</sup> Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 38.

<sup>84</sup> Cabrera Ormaza and Oelz, “The State’s,” 97.

<sup>85</sup> *Corrupción y derechos*, § 451.

#### 4.4. Whistleblowers

The main developments on corruption and human rights in the jurisprudence of the IACHR have been in the areas of freedom of expression, including protection of whistleblowers, i.e. persons who report acts of corruption, and access to information<sup>86</sup>. Freedom of expression is a core of democratic societies and its main function is to facilitate the social control of the government and other powers and that is why it plays a crucial role in denouncing acts of corruption<sup>87</sup>. It is undisputable that the freedom of expression is vital when journalists who try to shed a light on corruption and society are entitled to be informed about such facts<sup>88</sup>. The most hideous form of restriction of the freedom of expression is murder of a journalist<sup>89</sup>. In its jurisprudence the IACHR emphasized the connection between the right to life and freedom of expression. In the landmark advisory opinion concerning the compulsory membership in a journalist association in order to practice journalism, the Court described freedom of expression as a cornerstone of democratic existence<sup>90</sup>. The IACHR highlighted that freedom of expression and practice of professional journalist were closely interrelated. The work of journalists is to collect and present information, and their work embodies freedom of expression<sup>91</sup>. This right is a measure

<sup>86</sup> Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos N° 23, *Corrupción y Derechos Humanos*, accessed November 7, 2022, <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo23.pdf>, 25; Resolution 1/18, §1 (c)(d i–vii).

<sup>87</sup> *Corrupción y derechos*, § 185.

<sup>88</sup> “Go for Zero Corruption” Council of Europe, GRECO, accessed November 7, 2022, <https://rm.coe.int/factsheet-human-rights-and-corruption/16808d9c83>.

<sup>89</sup> I/A Court H.R., *Case of Carvajal Carvajal et al. v. Colombia*. Merits, Reparations and Costs. Judgment of March 13, 2018, Series C, No. 352, § 175; I/A Court H.R., *Case of Digna Ochoa et al. v. México*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2021, Series C, No. 447, § 46–47. See Committee to Protect Journalists, accessed November 7, 2022, [https://cpj.org/data/killed/2022/?status=Killed&type%5B%5D=Journalist&start\\_year=2022&end\\_year=2022&group\\_by=location](https://cpj.org/data/killed/2022/?status=Killed&type%5B%5D=Journalist&start_year=2022&end_year=2022&group_by=location).

<sup>90</sup> See I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*, Merits, Reparations and Costs. Judgment of February 5, 2001, Series C, No. 73, § 68.

<sup>91</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, § 74.

of exchange ideas and information<sup>92</sup>. That is why the public order, which stipulates the obligation to be a member of a given professional association cannot be applied in the case of journalists, since it would mean depriving them of the exercise of their freedom of expression<sup>93</sup>. In its case law the IACHR pointed out core human rights of individuals and obligations incumbent on states: the right to receive information and the duty to protect the individuals' right to such information<sup>94</sup>; the obligation to ensure effective procedure to process requests for access to information<sup>95</sup>; the right to appeal in case of obstruction of access to information<sup>96</sup>; the duty to prevent and protect journalists<sup>97</sup>. What is more, in the case of violation of human rights, States are not allowed to resort to mechanism of official secret, confidentiality of information or public interest or national security in order to withhold certain information, which are indispensable during pending proceeding<sup>98</sup>. All cases of denial of access to information must be substantiated and the burden of proof is borne by the organ, which refuses to provide (hand over) information<sup>99</sup>. The Court clearly stated that free flow of information is a rule and denial of this right is an exception<sup>100</sup>. The IACHR and the IACoMHR underlined the role played by the mass media and journalists with regard to full enjoyment of freedom of expression<sup>101</sup>. Considering that freedom of expression is not absolute right, the Court also

<sup>92</sup> I/ACourt H.R., Case of Ivcher Bronstein v. Peru, Merits, Reparations and Costs. Judgment of February 6, 2001, Series C, No. 74, § 148.

<sup>93</sup> I/A Court H.R., Series A, No. 5, § 76.

<sup>94</sup> I/ACourt H.R., Case of Claude Reyes et al. v. Chile, Merits, Reparations and Costs. Judgment of September 19, 2006, Series C, No. 151, § 77.

<sup>95</sup> I/A Court H.R., Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010, Series C, No. 219, § 231.

<sup>96</sup> Ibidem.

<sup>97</sup> I/A Court H.R., Series C, No. 352, § 162, 217.

<sup>98</sup> I/ACourt H.R., Series C, No. 219, § 202.

<sup>99</sup> Ibidem, § 230; I/ACourt H.R., Case of the Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs. Judgment of November 25, 2015, Series C No. 309, § 262.

<sup>100</sup> Baccio Tarracino, *The International*, 134.

<sup>101</sup> See *Corrupción y derechos*, § 414–421; Víctor Manuel Oropeza vs. Mexico, Report N° 130/99, case 11.740, November 19, 1999, § 2.

defined the limit of this right<sup>102</sup>. According to the IACHR, journalists are obliged to verify received information on which they based their opinions and to act in good faith<sup>103</sup>. But they also have the right to confidentiality of their sources, which due to development of new technologies involves a risk of digital espionage and disclosure of source of information<sup>104</sup>. One of the anti-corruption preventive measures is a duty of the State to ensure transparency in public administration<sup>105</sup> and foremost to guarantee public access to information<sup>106</sup> but also raising awareness as to the threats posed by corruption<sup>107</sup>. Transparency is based on free flow of information and encompasses also access to documents and information<sup>108</sup>. In addition its essential condition is to promote public debate and accountability and responsibility in the fight against corruption as well<sup>109</sup>.

Another group of whistleblowers are human rights defenders. The IAComHR defined them as “any person who in any way promotes or seeks to realizations human rights fundamental freedoms recognized at the national or international level”, including justice operators, environmental defenders<sup>110</sup>. In order to protect human rights defenders, the IAComHR grants various precautionary measures but also has called for protection of them and creation of appropriate environment to carry out their work of

<sup>102</sup> I/A Court H.R., Case of Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004, Series C, No. 107, § 117, 120; *Corrupción y derechos*, § 186.

<sup>103</sup> I/ACourt H.R., Case of Mémoli v. Argentina, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 22, 2013, Series C, No. 265, § 122.

<sup>104</sup> *Corrupción y derechos*, § 210–212.

<sup>105</sup> See Leonie Hensgen, “Corruption and Human Rights – Making the Connection at the United Nations,” *Max Planck Yearbook of United Nations Law* 17, (2013): 202.

<sup>106</sup> See Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362 of 4 September 2013, § 3, 18, 20.

<sup>107</sup> Bacio Terracino, *The International*, 133–134.

<sup>108</sup> Valentina Rossi, “Government Transparency and the Right of Access to Information: Evolving International and European Standards and Their Implementation in the Italian Legal System,” *Italian Yearbook of International Law* 28, (2018): 182; *Corrupción y derechos*, § 220–221.

<sup>109</sup> *Corrupción y derechos*, § 231.

<sup>110</sup> *Ibidem*, § 397–401.

investigation and punishing acts of corruption<sup>111</sup>. In the case *Valle Jaramillo et al. v. Colombia*, which denounced the relationship between paramilitaries and state agents, the IACHR stated that the acts of defamation and harassment targeted at Jesús María Valle Jaramillo to prevent him from reporting posed a threat to his life<sup>112</sup>. In regard to state responsibility for the violation of human rights, the Court referred also to the obligation *erga omnes* and pointed out that states were not responsible for every violation of human rights. In order to be charged of such breach, the State must be aware of a situation of “real and imminent” risk<sup>113</sup>. The IACHR stressed that human rights defenders supplemented either the State and inter-American human rights system functions in promotion and protection of human rights<sup>114</sup>. That is way the IACHR sets out the obligation incumbent on States: to adopt all necessary measures in order to ensure full exercise of rights enshrined in the IACHR – the rights to life, personal liberty, personal integrity, provided that State, where aware of an imminent danger to the human rights defenders<sup>115</sup>. The IAComHR on 5 July 2021 filed the case of *Julio Rogelio Viteri Ungaretti and family v. Ecuador*<sup>116</sup>, which concerns a military servicemember who in 2001 reported irregularities and acts of corruption in the army. The Commission stated that freedom of expression constituted “a means for reporting acts of corruption”. According to the IAComHR, disciplinary sanctions failed to pass a three-stage test: of legitimacy, legality, proportionality, and the obligation of prior approval of speeches before publishing constitutes a form of censure. It also pointed out that violations of freedom of expression were aggravated due to the fact that there is no other instrument to report acts of corruption in armed forces<sup>117</sup>. The IAComHR stressed that persons reporting acts of corruption

<sup>111</sup> Ibidem, § 404–410.

<sup>112</sup> I/ACourt H.R., Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008, Series C, No. 192, § 68.

<sup>113</sup> Ibidem, § 78–79.

<sup>114</sup> Ibidem, § 88.

<sup>115</sup> Ibidem, § 90.

<sup>116</sup> See Report No. 36/15, petition 717–05, OEA/Ser.L/V/II.155, Doc. 15 July 22, 2015, Original: Spanish.

<sup>117</sup> See for e.g.: Dimitrios Kaferanis, “The International Legal Framework on Whistle-Blowers: What More Should Be Done?” *Seattle Journal for Social Justice* 19, no. 3 (2021): 733–758.

were more likely to be subject to various repressive measures because of their activities such as criminal proceedings or unjustified dismissal<sup>118</sup>. The IACHR pointed out the State's obligation to protect individuals who are at risk due to their work to fight corruption<sup>119</sup>: to establish special measures, which guarantee adequate and effective protection. In order to be effective, those measures should be: implemented immediately after the risk becomes known; timely; and the person responsible for protecting the individual at danger should have adequate training and should be effective for as long as the danger lasts. In the view of the Court, a measure is adequate when: it is compatible with the functions of the person at risk, allows such person to carry out his/her current activities, and can be modified in the light of circumstance. Risk assessment must take into account gender<sup>120</sup>. In the case *Acosta et al. v. Nicaragua*, the Court analyzed in depth whether criminal proceedings constitute such adequate means of genuine search for the truth about deprivation of life of the victim. The Court noted that not only investigation and proceeding should be conducted properly but due diligence must also be taken in determining the motives of homicide<sup>121</sup>. The IACHR paid special attention to victims of law enforcement officers (police officers)<sup>122</sup> and prison service abuses especially when such forces are involved among others in act of corruption<sup>123</sup>.

#### 4.5. Staff of the justice system

Corruption in the judiciary may be defined as a deviation from judicial functions by the judicial authority or other justice operators, to obtain a material or immaterial benefit<sup>124</sup>. If the judicial body is not sufficiently protected, it is impossible to combat corruption effectively. In such cases,

<sup>118</sup> Corrupción y derechos, § 423–427.

<sup>119</sup> Cuadernillo, 45.

<sup>120</sup> I/ACourt H.R., Case of Human Rights Defender et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014, Series C No. 283, § 157, 190–192.

<sup>121</sup> See I/ACourt H.R., Case of Barbosa de Souza et al. v. Brazil, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2021, Series C, No. 435, § 127.

<sup>122</sup> Ibidem, § 105.

<sup>123</sup> I/A Court H.R., Case of Lysias Fleury et al. v. Haiti, Merits and Reparations. Judgment of November 23, 2011, Series C, No. 236, § 75–76.

<sup>124</sup> Corrupción y derechos, § 294.

the proceedings may not be launched at all, and documents relevant to the settlement of the case may be destroyed<sup>125</sup>. Furthermore, the witnesses may be intimidated and police officers bribed in order to discourage justice and state organs to take action to protect them<sup>126</sup>. The Court paid particular attention to the lack of due diligence on the part of the judicial authorities, which failed to see any connection between the arbitrary deprivation of life of the person who investigated a series of cases of corruption, smuggling, fraud, drug-trafficking among others<sup>127</sup>. Judges and prosecutors play an important role in enhancement and safeguarding the rule of law and the States are responsible for ensuring their independence and enable them to carry out their functions impartially<sup>128</sup>. In the inter-American practice, independence concerns both institutional independence, which refers to the independence of the administration of justice made up of judges, prosecutors, and functional independence<sup>129</sup>. Judicial independence and objectivity also means adequate process of appointment, irremovability and protection against external pressure<sup>130</sup>. All this guarantees encompasses also prosecutors<sup>131</sup>. Investigation authorities must be free from political pressure<sup>132</sup>. In the judgment concerning *Martínez Esquivia* the Court pointed out that the removal of prosecutors from their posts is possible only in certain limited cases i.e.: the occurrence of the conditions subsequent to which the appointment was subject and when prosecutor committed serious disciplinary offences or was proven incompetent<sup>133</sup>. The case was very characteristic because the prosecutor was removed from the post after having participated

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<sup>125</sup> Ibidem, § 295.

<sup>126</sup> I/ACourt H.R., Case of Gutiérrez and family v. Argentina, Merits, Reparations and Costs. Judgment of November 25, 2013, Series C, No. 271, § 121–122.

<sup>127</sup> Ibidem, § 122.

<sup>128</sup> I/ACourt H.R., Case of Martínez Esquivia v. Colombia, Preliminary Objections, Merits and Reparations. Judgment of October 6, 2020, Series C, No. 412, § 68.

<sup>129</sup> Corrupción y derechos, § 303–308.

<sup>130</sup> I/A Court H.R., Series C, No. 412, § 85, 95. See I/A Court H.R., Case of Cuya Lavy et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 28, 2021, Series C, No. 438, § 123.

<sup>131</sup> I/A Court H.R., Series C, No. 412, § 87–88; Corrupción y derechos, § 298.

<sup>132</sup> I/A Court H.R., Series C, No. 412, § 92.

<sup>133</sup> Ibidem, § 99.

in an investigation concerning alleged corruption of public officials and she rejected an order of her superiors to close the investigation<sup>134</sup>.

The IACHR very rarely refers to corruption directly but one of such cases is *Luna López v. Honduras*, in which a public official was reported to relevant authorities and media about alleged acts of corruption, illegal exploitation of forests by private companies and establishment of so called „Phantom cooperatives” in order to allow unlawful forest exploitation<sup>135</sup>. In this regard, the Court pointed out that there is a link between protection of the environment and other human rights<sup>136</sup>. The IACHR stressed the obligation incumbent on States i.e.: to adopt all necessary measures to protect right to life of those individuals, who due to their occupation are in danger. In short, states are obliged to prevent human rights violations<sup>137</sup>. According to the Court, the State, through its organs (Office of the Prosecutor), omitted to assess the risk to life of the victim (a public official) and failed to exercise due diligence<sup>138</sup>. The State is obliged to act with due diligence in case of special risk and the State failed to implement timely and necessary measures of protection. The prosecutor was aware of an imminent threat and did not take required steps to protect a person at risk, resulting in a breach of the obligation to protect the right to life<sup>139</sup>.

The IACHR worked on standards which must be met during proceedings concerning persons accused of corruption<sup>140</sup>. In the eyes of the Court, the presumption of innocence is the core of the right of fair trial and the burden of proof is borne by the prosecutor not the accused. It is essential for the enjoyment of the right of defence<sup>141</sup>. The exercise of the right of defence guarantees that the two structural principles of fair trial: equality of arms

<sup>134</sup> See “Yenina Esther Martínez Esquivia v. Colombia,” *Open Society Foundation*, accessed November 7, 2022, <https://www.justiceinitiative.org/litigation/yenina-esther-martinez-esquivia-v-colombia>.

<sup>135</sup> I/A Court H.R., Merits, Reparations and Costs. Judgment of October 10, 2013, Series C, No. 269, § 27.

<sup>136</sup> Ibidem, § 123.

<sup>137</sup> Ibidem, § 123–124.

<sup>138</sup> Ibidem, § 137, 139.

<sup>139</sup> Ibidem, § 137.

<sup>140</sup> Cuadernillo, 67.

<sup>141</sup> I/A Court H.R., Case of López Mendoza v. Venezuela, Merits, Reparations, and Costs. Judgment of September 1, 2011, Series C, No. 233, § 128.

and the right of contradiction are adequately adhered to<sup>142</sup>. Furthermore, this right limits the scope of judge's discretion and the parties may make the requests they deem relevant and the judge is obliged to evaluate them<sup>143</sup>. What is more, a decision taken by a national authority which could affect enjoyment of human rights must be duly justified<sup>144</sup>. Due to the fact that corruption is a space of opacity, the requirement of adequate justification of decision results in more transparency, which allows for civil control<sup>145</sup>. Referring to the practice of the ECHR, the Court pointed out that fair trial requires that law should be adequately accessible, with sufficient precision, foreseeable<sup>146</sup>. The IACHR found that uncertainty not always is equal to violation of the ACHR. Regulation with some degree of discretion still meets the requirement of foreseeability<sup>147</sup>. In relation to the reasonable time of proceeding, not only does it depend on its duration but also on complexity of the case. The Court pointed out that evidence of factors that contributed to the prolongation of the proceedings should be provided<sup>148</sup>. The right to fair trial is based on the principle of equality i.e.: both parties of the proceeding have equal footing and are subject to the same procedural rules and guarantees<sup>149</sup>. In this regard, the IACHR stressed that special care must be taken in cases involving public officials. In order to fight against corruption and to prosecute crimes against public administration, it is not desirable to subject politically active persons to an indefinite uncertain procedural situation with the aim of excluding them from the democratic political struggle. This special caution requires shortening the term that is usually considered

<sup>142</sup> Corrupción y derechos, § 326.

<sup>143</sup> Ibidem, § 329.

<sup>144</sup> I/A Court H.R., Series C, No. 233, § 141.

<sup>145</sup> Corrupción y derechos, § 332.

<sup>146</sup> I/A Court H.R., Series C, No. 233, § 199.

<sup>147</sup> Ibidem, § 202.

<sup>148</sup> I/A Court H.R., Case of Andrade Salmón v. Bolivia, Merits, Reparations and Costs. Judgment of December 1, 2016, Series C, No. 330, § 159. See e.g. IACHR 2020, Case of Noguera et al. v. Paraguay, Merits, Reparations and Costs. Judgment of March 9, 2020, Series C, No. 401, § 80–85.

<sup>149</sup> Helene Ruiz Fabri and Joshua Paine, “The Procedural Cross-Fertilization Pull,” in *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals*, ed. Chiara Giorgetti and Mark Pollack (Cambridge: Cambridge University Press, 2022), 70.

a reasonable time for the trial in order to defend and preserve rule of law<sup>150</sup>. Furthermore, the IACHR highlighted the requirement of judge impartiality as one of elements of fair trial. Impartiality means that a member of the Court do not have direct interest, is not involved in the dispute, have no preference to either party of the case. The principle is presumption of subjective impartiality unless proven otherwise. The objective impartiality concerned the case where the judge has offered a proof which raised reasonable concern about his partiality<sup>151</sup>. In this regard, the IACHR pointed out that objective aspect of impartiality concerned a situation in which an objective observer has doubts as to impartiality of judge in a given case for e.g.: suspension of the hearing without justification; the plaintiff's lawyer was not allowed to be assisted by another lawyer; the victim was denied to take part in the process of selecting the jury; passing to the judge a bag and sheets of papers from the accused person, the state omitted to investigate alleged bribery<sup>152</sup>. On the other hand, in the eyes of the Court proces fair trial is still preserved even if the person has no opportunity to prove their innocence in a corruption scheme when such case is unrelated to other (criminal) proceeding<sup>153</sup>. The IACoMHR proposed additional measures in order to restrict the scope of corruption in the administration of justice: to establish a system of accountability, including a follow-up system<sup>154</sup>. The jurisprudence of both organs indicate that also a person accused of an act of corruption enjoy the fundamental human right of fair trial and proceedings in corruption-related matters must comply with the principle of legality<sup>155</sup>. Corruption is also present in political life and the most frequent forms of corruption in regard to political rights are found in the political-electoral sphere and consist of fraudulent financing of politicians, vote buying and political clientelism. Therefore, it is indispensable to have an independent,

<sup>150</sup> I/A Court H.R., Series C, No. 330, § 178.

<sup>151</sup> I/A Court H.R., Case of V.R.P., V.P.C. et al. v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs. Judgment of March 8, 2018, Series C, No. 350, § 239.

<sup>152</sup> Ibidem, § 241, 244, 250, 253.

<sup>153</sup> I/A Court H.R., Case of Villaseñor Velarde et al. v. Guatemala, Merits, Reparations and Costs. Judgment of February 5, 2019, Series C, No. 374, § 138.

<sup>154</sup> Corrupción y derechos, § 339–342.

<sup>155</sup> Ibidem, § 354–356; 362–365.

impartial and legitimate system for the administration of justice and electoral control, as well as technical capacity to carry out such control<sup>156</sup>.

#### 4.6. Other vulnerable groups

The IACoMHR pointed out that another group vulnerable to corruption were persons in mobility, including asylum seekers<sup>157</sup>. There are different ways in which corruption affects such vulnerable people for. e.g. in reception process where a migrant must pay a bribe in order to be let into the State's territory or to gain access to social benefits. In case of human trafficking in conditions of slavery, the Commission states that there is a direct connection between corruption and violation of human rights due to the fact that the authorities of the country of destination are involved in such business or they knew about such practices and omitted to prevent and stop them. Another threat is the facilitation by State agencies of cross-border criminal activities such as drug traffic or money laundering. Furthermore, the State bears aggravated responsibility in case if State officials are involved in or even in charge of such criminal activities<sup>158</sup>. A similar case is women, LGBTI persons, Afro-descendants, persons with disabilities and the elderly<sup>159</sup>. All of these groups are direct or indirect victims of corruption. The IACoMHR pointed out that women and LGBTI persons are affected by various forms of violence, which is aggravated by the act of corruption, especially in case of sex workers. The Afro-descendants population rights such as: the rights to life, health, education are affected by corruption through inappropriate allocation of resources for the implementation of their policy. Another form of corruption is payment of a bribe in order to avoid discrimination by law enforcement authorities. The Commission is also concerned about persons with disabilities due to the fact that corruption have an impact on exercise of their rights, such as the civil legal capacity of persons with disabilities. Sometimes such persons have to pay bribes in order to carry out legal or commercial transactions. In case of the elderly, corruption in public contracting

<sup>156</sup> Ibidem, § 370; 386.

<sup>157</sup> Resolution 1/18, § 3(b).

<sup>158</sup> Corrupción y derechos, § 452–459.

<sup>159</sup> See Khulekani Moyo, "Corruption as a Human Right Violation," in *Research Handbook on Human Rights and Poverty*, eds. Martha F. Davis, Morten Kjaerum, and Amanda Lyons (Chetelnham–Northampton: Edward Elgar Publishing, 2021), 509.

has negative impact on e.g. assistance programs for elderly people, access for social security<sup>160</sup>. The case law of the IACHR and the IACoMHR shows that there is a link between corruption and the material status of the victim. People who are in worse living conditions are more likely to be victims of corruption<sup>161</sup>. In Latin America and the Caribbean almost one-third of the population live in poverty including approximately 10% in extreme poverty, which leads to structural inequalities and corruption<sup>162</sup>.

## 5. Conclusions

The phenomenon of corruption is not limited by culture, borders, tradition, religion or geography – it is just universal<sup>163</sup>. In Latin America, corruption is a cultural product that begins with 75% of the population being convinced that there is no equality before law. However, some changes are noticeable. Statistical data indicates that perception of corruption decreased from the rate of 62% in 2016 to 57 % in 2020. But in some countries of the region this rate of perception is still high i.e.: in Chile – 73%, in Venezuela – 75%, Paraguay and Peru per 70% and only in five states of Latin America less than half population think that corruption grows – El Salvador, Uruguay, Nicaragua, Mexico and Guatemala<sup>164</sup>. High-ranking public officials are the most susceptible of being corrupt i.e.: the president (58%), the parliament (55%), the police (50), judges (47%)<sup>165</sup>.

<sup>160</sup> Corrupción y derechos, § 468–484.

<sup>161</sup> Moyo, “Corruption”, 510.

<sup>162</sup> Verónica Gómez, “Structural Challenges to Access to Justice in the Americas: An Overview of Standards Promoted in the Inter-American System,” in *Equal Access to Justice for All and Goal 16 of Sustainable Development Agenda: Challenges for Latin America and Europe*, ed. Helen Ahrens, Horst Fischer, Verónica Gómez, and Manfred Nowak (Zürich: LIT Verlag GmbH and Co. KG Wien, 2019), 189, 202.

<sup>163</sup> See The United Nations Convention against Corruption, Reasource Guide on Good Practices in the Protection of Reporting Persons, United Nations Office of Drugs and Crimes, Vienna 2015, 1, accessed November 7, 2022, [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf).

<sup>164</sup> “Informe Latinobarómetro 2021,” (Santiago, Chile), accessed November 7, 2022, <https://www.latinobarometro.org/lat.jsp>, 81–82.

<sup>165</sup> Ibidem, 83–84. See “Americas Barometer,” accessed November 7, 2022, [https://public.tableau.com/app/profile/lapop.central/viz/LAPOPV3\\_2/Combination?publish=yes](https://public.tableau.com/app/profile/lapop.central/viz/LAPOPV3_2/Combination?publish=yes).

Neither documents regulating the fight against corruption nor documents on human rights protection refer to the issue of impact of corruption on human rights and perhaps this is the main reason why it is so difficult to establish a direct causal link between corruption and human rights violations<sup>166</sup>. But the key element which connects corruption and human rights is misuse of power<sup>167</sup>. The case law of the IACHR and the IACoMHR prove that in fact all human rights can be affected by corrupt action: civil, political, economic, social and cultural rights<sup>168</sup>. Both human rights treaty bodies treated corruption rather as a means of violation of already recognized human rights than of a brand new right<sup>169</sup>. In its practice, the IACHR pointed out that in many cases corruption may have led to violation of human rights but was not their violation in itself<sup>170</sup>. In such cases, corruption is a *sine qua non* factor which, in effect, led to a breach of human rights<sup>171</sup>. Furthermore, corruption affects human rights in regard to the limitation of State's capacity to fulfil obligations to respect, protect and implement human rights<sup>172</sup>. The Commission elaborated those obligations, i.e.: 1) the obligation of States under the ACHR: obligation to guarantee full enjoyment of human rights; obligation to adopt measures to prevent the infringement of rights linked to acts of corruption; obligation to investigate acts of corruption; obligation to guarantee the exercise of rights based on equal and non-discriminatory conditions; obligation to make reparations to the victims of corruption; 2) obligation under the American Declaration of the Rights and Duties of Man: obligation to respect and ensure the rights set

<sup>166</sup> See Kolawole Olaniyan, "Towards a Human Rights Approach to Corruption," in *The Cambridge*, 532.

<sup>167</sup> Corrupción y derechos, § 90.

<sup>168</sup> Julio Bacio-Terracino, "Linking Corruption and Human Rights," *Proceedings of the Annual Meeting* 104, (2010): 243.

<sup>169</sup> Cf. Andrew Spalding, "Anti-Corruption: Recaptured and Reframed," in *The Cambridge*, 523–524.

<sup>170</sup> See Bacio-Terracino, "Linking," 243.

<sup>171</sup> Jimena Reyes, "Symposium on New Directions in Anticorruption Law: State Capture Through Corruption: Can Human Rights Help?," *AJIL Unbound* 113, (2019): 331–332.

<sup>172</sup> Joel M. Ngugi, "Making the Link Between Corruption and Human Rights: Promises and Perils," *Proceedings of the Annual Meeting* 104, (2010): 246.

forth in the Declaration; obligation to act with due diligence in response to human rights violations, among other things<sup>173</sup>.

The Commission's and the Court's practice shows one thing when dealing with a phenomenon as complex as corruption, the context must always be taken into account when determining its impact on human rights<sup>174</sup>. But it is very doubtful whether corruption can constitute a human rights violation that generates international responsibility of the States before inter-American human rights treaty bodies<sup>175</sup>. In order to do that, it is indispensable to establish that the wrongful act has the capacity to infringe an international obligation of the State in the area of human rights and is attributable to the State<sup>176</sup>. Unfortunately, in a corruption case it is hard to establish the chain of events which led to the act of corruption<sup>177</sup>. Some scholars conclude that the attribution of responsibility in cases of international wrongdoing, based on acts or situations of corruption, is determined by the failure of relevant authorities to comply with the general obligations of the State within the scope of their competence. When there is international responsibility in place, the responsible State is obliged to make full reparation for the injury caused by an internationally wrongful act<sup>178</sup>. The practice of the IACHR and the IACoMHR indicates that corruption is not a victimless violation. The groups that are most vulnerable to acts of corruption are the poorest ones. It should also be borne in mind that violations of human rights can be both a cause and an effect of corruption<sup>179</sup>.

<sup>173</sup> Corrupción y derechos, § 249–283.

<sup>174</sup> See Kevin E. Davis, "Corruption as a Violation of International Human Rights: A Reply to Anne Peters," *European Journal of International Law* 29, vol. 4 (2019): 1291,

<sup>175</sup> See Nash Rojas, "Nuevos," 206–207.

<sup>176</sup> See Michał Balcerzak, "Korupcja jako zagrożenie dla społeczności międzynarodowej i praw człowieka," in *Świat wobec współczesnych wyzwań i zagrożeń*, ed. Janusz Symonides (Warsaw: Wydawnictwo Naukowe Scholar 2010), 536–538.

<sup>177</sup> Responsibility of States for Internationally Wrongful Acts 2001, Article 2, *Yearbook of the International Law Commission* 2, part 2 (2001): 34–36; Aloysius P. Llamzon, "State Responsibility for Corruption: A return to Regular Order," *European Yearbook of International Economic Law* 11, (2020): 111, 119–123; Tim Wood, "State Responsibility for the Acts of Corrupt Officials: Applying the 'Reasonable Foreign Investor' Standard," *Journal of International Arbitration* 35, no. 1 (2018): 108–110.

<sup>178</sup> Nash Rojas, "Nuevos," 219–220.

<sup>179</sup> Balcerzak, "Korupcja," 546.

The case law of the IACHR and IACoMHR illustrates that human rights, democracy and rule of law go hand in hand and that corruption has a direct impact on citizen's confidence in democratic institutions and undermines the whole idea of State's apparatus. As A. Gutierrez said "there can be no sustainable prosperity unless everyone can benefit from it. There can be no lasting peace without justice and without respect for human rights"<sup>180</sup>.

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<sup>180</sup> António Gutierrez, "Inauguration of the 40th Anniversary Commemorations, July 16, 2018, Inaugural Adresses", in *Dialogue between Regional Human Rights Courts*, Inter-American Court of Human Rights (San José, 2020), 21, 26.

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