

THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Review Meeting

Corruption and Human Rights

Geneva, 28-29 July 2007

PROSECUTION OF CORRUPTION CASES AND RESPECT OF HUMAN RIGHTS

Carlos Castresana

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INTRODUCTION

1. The International Council on Human Rights Policy demands the elaboration of a working paper on the subject of the existing relationship, if any, between corruption and human rights, for a latter discussion amongst specialists in this particular field. The issue is in itself poorly researched, particularly if we put the emphasis on the consequences for human rights that derive or potentially can derive from judicial investigations on corruption cases.
2. The Council asks for the point of view of an insider, someone who has gotten through professional activity first hand experience and information. The purpose of the research is to get response for answering two basic questionings.
3. First, the key question is about the investigations and effective prosecution of cases of corruption: can they serve to better protect human rights? This question requires an analysis and previous explanation of the existing relationship, if there is one, between corruption and human rights. In my opinion, this relationship exists, and it is a cause-effect relationship. It implies an affirmative answer to the question: there are some modalities of corruption that directly or indirectly cause human rights violations, and as a consequence, the successful fight and gradual elimination of the cause will produce necessarily a corresponding reduction of the effects.
4. The second question is referred to the possibility of existence of specific conditions for violations of human rights in the investigations of corruption cases; the answer, in my opinion, is affirmative: there are specific violations of the rules of due process that are present in the investigation on corruption cases, and are not present in other penal investigations. Those violations affect the rights of the investigated, the investigators and the victims.
5. We will approach first the subject of corruption and its impact on human rights; next the means and the specific legal instruments of the investigation and prosecution of corruption crimes, and we will attempt to verify if the special investigative means or its

abuse can generate human rights violations, and also if the cooperation, mixture and relation of both disciplines, criminal law against corruption, and human rights law, and its interaction, can help to prevent and fight the said violations.

EVOLUTION OF CORRUPTION

6. **Classic corruption:** Corruption has been defined as the abuse of a public position for personal gain.¹ The definition is extremely precise, but responds to a version or modality of corruption that can be defined as classic or traditional, in the sense that today, it being still far from being eradicated, does not constitute, in my opinion, the gravest problem of corruption present in human societies. This traditional corruption is personal, individual, and supposes the rupture of the public servant from his duties of loyalty and probity and is fundamentally related to the wish of illicit enrichment through the lawful or unlawful performance of his public functions. The essential modalities of the classic corruption are the misappropriation or embezzlement (appropriation of public funds that have been entrusted to the public servant for its management) or bribing (the obtaining of money or advantages of other nature but always of economic value, in exchange of doing or not doing something, licit or illicit, in the performance of his official functions).
7. In both cases the public servant abuses of his position deviating the power that has been entrusted to him from its regular way, making an act or taking a decision with the finality of personal enrichment instead of following the general or public interest.
8. This modality of corruption, the enrichment of the public servant by breach of trust that has been deposited in him for the performance of his functions, is extremely frequent, and in some cases reaches unprecedented seriousness because of the high amount of the public funds embezzled, the amount of profit illicitly obtained, of the importance of the public position from which the criminal conducts are realized, the long lapse of time the conduct is being committed, the impact that the conduct represents for the public opinion, and the number of public officers involved. However, even in the gravest of those cases, a direct or indirect affront or consequences conducing to violations of human rights is, if not hard to imagine, difficult to probe.
9. This modality of corruption is intimately tied to poverty and underdevelopment² and is widespread in poor countries, where the cost-benefit relation is extremely favourable for corruption and promotes corrupt conducts. Public officers in underdeveloped countries perceive great potential advantages and possibilities of enrichment through the deviation from the right performance of their public duties, while the risk of being discovered and punished seems remote; this cost-benefit relationships in rich countries is exactly the opposite: the public servant is well remunerated and will barely upgrade his quality of life if corrupted, and the possibilities of being caught are high, as the punishment for being caught is probable and severe.
10. Deterrence and wealth: those, and no morals or probity, honesty or loyalty, are the real factors to determine the difference between corruption in developed and underdeveloped

¹ Robert Klitgaard, cited in the Final Report on Immunity on the Authors of Economic, Social and Cultural Rights Violations. Consejo ECOSOC. E/CN4/Sub.2/1997/8 on June 21st, 1997, Special Relator El Hadji Guissé.

² Check the Corruption Perception Index of Transparency International from whose reading, year by year, a clear relationship may be established between the level of wealth and development and the honesty of public officers (Iceland, New Zealand, Norway) and the level of underdevelopment and public corruption (Haiti, Bangladesh)

countries. As Bertolt Brecht pointed out, honesty begins on satiated stomachs. In wealthy democracies with powerful reliable and transparent legal systems corruption becomes just too risky.

11. Classic corruption is essentially individual and public.³ Corruption in the private sector is not relevant because the owners of the legal persons have their way to keep employees closely under control, and the response to any irregularity is immediate and radical.
12. A paradigmatic example on individual classic corruption in its supreme manifestation is the one of General August Pinochet. He did not only destroy during the cold war the oldest democracy of Latin America and created a personal dictatorship of 17 years, but took advantage of his illegitimate position as President of the Republic of Chile to build year by year a complex and clandestine framework of front companies that served as a smoke screen, opened more than one hundred bank accounts and certificates of deposit, used fake passports and nonexistent identities, and used other sophisticated methods, instruments and procedures of the international financial system, destined to cover his personal gain and enrichment, gotten through the systematic deflection of public money to his personal profit, massively evading the payment of taxes, and getting personal gain from the charging to the multinational military industry of bribes or illegal “commissions” or “tangentes”⁴, from the acquisitions of arms and ammunition and other provision of goods and services for the Chilean Army during his dictatorship and even after it ended.⁵
13. It is more than probable that, apart from the complicity of the financial institutions where he had deposited or invested his funds, General Pinochet enjoyed some kind of cover protection from the governments of the countries where he did his *businesses*. This probability is grounded in two demonstrated facts: first, he violated systematically during many years the anti money laundering laws without consequences; second, he used regularly false documents and identities in a kind of businesses as arms industry submitted to intense surveillance, also without consequences. Anyway, no evidence of official complicity has arisen.
14. The dictatorship was the framework both for corruption and human rights abuses, and for impunity. But except for the coincidence in the authorship of both criminal activities – very frequent, by the way – there was not apparent cause-effect relationship between individual corruption and human rights abuses.
15. **Spreading the stain: the modern corruption, where public and private meet:** Another paradigmatic example of individual corruption is the one of the Saudi Prince Bandar Bin Sultan that has amassed a personal fortune during many years of charging commissions⁶ to the British arms industry for the acquisitions made by his government.⁷ The difference between the case of Prince Bandar and General Pinochet, both of them

³ The joke in Bulgaria during the transition after the Berlin Wall fall: the fundamental right is for every Bulgarian the right to become Customs officer one day in his life.

⁴ Universally known appellation of bribes in the Italian *Tangentópolis* of the 90’.

⁵ The personal fortune of August Pinochet was concealed from Chilean Treasury and from the investigators and prosecutors on counts of his many human rights abuses, using basically the financial structures of North American and British bank systems, with the complicity and cooperation of those institutions, as well as the services of several tax havens. The case has been documented exhaustively by the Permanent Subcommittee on Senate Investigations in USA in its March 2005 report “Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act supplemental Staff Report on US accounts used by August Pinochet.” US Government Printing Office, Washington 2005.

⁶ Apparently, 1,800 million euros. El Pais, June 27th 2007.

⁷ *New York Times* and *The Economist*. The Prince has been Ambassador of Saudi Arabia to the US during the last 20 years and is personal friend of President George W. Bush.

good clients of British Aerospace Systems, is that in the case of the Saudi Ambassador, the relation between his corruption and the official deviation of power not only in his Government but also in the British Government has been established. Once the case was discovered, Prime Minister Tony Blair ordered the investigation to be closed on arguments of national security, and the General Attorney Lord Goldsmith agreed. This is a good example of how the stain of corruption nowadays expands easily from the individual behaviour to the structural and regular functioning of the public institutions, even in the most democratic countries.

16. This second modality of corruption is directly related to globalization.⁸ After the social, economic, technological and political changes derived from globalization, corruption can be defined today as any deviation of power with economic purposes. It can happen both in the public and in the private sector, but this gain is not necessarily, not usually intended to the personal profit of the person that carries out the act of corruption.
17. During the 80's, a tendency to economic liberalization began to be expanded from the USA by the government of Ronald Regan and in Europe with Margaret Thatcher. This tendency was characterized by: the privatization of most of the essential public services (transport, social welfare, education and health services); the de-regularization of some basic productive sectors and strategic services (arms, energy, telecommunications, financial services); and a generalized tax reduction. The State, to put it in few words, was reduced.
18. At the same time, the fall of the Berlin Wall and the disappearance of the political order based in the mutual dissuasion between two confronted blocks, had as a consequence that political representation, articulated in democratic societies in political parties, began to require a substantial increase in financial resources, in order to promote the candidacies like marketing commercial products, once the ideological differences became more and more diffuse.⁹ The price increase of the political campaigns caused that the indebted political parties needed to be financed by the ones that had the resources to do so, the corporations, the large multinationals.
19. Corruption became then institutional, structural, collective, systematic and objective.¹⁰
20. Evolution and merging of legal persons during the same period have permitted that small teams of executives control huge corporations beyond any control because the ownership is so divided amongst thousands of shareholders than nobody can rule the company but those few employees.
21. Modern corruption is not governed by individual behaviours and is not regulated by ethical or moral criteria, and has displaced the centre of decision-making from parliaments to the markets.¹¹ The archetypical conducts are no longer bribing or embezzlement, and public or private corruption is indistinct.
22. Now, corruption is committed through illegal financing of political parties, trading with influence, insider trading, wrong management, prohibited negotiations, money laundering,

⁸ Carlos Castresana "Soberanía y justicia" in Derechos Humanos y Globalización Alternativa una Perspectiva Iberoamericana. Universidad Iberoamericana. Puebla, México, 2004.

⁹ *El País*, October 4th, 2004. The candidates for the presidential elections of 2004 collected for their campaign 1,400 million dollars, while the 2000 campaign the amount had been 345 million dollars. This even though new law pretended to regulate and limit the campaign expenditure.

¹⁰ Carlos Castresana, General Rapporteur. "Introductory Report" in the 2nd European Conference of Specialized Services in the Fight Against Corruption. Council of Europe, 1998.

¹¹ Noreena Hertz in The Silent Takeover, Global Capitalism and the Death of Democracy. Arrow Books, 2001. About the evolution of the financing of political parties.

tax fraud, fraudulent conveyance, violation of antitrust and antidumping regulations, fraudulent bankruptcy, etc. Confusion between public and private is complete. As Groucho Marx stated many years ago: “the key of success in businesses is honesty: if you can avoid it, it’s done”.

23. The priorities are not decided in the general or public interest, but in the particular interest of those who had financed the political campaigns, who control and pay to the decision makers.¹² In some relevant cases, important and popular businessmen have decided to launch their own political careers without renouncing to their businesses. And controlling the mass media and having unlimited resources for their campaign, they are becoming successful in a significant number of cases.
24. Another fundamental aspect of this social and economic model is the progressive reduction of the fiscal systems to taxing consumption of goods and services, the taxing of employees and self-workers. The fiscal charge on legal persons, and especially on international transactions is smaller and smaller each day through procedures that are based on tax havens. When corruption extends beyond the individual and becomes institutionalized, generalized, systematic, and carried out by corporations, then this affects social, economical, cultural, civil and political rights.¹³
25. This model of economic system, although provoking economic growth, only increases inequality.¹⁴ A 2005 Report from the UN denounces the severe increase in economic and social inequalities during the last decade. It reveals that, for example, 80% of the world’s wealth (GDP) is in the hands of 1.000 million people living in developed countries. This obviously implies that the other 20% of the world’s GDP is shared by the 5,000 millions people who live in developing or underdeveloped countries.¹⁵ It is very similar to the model of totalitarian society described by Aldous Huxley in “A Brave New World” in 1932: “The optimum population is modeled on the iceberg, eight-ninths below the water line, one-ninth above.”
26. This second modality of corruption that implies the systematic diversion of public interest, notably affects economic and social rights. Two Reports from United Nations organisms, the Food and Agriculture Organism (FAO) and UNICEF have just provided terrifying data about the world nutritional overview and the situation of the most disfavoured children of the world. The number of people who are hungry is of 852 million (9 of those million in industrialized countries) and 5 million children die each year just for lack of food and proper nutrition. But 1.000 million children suffer from misery, war, famine, or AIDS, which clearly endangers their lives¹⁶, because it deflects essential resources that are needed in order to maintain the conditions of a dignified life.

¹² Lois Le Floch Prigent, Chief Executive Officer of the French Oil Corporation ELF involved in the most serious case of corruption in France accepted that he had systematically bribed the governments of the African countries where they were doing business, and declared that every French President, from De Gaulle to Mitterrand, had been perfectly aware.

¹³ Washington Post, December 8th, 2006. Among 25 poor countries probed in detail by the World bank’s Independent Evaluations Group, only 11 experienced reductions in poverty from the mid 90’s to the early 2000’s, while 14 had the same or worsening rates over that term. The group said the sample is representative of the global picture.

¹⁴ *El Pais*. December 11th, 2006, The 118 richest people of the list created by Bilan possess 460,000 million swiss francs (306 million euros), which is the equivalent of the Swiss GDP. The fortune of the Sweden citizen Ingvar Kamprad, founder and owner of Ikea, is estimated in 17,000 million euros.

¹⁵ José Luis Ocampo, UN General Sub secretary for economic and social affaire. *El Pais*, August 26th, 2005.

¹⁶ *El Pais*, December 10th, 2004.

27. The State has been reduced so much that can no longer affront the basic commitments of the social contract. And finally, this deficiency in the way economic and social rights are granted, causes harm to civil and political rights as well. The loss of the guarantees of a dignified life ends up meaning the loss of life itself. The most scandalous example is the one of Hurricane Katrina: in light of a serious natural emergency, known beforehand, the most powerful State in the world is incapable of programming the most elemental evacuation and transportation for the population without resources of their own, and these people die abandoned to their own destiny. Once the list of the casualties was verified, and the victims identified there were no surprises: they were racial minorities, migrants, poor, elders, the sick, the prisoners in jail, women and children left behind. All of them members more or less previously determined of risk groups of individual socially discriminated.
28. In this case the impact on the institutionalized corruption on human rights is evident.
29. **Corruption Inc.:** The third level of corruption is the one that refers to corporations themselves. We have already mentioned the reduction of the financial capacity of States, the decrease in the political power of public and democratic institutions and therefore, the displacement of economic power and political capacity of control towards the markets, where decisions are adopted by legal persons without taking into account public interests at all.
30. We have also mentioned an evolution happened inside corporations, where there is an overcrowding of shareholders provoking that the majority of the capital is not owned by only one or a group of shareholders; instead, the big companies are run by a few executives rather than by their so many owners.
31. Finally, the phenomenon has provoked that the legal person has “come to life” by acquiring capacity of taking decisions that follow exclusively the logic of profit and does not attend any moral criteria, not even the personal criteria of the individuals who formally direct the enterprise. These directors adopt solutions which follow the logic of the market and are independent of their personal will or any other considerations, to preserve their charges.
32. This new version of the myth of Frankenstein acquires all its virtuality in those situations where corporations are left alone: specially, when making business in places or situations where they are beyond the control of the States, and also where the rules of the free and fair competition don't work: it means basically, in developing countries and in the natural resources market.
33. When corporations are left alone in a market without limits, the creature of Frankenstein becomes really dangerous. A lot of violations of basic human rights happen in this new wilderness where the only rule is the law of the strongest. The main violators of human rights are nowadays non-state actors. Corporations, irregular armed groups, terrorist organizations, mafias and organized gangs: those who play without rules.
34. During the United Nations Program Oil for Food, 1.8 billion dollars were paid as bribes by 2,400 companies, according to the UN Experts Panel.¹⁷ The total number of companies that had taken part in the program was 4,500. The country with the most companies involved in the program was Russia, followed by France.¹⁸ Human rights violations, in the international context of the exchange of goods and services, have no

¹⁷ *Washington Post*, October 20th, 2005.

¹⁸ *New York Times*, October 27th, 2005.

criteria for justice, promotion of development or equitable distribution of wealth, but rather that of the exclusive interests of corporations.

35. This way, natural resources have become a curse rather than a blessing.¹⁹ The most exemplifying case in this matter is that of Equatorial Guinea, a tiny dictatorial country in sub-Saharan Africa. Equatorial Guinea is something other than one of many cases of corruption of an authoritarian government. It is an actual kleptocratic regime in which most of the wealth belonging to the Equatoguinean people is looted for the personal profit of President Teodoro Obiang Nguema, with the acquiescence, support and participation of corporations operating in the natural and financial resources of the country. The causes are, basically:
- a) Widespread corruption, induced by multinational corporations, directly or indirectly bribing high ranking Equatoguinean officials and members of the government and their families, and facilitating the systematic embezzlement of the national public budget.
 - b) A systematic deprivation of the resources to the country through Production Sharing Contracts (PSCs) in which the revenues to be paid by oil and gas corporations to the Equatorial Guinea National Treasure in exchange for the concessions for exploitation of natural resources oscillates between 13 to 20%, in contrast to the regular rates to be paid in the same sector in countries with similar conditions to Equatorial Guinea, between 45 to 90%. Oil and gas companies or their subsidiaries have participated since the very beginning of the exploitation of the vast resources of the country in partnership with President Obiang himself or the front companies he controls.
 - c) The system works in a framework of dictatorship, violation of human rights, persecution of political opponents, political instability, and absence of enforcement of rule of law. Impunity of abuses is absolute.
36. The current situation of extractive oil and gas industry in Equatorial Guinea is extremely prosperous²⁰, and its potential and future is enormous²¹. Taking into account the revenues of oil and gas exportations, considered in US (the main client) prices, the income per capita of Equatorial Guinea is the second in the world, only after Luxembourg, and before Norway and the US²². Considering the factors to measure the level of national human development²³, development in Equatorial Guinea should be at a level equivalent to a developed, middle average European Union country, precisely between Greece and Portugal²⁴, and should be around the 25th in the World List, among the countries with high human development. Instead, it is a miserable country, the 121st of the List, in which most of the population lives in conditions of harsh underdevelopment. The reasons²⁵ should be summarized as follows:

¹⁹ Richard Murphy and Nicholas Saxon mention that Nigeria, the main country producing oil in sub-Saharan Africa, has suffered a per capita reduction since 1970 of 25% under the regional average. Financial Times, June 1st, 2007.

²⁰ Even being a very small country, Equatorial Guinea is the third exporter of oil and gas of sub-Saharan Africa, only after Nigeria and Angola, and with better quality and easier and cheaper extraction.

²¹ Equatorial Guinea reserves are estimated to be the 10% of the world reserves, the same level that Kuwait.

²² Source, CIA Report.

²³ Source, United Nations Human Development Report 2005.

²⁴ The GDP per capita in 2003: Greece, \$19,954, Equatorial Guinea, \$19,780, Portugal, \$18,126, Source, United Nations Human Development Report 2005.

²⁵ The situation is widespread in Africa, in spite of Resolution 1803 (XVII) of the United Nations General Assembly of September 14, 1962 referring to the inalienable rights of all States freely to dispose of their natural wealth and resources in accordance with their national interest, and the duty to respect for the

- a) Corruption: the Government of Equatorial Guinea is looting the wealth of the country with the acquiescence, cooperation and partnership of multinational extractive and financial corporations.
 - b) Oppression: Equatorial Guinea is much worse than a dictatorship. The regime is a ruthless and permanent violator of human rights. The President and his Clan retain all political power, the government and institutions.
 - c) Misery: Most of the population lives in conditions of extreme poverty. The death rate amongst women and children is terrible. The life expectancy of the population at birth is 43.3 years, when, according to the wealth of the country, it should be around 78 years.²⁶
37. The three above mentioned facts are not independent, but interrelated. In Equatorial Guinea, as in many other countries, oppression is instrumental to corruption. The widespread framework of corruption can only be maintained with the systematic repression of the population and political opposition. Finally, poverty is not an independent fact either: it is the necessary consequence of the huge level of corruption which situates Equatorial Guinea as the 6th most corrupt country in the world²⁷. The corporations, not just Equatoguinean officials, must also be held accountable for the miserable conditions of life of the population. Equatoguineans are dying²⁸, their death²⁹ being the foreseeable and necessary consequence of the spoliation of the country's wealth. The participating corporations knowingly and willingly accept this result of death.³⁰
38. **Silver or lead: The corruption of organized crime:** A fourth level of corruption which increasingly affects human rights, is the one related to organized crime.³¹ The complicity and inefficiency of authorities has generated poor protection of human societies and specially the groups that end up under the control of organized crime.³² Institutional policies, in the European Union and in the United States, relative to the illicit migration of

economic independence of States. Likewise, Resolution 3201 (S/VI) of May 1st, 1974 consists of the declaration on the establishment on a new economical order. The Charter of Economic Rights and Duties of States, Resolution 3281 (XXIX) states that "every State has and shall freely exercise full permanent sovereignty including possession, use, and disposal over all its wealth, natural resources, and economic activities."

²⁶ Source, United Nations Human Development Report 2005.

²⁷ Actually, the first one, if we consider only the countries with some welfare capability. Source, Transparency International.

²⁸ Countries, no matter their level of wealth or development, use to have balanced rates of life expectancy and GDP indexes, because the health of the people tend to correspond to the wealth of the country. The most wealthy and developed country, Norway, has a life expectancy index of 0.91 correspondent to a GDP index of 0.99. The most miserable and underdeveloped country in the planet, Niger, has a life expectancy index of 0.32, correspondent to its GDP index, 0.35. Equatorial Guinea has a GDP index of 0.88, the same as Israel, Greece, Brunei or Qatar, but, instead of all those countries, whose indexes of life expectancy are without exceptions over 0.80, the life expectancy index of Equatorial Guinea is only 0.30, even worse than Niger. Source, United Nations Human Development Report 2005.

²⁹ Misery in the country is evident, and information about its underdevelopment is public. Oil and financial corporations know the amount of Equatoguinean exportations because they pay and manage them, and know the degree of development that should correspond to the Equatoguinean GDP. The deviation of rates is so enormous and scandalous that nobody making business there can claim to ignore it.

³⁰ Carlos Castresana in "Equatorial Guinea. Open Society Justice Initiative. Research Project. Final Report." University of San Francisco School of Law. Center for Law & Global Justice. San Francisco. May 2006.

³¹ Carlos Castresana on "Corruption, Globalization and Organized Crime" from Corruption in a Globalized World, Interdisciplinary Analysis Ratio Legis. Salamanca, España, 2004.

³² According to the International Monetary Fund, money laundering represents between 2% and 5% of GDP of the world.

workers from developing countries throws these people into the hands of powerful criminal organizations that take these people across borders and proceed to exploit them.³³

39. The paradigmatic example of State's failure and organized crime groups violating basic human rights in a systematic and widespread way is Colombia with its, 40-year armed conflict, which has created 3 million people displaced from their homes, and over 11,000 child soldiers.³⁴
40. **Crossing the red line. Corporations and armed conflicts:** Finally, the "free" way of making businesses, i.e. corruption of the corporations in those places with armed conflicts and abundant available natural resources are directly provoking the violation of fundamental rights of the population since, indirectly, and sometimes directly, corporations finance the conflict by assisting the participants, governments or irregular armed groups, providing them unlimited access to arms, ammunitions or funds to buy these, in exchange of natural resources. As a clear example in this case, aside of all the conflicts due to diamonds in Liberia and Sierra Leona, the Democratic Republic of Congo has experienced a veritable genocide with more than 4 million deaths since 1997, in which relies in the illegal exploitation of natural resources (coltan, copper, gold, cobalt, diamonds, etc.) by multinational corporations, mainly European and North American.³⁵ In these cases, corruption reaches the category of international crime and in that sense can be built the criminal responsibility by conspiracy, complicity, or aiding or abetting war crimes or crimes against humanity. ³⁶

LEGAL INSTRUMENTS TO FIGHT CORRUPTION AND ENSURE HUMAN RIGHTS

41. All States, and good part of supranational organizations, such as the United Nations, Organization of American States, European Union, Organization for Economic Cooperation and Development, and Council of Europe, have specific judicial instruments to fight corruption.³⁷ States establish in their penal codes the criminal conducts relative to corruption, and usually include in their procedural codes some particularities of the penal process regarding corruption, such as those referred to special investigative techniques that may be used in corruption investigations, and also in determining the competent tribunals, the immunities that protect those indicted while in office in certain high ranking posts, measures for increasing or diminishing punishment, suspension or forgiveness of penalties for those who collaborate with authorities in fighting corruption, and in regards of identifying, freezing, and seizing those goods or funds acquired illegally through corruption acts.
42. On that same way, international judicial instruments, in the form of Conventions and International Agreements, regional or global, attempt to harmonize and homologate the legislation of States to facilitate international cooperation. Therefore, we will concentrate on the most universal agreement of all against corruption, the United Nations Convention against Corruption approved in Mérida, México in 2003. The Convention tries to establish

³³ Carlos Castresana, "El Muro" UNAM, México, 2007.

³⁴ Carlos Castresana and others, CIJ report on Human Rights in Colombia, 2005.

³⁵ United Nations Panel of Experts. Report 1146/2002 of October 16, 2002. The Report states that of 85 companies making business in violation of the OEDC Guidelines for multinational enterprises, some of them as famous as Barclays Bank, Bayer, American Mineral Fields or Trinitech, 21 are of Belgium, 12 of United Kingdom, 8 of USA, 5 of Germany, 2 of Switzerland, 2 of Canada, 1 of Netherlands, 1 of Finland.

³⁶ Rome Statute of the International Criminal Court.

³⁷ Jorge F. Malem Seña in Globalización, Comercio Internacional y Corrupción. Gedisa Editorial. Barcelona, 2000.

a global strategy against corruption with penal, procedural, cooperative, preventive, and repressive measures.

43. Among the preventive measures can be mentioned the adoption of transparency policies, the creation of special units against corruption, the establishment of behavioral codes for public officers, the transparency in biddings and contracts in the public sector as well as in the private sector, the participation of civil society, and the prevention of money-laundering.
44. The repressive penal measures for the public sector are those imposing to the ratifying States the penalization of bribery of national, foreign, and international public officers, embezzlement, misappropriation or other diversion of public property, trading in influence, abuse of functions, illicit enrichment, bribery, embezzlement and money-laundering in the public and private sector, concealment, and obstruction of justice, regarding the authors, collaborators and other ways of participation and attempt.
45. The Convention establishes that the penal, civil, and administrative liability of legal persons should be taken in accordance with effective, proportional, and discouraging sanctions.
46. The Convention contemplates also procedural measures for the most effective persecution and punishment of corruption crimes, including measures for the freezing, seizure and confiscation of assets, protection of witnesses, experts and victims, reporting persons – whistleblowers-- and measures for national and international cooperation among different authorities for extradition to overcome obstacles that may arise out of the bank secrecy laws.
47. The Mérida Convention provides strong measures to make possible the asset recovery after the conviction that corruption is fundamentally a money issue, and it is imperative, so that it can be fought successfully, that States must be able to seize funds acquired through corruption, in order to get the prejudices caused being compensated, and to dissuade those who intend to commit corrupt acts. To be sure than those measures, besides sanctioning the perpetrators, do not harm their families, associates, or other natural or legal persons not related to the criminal activity, enough evidence that establish beyond doubt that a relationship between acts of corruption and the seizure of funds and assets must be reached; moreover, there must be granted the possibility that those persons can defend themselves during the process, opposing the adopted measures and exercising their right to use legal actions and appeals in their favor.

DUE PROCESS

48. Is there the possibility that penal and procedural domestic and international norms facilitate or promote the violation of human rights in the penal process during investigations regarding corruption?
49. The rights of the due process are substantially equal in any type of penal procedure. The abuses that might occur, violation of human rights of those taking part in the penal proceedings, are, in my opinion, essentially the same in any process: there exists certainly, the possibility that unlawful deprivations of freedom, arrest, detention or imprisonment may occur, attempts to the honor or to the privacy of the investigated persons and of his personal, professional and familiar environment (wiretapping, searching, electronic

surveillances³⁸, video recordings, monitored deliveries, utilization of undercover agents, etc.) might happen. Corruption investigations are a good framework to lead the wrong action against innocent people; but in general the risk, except under the circumstances which are going to be explained later on, won't be ordinarily major than in another processes.

50. In any case, there are applicable to the processes of corruption the general rules that establish a triple requirement for the adoption of special means of investigation, which are: the need, the proportionality and the motivation. Keeping this basic triple rule, the corruption investigations must not present major problems than any other investigation. The three rules obey to the common consideration that the special investigative means affect to the fundamental rights, and for this reason require special justification and preventions that other ways of investigation not so invasive don't need.
51. The necessity rule refers to the measurement of the special investigative means. Those must be adopted only when the information or the proof intended to be obtained can not be reasonably achieved in another way that doesn't turn out to be so harmful. The need or the impossibility must not be absolute; instead, the standard for interpretation is the reasonability test. It is not justified, for example, searching a private family home for the purpose of obtaining information or documentation available in a public registry or in another place of easier and less harmful access.
52. The rule of proportionality is submitted, equally, to a reasonable interpretation and means that must be a balanced relationship between the gravity of affectation of fundamental rights inherent in the special investigative mean to be implemented and the seriousness of the offense that is investigated and claims to be clarified. Serious interferences are justified only before serious criminal facts³⁹.
53. The third rule is the motivation. The affectation of fundamental rights is ordinarily a matter reserved to the decision of the judicial authority. One of the main problems that can appear related to the violation of human rights in the frame of the investigations of corruption is precisely the fact that the authorization for the adoption of these special means could correspond to a non judicial authority, which in itself implies a reduction of the guarantees of the process, and also makes arise questions related to the impartiality of the judicial organ that will be mentioned later. To make sure that the requirements of need and proportionality concur and to make sure that the decision of adopting a special investigative mean can be checked by a superior instance, it is necessary that the decision is written and motivated, i.e. that those who are adopting it must express the motives in which the reasoning or motivation that carries them to adopt that decision.

OTHER PROCEDURAL MEASURES

54. The fundamental rights of the accused in the penal process can turn out to be affected not only for measures of investigation but for other protective measures and also for those of execution of a judgment. For those reasons, it is very important to grant that abuses do not take place in the decisions of arrest, imprisonment, provisional release or freedom with or without bail, in the freedom under parole, in the provisional suspension or separation of functions of public servants, or of the executives in companies or other legal

³⁸ The *vladivideos* used by the *strong man* of Perú, Vladimiro Montesinos, during Alberto Fujimori's dictatorship to compel and to blackmail his political adversaries, reached world popularity.

³⁹ The article 30.1 of the Merida's Convention makes reference to the gravity of the corruption crimes.

persons. This is not different in corruption cases than in other processes. What is, then, the particularity of the corruption processes?

55. **Politically biased investigations:** First of all, there is a serious risk of political abuse or manipulation of corruption cases. Being corruption a phenomenon of undoubted importance for the public opinion, preferred attention of mass media, cause of dissatisfaction and social alarm, and being ordinarily its responsible persons with public, political and economic relevancy, concerning governments and other official institutions, political parties and individuals that occupy elective charges, relevant financial or industrial corporations, the processes of corruption are in nature, scenario for the struggle of so many confronted forces and interests. As a perfect playground for the political debate, corruption cases often can be used by the above mentioned persons or institutions, trying to manipulate or bring the interest of justice into particular and biased interests.⁴⁰ The first danger of violation of the human rights inside the criminal process is then, the process itself, which impartiality for the sake of justice can be twisted, as in fact often happens, for extra legal reasons.⁴¹
56. During decades, it has being a proverbial tradition in México the “sexenal”⁴² imprisonment: every elected President, to make a scene of a break, before the public opinion, with regard to the previous stage, promoted the indictment and imprisonment of one or more relevant prominent figures of the previous presidency, from the political or managerial world, prominent figures who remained imprisoned and submitted to penal process during the practical totality of the presidential stage to be finally released without major consequences at the end of that President’s mandate, being then replaced by the newly “sexenal” indicted designated by the new elected President, and so on.
57. **Advantages and dangers of concentrating all the gunpowder:** The Italian Constitution, escaping from the precedents of the Mussolini’s period, prohibits any special prosecutorial or judicial bodies: regular organs for equal citizens.
58. Instead, the experience of different countries has established the feasibility of specialized organs, either polices units, or other public services as those like the revenues, taxes or treasury institute or ministry, controllership or customs, special units of the Attorney’s office or special judicial organs⁴³. The advantages of specialized multidisciplinary teams are obvious.
59. However, even though the international legal instruments recommend the creation and existence of specialized organs against corruption,⁴⁴ it is indispensable to give them a strong legal statute to guarantee the independence and impartiality of these organs, to

Most recently, the uncover videos were massively used in Mexico with political purpose in preparation for the electoral campaign 2006.

⁴⁰ The latest and most notorious example is the indictment of Mexico’s City Mayor at the time, Andrés Manuel López Obrador, for a dubious and in any case minor criminal responsibility, with the hardly veiled intention of separating him of the 2006 presidential career, procedure that ended as abruptly as it had begun, with a political decision not to go on with the procedure, in the middle of the international scandal, and with the resignation of the General Attorney.

⁴¹ Another good example was the last period of the Presidency of William J. Clinton in the US, permanently pending of the impeachment in the Lewinski affair, case that reasonably should not have gone beyond the private concern of the adult male and females involved.

⁴² Referred to Presidential terms consisting of six years.

⁴³ Merida’s Convention, Art.58 establishes the creation of units of financial intelligence to make easier the persecution of corruption crimes.

⁴⁴ For example, Art. X of Merida’s Convention.

avoid their manipulation or their transformation in puppets of the executive power⁴⁵. If we depart of the assumption that most of the corruption cases are produced in the area of the executive power, it is simply impossible to imagine an organ hierarchically linked and dependent of the executive properly investigating its own criminal activity.⁴⁶ When the manipulation of the investigative organs goes against the defendant, the rights of this one will get affected. When the manipulation is intended to protect the defendant, the rights of the victims and the rights and diffuse interests of the society in general will be affected.

60. One of the most effective remedies against the political utilization of penal process in corruption matters, both in favor or against the defendant, is the elimination of the monopoly of the exercise of the criminal action, that in most of the legal system is entitled only to the General Attorney's Office. Also, the possibility of discretionary exercise of the criminal actions should be abrogated. The prosecution of the corruption crimes must be objective and impartial to the maximum extent, not to be dependent of criteria of politic opportunities or governmental instructions, and must be democratized, in the sense that the possible exercise of legal actions must be attributed to as many citizens and organizations as possible, with the most open conditions of standing.
61. **Investigation control.** In any case, and especially when the investigation may affect the indicted persons fundamental rights, is highly recommendable the separation in the investigations among the investigator organ and the one of the guaranties. A good part of the abuses that are produced not only in corruption cases, but in general, take place when the decision about freedom or imprisonment of the accused, or the adoption of special investigative means corresponds to the same person or authority responsible of the investigation, because this person, by definition, will lack of the impartiality needed to make a balanced decision. For this reason, is highly convenient that the authority who must decide about the imprisonment or other provisional measures, be a judicial authority and besides, a guarantee authority, i.e. that doesn't have attributed the responsibility of the investigation, but precisely of the vigilance of the legality of the investigation. The authority in charge of the investigation can be a judge, a prosecutor, or both, but in any case, investigator and controller must be different authorities and independents among them.
62. **Immunities.** Many high level public officials, such as Heads of State, Prime Ministers, members of the Government, the Parliament, or the Judiciary are protected for some kind of special jurisdiction and/or immunity; the first is referred to the jurisdiction of the Courts that may indict, prosecute and try them (normally the Constitutional Court, The Supreme Court, a Regional Court); the second is referred to the authorization to proceed that normally must be passed before the prosecution office being able to bring charges against the protected person (procedure of waiver of immunity). Such immunities, generalized among the continental European system, are exceptional in the Anglo-American system, and are usually justified in the consideration that such protections are necessary to shield the public post from eventual politically biased prosecutions. Immunities can be positive depending on the affected public position, and always depending if its application does not turn out to be improper and takes place only to assure the effective performance of the functions and the regular functioning of the

⁴⁵ Joaquín González in Corruption and Democratic Justice. Introduction to a theory of the judicial function in changing societies. Clamores. Madrid, 2000

⁴⁶ Carlos Castresana "Role du Procureur dans le instruction penale" in the Role du ministere publique dans una societ e democratique. Demo-Droit Themis. Council of Europe. 1997

institutions. Nevertheless, in many cases these procedures are abusively used to shield the accused, providing impunity or at least undue delays⁴⁷.

63. Immunities are making businessmen get into politics; instead of financing others' campaigns, they are financing their own and achieving immunity. Such are the cases of Berlusconi, Cheney, Rumsfeld. ⁴⁸
64. **Amnesties and Pardon.** Frequently, specially in Anglo-American legal systems, law provides mechanisms of negotiation consisting of the legal possibility of offering to the accused procedural advantages, amnesty or reduction of the period of imprisonment or other penalties in exchange of the cooperation with the investigation. There is no particularity in the matter of corruption, except that this discretionary tool can be used with political aims in the penal process, with the danger of manipulation to which already mention has been made. The real abuse may come from the discretionary use of pardon. The last day of his mandate, President Clinton pardoned 40 of his friends with legal white collar crimes problems.⁴⁹ The use of the pardon should be objective and restricted to the few cases in which the interest of justice recommends to use this exceptional power.
65. **Risk for investigators.** It has been mentioned that the investigators of corruption cases can be manipulated or politically directed in one or another direction. It must be indicated now that they can also be, and in fact are, submitted systematically to harassment and put under great pressure. This pressure is produced by hierarchic and intra-institutional routes, and also produced by disciplinary actions, by means of the use and abuse of the procedures of denunciation of that nature, by means of the exercise against them of civil or criminal actions, by interfering, sometimes very seriously, their private lives with unofficial, illegal investigations of its wealth and its relatives', treasury tax inspections, and finally with campaigns that can be of praise or loss of prestige through the media.⁵⁰ It's essential to grant to the civil employees that are in charge of corruption cases of a legal statute that confer greater solidity and stability, independence and impartiality to the exercise of their functions, and at the same time combine the greater institutional endorsement with the most energetic exigency of responsibility and transparency. ⁵¹ "They will try to buy you; if it doesn't work, they will threaten you; and if this still doesn't work, they will kill you. But before killing you, they will destroy your respectability. That way, everybody will assume that there was a good reason for you to be killed". ⁵²
66. **Victim's Rights.** Normally, corruption does not have specific victims, it's all about the State or the treasure, meaning public institutions, or the citizen's funds. Commonly, it is difficult to establish a cause-effect relationship between corruption acts or prejudice

⁴⁷ Merida's Convention demands in its article 30.2 that the States establish appropriate balance for the immunities and recognized privileges to their public servants and the necessity of a effective corruption crimes investigation and persecution. If we take a look to the list of High ranking Officials who have avoided prosecution through immunities, the conclusion must be necessarily that immunities are being abused: Chirac, Berlusconi, Kohl, and many others.

⁴⁸ Cheney 100 M, Rumsfeld 250 M, Noreena Hertz. Cheney kept charging Halliburton already Vicepresident. Rumsfeld sold his participation in Enron immediately before the company went broke.

⁴⁹ In an even worse example of manipulation of justice, the Spanish Popular Party, then in the opposition, prosecuted, exercised the criminal action and accused several members of the governing Socialist Party involved in cases of corruption "Filesa" and State terrorism "Gal" who were tried and found guilty, and as soon as the Popular Party won the general elections, President Aznar granted the pardon to those former opponents.

⁵⁰ Eva Joly, French magistrate in the Elf case: They insult us, and there's nothing we can do. Quoted by Richard Murphy and Nicholas Saxon. *Financial Times*, June 1st 2007.

⁵¹ For example, personal persecution against the Italian Magistrates of Mani Pulite, the French investigators in the ELF case and President Chirac's in his stage as the Mayor of Paris.

⁵² Giovanni Falcone. Conversations with Marcelle Padovani.

towards a specific citizen or group of citizens, business or economic sector. Nevertheless, the truth is that corruption affects, through diffused interests, the whole community, with two potential consequences. One is negative: the lack of a specific victim contributes and facilitates impunity, because judges usually have a minor personal cost in absolution since absolution benefits specific powerful individuals and does not harm anyone in particular. Other consequence should be positive: as corruption offends everybody, everybody should be entitled to exert legal actions for corruption acts.

67. **Media and Communications.** President Johnson said, talking about the main and most influent correspondent of the Vietnamese war in American television: If we've lost Conkrite, we've lost the war.⁵³ There is few importance directed at the media, related with corruption, and media have a fundamental part. First of all, public relevance in the cases of corruption makes the media erect, for good and bad. Second, media is the loudspeaker for every actor in the process to defend their respective positions. And third but not least, media is supposedly always for the truth and with society, but unfortunately, in many cases, their position is far from this supposed championship or priesthood for the freedom of information.
68. Obviously, media promote transparency as a rule, but in several cases they have shown themselves as accomplices, when no directly involved as interested actors, and responsible from the deliberate poisoning of the public opinion.
69. Submitted to the same evolution as the corporations, mass media have become in powerful lobbies of influence and opinion that obey the interests of owners, partners, or main shareholders. They divulge, hide, or even manipulate information, which obviously goes against freedom or the right to information.⁵⁴
70. It's possible to recommend the greatest transparency to the media, the same transparency they promote for others. So, are we able to know who every media belongs to, their economic, politic interests, how much they perceive for publicity and from who, and if they have loaned money and who they owe to?⁵⁵

CORRUPTION REPRESSION AS A MEANS OF HUMAN RIGHTS PROTECTION

71. Corruption causes violations of human rights. Biased prosecution of corruption cases causes violations of human rights too. Corporations are the new and more important responsible actor of serious corruption acts, and in some cases, are direct or indirectly responsible of egregious violations of human rights. The consequences are obvious: established the appropriate relationship between corruption and human rights, the necessary cooperation between people determined to fight corruption and people determined to fight violations of human rights, and watching the tools we already have and those we are missing.
 - a) We must fight corruption and doing that we will avoid the subsequent violations of human rights
 - b) We can be more successful fighting corruption if we prevent human rights abuses in the criminal process.
 - c) We need a new criminal law to make corporations really accountable.

⁵³ *El Pais*, October 8th 2004

⁵⁴ *El Pais*, October 8th 2004 The credibility of mass media fell 38% in the last American elections

⁵⁵ See Carlos Castresana "The role of civil society and the media in building a culture against corruption" in Global Action against Corruption. The Mérida Papers. UNODC Vienna, 2004.