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**CORRUPTION AND CIVIL RIGHTS: WARNINGS AND LESSONS FROM
HUMAN RIGHTS ACTIVISM AND TRANSITIONAL JUSTICE
EXPERIENCES***

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What can we learn from anti-terrorism and anti street crime initiatives?

1. In most of our developing countries corruption is not a marginal problem. It is a central, systemic and all pervasive problem that permeates our lives entirely. Because of these characteristics of the phenomena, and as we have seen in previous panels, corruption is among the main causes for many of us not being able to enjoy our rights or a simply to carry out a better life. Plenty if not a considerable part of the money dedicated to public works or social welfare programs is lost because of corruption. Many of our judges and control agencies are captured and do not perform their duties. Our civil societies are, in most cases, still inexperienced in dealing with this problem, although they are in better shape than a decade ago, but it still can do little more than attacking the problem from the margins. Given this state of facts, it seems to have little sense to focus only on the criminal justice system as the main strategy for fighting systemic corruption and I think there is today a broad agreement about the need of fighting against corruption with more systemic strategies – in addition to the judicial one.

2. The violation of rights through the fight against corruption is different in nature from the threats posed on rights by other policies such as anti-terrorist or anti-crime policies.

3. Terrorism and street crime acts generate victims. The victims claim for justice. When those claiming for justice are many and their cause seems to attract the support of the public, politicians develop policies against terrorism and crime. More serious the harm against the victims, stronger their claim to go tougher on the perpetrators and to anticipate further acts. Then the victims may be supported by those feeling empathy to them or rage against the perpetrators. The force of them together will put pressure on democratic governments in order to be receptive of their demands and they will frequently allow the government to remove any possible obstacle that blocks the possibility to reach anti-terrorist and anti-crime policies' goals. Rights are frequently regarded as one of those obstacles.

4. We all know how difficult it is for civil and human rights activists and groups to oppose governments whose policies are tough on crime or terrorism that have little or no respect for rights. Profiling, violations to due process and privacy, restrictions on free speech and free access to public information are the usual rights affected by these initiatives. However, does it happen the same with anti corruption policies? It does not seem to me that we are before the same phenomena.

5. The cases of terrorism and spread street crime seem to be different from corruption and these differences lead to policies and government reactions when fighting against corruption that affect rights differently. What is this difference about? Lets look on terrorism and crime closer. In these two cases we can observe that:

- There is an extended popular claim for the government to do something effective against both threats that affect directly many people's lives.
- In these cases, government officials are usually not part of the problem, at least not directly. They are usually not involved in street criminal or terrorist

acts, although it may happen that some agencies maybe inefficient in dealing with these threats or captured by those responsible for terrorist or other criminal acts. Probably for these reasons they commit themselves to do something about these problems and sometimes they actually undertake policies and measures.

- Politicians and officials get very concrete benefits out of combating terrorism or crime, such as votes, popular support, or even economic profit that greatly exceed the costs of not undertaking anti-crime or anti-terrorism policies.
- Before terrorist attacks and spread street crime situations there are clear and tangible victims that claim for justice or vengeance.

6. Corruption is different from terrorism or regular street crime. Corruption takes place when government officials individually or organized as a group abuse of their constitutional or legal powers. Those in government take advantage of their prerogatives and power for offering the making of decisions – or the non-making of them – to those who can and want to pay for them. These are crimes in which the victim is not a particular and identifiable individual or a group of individuals, but the harmed one is society as a whole, the public interest, and the rule of law. Probably this is one of the reasons why corruption has not been regarded as a crime or even as a problem by common people and organizations for many years. For some it was an unavoidable part of politics as usual. For others it was “grease for businesses.” Additionally, policies against corruption are frequently pretty ineffective when they focus exclusively in persecuting those responsible for corrupt acts and disregard prevention of systemic corruption. When a new democratic government takes office and is probably ready to investigate corruption, and if corruption is structural and pervasive, anti-corruption measures are not sustained and investigations are usually stopped as soon as the people weaken their claim for measures against the previous regime. Corruption is soon present in the new government and the will to fight the problem diminishes or vanishes.

7. Anti-corruption policies and strategies are not easily comparable to anti-terrorist or anti-crime crusades. Why?

8. As we have and are experiencing today in many of our nations, some anti-terrorism and anti-crime policies are inherently and structurally against human rights because of the way they are constructed. Instead, according to our experience, anti-corruption policies have implied a threat to rights not necessarily because of the inherent characteristics of the policies themselves, but because of discrimination and selectiveness in the implementation of those policies, that are sometimes addressed to opposition leaders or politicians, with or without foundations, and only against them. However, I am not saying that an anti-corruption policy cannot be inherently and structurally against rights. It can. But the experience, at least in Latin America, has not being this, probably because there has been no real and sustained policy against corruption in the region. The argument that goes that rights can be structurally threatened by policies against corruption, presupposes the fact that governments at some point have made their minds to fight corruption in a sustained and decisively way. This may happen when those in government are considered to be the good

fellows and those outside the government – and not necessarily the political opposition – are the bad ones, as it may be the case for terrorism and street crime. Of course, I believe we would agree that the line that separates the bad guys from the good ones is not easily identified, but this is not true for most people, at least for most of the time. Indeed, with regard to corruption, what usually happens is that the only individuals that are persecuted and prosecuted by the new government are some of the old government fellows, particularly those who have lost popular support or political coverage. In most cases, the new government will launch a series of initiatives that will deal with past corrupt practices through means such as the creation of Anti-Corruption Offices or Investigation Committees. However, these Offices and Committees and their goals are not in themselves a threat on human rights, but the way in which they act and undertake their duties. Anti-corruption policies, like justice provided by courts, cannot be selective and, in this case – unlike in other situations – they should be blind to differences.

9. However, I think it is worthy to do the exercise of thinking and anticipating ways in which anti-corruption measures and policies may inherently and structurally affect rights. Let's imagine that corruption is like terrorism and pervasive street crime and that the fight against corruption may inspire some governments to do what others have done when they fight terrorism and street-crime. Let's imagine that in facing the particular case of corruption governments behave towards rights in the same unjustified way that some of them do when fighting what they consider to be a bigger evil, such as terrorism and street crime. The need to defeat this bigger evil can be raised as a justification for violating rights. This is unacceptable. Persons are ends in themselves and there is no way to justify that we use any individual as a means for achieving a higher end.

Threats to human rights due to anti-corruption policies

10. Corruption is a crime that requires at least two kinds of factors in order to take place. Firstly, it requires the consent of the parties involved (government and private party). It is the kind of crime that someone may call “victimless” since there is no obvious and evident victim, unless we consider the public or the rule of law as a victim. Secondly, it requires that corrupt acts happen in secret. Most threats to rights in the fight against corruption will probably be related to the violation of the right to privacy, as a way to break into secret situations and being able to find out what happens. Strategies such as the installation of hidden cameras, the setting of legal entrapments, and the interception of communications (email, telephone, etc.), usually related to or grounded in profiling and discrimination, are the usual suspects.

11. In doing this exercise we can foresee that at least four rights can be affected in the fight against corruption:

a) Freedom of expression:

12. Free speech is a fundamental right of our constitutional democracies. This is not only an individual right but also a “social right” as the Inter American Human Rights Court has put it according to what is established in the Inter American Human Rights Convention. This right is not only important for the individual who wants to

express her ideas, but it is also important as a precondition for democracy to work correctly. As long as freedom of expression is protected, and according to what was said by the US Supreme Court in *New York Times v. Sullivan* – what was followed by several other legal systems in the world – the protection of free speech assures a more robust public debate, fundamental precondition for a strong democratic system. One of the best strategies against corruption is to protect free speech, since it is through free speech that critical voices, usually those denouncing corruption and investigating deeds and its consequences is the best way to fight against them. However, if we anticipate state action against corruption by looking at what happens to anti-terrorism policies, we can imagine that some initiatives against corruption may impact negatively on free speech. Such is the case of decisions made by governments with the goal of being able to access to the sources of journalists investigating corruption. Journalists investigating corruption are usually able to know more than the government itself about what happened or is happening in a corruption case. This possibility takes place because journalists are able to receive information without needing either to know the identity of the sources or without being compelled to make it public. This possibility is at the core of journalism and free speech protection as a precondition for democracy. To force a journalist to reveal her sources in order to investigate corruption – or terrorism or crime – may seem useful only if we look exclusively to the short term goals of the decision. However, the protection of the sources is basic for assuring freedom of information and freedom of expression.

13. Similarly, the criminalization of expression, particularly of those working as journalists – but not only them – who refuse to reveal their sources is a powerful way of chilling and silencing freedom of expression as well as for avoiding other whistleblowers to speak up or talk to journalists. Although it may seem to be that this “minor” restriction to free speech may result in an effective move against corruption – or terrorism or crime – it is clear to me that in the long term this kind of measures undermine one of the most basic strategies against corruption and that is the protection of free speech and freedom of information. This is also applicable to whistleblowers from within the government, whose free speech should be as protected as the one of journalists since they are sometimes the only ones who can tell the rest of us what is going on within the black box of the administration.

b) Freedom of information:

14. It is clear for most of us meeting here that the effective protection of Freedom of Information or more precisely of right to free access to public information, is another effective strategy against corruption. As it happens with freedom of expression, these rights are ways bringing light to the political system and we know that corruption is a plant that grows in darkness. However, we have had in Latin America some initiatives triggered by some of our governments by which, with the expressed goal of protecting the right to access to public information as a strategy against corruption, other rights have been or may be put at risk, such as privacy, by understanding that the right to “public information” is not limited to the right to access information in the hands of the government, but all kinds of information about which there is a public interest, being it in the hands of the government or in private hands, creating the conditions for the government to interfere with individuals’ privacy and private information. Of course, there many kinds of private information

that is of public interest and the government and the public should be able to claim it, but some of these initiatives have attempted to go further than that reaching out to private held information (journalists sources, NGOs data bases, private phone books, etc.).

c) Freedom from state interference in private life:

15. Since corruption happens in secret and, in addition, usually takes place without affecting any individual victim in particular, governments may feel tempted to undertake measures that allow them to be able to have access to private aspects of people's lives in order to find out how corruption practices and acts are developed and who is involved in them. Most constitutional democracies create a realm of privacy protected by the law against state government interference. However, as it happens with anti-terrorist and anti-crime policies, governments may feel they have the support of the people and some moral justification to step on privacy based on the argument that they are protecting the public interest. This is dangerous and it is crucial that civil society, opposition leaders, and particularly human rights activists, pay special attention to this permanent threat on constitutionally protected privacy and take action as a consequence. Mechanisms of severe state surveillance, interception of telephone conversations, emails and correspondence, and some legal entrapment and set ups, are allowed to governments only under certain very specific circumstances and provided enormous control and judicial supervision. However, it may not be the case, particularly in many of our countries, in which institutions are not strong and where allowing our governments to undertake many of these measures may imply to give them a *carte blanche* for violating human rights.

d) Due process of law:

16. We all know that one of the main targets of any strong policy against terrorism or crime will target on basic due process rights such as the right to legal advise, the right to a fair trial or the right to appeal a court's decision. Anticorruption policies are not an exception and particularly in those contexts in which a new regime takes advantage of the weakness and the lack of popular support of those who ruled before, the chances for the new government to feel allowed to violate or restrict due process of law rights are increased. Similarly to what I said in the previous cases, special attention must be given to government action in these contexts.

Anti-corruption policies and the rule of law: lessons from transitional justice against systematic and massive human rights violations experiences

17. Finally, there are many lessons that we can draw from the human rights movements in countries such as mine. Argentina lived through a bloody and cruel dictatorship between 1976 and 1983. During and after those years human rights groups mostly created by victims or relatives of the victims have been working hard for attracting people's attention to the rights violations perpetrated by the dictatorship basically pushing for their agenda of truth seeking and justice. In 1983 a new

democratic government took office in Buenos Aires. Alfonsín, a social democrat and civil rights lawyer was elected President. He appointed a small group of prominent legal experts to help him with the tough decisions he would have to make regarding past human rights violations. He had defeated the Peronist candidate Italo Luder, in the presidential election, a candidate whose theory was that nothing could be done about the crimes of the past due to the fact that the military, before leaving the government, had issued a self-amnesty law. Carlos Nino, a law professor whom I was fortunate to work with for many years, was the leading figure of Alfonsín's legal advise group. He had the idea that it was not possible to re-found Argentina's new democratic regime without trying the crimes of the past. Trying these crimes would be crucial for showing the people that the rule of law had been reestablished and that from that moment on, nobody would be above the law. Of course, the tough decisions of those times were related to questions such as who should be tried and where to draw the line between those who were responsible for making the decisions and those who were executioners with a different kind of responsibility, as well as whether they should be treated differently. The country was divided between those who thought that a everybody involved in any way in any human rights violation during the dictatorship should be punished regardless of the threats that this strategy may put on the survival of the young democratic system, and those who thought that forgetting was the only way to move forward. The first group was mainly connected or formed by the victims or their families and the second group was mainly formed by the perpetrators, their friends, and allies. The government had tough choices to make. Finally, Alfonsín decided to try the main figures of all the military *juntas* that had ruled since 1976. Despite these crucial and fundamental differences, one thing was clear, that trials had to be fair and just. That the rule of law and due process had to be respected and that by doing this – the trials where even televised –, for one time the Argentinean people would be told that the law was applied equally to everybody, even to those who had performed horrible and almost inhuman acts, who were all powerful until yesterday. The message was clear: democracy was treating these terrible persons as individuals who had a rights.

18. What lessons can we draw from this experience when dealing with corruption? What are the similarities between the process that led to the trials against the military *juntas* in Argentina and the investigation and punishment of corrupt practices? The first similarity is about the context in which anti-corruption measures are undertaken. They are usually launched by a regime that follows another one considered by the public as corrupt. However, corrupt practices, particularly in those cases in which corruption is pervasive and systemic, it is improbable that it finished with the previous regime. However, all governments, including those that won elections by campaigning against corruption, are reluctant to admit or investigate corruption within their own administrations. The selectiveness in the investigation of corruption, as well as in the investigation of former human rights abuses by a previous regime, creates the perception that the law is not the same for everybody. In this way, the fight against corruption is undermined in its moral authority, credibility, and effectiveness, at the same time that it provides to those who committed past corrupt acts with the opportunity to present themselves before the people as victims of discrimination and selective persecution, even when they deserve to be punished by what they did. One of the main objectives of any anti-corruption policy is the reestablishment of the rule of law in the sense that the law is equally applied to everybody. Any kind of unjustified selectivity in the investigation of corrupt practices,

exposes itself to the attacks of those who will present it as unjust and as taking advantage of a power position for going after those who lost public support or political coverage. The only way to build up a solid rule of law regime is through a fair and equal application of the law. As Peter Eigen, founder and former President of Transparency International, has said, corruption can only be fought against through legal means. Disregard of human rights in combating corruption is not only morally wrong, but it is also strategically mistaken, since it undermines the foundations of the anti-corruption policy in itself. If we defeat corruption, it must be without giving up our ideals and values. If we give them up, corruption would have defeated us.