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A Comparative Assessment of the Compliance with Human Rights Standards of Anti-Corruption Legislation

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A COMPARATIVE ASSESSMENT OF THE COMPLIANCE WITH
HUMAN RIGHTS STANDARDS OF ANTI-CORRUPTION LEGISLATIONS

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I. THE CURRENT DEVELOPMENT OF ANTI-CORRUPTION POLICIES

1. Anti-corruption programs only began to figure on the global public agenda in the late 1980's and early 1990's. We find proof of this in the *Eighth United Nations Conference on the Prevention of Crime and the Treatment of Offenders*, held between the months of August and September 1990, where approval was given to a report with observations, recommendations and measures intended to combat corruption¹, in which special emphasis was given to five key areas: a. Criminal regulations for crimes of corruption; b. Administrative mechanisms and rules to prevent corruption and abuse of power; c. Procedures for investigating and punishing corrupt public officials; d. Rules regarding confiscation of funds from corruption; e. Penalties with respect to businesses involved in the cases; f. Policies for personnel training.²
2. In 1996, under the auspices of the OAS, the Inter-American Convention against Corruption was signed, and then in 2001, the UN organized the United Nations Convention against Corruption. These two documents, which were gradually ratified by the countries in the region, summarize with precision the set of measures established in the international sphere to effectively combat these crimes.
3. While the basic principles governing this issue give priority to strengthening transparency policies, standards of behavior, and accountability of public officials, in terms of prosecution and judicial sanctions, the most important anti-corruption measures are the following:

¹ For methodological purposes, we will understand crimes of corruption to mean not only crimes qualified as acts of corruption (Art. CICC:VI) but also those forms of crime that make use of corrupt practices as an effective mechanism for committing crimes of a fiscal, economic or financial nature, such as tax evasion, business fraud and asset laundering. The social damage produced by these criminal activities, and the necessary complicity required on the part of public officials, are the two reasons that justify this wide-ranging conception of corruption.

² Cf. Report "Prevención del Delito y la Justicia Penal en el contexto del desarrollo: Realidades y perspectivas de la cooperación internacional. Medidas prácticas contra la corrupción", Published in the Journal *Pena y Estado* N° 1, Year 1993

1. Creation of special offices for preventing and prosecuting crimes of corruption.
 2. Development of specialized investigative techniques.
 3. Creation of witness-protection rules and systems.
 4. Creation of asset-recovery rules and policies.
 5. Regulation and application of financial transparency standards.
 6. Creation of rules for information access and citizen participation.
 7. Creation of penalty rules and sanctions for systems of criminal responsibility on the part of judicial personnel.
4. While this set of measures has been accepted at the international level by most of the countries of the region, two “*initial*” issues³ set limits on the effective application of these measures in real cases of corruption. In the first place, not all the countries that ratified these instruments complied with their duty to adopt the rules in their local law. In the second place, in those cases in which countries did comply with this duty, they have not necessarily implemented the rules effectively when prosecuting these crimes.
 5. Under ideal conditions, the countries of the region should have independent anti-corruption offices that are capable of producing successful results, with institutional programs that effectively guarantee the protection of the physical integrity of denouncers, witnesses and experts in judicial cases, with effective standards for civil seizure of assets, precise regulations concerning the use of special investigative techniques, effective rules for preventing asset laundering, and finally, policies that adequately safeguard the integrity and independence of judicial magistrates and public prosecutors.
 6. And yet, the countries of the region have low levels of compliance in the application of these measures, as well as severe weaknesses in developing and consolidating practices that strengthen the duties of adoption and implementation of international standards. The discussions held at the **Seventh Annual Anti-Corruption Conference**⁴ give particular insight into these problems. At the workshop that focused on illustrating the experiences of anti-corruption offices in Latin America and the Caribbean, reflections were made concerning “...*The need to design and implement comprehensive State Anti-Corruption Policies with a short, medium and long-term vision...*” and it was “...*recognized that there is a problem of systematic follow-through in corruption cases and that political interference affects this process*”.⁵
 7. The following table shows the levels of adoption of anti-corruption standards in randomly-selected countries in the region.⁶

³ We clarify here that these two issues take on an *initial* character, to the extent that effective compliance of the demands of adoption and implementation of international standards in internal law provides an adequate platform for prosecuting corruption cases, and yet it does not guarantee effective results in terms of punishment for corrupt officials and dissuasion of the commission of these crimes. Additional complexities have a direct relation to phenomena of institutional weakness produced by the penetration of private interests within state power. The phenomenon of the Captured State is a reality in most of the countries of Latin America and the Caribbean, especially with regard to the functioning of the penal system and bodies charged with monitoring public and financial activities.

⁴ Held in November 2006 in Guatemala City.

⁵ See http://12iacc.org/archivos/WS_8.6_CONCLUSIONS.PDF. The workshop “*Experiences, weaknesses and strengths of Anti-Corruption Offices in Latin America*” was made up of panelists from Nicaragua, Mexico, Argentina and Bolivia.

⁶ The table only attempts to show the normative situation in several countries in a graphic way. Law is taken to mean rules formally emitted by the Parliament of each State.

Anti-corruption measures	Argentina	Bolivia	Paraguay	Peru	Dominican Rep.
Anti-corruption offices or prosecutors	YES	YES	YES	YES	YES
Special investigative techniques for corruption cases	NO	NO	NO	YES	YES
Witness-protection law	NO	YES	NO	YES	NO
Civil seizure law	NO	NO	NO	NO	NO
Financial transparency law	YES	YES	YES	YES	YES
Information access law	NO	NO	NO	YES	YES

8. After twenty years of designing anti-corruption policies, one would expect the countries' anti-corruption offices to discuss a different type of problem, and not the need to have State Policies on this issue. In the countries of Latin America and the Caribbean, there are no indicators detected that would suggest that current anti-corruption policies are producing successful results.

II. CORRUPTION AND HUMAN RIGHTS. ARTICULATION MODELS.

9. High levels of compliance with anti-corruption policies should correspond to high levels of compliance in human rights. Under these ideal conditions, there should be a balance between anti-corruption standards and human rights standards⁷ that we will call the ideal-conditions model (Icm).
10. A prosecutor who adheres to an (Icm) model would apply policies to combat corruption within the framework of general respect for human rights. This, however, is an ideal model and, as such, it differs from actual practice. Our resolute prosecutor would be familiar with the situation of having to choose between combating corruption by violating human rights standards or not combating it out of respect for these standards. In this case, the prosecutor might have to face this situation and find herself pressured to disregard some standards for protecting fundamental rights. This situation would imply an unbalanced articulation between the variables of the equation, giving rise to a model that, judging by the trends at least in Latin America and the Caribbean, appears as counterfactual (Cfm), i.e., contrary to fact and thus, difficult to prove.
11. At the opposite extreme of the (Cfm) situation, different actual cases in the region provide evidence that low levels of anti-corruption standards correspond to low levels of compliance with human rights standards⁸ and, under these conditions, the application of policies for prosecuting corruption cases presents a distorted articulation with respect to policies for protecting human rights. This model, which we will call the real model (Rm) is characterized by offering unequal protection for the victims and those involved in corruption offenses. The victims of corruption cases, who represent the weak party in the cases, encounter serious difficulties in the (Mr) model to obtain legal protection, while the public officials and businesspeople suspected of committing the crimes, who represent the strong side of the relationship, obtain differential advantages in the application of human rights standards.
12. If we return to the situation described in (Icm), the conditions of inter-variable balance are met if anti-corruption and human rights standards are articulated in such a way that no restrictive

⁷ The human rights standards considered are those that establish legal rules for: a. Due process; b. Presumption of innocence; c. Judicial independence; d. Effective judicial protection; e. Standards regarding protection of physical integrity; f. Standards regarding privacy. All of these standards are regulated by norms in the Universal Declaration on Human Rights, the Covenant on Civil and Political Rights, the European Convention on Human Rights.

⁸ While most countries in Latin America and the Caribbean have adhered to the inter-American system of human rights protection by incorporating international human rights covenants as constitutional norms, the reality of the region shows a significant lag in terms of effective compliance with the standards.

clashes are produced at either end, which means that under ideal conditions, the application of human rights standards is equal for the parties, because the victims and accusers find protection in them from the abuses of power and/or threats that they might receive from the accused, and the accused find protection in them when the time comes for the criminal justice system to apply the law.⁹

III. A TOUR OF THE REGION

13. The (Rm) model has direct repercussions on the way the different countries of Latin America and the Caribbean prosecute corruption and other offenses associated with this criminal practice. For this reason, on the basis of different experiences taken from countries in the region, we will show the way articulation between anti-corruption and human rights standards is distorted.

Uses and abuses of due legal process

14. One basic principle in prosecution is respect for due legal process. This fundamental human rights standard is recognized as a constitutional guarantee in all countries of the region.
15. The effective fulfillment of this guarantee presents real problems in judicial practice, especially with respect to common crimes. In this kind of investigation, legal claims of violations of the right to defense during the proceeding, the right to a hearing, the right to refute the evidence of the charge, to remain in liberty during the proceeding, etc., do not always have results that are favorable to the rights of the accused. On the other hand, in cases of judicial investigations for crimes of corruption (including crimes of an economic-financial nature), legal claims filed for violations of due legal process tend to obtain results that are favorable to the accused in the case, and are often used as a tool for delaying the investigations.
16. For example, the right to remain in liberty during the criminal proceedings is one of the most valuable human rights standards¹⁰, derived from due legal process. Procedural norms clearly define this principle and set specific exceptions to the validity of preventive detention.
17. In the Argentine Republic, the violation of this principle has led to a steady increase in the number of preventive detentions. Disregarding the rules of law, judges tend to apply this kind of detention for prolonged periods of time as a general rule¹¹ and liberty during the proceedings as an exception in cases of conventional offenses, especially crimes against property.
18. In some cases, however, judges in charge of financial fraud cases have shown greater respect for this basic principle. In 2002, a judicial magistrate ordered proceedings with preventive detention for various directors of a banking institution accused of falsifying balances and other kinds of financial fraud, but after two years of detention, the same judge ordered the release of the

⁹ This model of dynamic inter-variable equilibrium is analyzed more clearly by Luigi Ferrajoli under the concept of *“the law of the weakest”*.

¹⁰ The American Convention on Human Rights sets forth the right to personal liberty in article 7, and the Covenant on Civil and Political Rights does so in articles 9 and 10.

¹¹ According to the last National Prison Census, carried out with data from the National System of Statistics on the Enforcement of Sentences –SNEEP (in its initials in Spanish)—for 2004, the number of accused under preventive detention in prison facilities belonging to the federal system totaled 4975 persons, while convicts numbered 4661; in the prisons of the Province of Buenos Aires there were close to 18.608 persons held under preventive detention, and 4.287 with actual sentences. Currently, there are roughly 4973 persons detained as defendants in the Federal System, as compared to 1517 actual convicts. Source: Prison Attorney’s Office.

accused, when the defense filed a motion in which the accused appealed to the application of the right to personal liberty set forth in the American Convention on Human Rights¹².

19. Even though there can be no objection to the judicial ruling from a legal point of view, there are objective reasons to suspect that judges apply criminal law differently in cases of common crimes and crimes of power. In the cases alluded to above, the directors of the banking institution had very close ties to the circles of political power in the 1990's in Argentina, and in addition, this institution was used to recycle public funds that were misappropriated in major corruption cases.
20. Other cases of differential application of criminal law with respect to due legal process can be illustrated by looking at the principle of reasonable term. This international human rights standard sets forth that people have the right to be judged within a reasonable period of time, which implies that the accused party has a guarantee in his or her favor against judicial inaction.
21. While penal doctrine does not define exactly what a reasonable term of a criminal proceeding is, the rule has been applied differently to favor, once again, different defendants accused of large-scale bank fraud. An example of this is **Report 68/69 Case 11.709 – Luis María Goteli (h) – Argentina – May 14, 1999**¹³, where the petitioner brought charges against the Argentine State before the Inter-American Human Rights Commission for the prolonged duration of the legal process filed against him¹⁴. The judicial investigation in this case lasted more than fifteen years, and the Argentine State recognized having violated the right to a reasonable term in detriment to the accused party.
22. While it is true that this human rights violation can be addressed from the perspective of the Rule of Law, it is no less true that in litigation over crimes of corruption and financial fraud, one of the most common legal defense strategies consists of filing delaying motions that block the development of the judicial investigation, such as motions to disqualify judges, objections to expert evidence, motions to nullify procedural acts, etc., that delay the actual discussion of the matter at hand. In the case alluded to previously, the defense over the years filed countless incidental motions in order to delay the definitive ruling of the lawsuit, for which reason the unreasonable delay of the proceeding is not attributable only to the judge of the case, but also to the behavior of the defendants in the criminal investigation¹⁵.
23. In this same line of judicial investigations of cases of large-scale corruption, the filing of incidental motions occupies a significant part of the body of the case files. The so-called **“false trials”** allow the case file to be consumed in procedural motions and appeals to different judicial bodies (higher courts, appeals courts, superior courts). As part of a study made of the federal justice system in Argentina, concerning investigations for crimes of corruption, we took a sample of ten cases and requested information about the number of incidental motions filed in each one.

¹² The decision finally went to the next higher jurisdictional body (Federal Appeals Chamber) and the preventive detention was upheld.

¹³ See www.cidh.org/annualrep/99span/Admisible/Argentina11.709.htm

¹⁴ In Argentine Justice, the directors of the former Banco de Italia y Río de la Plata S.A. were investigated for crimes committed by the Gotelli family (majority owner of the financial institution's capital), crimes consisting of misappropriating funds taken from the public and that were embezzled by means of over thirty non-existent companies (*shell companies*) to the benefit of the institution's directors. Currently the case has surpassed the statute of limitations of criminal law, but some legal questions are still pending, regarding the ownership of properties and negotiable assets about which it is not known whether they derive from the crimes under investigation or not.

¹⁵ Many other similar cases can be cited where charges of violations of due legal process have been brought due to the proceeding's excessive length, such as the Falanga case regarding bank fraud committed against the former Banco de los Andes in the Argentine Republic.

CASE	CRIMES INVESTIGATED	INCIDENTAL MOTIONS
FILE 3678/94 – FEDERAL COURT No. 2 – FEDERAL CAPITAL	FRAUD AGAINST THE PUBLIC ADMINISTRATION	OVER 100
FILE 4931/95 – FEDERAL COURT No. 10 – FEDERAL CAPITAL	ABUSE OF AUTHORITY – VIOLATION OF THE DUTIES OF A PUBLIC OFFICIAL	OVER 100
FILE 9864/96 – FEDERAL COURT No. 2 – FEDERAL CAPITAL	FRAUD AGAINST THE PUBLIC ADMINISTRATION	BETWEEN 40 AND 60
FILE 15597/00 – FEDERAL COURT No. 5 – FEDERAL CAPITAL	ILLICIT ENRICHMENT	BETWEEN 1 AND 10
FILE 4419/98 – FEDERAL COURT No. 7 – FEDERAL CAPITAL	FRAUD AGAINST THE PUBLIC ADMINISTRATION	BETWEEN 1 AND 10
FILE 6542/97 – FEDERAL COURT No. 5 – FEDERAL CAPITAL	FRAUD AGAINST THE PUBLIC ADMINISTRATION	OVER 100
FILE 1985/97 – FEDERAL COURT No. 3 – FEDERAL CAPITAL	ILLEGAL COLLECTION – NEGOTIATIONS INCOMPATIBLE WITH PUBLIC SERVICE	OVER 25
FILE 2229/94 – FEDERAL COURT No. 7 – FEDERAL CAPITAL (CURRENTLY IN ORAL TRIBUNAL No. 3)	FRAUD AGAINST THE PUBLIC ADMINISTRATION	BETWEEN 50 AND 100
FILE 12432/02 – FEDERAL COURT No. 5 – FEDERAL CAPITAL	PERJURY	OVER 30
FILE 9574/01 – FEDERAL COURT No. 5 – FEDERAL CAPITAL	ILLICIT ENRICHMENT	OVER 20

Source: Database against Corruption and Economic Crime in Argentina. Prepared by Cipce.

24. In each of these case files, the crimes of corruption were committed by high-level public officials and/or businesspeople. In the cases of fraud against the public administration, the incidental motions totaled over 100 motions, while in the cases of illicit enrichment there have been over 20 delaying motions per case file. A simple objection (e.g. appeal of an incriminatory decision) before a higher jurisdictional body can take between two months and a year at least for common offenses. Imagine then how long it would take to process a motion involving complex issues such as those analyzed in corruption cases.
25. From this we can infer that the rules of due legal process, instead of assuring the correct handling of the trial and respect for the parties' fundamental rights, are used by the defendants to delay the proceedings and exploit the statute of limitations on judicial investigations in order to have the charges dropped. The main problem here, however, is not so much the abuse of incidental motions as the excessive acceptance of these motions by the judicial tribunals, which raises serious questions regarding judicial independence, to which we will refer later.
26. Among other abuses of the rules of due legal process, especially of the right to defense during a trial, we can point to the current proceedings of the Baninter fraud case in the Dominican Republic. This banking case is known internationally for the level of harm done by abuse of confidence, falsification of balances and asset laundering. The case at present is in the midst of the oral judgment stage, and yet the defense lawyers are constantly making use of delaying motions to draw out the trial in their favor. Thus for example, in January 2007 a legal discussion arose about the extent of the right to defense during a trial, when the lawyers for one of the defendants objected to the trial court that the accusing body was blocking access to all the details of accusatory evidence obtained from a local newspaper in which an article referred to the entity's fraudulent maneuvers. The defense demanded that the court order the prosecutor to reproduce orally the contents of the entire newspaper and not just the article that the prosecutor intended to introduce by reading. In this same line of defensive maneuvers, the lawyers for the accused bankers, when stating the terms of their defense, take entire weeks to reproduce orally documents, reports, rulings and voluminous doctrinal opinions by experts in finance, economy and criminal law¹⁶. This situation, as absurd as it may seem, is actually occurring in the investigation of cases and gives an idea of the way those accused of corruption manipulate the rules of due process, and gives an idea as well of the critical levels of judicial independence that the judicial branch is manifesting¹⁷.

¹⁶ See http://www.pciudadana.com/crisisbancaria/Boletin_CTI/01112007_02Boletin_CTI.pdf. Especially the account of the facts from the hearing on January 11, 2007.

¹⁷ It has reached such a level that from the beginning of the public oral proceeding at the end of 2006 to the present, the defense lawyers have presented 23 objections regarding procedural issues, of which only one was sustained, and 14 of them were raised by just one of the defendants. The State's attorneys constantly demands that the hearing begin to examine the grounds of the litigation. Consult the pertinent news published in the press at the following web site: http://clavedigital.com/Portada/Articulo.asp?Id_Articulo=7982

Concerning the independence of the judges who investigate corruption

27. Having a Judicial Branch, and of course a team of independent prosecutors who are free from the direct influences of political power, is a fundamental guarantee from the perspectives of both human rights standards and anti-corruption standards. If we recall the (Icm) model, under conditions of equilibrium the judges and the prosecutors should be independent enough to investigate crimes of corruption and obtain successful results. In the (Rm) model that is present in the countries of Latin America and the Caribbean, judges and prosecutors do not always have the independence needed to carry out their investigative work autonomously.
28. Between 1980 and 2005, the Argentine justice system has carried out over 750 investigations for crimes of corruption. In only 14 cases did justice manage to apply effective sentences for these crimes, i.e., in just 3% of the cases was there a definitive solution¹⁸. One possible response to this situation is to recognize the procedural difficulties inherent in this kind of investigation, but the reader cannot fail to notice that a certain amount of judicial inertia and indolence accompanies these cases. Thus, for example, a case was detected in which a sentence had already been handed down, and yet the statute of limitations took effect due to the time it took the superior court to consider the appeal filed by the defendant against the definitive sentence¹⁹.
29. This case is interesting, because it brings up the recent approval of law 25.990, which in the Argentine judicial system put an end to a legal debate that had a direct impact on human rights standards. Until the law was approved, the criminal code set forth that the statute of limitations was interrupted by the commission of another offense or by the aftermath of trial. This last term, long discussed in local doctrine and jurisprudence, was interpreted in many ways to prolong criminal trials beyond their reasonable limits. The new law, with healthy legal judgment, brought the long discussion to a close by defining the exact procedural acts that interrupt the statute of limitations.
30. The law, however, sparked strong criticism, because it bestowed benefits on many public officials accused of crimes of corruption. In this way, a criterion that was correct in terms of human rights, negatively affected the possibility of obtaining indictments and convictions by trial for crimes that did serious harm to the national public treasury. The drafting of the law was a significant step forward in the area of human rights, but it had negative consequences in terms of the prosecution of corruption cases, consequences that are attributable to the officials in charge of carrying out the investigations for these crimes, who took years to make significant headway toward the definitive solution.
31. In the (Rm) model then, the articulation between human rights and anti-corruption policies is distorted because a step forward in the human rights variable has a negative impact on the anti-corruption variable, but for reasons that have nothing to do with human rights policies, but rather are attributable to other reasons entirely, in this case, to problems of independence in the judicial magistracy and the Public Prosecutor's Office.
32. Paraguay has seen similar cases where the inaction of judges favors the impunity of these crimes. Thus for example, recently the Prosecutors of Economic Crime in Paraguay presented the

¹⁸ See presentation Databank against Corruption and Economic Crime, prepared by the Center for the Investigation and Prevention of Economic Crime <http://www.ceppas.org/cipce>

¹⁹ The case is recorded in file 5680/98, and was brought against the directors of the former Banco San Miguel for the crime of fraudulent administration in detriment to the public administration. The case generated damages for more than 8 million dollars. The case gives rise to a situation that from the perspective of criminal responsibility is nonsensical to say the least: the commission of a crime is clearly established, as well as the perpetrator, whose guilt is demonstrated. A sentence is handed down, but the perpetrators of the crime manage to elude the legal consequences of their acts due to judicial inaction.

Attorney General with a report on the outcome of the legal proceeding conducted in that country against the former president González Macchi, who was recently convicted for crimes of illicit enrichment in the exercise of public office, although the conviction was later overturned on appeal to a higher court. The prosecutors in their report state that the overturning of the former president's conviction was attributable to the actions of the criminal justice system, which among other things, allowed undue delays in the proceedings²⁰.

33. In this last country, there have also been cases of proceedings against prosecutors for the commission of crimes of corruption. Recently the justice system indicted a prosecutor of the Public Prosecutor's Office for the crimes of passive bribery and extortion for demanding payment from a company in exchange for "fixing" the proceedings in a criminal case.²¹
34. The Global Report on Corruption for the year 2007, prepared by Transparency International, urgently warns of the risks of corruption, political interference and lack of independence of the Judicial Branch, and points out the devastating effects of impunity and lack of effective judicial protection on the victims.
35. The reports-by-country chapter of the 2007 Report includes the experience of the Judicial Branch in Costa Rica, where in spite of efforts to modernize the functioning of the State courts, and the progress the country has made in developing anti-corruption policies, the problem persists in sensitive areas such as commercial and criminal justice, especially in matters related to economic and financial crime, and drug trafficking²².
36. The region thus presents visible problems in terms of judicial independence that have a negative impact on the prosecution of corruption cases and on the citizens' perception of the role that justice should play in preventing the reproduction of these pernicious social actions.

The crime of illicit enrichment and the allegation of the presumption of innocence

37. The definition of illicit enrichment, regulated in the international conventions that define anti-corruption standards, in practice sparked doctrinal and jurisprudential debates about the constitutional character of the definition, in view of possible detriment to the right to the presumption of innocence that is set forth in the constitution as a fundamental guarantee within criminal proceedings.
38. The main criticism lodged against the structure of this criminal definition is that at least materially it would incorporate elements that simplify the evidentiary demands regarding the illicit behavior of the public official and therefore, it could generate a clash with basic human rights standards, such as the presumption of innocence and the obligation not to testify against oneself. The assertion that the criminal definition inverts the burden of proof and demands that the official accused of enriching him or herself in the exercise of a public office, demonstrate that the riches obtained had a licit origin, would imply in this sense a step forward in anti-corruption policies at the expense of standards protecting human rights.

²⁰ See Communiqué from the Public Prosecutor's Office, published on 5/06/07 "**FISCALÍA RESPONSABILIZA JUECES DE LA IMPUNIDAD D GONZALES MACCHI**"

http://www.ministeriopublico.gov.py/menu/institucion/prensa/mas_noticias/busqueda.php.

²¹ See <http://72.14.209.104/search?q=cache:NZEYGjNvJxYJ:www.ultimahora.com/notas/40178-El-fiscal-Gaona-y-el-ex-canciller-imputados-por-pedido-de-coima+%22fiscal+gaona%22+%2B+%22cohecho%22&hl=es&ct=clnk&cd=3&gl=py>;

http://www.ministeriopublico.gov.py/menu/institucion/prensa/mas_noticias/busqueda.php?arti_id=9964

²² http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2007#7

39. This criticism, formulated as a defense objection by lawyers for public officials accused of corruption, has not always been well received by judges that have had the opportunity to judge this type of crime. In some cases in which convictions were obtained by applying this criminal definition, the rulings argued that far from producing an inversion of the burden of proof, the accusatory body had to prove that the public official increased his personal wealth considerably and unjustifiably during the period he held public office. Once convincing evidence is gathered regarding the official's unjustified increase in wealth, the accusation within the criminal proceeding must guarantee the defendant a suitable opportunity to justify the licit origin of the wealth obtained, this being understood as a manifestation that is inherent to the right to defense during trial. Therefore, in order to reach this stage, the prosecutor must have previously gathered evidence that indicates that the public official became notoriously and unjustifiably richer²³.
40. The debate about potential violations of human rights standards took a drastic turn toward the protection of these standards as applied to defendants accused of corruption. The judicial rulings also wield considerations of another type, such as the special duties that public officials assume when they take possession of a public office. Among these consequences, the legal obligation to present sworn declarations about their income cannot be avoided with an invocation of the right to privacy, because public officials upon assuming a State position freely restrict their private sphere to pursue a higher interest.
41. Without precluding this argumentative logic, the debate about the crime of illicit enrichment could give rise to serious clashes with basic human rights standards, in the light of other standards such as the prohibition of double incrimination in criminal matters in cases where those accused of corruption are convicted of illicit enrichment and bribery with regard to the same act. This situation would be legally conformed by pointing out that the definition of illicit enrichment is a subsidiary definition that is only applied when the rest of the alleged acts of corruption are not admissible or cannot be proven in the case under investigation. In some of the criminal proceedings brought against public officials associated with the Fujimori/Montesinos "clan" in Peru, situations of simultaneous concurrence came up between the crime of bribery and illicit enrichment.
42. Nevertheless, beyond these questions regarding the way human rights and anti-corruption policies are articulated, it cannot be overlooked that the criminal definition of illicit enrichment is an effective tool for obtaining convictions in corruption cases, as shown by the ten-year prison sentence and 15-million-dollar fine imposed on Montesinos for the commission of this offense.
43. Thus, the tensions between human rights and anti-corruption policies must be considered carefully by the courts and prosecutors, in order to avoid losing valuable resources in the legal fight against these crimes.

The importance of the protected witness in the legal system

44. Without a doubt, offering adequate protection to victims and witnesses in corruption cases is a very effective incentive for obtaining useful information that can help to investigate this kind of crime and obtain appropriate punishment for those responsible. However, the lack of firm witness-protection rules and policies in corruption cases is one of the most glaring weaknesses

²³ See Rulings "Pico, José M. y otra" – National Chamber of Criminal Appeals - -Courtroom I –Argentine Republic; "María Julia Alzogaray s/ enriquecimiento ilícito" – National Chamber of Criminal Appeals – Courtroom IV – Argentine Republic. This last ruling can be consulted at http://www.ceppas.org/cipce/index.php?option=com_docman&task=cat_view&gid=42&Itemid=26

in the countries of the region. Threats, intimidation, extortion and risks to the denouncers' physical integrity and that of their families are a high cost that the judicial system and civil society pay, a cost that pays dividends to corruption and impunity.

45. In Paraguay, civil organizations on different occasions publicized cases of victims or witnesses of corruption who received serious threats from public officials trying to pressure them into dropping the criminal charges they had filed. Paraguay lacks a law and a witness-protection system for these cases. The publicizing of these cases by civil organizations²⁴, sparked actions aimed at developing pilot experiences in different public agencies to guarantee that employees and officials who find out about corruption cases can blow the whistle anonymously, by means of a database designed exclusively for this purpose. The database also seeks to guarantee follow-through and monitoring of the case and the development of coalition networks. This experience led to the installation of small anti-corruption offices for the purpose of encouraging whistle-blowers in these cases. While there are still no measurements of results within the program, the experience indicates that it had a direct impact on the beneficiaries.
46. The Argentine Republic has witness-protection rules in cases of drug trafficking²⁵ and with a decree²⁶ that expressly creates an Office of Protection for Witnesses and Defendants. Aside from the fact that the office is not specifically intended to work with those denouncing acts of corruption, since its creation no significant work has been done on the issue.
47. An indication of this inaction can be detected in cases of corruption in which denouncers and witnesses have submitted different denunciations and reports to the State and civil organizations regarding threats against their physical integrity. These threats took the shape not only of personal intimidation, but also of "fixed" criminal charges and proceedings in which arbitrary arrests were ordered against the denouncers. These threats grew to such an extent that they were also directed at the prosecutors of the case, who found their reputation and integrity under threat by groundless impeachment proceedings. In these cases, prosecutors are currently investigating crimes of fraudulent administration against the public administration, involving mayors from the Province of Buenos Aires, accused also of illicit association and repeated false pretenses. The case was denounced before civil organizations, who wrote up reports and petitions to the public authorities to guarantee the physical integrity and independence of the judicial investigation^{27 28}.
48. The seriousness of this situation can also be seen in other cases in the region. In Peru, for example, as the proceedings against the Fujimori/Montesinos clan were underway, the Congress of the Republic passed a law to protect witnesses from organized crime. Informed sources however affirm that due to lack of resources and in some cases, the irresponsibility of judicial officials, the law has not had any practical consequences.
49. These examples are significant because they show how the judicial system abandons the victims of corruption, leaving them vulnerable to possible reprisals from the officials under investigation.

²⁴ See Project "Protección al denunciante de hechos de corrupción" on the website of the Institute for Comparative Studies in Criminal and Social Sciences – Paraguay office, <http://inecip.org.py>

²⁵ Law 24.424 which incorporates article 33 bis into law 23.737 about drug trafficking.

²⁶ Decree 262/1998.

²⁷ See Center for Legal and Social Studies – Cels – Human Rights in Argentina. Annual Report 2006.

²⁸ The lack of solid witness-protection norms is so grave, that in a criminal investigation into crimes of torture and state terrorism, a key witness who gave testimony leading to the conviction of the defendant in the case was recently kidnapped by unknown people or forces. His whereabouts are still unknown. This serious attack on human rights spurred the passing of Decree 2475, which sets up a new witness-protection system for victims and denouncers of state terrorism.

50. In the region, people have not yet come to appreciate the dissuasive impact that an effective witness-protection system could have in terms of both denunciations and judicial investigation; it also discourages people from committing these crimes in the first place.
51. Unlike the cases summarized previously, where the articulation between human rights and anti-corruption policies worked in favor of the accused parties, in this aspect, the absence of clear witness-protection laws and policies weakens the strategic role that these witnesses play in the prosecution of the cases, and leaves them in a state of vulnerability and danger. As far as this issue is concerned, the ethics and anti-corruption offices in the region's countries have a long way to go before they comply with international standards.

Asset recovery in the region. An unfinished task.

52. Another illustrative example of how the functioning of anti-corruption policies in the region neglects the rights of the victims of these crimes is the absence of rules and policies for recovering assets of illicit origin.
53. The Argentine experience in different court cases demonstrates that the recovery of public funds stolen from the State does not concern the judges who hand down the rulings. Not even in the few trials that managed to come up with convictions for these crimes was asset confiscation applied as an accessory punishment. Such is the case of the sentence given to a former public official, convicted of the crime of illicit enrichment and ordered to return close to 700 thousand dollars to the state as unjustified wealth. In this case, different non-governmental organizations submitted requests to the court that handed down the sentence and the magistrates of the higher court, asking for the return of the money stolen from the State and its definitive allocation for the purchase of surgical supplies for public hospitals, as a symbolic way of repairing the social damage suffered by the community, the real victim of these crimes²⁹. While the conviction was upheld on appeal, the social recovery of the money was ordered for the purpose of socially restituting the damage that was inflicted. At present the enforcement of this measure is still pending.
54. This is the first court ruling in the Argentine judicial system to recognize this type of mechanism as an appropriate and effective tool in the fight against corruption³⁰. In other relevant cases, such as the notorious IBM – Banco Nación case where crimes of fraudulent administration in detriment to the public administration and bribery are being investigated, close to US\$ 4.500.000.00 was repatriated. The money has not yet been definitively extricated from the defendants' property, however, even though they have recognized and disclosed to the justice system the information needed to detect where the ill-gotten money is deposited.
55. The Argentine Anti-Corruption Office, whose mission is to produce rules aimed at strengthening the fight against corruption, has yet to produce a legal rule offering legal tools that would make it easier to seize assets as an alternative to a criminal trial. While several projects have been created for this purpose, the public agencies and the parliament have not given the matter the attention it deserves.
56. The experience of other countries shows that this is a possible way to fight corruption. With the Fujimori/Montesinos case, Peru moved front and center among the successful cases of asset recovery around the world. To date, more than US\$ 250 million dollars have been repatriated

²⁹ See the presentations prepared by Cipce at <http://www.ceppas.org/cipce>

³⁰ A summary of relevant aspects of the case can be consulted at <http://www.ceppas.org/cipce/> - See “**Síntesis del fallo María Julia Alsogaray dictado por la Sala IV de la Cámara Nacional de Casación Penal**”

from different financial havens, such as Switzerland, the Cayman Islands and the United States. In some of these cases, the accused collaborated in repatriating the money.

57. Colombia has also come up with an innovative system. By enacting law 793/2002 on expired ownership, the Congress of the Republic instituted tools for confiscating, without a conviction, the proceeds of the crimes of illicit enrichment, crimes against the Public Treasury, and those that affect the economic order, the environment and public health. The approval of this law, especially the disarticulation of the required previous criminal conviction for the offense that gave rise to the confiscated assets, raised questions of possible infringements on the property rights of the purported owners of the assets. The State Constitutional Court has established in different jurisprudential rulings that the expiration of ownership belongs to the realm of proprietorship, and lacks a criminal nature. Thus, the Court maintained that "...The expiration of ownership, as follows from the foregoing, is an autonomous institution, of constitutional lineage, in the realm of proprietorship, by virtue of which, following a trial that is independent of any criminal trial, having observed all procedural guarantees, a sentence is handed down disavowing that the person who appears as the owner of the property acquired under any of the circumstances foreseen by the norm really is such, because the origin of his acquisition, illegitimate and spurious inasmuch as it is contrary to juridical order, or to collective morals, excludes the alleged property from the protection given by article 58 of the Constitution. Consequently, the property referred to in the corresponding judicial decision passes to the State with no recourse to compensation, retribution or indemnity whatsoever..."³¹.
58. Laws similar to the United Kingdom's *Proceeds of Crime Act 2000*, which implements civil confiscation systems and creates asset-recovery offices, could offer the region a way to make significant progress³². What are needed are sentences that force those convicted of corruption to return the money they stole from the public coffers. The return of stolen money has a greater symbolic effect than a conviction. Society is anxious to see that the corrupt do not get rich off public money. To fight corruption, clear actions are needed that make a social statement that the criminal justice system will not tolerate corrupt officials getting rich off public funds. In this aspect, there is work to do in the many countries of the region that have not taken steps toward developing this type of system.

Judges and civil society faced with cases of corruption

59. Some references to essays written to promote citizen participation in the litigation of major corruption cases also serve to illustrate the way articulation is distorted between human rights standards and anti-corruption policies.
60. The participation of civil society in the monitoring of corruption cases is not only a right that is recognized in relevant international covenants, but also a manifestation inherent to the right to freedom of expression in a democratic community. To this extent, the right to know about the development of anti-corruption trials and to litigate in them is a standard inherent to human rights and to the system of anti-corruption policies.

³¹ C-374 of 1997 and C-409 of 1997. The report submitted by the country to the Inter-American Commission for drug control and drug abuse -- CICAD (in its initials in Spanish) -- of the OAS is available for consultation on the Internet at www.cicad.oas.org/Lavado_Activos/esp/GupoExpertos/CUESTIONARIOS/DECOMISO/COLOMBIA

³² The Republic of Brazil has an Asset-Recovery Office, under the Ministry of Justice. This office conducts financial investigations into crimes of corruption, financial fraud and asset laundering. It also has the authority to initiate actions aimed at recovering the proceeds of criminal activity in state jurisdictions and/or abroad.

61. The experience of different civil organizations in Argentina points to serious obstacles to active citizen participation in the litigation of these cases for the purpose of defending collective interests. In this country, in spite of the ratification of the Inter-American Convention against Corruption, there are no laws that promote and encourage citizen participation in following corruption cases. A few years ago, the Supreme Court of Justice handed down Order 28/2004, which regulates the *amicus curiae* recourse in favor of persons and organizations that have technical expertise on issues that are specifically debated in cases of public interest and wish to take an active part in these cases by making substantial contributions that help to resolve the case fairly. This recourse, which is admitted in international human rights law and provided for in the Internal Regulations of the Inter-American Human Rights Court, as a suitable procedural mechanism for guaranteeing the participation of civil society, was used by human rights organizations to promote the recognition of the right to the truth in issues related to State terrorism.
62. In the wake of the major corruption cases that the country underwent in the 1990's, the *amicus curiae* recourse began to be used in corruption cases to give input, suggestions, measures and arguments that would help to recover public funds stolen in connection with these crimes. In some cases favorable recognition was achieved so that civil organizations could formulate proposals leading to the prompt resolution of the trials, but in most cases, the courts openly reject the submittal of this kind of procedural instrument.
63. The following table shows a summarized list of the most important cases in which *amicus curiae* briefs have been submitted in support of corruption investigations. In all the cases, the petitioning organizations formulated their presentations by invoking the right to citizen participation in corruption cases as provided for by the CICC. In just three of the fourteen cases included here were the presentations admitted, while in seven they were openly rejected by the judge in charge of the case, or by the higher judicial instance.

CORRUPTION CASE	Admissibility
"Alsogaray María Julia for illicit enrichment"	YES
"Rohm, Carlos Alberto and others for illicit association" (Banco General de Negocios)	NO
"Dadone, Aldo for fraud against the public administration" (IBM-Banco Nación)	NO
"B.C.R.A charged with irregularities at the Banco del Oeste S.A."	NO
"B.C.R.A charged with irregularities at the Banco del Iguazú"	NO
"Demeyer, Eduardo Rodolfo and other for illicit association"	IT WAS BORNE IN MIND
"Duran, Jorge Alberto and others for fraud against the public administration"	NO
"Gotelli, Ricardo Pablo and others for fraud"	NO
"Martínez, Jorge Pablo and other for fraud against the public administration"	NO
"Moyal, José and others for repeated false pretenses against the public administration"	IT WAS BORNE IN MIND
"Pirillo, José for fraudulent administration"	NO JUDICIAL RULING
"Temes, Jorge Horacio and others for fraud against the public administration"	IT WAS BORNE IN MIND
"Cantarero and other for bribery"	YES
Cariglino Jesús Cataldo for fraud in detriment to the public administration	YES

Source: Database against Corruption and Economic Crime in Argentine. Cipce

64. The three cases in which "IT WAS BORNE IN MIND", the request for the participation of civil organizations can be interpreted as either admitted or not admitted, because the judge did not rule on the brief as formulated, and simply had its entry into the judicial file recorded. Finally, the case of "NO JUDICIAL RULING" has been underway for over eleven months without a favorable or unfavorable ruling from the judge.
65. The justice system rejected 50% of the cases in this sample, while in only 21% did it recognize the legitimacy of civil society to follow the cases³³. In spite of an order where the highest court

³³ Where admissibility is marked YES, it does not necessarily mean that the judges accepted the proposals put forth in the *amicus curiae* brief, only that they recognized the legitimacy of such an intervention.

of the Judicial Branch recognizes the recourse of *amicus curiae*, on the grounds of international human rights standards ratified by the Argentine State, the lower-court judges, who are in charge of judicial investigations for crimes of corruption, manifest an outright rejection of the use of this kind of mechanism to monitor the follow-up given to cases of public interest.

66. This last aspect of the relationship between human rights and anti-corruption policy points up a considerable distance between the judges and prosecutors in charge of the case, and the interests of civil society in taking an active part in the fight against corruption. Although no similar experience has come to light in other countries in the region, except a similar case in the Dominican Republic³⁴, the lack of laws recognizing the civil society's right to participate in corruption cases is a serious obstacle to reinforcing a solid strategy for prosecuting such cases.

IV. CONCLUSIONS FROM THE FIRST PART

67. Latin America and the Caribbean, like other regions in Africa and Asia, have low levels of compliance in terms of human rights and anti-corruption measures. On the basis of the examples presented here, there are reasons to posit a particular mode of articulation between the two extremes.
68. The region is far from achieving a balance between the two standards, according to the characteristics given in the (Icm) model, but it also keeps its distance from the (Cfm) model, i.e., the one where it is feasible to suppose that anti-corruption policy can be applied even when the human rights of the accused are violated during the criminal trial.
69. On the contrary, the cases mentioned here serve to show that countries are moving closer to the (Rm) model, where the two ends of the opposing interests are articulated in such a way that those accused of corruption obtain advantages in the application of human rights standards when compared to the denouncers and witnesses, who tend to run into serious trouble when trying to secure legal protection in these cases. Even civil society suffers the distorting effects of this arrangement; it must face the legal obstacles that the judicial system puts up to their active participation in following the cases and advocating for asset recovery in society's favor.
70. This model, which we could call the distorting conditions model, upsets the balance that human rights standards try to create between the parties to a dispute, in this case, a criminal dispute. To critically accept the application of human rights standards in favor of one of the sectors involved in a case, especially when this sector already enjoys special conditions of social power, is to accept the differential application of the law, contradicting the principle of equality before the law. This model has strayed far from the purposes pursued by the protection system and international human rights standards.
71. If the articulation between human rights and anti-corruption policies offers advantages to the powerful side and disadvantages to the weaker party in these cases, the direct impact will be that the possibilities of rolling back corruption in the countries of the region will tend to decrease as the costs of corruption affect victims and perpetrators differently. This relation is a distorting factor because it strengthens the accused, makes the victims vulnerable and, in consequence, favors impunity and encourages the commission of new crimes; at the same time, it discourages reports of corruption, investigation and social participation in prosecuting the cases.

³⁴ In the wake of the bank frauds that battered the Dominican economy in 2003, a network of civil organizations was set up, with over fifty NGO's taking part. The network is called the Coalition for Transparency and Institutionality (CTI, in its initials in Spanish). CTI has followed the bank cases closely, and currently monitors the development of the oral judgment against the directors of the banks that fraudulently declared bankruptcy, and publicizes the case in the press and over the web.

V. CORRUPTION, HUMAN RIGHTS AND POVERTY

72. Up to now, we have analyzed the articulation between the application of anti-corruption policies and the protection of human rights. We have only told one part of the story, however. In current debate about corruption and the application of the two main international conventions against corruption, there is a tendency that reflects a pronounced bias against people in situations of poverty and other groups that are socially excluded on the basis of sex, class, race, etc.
73. This bias tends to associate corruption with the sociological definition of “white-collar crime,” i.e., according to Sutherland’s definition³⁵: these are crimes committed by people of high socioeconomic status who break laws intended to regulate their professional activities, either in the state or private sector.
74. And yet neither the Inter-American Convention against Corruption nor the United Nations Convention against Corruption set forth a definition of corruption that is restricted to white-collar crime. On the contrary, the two conventions adopt a descriptive approach that is inclusive and adaptive enough to take in all kinds of crimes associated with corruption in the widest sense of the word.
75. Thus, bearing this point in mind, we will repeat the analysis we developed in the first part of this report, but focus this time on anti-corruption policies in the context of social anti-poverty programs. In other words, we will focus on the management of state resources earmarked for people in situations of extreme poverty and indigence.
76. For this analysis, we will concentrate on the management of a new generation of social anti-poverty programs known as Transfer with Co-responsibility Programs (TCP)³⁶.
77. The design of TCP’s differs from the design of earlier social programs in three ways. First, they are associated with the policy of subsidizing demand, not supply. Second, these programs have a two-fold objective: a short-term objective that seeks to enhance people’s income (cash subsidy), and an objective that seeks to accumulate human capital over the medium-term (education and health) in order to break the intergenerational cycle of poverty. Third, the subsidy targets women. Rigorous evaluations of the impact of cases like Brazil’s “Bolsa Familia” program, and Mexico’s “Opportunities” have shown the positive results obtained in terms of the two objectives sought.
78. Furthermore, in some countries, the design of these programs was developed within the framework of a strategy of a rights-based war on poverty, including accountability systems to prevent and control abuse of power, corruption and clientalism. In this sense, comparative experience points to a paradox in TCP management: the focus on the most underprivileged groups in our society calls for transparent institutions, effective bureaucracies and independent controls. These programs, however, are generally implemented in countries that have trouble guaranteeing free access to public information, with restricted channels of participation and a weak, if not inexistent tradition of institutional accountability. In addition, it must be borne in mind that targeted social programs are implemented in a decentralized way, and it is precisely at the level of local governments where the greatest asymmetries of information and power occur. One final consideration is that the new TCP’s target women for subsidy transfers, in an institutional context of local governments with a pronounced patriarchal and authoritarian structure, and in a wider framework of Latin American social policies in which the perspective

³⁵ See E.H. SUTHERLAND, *Ladrones profesionales*, La Piqueta, Madrid, 1988, 219-236.

³⁶ These programs are characterized, among other factors, by their wide coverage. In Brazil, for example, the “Bolsa Familia” covers 11 million families; in Mexico, 5 million; and in Argentine, 1 and a half million families.

of gender is practically ignored or underestimated in the design and management of targeted social programs.

The anti-corruption struggle and the human rights of minorities: the experience of Mexico and Argentina

79. The two experiences³⁷ that we will analyze feature a series of novel institutional arrangements that seek to guarantee the rights of people entitled to social programs in the face of corruption and abuse of power. To study these accountability systems, we will divide the accountability process into two stages: 1) system input, and 2) system output.

System input

80. In general, system input should consider the capacity to install safe, accessible channels to promote the presentation of complaints. Two main categories of complaints can be discerned. The first has to do with operational lapses within the program, i.e., complaints about deficiencies in the operation and/or implementation of the program. These do not generally involve the presumption of a crime. The second category includes claims that may indicate a possible crime, such as mistreatment, or demands of money or favors in return for the plans, or threats, or political manipulation of the plans. We will call this type of complaint **denunciation or “hard-core” denunciation**.
81. In this sense, a system of complaints and denunciations should have various channels, both centralized and decentralized, to receive input, as well as mechanisms to guarantee the confidentiality of the denouncer. The direct implementation of these programs is generally the responsibility of the local government, which in many cases is behind the crime, by commission or omission. In general, most reports of corruption and political clientalism in social programs are associated with local leaders who have direct contact with the intended recipient of the social benefit. This evidence coincides with the specialized literature on political clientalism, which warns of the dangers that the victims of corruption and clientalism face when denouncing those responsible.
82. An input system for denunciations should try to minimize these risks by gaining the victims' confidence. In this sense, the use of the telephone offers a depersonalized and direct channel to reassure victims. Thus, the installation of free telephone switchboards can be an effective and secure channel for this type of system.
83. Another important feature in the design of such system input mechanisms is flexibility, so that they can adapt to demand. This means, on the one hand, projecting the system's potential demand and trying to meet it with an appropriate number of work slots and telephone lines, sufficient hours of service to the public, and geo-referencing systems for the calls when necessary. Empirical experience shows that these systems face a high level of non-registration of calls, even when the system is widely publicized. The cases analyzed in this second part of the report have implemented different mechanisms to deal with this problem, ranging from the installation of automatic options to provide public officials with basic information, to systems for diverting calls in order to free up telephone lines.
84. On the other hand, these systems require investment in training for the operators so that they can receive, reassure and inform the people who call. The ideal profile for this kind of system is generally a professional in the area of social work and/or psychology, since the operator must

³⁷ Adapted from Gruenberg, CH., Pereyra Iraola, V. Manual de Empoderamiento, Tinker Foundation, mimeograph.

provide attention for the beneficiaries and listen to their problems. Many of the denunciations presented by the beneficiaries of social programs arise from disinformation, which puts them in a situation of extreme vulnerability with regard to others with greater local power. This is the case, for example, of municipal authorities in Mexico who threatened beneficiaries with the cancellation of their access to social programs if they didn't vote for the Mayor, even though these authorities had no influence whatsoever over the registration of beneficiaries. The system of attention for users serves, in these cases, as a source of information for the beneficiaries of social programs and as a way to contain denouncers' fears.

System output

85. System output presents a number of important challenges. On the one hand, there are the challenges related to the investigation of the cases. The systems presented in these cases exhibit a varied combination of institutional strategies, ranging from the creation of research units, transfer to special prosecutor's offices, and closure of denunciations through citizen orientation. In general terms, greater effectiveness seems to be achieved in systems that promote the specialized investigation of denunciations.
86. Another challenge on the output circuit is the effective application of sanctions. A first glance reveals two main challenges. One of them has to do with the application of administrative and criminal sanctions. Empirical evidence in Latin America, Africa and Asia shows that criminal justice systems have a marked tendency to repress and prosecute people living in poverty, instead of protecting them as victims of corruption and clientalism. The second challenge is linked to the development and application of alternative sanctions other than criminal sanctions. Another challenge is related to the juridical frameworks in which this type of system is inserted. A paradox of the systems for investigating denunciations against social systems is that while they are supposed to reassure the denouncers, thereby increasing the number of anonymous denunciations and protecting the denouncers' identity, they do not then criminally prosecute or investigate these charges due to lack of information or they simply do not guarantee the denouncer's identity. The challenge that is still pending is to create more efficient, but also more effective output systems that manage to protect the identities of those entitled to the social programs and to discourage those who abuse public power.

The Case of the "Opportunities" Program in Mexico

87. The Mexican case is without a doubt the most complete in Latin America in terms of the different channels that citizens (those entitled to social programs and other citizens) have to present complaints and denunciations about the manipulation of social programs. The federal government in Mexico has different systems that allow citizens, by means of a complaint or denunciation, to exert social control over government officials in charge of implementing social programs. In the event irregularities are committed, they can file a denunciation to which the internal control body responds by opening an investigation to determine who is responsible. Three main channels of citizen input are highlighted in the different materials produced to publicize social programs: the General Office for Citizen Services of the Ministry of the Public Function (SFP, in its initials in Spanish), the Citizen Services System (SAC, in its initials in Spanish) of "Opportunities", and the systems for responding to denunciations of the Special Prosecutor's Office for Electoral Offenses (FEPADE, in its initials in Spanish).
88. The SPF receives citizen input about the actions of all public officials of the Federal Government and the quality of government procedures and services. The input is classified into denunciations for non-compliance with obligations, complaints and suggestions regarding

service, applications and recognitions. After recording the input in the Electronic System for Citizen Services, the matter is referred to the internal control body of the corresponding area so that it may initiate its investigation, and if necessary, the administrative procedure for determining responsibilities. The system does not specialize in receiving input on social programs; it handles all petitions and requests for information from citizens about any matter within the federal government's purview. When a case of corruption is suspected, a specialized unit from the SPF is sent to investigate, and if an electoral offense is suspected, a unit is sent from FEPADE.

89. Mexico's main social program, the "Opportunities" Program, has a citizen services system that specializes in receiving and responding to doubts, requests and complaints/denunciations related to the program. The SAC receives requests from citizens in its headquarters and each one of the program's state offices. Citizen demands that reach the Program are classified under three main headings: requests/consultations, complaints/denunciations, and others.
90. Finally, the Special Prosecutor's Office for Electoral Offenses (FEPADE), set up in 1994, is the highest authority for responding to and investigating denunciations involving federal election matters. Among these denunciations are some related to actions linked to social programs, such as buying and coercing votes using public resources earmarked for the fight against poverty. FEPADE has six citizen-response services: the FEPADETEL system, which receives telephone calls; FEPADENET, which receives e-mails; *Fiscal en Línea (Prosecutor on Line)* for filing denunciations by Internet; the Pre-denunciation System *PREDEF*; Personalized Attention Modules and Itinerant Modules. It also receives denunciations, by way of official letter, from other citizen services systems. Both the SFP and the SAC select and send to FEPADE by official letter the denunciations that come to their offices regarding electoral offenses of proselytizing.
91. The following table gives a comparative overview of the main characteristics of each of the three systems:

Figure 9: Mechanisms for receiving denunciations and prosecution, Mexico (static analysis)

	SAC "Opportunities"	SFP (SACTEL)	FEPADE
Government Agency	"Opportunities" Program, Ministry for Social Development, PEF	SFP, PEF	Prosecutor's Office of the Attorney General of the Republic (PGR), PEF
Description	Response to citizens, orientation and information, and reception of complaints and denunciations involving the "Opportunities" Program	Response to citizens, orientation and information, and reception of complaints and denunciations involving public servants	Reception of denunciations of electoral offenses

	SAC “Opportunities”	SFP (SACTEL)	FEPADE
Organization	Two geographical levels: it has a central headquarters but also receives and investigates complaints in all the Program’s decentralized units in the States	Two levels of organization: the SFP maintains central control, but each Internal Auditing Office of each federal agency also receives and investigates complaints and denunciations from its agency.	Centralized, although there are itinerant modules and any District Attorney can receive denunciations on a decentralized level.
Main denouncer	Beneficiaries of the “Opportunities “ Program	Beneficiaries of other social programs and other citizens	Any citizen, including public bodies and the Federal Electoral Institute, SACTEL and SAC Opportunities
Profile of denouncer	Citizens in conditions of poverty or exclusion	Any citizen	Mostly citizens with a university education
Ways of receiving denunciations	Correspondence, special letter-boxes, e-mail, telephone switchboard, fax, hearing, and Internet	Correspondence, e-mail, telephone switchboard, fax, hearing, and Internet.	Correspondence, e-mail, telephone switchboard, fax, hearing, Internet, others.
Percentage of denunciations regarding social programs over total of denunciations received	100% of the denunciations received involve the “Opportunities” Program	5 to 10% of the denunciations received involve social programs	19% of the denunciations involve manipulation of social programs for electoral purposes

	SAC “Opportunities”	SFP (SACTEL)	FEPADE
Competence for resolution and/or adjudication of denunciations	<p>Ordinary complaints and denunciations of the “Opportunities” Program are sent to the Program’s State offices</p> <p>Crimes of corruption by federal officials are directed to the SFP</p> <p>Electoral offenses are directed to FEPADE</p>	<p>Ordinary complaints and denunciations regarding federal public officials</p> <p>Crimes of corruption by federal officials are directed to a Special Unit of the SFP, which investigates and presents the cases to the Attorney General’s Office</p>	<p>Electoral offenses. The offenses are investigated by District Attorneys of the Prosecutor’s Office. The DA’s put the case together and present it to the Judicial Branch, which orders the detention of the accused.</p>
Other crimes outside of their competence of resolution	<p>Complaints and denunciations about the Program involving agencies and persons other than federal officials</p>	<p>Complaints and denunciations about social programs involving agencies and persons other than federal officials</p>	<p>Complaints and denunciations not considered in the Federal Electoral Code’s characterizations</p>

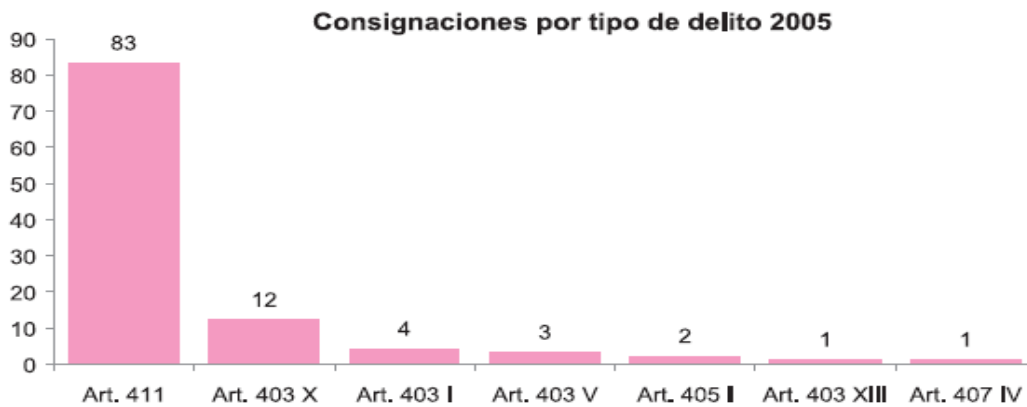
92. Even though each input system functions independently, all of them, upon detecting a possible crime, direct the denunciation to FEPADE. For this reason, the next step will be to analyze the workings of this special prosecutor’s office for electoral offenses.

The workings of the Special Prosecutor’s Office for Electoral Offenses,

93. The Special Prosecutor’s Office for Electoral Offenses (FEPADE, in its initials in Spanish), was created in Mexico in 1994, under the auspices of the Federal Electoral Institute, to investigate denunciations involving electoral offenses. Electoral offenses, characterized in 10 articles of the Federal Criminal Code, are grouped on the basis of the active subject (public servant, party official, electoral official, etc.) and can be sanctioned with prison sentences ranging from six months to 9 years, except for the provisions set forth in articles 404 (suspension of political rights) and 408 (fine).
94. Within this framework, the results of criminal prosecution of crimes related to the manipulation of social programs are very discouraging. The rate of judicial processing of this type of offense is very low. These denunciations can represent 12% of the total denunciations that enter the Prosecutor’s Office, but they make up a very low numbers of the cases that are processed, although, due to the confidentiality in which current criminal files are held, it is impossible to determine exactly how many cases processed by FEPADE involve social programs. It is possible, however, to draw some general conclusions. The following graph shows the number of judicial procedures by offense characterized in the Electoral Criminal Code. It can be observed that the number of cases processed (106) is very low if one considers that in 2005, a total of 851

pretrial investigations were resolved³⁸. Most of the judicial procedures were in 2005, and most of the criminal actions that were processed involved the illicit issuance of voter identification cards (art. 411) and the illicit removal of ballot boxes or destruction of electoral ballots (Art. 403 X).

Graph XXX: Number of indictments by article of the Electoral Criminal Code (2005)



Source: Annual Report, 2005.

95. Only article 403 V (confiscating citizens' voter identification cards) and, to a lesser degree, article 407 IV (public servants who provide service or support to political parties by illegally utilizing the time of their subordinates) could refer indirectly to crimes involving social programs. But in both cases, the reference would have to be overly indirect. At any rate, even if this were true, it would only correspond to 3.7% of all judicial procedures, and to 0.47% of all pretrial investigations.

The Heads of Household Plan in Argentina

96. Very few social programs in Argentina include formal accountability mechanisms. Some progress is being made, however, to promote accountability within the framework of the implementation of the Heads of Household Plan.

System input

97. In this program there is a Commission for Handling Denunciations Involving Employment Programs (CODEM, in its initials in Spanish). CODEM³⁹ receives complaints and denunciations through four channels:

- 1) **By telephone:** through a Call center (0800-222-2220)2)
- 2) **In writing:** by mail or by internal reference from other areas of the Ministry.
- 3) **Personally:** from people who approach the Commission.
- 4) **Others:** CODEM can intervene in cases it hears about through the press or other media.

³⁸ Of which 13% were resolved as execution of criminal action, 21% as reserve, 48% as non-execution of criminal action and 18% in declarations of incompetence.

³⁹ See: www.trabajo.gov.ar/programas/sociales/jefes/codem.htm

98. Complaints and denunciations are made directly in the offices of CEDOM⁴⁰ or else through the Employment and Training Offices (GECAL, in their initials in Spanish) located in the provinces throughout the country. The denunciations refer to irregularities in the following cases and situations: a) the granting of the program's benefits, b) non-compliance with requirements, c) the incidental appearance of promoters or intermediaries, d) the non-fulfillment of required benefit, e) serious offenses committed by the implementing agencies in detriment to the beneficiaries, among other issues. The denunciations, which can be anonymous, are entered into the system by means of an information-processing program that classifies them into the following categories: 1) extortion, 2) corruption, 3) ineligible beneficiaries, 4) irregular registration, 5) consulting boards, 6) irregular required benefits, 7) process for irregular payment and others. Extortion comprises denunciations that involve the demand of a sum of money or of some other required benefit not set forth in the program's regulations in order to have access to the benefit or its continuance. The category "corruption" comprises denunciations where the active subject of the extorting behavior is a public official.
99. When these denunciations involve a crime, CODEM refer them to the Social Security Prosecutory Investigation Unit (UFISES, in its initials in Spanish), which investigates the case and handles it under the jurisdiction of the Criminal Procedural Code of the Nation. Of the different types of denunciations mentioned above, only 4 are considered crimes and referred to UFISES:
- a) Corruption
 - b) Extortion
 - c) Irregular registration
 - d) Irregular required benefit
100. The second input channel into the system is UFISES, which is in charge of all cases having to do with crimes involving the adjudication, distribution and implementation of social plans.
101. UFISES, in addition to receiving denunciations that it refers to CODEM, receives denunciations directly from individuals (in person or by telephone) and carries out its own investigations. When a denunciation is presented to the Unit, it notifies the Consulting Boards, as a first instance, and Municipalities to corroborate the information. It also cross-checks beneficiary lists from different social plans with the payroll of municipal employees, provincial police, and other public officials to detect irregularities.

⁴⁰ For a detailed look at the denunciation process: www.siggen.gov.ar/documentacion/res_se_121-03.asp

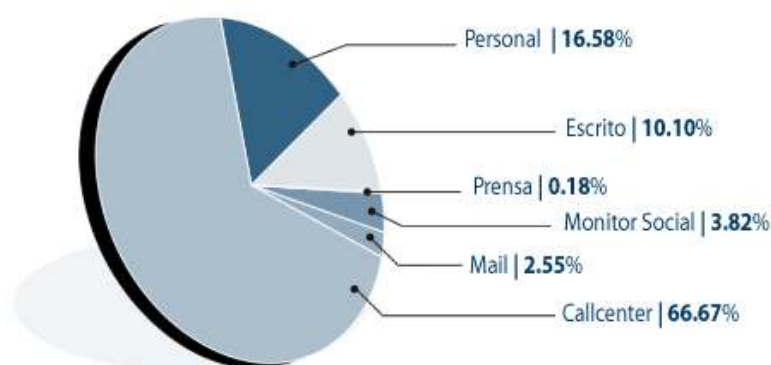
Table: Mechanisms for receiving denunciations, Argentina.

	CODEM	UFISES
Agency	Secretariat of Employment, Ministry of Labor	Public Prosecution Ministry
Description	Reception of complaints and denunciations regarding Heads of Household Plan and also, since 2003, the Community Employment Program (PEC, in its initials in Spanish)	Reception of denunciations regarding the Heads of Household Plan and also, since 2003, PEC.
Organization	Two geographic levels: has central office but also receives and investigates complaints in all provincial Employment Offices	Centralized
Main denouncer	Beneficiaries of the Heads of Household Plan	Beneficiaries of the Heads of Household Plan
Profile of denouncer	Citizens in conditions of poverty or exclusion	Any citizen, but mainly citizens in conditions of poverty and exclusion
Ways to receive denunciations	Correspondence, e-mail, telephone switchboard, and hearing.	CODEM, hearing, e-mail. It also carries out its own investigations.
Percentage of denunciations involving social programs over total of denunciations received	99% of the denunciations received involve the Heads of Household Plan	Receives many denunciations involving the Heads of Household Plan and PEC, although it also receives denunciations about other social security offenses.

Competence of resolution and/or adjudication of denunciations	<p>Complaints and denunciations involving the Heads of Household Plan are referred to GECAL or Municipality.</p> <p>Crimes of corruption and extortion within the Heads of Household Plan are referred to UFISES</p>	<p>Investigates and puts together the cases to present them to the Judicial Branch</p>
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102. **Multiple accesses:** One of the strengths of the system is the variety of channels for receiving denunciations. The statistics broken down into types of channel coincide with the recommendations made by the specialized literature on political clientalism. Almost 70% of the denunciations are made by toll-free telephone line, which as we mentioned operates centrally under the auspices of the Ministry of Labor. The toll-free number allows people who are victims of abuse of power to file the denunciation before a government agency other than the local government, which is usually the promoter of the situation, by commission or omission. The farther away from the local setting the public agency is that receives the denunciation, the greater the motivation and security for the denouncer. In this sense, toll-free telephone numbers have proven to be, in Argentina and other countries, the most effective instrument for attaining this objective.

CODEM
Denuncias y Reclamos por origen
Marzo 2004

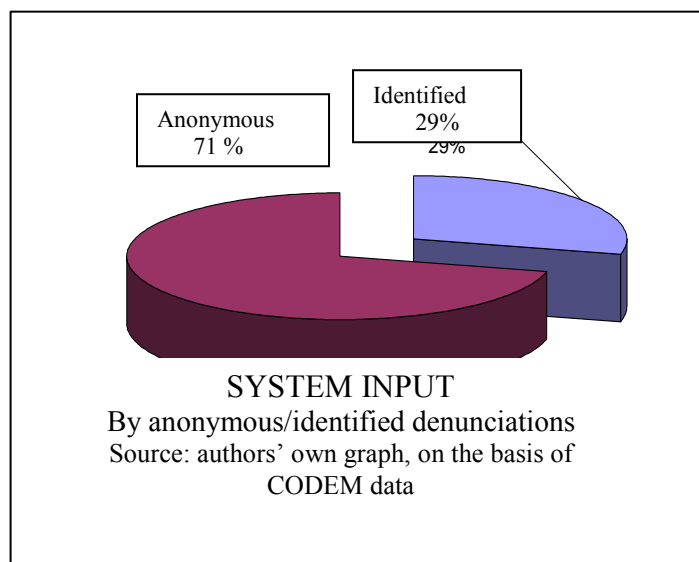


CODEM
 March 2004

Denunciations and Complaints by Origin

In person	16.58%
In writing	10.10%
Press	0.18%
Social Monitor	3.82%
E-mail	2.55%
Call Center	66.67%

103. **Preservation of anonymity:** As with other techniques for investigating acts of corruption both inside and outside the public administration, the preservation of anonymity guarantees the denouncer's security, thereby instilling confidence and providing incentives for the person to take action and file the denunciation without fear of threats or subsequent reprisals. In the specific case of the Heads of Household Plan, the denouncers' preference for remaining anonymous is demonstrated by breaking down the denunciations of crimes received by telephone at CODEM into anonymous and known identity. UFISES, however, does not take anonymous denunciations, nor does it take steps to preserve the denouncer's identity (*sic*). This points to a striking contradiction between an input system that promotes anonymous denunciations and an output system that rejects this kind of denunciation.



104. Thus, if we take the number of Heads of Household Plans allocated since the program's creation, and we compare it with the number of denunciations presented by UFISES before the Judicial Branch, it could be argued that in Argentina there is neither corruption nor political clientalism or that these are marginal phenomena. However, as is the case with epidemiological controls, a rate far below projections suggests under-recording, rather than the non-existence or elimination of the problem. The number of judicial cases presented by UFISES to the Judicial Branch represents less than 0,1% of the total of Heads of Household Plan beneficiaries.
105. In addition, of the total number of denunciations presented by UFISES to the Judicial Branch, none resulted in a sentence. This fact could suggest that system output should not be based on a strategy of criminal prosecution. In view of the justice system's non-existent capacity/will to receive cases of clientalism in social programs, a new agenda of investigation should be opened to identify and implement new, more effective kinds of sanctions that are quick and dissuasive, and not necessarily criminal sanctions.
106. If we compare the relationship between the number of hard-core denunciations that enter the system with the number of sentences handed down by the criminal justice courts, we will confirm the system's incapacity to respond to denunciations of corruption, abuse of power and clientalism.

	Mexico “Opportunities” Program	Argentina Heads of Household Program
# de beneficiaries	5,000,000	1,500,000
# of complaints (2005-2006)	28,314	12,151
# of hard-core complaints (HCC)	2,413	435
% of HCC over total beneficiaries	0,048%	0,029%
% of HCC over total complaints	8,52%	3,58
% of HCC that received a sentence	0	0

107. Thus, we finish analyzing two of the most highly developed accountability systems applied to the administration of social anti-poverty programs. These two experiments serve as a veritable institutional laboratory because we are looking at two accountability systems specifically designed to combat corruption and political clientelism in the administration of social anti-poverty programs. From this perspective, the Mexican and Argentine experiences are two of the most fully consolidated experiences for comparing and drawing conclusions.
108. In both cases, the intention was to develop ample, smooth system input through the intensive use of different communication media, with the aim of promoting the denouncers’ access to the system and instilling enough confidence so that people would present complaints and denunciations.
109. The system output, however, turned the dynamic on its head and led to the opposite result. Only an infinitesimal and marginal percentage of the denunciations that entered the system found their way to the output stage, and the few that made it, were rejected by the judge. In consequence, the number of judicial cases that received a sentence was practically zero.
110. This particular configuration of “ample input” and “narrow output” produces a funnel effect: hundreds of denunciations enter each day, thousands each month, but only a small percentage are investigated and sanctioned. For this to happen, a mechanism must be operating in some part of the process so that the flow is restricted, has its volume decreased (funnel effect) and becomes a minor set of investigations that will not receive a judicial sentence at the end of the process.
111. When the operations of the two systems are compared in detail, it becomes clear that in both cases, the funnel begins to close when the acts set forth in the denunciations are interpreted as “criminal offenses” i.e., when criminal prosecution is set into motion. In both cases, the accountability system was designed around the verification of the existence of an offense and of the criminal proceeding to prosecute it. If we concentrate and visualize the funnel effect, the question naturally arises about the effectiveness of the Judicial Branch to sanction clientel practices in the administration of targeted social programs. Moreover, in both the Mexican and Argentine cases, serious shortcomings were found in the protection of the denouncer’s confidentiality.

112. In Latin America, as in other regions of the world, after almost a century without significant reforms, it became clear that the judicial systems were conducive to the project of military dictatorships and authoritarian governments. In this context, during the last two decades a series of reforms were implemented, ranging from the adoption of legislative measures – modifying or repealing laws, regulations, customs and practices that compromised human rights and the democratic system – to the adoption of administrative and management measures needed to raise the standards of respect for guarantees and of the efficiency of the justice system. The World Bank alone reports that in Latin America it has supported 330 “rule of law” projects, spending \$2.9 billion dollars since 1990⁴¹.
113. Nonetheless, despite all the justice reforms and modifications, experts concur with the perspective of ordinary citizens, who have seen no significant change in the justice system. And polls show that the citizenry’s opinion of the justice system, traditionally bad, has not improved.
114. From the viewpoint of studies of human development and the war on poverty, the judicial system has shown more resolve in criminalizing people in situations of poverty than in prosecuting crimes against them. Moreover, this bias against the poor becomes even more pronounced when poor women are considered⁴². This situation is associated with the phenomenon of the criminalization of poverty,⁴³ a process by which the criminal system is used as an instrument to control the social insecurity produced by neo-liberal policies of deregulation and structural adjustment. Nowhere is this phenomenon better exemplified than in Argentina’s criminalization of social protest, when the State arrests and indicts people who publicly demand more and better targeted social programs. In other words, social programs and the justice system target the same people or groups. But there is a fundamental difference: while the former seek to redistribute resources, the latter brings charges against them. In this context, making legal institutions accessible and receptive to the poor is one of the greatest challenges facing legal and judicial reform initiatives. All these arguments suggest that the justice system in Latin America is not in the position to guarantee the human rights of the beneficiaries of social programs in the face of governments’ corrupt and cliental practices.

VI. Final conclusion

115. In the first part of the report, we saw that there is a long way to go to reach the ideal model of equilibrium between anti-corruption standards and human rights. We used empirical evidence to show that there is a model in operation that favors the accused, who take advantage of their class privileges and their high socio-economic status to obtain advantages in the application of human rights standards as opposed to the denouncers and witnesses who face serious obstacles to obtaining legal protection.
116. Then, in the second part of the report, we concentrated on acts of corruption and abuse of power involving the administration of social anti-poverty programs. And our empirical evidence demonstrated the functioning of a model that protects groups that abuse their authority and state power for their own interests. In this case, the victims of state power abuse find that access to the justice system is completely restricted for them.

⁴¹ Up to roughly that date, USAID was one of the main financial supports of judicial reform projects. From 1984 to 1993, USAID invested 46 million dollars in Latin America. (GAO; 1993:2)

⁴² See: UNDP Human Development Report (2002), New York: UNDP.

⁴³ See Wacquant, Loïc. The penalisation of poverty and the rise of neo-liberalism. *European Journal on Criminal Policy and Research*, 2001.