Report from Colombian organizations of the civil society for presentation to the Third Round of the Committee of Experts of the Follow-up Mechanism for the Implementation of the Inter-American Convention Against Corruption -MESICIC

Reporting organizations the Civil Society

Agosto de 2009, Bogotá, Colombia

Executive Summary

The Colombian institutional context

In Colombia, the fight against corruption takes place under three legal frameworks, each with an incumbent entity: (i) criminal, under direction of the Office of the Attorney-General, (ii) disciplinary, under direction of the Office of the General Procurator and (iii) fiscal control, under direction of the Office of the Comptroller General of the Republic. Investigations by each such entity are conducted independently, but, pursuant to the law, sharing of information and harmonization among such three instances are required. However, the lack of systems to facilitate the flow of inter-agency information entails co-ordination problems among these three entities.

The Colombian State has institutional weaknesses that foster chained situations of corruption. One of such weaknesses lies on the Congress of the Republic and the questioning of the laws' legitimacy. Two reasons lead to the above situation: (i) over 70 congressmen are being investigated or have been convicted on the grounds that they consented to receive support from illegal armed groups, paramilitary groups, in particular. The Capturing of the State and the continued association among such groups and other political actors, weaken the legitimacy of politics and of other institutions; and (ii) the Congress of the Republic has failed to enact an effectual legal framework to face the prevalence of private interests or conflicts of interests, in law-making activities. For example, the law on funding of electoral campaigns does not hinder funding by State contractors, a circumstance which triggers corruption and inequality. These factors have negative impact on the fight against corruption, which is no longer an issue of political and economic character only, to become a booster of moral and social illegitimacy.

Additionally, approval by the members of a majority coalition in the Congress aligned with the Government of a constitutional amendment to permit the first presidential reelection, affected the division of powers and check-and-balances system prevailing in Colombia. Although the President of the Republic has always been empowered to influence the designation of directors in control entities, by proposing terns of candidates, the present risk rests on the possible over-representation of the Executive in such bodies and high courts.

Summary of the Third Round Questionnaire, Section I and II

Chapter includes a query on the approval of tax benefits enacted in breach of anti-corruption laws for. Two scenarios of feasible tax benefits are presented, to wit: (i) entry of bribes or related payments, as legal expenses, o (ii) bribes paid to withholder agents. Although no law penalizes the foregoing scenarios, the Colombian laws provide mechanisms to indirectly prevent both situations.

Chapter II makes reference to accounting rules that require registration of all transactions entered by private enterprises with the aim of preventing domestic and transnational bribing. The core regulation on the matter is the Commercial Code. The Penal Code also stresses the significance of relying on creditworthy private documents. Thus, the failure to record certain accounting transactions may entail civil, commercial and criminal penalties. In reviewing the relevant regulations it was identified that the fiscal auditor plays an important role as he attests the truthfulness of all accounting data. However, the fiscal auditor depends on the manager, whereby a conflict of interests is likely to occur. Professional associations may play a core role in enforcing rules against domestic and transnational bribing. The function of the Chambers of Commerce is highlighted in connection to appropriateness of given procedures such as registration of ledgers.

Chapter III includes a query on the laws that prohibit transnational bribing. Colombian laws prohibit Colombian citizens from offering bribes to government officials from other countries; however, there are no official data on this specific offence. Reference is made as to the difference between bribes associated to drug-trafficking and bribes under the framework of transnational bids: transnational bribing enhances the strengthening of Colombian drug-trafficking organizations abroad and, therefore, the commission of other crimes.

Chapter IV emphasizes that the unlawful enrichment of government officials is provided as a crime under the Penal Code. Colombia was a pioneer country in doing so, although it was the consequence of drug trafficking rather than derived from the fight against corruption. There are no specific statistic data on this crime information. The income and revenues tax declaration that government officials are bound to file on annual basis is a tool to enforce penalties related to this crime. However, such forms are filed on paper to be subsequently archived and are deemed information under secrecy. Therefore, comparison of data therein included and tax and financial information from other State entities, is unlikely.

Chapter V points out that corruption actions may be grounds for the extradition of Colombian nationals. Following a review of a number of opinions rendered by the Supreme Court of Justice – the entity responsible for approving all extradition requests Colombia – leads to conclude that only one extradition case has been grounded on corruption reasons. Drug trafficking is the reason prevailing in all such requests. Again, there are no statistic data to assess the weight of national and international corruption in the sphere of extradition of nationals.

As to the *review of previous rounds* (Section II of the questionnaire), it is noted that the normative progress made in connection to connectivity, public procurement, and the development of tools to facilitate access to public information and to improve rendering of accounts vis-à-vis the citizens, are necessary but, have nonetheless been insufficient as these have not impacted the key aspects of corruption in the country, to date.

Colombia relies on an appropriate constitutional and jurisprudential framework relating the right to access information, although inadequate practices always occur. Both the Administration and its officials in their day-to-day activities are reluctant to facilitate enforcement of this right. Regulations are spread out and there is no statutory law relating access to information, whereby such behavior by public officials is fostered. In Colombia there is no entity responsible for promoting access to information and data collection in a single system at the reach of all citizens. Therefore, while information is sub-utilized and information systems are poor, i.e., disorder, lack of unity, compatibility and effective and updated tools to expedite the concerned procedures, are remarkable. The rule, rather than the exception, is that public information should remain under secrecy. Often, government officials refuse to disclose information under the argument of secrecy to protect the national security and the rule of law. Secrecy is a core element of bureaucracy expressed in the Government and its officials' reluctance or silence. More than a regulation is required to transform such behavior. Tension among authorities and citizens when they request public information, is widely known. Despite the fact that constitutional mechanisms such as *Tutela* actions and Petitions

have allowed citizens' to access certain information and to obtain responses from the State aimed at securing their affected rights, public officials see these tools as a threatening and aggressive remedy.

Colombian regulations promote easy access to information on procurement in the media and the press. However, nether the Portal on Public Contracting nor the Information System on State Procurement – SICE, per its abbreviation in English – which require disclosure of relevant and complete information have achieved their pursued targets with respect to use and record of information by the contracting public entities. Analysis made on the Colombian situation prove that the country's weakness in the sphere relating disclosure of contractual information, are mainly reflected in the entities performance and are not the result of the regulations obscurity. Enforcement of the contracting laws in small regions and municipalities is feeble and such laws are construed in accordance with the particular circumstances of the actors involved, while such is one of the triggering factors of State Capture, and the Co-opted State Reconfiguration.

All of the foregoing is accompanied by the public entities' general weakness to adequately render accounts on continued and systematic basis, and the failure to strictly enforce the law, which is reflected on the State inability to select its officials on the grounds of merits. Outcomes from the recent 2007-2008 Benchmark on Transparency of Public National Entities, conducted by *Transparencia por Colombia* where 158 entities were measured, proved that the lowest-average index is *selection per merits (*52.4/100); second in range is *public hearing of accounts rendering* (57.7/100). From the three branches of public power, the *Legislature* has the lowest rate (39.2/100) with high corruption exposure and, with respect to other factors, the lowest one relates to *visibility* (66.4/100). Major questions exist vis-à-vis the Congress of the Republic given the obscurity of its actions and the fact that such organ is reluctant to timely and accurately provide information relating its management and legislative duties.

Conclusions

The Colombian State relies on sufficient laws and statutes to prevent, prohibit and penalize corruption. Generally, Colombia is up to date in terms of laws on the fight against corruption, but, evidently, the mere legal framework is insufficient to ensure institutional strength. As indicated above, associations among illegal actors and political actors impair the State institutions and lessen the lawfulness of laws and government decisions enacted and made.

Recently, the foregoing, traditionally known as corruption - bribing, undue award of contracts, favoritism and embezzlement of public resources – changed to the extent that, presently, it is impossible to consider and understand such phenomena unless in a wider context and, in due consideration of the determinant role played by process and actors featured as "mafia". Currently, corruption in Colombia should be understood in light of the involvement of illegal armed groups and the use of degraded practices such as threats and murders of government officials and members of the civil society; displacement of peasant peoples and land usurpation, in the search for power and territorial dominance, particularly to expand their illicit activities and to cause prevalence of their interests aimed at achieving social legitimacy. Colombian public living is hassled and permeated by crime. In the past years, the society got used to frequent and spread scandals that reveal deep and harmful links between criminal activities and political actions.

Specific and general recommendations from the civil society to the Republic of Colombia

The Colombian State should implement a Single Format to declare assets and income, (i) in a web-environment software capable of producing a digital certificate updatable in periods not to exceed 6 months, (ii) inter-agency linked to allow taxation and financial intelligence agents to verify all data entered on the system, (iii) equipped with sub-programs that launch alert signals when detecting abnormal patrimony increases, (iv) reporting of any such alerts to the Office of the General Procurator, the Office of the Comptroller General of the Republic and the Office of the Attorney-General, to undertake investigations ex officio. Failing such features, the Format will simply become a bureaucratic procedure not useful to facilitate the enforcement of laws against unlawful enrichment. Furthermore, worth is emphasizing the significant involvement of attorneys and accountants associations in the enforcement of disciplinary controls and the self-regulation of their respective professions, for the fight against corruption. Finally, it is required to uphold budgetary independence in the judiciary, while increasing the number of administrative career officers designated in bodies of control.

Structurally speaking, it should be recognized that corruption boosts general environment of crime, both domestically and internationally. Thus, the appropriate penalization of transnational bribing and the extradition in case of crimes against the public administration are useful tools to generally weaken criminality. Likewise, it should be acknowledge that such corruption ambiance entails risks against the law, to wit: when corruption impairs the enactment, defense and enforcement of the law – which are the foundations of any modern State of Law – the Law is in danger, as such situation might involve the defense of partial interests or, even worst, of criminal interests.

Due to all of the above, the Colombian State should make audacious and greater efforts to cause all officers, entities, entrepreneurs, education entities, social organizations and citizens *to be stricter in the compliance with existing laws and the promotion of a legal framework that is coherent with the national reality.* Although tuning of the existing laws is mandatory in certain aspects, one task that should not be postponed is the need of being more demanding in the compliance with such laws, and to close the country's gap between the scarce or null application or enforcement of its regulations and laws, in practice. It is required to pursue stronger penalties for law breaches, and positive incentives for law compliance. In Colombia, and generally, in Latin America, the fight against corruption should not be merely grounded on the enactment of laws and rules, given that these are not complied with or partially complied, while dominant groups have the power to adjust them for their benefit.

On the other hand, it is mandatory to *place corruption at the center of the national agenda*. The fight against corruption has been relegated to a second rank, in a country whose priority is prevailing over the armed conflict. Colombians seem unaware of the link between such two phenomena and their harmful effects upon: the efficacy and legitimacy of its institutions; the equality and social justice; the access to rights; the generation and distribution of richness; the strengthening of democracy; and, the improvement of their own lives. The national Government and top officials' restriction and manipulation of public information are factors that worsen this reality.

The Colombian government must accept the critical situation where illegal actors permeated politics and both national and local management and, therefore, it should open paths permitted by the Rule of Law and the Constitution, so that the Bodies of Control and the concerned citizens might *act audaciously and determinedly to bar the increasing State Capturing and Co-opted State Reconfiguration and to preserve the necessary balance and independence among the pubic branches of power***.**

Corruption en Colombia has evolved into sophisticated and complex modalities, actors are highly diverse, organized and often involved in delinquent networks with long-term goals that seek the impairment of core State aspects at various levels. Their targets are structural and ambitious; these exceed economic issues in the search for consolidating political and territorial power and social legitimacy. Combating this growing phenomenon requires designing integral and comprehensive amendments and measures, differing from those customarily applied in the sphere of the fight against corruption.