EXPERT OPINION ISSUED ON OCCURRENCE OF LAWFARE IN ECUADOR

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I. INTRODUCTION – WHAT IS LAWFARE?

The concept of lawfare was initially developed by Oxford University professor Charles Dunlap and focused mainly on military objectives[1]. However, Harvard professors John and Jean Comaroff were the ones who later developed the thinking regarding the use of lawfare to achieve political ends[2]. According to them, lawfare consists in the use of legal means to achieve political and economic ends. Democratic and authoritarian states use their own legal rules; their only duly enacted criminal codes; their administrative law; and their states of emergency to impose a sense of order upon citizens – their subordinates. Therefore, it is an asymmetric attack by the Government and it aims at the weakest side of this relationship: its citizens.

The abuse and misuse of the violence of the law with the purpose of attaining political ends to de-legitimize a chosen political enemy is lawfare. It is an asymmetrically unjustifiable judicial attack, a weapon aimed at destroying the chosen enemy through the use, misuse, and abuse of the legal system and the media to generate public outcry against said enemy.

1 DUNLAP JR., Charles. *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts.* En *Humanitarian Challenges in Military Intervention Conference*, Washington, DC, 2001.
2 COMAROFF, John L. e COMAROFF, Jean. *Law and Disorder in the Postcolony*, in *The University of Chicago Press*, 2006.

The abuse of the judicial system, of human rights rules, and of humanitarian rules through lawfare hampers the global search for world peace, since it erodes the integrity of the legal system and weakens legal rules

Lawfare is potentially destructive because it invokes two extremely powerful words: law and warfare. And it is precisely the combination of these two powers that makes lawfare such a powerful weapon, especially when the law is misused or abusively used.

Lawfare represents waging war through non-conventional means. The legal sphere becomes the battlefield, spaces where lawyers and jurists define the legitimacy of war.

As in war, lawfare acts in dimensions. Among the dimensions of war, three of them can be easily related to lawfare: geography, which in lawfare corresponds to jurisdiction; weaponry, which in lawfare corresponds to laws; and externalities, which, both in war and in lawfare, correspond to the environment created to use the weapons against the chosen enemy.

In war, camps and battlefields are carefully chosen in view of the geographic advantages and disadvantages when fighting against the enemy. Armies strategically use cartography, the landscape, and geography. The importance of an army's geographic choice is decisive for the possibility of success, or, in the words of Chinese strategist and philosopher Sun Tzu, "the harbinger of victory." The author affirms that geography, when in favor of who will initiate the battle, can condemn them to failure even before the confrontation starts.

In lawfare, the importance of choosing the battlefield to fight against the chosen enemy is crucially relevant. The battlefield in lawfare is represented by the jurisdictional body in which the proceeding will be conducted, since choosing specific courts can be decisive for the success of lawfare, because the legal theory used by its practitioners may have more or less strength depending on the chosen body.

Some organizations have adopted the tactics of beginning proceedings related to the same set of events in various different jurisdictions, thus intimidating the defendants and causing the exhaustion of his/her appeals. This strategy is applied until the desired result is attained in any jurisdiction[3].

3 TIEFENBRUN, Susan. *Semiotic Definition of Lawfare*, in *Case Western Reserve Journal of International Law, vol. 43, issue I,* 2010, p. 53-54: "*Organizations have been influential in initiating suits over the same set of events in several different jurisdictions,*

Another jurisdiction tactics, pointed out by jurists, such as Geoffrey Robertson and Susan Tiefenbrun, is the so-called "libel tourism," which refers to the practice of proposing libel actions not in the jurisdiction in which the offense occurred, but in courts considered more friendly towards the prosecution and do not require proof of the defendant's guilt. Instead, in these courts, the defendant is the one who has to prove his/her innocence. Tiefenbrun points out that British courts are known to operate that way, going against the principle of presumption of innocence adopted in American courts[4].

The second dimension of war is the weapon used in the fight, the most efficient weaponry to face a specific enemy. In lawfare, said weaponry is represented by the law chosen to defeat the enemy.

Among the laws that are more often chosen by lawfare practitioners, rules that address corruption and money laundering have stood out

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thereby causing harassment of the defendants and exhaustion of their resources. This tactic is done until a favorable judgment of the desired suit is achieved somewhere".

4 TIEFENBRUN, Susan. *Semiotic Definition of Lawfare*, in *Case Western Reserve Journal of International Law, vol. 43, issue I,* 2010, p. 54: "*A growing phenomenon called ―libel tourism is another example of the use of lawfare and its silencing impact. Libel tourism is forum shopping. Plaintiffs bring defamation lawsuits in plaintiff-friendly jurisdictions like England, the ―libel capital of the Western world. In British courts, ―libel plaintiffs do not need to prove the guilt of the accused, but rather the accused must prove their own innocence. This is the exact opposite of the presumption of innocence used in U.S. courts*".

recently. They are used as a false cause, because they can be more easily manipulated. That is why it is said that lawfare is the misuse and misapplication of the law to attain political ends.

Lawfare is, therefore, inherently negative; it is the opposite of the search for justice, since it consists of the institution of frivolous judicial proceedings and the misuse of legal procedures to intimidate and frustrate the chosen enemy.

The third dimension of both war and lawfare refers to externalities, that is, the environment created to use one's weapons against the chosen enemy. In lawfare, the support given by the media when there is an interest in political persecution by the State is well-known. The media create an environment of alleged legitimacy for said persecution through the presumption of guilt toward the chosen enemy whose conviction without evidence the State wishes to obtain or even causing the public opinion to demand said conviction.

Therefore, the media helps to create diffused suspicion with regards to the chosen enemy to hide the fact that the accusations are unsubstantiated due to the non-existence of crime.

This is directly connected with what is known as "war of information," a phenomenon that consists of the use and handling of information with the purpose of obtaining competitive advantage against an opponent.

For lawfare, this phenomenon is relevant when used to conduct a disinformation campaign through the interference of the means of communication.

This attitude of the means of communication has become more serious in the latest years. Media campaigns have been conducted in favor of political persecution against the enemies lawfare practitioners have chosen.

According to German constitutionalist Otto Kirchheimer, the state apparatuses are aimed at turning a specific political opponent into an enemy of the community through the use of means that go beyond the Law, such as schools, means of communication, and others[5].

The campaigns obviously strongly influence the population that, in its turn, ends up "putting pressure" on judges with regards to their decisions as they begin to guide themselves according to the people's approval.

5 KIRCHHEIMER, Otto. *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton University Press, 1961, p. 107.

The Brazilian justice system, for example, became dependent on means of communication to reach legitimacy, especially when turning against the legislative and the executive branches. So, when a judicial decision is not given visibility by the media, the possibility of having an appeal heard with impartiality and solely based on what the law sets forth is substantially higher.

According to General Comment 32 of the UN Human Rights Committee about the Presumption of Innocence, "*It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.*"[6]

In case *Gridin v Russian Federation*[7], judged by the Committee, it was understood that a public statement of guilt made by a high-rank prosecutor in public meeting, together with prosecution information leaked to the media, violated article 14 (2) of the Covenant. The Committee stated, in this case, that comments made by the media can hinder a fair trial if the State fails to use its power to control them.

6 Communication no. 770/1997. Repeated in *Kozulia v Belarus* no 1773/2008 y *Zinsou v Benin* no. 2055/2011.
7 *Gridin v. Russian Federation*. *Communication No 770/1997, 20 July 2000 CCPR/C/69/D/770/1997770/97*, paragraph 8.3.

That unquestionable dependence on the media is one of the dimensions of lawfare, characterized by externalities, in other words, elements that, although not part of the case, create an ideal environment to convict the chosen enemy.

Lawfare is, therefore, an asymmetric attack that uses the law and the courts to demonize and delegitimize a political opponent.

II. CONTEXT

II.a. THE 2017 ELECTIONS

Lenín Moreno was elected President of Ecuador after an agitated second electoral round held on April 2, 2017. The difference between him and his opponent of *Alianza para el Cambio*, Guillermo Lasso, was little more than 2.5 points whereas the difference between them in the first round had been over ten points.

It is important to point out that the electoral campaign between these two opponents involved a series of divergences that heated up the process. On one side, the candidate of *Alianza para el Cambio*, on several occasions reported the existence of a "dirty campaign" orchestrated by pro-government political forces to weaken him; on the other, said forces

pointed Lasso as a detractor of Ecuador's recent social achievements and a fundamental actor with regards to past misfortunes.

Although the elections ended with Moreno's victory, the existing differences in the *Alianza País* campaign leadership did not disappear; neither did the differences in how to conduct politics between Lenin Moreno and Rafael Correa Delgado, the President who was leaving, or between Moreno and his running mate, Jorge Glas Espinel.

Regionally speaking, the situation was not entirely stable to follow the path of the self-determined *Revolución Ciudadana*. Correa found himself leaving the government while observing the regional integration process, of which he was a fundamental actor, beginning to collapse. On one hand, he had resisted the September 2010 police coup attempt, ensuring order and the continuity of democratic life in Ecuador. Whereas, on the other hand, the region was undergoing the end of the so-called "progressive" governments cycle – which some groups called populists in a discrediting tone – and witnessing increasing electoral wins of liberal groups.

What happened were the so-called soft coups or new styles of coup d'états. It is important to recall that in June 2009, President José Manuel Zelaya was removed from office through a new type of coup d'état,

which blew up the Honduran rule of law and caused the country to plunge in an unprecedented social and political crisis. Former Paraguay President, Fernando Lugo had the same fate, after not being able to overcome the crisis of the Curuguaty massacre, for which he was removed from office without having his right to defense guaranteed, in June 2012.

The impeachment of the President of the Federal Republic of Brazil through a parliamentary coup had a strong symbolic and experiential impact in Latin America. Dilma Rousseff, as we all know, was the victim of the combination of all possible illegalities to remove a president in full exercise of his/her mandate and the corollary of the coups that began to twist the fate of Southern Cone governments. In said context of setbacks and weakness, the Ecuadorian presidential election took place. Some voices have pointed out that period as the gestation of the State of Exception in some countries.

The Inter-American Commission on Human Rights has expressed its concern on the theme and recalled the positions it has adopted in previous statements: a) "…about the coup d'état in Honduras in 2009… it strongly condemned "the rupture of the constitutional order in Honduras" and called for the "restoration of the democratic order and respect for human rights, for the rule of law, and for the Inter-American

Democratic Charter in Honduras;" b) "In the year 2012, the Commission also continued to address the impeachment proceeding that ousted former President Fernando Lugo in Paraguay. About this event, the Commission issued a statement on which it expressed its deep concern with the circumstances under which said proceeding took place. Based on information collected at the time, the IACHR considered "the impeachment proceeding against a constitutionally and democratically elected president unacceptable" and affirmed that the rule of law in Paraguay has been affected;" and c) "…with regards to the political trial through which the legislative body impeached former President Dilma Rousseff in Brazil, in 2016 the IACHR has also issued a statement expressing its concern with the impeachment of the constitutionally and democratically elected president, specifically in view of "the reports about irregularities, arbitrariness, and absence of due legal process guarantees in the stages of the procedure." All of this is in the Inter-American Commission on Human Rights's request to the Inter-American Court of Human Rights to present an Opinion on Democracy, Human Rights and Political Trials, dated October 2017.

It is perhaps possible to ask, then, in this context, if the second-round of the elections in April 2017 was only a matter of the national parties or if the regional context was also reflected in the electoral process won by the

Moreno – Glas ticket, to be able to understand, therefore, the current context of the various pending judicial proceedings.

Finally, *Alianza País* took office on May 25, 2017 and was full of incidents that symbolically exemplify the differences between groups that later became identified as *correístas* [Correia supporters] and *morenistas* [Moreno supporters]. One aspect is enough to show that: the insistent reference to the "different" styles in the president-elect's speech and the immediate exit of his predecessor, after the inauguration ceremony.

II.b. THE FIRST DAYS OF THE ADMINISTRATION

What started as an isolated event, and typical of the tension that commonly exists in electoral processes, began to shift to the context of the administration with different impact and greater evidence. This was seen both in the distribution of positions in the Executive Branch and the choice of interlocutors in the House of Representatives.

The tensions within the government were greatly affected by the call for "National Dialogue" convened by President Moreno in the first days of his government. Although the proposal was originally presented as a place for openness and consensus-building with opposition spaces, soon

the *correísmo* was not in a position to maintain it, since those sectors that Correa had faced in the government, which were also those that the sector indicated as responsible for working against the country, began to participate.

However, the tensions between the different styles were only the prologue of the conflicts that were later taken to another level and involved other actors. Correa, not only did not leave the country as he had promised when he left the government [he had affirmed his intention to move to Belgium with his family], but also began to editorialize in the national media about the profile of the new President. This was clearly not well received by President Moreno, who not only refused to speak with Correa, but also affirmed his comments were "undue."[8]

The construction of Moreno's dialogue with opposition sectors began to highlight his strategy of political assembly outside of the traditional *Alianza País*. Meanwhile, *Revolución Ciudadana* felt the impact of that on the increase of conflicts between sectors. *Correísmo* indicated as the limit for dialogue the inclusion of social and political actors who had destabilized and/or worked against the Correa administration, while Moreno not only continued to dialogue with those actors, but also

8 https://www.eltelegrafo.com.ec/noticias/columnistas/1/lenin-moreno-versus-rafael-correa *¿Lenín Moreno versus Rafael Correa?*[Lenín Moreno versus Rafael Correa?]

included them in the Government by giving them prominent positions in strategic spaces, such as Media and Energy.

This increasingly deepened "dialogue" with sectors of the opposition (Fuerza Ecuador, SUMA) also allowed for the consolidation of the idea that it was necessary and urgent to "fight corruption," something that was mentioned in the campaign only superficially. With this, the Government of Moreno, political heir of the process that started in 2007 under the name of *Revolución Ciudadana*, began to implement measures to end, according to what was interpreted, corruption of the government he had inherited in the form of a process and with many of its original actors. Both the new and the previous President had the same Vice-President: Jorge Glas Espinel.

This was how a process of programmatic anomaly began in Ecuador. A branch of government (Executive and Legislative), began a strong campaign of endogenous differentiation with its main official counterpart: the *correísmo*. It no longer marked the distance between opponents (with whom there was dialogue and agreements) but it established the limits in styles, procedures, and futures with the internal force of the sector. It was a sort of government that ate itself.

II.c RUPTURES IN *OFICIALISMO*

In this context former Ecuador President Rafael Correa Delgado leaves the country with his family to live in Belgium and "leaked" audios recordings, allegedly of one of Odebrecht Ecuador's commercial operators, José Conceicao Dos Santos, in which he affirmed he benefited from public construction works in exchange for large sums of money to employees who intervened in political decisions. Here we have one of the elements present in the investigation of corruption cases in Brazil: the figure of the repented person or collaborator who contributes with "information" to accelerate the course of investigations.

It is important to point out that the surprising leak of audio recordings explaining corruption maneuvers within the government to the benefit of private companies first took place in Brazil (Rede Globo TV channel) and is reproduced by the Ecuadorian media as the truth and absolute proof of the guilt of those involved. In this social environment, the Federal Attorney's Office, led by Carlos Baca Mancheno, began to file a number of lawsuits against one of those in the audio: Vice-President Jorge Glas Espinel[9].

9 https://www.eluniverso.com/noticias/2017/08/01/nota/6309547/diario-oglobo-publica-audio-supuesta-conversacion-carlos-polit "*O Globo publica audio donde supuestamente se revela que Carlos Pólit recibía dinero en efectivo de Odebrecht".* [O Globo publishes audio in which it is allegedly revealed that Carlos Pólit was receiving cash from Odebrecht.]

Said data are not less significant than nor isolated from the context in which the parliamentary coup d'état against President Dilma Rousseff in Brazil took place. After the first year of Michel Temer's government and considering that Rede Globo TV Channel was one of the main coordinators of the social environment established against Dilma and Lula, it is almost a self-fulfilling prophecy to see the same television network broadcasting "conversations" that incriminate government allies of PT (Workers' Party)[10].

It was not enough to knock down the constitutional basis that supported Rousseff's government nor disclose whistleblowers' depositions against Lula to fuel future investigations, it also had to show foreign allies of Brazilian "populism" as part of this corruption scheme and the context, clearly unfavorable for progressive governments in the Southern Cone, ensured that these types of maneuvers were successful to benefit conservative sectors of Brazil and its allies abroad.

It is important to note, in this context, the emergence and dissemination of voices in the regional media reporting the alleged "originally corrupted" feature of progressive governments. Seminars, talks, papers, editorials, and audiovisual programs were widely disseminated to

10 https://www.tiempoar.com.ar/nota/la-cadena-globo-pidio-disculpas-por-acusar-falsamente-a-dilma-y-a-lula *"La Cadena Globo pidió disculpas por acusar falsamente a Dilma y Lula"*. [Globo conglomerate apologized for falsely accusing Dilma and Lula.]

complement the media *mise en scene* of a discourse and a common knowledge regarding a type of government with certain characteristics in terms of ideology and in the execution of public policies.

In other words, the process that led to the transformation of the political crisis into actions apparently tinged with lawfare was allegedly carried out in three phases:

- The first was formed based on the grounds of the judicial narrative of the "Odebrecht Case", from Brazil, which also affected Ecuador. Specifically, with the statements of José Conceição implicating Vice President Jorge Glas, as beneficiary of the receipt of bribes related to public biddings.

- The second was the institution of a "Council of Citizen Participation and Transitory Social Control", whose members were appointed by President Moreno, which had the power to assess and monitor the most important public offices.

-The third phase is represented by the "Balda Case," in which the former President Rafael Correa was charged with the crime of conspiring to kidnap a person, within the framework of a supposed strategy of

persecution of political opponents who were refugees in Colombian territory.

The first two phases are almost over and their effects are already substantially complete. The third one is still in progress and aims at depreciating the public image of Lenin Moreno's main opponent.

That support is given by means of communication when there is interest in the political persecution performed by the Government and it is directly related to the third dimension of lawfare, which has been previously described: means of communication create an environment of alleged legitimacy for said persecution by creating a presumption of guilt of the chosen enemy aiming to enable a conviction with no evidence or even leading the public opinion to demand a conviction.

III. JORGE GLAS ESPINEL'S SITUATION

The political tsunami that caused the situation in which Vice-President Glas Espinel ended up separating even more two opposing groups. Rafael Correa Delgado, began to raise the tone with regards to questioning the government at the hands of Moreno; in addition, it was suggested that his "distancing" could also be understood as a democratic "exile."

President Moreno, in his turn, with Carlos Baca Mancheno as the Attorney-General during the investigation against Vice-President Glas Espinel, decided to divest him of all of his constitutional powers "revoke executive decree number 9 signed on May 24, 2017, removing the Vice-President of the Republic from all his duties," according to decree 100/2017[11].

Unable to continue to coordinate public policy and exercise his duties in the Executive Committee of the Advisory Productive and Audit Council and in the Committee for the reconstruction of the areas affected by the earthquake of April 2016, Glas begins to retreat, which puts him in direct confrontations with the *correísta* basis in view of what is considered a flat-out attack against the foundational actors of *Revolución Ciudadana*.

In parallel, the level of communicational treatment given to the government crisis increases, but the differentiation between the conflicting sectors always prevails. Moreno uses the social environment to make progress in the process of differentiating what is considered "the past" or "corruption." At the same time, legal proceedings against Glas Espinel, Carlos Pólit, and other officials of the Correa administration in

11 http://contexto.gk.city/ficheros/jorge-glas-sin-funciones/que-significa explanation of President Moreno's decision and duties of the Vice-President.

which they are accused of participating in criminal acts, such as bribery and conspiracy, are carried out.

The weakness of the sector that set the pace of Ecuador over the last 10 years is evident. Its greatest leader is in "exile" from where he operates in the media and through social networks; his right-arm is undergoing a process of media harassment due to the investigation conducted against him and the representatives who answer to him in Congress, and has no room to act.

Quickly, the social environment becomes adverse for Vice-President Glas, who, unable to take institutional action, and without sufficient legislative support, decides to stop fighting back the investigation process against him. This allows Prosecutor Baca to request restriction measures through the approval of the National Assembly[12] and then order a preventive detention, due to flight risk and obstruction of justice. Glas, with no room for action, and despite having fully cooperated with the proceeding decides to turn himself in to avoid further damage[13]. He is detained in early October 2017 and is quickly replaced by the Minister of

12 https://www.eluniverso.com/noticias/2017/08/30/nota/6355666/juez-prohibe-glas-salir-pais-mientras-se-investiga *"Juez prohíbe a Jorge Glas salir del país mientras se lo investiga".*[Judge prohibits Jorge Glas from leaving the country while he is being investigated.]

13 https://www.facebook.com/JorgeGlasEspinel/videos/1489333841149417/ Video from Jorge Glas Espinel's official Facebook page. *"Al país en momentos aciagos"* [To the country witnessing dark moments].

Urban Development and Housing María Alejandra Vicuña, through Executive Decree No. 176.

Glas's search and detention, instead of stopping the harassment campaign, intensified it. Before, he was subjected to public shame for being investigated and now he was pointed out as the orchestrator of criminal maneuvers and, therefore, morally incapable to perform the position for which he had been elected in the second round, on April 2, 2017.

It is worth noting that none of those prosecuted for alleged corruption and conspiracy spoke against Vice-President Glas Espinel. Note the comment made by Ricardo Rivera, alleged intermediary of Glas in ODEBRECHT, on September 28, 2017, as highlighted by the newspaper "El Comercio," he said before the Federal Attorney's Office that *"it is false and absurd what (the Odebrecht whistleblower José reporter Conceição Santos said that I intervened in the signing of contracts that are said to have benefited Odebrecht." "It is absurd to say that I've influenced a Vice-President of the Republic, in this case the engineer Jorge Glas, whose role is not to decide on contracts, bidding documents, bidding committees, evaluation of offers, etc., to everything that concerns a pre-contract and contract process."*[14]

14 As one understands from https://www.elcomercio.com/actualidad/odebrecht-

IV. GLAS'S DESTITUTION AND USURPATION OF JURISDICTION

While in prison, Glas is subjected to a new institutional attack, this time by action of the Office of the Comptroller General of the Republic who orders his resignation from the Vice-Presidency. As quoted in the agency's official website: *"Comptroller General Pablo Celi signed the notice, which resulted from a special report issued by the Office of the Comptroller General in August. Both Jorge Glas and his lawyer, Franco Loor, announced that they will appeal against the Comptroller's decision and that they will present a protective action. Vice-President Jorge Glas was notified of the resolution of the Comptroller General on Friday, October 27, 2017, in jail 4. The document orders the sanction of resignation against Glas, and has effect on his current public position, according to sources from the Comptroller's Office, for his participation in the signing of Singue oil tanker in April 2012, as part of the bidding committee."*[15]

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ricardorivera-declaracion-fiscalia-jorgeglas.html "Ricardo Rivera: *´Es absurdo que yo haya influenciado a un Vicepresidente´"* [It is absurd that I influenced a Vice President].

15 Office of the Comptroller General's official website http://www.contraloria.gob.ec/CentralMedios/CGENoticias/19099 *"Contraloría notificó destitución a Jorge Glas, quien impugnará"* [Office of the Comptroller General notified destitution to Jorge Glas, who will appeal.]

Without room for action, and judged by the public opinion, Jorge Glas publishes a statement from jail to *"denounce to national and international public that I am being the object of the most profound, aggressive and illegitimate political persecution that has ever targeted a public official in the country with the aggravating circumstance that institutions, such as the Office of the Comptroller General, the Federal Attorney's Office, and even judges of the National Court of Justice, are serving as instruments for said purpose."* He also adds that *"it does not seem to be a coincidence that this new attack against me takes place at the precise moment when a group of fellow assembly members filed a protective action against decree 176, which nominated Maria Alejandra Vicuña as Vice-President, even though, constitutionally and administratively, I am legitimately enjoying my vacation period."*[16]

However, to consummate the ousting of the Vice-President, the vacancy of the position and a judicial conviction were necessary.

Glas Espinel was convicted in the Odebrecht case on December 13, 2017. In the document, Judge Edgar Flores stated Glas had favored public contracts in exchange for receiving payment from Odebrecht, which is a

16 https://twitter.com/Efrancoloor/status/924059593667424256 Jorge Glas Espinel's attorney's Twitter account. "A la opinión pública" [To the public opinion] is the statement signed by him.

company that has been accused of corruption acts in other Latin American countries.[17]

The positions was considered "vacated" on the first days of 2018 and on the 90th day the Vice-President was unjustifiably absent from his duties, which was interpreted as sufficient reason to oust him from office, which took place quickly[18]. In October 2017, the substitute for the position had been chosen, the former Minister of Urban Development and Housing, María Alejandra Vicuña[19]. And since Glas was considered "unemployed due to absence" the decision was ratified.

However, it is clear that the charges were included in the procedure without specific authorization from the Assembly, as well as the preventive detention order, which was executed on October 4, 2017 without being examined by the congress. In practice, both according to the understanding of the judge and the Prosecutor, the authorization to proceed with the criminal action, voted by the National Assembly on

17https://www.nytimes.com/es/2017/12/13/jorge-glas-ecuador-condena-corte-odebrecht/ *"Corte ecuatoriana condena a seis años de prisión al vicepresidente Jorge Glas"* [Ecuadorian court sentences Vice-President Jorge Glas to six years of imprisonment.]

18 https://www.bbc.com/mundo/noticias-america-latina-42560199 *"El presidente de Ecuador, Lenín Moreno, asegura que el vicepresidente Jorge Glas cesó del cargo y busca un reemplazo"* [The president of Ecuador, Lenin Moreno, says Vice-President Jorge Glas has resigned and is looking for a replacement].

19 https://www.france24.com/es/20180107-vicuna-vicepresidenta-ecuador *"María Alejandra Vicuña, la psicóloga que se convirtió en la vicepresidenta de Ecuador"* [María Alejandra Vicuña, the psychologist who became the vice president of Ecuador].

August 25, 2017, confers standing to any act the judiciary deems appropriate to adopt against the Vice President.

The procedural conduct, however, lacks motivation in two senses: first, because it admitted in the procedure charges not provided in the original application for authorization to proceed; second, because the preventive detention was executed while Glas was still in office. In the first aspect, it's worth noting that the examination of the legislative branch, in recognition of the performance of the judiciary against political organs, is part of a basic principle of democratic constitutionalism, being a counterweight against possible instrumental use of the criminal code. In order to avoid abuses due to the weakness of the position of the judges in the face of political pressure, the judge has the duty to direct a request indicating the facts and conducts he or she wants to investigate and prosecute. Precisely because it corresponds to the Legislative Branch the duty to examine the charges and the evidence, the provision would become useless if it would be allowed to assign new hypotheses of crime not considered by the legislative branch. The same reasoning corresponds to preventive detention. Note that, in this sense, the norms provide for a double guardianship regime in favor of the members of the National Congress: on the one hand, the authorization to proceed criminally against them, on the other, the impossibility of depriving the

parliamentarian of his or her liberty, except in case of flagrante delicto or of a final judgment of conviction.

Without prejudice to the above-mentioned proceedings, it is important to note that the Inter-American Court of Human Rights has established that this type of decision made by non-judicial bodies must respect the rules under the guarantee of the due process – among others; this is what it establishes in the cases *Constitutional Court v. Peru* and *Constitutional Court v. Ecuador*. The principle of innocence, the accusation based on previous and legally established facts, the independence and impartiality of judges, the due substantiation of the accusation, the certainty of the facts and the reasons that support the accusation are some of the rules that ensure the rights that must be protected for every person who is "prosecuted." Hence, an impeachment proceeding cannot and should not be, as sometimes it seemed intended to, be similar to a proceeding without the essential guarantees of a democratic system that are summarized in the precept of the due process. The proceeding is fair according to the terms of the Inter-American Court insofar as the institutional mechanism through which it is implemented operates in full respect of those rules that make the guarantee of human rights encompassed in the expression 'due process.' And this due process must be verified with their respective adjustments in all types of sanction,

removal, and liability procedures for public officials, whether of political, civil, administrative, criminal, and/or any other nature.

On October 21, 2018, after over a year in prison, Glas was transferred to the Latacunga prison, where he was prevented from contacting his family and defense attorneys, something which violates the international regulations on the protection of incarcerated people. On October 23, a letter signed by Glas was published, in which he declared a hunger strike for refusing the transfer and for fearing for his life[20].

V. THE CALL FOR POPULAR CONSULTATION AND REFERENDUM

In the above-explained context, the presentation of a new binding popular consultation project on management fields is promoted. President Moreno intends to make progress with exogenous support in fields that are sensitive and in which manipulation is done very easily by the media and interested sectors. One might ask whether the effect of said consultation may be one of previous proscription of some ideological sectors.

20 https://www.notimerica.com/politica/noticia-ecuador-ex-vicepresidente-jorge-glas-declara-huelga-hambre-ser-trasladado-carcel-ecuador-20181023034937.html "El ex vicepresidente Jorge Glas se declara en huelga de hambre tras ser trasladado de cárcel en Ecuador"

The call[21] takes place through decrees 229 and 230 of 2017 requesting the National Electoral Council to analyze the feasibility of the consultation. The process of consultation and dialogue with political and citizen forces had begun in September, while the results that substantiated the decrees at issue became tangible in November 2017. Finally, the National Electoral Council of Ecuador determined that the popular consultation and referendum were to be held in February 2018, punctually on Sunday the 4th, consisting of the following questions to be answered with yes or no:

V.a. QUESTIONS

I. "Do you agree with the amendment of the Constitution to sanction those convicted of acts of corruption with their disqualification from participating in political life and with the loss of their properties, as stated in Annex 1?"

II. "To ensure the principle of alternance, do you agree to amend the Constitution of the Republic of Ecuador so that all the authorities who are elected by the people can be re-elected only once for the same office, resuming the mandate of the Constitution of Montecristi and nullifying the indefinite re-election approved through amendment by the National

21 https://www.dw.com/es/ecuador-lenín-moreno-convoca-consulta-popular/a-41589794 *"Ecuador: Lenín Moreno convoca Consulta Popular"* [Ecuador: Lenin Moreno calls Popular Consultation].

Assembly on December 3, 2015, as established in Annex 2?"III. "Do you agree to amend the Constitution of the Republic of Ecuador to restructure the Council of Citizen Participation and Social Control, as well as to terminate the constitutional period of its current members and that the Council that temporarily takes over their functions has the power to evaluate the performance of the authorities assigned to it, being possible, if necessary, the early termination of their terms according to Annex 3?"IV. "Do you agree to amend the Constitution so that sexual crimes against children and adolescents do not have a statute of limitations, according to Annex 4?"

V. "Do you agree to amend the Constitution of the Republic of Ecuador to prohibit mining of metal in all its stages, in protected areas, in intangible zones, and urban centers, according to Annex 5?"

VI. "Do you agree with the revocation of the Organic Law to Prevent Speculation on the Value of Land and Speculation of Taxes, known as the Surplus Value Law, according to Annex I?"

VII. "Do you agree to increase the intangible zone by at least 50,000 hectares and reduce the area of oil exploitation authorized by the National Assembly in the Yasuní National Park from 1,030 hectares to 300 hectares?"

V.b. TENDENCIES IN CONFLICT

The “Yes” campaign unified pro-Moreno political forces and sectors of the opposition with which they had built “national dialogues,” while the “No” was backed by Correa’s supporters and leftist opponents of Lenín Moreno.

Already isolated, Correa’s supporters disputed the electoral context in which the consultation was held and lost, although something else could be said. The "Yes" campaign obtained an average of 67% of answers, while the "No" obtained the remaining 33%. Moreno supporters and its ally sectors balanced the scale to their favor, but Correa’s supporters managed to retain the vote of its own base and took advantage of the dispute to breach with *Alianza País* and form the *Movimiento Alfarista*[22].

For its part, Moreno supporters won an important victory, guaranteeing the reform of key instruments, with clear projection in the political and electoral fields[23].

VI. FORMER PRESIDENT CORREA’S CURRENT SITUATION

22https://www.eltelegrafo.com.ec/noticias/politica/3/correistas-deciden-nombre-movimiento-de-la-revolucion-alfarista *“Correístas deciden nombre: Movimiento de la Revolución Alfarista”* [Correístas decide on name: Movimiento de la Revolución Alfarista].
23https://www.lagaceta.com.ar/nota/760452/actualidad/lenin-moreno-le-cerro-correa-camino-hacia-reeleccion.html *Lenín Moreno le cerró a Correa el camino hacia una reelección* [Lenin Moreno closed Correa's path to a reelection].

The positive effect achieved by the national Executive Branch through measures to fight "corruption" and in favor of the "Republic" was followed by the kidnapping of three Ecuadorian citizens on the border with the Republic of Colombia. Two of them were journalists from the newspaper "El Comercio" (Javier Ortega and Paúl Rivas, journalist and photojournalist) and Efraín Segarra, driver who accompanied them in the coverage they were doing in the Northwestern border of the country.[24].

For 18 days of uncertainty little was known about the whereabouts of the hostages and the conditions in which they were. It all came to an end when, on April 13, President Lenin Moreno announced the sad news: *"With deep sorrow, I am sorry to inform you that the assassination of our compatriots has been confirmed. I have arranged immediate actions. The country is in mourning. We shall respect the pain of our brothers. Now it is the time to be united."*[25]

The situation generated divergences between the ruling party and the *correista* opposition, mainly due to issues related to security and defense[26] and the idea that in some parts of the border with Colombia

24https://www.nytimes.com/es/2018/04/04/tres-periodistas-ecuatorianos-secuestrados-dos-visiones-sobre-el-manejo-de-la-informacion/ "*Tres periodistas ecuatorianos secuestrados; dos visiones sobre el manejo de la información*" [Three Ecuadorian journalists kidnapped; two visions about the handling of information].
25 https://twitter.com/Lenin/status/984854670177918978 President Lenin Moreno's official Twitter account.
26http://www.teleamazonas.com/2018/08/ecuador-adquirira-equipos-para-reforzar-la-

offered favorable conditions for the operation of insurgent groups[27] and drug traffickers[28] to emerge.

Little by little, the social atmosphere became strained and there was room for the media to promote the idea that former President Correa allegedly maintained, during his administration, connections with Colombian armed insurgence groups. The hypothesis was based on two examples given as proof of the connections: The commitment between Ecuador and Colombia in order to incorporate the northwest border through the Mataje Bridge, a shared financing work named by the opposition as "the FARC Bridge." And the commitment of former President Correa to the peace process between the administration of Juan Manuel Santos and the Revolutionary Armed Forces of Colombia [FARC]. As mentioned in the conversation both had in the meeting aired by *Agencia Noticias RT*, "*Correa points out that the problems on the border with Ecuador persist in the form of drug trafficking, violence, and active criminal organizations. 'We've made a lot of progress towards that goal of [Latin America] being an area totally at peace,' Santos answers, explaining*

seguridad-en-frontera-con-colombia/ *"Ecuador adquirirá equipos para reforzar la seguridad en frontera con Colombia"* [Ecuador will purchase equipment to strengthen security at the border with Colombia].

27 https://www.lahora.com.ec/carchi/noticia/1102180241/militares-de-ecuador-y-colombia-se-reunen-en-tulcan *"Militares de Ecuador y Colombia se reúnen en Tulcán"* [Military from Ecuador and Colombia meet in Tulcán].

28https://www.elcomercio.com/actualidad/rutas-droga-ecuador-estadosunidos-frontera.html "Cuatro corredores de la droga salen de la Costa de Ecuador" [Four drug paths leave the Coast of Ecuador].

that 'in the Colombian case, the agreement with the FARC was a very important step, because the FARC was the largest, oldest and most powerful armed group in that region."[29]

The advantage that Correa allegedly had due to his connection with the insurgent groups was nothing less than to obtain money for the financing of his last electoral campaign, in which Glas Espinel was his Vice President. This idea was quickly taken by detractors of the former president who took advantage of the treatment given by the media to the issue to file complaints against Correa for the alleged link with the FARC[30].

Then there was the idea that Correa, as President, had also been the mind behind the kidnapping of Ecuadorian politician Fernando Balda in Colombia, who escaped from Ecuadorian courts after being convicted of defamation.

The facts that form the subject of the charges refer to the alleged "kidnapping" of Fernando Balda, which took place on August 13, 2012,

29 https://actualidad.rt.com/programas/conversando-correa/274752-santos-correa-entender-tipo-relacion-otan *"Juan Manuel Santos en 'Conversando con Correa' - ciclo televisado".* ["Juan Manuel Santos in 'Talking to Correa' - televised cycle"]

30 https://www.elcomercio.com/actualidad/andresmichelena-fiscalia-investigacion-frontera-ministros.html *"Andrés Michelena: Fiscalía investiga proceso de fondos de campaña electoral de Rafael Correa"*["Andrés Michelena: Prosecutor's Office investigates Rafael Correa's campaign campaign funds"]

in Colombian territory and lasted only a few minutes because the police managed to intervene and prevent it. The Colombian Attorney's Office filed charges for "simple kidnapping" (Article 168 of the Criminal Code) accusing the Colombian police of having acted under the instructions of officials of the Ecuadorian intelligence service. However, the procedure never reached the discussion of the charges and the evidence, since the Attorney's Office notified the settlement of "pre-agreements' with the accused, based on Article 348 of the Colombian Criminal Procedure Code (Law 906 of 2004).[31] In practice, with such an instrument, the defendant renounces his right to defend himself against the charges, admitting guilt and freeing the State from the obligation to provide evidence regarding the facts and liability.[32]

The launching of the investigation related to the facts presented before Ecuadorian Courts was made by impulse of the prosecution and then taken care of by the acting judge. As the facts go back to the period in

31 "*In order to humanize procedural action and punishment; obtain prompt and full justice; activate the solution of the social conflicts generated by the crime; propitiate the integral reparation of the damages caused by the perpetrator and achieve the participation of the accused in the definition of his case, the Attorney's Office and the accused or defendant may settle pre-agreements that imply the termination of the process.*
The official, when concluding the pre-agreements, must observe the directives of the Attorney General's Office and the guidelines established as criminal policy, in order to honor the administration of justice and avoid its questioning."

32 Sintura, F. J. Preacuerdos y negociaciones entre la fiscalía y el imputado o acusado. In: *Revista Internacional de Derecho Penal Contemporáneo*. *Legis*, 09, 2004, p. 85 – 108

which Rafael Correa was President of the Republic, the judge sends a request for authorization to proceed with it to the House of Representatives, in accordance with Article 120, 10, of the Constitution. The provision leaves no doubt about jurisdiction and, above all, the need for voting by the National Assembly for the institution of the criminal procedure against the highest ranked State official. Although on August 15, 2018 the Ecuadorian representatives, with a decision adopted by a simple majority, declare their own lack of jurisdiction to answer the request of the judge. In the first act of noncompliance with the Constitution, another one immediately follows, since the judge, instead of raising the issue regarding jurisdiction asking for clarification from the Constitutional Court, decides to set the date of the preparatory hearing.

However, there are other issues.

In the first place, there is an issue of territorial jurisdiction: the conducts that are object of the proceeding were performed in Colombia, without repercussions in Ecuador. Article 404 of the Organic Criminal Code clearly states that "when the offense has been prepared and began in one place and was completed somewhere else, the case shall be heard in the latter" (number 2) and that "when the offense is committed in foreign territory, the defendant shall be tried by the judge of the territorial district in which the defendant is" (number 6). In March, the judge ordered the

preventive imprisonment of Jéssica Falcón Querido, Jorge Armando Espinoza Méndez, and Luis Raúl Chicaiza Fuentes for allegedly being involved in the case. It is striking to see a preventive detention issued 6 years after the events occurred.

A second reason for lack of jurisdiction derives precisely from the evidence against Correa, that is, mainly, Chicaiza's plea bargain in which he stated to the Prosecutor that he had talked with Correa in 2011 about a possible kidnapping operation (although Chicaiza's defense lawyer himself admits they have no means to prove the conversations actually happened[33]). The letters from Chicaiza to President Rafael Correa, as well as other statements made by intelligence officials involved in the alleged kidnapping and produced by the Colombian Prosecutor, are evidentiary elements that lack legitimacy in the proceeding pending before the National Court of Justice of Ecuador. As already stated, the judgement of conviction was issued by the judge of the 11th Criminal Court of the Circuit of Bogotá based on the "pre-agreements," through which the whistleblowers benefited from sentence reduction. There is no way to use these plea bargains as evidence in an Ecuadorian proceeding without seriously violating the defendant's guarantees.

33 *REVELACIÓN: Raúl Chicaiza 'No tiene pruebas de presuntas llamadas de Rafael Correa', admite abogado Diego Chimbo"*[REVELATION: Raúl Chicaiza 'No evidence of alleged calls from Rafael Correa', admits lawyer Diego Chimbo] in www.ecuadorinmediato.com, 26 junho 2018. Disponível ao link: https://bit.ly/2nqFI4O

Last but not least, it should be noted that the Colombian Prosecutor, after evaluating the evidence presented by the accuser (Balda) and the acts that should have the appearance of crime, decided not to accept the accusation against Rafael Correa because he did not find "sufficient motivation" on the part of Balda "to link, in this investigation, senior officials of the Republic of Ecuador, such as the Head of State, Head of Government, other high-level ministers accused of the conducts under investigation." The dismissal of the information by the Attorney General of Colombia was based on the provisions of article 69 of the Code of Criminal Procedure of Colombia, which states: "groundless allegations shall be dismissed." In this regard, the Colombian Constitutional Court stated that: "The inadmissibility of the complaint can only be declared when the fact does not exist, or does not have the characteristics of a crime."[34]. Currently, Correa is being judicially prosecuted at the request of the Attorney General, who asked the Criminal Chamber of the Ecuadorian National Court of Justice, the prosecution of the former official for believing that there is evidence to link him as the actual perpetrator of the kidnapping Fernando Balda suffered in 2012.[35]

34 Colombian Prosecutor's order of March 28, 2016, point 5.3.

35 https://www.eluniverso.com/noticias/2018/06/18/nota/6817622/inicia-audiencia-vinculacion-rafael-correa-caso-balda#goog_2094834115 *"Rafael Correa queda vinculado al caso Balda"*["Rafael Correa is linked to the Balda case."]

The judge presiding over the case determined that, while the investigation remains, Correa must present himself before the National Court of Justice every two weeks, which is difficult because the former President is based in Belgium with his family. For that reason, perhaps, he appeared at the Ecuadorian consulate in that country fifteen days after the order issued by the judge. The action seems to have been insufficient, since the judge considered the act as contempt and ordered the preventive detention and the issuing of Interpol Red Notices against the former Ecuadorian President.

VII. UNABLE TO TAKE PART IN POLITICAL LIFE?

Lawfare has a specific method for certain purposes, not every misinterpretation, abuse of law or judicial investigation "fits" the definition. The construction, appointment, and weakening of the "political enemy" in order to remove him or her from the electoral political scenario, preventing him or her from running as a candidate for a partisan space. But it does not end there; it affects all citizens who sympathize with such an electoral project by affecting their own collective political right. It negatively impacts on the individual political rights of the political career of the one who is being the victim of lawfare and of the political rights of the citizens who end up being prevented from choosing a certain candidate in the electoral offer or not.

The mechanism of the lawfare is no different in its use of ideologies, it does not matter if left, right or center; the person is an enemy of certain interests in a certain moment and space being called to be attacked, weakened, and eliminated under the methodology of the lawfare in the electoral sphere. Lula da Silva's case and what happened in Brazil is perhaps the paradigmatic case of an alleged lawfare.

The process of impeachment of former President Rousseff that was part of a larger strategy of destitution of power, outside the electoral mechanism, from the sector that had legitimately had access to it: the Workers' Party – PT –. Therefore, it was necessary to realize, in this year's elections in Brazil, that its natural and favorite leader in all the polls was disqualified from running. And it was at this point that certain decisions of the judiciary provide the other part of the strategy, such as illegally imprisoning Lula Da Silva. All of this with the necessary and possible expansion of certain means of communication in the construction and media bashing of the figure of the "public enemy." It weakens and extinguishes leaving it vulnerable under different strategies, including hostile and illegal gestures against those who defend their rights. Lula da Silva, despite international decisions to guarantee his electoral rights, was proscribed when the Electoral Courts do not allow him to run in the elections (United Nations Human Rights Committee

Decision, dated August 17, 2018, ratified on September 10, 2018 in which it is expressly stated that the Judicial Branch is one of the authorities obliged to comply with the international obligations assumed by the State).

Coincidentally in Argentina, a number of complaints against the administration of former President Cristina Fernández de Kirchner have appeared – three, in particular: the case regarding the future dollar, the case regarding the death of former prosecutor Alberto Nisman, and the recently launched case of the "Gloria" notebooks. The latter, driven mainly by the "repentant," a sort of informers who recognize themselves as participants in criminal acts, but who obtain legal benefits for incriminating officials of the administration that ended in 2015.

A kind of similarity can be observed in the Brazilian experience: statements that are rewarded with judicial benefits (plea bargain agreements), imputation of crimes to officials of a determined administration and institution of investigations and ordering of preventive detentions against those targeted as "liable." All of this with an important amplification of certain means of communication on certain details of said cases.

VIII. THE MOST FAVORABLE CRIMINAL LAW IN THE GLAS ESPINEL CASE

Perhaps what draws most the attention of the outside observer to the procedure of the Vice President of Ecuador is, undoubtedly, the interpretation that has been given to the criminal law between a repealed criminal code and a new criminal legal order.

The tension there seemed to lie in the interpretation given to the legal change made and the impact on that interpretation and application of the guarantee of the most favorable criminal law; which, obviously, to be a guarantee, is applied to any criminal process regardless of the illegality under investigation.

As we have been reporting, the prosecution of acts of corruption represents an important challenge for a justice system that has been seriously questioned around the continent in terms of its lack of transparency and legitimacy.

At the Inter-American level, the IACHR has said that the determining factor in this type of trial is that the guarantees of Article 8 of the American Convention on Human Rights and in particular, paragraph 2, especially regarding procedural guarantees, are met.

Thus, understanding the system from the Constitutions before the law represents a remarkable advance in terms of citizen rights and institutional quality of power.

The due process transcends everything in democracies, since it is not possible to fight corruption with illegalities. Irregularities are fought with constitutionality, with its procedures and rules.

Thus, fundamental principles of criminal law appear as the principle of legality and its counterpart, the non-retroactivity of criminal law, which have constitutional status – contained in modern constitutional systems, including in Argentina and Ecuador (Article 18 Argentina and 76 Ecuador), as well as at a conventional level provided for in articles 9 of the American Convention on Human Rights and 15.1 of the International Covenant on Civil and Political Rights, to which Article 11.2 of the Universal Declaration, Article 19.1 of the Convention on the Rights of Foreigners, Article 7.2 of the African Charter, Article 15 of the Arab Charter, Article 7 of the European Convention, Section N7.a of the Principles on Fair Trials in Africa, Article 22 of the Statute of the ICC.

The guarantee included here is the prohibition of the laws “ex post facto,” however, the aforementioned conventional principle recognizes

an important exception, which is the retroactive effect of the most favorable criminal law.

In particular, at the regional level, Article 9 of the American Convention on Human Rights[36] expresses with precision the scope of the non-retroactivity of criminal law and the retroactivity of the most benign criminal law. The validity of this rule comes to cancel then, all the discussions that questioned or limited the retroactivity of the law that is more benign.

The principle of retroactivity of the most favorable criminal law finds its foundation in the nature of criminal law. If this provides only exceptional situations, the succession of laws that alters the incidence of the state in the circle of legal rights, denotes a change in the assessment of the conflict.

As we have explained, the right to retroactivity recognizes as a basis the fact that society cannot punish more severely a fact that occurred in the past that no longer devalues in the present (or does not do so with equal intensity), since the criminal rules reflect the social (de)valuation of the

36 Article 9 of the American Convention on Human Rights: "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

behavior considered illegal for a community, and this constitutes a limit of the State's punitive power.

In other words, the conventional right to the application of the most favorable criminal law is based on the observation that the enactment of the new law, more benign for the accused or convicted, reflects the change in the assessment that the community makes regarding the imputed conduct, understood as a measure of the deserved reproach.

Moreover, the best response that a law-abiding society can give to the commission of crimes and the only effective and principled way of not resembling what is fought and rejected is the strict compliance with the laws and principles that characterize the Rule of Law.

We cannot ignore that the principle of retroactivity of the most favorable law to the accused, has been widely recognized at the regional level - Court IDII cases "Vélez Loor vs. Panama" ruling of 11/23/2010, paragraph 184: "Tristán Donoso vs. Panama," judgment of 27/1/2009, paragraph 135; "García Asto y Ramírez Rojas vs. Perú," sentence of 11/2005, paragraph 191; "Palamara Iribarne v. Chile," ruling of 11/22/2005, paragraph 115; "Canese v. Paraguay," judgment of 8/31/2004, paragraphs 171 to 179; "De La Cruz Flores vs. Peru" of 1/18/2004, paragraphs 77 and 105; "Iorí Berenson Mejia vs. Peru,"

sentence of 11/25/2004, paragraph 113, "Baena Ricardo and others vs Panama," sentence of 2/2/2001, paragraphs 103, 160, 166 and 183, "Castillo Petruzzi and others vs. Peru," sentence of 5/30/1999, 2 paragraph 113-.

Also, the ECHR in Koprivnikar vs. Slovenia considered that Slovenia was responsible for the violation of Article 7 of the European Convention on Human Rights: "The guarantee enshrined in Article 7, an essential element of the rule of law, occupies a prominent place in the protection system of the Convention, as underlined due to the fact that, according to Article 15 of the Convention, its repeal is not allowed in times of war or other public emergencies. It should be interpreted and applied, as it follows its objective and purpose, in such a way as to provide effective guarantees against the persecution, conviction, and imposition of arbitrary punishment..." (See paragraph 45). "Article 7 is not limited to the prohibition of retroactive application of the most serious criminal law. It also embodies, more generally, the principle [....] *Nullum crimen, nulla poena sine lege* [...]. While it prohibits extending the scope of existing offenses to acts that previously did not constitute offenses, it also implies the principle that criminal law should not be construed extensively to the detriment of a defendant, for example by analogy..." (Cf. paragraph). "The offenses and the corresponding penalties must be clearly defined by law. This requirement is met when the individual can

know, based on the language in the clause at issue, with the support of the interpretation by a court and after receiving the appropriate legal assistance if needed, what acts and omissions would or would not make him criminally liable and would be the applicable punishment...” (See paragraph 47).

“When it refers to ‘law,’ article 7 refers to the same concept as the Convention in other cases, a concept that comprises formal laws such as precedents and implicates qualitative requirements, especially those pertaining to accessibility and predictability. Such qualitative requirements must be met both with respect to the offenses and their respective punishments…” (See paragraph 48). “Article 7 guarantees not only the principle of non-retroactivity of the most serious criminal laws but also, implicitly, the principle of retroactivity of the most favorable laws; in other words, where there are differences between the criminal laws in force at the time of the commission of an act and the following laws promulgated before a final judgment, the courts must apply the law whose clauses are more favorable for the defendant...” (See paragraph 49). “No matter how clearly written the legal clause is, in any legal system, including the criminal system, there is an inevitable element of judicial interpretation. There is always the need to clarify some points and adjust them according to the circumstances…” (See paragraph 54). “The Court understands that the situation [in this case] contravenes the

legality principle, whose confirmation requires the punishment to be clearly defined by law […]. It also understands that the domestic courts were in a difficult position to unify sentences without a clear legal basis to do so. The Court notes in this regard that, although the courts were certainly the best positioned to interpret and apply domestic law, at the same time, they were bound by the principle established in Article 7 of the Convention, in relation to which only the law can define a crime and prescribe a punishment [...]. It considers that the only way in which the courts could have ensured compliance with this principle and mitigated the effects of the lack of predictability of the law in this case would have been interpreting the deficient clause in a restrictive way, that is, in favor of the petitioner (see paragraph 56)." To resolve in this way, the ECHR made repeated references to its case "Del Río Prada v. Argentina. Spain."

On the other hand, international courts, such as the International Criminal Court for the former Yugoslavia in charge of judging human rights violations, have recognized the imperative nature of the application of the principle of the most favorable law.

The violation of the principle of legality to which we have been referring (Article 9 ACHR) is seen in all the specific derivations that emanate from it and which we now indicate:

a. Previous law in a limiting sense (prohibition of non-retroactivity). The first derivation of the principle of legality implies the prohibition of retroactive use of laws that punish new crimes or aggravate their punishment. Retroactivity is only admitted (and this is expressly stated in the last sentence of Article 9 ACHR) when its use implies putting the person who is being criminally prosecuted in a better situation. This is not the case, since it is noted that the repealed Criminal Code and the currently valid Organic Penal Code have been used to build a mix that has put Glas in a situation that would have been harmful to him, using the valid criminal law. Moreover: there is an ultra-active use of the repealed criminal law to worsen its conditions, an issue that is absolutely contrary to the prohibition that we are dealing with. The prohibition of retroactivity does not exhaust its scope in the punishment of conduct that at the time of the fact were not intended as criminal by law: they also prevent the retroactive application of criminal laws that increase penalties, establish aggravating circumstances, or create aggravated figures of a crime. The prohibition of retroactivity of the most serious criminal law also reaches calculation of punishment. This forms the broadest notion of "fair warning:" the setting of all conditions on which the application of punishment depends; the so-called "fair warning guarantee." This means that the "statute" in force at the time of the act cannot be modified to the detriment of the accused. In this broad sense of the term, the definition includes all the conditions of punishment: the

definition in the strict sense ("definition of crime," "systematic definition" or "adjustment of definition"), the existence of certain causes of justification, the legal limits of the principle of culpability (for example, causes of non-attribution), the conditions for punishability and also the procedural conditions, including the rules relating to the prescription and exercise of actions.

b. Written law. This derivation implies that for a criminal law to be enforced, such law must emanate from the Legislative Branch. And it must be enforced (as it will be exposed in the following point) in the strict sense that this State Branch has granted it. In this case, by using two laws in force at two different times and constructing a criminal "mix," taking elements from one law and others from the other, the obligation of respecting the law emanating from the Legislative Branch has also been violated.

c. Strict law. The most important prohibition of this derivation is the impossibility of using the analogy as a form of enforcement of criminal law. The judge cannot extend the sanction to actions not covered by the text, even when there are reasons to think that the action not covered is basically as invaluable as the action described in the definition of the crime. In the same sense, a new definition of crime cannot be made by using elements contained in various definitions in the same normative

body, nor in definitions contained in various laws in force and not in force.

d. Certain Law (*Ley cierta*). This dimension is linked to the prohibition of vagueness in the formulation of definition of crimes. Although it is addressed directly to the legislator, it also reaches the judge. It is the requirement for the determination derived from the principle of legality: it is based on the core of the principle of legality not only that there is a written law, prior, not expandable by analogy, but also true in the determination of the scope of the prohibited and the penal reaction to be imposed.

Therefore it can be seen how the work has been contrary to these requirements of the principle of legality: a new criminal definition has been formed from a body other than the legislative one (violation of the written law) integrating elements of various legal formulas (violation of the strict law and *ley cierta*), giving ultra-activity to the detriment of the repealed Code and adding it to the detriment of the current Code (violation of the prohibition of retroactive use of the most burdensome law), forming a new legal formula whose sole purpose has been to harm the accused.

In summary, the right that comes from the enforcement of the most favorable criminal law is extended to all crimes, without making any

distinction and the courts could not deny someone what should be granted to all, not observing this guarantee in any process jeopardizes not only the process that violates it, but the democratic system itself, the breaking of certain principles marks the end.

IX. FINAL CONCLUSIONS, REMARKS AND SUGGESTION TO CONTINUE MONITORING THE PROCEDURE

Fundamental rights are limits to "power." They were born with the clear purpose of preventing a majority from violating human rights, based on a "natural legitimacy." They are, in short, unavailable, becoming a limit to the democratic system itself. In fact, they represent more than a limit, since they are the very foundation of the democratic and constitutional system. Transnational protection reinforces this perspective by presenting itself as an international body for the protection of fundamental rights, given the real possibility that States fail to comply with the international commitments assumed in regional and universal human rights treaties.

This is why we claim that fundamental rights are boundaries to the very arbitrariness and to powers of all natures, economic, political, social, or media, among others. We must bear in mind that the Pact of San Jose of Costa Rica clearly imposes duties on the States and also on all people;

with the purpose of making conventional and ethical human rights requirements concrete.

It is quite obvious that corruption destroys the trust that makes the representative system possible and undermines the foundations of the democratic State that abides by the rule of law, insofar as it removes indispensable financial means to the realization of fundamental rights.

However, the gravity of the act of corruption can never justify disregard for the Law, the breaking of its basic rules of fundamental rights. There is no valid alternative to democratic legality. It is an impossible dilemma. In other words, corruption can only be confronted within the limits of the Rule of Law.

In Latin America, it seems to be taking place a movement committed to put on stage certain struggles that are carried out, for example, against corruption but that sometimes hide other purposes. We must be clear here: the fight against corruption is an obligation of the State, of the judicial power, of the different branches of Government, and, also, the whole society. However, this does not authorize the fight against corruption outside the limits of the Rule of Law enriched by an abundance of precedents and normative provisions – international conventions, constitutions, and procedural laws – in terms of due process.

We have referred to what has happened in Brazil, as an example of undue judicialization of public policies through the unlawful destitution of the former President – linked to government decisions on budgetary matters and which were not technically possible to be reviewed by an impeachment. A political project is "prosecuted" through the wrong paths.

The electoral agreement between citizenship and government is thus broken by the destitution of those who have been legitimately elected by the people – such as the President in Brazil and the Vice President in Ecuador.

The Glas case falls within the context we have described, being striking both the manner and cause to proceed to remove him from his position and the sentence imposed from a misinterpretation that ignores the principle of more lenient criminal law with specific national and transnational protection in various treaties and case law decisions.

Regarding the Correa case, the trial of the former President of Ecuador cannot and should not be put out of context from the growing process of criminalization of public policies that characterized a certain political-historical period in Latin America.

Based on this report, we express our consistent opinion on the following conclusions and suggestions:

1. There are indications of the existence of a typical case of lawfare in the way in which the then Vice President JORGE GLAS ESPINEL has been dismissed and, especially, the misinterpretation that has been made of the most favorable criminal law principle.
2. These signs have greater significance even within a Latin American context: a) by the serious background in Brazil with the illegitimate destitution of former President DILMA ROUSSEFF, b) the illegal imprisonment of LULA DA SILVA in a clear violation of procedural, constitutional, and conventional guarantees aggravated by the lack of adaptation in their internal order of the international obligation to ensure their electoral rights as recognized by the United Nations Human Rights Committee, and c) certain legal proceedings brought against the former President of Argentina, Cristina Fernández de Kirchner.
3. The judicial proceedings against GLAS ESPINEL and CORREA DELGADO in progress, in our opinion, need to be observed simultaneously and permanently through the concept of external observers.
4. The simultaneous external observation with direct access to the judicial proceedings will allow in a subsequent report to concretely detect

the existence of judicial pieces that could or not be defined – along with other elements already indicated – as typical supposed lawfare.

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