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CORRUPTION AND HUMAN RIGHTS IN THE UN FRAMEWORK

José Santos Pais ⁸

1. United Nations Sustainable Development Goals.

1.1. The United Nations Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity.

1.2. Goal 16 (Peace, Justice and Strong Institutions) is based on the assumption that there is no hope for sustainable development without peace, stability, human rights and effective governance, based on the rule of law.

It is estimated that corruption, bribery, theft and tax evasion cost developing countries US \$ 1.26 trillion per year.

According to the United Nations High Commissioner for Human Rights, money stolen through corruption every year is enough to feed the world's hungry 80 times over.

From 2000 to 2009, developing countries lost US\$8.44 trillion to illicit financial flows, 10 times more than the foreign aid they have received.

1.3. As targets for Goal 16 of the United Nations Sustainable Development Goals, we may find, *inter alia*:

By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime Substantially reduce corruption and brib-

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ery in all their forms

Develop effective, accountable and transparent institutions at all levels Ensure responsive, inclusive, participatory and representative decision-making at all levels

2. The negative impact of corruption on the enjoyment of human rights.

2.1. It is widely recognized that corruption undermines the realization and enjoyment of human rights, particularly civil and political rights, as well as socioeconomic rights.

It also affects the functioning of and legitimacy of public institutions, undermining justice and accountability reforms and processes, preventing good governance models and significantly hampering the rule of law.

2.2. Corruption remains a source of human rights abuses and a serious barrier to State's obligations to respect and to ensure to all individuals within their territory and subject to their jurisdiction (including sometimes extra-territorial obligations as well), without distinctions of any kind (principle of non-discrimination), the rights of such individuals, namely those rights recognized by international human rights treaties (for instance the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights). The obligation to protect also requires States to take measures preventing third parties from interfering with the enjoyment of human rights. This implies a duty to prevent, investigate and punish acts of corruption by State officials and non-State actors (such as transnational corporations, intergovernmental organizations, aid agencies and civil society organizations) to ensure that victims have access to appropriate and effective remedies.

2.3. States are expected to adopt legislative and other measures, namely public policies, as may be necessary, to give effect to human rights laid down in international instruments, as well as to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. Such remedies are to be determined by competent judicial, administrative or legislative authorities, namely through effective judicial remedies

and, when granted, remedies (for instance, reparation, compensation or redress for harm suffered) are expected to be enforceable (see for instance article 2 of the ICCPR).

3. The phenomenon of corruption.

3.1. The phenomenon of corruption is probably as old as the history of mankind. It can have a domestic or international dimension and may range from petty (administrative) to large scale (grand) corruption, meaning that the involved assets and proceeds of this crime may vary significantly.

3.2. Corruption may take many forms: bribery, kickbacks, embezzlement of public funds, misappropriation or other diversion of property, trading in influence, abuse of functions or position, favoritism (including patronage, nepotism and cronyism), illicit enrichment and concealment and laundering of the proceeds of corruption.

At the core of these crimes, one normally finds a misuse of power held in a State institution (involving individuals that make rules, policies and executive decisions and mostly within the framework of public procurement processes) or by a private organization, as a result from the transfer of money or other things of value (an illicit fee), to obtain an undue advantage for private or public, namely political, gain.

4. Corruption at the international level

4.1. During the Cold War, as the world was divided, there was no interest from the international community to tackle corruption.

In the 1970s, some scholars justified corruption as a *'necessary cost of business'*. In the 1990s, however, the *'good governance'* agenda and the creation of Transparency International contributed to change the way international community perceived corruption, which started to be seen as a global problem deterring economic development. This fact led to the creation of several international and regional instruments to address the problem.

4.2. Although there still is no internationally recognized definition of corruption, almost all Member States of the United Nations (189) agreed to criminalize such behaviors by ratifying the UN 2003 Convention against Corruption. This international instrument cov-

ers not only preventive measures, but also criminalization and law enforcement measures, international cooperation and asset recovery.

4.3. An Implementation Review Mechanism (IRM) has been set up, as a peer review process that assists States parties to effectively implement the Convention. The first cycle of the Review Mechanism started in 2010 (on Criminalization and Law Enforcement and International cooperation) and a second cycle followed in 2015 (on Preventive Measures and Asset Recovery).

A comprehensive self-assessment checklist was designed as a tool to facilitate the provision of information on the implementation of the Convention. To that effect, UNODC has developed a user-friendly computer-based application to allow States to provide information on the implementation of the Convention (the Omnibus Survey Software).

4.4. States are expected to protect victims, witnesses, experts, law enforcement personnel, judges and prosecutors dealing with corruption cases, as well as journalists investigating them, from intimidation and harm, as well as to ensure safe, accessible, visible and independent and reliable channels for reporting corruption.

4.5. After becoming a problem addressed by general public international law, corruption was also addressed later by human rights law, due to the “*humanization*” of international law and the “*good governance*” agenda.

Such an approach enlarges the focus of anti-corruption strategies. Instead of focusing only on the economic and criminal consequences of the problem, anticorruption strategies with a human rights approach also focus on the effects of corruption on the victims, especially on those belonging to vulnerable groups, allowing for their increased participation as rights-holders and for greater transparency and social accountability.

Moreover, such an approach also allows for the participation of several different human rights monitoring mechanisms, each with its own expertise and scope of intervention.

5. The problem of corruption as dealt with by United Nations treaty monitoring bodies

5.1. In addition to the work carried out by other UN bodies, several United Nations treaties monitoring bodies have dealt with the problem of corruption, particularly the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.

The Human Rights Committee has addressed this issue for many years now, within the review of States party's reports, general comments and individual communications.

5.2. Corruption may have a harmful impact - both direct and indirect and sometimes also remote - on the availability, quality and accessibility of goods and services that support the realization of human rights, thereby undermining their enjoyment, namely by more vulnerable, disadvantaged and marginalized groups, including women (who are often more affected than men), children, persons with disabilities and the poor (who suffer disproportionately because they are particularly dependent on public goods and services).

5.3. Corruption may affect many different areas, as the right to education, right to health, right to adequate housing (bribery of public officials to obtain land leases often leading to forced or arbitrary evictions of inhabitants), the right to social benefits or to minimum standards of living. It surely affects in general the right to development.

In fact, the ability of States to realize all human rights is, to a large extent, dependent on the allocation of sufficient resources in the public budget. By diverting budgetary resources from sectors supporting the realisation of human rights, States impair the availability, quality and accessibility of public goods and services, reducing the maximum resources at their disposal for public effective policies on those areas.

5.4. As highlighted particularly by the Human Rights Committee, corruption tends to undermine the rule of law, democracy, good governance and the administration of justice.

It weakens accountability structures created to protect human rights, affects the principle of equality of all persons before the law, contributing to the impunity of perpetrators of different types of

crimes, hampers the activity and effectiveness of law enforcement and judicial bodies and seriously compromises the rule of law.

5.5. Crucial principles like access to courts, equality of arms or the presumption of innocence can no longer be guaranteed in situations where those involved in administering justice such as judges, prosecutors, law enforcement officers and court support staff engage in corrupt conduct, including bribery, extortion, intimidation, influence peddling and the abuse of court procedures for personal gain.

Corruption may cause severe damage to citizens in particular and to the community in general, hampering fairness, causing social damage, breaching social trust, affecting public interest and ultimately damaging democracy.

5.6. The Human Rights Committee has developed, over the last 15 years, a comprehensive approach to corruption by raising it in different contexts.

As regards Concluding Observations on States party's reports, references relating to corruption have been made in connection to the right to a fair trial, judicial independence (regarding the integrity of both judges and prosecutors and the need to strengthen their capacity to address complex and high-level corruption cases), law enforcement (in the framework of anti-corruption legislation and the effectiveness and impartiality of criminal investigations), participation in public affairs, the right to life (in cases where the death penalty is legal for corruption crimes), penitentiary institutions, human trafficking, forced labour, corruption in the business context, freedom of movement (corruption in the registration system - *propiska*), corruption within the management of natural resources (to guarantee a transparent and fair management of these resources to prevent for instance land grabbing, encroachment on protected forests, illegal logging or irregularities in granting contracts for development projects and to ensure indigenous peoples are meaningfully consulted to obtain their free, prior and informed consent to such projects) and many others.

As regards individual communications, complaints were often brought to the Human Rights Committee by persons who claimed

violation of their rights in the context of national proceedings in which they had been subjected to investigation under charges of corruption.

As regards General Comments, General Comment 36 on right to life (article 6 of the ICCPR) refers twice to corruption: in paragraph 23 (*The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. Such persons include ... officials fighting corruption and organized crime ...*) and in paragraph 35 (*The term "the most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death, such as ... corruption and other economic and political crimes ..., although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty*).

5.7. Corruption may affect the right to participate in public affairs, such as the right to vote and to be elected (manipulation of elections, referenda, or plebiscites through the bribery of voters, intervention of electoral bodies to prevent or hamper the participation of members of opposition parties), right to freedom of expression and freedom of information (interfering in activists and journalists' work, hampering or even closing down media that may express adverse views on government in place or expose corruption cases), right to freedom of assembly (by not authorizing or creating significant difficulties for the realization of peaceful assemblies).

6. International assistance and cooperation.

6.1. As part of international assistance and co-operation programs towards the realization of human rights, States are expected to promote public integrity, as well as to contribute to abolishing financial secrecy laws and policies which enable corruption and illicit financial flows from other countries, allowing beneficial owners to remain anonymous.

States should also monitor suspicion spending patterns and punish unexplained wealth.

States should finally significantly improve and facilitate the re-

covery of proceeds of the crime of corruption, eventually returning stolen assets to their country of origin.

(Resumo em português)

CORRUPÇÃO E DIREITOS HUMANOS NO QUADRO DA ONU

No texto analisa-se a ligação entre a corrupção tal como é vista pelo direito internacional e os direitos humanos. Além do trabalho realizado por outros órgãos da ONU, vários órgãos de monitoramento de tratados das Nações Unidas lidaram com o problema da corrupção, particularmente o Comité de Direitos Humanos, o Comité de Direitos Económicos, Sociais e Culturais e o Comité dos Direitos da Criança. O Comité de Direitos Humanos tem abordado esta questão há muitos anos, na revisão dos relatórios dos Estados Partes, em comentários gerais e em comunicações individuais. A corrupção pode ter um impacto nefasto – direto e indireto e por vezes também remoto – na disponibilidade, qualidade e acessibilidade de bens e serviços que suportam a concretização dos direitos humanos, prejudicando assim o seu gozo, nomeadamente por parte de grupos mais vulneráveis, desfavorecidos e marginalizados, incluindo mulheres (muitas vezes são mais afetadas do que os homens), crianças, pessoas com deficiência e pobres (desproporcionalmente afectados porque são particularmente dependentes de bens e serviços públicos). A corrupção pode afetar muitas áreas diferentes, como o direito à educação, o direito à saúde, o direito à habitação adequada (por suborno de funcionários públicos para obtenção de arrendamento de terras, muitas vezes levando a despejos forçados ou arbitrários de habitantes), o direito a benefícios sociais ou a padrões mínimos de vida. Afeta em geral o direito ao desenvolvimento. De facto, a capacidade dos Estados de assegurar todos os direitos humanos depende em grande medida, da alocação de recursos suficientes no orçamento público. Ao desviar recursos orçamentais de setores que apoiam a realização dos direitos humanos, os Estados prejudicam a disponibilidade, qualidade e acessibilidade de bens e

serviços públicos, reduzindo o máximo de recursos de que dispõem para políticas públicas efetivas nessas áreas. Conforme destacado particularmente pelo Comité de Direitos Humanos, a corrupção tende a minar o Estado de direito, a democracia, a boa governança e a administração da justiça. Enfraquece as estruturas de responsabilização criadas para proteger os direitos humanos, afeta o princípio da igualdade de todas as pessoas perante a lei, contribuindo para a impunidade dos autores de diversos tipos de crimes, dificulta a atividade e eficácia dos órgãos policiais e judiciais e compromete gravemente a norma da lei.