Incorporation of anti-corruption conventions into Brazilian law and the Administrative Improbity Law*

Incorporação das convenções de combate à corrupção no direito brasileiro e a Lei de Improbidade Administrativa

*Valerio Mazzuoli***
*Landolfo Andrade****

ABSTRACT

The essay analyzes the incorporation and hierarchical *status* of anti-corruption conventions in Brazil, proposing that such instruments are norms equivalent to international human rights instruments, meaning that, in Brazilian law,

* Article received on August 3, 2023, and approved on April 29, 2024. DOI: https://doi.org/10.12660/rda.v283.2024.89876.

** Professor at the Faculty of Law at Universidade Federal de Mato Grosso (UFMT). Post-doctorate in legal-political sciences from Universidade de Lisboa. PhD in international law from Universidade Federal do Rio Grande do Sul (UFRGS). Master's in Law from pela Universidade Estadual Paulista (Unesp). Full member of the Brazilian Society of International Law (SBDI). Attorney and legal consultant. Email: valerio.mazzuoli@ufmt.br.

*** Master's in Diffuse and Collective Interests from Pontifícia Universidade Católica de São Paulo (PUC-SP). Specialization in private law from Escola Paulista da Magistratura (EPM). Professor of Diffuse and Collective Interests at the schools of Ministérios Públicos dos Estados de São Paulo e Santa Catarina, at the School of Collective Law and on the G7 Legal Course. Public Prosecutor in the state of São Paulo. E-mail: landolfosouza@mpsp.mp.br.

they would have a higher hierarchical level than laws. Finally, the essay defends the invalidity of the rules of the Administrative Improbity Law (Law no. 14,230/2021) when they offer dishonest agents milder treatment than that stipulated by the rules of the United Nations Convention against Corruption.

KEYWORDS

corruption — international treaties — status of international treaties — conventionality control — Brazilian law

RESUMO

O ensaio analisa a incorporação e o *status* hierárquico das convenções de combate à corrupção no Brasil, propondo que tais instrumentos são normas equiparadas aos instrumentos internacionais de direitos humanos, pelo que, no direito brasileiro, guardariam nível hierárquico superior ao das leis. Por fim, o ensaio defende a invalidade das normas inseridas na Lei de Improbidade Administrativa pela Lei nº 14.230/2021 quando oferecerem aos agentes ímprobos tratamento mais brando do que aquele estipulado pelas regras da Convenção das Nações Unidas contra a Corrupção.

PALAVRAS-CHAVE

corrupção — tratados internacionais — *status* dos tratados internacionais — controle de convencionalidade — direito brasileiro

1. Introduction

The defense of administrative probity is directly associated with the monitoring of and fight against corruption in the *broad sense*. In the state sphere, important for the purposes of this essay, corruption is defined as the abuse of invested power to satisfy a private interest, a personal circle or entity. In other words, it is a practical commission or omission, in violation of the law, by a public official in the exercise of their functions to obtain undue benefit for themselves or another person or entity.

The phenomenon of corruption was, until very recently, conceived in a strictly *national sense*. However, with the increasing openness, integration, and interdependence of global economies, the *transnational* dimension has become

clear. Thus, the international community recognize corruption as an illicit activity which poses a significant threat to global growth and financial stability. Besides eroding public trust and the rule of law, it destabilizes competition, distorts allocation of resources and impedes cross-border trade and investment. For this reason, governments and multinational institutions have begun to incorporate mechanisms to promote integrity at global and regional levels, focused especially on the following objectives:

(*i*) implementation of international transparency standards on the activities of legal entities and their respective assets, as these can be used to hide or disguise illicit activities, such as money laundering, tax evasion and corruption;
(*ii*) implementation of transparency and integrity measures in the public sector, which are essential to prevent the misappropriation of public resources and conflicts of interest;
(*iii*) strengthening international cooperation, to combat corruption in an increasingly globalized context.

To achieve these objectives, however, state legal systems must be consolidated through enforcement of international treaties and conventions on corruption, implementing high standards of official conduct that facilitate governmental integrity, economic growth and international security.

The topic is especially relevant in Brazil; thus, the urgent need to understand how anti-corruption conventions are expressed in law and their hierarchical *status*, notably for controlling the conventionality of the Administrative Improbity Law with regard to the United Nations Convention against Corruption.

2. International anti-corruption conventions ratified by Brazil

As observed, the fight against corruption has gained traction around the world, with increasing international initiatives aimed at quashing practices contrary to the principles of the Democratic State of Law.

Currently, the Federative Republic of Brazil is a party to three international conventions, considered paradigms in this respect, namely: the Inter-American Convention Against Corruption (OAS), the Convention on Combating Bribery

of Foreign Public Officials in International Business Transactions (OECD) and the United Nations Convention against Corruption (Mérida).

Such agreements are vital pieces of the so-called microsystem of public asset defense, combining conventional, constitutional and infra-constitutional norms. Below, we highlight some important aspects of each of these international conventions.

2.1 Inter-American Convention on Combating Corruption (OAS)

On March 29, 1996, in Caracas, Venezuela, the state parties to the Organization of American States (OAS) signed the Inter-American Convention against Corruption (CICC). This is the first international agreement to define minimum standards to be observed by party states in the fight against corruption.

The Brazilian National Congress approved, through Legislative Decree no. 152, June 25, 2002, the text of the CICC, with a single reservation, about art. XI, § 1º, *w*,[1] and passed the instrument of ratification to the OAS General Secretariat on July 24, 2002. Under the terms of art. XXV, this came into force in Brazil on August 24, 2002, promulgated by Decree no. 4.410, October 7, 2002

The purposes of the CICC, as set out in Article II, are to promote and strengthen the development, by each of the Parties, of mechanisms necessary to prevent, detect, punish and eradicate corruption, and to promote, facilitate and regulate technical cooperation between the same Parties.

To this end, ratifying States pledge to adopt a set of preventive measures in their institutional systems, among which are: creation of standards of conduct for the performance of public functions; strengthening of mechanisms that encourage participation of civil society and non-governmental organizations in efforts to prevent corruption; creation and strengthening of internal control bodies; creation of systems to protect public officials and private citizens who report acts of corruption in good faith; creation of systems for recruitment of public officials and acquisition of goods and services by the State, to ensure transparency, equity and efficiency.

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[1] "Article XI—1. In order to promote the development and harmonization of national legislation and the achievement of the objectives of this Convention, the Party-States deem it appropriate to consider classification of the following conduct in their legislation and undertake to do so: […] *w*. any action or omission carried out by any person who, by himself or through an intermediary, or acting as an intermediary, seeks the adoption, by the public authority, of a decision by which it illicitly obtains, for itself or another, any benefit or profit, whether or not there is damage to the State assets".

The CICC does not define what constitutes an "act of corruption" but lists, in art. VI, the illicit acts of concern, which, therefore, attract its attention. In this regard, the Caracas Convention considers an act of corruption, *inter alia*, the performance, by a public official or person exercising public functions, of any act or omission in the exercise of their function in order to illicitly obtain benefits for themself or a third party (art. VI, I, *w*). This conduct, it is argued, most closely resembles the concept of corruption cited in doctrine, as stated by Transparency International, which is the "abuse of power entrusted to someone to obtain private gain".[2]

Besides the minimum list of illegal acts that must be prevented by the States Parties, others may be added, to adhere with domestic legislation. International bribery was also a matter of concern under the Convention. The offer or supply of advantage to an official of another State, to encourage the performance or omission of a certain act, is prohibited and sanctionable (art. VIII).

The CICC also provides for broad reciprocal assistance between the Parties, to facilitate the gathering of evidence and other acts ensuring due diligence, and the investigation or prosecution of acts of corruption. Furthermore, Member States made a commitment to provide broad cooperation and assistance, to identify, locate, block, seize and confiscate assets obtained or derived from crimes defined in the Convention itself (Art. XV).

In many respects, Brazil is in full compliance with the terms of the CICC. However, to consolidate this, the State apparatus has developed initiatives, focused on investigating and clarifying irregularities, tackling impunity, encouraging public transparency and social supervision.

2.2 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD)

The Organization for Economic Cooperation and Development (OECD) was created in 1948 to implement the so-called "Marshal Plan", using funding from the United States for the reconstruction of a Europe devastated by the Second World War. Currently, it is made up of 38 member States, accounting for more than 80% of world investment and trade. It plays a fundamental role in responding to the challenges faced by the global economy.

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[2] Available at: www.transparenciainternacional.org.br. Accessed on: 31 Jul. 2023.

The OECD establishes international standards and codes in collaboration with its member nations. Its main objective is to help governments boost prosperity and combat poverty through economic growth and financial stability.

Bribery of foreign public officials was an issue initially addressed by the OECD Working Group on "Bribery in International Business Transactions". The efforts resulted in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, known as the "Anti-Bribery Convention". The text was signed in Paris in 1997 by OECD member states, joined by countries such as Brazil, Argentina and Chile, and came into force in 1999. In Brazil, the Convention was ratified on June 15, 2000, and promulgated by Decree no. 3.678, November 30, 2000.

The OECD Anti-Bribery Convention calls upon member states to adapt their legislation to the measures necessary to combat corruption of foreign public officials in the context of international trade. For the purposes of the Convention, such officials are any persons who hold positions in the legislative, executive or judicial branches of a foreign country, whether appointed or elected; or any persons who exercise a public function for a foreign country. The Convention also relates to employees or representatives of an international public organization as public officials.

The signatories to the Convention have assumed the obligation to criminalize the offer, promise or provision of undue advantage, pecuniary or other, to a foreign public official who, directly or indirectly, through action or omission, in the performance of their public duties, takes advantage from or impedes transactions in the conduct of international business (art. 1, 1).

Concerning the Convention, any individual or entity, regardless of nationality, that commits acts of bribery of a foreign public official in the territory of a signatory is subject to the prohibitions established therein.

The Convention also provides for tax and accounting rules. The accounting rules included in the OECD require prohibition of "unrecorded fund" accounts and inadequately disclosed transactions. It also prohibits operations that facilitate concealment of corruption by foreign public officials, such as recording of non-existent expenses and issuance of obligations with inadequate justification, or use of false documents to corrupt foreign officials. To ensure the effectiveness of these prescriptions, the Convention determines that signatories impose civil, criminal and administrative penalties for omissions and falsifications in bookkeeping and of records, accounts and financial statements.

Regarding money laundering, the Convention stipulates that if a signatory criminalizes corruption of a public official under the applicable legislation, it

must do the same, under equivalent conditions, for bribery of a public official, regardless of where the act occurred (art. 7).

One of the most important points of the OECD Convention involves the liability of legal entities for transnational bribery. In this regard, art. 2 determines the adoption of measures necessary to hold legal entities accountable for the corruption of foreign officials. In turn, art. 3 provides, *inter alia*, that bribery of foreign officials should be suppressed through proportionate, effective and dissuasive criminal penalties, compatible with those used to fight domestic corruption. In cases where the national legal systems do not allow for the criminal liability of legal entities, the Convention requires States parties to ensure they are subject to non-criminal penalties, including pecuniary sanctions.

In 12 countries—Brazil, Bulgaria, Colombia, Germany, Greece, Italy, Latvia, Mexico, Poland, Russia, Sweden and Turkey—the liability of legal entities for the corruption of foreign public officials is extra-penal. The other signatories of the OECD Convention recognize the criminal liability of legal entities for offenses of this nature, with some variations.

Currently, the Brazilian legal system is in full compliance with the terms of the OECD Anti-Bribery Convention. The enactment of Law no. 10.467/2002, notably, added Chapter II-A—"Crimes committed by private individuals against foreign public administration"—to Title XI of the Penal Code. Subsequently, as a result of the Convention, Brazil enacted Law no. 12.846/2013, providing for administrative and civil liability of legal entities for harmful acts to the public administration, national or foreign (Corporate Anti-Corruption Law). Clearly, through various legislation, Brazil has adapted to international conventions on anti-bribery practices, showing a desire to respect international standards.

2.3. United Nations Convention Against Corruption (Merida Convention)

The text of the United Nations Convention Against Corruption (UNCAC) was defined and approved by Resolution no. 58/4 of October 31, 2003, and later signed in Mérida, Mexico, on December 9, 2003, by several States.

Under Article 1 of the Convention, implemented on 14 December 2005, its purpose is to: *a*) promote and strengthen measures to prevent and combat corruption more effectively and efficiently; *b*) promote, facilitate and support international cooperation and technical assistance in preventing and combating

corruption, including asset recovery; and *w*) promote integrity, accountability and proper management of public affairs and assets.

To date, the Mérida Convention is the most complete and comprehensive international regulatory instrument of this nature, with 140 signatories. In Brazil, Uncac was enacted by Legislative Decree no. 348/2005, ratified on June 15, 2005, and enacted by Executive Decree no. 5,687/2006.

In the chapter on corruption prevention, The Convention requires participants to implement effective anti-corruption policies which stimulate public participation and reflect the principles of the rule of law, including integrity, transparency and accountability, among others (art. 5, 1). Also, in the area of prevention, the parties must adopt systems for selecting and recruiting civil servants according to objective merit (art. 7, 1, *a*). They should increase transparency in the financing of candidates and political party campaigns and devise codes of conduct which encourage civil servants to report corruption and deter the receipt of gifts or any action that might cause conflict of interest. Bidding processes must foster broad participation and have pre-established, fair and impersonal criteria (art. 9). Steps must be taken to expand public access to accounts and develop social participation in this process (art. 13) and establish preventive measures against money laundering. Finally, the international standard highlights the independence of the Judiciary and the Public Prosecutor's Office in tackling corruption.

The Mérida Convention also includes provisions to prevent corruption in the private sector, including: creating company auditing and accounting standards; establishing effective civil, administrative and criminal sanctions that deter malpractice; promoting cooperation between law enforcement and private companies; preventing conflict of interest; prohibiting the existence of "slush funds"; and discouraging tax exemptions or reductions for expenses, considered bribery, and other similar conduct.

In the chapter on penalties and law enforcement, the Convention encourages signatories to institute criminal classifications that cover not only the basic forms of corruption, such as bribery and misappropriation of funds, but also acts that contribute to corruption, such as obstruction of justice, influence peddling and laundering of proceeds from corruption.

States Parties must obligatorily criminalize: (*i*) bribery of public officials, (*ii*) active corruption of foreign officials, (*iii*) fraud and misappropriation, (*iv*) money laundering and (*v*) obstruction of justice. They should also, to the extent possible, classify conduct such as passive corruption of foreign officials, influence

peddling, abuse of power, illicit enrichment and bribery and misappropriation of resources in the private sector.

In the chapter on international cooperation, the Convention emphasizes that all aspects of anti-corruption efforts require international cooperation, such as mutual legal assistance in the collection and transfer of evidence, in extradition proceedings, and joint investigation, tracing, freezing of assets, seizure, and confiscation of corruption proceeds (art. 43).

The Convention is innovative compared to previous treaties, allowing mutual legal assistance even in the absence of double jeopardy, when it does not involve coercive measures. The practice of double jeopardy means that a country does not need to extradite people who have committed acts not considered crimes in its territory. However, since the implementation of the Convention, these requirements have become more flexible, as the international standard provides that even crimes not defined under the same terms or in the same categories may be considered equivalent, triggering extradition.

Extradition must be guaranteed in cases of crimes mentioned in the Convention and when the requirements of double jeopardy are met. Signatories shall not consider corruption crimes political crimes. Furthermore, States that make extradition conditional on the existence of international agreements may use the Convention as a legal basis for their enforcement. If one State does not extradite nationals, it must use the other State's request as the basis for an internal proceeding. Furthermore, the Convention provides that parties shall seek to harmonize their national laws with existing international treaties.

The Convention also provides for broader measures of mutual legal assistance in investigations, prosecution and legal proceedings relating to crimes covered by the Convention.

Asset recovery is an important innovation and a fundamental tenet of the Convention. States Parties should support each other with extensive measures of cooperation and assistance in this area, to defend the interests of victims and legitimate owners of these resources. In this regard, signatories are expected to adopt measures to identify the final beneficiaries of large deposits made in accounts and intensify the monitoring of the accounts of those who perform or have performed key public functions, as well as their family members and close associates.

In its final provisions, the Convention establishes that the measures provided therein constitute a minimum standard for punishing acts of corruption. Parties may adopt, internally, more restrictive measures than those of the Convention in the fight against corruption, but must not adopt milder measures (art. 65, 2). This involves implementation of the principle of non-regression in anti-corruption

matters, an important hermeneutical reference that should guide the interpretation and application of infra-constitutional norms in tackling corruption in Brazil.

In other words, the 2003 Mérida Convention obliges its signatories to adopt a *minimum* normative model in this regard. The ethical imperative of limiting legislative discretion applies to both civil and criminal offenses.

3. Normative status of human rights conventions in Brazil

The primary status of international human rights treaties and conventions has been a subject of controversy in Brazil, notably due to changes in the understanding of the Federal Supreme Court (STF) over the years. Doctrine is divergent on the topic, reflecting the inconsistency of the STF decision. Case law and doctrine have addressed the issue in Brazil from the perspective of (*i*) normative parity between treaties and domestic laws, (*ii*) the supra-legality of human rights treaties and (*iii*) the constitutional norm status of these same international instruments.

With Constitutional Amendment no. 45/2004, treaties and conventions on human rights, if approved by three-fifths of each House of the National Congress (Chamber and Senate), in two rounds, become "equivalent to constitutional amendments" (CF, art. 5, § 3).

In the decision on Extraordinary Appeal no. 466,343/SP, the STF established that international human rights treaties and conventions, approved by a simple majority, possess supra-legal *status*, i.e., under the Constitution, but over the law, while other treaties (common treaties) enter the Brazilian legal system with the force of ordinary law (the thesis of normative parity). According to this understanding, only treaties approved by a qualified majority in Congress (CF, art. 5, § 3) and ratified by the President of the Republic are equivalent to a constitutional amendment in Brazil, and in such cases, serve as paradigms for *concentrated* control of regularity.

Despite the doctrinal criticisms of this uncertain and unconvincing normative escalation, there are, in terms of case law, three distinct hierarchical levels of international treaties and conventions in Brazil:

(*i*) human rights, if approved in each house of the National Congress, in two rounds, by three-fifths , are equivalent to constitutional amendments (CF, art. 5, § 3);

(*ii*) those on human rights approved by the ordinary procedure (CF, art. 49, I) have supra-legal status;[3]
(*iii*) other treaties (common treaties, unrelated to the subject of human rights) enter the Brazilian legal system with the force of ordinary law.

In fact, all international human rights treaties appear to meet the criteria of Brazilian constitutional norms, as they have the same ethical and axiological foundation as fundamental rights provided for in the Federal Constitution of 1988. Notwithstanding the case law differences, however, there is clearly a difference between the *status* of constitutional norm (CF, art. 5, § 2) and an *equivalence* of a constitutional amendment (CF, art. 5, § 3). One—without going into depth—is that treaties approved with a qualified quorum in Congress (CF, art. 5, § 3) and in force in Brazil become paradigms of *concentrated* control of conventionality; thus, it is possible to file actions in the STF for the abstract control of norms based solely on an international human rights conventions approved and in force in the State. This, nonetheless, does not negate the constitutional, normative nature of treaties not approved by a qualified majority in Parliament. These will not be a paradigm of *concentrated* standards control but serve as a basis for *diffuse* control.[4]

It is, therefore, certain that international human rights conventions incorporated in Brazilian law have a higher status than domestic laws and, thus, serve as overarching paradigms.

4. Legal nature of anti-corruption conventions

Determining the hierarchical status of international anti-corruption conventions ratified in Brazil involves an analysis of their object and purpose. After all, since these treaties address human rights, they will have, according to current STF case law, a normative (at least) supra-legal status in Brazil (approved by a simple majority). Alternatively, discounting the basis of these treaties, according to the STF they possess the status of ordinary law in Brazil, equivalent to the norms of this level, for the purposes of applying criteria of specialty and/or chronology for resolving normative conflicts.

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[3] STF, RE 466,343/SP, rel. min. Cesar Peluso, judge. 12/MARCH/2008.
[4] For everything and for details, *v*. MAZZUOLI, Valerio de Oliveira. *Curso de direito internacional público*. 15. ed. rev., atual. e ampl. Rio de Janeiro: Forense, 2023. p. 783-811.

The prevailing understanding, seemingly, is that corruption is behind the low quality of governance and economic failure, not a mere symptom of it. But, as intuitive as this is, the link between corruption and human rights violations is not really explored in specialized doctrine and is relatively new in terms of International Conventions, despite its obvious significance.

Strictly speaking, the right to live in an environment free of corruption is not yet enshrined, *de jure*, as a prescribed human right.[5] In fact, the alleged right to "freedom from corruption" is not found in any human rights treaties. There is even a certain reluctance concerning this recognition, for a range of reasons. For some, corruption is inherent to human nature. Hence, no universal law could inhibit its occurrence.[6] Others contend that corruption is a necessary evil, important for governments and economies to function more efficiently.[7] There are those who argue that different degrees of corruption may be tolerated as transitory or cultural phenomena in different regions or countries.[8]

Conversely, Matthew Murray and Andrew Spalding defend the idea that the right to live in an environment free from corruption should be included in the list of internationally recognized human rights.[9] They present the following, summarized arguments:

(*i*) according to John Locke's "law of nature," without regulation by a neutral third party—or government—people will act in their own self-interest and compromise the freedom of those around. If public agents become corrupt, they cease to act as neutral intermediaries and, consequently, States cease to exercise their original and primary function;

(*ii*) the elevation of *status* puts anti-corruption laws ahead of other laws. Many States ratify international conventions and adopt, domestically, laws to combat corruption. The big problem is the

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[5] The doctrine defines a separation between *fundamental rights*, human rights recognized and enshrined in the Constitutional Law of a specific State, and *human rights*, established in international treaties on the matter. On the topic, *see*. MAZZUOLI, Valerio de Oliveira. *Human rights course*. 9th ed. rev., updated. and expanded. São Paulo: Método, 2022. p. 23-24; e SARLET, Ingo. *A eficácia dos direitos fundamentais*. 9. ed. Porto Alegre: Livraria do Advogado, 2008. p. 35.

[6] For Kant, for example, human beings have a natural propensity for evil (cf. KANT, Immanuel. *Critique of pure reason*. Translated by Afonso Bertagnoli. New York: Routledge, 1959. p. 166-167).

[7] In this sense, see the doctrine of the "Greased Gears Theor"y: FURTADO, Lucas Rocha. *As raízes da corrupção no Brasil:* Estudo de caso e lições para o futuro. Belo Horizonte: Fórum, 2015, p. 45.

[8] ALMEIDA, Alberto Carlos de. *A cabeça do brasileiro*. São Paulo: Record, 2007. p. 16.

[9] MURRAY, Matthew; SPALDING, Andrew. Freedom from official corruption as a human right. *Governance Studies*, Washington, DC, p. 11-5, Jan. 2015.

limited effectiveness of these laws and impunity of the corrupt and corruptors. In this scenario, considering the practice of corruption a direct violation of human rights gives greater weight to this body of regulations. The practical implications of this categorization are immediate for the legislation of any country, as the entire regulatory framework for combating corruption is interpreted and applied from a new perspective;

(*iii*) elevating the right to live in a corruption-free environment to the status of a human right undermines the fragile justification of those who dismiss anti-corruption initiatives on the grounds that corruption is a cultural phenomenon. Since human rights are universal, the claim that some cultures are more corrupt than others is longer valid;

(*iv*) it is absolutely impossible to implement other human and fundamental rights, including the rights to health and education, without addressing corruption.

Such arguments are convincing. Yet, although anti-corruption efforts are increasingly common, and initiatives such as the Merida Convention encourage global implementation of combative laws, there is a lack of political will in many countries to make this real. Recognition of the right to live in a corruption-free environment as a human right would certainly provide the impetus for countries to strengthen their anti-corruption initiatives.[10]

In the region of South America, the Inter-American Commission on Human Rights (IACHR) recognizes corruption as a phenomenon that affects human rights in their entirety, with dilatory consequences for the rule of law and democratic institutions. In 2017, the Inter-American Commission passed Resolution no. 01/17 on "Human Rights and the Fight Against Impunity and Corruption", reaffirming that the fight against corruption is inextricably linked to the exercise of human rights. In the text, the Commission concluded that the establishment of effective mechanisms to eradicate corruption is an urgent obligation, to facilitate effective access to independent and impartial justice and guarantee the human rights of all.

In 2018, the Inter-American Commission issued Resolution No. 01/18, on "Corruption and Human Rights", in which it highlighted that corruption has a serious and differentiated impact on the enjoyment and exercise of human rights

[10] On this, cf. ZENKNER, Marcelo. *Integridade governamental e empresarial*: um espectro da repressão e da prevenção à corrupção no Brasil e em Portugal. 2. reimp. Belo Horizonte: Fórum, 2019. p. 91.

by historically discriminated groups, such as the economically poor, women, indigenous peoples, and those of African descent, and profoundly affects victims of human trafficking, including immigrants, children, and women. In the same resolution, the IACHR recommended that States promote an effective regional response to corruption, based on the promotion and protection of human rights.

The Inter-American Court of Human Rights itself recognized the direct violation of human rights resulting from acts of corruption in the case *Ramírez Escobar and Others v. Guatemala* (March 9, 2018). The case involved the Guatemalan government and an irregular adoption scheme. Extreme poverty, the high birth rate and lack of effective supervision of adoption procedures favored an illegal trade, it was found. In its decision, the Court reminded States that measures must be implemented to "prevent, punish and eradicate corruption effectively and efficiently", highlighting the negative consequences of corruption for the enjoyment and exercise of human rights: "*Furthermore, corruption on the ground affects the rights of individually, with repercussions for the whole of society, to the extent that the population lose confidence in the government and, over time, in the democratic order and the rule of law*". Thus, the Inter-American Court acknowledged that corruption impinges on the right of children and parents to enjoy family life, thus violating the rights of minors. In these circumstances, the state clearly fails in its obligation to protect and guarantee rights, disrespecting art 1, 7, 16 and 19 of the American Convention on Human Rights of 1969.

In the same regard, the Inter-American Commission on Human Rights published a newsletter in 2019, called "Corruption and Human Rights", stressing the idea that corruption impinges on the enjoyment and exercise of human rights, especially of more vulnerable groups, who have historically been victims of discrimination. The main objective of the text was to demonstrate the inseparability of human rights and the phenomenon of corruption. Therein, the IACHR states that it will advance monitoring mechanisms, including individual petitions, to analyze, as a priority, cases of serious human rights violations resulting from acts of corruption. Based on this understanding and international human rights obligations, the IACHR issued specific recommendations to States on how to tackle corruption accordingly.

Indeed, the most recent recommendations of the IACHR on corruption and human rights acknowledge direct violations of human rights through acts of corruption. In fact, corruption, both active and passive, have historically explained many of the problems faced in Latin American countries, leading to sophisticated police operations and judicial convictions, following complaints filed by the Public Prosecutor's Office. A consequence of this problem, especially

in Brazil, is the lack of resources available to deal with serious social challenges, in the areas of employment, health, leisure and education, amounting to serious violations of the human rights of certain sections of the society. Thus, understanding this context, it is clear that international conventions aimed at tackling corruption are necessarily concerned with safeguarding human rights, through the prevention of corrupt practices.

This finds resonance in the preamble of the Merida Convention, in which then UN Secretary-General, Kofi Annan, stated that corruption is an insidious plague with a range of corrosive consequences for society. Corruption undermines democracy and the rule of law, causes human rights violations, damages markets, destroys the quality of life, and allows organized crime, terrorism and other threats to social harmony to flourish and spread across countries.

Thus, governments and international organizations adopt principles, laws and mechanisms to fight corruption domestically and transnationally, to alleviate the suffering of its victims. Yet, unfortunately, anti-corruption regulations do not always produce the desired effects, as measures taken at the domestic level are implemented slowly.

Until the right to live in a corruption-free environment is recognized as a definitive human right, the world envisioned in the 1948 Universal Declaration of Human Rights, the 2003 Merida Convention and other conventions will remain an abstract ideal. In any case, it is certain that the magnitude of the problem, especially in developing countries, has an enormous impact on the democratic system, rule of law and human rights in general. This grave state of affairs demands strong measures. To this end, civil society, social movements and the entire population must demand and pursue changes to improve the situation; and responsible political leadership is needed to effectively drive these changes.

In this regard, anti-corruption regulations must be based on a robust conceptual foundation, with recognition of the right to live in an environment free of corruption as universal and inalienable.

5. Control of conventionality of anti-corruption laws

Recognition of the importance of human rights as a basis for anti-corruption conventions requires their categorization as human rights norms, with a supra-legal *status* in Brazilian law (as they were not approved by a quorum, qualified by constitutional amendments, according to the STF—art. 5, § 3, of the CF). In this scenario, such conventions are regarded as infra-constitutional norms or

standards in the fight against corruption, as seen in the case of the Administrative Impropriety Law (Law no. 8,429/1992, amended by Law no. 14,230/2021).

Thus, any law which goes against the anti-corruption conventions will lack legal validity, since control of conventionality does not deny the effectiveness of laws, but their validity. They will be effective, but invalid. Therefore, any infra-constitutional anti-corruption regulation, in order to be valid, must have dual, vertical material compatibility, i.e. it must be compatible with the Brazilian Constitution and with the anti-corruption treaties in force in the country.

Based on the premise that the anti-corruption conventions ratified by Brazil (according to the STF) do not have constitutional force, they will serve as a paradigm (only) for *diffuse control of conventionality* (or supra-legality). This diffuse control should not be confused with *legality control* (a decree vs. a law) nor with *constitutionality control* (where there is contradiction between a law and the Constitution). It must be raised as a preliminary matter in each case, and the relevant judge or court must analyze it before examining the merits of the claim. In other words: diffuse control of conventionality can be invoked before any court or tribunal and should be considered by all bodies of the Judiciary.[11]

6. Possible unconventionalities of Law no. 14,230/2021

Law no. 8,429/1992, LIA (Administrative Misconduct Law), classified administrative misconduct in three distinct forms: *a*) that which involves illicit enrichment of the official (art. 9); *b*) acts that cause harm to the public treasury (art. 10); and *c*) acts that violate the principles of public administration (art. 11). In practice, the law imposes political, civil and administrative sanctions. Furthermore, the LIA defined the active and passive subjects of misconduct, addressed investigative procedures and regulated civil action for administrative misconduct. It also addressed declaration of assets, prescription and criminal offenses.

After almost three decades, during which time modifications were made to the original text, the Chamber of Deputies set up a committee to reform LIA. Chaired by the minister of the Superior Court of Justice (STJ) Mauro Campbell Marques, the commission included Cassio Scarpinella Bueno, Emerson Garcia,

[11] For details, *see* MAZZUOLI, Valerio de Oliveira. *Controle jurisdicional da convencionalidade das leis*. 6. ed. rev., atual. e ampl. Rio de Janeiro: Forense, 2025.

Fabiano da Rosa Tesolin, Fábio Bastos Stica, Guilherme de Souza Nucci, Mauro Roberto Gomes de Mattos, Ney Bello, Rodrigo Mudrovitsch, Sérgio Arenhart and Marçal Justen Filho.

Bill no. 10,887/2018, the result of a study undertaken by the committee, was based on three premises: (*i*) the adequacy of the LIA text to national jurisprudence; (*ii*) the conformity of the text of the law to the 2015 Code of Civil Procedure; and (*iii*) the improvement of the legal regime for liability for acts of administrative impropriety.

In October 2020, the rapporteur of Bill no. 10,887/2018, Congressman Carlos Zarattini, presented a text that, submitted to an urgent regime and approved by a large majority, substantially altered the original wording of the Bill. Legislative procedures followed, and the text was sent to the Federal Senate, registered as PL no. 2,505/21 and soon approved, with a large majority and few changes to the text. In the end, Law no. 14.230, of October 25, 2021, was sanctioned, without presidential vetoes, and approved in Congress.

In force since October 26, 2021, Law no. 14,230/2021 introduced a broad and significant reform of Law no. 8,429/1992, substantially changing the rules on administrative impropriety. In broad terms, structural changes are identified in six areas of the original text of the Law:

(*i*) *Typology of acts of administrative impropriety*: the amended text no longer provides for the negligent form of an act of impropriety, establishes a closed definition of an act offensive to the principles of public administration (art. 11) and requires a special subjective element to characterize acts offensive to the principles of public administration, provided for in the LIA and other laws;

(*ii*) *Sanctions regime*: the same penalties that were already provided for in the original text of art. 12 of the LIA remained, but with important modifications to their minimum and maximum levels, scope and reach;

(*iii*) *Prescription regime*: art. 23 of the LIA established a single prescriptive period of eight years, from the occurrence of the fact or, in the case of permanent infractions, from the day on which the permanence ended, regardless of the nature of the relationship between the guilty and injured parties. Also worthy of note is the creation of a type of intervening prescription, which, until then, had been rejected by the STJ;

(*iv*) *Legal framework for precautionary measures*: in addition to the extinction of the precautionary measure of seizure, the amended text promoted significant changes in the regime of precautionary measures of unavailability of assets and removal of the public official from the exercise of their office, employment or function;

(*v*) *Legal framework of the civil non-prosecution agreement (ANPC)*: Law no. 14.230/2021 maintained the possibility of a negotiated solution in the field of LIA and introduced material and procedural parameters for the celebration of the ANPC, which had not existed, which should give more legal certainty to the subject;

(*vi*) *Procedural discipline of the defense of administrative probity*: the legislative reform eliminated the admissibility phase of the misconduct action, formulated a decision to classify conduct, exclusive to the administrative misconduct procedure, and introduced special rules on production and burden of proof, among other new elements.

Strictly speaking, the reform advanced by Law no. 14,230/2021 represents a change in the original wording of the LIA, with the modification of 21 of its 23 articles. Formally, the numbering of Law no. 8,429/1992 was preserved, but from a material point of view, it is a new law, distinct from the original.

Some of the rules added to Law no. 8,429/1992 by Law no. 14,230/2021, however, may be out of step with the obligations assumed by Brazil vis-à-vis the international conventions on corruption ratified by the Brazilian State, especially with those of the 2003 Mérida Convention.

As seen, state parties may adopt, internally, a more restrictive or rigorous line than that provided for in the United Nations Convention against Corruption but are prohibited from adopting *softer* measures. This is due to the principle of prohibition of regression, as mentioned. Yet, many of the rules added by Law No. 14,230/2021 appear more lenient than those of the Convention, which means that, *a priori*, its examination does not pass the conventionality control unscathed.

An example is the apparent requirement of a special subjective element, namely, the purpose of obtaining undue advantage or benefit for oneself or another person or entity, for the types of administrative impropriety provided for in arts. 9 (*illicit enrichment*), 10 (*damage to the public treasury*) and 11 (*offense to the principles of public administration*) of LIA.

Following the reform introduced by Law no. 14,230/2021, configuration of administrative impropriety offensive to the principles of public administration now requires, by virtue of the rule in art. 11, § 1,[12] proof of both a *general subjective element of the type*, namely, intent (willfulness and awareness of conduct prohibited by law), as well as a *special subjective element of the type*, that is, the intention to obtain an undue advantage, for oneself or another.

This legislative change is not insignificant. Henceforth, under the terms of the Law, willful practice of one of the conducts typified in the list of art. 11, by itself, shall not attract the attention of LIA. Such conduct will only constitute an act of administrative impropriety if it is demonstrated that the offender intended to obtain undue advantage. For example, if a public official, consciously and voluntarily, denies transparency to official acts, their conduct is clearly offensive to the principles of the administration, but may be considered *atypical* for the purposes of LIA, if the purpose is not specifically demonstrated. In turn, under the terms of art. 11, § 2, of the LIA, the requirement of this purpose covers any acts of administrative impropriety typified in LIA or in special laws, and any other special types of administrative impropriety established by law. A literal interpretation of this provision might be that, following the reform of LIA, any and all acts of administrative impropriety, provided for in the Law (arts. 9, 10 and 11) or outside it, require, the presence of both the *general subjective element of the type*, namely, fraud, and *special subjective element of the type*, i.e., the intention to obtain undue advantage.

In particular, it is argued, the extension rule of § 2 of art. 11[13] does not match the modalities of arts. 9 (*illicit enrichment*) and 10 (*damage to the public treasury*) of the LIA. That is to say, the configuration of the acts of administrative impropriety typified in arts. 9 and 10 of LIA only require proof of intent (*general subjective element of the type*). Thus, as expressly provided for in § 1 of the art. 11 of the LIA, we recognize the inspiration for the provision of this special purpose in is the 2003 Mérida Convention. In this Convention this special purpose—*intention to obtain undue benefit, for*

[12] Art. 11 […] § 1º. Under the terms of the United Nations Convention against Corruption, established by Decree no. 5,687, January 31, 2006, administrative improbity applies, in the application of this article, only when the purpose of the official's conduct is clearly to obtain undue profit or benefit for himself or for another person or entity. (Added by Law no. 14.230, 2021).

[13] Art. 11 […] § 2. The provisions of § 1 of this article apply to any acts of administrative impropriety defined in this Law and in special laws, and to any other special types of administrative impropriety established by law.

oneself or another—is only required for configuration of *abuse of functions*, an act of corruption typified in its art. 19,[14] which bears similarities to an act of impropriety offensive to the principles of the administration. As for the other 10 types of corruption described in the Convention, including illicit enrichment[15] and embezzlement or misappropriation,[16] analogous to the types of misconduct provided for in arts. 9 and 10 of LIA, no special purpose is required. In other words, of the 11 types of corruption described, only one (abuse of office) requires, in addition to intend, the special subjective element of the type for its configuration.

Thus, in a logical-systematic interpretation of the rule provided for in § 2 of art. 11 of LIA, in accordance with the 2003 Merida Convention, the *rationale* is standardization of the subjective classification of all administrative acts contrary to the principles of public administration, provided for in the LIA or in special laws, under the aegis of the rule provided for in art. 19 of the Merida Convention.

A contrary understanding, in that LIA requires this special purpose to configure *all* acts of administrative impropriety, including those for which only intent is required (damage to the public treasury and illicit enrichment), may lead to the conclusion that the LIA is *less restrictive* than the Merida Convention, at odds with the provisions of art. 65, 2, of the Convention, according to which "each party may adopt stricter or more severe measures than those provided for in this Convention in order to prevent and combat corruption". Thus, States may adopt *stricter* measures than those adopted by the international standard, but never *more moderate* ones. Thus, in this sense, the rule expressed in art. 11, § 2, of LIA may be considered unconventional, due to material incompatibility with the 2003 Mérida Convention, as a control test.

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[14] Art. 169. *Abuse of functions*. Each State Party shall consider adopting such measures, legislative or otherwise, as necessary, to criminalize, when committed intentionally, abuse of functions or office, i.e., the performance or omission of an act, in violation of the law, by a public official in the exercise of their function, to obtain undue advantage for themselves or another person or entity.

[15] Art. 169. *Illicit enrichment*. Subject to its constitution and the fundamental principles of its legal system, each party shall consider adopting such measures as may be necessary to criminalize, when committed intentionally, illicit enrichment, i.e., significant increase in the assets of a public official in relation to his legitimate income, which cannot be reasonably justified.

[16] Art. 169. *Misappropriation or embezzlement, misappropriation or other forms of diversion of assets by a public official*. Each party shall adopt such legislative and other measures as may be necessary to criminalize, when committed intentionally, misappropriation or embezzlement, or other deviations of public or private property, funds or securities, or any other thing of value entrusted an official by virtue of their position.

This same understanding was recently adopted by the Court of Justice of the State of São Paulo, in the rapporteur vote:

> In fact, § 2 of article 11 extended the requirement of specific intent to all other types described in articles 9 and 10 of Law no. 8,429/1992. This provision is contrary to Decree no. 5.687/2006 [promulgating the Mérida Convention], which does not require specific intent for acts of illicit enrichment and embezzlement.[17]

It is understood, therefore, that art. 11, § 2, of LIA extended the requirement of this special purpose only to acts of administrative impropriety contradicting the principles of public administration provided for in diverse laws, such as the City Statute (Law No. 10,257/2001), the Access to Information Law (Law No. 12,527/2011) and the Election Law (Law No. 9,504/1997). In other words, to determine an act as offensive to the principles of public administration as defined in art. 11 of the LIA or other legal instruments, characterization depends on proof of the public official's intention to obtain undue benefit, for himself or for others. In relation to the other types of acts of administrative impropriety, regulated in articles 9 (illicit enrichment) and 10 (damage to the public treasury) of LIA, the only condition is intent (general subjective element of the type).

On this point, it should be noted, the evidentiary standard that authorizes imputation of an act of administrative improbity does not depend on an unequivocal demonstration of intent—consciously—to obtain undue advantage or benefit. In fact, it is clear that "fraud is a judgment, not an object of evaluation; it is therefore not *dolus naturalis*, essentially psychological, nor ontological".[18] Therefore, imputation of intent is never a simple derivative of willful processes.

From this perspective, what is asked is not whether the act was desired by the individual, but whether it could be *effectively imputed*, rationally speaking. In other words, it is important to know whether the official, with clear factual knowledge (about the aspects and the prognosis of the result), would only have acted if willing to accept, on a rational basis, such an outcome.[19] In fact,

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[17] TJSP, Apelação Cível nº 1021704-58.2021.8.26.0053, Comarca de São Paulo, rel. des. Percival Nogueira, juiz. 30/MAY/2023.

[18] MARTELETO FILHO, Wagner. *Dolo e risco no direito penal*: fundamentos e limites para a normativização. São Paulo: Marcial Pons, 2020. p. 190 et seq.

[19] In this sense, see: RODRIGUES, Daniel de Sá; LAURIA, Thiago Augusto Vale. *Informação Técnico-Jurídica* nº 02/2023 do Centro *Operacional das Promotorias de Justiça de Defesa do Patrimônio Público do Ministério Público do Estado de Minas Gerais*. Mimeografado.

the control body does not have access to the thoughts of any actor and, based on supposition, determine acts of will motivating the acts attributed. Strictly speaking, it is enough for the interpreter to analyze behavior in terms of the knowledge possessed at the time of the act. Such *knowledge* must be proven; *willingness* imputed. Fraud, therefore, amounts to knowledge that the occurrence of the result is likely.

In this regard, the Mérida Convention itself, in art. 28,[20] establishes that the criteria of knowledge, intention or purpose may be inferred from objective factual circumstances. This rule clarifies the idea that the interpreter should not be concerned with demonstrating an act of will in a psychological sense. In other words, it is enough to prove knowledge of these objective factual circumstances for will to be attributed to the official in question. In other words, it is unreasonable to require proof of intentionality, only objective identification of the conduct and the result—illicit enrichment, damage to the public treasury or offense to principles of public administration—within the realms of probability.

Everything that has been stated regarding intent, as a general subjective element, would apply to the special subjective element, provided for in art. 11, §§ 1 and 2 of LIA. That is to say, the purpose of obtaining undue advantage or benefit, referred to in such provisions, would be interpreted in an attributive-normative sense, not in a psychological-descriptive sense. In this sense, it is enough to objectively identify the conduct and demonstrate the result—obtaining undue benefit—is likely, in order to characterize the special subjective element.

7. Conclusions

The increasing openness, integration and interdependence of economies have highlighted the global scale of corruption. For this reason, governments and multinational institutions have introduced mechanisms to reinforce integrity at global and regional levels. The fight against corruption has universal resonance, evidenced in an growing number of international treaties and conventions, aimed at meeting the goals of a world free from illicit practices which are contrary to the principles of the democratic rule of law.

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[20] "Art. 28. Knowledge, intent and purpose, as elements of an offense. The knowledge, intent, or purpose required, as elements of an offense, established in accordance with this Convention may be inferred from objective factual circumstances."

Brazil is currently a party to three international conventions, considered paradigms in the fight against corruption: the Inter-American Convention Against Corruption (OAS), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD) and the United Nations Convention against Corruption (Mérida Convention). Such agreements are vital elements of the so-called microsystem of defense of public assets, which unites conventional, constitutional and infra-constitutional norms. As is known, the scale of corruption, especially in developing countries, has dire consequences for the democratic system, rule of law and human rights; thus, implementation of anti-corruption norms with a more robust conceptual basis are urgently required, affirming the right to live in a world free of these practices as universal, fundamental and inalienable.

An immediate effect of this recognition is categorization of international conventions ratified in Brazil as governing *standards*, differentiated in national law. International treaties to which the Federative Republic of Brazil is a party to, thus possess the status of infra-constitutional norms (with regard to the current case law of the STF on the subject). In this sense, these conventions are considered standards of conventionality control of infra-constitutional norms in the fight against corruption in Brazil. As discussed, the Administrative Impropriety Law (Law no. 8,429/1992) merits special attention in this regard, especially following the reform presented by Law no. 14,230/2021.

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