

File Number N°00396-2023-1-5001-JR-PE-03

Abstract: TECHNICAL-LEGAL CONTRIBUTION TO THE APPEAL FILED ON THE CURRENT INTERNATIONAL FRAMEWORK FOR THE REPARATION OF DAMAGE CAUSED BY CORRUPTION AND THE REPRESENTATION OF VICTIMS.

To the Honorable Magistrates of the FIFTH NATIONAL CRIMINAL APPEALS CHAMBER of the National Superior Court of Specialized Criminal Justice of the Republic of Peru

Established in August 2006, the UNCAC Coalition is a global network of more than 350 civil society organizations (CSOs or NGOs) in over 100 countries, committed to promoting the ratification, implementation, and monitoring of the United Nations Convention against Corruption (UNCAC). The Coalition mobilizes civil society action for the UNCAC at the international, regional, and national levels and is based in Vienna, Austria.

The UNCAC framework is so comprehensive that it is relevant to a wide range of organizations. Accordingly, the Coalition is made up of groups working in different areas. Among them is the Working Group on Victims of Corruption, of which I am Chair, and in whose capacity I am writing this message. Our group is a platform that hosts close to 200 people, including representatives of civil society organizations and academics from around the world. Our group works to promote and secure redress for the harm caused by corruption through sharing knowledge and supporting cases in litigation.

With this technical concept, we aim to provide our expert opinion on key aspects of International Law relevant to the case referenced, specifically regarding the ongoing process involving the alleged crime of Passive Bribery purportedly committed by the Municipal Manager of the Municipality of Miraflores. We respectfully request that this opinion be considered by the Chamber in its review of the appeal filed by the KUSKACHAY ASSOCIATION.

BACKGROUND

The KUSKACHAY ASSOCIATION is a Peruvian anti-corruption NGO that promotes an ethical culture and a social environment free of corruption. As part of its activities, KUSKACHAY denounces cases of corruption, conducts anti-corruption campaigns, and promotes integrity and transparency in Peru.

On August 18, 2023, under item 14 of Art. 139 of the Political Constitution of the State and Art. 94.4 of the Criminal Procedural Code, KUSKACHAY ASSOCIATION requested to be recognized as an aggrieved party in the case under case file N° 151-2023. In this case, the Specialized Corporate Prosecutor's Office for Crimes of Corruption by Public Officials in Lima - Fourth Office - is investigating a complaint against the Municipal Manager of the Municipality of Miraflores for the alleged crime of Passive Bribery. The circumstances in which the Municipal Manager allegedly coerced a company to donate micro-mobility vehicles in exchange for renewing an operating license that was in force are being investigated. When the company did not agree, the Municipal Manager reportedly ordered the seizure of all its vehicles, which led to the company's bankruptcy.

The request of the KUSKACHAY ASSOCIATION was rejected by Resolution No. 16, dated August 23, 2023 by the Prosecutor's Office, which argued that the aggrieved party in the crimes of corruption of officials is the State and that therefore the only one entitled to be incorporated as an aggrieved party in the investigation is the Special Prosecutor's Office for Crimes of Corruption of Officials.

On August 31, 2023, invoking the violation of due process and the constitutional principle of procedural defense enshrined in Article 139 of the Political Constitution of Peru, the KUSKACHAY ASSOCIATION filed an action for protection of rights, arguing that Resolution No. 16 did not justify why they cannot be an aggrieved party and did not consider the arguments presented. It also requested the nullity of Resolution No. 16 and that the Prosecutor's Office be ordered to justify its decision in accordance with national and international procedural norms that bind Peru.

On January 11, 2024, by Resolution No. 6, dated December 22, 2023, the Third Preparatory Investigation Court declared the protection of rights filed by the technical defense of the KUSKACHAY ASSOCIATION inadmissible, arguing, among others, that it is not appropriate since during “the preliminary investigation, the accused and aggrieved parties have not been identified”.

On January 15, 2024, the representatives of the KUSKACHAY ASSOCIATION filed an appeal to maintain the procedural guarantee of defense provided in paragraph 14 of Article 139 of the Political Constitution of Peru.

THE INTERNATIONAL FRAMEWORK FOR THE PROTECTION OF VICTIMS OF CORRUPTION

Article 35 of the United Nations Convention against Corruption (hereinafter UNCAC or simply “Convention”), to which Peru has been a party since October 19, 2004, and therefore binds it, establishes that States Parties have the obligation to “ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.” Thus, the UNCAC mandates that damages caused by corruption, in any form, whether individual or collective, must be repaired, and that victims are guaranteed appropriate access to justice. The Convention does not distinguish between natural or legal persons, neither between individual and collective damages when recognizing their status as victims of corruption.

There is also an obligation on states, under Article 13 of the same UNCAC, to “promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption.” On this basis, the Working Group on Asset Recovery of the Convention has argued that “while the Convention does not provide a definition of who is a victim of corruption, it is important

to take a broad and inclusive approach, recognizing that individuals, entities and States may be considered victims of corruption and, furthermore, civil society and non-governmental organizations play an important role in ensuring that victims are represented in corruption proceedings and, as such, should be able to report crimes, give evidence, represent victims or engage in public interest litigation.”

Thus, the representation of victims in proceedings that seek to establish criminal, civil, or administrative liability in possible acts of corruption raises two crucial aspects in defense of individuals' fundamental rights: on the one hand, the reparation of damages and the rights violated by acts of corruption and the fundamental right of victims to be represented before the courts to access this right to reparation.

The Inter-American Commission on Human Rights -IACHR- has maintained in its 2019 report on Corruption and Human Rights that every State must adopt the necessary measures to facilitate access - both for victims and for those who report acts of corruption- not only to adequate and effective means to report these crimes, but also to effective means to achieve an adequate reparation of the damage and thus contribute to avoid its repetition. Likewise, during the process of investigation and prosecution of these cases, the victims should have ample opportunities to participate and be heard, both in the clarification of the facts and in the punishment of those responsible, as well as in the search for just reparations.

The Commission has also pointed out that States are obliged to identify the victims -who may be social groups represented by civil society organizations- to ensure fair reparation of damage, since corruption is not an abstract crime without a passive subject. On this basis, any person whose enjoyment of any human right is affected by a corrupt practice has the right to be recognized as a victim. In this case, the petitioners' right to timely and effective access to judicial remedies was affected, and through this, their right to participate, request, and contribute to the prompt reparation of the damage caused by corrupt practices.

Since corruption affects human rights, this individual right of access to justice and due process is also related to the protection of collective and fundamental rights. The public administration is responsible for providing public goods that guarantee the fulfillment and protection of the fundamental rights of citizens through the non-discriminatory use and investment of public funds. Therefore, there exists a collective right and a legally protected interest in effective and ethical public administration, ensuring that public goods are safeguarded and access is guaranteed to be non-discriminatory. Corruption directly affects fundamental rights, among others, through a biased and discriminatory public administration that does not fulfill its duty. Therefore, there is a direct link between citizens' rights to access justice and freedom of association to defend collective interests, and the protection of their collective rights when these are harmed or at risk in cases of corruption. Assuming that citizens or civil society organizations are not entitled to be represented in a corruption case would imply that they are not victims or that they are not entitled to represent victims of collective rights violations.

Collective harm and its victim arise independently of any criminal, civil, or administrative liability assigned to specific individuals or entities. That is to say, the damage and the duty to repair it arise from the commission of the acts themselves, not from the identification and singling out of those responsible.

Likewise, the state's responsibility to protect the fundamental rights of its citizens is not suspended when acts of corruption occur. In the same sense, and also binding for Peru, Article 25.1 of the American Convention establishes that every State has the general obligation to provide effective judicial remedies to the victims of human rights violations (Article 25), which must be substantiated in accordance with the rules of due process of law (Article 8.1).

Therefore, States should encourage, promote, and respect the recognition of victims of corruption and the participation of NGOs in proceedings before judicial and/or administrative bodies to guarantee the rights to truth, justice, and reparation. NGOs should have the capacity to represent victims and intervene in judicial and administrative proceedings, acting as guarantors and defenders of the collective rights and interests of victims and citizens in the face of acts of corruption that violate human rights.

THE PERUVIAN LEGISLATION

Art 94. 4 of the Peruvian Code of Criminal Procedure¹ establishes that associations in crimes that affect collective or diffuse interests, whose ownership injures an undetermined number of persons, or in crimes included as international crimes in International Treaties approved and ratified by Peru, may exercise the rights and faculties attributed to the persons directly offended by the crime, as long as the social object of the same is directly linked to those interests and has been recognized and registered prior to the commission of the crime that is the object of the proceeding.

The damage caused by crimes against public administration, as in this case, is collective because it impacts not only those directly involved in the incidents but also all citizens who rely on the integrity, honesty, and impartial treatment of the administration, regardless of their involvement in the specific situation. Trust in public administration is an intangible collective asset, and it is invariably compromised by corruption-related crimes, regardless of whether individual material or immaterial damages are directly inflicted on specific parties involved.

The Peruvian Law, consistent with international frameworks, is therefore clear and explicit in admitting representation of the victims of collective damages, through non-governmental organizations (associations), requiring only as a condition that their corporate purpose has a direct link with the collective interest that is protected, and that they are duly constituted prior to the acts committed. This means that a right to representation cannot be legitimately denied to an association on grounds that do not pertain to either of these two conditions. Doing so would violate not only national law, but also the international frameworks referred to above that guarantee these rights.

The Right of Representation and Participation of the Victims

In this case, the KUSKACHAY ASSOCIATION is legitimized to exercise its rights and powers under Art. 94. 4 of the CPP, as it meets the two conditions required by law: i) its corporate purpose is directly linked to the fight against corruption, and ii) it has been recognized and registered prior to the commission of the crime. It would violate the principle of legality to invoke a circumstance not foreseen either in the Law or in international frameworks to deny its status and right of representation in the process.

Despite the provisions of the Convention and the Peruvian Code of Criminal Procedure (CPP) regarding the right of the aggrieved to intervene in the investigations and proceedings under equal conditions as

¹ Art. 94. 4 CPP of Peru: “Associations in crimes that affect collective or diffuse interests, whose ownership injures an undetermined number of persons, or in crimes included as international crimes in International Treaties approved and ratified by Peru, may exercise the rights and faculties attributed to the persons directly offended by the crime, provided that the corporate purpose of the same is directly linked to those interests and it has been recognized and registered prior to the commission of the crime that is the object of the proceeding.”

the investigated or accused², since the code clearly states that the aggrieved is the one who is offended or harmed by the consequences of the crime (art. 94.1), the representative of the Public Prosecutor's Office of Peru would be denying these rights by pointing out that the only aggrieved party in the crime of corruption is the State because it is the owner of the legal good by “being the passive subject in crimes against the Public Administration.” This leads to the erroneous affirmation that the only one entitled to intervene on behalf of the aggrieved party (which according to them can only be the State), is the Specialized Public Prosecutor. In effect, arguing that only the State can appear as a victim, even when representing society, clearly contradicts both national and international legal frameworks that recognize citizens' rights to reparation, participation, and representation. This stance would exclude the actual victims—those who suffer the harm—from representation. It also openly violates the principle of equality of the parties in the proceedings, by allowing representation for a potential defendant but not for the victims.

On the other hand, Resolution No. 16, issued by the Prosecutor's Office, uses the confidentiality of the investigation to indicate that only the parties or the attorneys appearing in the investigation can be informed of its contents. The prosecution resorts to this additional argument to sustain the impediment for the Kuskachay Association to be incorporated as alleged aggrieved party in the investigation. This assertion implies a contradiction, since being expressly authorized to exercise the rights of aggrieved parties in corruption crimes by mandate of art. 94.4 of the CPP, that is, to learn about the contents of the investigation, it is denied access to it, stating that it is not a party and, therefore, cannot access the investigation either directly or through its lawyers.

The Protection of the Right to Representation and Participation

According to the international and national normative framework applicable to this case, NGOs must have the capacity to represent the victims and intervene in judicial and administrative proceedings, acting as guarantors and defenders of the collective rights and interests of the victims and citizens in the face of acts of corruption that violate human rights. The Republic of Peru has provided tutelage to ensure that these fundamental rights are protected in a timely manner.

The appealed resolution issued by the Third Court of Preparatory Investigation denying the tutelage of right raised by the KUSKACHAY ASSOCIATION bases itself on the fact that this action is “residual” and that it constitutes a “quick, simple, and effective” remedy to protect the fundamental rights of whoever considers themselves aggrieved by the crime, without distinguishing which stage of the investigation is involved. However, contradictorily, it states that since we are facing a preliminary investigation, the victim of the consequences of the crime - or whoever exercises their rights and faculties - does not have the right to be incorporated as a potential victim at this stage and has to wait for the prosecution to formalize or not the preparatory investigation. This statement denies the right of the aggrieved party to intervene in the proceedings and to be informed of its results, which is enshrined in art. 95.1 of the Code of Criminal Procedure. It also ignores the way in which the victims of collective damages are configured in situations involving acts of corruption since their condition does not depend on the determination of criminal, civil, or administrative liability of the perpetrators. Their condition and their right to be compensated arise simply from the damage caused.

² Preliminary Title: Art. I.3 (The parties shall intervene in the process with equal possibilities of exercising the powers and rights provided for in the Constitution and in this Code. Judges shall preserve the principle of procedural equality and must remove all obstacles that prevent or hinder its validity) and art. IX (The criminal process also guarantees the exercise of the rights of information and procedural participation to the person aggrieved or harmed by the crime. The public authority is obliged to ensure their protection and to provide them with treatment commensurate with their condition).

The decision not to admit the tutelage, therefore, also contradicts the provisions of art. 71.4 of the Peruvian Code of Criminal Procedure, which expressly states that when the accused (and the injured party, who has the same rights due to the principle of procedural equality) “considers that during the Preliminary Proceedings” their rights have not been respected, they may appeal to the judge of the Preparatory Investigation to remedy, correct, or arrange the corresponding protective measures.

CONCLUSION

We therefore urge the Court to carefully consider the arguments set forth herein, particularly regarding the admission of the KUSKACHAY ASSOCIATION as a legitimate representative of the victims of corruption. Accordingly, the KUSKACHAY ASSOCIATION should be allowed to participate in the preliminary investigation being conducted under CF 151-2023, ensuring its right to participation and representation throughout the entire procedure, that is, from the beginning of the preliminary proceedings.

Cordially,

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