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# Victims of Corruption

Back for Payback

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Juanita Olaya Garcia  
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Stolen Asset Recovery Initiative  
The World Bank • UNODC



THE WORLD BANK  
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UNODC  
United Nations Office on Drugs and Crime



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**StAR**—the Stolen Asset Recovery Initiative—is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.

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# Abbreviations

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<b>CETS</b>	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism
<b>COPINH</b>	NGO Civic Council of Popular and Indigenous Organizations of Honduras
<b>COSP</b>	Conference of State Parties to the UNCAC
<b>ECCJ</b>	ECOWAS Court of Justice
<b>ECOWAS</b>	Economic Community of West African States
<b>EU</b>	European Union
<b>FATF</b>	Financial Action Task Force
<b>FCPA</b>	Foreign Corrupt Practices Act (United States)
<b>GFAR</b>	Global Forum on Asset Recovery
<b>IACHR</b>	Inter-American Commission of Human Rights
<b>IBA</b>	International Bar Association
<b>ICE</b>	Costa Rican Electricity Institute
<b>MACCIH</b>	Mission to Support the Fight against Corruption and Impunity in Honduras
<b>NGO</b>	Non-governmental Organization
<b>OAS</b>	Organization of American States
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>SFO</b>	Serious Fraud Office
<b>StAR</b>	Stolen Asset Recovery Initiative
<b>TI</b>	Transparency International
<b>UN</b>	United Nations
<b>UNCAC</b>	United Nations Convention against Corruption
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>UNODC</b>	United Nations Office on Drugs and Crime



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# 1 Introduction

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Corruption harms communities and impacts the global economy. It discourages business opportunities, hinders foreign aid and investment, and exacerbates inequality. It victimizes society's most vulnerable and marginalized individuals by affecting their ability to meet their basic needs, as well as reducing their chances of overcoming poverty and exclusion. For example, corruption costs lives in the construction industry<sup>1</sup> and in the health care sector.<sup>2</sup> The divesting of public funds leads to decreased spending on public services, such as education and the protection of the environment.<sup>3</sup> When corruption is committed through criminal groups that are connected to influential economic or political actors,<sup>4</sup> it increases the risk of instability and violence, which in turn poses a threat to international peace and security.

In recent years there has been an increasing recognition of the relationship between corruption and human rights, as reflected by two resolutions adopted by the United Nations (UN) Human Rights Council in 2021.<sup>5</sup> Whereas social, economic and cultural rights are affected when corruption impacts the provision and quality of goods and services, civil and political rights are impacted when corruption prevents the proper functioning of institutions, undermines the rule of law and ultimately harms trust in the legitimacy of government.<sup>6</sup>

Despite this general understanding and the research efforts engaged in generating data on this matter,<sup>7</sup> because of its covert nature and pernicious consequences, the cost of corruption is markedly difficult to measure and quantify. Similarly, victimization in this context is often complex because, as in the case of environmental crime,<sup>8</sup> its victims are not always easily identifiable. In many cases, they may not even be aware of their victimization.

The prevention and countering of corruption have attracted significant political attention. However, it is also increasingly acknowledged that preventive approaches and repressive criminal responses are incomplete if the damages arising from the acts in question are left unaddressed. Thus, this publication is focused on exploring such damages, including how victims can be compensated.

The reparation of damages exists as a general principle of law in all legal systems. In both common law and civil law systems, it is understood as the remediation of a harm originating from an unlawful conduct in order to reestablish the situation that would have existed had the harm not occurred (*Restitutio ad integrum*).<sup>9</sup> Different legal systems resort to different terms to refer to the various concepts related to remedying damages. Therefore, the terms recovery, restitution, reparation, compensation, remedy and redress may have different meanings in different jurisdictions.

Moreover, the recovery of corruption damages may be grounded in two distinct conceptual regimes: the "anti-corruption regime" on the one hand, and human rights law on the other. Human rights are understood as "internationally guaranteed legal entitlements of individuals vis-à-vis the state."<sup>10</sup> As such, they are the foundation for a claims-based and victim-centered approach that is focused on ensuring reparation for the aggrieved (individual or collective) victims. This contrasts with a repressive anti-corruption angle that is focused on prosecuting the offenders and ensuring accountability. However, both regimes have in common that they are grounded in the rule of law, or the idea that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly

administered in the courts.”<sup>11</sup> In other words, both approaches require an application of the law that is fair, consistent and predictable.

The United Nations Convention against Corruption (UNCAC), the only legally binding universal anti-corruption instrument, incorporates provisions aimed at promoting domestic legal frameworks that provide victims (and prior legitimate owners) with the means to recover the damages and assets implicated in corruption offences. In this context, the UNCAC’s Chapter V is devoted to asset recovery, which goes beyond the archetypal and narrow anti-corruption focus on law enforcement with regard to the offenders, specifically, to returning the stolen assets to their rightful owners, including countries from which they had been illicitly taken. The inclusion of claims-based provisions related to the compensation of victims within the UNCAC, if only sparsely and broadly considered, shows that the anti-corruption regime and the human rights approach do in fact interlock and mutually reinforce one another.

Notwithstanding, concepts such as that of the “victim,” when integrated into anti-corruption treaties, do require a shift in perspective from the default objective of ensuring accountability by averting impunity to the objective of ensuring the reparation of the harms caused to victims—whether these are individuals, particular groups within societies, or entire states.

Despite the international consensus reflected in regional and international instruments and declarations (see chapter 2), no systematic research has been conducted concerning the reparation of victims of corruption. Furthermore, the existing research

by academics,<sup>12</sup> civil society organizations,<sup>13</sup> and the United Nations Office on Drugs and Crime (UNODC) shows that in only a small number of countries have victims of corruption offences been compensated. In most cases in which embezzled funds are recovered, no reparation is received. Also, in most other cases, there is no information about the matter. What is more, there do not appear to be many such attempts to recover the damages engendered by acts of corruption.

This dearth of cases was discussed by the UNCAC’s States parties at the Sixth Session of the Conference of State Parties to the UNCAC (COSP) held in 2015.

It culminated in the adoption of a

resolution directing the COSP’s Open-ended Intergovernmental Working Group on Asset Recovery to compile a list of best practices for identifying victims of corruption and the parameters for compensation.<sup>14</sup> Discussions continued at the 2017 and 2019 sessions. The States parties also passed additional resolutions instructing the Working Group to redouble its efforts to identify best practices.<sup>15</sup>

This publication was developed as part of that effort and within the larger objective of stimulating further research and exchange on the matter. It is aimed at providing an overview of the current state of law and practice regarding: (i) the recovery of corruption damages; (ii) outlining the different types of legal frameworks and avenues available in different legal systems; and (iii) the respective legal barriers and other challenges that may arise.

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This publication draws on the responses of 56 jurisdictions received in response to two questionnaires<sup>16</sup> concerning countries' legislation and their implementation. It was conducted by the UNODC and the Asset Recovery Committee of the International Bar Association. Despite the breadth of the geographic scope, the responses covering every region, the stage of development and a diversity of legal systems, the sample was considered too small to draw definitive conclusions from—especially as the responses reflected the lack of available information concerning practical cases of implementation. For this reason, references to the responses are limited to certain instances. The surveys are referred to as “the questionnaires” throughout the publication. To the extent necessary, the analysis also relies on existing research concerning the recovery of damages for corruption and the comparative law literature on torts and civil liabilities and criminal procedures,<sup>17</sup> as well as the outcomes of the UNCAC's country reviews conducted under its Implementation Review Mechanism.

In terms of scope, the following points require attention. Firstly, although the most frequently occurring type of corruption is small-scale corruption through which natural or legal persons are harmed by agency actions or decisions, the scope of this publication is focused on addressing questions of recovery relating to cases of grand corruption. The significant sums involved in such cases, as well as their complexity, mean that the possibility for recovery in such cases merits particular attention.

Moreover, this publication focuses on the existing legal avenues. Therefore, it does not address the challenges associated with enforcing judgments once they are adjudicated. Judgment enforcement is a potentially significant challenge in transnational corruption cases where the perpetrator or the stolen assets may reside outside of the jurisdiction hosting the legal proceedings, so that the matter would merit a publication of its own.<sup>18</sup>

Finally, the limitations of this study relate to the most salient feature of the countries surveyed through the questionnaires, which is the absence of public information about the participation of victims of corruption in criminal proceedings. The countries' responses to the questionnaires demonstrate the difficulty of accessing and sharing information related to corruption cases. Of the 56 countries surveyed, only three (the Cayman Islands, Greece and South Africa) indicated that they were aware of cases in which the compensation of damages was granted to victims of corruption. Also, only three (Brazil, South Africa and Switzerland) knew about the involvement of victims of corruption in proceedings for asset return. In response to the question regarding whether the government publishes statistics or reports about the role and participation of victims of corruption in criminal proceedings, all surveyed countries responded negatively. Therefore, the absence of relevant information for such cases is a limitation of its own.

Rather than aspiring to present a comprehensive overview or providing guidelines on how countries could better repair the harm caused by corruption, this publication is more humbly aimed at presenting the findings of the information available. The objective is to serve as a starting point for further research, exchange and debate between policy makers, legislators, prosecutors and other judicial officers, law enforcement officials, legal scholars, human rights advocates, citizens, as well as the general public.

In addressing a globally diverse readership familiar with different legal systems, for the purpose of this publication, the following expressions should be understood as follows: Reparation is understood as a broad concept entailing any remedy with regard to any type of harm caused by corruption, whether it be by restoring the situation to its initial status or by compensating for the harm in any other way. Therefore, reparation not only covers pecuniary damages, but also the wider, less tangible and more diffuse damages. After all, the consequences of corruption do not limit themselves to direct and immediate harms or easily quantifiable monetary losses. Furthermore, the pursuit of monetary and non-monetary damages need not be a mutually exclusively endeavor. Remedy is understood as an enforcement of the legal right of a person harmed by a wrong, whereas compensation of damages is more narrowly understood as the

monetary remedy imposed by a court and awarded to a harmed party as a recompense for harm.

This publication contains 6 chapters, beginning with an overview of the international and regional standards relating to the recovery of corruption damages (Chapter 2) and the different existing judicial avenues for such reparation (Chapter 3). It moves on to exploring legal standing and who can obtain victim status (Chapter 4), as well as damage claims, including challenges in establishing causality (Chapter 5). Chapter 6 concludes with potential actions aimed at overcoming the various challenges identified.

## Notes

- 1 Nicholas Ambraseys and Roger Bilham, "Corruption Kills," *Nature*, Issue 469, (2011): pp. 153–156.
- 2 Tim K. Mackey and others, "The Disease of Corruption: Views on How to Fight Corruption to Advance 21st Century Global Health Goals," *BMC Medicine* Issue 14, (2016): pp. 149–165. See also K. Hussmann *Health sector corruption*. (Bergen: U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, 2020), page 10.
- 3 Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform*, 2nd edition (Cambridge, Cambridge University Press, 2016) pp. 27–36.
- 4 Sarah Chayes, "When Corruption is the Operating System: The case of Honduras." (Washington, DC: Carnegie Endowment for International Peace, 2017), pages 1,112, and114.
- 5 Resolution adopted by the Human Rights Council no. A/HRC/RES/46/11 of 26 March 2021 concerning the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation and A/HRC/RES/47/7 of 26 July 2021 on the negative impact of corruption on the enjoyment of human rights.
- 6 E. Hava, Gran corrupción: estrategias para evitar su impunidad internacional. *Nuevo Foro Penal*, Volume 12, Issue 8, pages 60–98. doi:<https://doi.org/10.17230/nfp.12.87.2>.
- 7 The challenges of measuring the macroeconomic and microeconomic costs of corruption have been outlined in an Evidence Paper prepared by the United Kingdom's Department for International Development. See page 35, Chapter 4 concerning the effects of corruption: costs and broader impact of word missing? [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf). See also a joint OECD-STAR publication concerning the [Identification and Quantification of the Proceeds of Bribery \(worldbank.org\)](#).
- 8 See Eileen Skinnider, "Effect, Issues and Challenges for Victims of Crimes that have a Significant Impact on the Environment," Book, publisher? (2013).
- 9 Clare Connellan, Elizabeth Oger-Gross and Angélica André, "Compensatory Damages Principles in Civil and Common Law Jurisdictions: Requirements, Underlying Principles and Limits." Trenor, John (ed). In *The Guide to Damages in International Arbitration* (2018) p.7.
- 10 Kälin and Künzli, *The Law of International Human Rights Protection*, Oxford University Press, Second Edition, p. 32.
- 11 Lord Bingham, *The Rule of Law*, Penguin UK, Reprint Edition 2011.
- 12 Michael Joachim Bonell and Olaf Meyer, "The Impact of Corruption on International Commercial Contracts," in M. Schauer and B. Verschraegen, eds., *General Report of the XIXth Congress of the International Academy of Comparative Law, Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Compare* (Springer Science + Business Media B.C. 2017); Olaf Meyer, ed., *The Civil Law Consequences of Corruption* (Baden Baden, Nomos, 2009). UNCAC Coalition. Submission by The UNCAC's Coalition Victims of Corruption Working Group to the first resumed 12th session of the Implementation Review Group. 27 August 2021. <https://uncaccoalition.org/recognizing-victims-of-corruption/>. Juanita Olaya García, "Arguments or Excuses? Common Reasons I Hear to Avoid Reparations for Corruption Cases." (Henry J. Leir Institute, The Fletcher School of Law and Diplomacy, Tufts University, 2020). <https://www.corruptionjusticeandlegitimacy.org/post/arguments-or-excuses-common-reasons-i-hear-to-avoid-reparations-for-corruption-cases>. Juanita Olaya García, "Reparations for Corruption: How Corruption Enforcement Ignores Victims' Rights." (Henry J. Leir Institute, The Fletcher School of Law and Diplomacy, Tufts University, 2020). <https://www.corruptionjusticeandlegitimacy.org/post/reparations-for-corruption-how-corruption-enforcement-ignores-victims-rights>.
- 13 Transparency International, "Exporting Corruption: Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention." (Berlin, Transparency International, 2020) pp. 21–24.
- 14 Resolution 6/2, Sixth Session of the Conference of the States Parties to the United Nations Convention against Corruption, November 2015 (<https://www.unodc.org/unodc/en/corruption/COSP/session6-resolutions.html>).

- 15 Resolution 8/9, Eight Session of the Conference of the States Parties to the United Nations Convention against Corruption, December 2019 (<https://www.unodc.org/unodc/en/corruption/COSP/session8-resolutions.html>). Resolution 7/2, Seventh Session of the Conference of the States Parties to the United Nations Convention against Corruption (<https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V1708295E.pdf>).
- 16 Both the UNODC *Note Verbale* (Verbal Note) and the International Bar Association (IBA) questionnaire sought information about the domestic laws governing the recovery of damages for corruption, including cases where there had been a successful recovery. Responses were received from 54 UNCAC state parties and the Cayman Islands and the Bailiwick of Jersey, two jurisdictions which adhere to the Convention through their relationship with the United Kingdom. The 56 respondents represent state parties in every region and at every stage of development. They also represent legal systems based on European civil law, English common law, Islamic law, or some combination of them. They are listed in annex 1, along with whether the information came from a response to a *Note Verbale*, the IBA questionnaire, or both.
- 17 The biography and resources on this topic have been increasing. For example, in addition to the sources cited in this publication, see, for example, UNCAC Coalition, UNCAC Coalition Statement to the 7th Conference of States Parties in Vienna, October 20, 2017; Jean-Pierre Brun and others, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (Washington, D.C., World Bank, 2015); Emile van der Does de Willebois and Jean-Pierre Brun, "Using Civil Remedies in Corruption and Asset Recovery Cases," *Case Western Reserve Journal of International Law*, Issue no. 45, 2013, pp. 615–650; OECD-StAR, *Identification and Quantification of the Proceeds of Bribery* (Paris, OECD, 2012). Olaya Garcia, Juanita, "Dealing with the Consequences: Repairing the Social Damage Caused by Corruption." (January 15, 2016). Available at SSRN: <https://ssrn.com/abstract=3475453> or Olaya Garcia, Juanita and Attisso, Kodjo and Roth, Anja, "Repairing Social Damage Out of Corruption Cases: Opportunities and Challenges as Illustrated in the Alcatel Case in Costa Rica." (December 6, 2010). Available at SSRN: <https://ssrn.com/abstract=1779834> or <http://dx.doi.org/10.2139/ssrn.1779834>.
- 18 See Stefano Betti, Jean Pierre Brun and Vladimir Kozin, [Orders without Borders: Direct Enforcement of Foreign Restraint and Confiscation Decisions](#) (Washington, D.C., World Bank, 2021).



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# 2 International Standards

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Provisions on and references to the recovery of corruption damages are included in several international and regional anti-corruption treaties, other international standards emerging from human rights instruments, as well as soft law declarations. Through these standards developed in recent decades, countries have agreed on principles and broad mechanisms aimed at ensuring that their legal frameworks provide victims with the means to recover the damages caused by corruption offences. Therefore, this chapter is aimed at providing a brief overview of the relevant international obligations and commitments made by States, namely:

- The United Nations Convention against Corruption
- The Political Declaration adopted at the United Nations Special Session of the General Assembly
- The Council of Europe Civil Law Convention on Corruption
- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism
- European Union (EU) Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU
- Relevant Human Rights Treaties establishing the rights to remedy
- The Global Forum for Asset Recovery Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases
- Relevant Recommendations from the Financial Action Task Force.

## 2.1 The United Nations Convention against Corruption (UNCAC)

As mentioned in the introduction, the UNCAC, adopted by the United Nations General Assembly in 2003 and entered into force in 2005, is the only legally binding universal anti-corruption instrument. Depending on the wording of each provision, the Convention imposes obligations and sets standards to be pursued by the 190 State parties (the number of State parties at the time of drafting this publication). Four of the five relevant provisions cited below contain mandatory language, thus establishing an obligation for all State parties to adopt the measures in question.

Another unique aspect of the Convention is the establishment of its Implementation Review Mechanism, which is a peer review process aimed at supporting States in the implementation of all substantive provisions of the Convention. It does so through the identification of challenges, good practices and technical assistance needs. This allows States to identify gaps in their legislative and institutional frameworks. At the same time, it allows for the identification of trends in implementation among the broader practitioner and academic anti-corruption community.



## 2.1.1 Provisions in Chapter III concerning Criminalization and Law Enforcement

The first provision relevant to the issue of victim compensation is found in Article 32 on the protection of witnesses, experts and victims. Whereas four of the article's five paragraphs refer to protection measures, the last paragraph requires State parties to enable victims' views and concerns to be considered in criminal proceedings. Close to ten percent of the 174 State parties reviewed under the first cycle at the time of drafting received recommendations about this provision, suggesting that the legislation of the vast majority of States foresees, at least in some way, consideration of the views or interests of victims in criminal proceedings. Good practices identified by the reviewing experts included the enactment of a specific law on victims in one State party, and the use of victim impact statements during criminal corruption proceedings in another.

Article 34 concerning the "consequences of corruption" requires State parties to "take measures" to address consequences of specific acts of corruption. It also encourages them to consider corruption as a "relevant factor in legal proceedings to annul or rescind a contract". Almost a quarter of the 174 State parties that finalized their first cycle reviews received recommendations regarding the allowing of corruption to be a relevant factor in legal proceedings to annul or rescind a contract or withdraw a concession. This suggests that reviewing experts have interpreted the broad and undefined language of Article 34 as not necessarily requiring more than that to consider the State party under review as complying with its obligation to address the consequences of corruption.

The UNCAC's Article 35 is more closely relevant in the context of ensuring victim compensation, as it requires State parties to take measures to grant standing to "entities and persons who have suffered damage as a result of an act of corruption." This allows them to initiate legal proceedings "against those responsible for that damage in order to obtain compensation." Although the UNCAC does not include a definition of victim, the *Travaux Préparatoires* to the Convention include an interpretative note for Article 35 to clarify that "entities and persons" must be understood to include natural persons as well as legal persons, including States. However, the UNCAC does not define

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“Article 34 concerning the “consequences of corruption” requires State parties to “take measures” to address consequences of specific acts of corruption.”

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and, therefore, does not exclude any category of damage.

Just over ten percent of the 174 State parties having completed their first cycle reviews received recommendations regarding this provision. These ranged from broad recommendations aimed at ensuring that sufficient measures exist to provide for the compensation of damages resulting from acts of corruption to very specific recommendations reflecting the different challenges reviewing experts identified with regard to the implementation of Article 35. As stated in the "State of Implementation of the UNCAC," "[t]here are usually no special legal provisions that provide a cause of action based on damages due to corrupt activities; such cases are dealt with under the general principles of civil (contract or tort) law.<sup>1</sup> As such, in general, reviewing experts considered such general principles of civil (contract or tort) law as sufficient to ensure compliance with Article 35.

### 2.1.2 Provisions in Chapter V concerning Asset Recovery

Chapter V of the Convention covers asset recovery measures. Article 51 provides that the return of assets is a fundamental principle of the Convention. Articles 54 and 55 cover mutual legal assistance with a view to confiscating the assets. Article 57 concerns the return and disposal of assets confiscated through such requests. Finally, Article 53 concerns measures enabling States to directly engage in civil proceedings to recover the assets and to have their views heard when a decision of confiscation is being considered by the courts.

Article 53 covers “direct recovery” with a view to allowing the State of origin to directly take civil action to establish ownership of assets, recover damages, and have its claims recognized by the State hosting the assets when the latter is making a decision concerning confiscation. Most pertinently in the context of recovering corruption damages, Article 53(b) requires State parties to enable their courts to order those who have committed corruption offences to pay compensation or damages to another State party that has been harmed by such offences. At the time of drafting this publication, just over ten percent of the 66 State parties having finalized their second cycle reviews covering asset recovery provisions received recommendations about this provision. This suggests that the vast majority of States do allow their courts to order compensation to be paid to other States.

Finally, Article 57, paragraph 3 (c) concerning the return and disposal of assets, includes the requirement to give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

## 2.2 The Political Declaration adopted at the United Nations Special Session of the General Assembly

In June 2021, the United Nations Member States and the UNCAC State parties adopted a political declaration entitled, “Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation.” This was taken at the special session of the General Assembly against corruption. The Declaration, among other pledges, reaffirmed the States’ commitment to implementing the provisions of Chapter V concerning asset recovery, particularly paragraphs 46 and 49. Although the term “victim” only appears in three instances (once in the preamble, once in the context of protecting them from retaliation, and only once in the context of compensation), the declaration included the commitment to establish the necessary legal frameworks allowing State parties to initiate legal proceedings to claim title to or ownership of assets. It also provided for consideration of models of disposal and administration of confiscated assets, thereby allocating such assets to funds that could be used to compensate victims or benefit communities.

*49. We [...] will consider the various possible models of disposal and administration of confiscated proceeds of offences established in accordance with the Convention, including, where feasible, allocating such proceeds to the national revenue fund or the State treasury, reinvesting funds for special purposes and compensating victims of the crime, including through the social reuse of assets for the benefit of communities. [...]*

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## 2.3 The Council of Europe Civil Law Convention on Corruption

The Council of Europe Civil Law Convention on Corruption was adopted by the Council of Europe States in 1999 and entered into force in 2003. It is unique in serving as “the first attempt to define common international rules in the field of civil law and corruption”.<sup>2</sup> The Programme of Action against corruption developed by a Multidisciplinary Group on Corruption prior to its drafting explained the need for such a Convention based on the following reasoning in the context of countering corruption:

*[...] civil law is directly linked to criminal law and administrative law. If an offence such as corruption is prohibited under criminal law, a claim for damages can be made which is based on the commission of the criminal act. Victims might find it easier to safeguard their interests under civil law than to use criminal law. Similarly, if an administration does not exercise sufficiently its supervisory responsibilities, a claim for damages may be made.*<sup>3</sup>

This Declaration was developed based on the recognition of the importance of the fact that “civil law take into account the need to fight corruption and in particular provides for effective remedies for those whose rights and interests are affected ”by corruption.”<sup>4</sup> As such, the Council of Europe Civil Law Convention on Corruption includes a breadth of provisions aimed at ensuring that the Civil Law of its State parties provide the means to respond to corrupt acts. Therefore, it encompasses provisions concerning: (i) compensation for damage; (ii) liability, including State responsibility for acts of corruption committed by public officials; (iii) contributory negligence and the potential reduction or disallowance of compensation; (iv) validity of contracts; (v) protection of employees who report corruption; (vi) clarity and accuracy of accounts and audits; (vii) the acquisition of evidence; and (viii) court orders to preserve the assets for the execution of the final judgment and international cooperation. The provisions most relevant in the context of the compensation of damages include Articles 1, 3, 4 and 5, as follows:

- Article 1 obliges States to provide effective remedies for victims of corruption, including the obtention of compensation for damage.
- Article 3 provides for the *rights of victims of corruption to initiate an action in order to obtain full compensation for the damages* suffered. It specifies that such damage is not limited to material damage or loss of profits but may also include non-pecuniary loss.
- Article 4 provides the general conditions under which damage must be compensated, which includes (1) that an offender have committed or authorized or even failed to prevent an act of corruption; (2) that a victim have suffered damage; and (3) that there be a causal link between the two. The second paragraph foresees the case in which more than one person may be liable for the same corrupt act.
- Article 5 obliges States to enable victims to claim compensation from a State in the case in which the damage was caused by an act of corruption by its public officials.

The Council of Europe Civil Law Convention on Corruption is unique in its explicit provision of a broad definition of damages in Article 3, as well as the provision for State liability for the acts of its officials in Article 5.

## 2.4 The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, also known as the Warsaw Convention or CETS 198, was adopted by Council of Europe States in 2005. The aim was to facilitate international cooperation and mutual legal assistance in investigating crime and locating, seizing and confiscating the proceeds thereof. Article 25, even in its non-mandatory language, closely mirrors the UNCAC's Article 57 (3) (c), in providing that a requested State must, "give priority consideration to returning the confiscated property to the requesting party so that it can give compensation to the victims of the crime or return such property to their legitimate owners."

## 2.5 European Union (EU) Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

The European Union Directive 2014/42/EU is aimed at facilitating the confiscation and recovery of proceeds and instrumentalities of crime within the EU. In its preamble, it refers to making use of confiscated property for "social purposes" and more pertinently, Article 8 provides that confiscation measures should not prevent victims from seeking compensation for their claims, specifically:

*[...] Member States should consider taking measures allowing confiscated property to be used for public interest or social purposes. Such measures could, inter alia, comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility. That obligation to consider taking measures entails a procedural obligation for Member States, such as conducting a legal analysis or discussing the advantages and disadvantages of introducing measures. [...]*

Article 8

*[...]*

*10. Where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.*

## 2.6 Victims as defined in International and Regional Human Rights Treaties and Standards

Human rights standards are relevant insofar as they provide a definition of victims and establish a general right to remedy for human rights violations, with this right itself becoming a key principle of human rights law.<sup>5</sup>

Most notably, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>6</sup> adopted by the United Nations General Assembly Resolution Number

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40/34 on November 29, 1985, provides a definition of victims which includes both individual and collective victims, with the victim status independent of the identification, apprehension, prosecution, or conviction of the perpetrator. The Declaration also recognizes the rights of victims of crime to redress, restitution, and compensation. In addition, it provides the judicial and administrative mechanisms of remedy and redress they are entitled to in paragraphs 4 and 5 as follows:

*A. Victims of crime*

*1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.*

*2. A person may be considered a victim under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.*

*[...]*

*Access to justice and fair treatment*

*4. Victims [...] are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.*

*5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.*

Based on the Universal Declaration of Human Rights, Article 8 on *"the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law,"* Article 2 of the International Covenant on Civil and Political Rights stipulates that States must develop possibilities for judicial remedy and ensure that any granted remedies are enforced.

Chapters VII to X of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,<sup>7</sup> similarly foresees measures providing victims with equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

Regional human rights conventions include similar provisions to those foreseen in the international treaties and declarations, with the European Convention on Human Rights providing the right to an effective remedy as part of Article 13. Article 25 regarding "judicial protection" of the Inter-American Convention on Human Rights specifies the State duties concerning effective recourse. In this regard, the Inter-American Commission of Human Rights (IACHR)<sup>8</sup> posited in a 2019 report on Corruption and Human Rights that States must adopt the necessary measures to facilitate access for victims (and for those who report acts of corruption) to adequate and effective means to report such crimes, as well as to the effective means to repair the damages

thereof. In stressing that corruption is not an abstract crime with a passive subject, the Commission argues that, particularly in cases of grand corruption, States have a duty to identify the victims, which may be entire social groups. This will ensure an effective and just reparation of damages.

The *United Nations Guiding Principles for Business and Human Rights*,<sup>9</sup> based on its “Protect, Respect, and Remedy” Framework, contains a pillar concerning remedy. It requires States to make available means to effective victims for business-related human rights violations (see paragraphs 25 to 31).

## 2.7 Aarhus Convention

European regional efforts aimed at developing common frameworks for class actions have led to the adoption by the United Nations Economic Commission for Europe (UNECE) of the *Aarhus Convention* in 1998.<sup>10</sup> Among other rights, the Convention grants the public access to justice for collective redress. To ensure consistent implementation across Europe, the European Parliament issued a Resolution in 2012 entitled “Towards a Coherent European Approach to Collective Redress.”<sup>11</sup> It seeks for the principles of collective redress to be applied horizontally across the EU on areas subject to collective redress, including corruption.<sup>12</sup> Its implementation was further encouraged by the Recommendation issued by the European Commission in 2013.<sup>13</sup> The Recommendation attaches the issue of legal standing to the type of damage and distinguishes between cases in which the collective victims are an identifiable group and cases in which they are not. A 2018 report published by the European Commission concluded that its implementation was not being consistently applied across Europe. It also found that the rules concerning jurisdiction on collective redress were not in line with the recommendation, thus rendering the development of cross-border collective redress mechanisms difficult.<sup>14</sup>

## 2.8 Other international commitments

### 2.8.1 The Global Forum on Asset Recovery Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases<sup>15</sup>

The Global Forum on Asset Recovery (GFAR) is a platform created by the joint UNODC-World Bank Stolen Asset Recovery Initiative (StAR). It is aimed at supporting investigators and prosecutors charged with identifying and tracing assets for their recovery and return. The ten GFAR principles were developed and adopted by governments and civil society organizations at the Global Forum on Asset Recovery in December 2017. It included the support of the StAR Initiative, two co-hosts (the United Kingdom and the United States) and four “focus countries” (namely, Nigeria, Sri Lanka, Tunisia and Ukraine). Most notably, they recommend that “stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct.” They also encourage States to facilitate the participation of citizens from victim states and other non-state actors in the asset return process.

### 2.8.2 Recommendations from the Financial Action Task Force

The Financial Action Task Force (FATF) is an inter-governmental body created to set international standards aimed at countering money laundering and the financing of terrorism. Among other things, the FATF Recommendations establish the fundamental guidelines in the enactment of measures for the purpose of seizing illicit proceeds through the provision of temporary measures, cooperation with foreign jurisdictions, and the granting of sufficient authority to national authorities to apply these measures

domestically and internationally. A best practices paper entitled “FATF Best Practices 2012—on Confiscation—Recommendations 4 and 38—and a Framework for Ongoing Work on Asset Recovery”<sup>16</sup> provides that asset-sharing agreements must “be consistent with” the compensation of victims.

## Notes

- 1 [https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679\\_E-book.pdf](https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf).
- 2 <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=174>.
- 3 <http://www.worldlii.org/int/other/treaties/COETSER/1999/2.html>.
- 4 Principle 17 of Resolution (97) 24 on the 20 Guiding Principles for the fight against Corruption, adopted by the Committee of Ministers, at its 101st Session on 6 November 1997.
- 5 Most human rights, humanitarian law and international criminal law treaties contain similar provisions, including: (i) the Universal Declaration of Human Rights (Article 8); (ii) the International Covenant on Civil and Political Rights (Article 2); (iii) the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); (iv) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14); (v) the Convention on the Rights of the Child (Article 39); (vi) the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV) (Article 3); (vii) the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (Article 91); and (viii) the Rome Statute of the International Criminal Court (Articles 68 and 75). The same applies to regional human rights Conventions with the African Charter on Human and Peoples’ Rights (Article 7); the American Convention on Human Rights (Article 25); and the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13)—all enshrining such rights to remedy.
- 6 See the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse>.
- 7 The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the United Nations General Assembly Resolution 60/147 of 16 December 2005, available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyand-reparation.aspx>.
- 8 <https://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf>.
- 9 [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).
- 10 <https://unece.org/DAM/env/pp/documents/cep43e.pdf>.
- 11 EU Parliament Initiative 2011/2089 8INI, Towards a coherent European approach to collective redress, 2011.
- 12 Juanita Olaya Garcia, “Dealing with the Consequences: Repairing the Social Damage Caused by Corruption, January 15, 2016, p. 8). Available at SSRN: <https://ssrn.com/abstract=3475453> or <http://dx.doi.org/10.2139/ssrn.3475453>.
- 13 EU Commission Recommendation 2013/396/EU) On common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013.
- 14 EU Commission, Report on the Implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, COM(2018) 40 final, January 25, 2018, available at [www.ec.europa.eu/newsroom/just/document.cfm?action=display&doc\\_id=49502](http://www.ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49502).
- 15 <https://star.worldbank.org/gfar-principles>.
- 16 <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Bestpracticesonconfiscation-recommendations4and38andaframeworkforongoingworkonassetrecovery.html>.

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# 3 Avenues for Reparation

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Having introduced the existing international and regional standards established with regard to compensating victims of corruption crimes, this third chapter aims at presenting the principal judicial avenues available in the different jurisdictions across the globe. These include:

- Civil proceedings
- Criminal proceedings (including in foreign jurisdictions)
- Non-trial resolutions
- Class actions and representative actions
- Constitutional protection mechanisms
- International and regional human rights mechanisms.

## 3.1 Civil proceedings

Civil proceedings are the most common and straight-forward avenue for seeking reparation of damages. In a civil lawsuit, a (natural or legal) person may seek compensation from another (natural or legal) person for the harm caused by the latter's actions. The ability of victims to recover damages from corrupt acts depends on the applicable substantive law, as well as on the procedures available to invoke it. In civil law countries, these principles are enshrined in Civil Codes, whereas in common law countries, general liability is based on tort law doctrines established by case law.

The responses to the questionnaires indicate that in all responding countries, anyone claiming to be a victim can in principle file a suit for corruption damages in a civil court, should they meet the standing requirements (see chapter 4).

The advantages of this avenue, as opposed to criminal proceedings, include the possibility for civil plaintiffs to name any defendants, including persons or entities they believe were only tangentially involved in the corruption, as well as naming senior government officials, or major foreign investors in the suit. A second advantage concerns the burden of proof, or the level of evidence that the plaintiff must present to prevail. Unlike in criminal proceedings, civil plaintiffs must prove their case by a preponderance of the evidence, meaning that the plaintiff must show that it is more likely than not that their version of the events is true.

By contrast, in civil suits it is the civil plaintiff who bears the responsibility of proving the damage, as well as the expenses of investigating and proving causation and damages. If the suit succeeds, the laws of some countries provide that the defendant must not only pay damages but reimburse the plaintiff for the costs incurred in bringing the case. Since civil suits often take a considerable time to be resolved, the plaintiff must be able to pay the expenses or find someone willing to finance them while the action is pending. Furthermore, cost shifting rules in many countries provide that a plaintiff that fails to prove liability is also liable for the costs the defendant incurred defending against the suit. In cases where the facts are complex and a large number of documents are



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examined and witnesses interviewed, the risk of having to pay the defendant's costs is a significant deterrent to filing a civil suit.<sup>1</sup>

## 3.2 Criminal proceedings

In criminal cases, a court may order the defendant to pay restitution to the victim as part of their sentence. In this instance, the restitution is intended to compensate the victim for any damages caused by the defendant's criminal act. Where the corrupt act causing the injury is a crime and the offender is convicted, many countries will permit the party to recover damages in the criminal case.

In civil law jurisdictions, victims can apply to become a "civil party" to the prosecution. If certified by the court and proof of damages is established, these can be recovered in the event of a conviction.<sup>2</sup> Depending on national law, civil parties may also enjoy other rights when acquiring such status, including the obtention of access to the evidence the prosecution has gathered; participation in the pre-trial investigation; the pursuit of separate, independent lines of inquiry; and the possibility to present evidence at trial. In some countries, civil parties have a right to challenge a prosecutorial decision to decline to open a case or to dismiss it before judgement is entered.<sup>3</sup> The main advantage of criminal proceedings is that the prosecution is responsible for proving legal cause and damages. In many countries, the prosecutors' power to compel the defendant and third parties to produce evidence far exceeds the evidence-gathering possibilities of a plaintiff in a civil case.

Although historically this avenue has been limited to civil law jurisdictions, common law countries have increasingly enacted legislation, similarly allowing or requiring its criminal courts to order the convict of a crime to compensate the victim,<sup>4</sup> along with developing sentencing and settlement guidelines.<sup>5</sup> For example, in Botswana, Ghana, and Sri Lanka, the court may order a criminal defendant to pay damages upon conviction. In Nigeria, a court may, upon conviction, order the restitution or return of the sums lost by the victim.

### 3.2.1 Criminal Proceedings in Foreign Jurisdictions

Although civil and criminal avenues may be available to victims in their own jurisdictions, in some cases the domestic courts may be inadequate due to institutional weaknesses, a lack of standing for victims—and even corruption in the judiciary itself. In such cases, victims may more effectively seek reparations in foreign courts.

Because corruption is often a cross-border phenomenon, several countries have adopted legislation enabling them to undertake investigations of corrupt practices with an extra-territorial reach. The first to adopt such a measure was the United States with its Foreign Corrupt Practices Act (FCPA) of 1977. Others including Australia, Brazil, Canada, France, Hong Kong Special Administrative Region (SAR) China, Spain, and the United Kingdom have since followed suit in the implementation of similar legislation. Although varying in reach, many of these legal frameworks were developed to enforce the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The conditions under which investigation and prosecution can take place may vary, with jurisdiction generally established through the citizenship or residence of the perpetrators, or through the location of the criminal act, the registration of companies or home companies, or the stolen assets. In the United States, a company's listing on the United States Stock Exchange suffices for prosecution of its corrupt acts.

The use of proceedings in foreign jurisdictions for the recovery of damages is not yet widespread. Indeed, most transnational cases have been prosecuted on the basis of such extra-territorial legislation concerning the United States and Switzerland, followed by Australia, Brazil, France, Germany, Israel, Italy, Norway, Portugal, Spain, Sweden, and the United Kingdom with moderate levels of enforcement.<sup>6</sup>

### 3.2.2 Non-trial resolutions

In some cases, parties may choose to resolve their disputes through non-trial resolutions, which allow for the resolution of cases without undergoing long investigation and prosecution stages.<sup>7</sup> These agreements between an entity or individual and an enforcement authority, which may involve plea agreements or deferred or non-prosecution agreements, allow for the imposition of penalties, the disgorgement of profits, which is a remedy requiring a party who profits from illegal or wrongful acts to give up any profits they made as a result of that illegal or wrongful conduct, compliance and reporting conditions and other sanctions.<sup>8</sup>

A recent International Bar Association study found that 57 of the 66 countries studied used some form of non-trial resolution to resolve international corruption cases.<sup>9</sup> Also, according to a 2019 OECD report, 78 percent of foreign bribery cases are resolved via non-trial resolutions.<sup>10</sup>

Non-trial resolutions enable the swift resolution of complex cases and require less resources than the pursuit of a conviction. However, settlements are typically conducted through administrative meetings between the prosecutorial authorities and the offender without involving the potential victims, proceeding on the assumption that the authorities will represent the latter's interests. Another matter of contention relates to the confidential nature of those agreements, which means that victims must rely on information being transmitted by the law enforcement authorities. Thus, the absence of guidance or practice of taking into consideration the interests of victims in corruption settlements may be a challenge in ensuring their representation, and, ultimately, in receiving full compensation.

In the Lava Jato case, the absence of a mechanism allowing for victim representation during the settlement negotiations between the U.S. Department of Justice and the Odebrecht Group resulted in the systematic exclusion of victims' interests. The FCPA, which was used as a legal basis for the non-trial resolution, does not foresee a procedure for involving victims or considering their claims during the negotiations for alternative resolutions. In the absence of any means for ensuring victim representation, the negotiation process was conducted at the discretion of the authorities and the Odebrecht Group, thus leaving the pursuit of non-criminal legal avenues as the only possibility for victims to seek recovery of damages.

Countries including Brazil<sup>11</sup> and the United Kingdom have issued guidelines explicitly requesting that the agreement include some form of reparation to the victims (whether individual or collective).

In the United Kingdom, guidance concerning *Plea discussions in cases of serious or complex fraud*<sup>12</sup> provides that in conducting plea discussions, the prosecutor must ensure that "the interests of the victim, and where possible any views expressed by the victim, are taken into account when deciding whether it is in the public interest to accept the plea." Moreover, it provides the following:

*D.10 The prosecutor should bear in mind all of the powers of the court and seek to include in the joint submission any relevant ancillary orders. It is particularly desirable that measures should be included that achieve redress for victims (such as compensation orders) and protection for the public (such as directors' disqualification orders, serious crime prevention orders or financial reporting orders).*

The *Deferred Prosecution Agreements Code of Practice*<sup>13</sup> provides:

*2.5 Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence, which includes the culpability of [the organisation] and the harm to the victim. [...]*

7.2. [...] It is particularly desirable that measures should be included that achieve redress for victims, such as payment of compensation. [...]

7.9. The suggested financial terms may include but are not confined to: compensating victims; payment of a financial penalty; [...]; donations to charities which support the victims of the offending; [...]

### 3.3 Class Actions and Representative Actions

In addition to the criminal or civil avenues outlined above, procedures enabling the recovery of collective damages through single action are starting to be employed in corruption cases. Two types of action exist in this regard, namely: class actions and representative actions.

In a class action, those injured aggregate their individual claims into a single suit. The requirements for bringing a class action vary depending on the jurisdiction and the specific laws involved. In general, in order for a class action to proceed, a court must first certify the class, which requires the representative plaintiff(s) to demonstrate that the class meets certain requirements, such as: (i) numerosity (there are too many plaintiffs for each to file a separate lawsuit); (ii) commonality (the claims of the plaintiffs share common questions of law or fact); and (iii) typicality (the representative plaintiff(s) have claims that are typical of the class and arise from the same course of events). If the court certifies the class, then the case can proceed as a class action, with the representative plaintiff(s) acting on behalf of the entire class. In some countries, a class action can be brought if the claimants allege that they share a common violation and legal cause, with the specific amount of damages left to separate individual proceedings. However, in other cases, damages or the formula for calculating damages must be common to all members as well.

Research for this paper found two class actions in the U.S. seeking compensation for acts of corruption. Both arose from guilty pleas entered by executives of the Illinois public utility company Commonwealth Edison (ComEd) in July 2020. The charges related to the bribery of Illinois state legislators from 2011 to 2019 aimed at scheduling votes to pass legislation favoring the company. The types of undue advantages included appointing an individual to ComEd's Board of Directors at the request of a public official, as well as the granting of internships in the company for individuals associated with the public officials. One case was brought under federal law and the other under Illinois state law. The deferred prosecution agreement between ComEd and federal prosecutors entailed a US\$200-million fine for the company. The company admitted to payments totaling US\$1.3 million made to the former Illinois House Speaker's associates in exchange for influencing the legislative agenda. The class in both cases consisted of 4.5 million customers, including individuals and businesses. Both complaints alleged that the laws approved as a result of the bribe led to class members paying higher prices than they should have, with the overcharge exceeding US\$150 million.<sup>14</sup>

Representative actions are similar to class actions. However, rather than having the court certify a class, the representative plaintiff(s) bring(s) a claim on behalf of the group, and the judgment only applies to those individuals who have chosen to be part of the group or who have actively participated in the proceeding. Representative actions are used in jurisdictions that do not provide for class actions, or alternatively in jurisdictions that do, when the group of individuals is too small or the claims too diverse for a class action.

In a representative action, a government agency, non-governmental organization (NGO), and in some countries any citizen, may seek the recovery of "social," "diffuse" or "collective" damages on behalf of a group or even the nation's citizens as a whole. The possibility for the public prosecution service or an NGO to seek damages on behalf of

the collectivity is particularly well-suited for cases of grand corruption in which damages are incurred by a large number of claimants or a society as a whole. In several Latin American countries, including Argentina, Brazil, Costa Rica, and Peru, the right of a group to recover corruption damages is enshrined in the constitutions, with the examples of actions brought by public prosecutors for social or collective damages demonstrating the potential of representative action.

In Honduras the courts have affirmed the right of a NGO to represent an indigenous community in corruption cases. The case involved the awarding of a construction contract of a hydroelectric dam on the Gualcarque River to DESA, a firm that was not an approved bidder—and not in possession of valid licenses. With the project impacting the livelihood of the indigenous community residing on the lands, vocal opposition by its leaders led to assassinations in 2016. One of the victims, Berta Cáceres, a prominent Honduran environmental defender, was shot in her home.

The NGO Civic Council of Popular and Indigenous Organizations (COPINH), representing the indigenous community, brought an action requiring the prosecutor to open a criminal investigation in 2010, and again in 2014. The case was initially jointly investigated by the local prosecutor's office, special fraud unit and the Organization of American States (OAS)-backed Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH). This case led to the indictment of DESA executives, and the public officials involved in the corrupt and fraudulent acts. The charges included fraud, abuse of authority, violations of the duties of state officials, negotiations incompatible with the exercise of public functions, and document falsification. After COPINH was initially accepted as a civil party to the criminal case, the defendants made a motion to dismiss its participation, which was denied by the trial court in March 2019. This decision was based on its determination of the association as an indirect victim in line with the United Nations definition of victim. The Court of Appeals overturned the ruling in August 2019, determining that COPINH could not act as a civil party to the proceedings in view of the Criminal Procedure Code's definition of victims, thus determining instead that the State was the only victim of the case. The COPINH filed a constitutional challenge with the Constitutional Chamber of the Supreme Court in November 2020, which ultimately overturned the decision in August 2021, thereby granting the COPINH the status of civil party.

### 3.4 Constitutional Protection Mechanisms

Many countries foresee mechanisms that will allow for immediate remedy in cases in which constitutional rights are violated. In some countries, individuals can bring claims directly under the constitution to seek redress for violations of their constitutional rights. This may involve filing a lawsuit against the government or a public official or filing a complaint with a constitutional court or other administrative body.

Constitutional injunctions ordering the authority to suspend actions or to undertake new action(s) may also offer ways to claim reparation of damages. In this instance, the focus would not be on the corrupt act, but on its implications concerning the obligations of the government to protect constitutional rights.

As noted, the Constitutions of Argentina, Brazil and Costa Rica provide explicit references to collective rights and interests, as well as the right to remedy, thereby laying the foundation for relevant constitutional injunctions and orders for the reparation of damages (see boxes 3.1 and 3.2 below).

### Box 3.1. Consitution of Argentina

The Argentinian Constitution contains references for protection against social damages in Articles 41 and 42:

#### Article 41

*All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law. [...]*

#### Article 42

*As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment. The authorities shall provide for the protection of said rights, the education for consumption, the defense of competition against any kind of market distortions, the control of natural and legal monopolies, the control of quality and efficiency of public utilities, and the creation of consumer and user associations.*

### Box 3.2. Constitution of Costa Rica

Similarly, the Costa Rican Constitution contains provisions supporting a claim for the reparation of social damages as a consequence of corrupt acts in Articles 41 and 50:

#### Article 41

*Obeying the laws, all shall find redress for the injuries or damages they have received in their person, property or moral interests. Justice must be done to them promptly, fulfilled, without denial and in strict conformity with the laws.*

#### Article 50

*The State will procure the greatest well-being to all the inhabitants of the country, organizing and stimulating production and the most adequate distribution of the wealth.*

*All persons have the right to a healthy and ecologically balanced environment. For that, they are legitimated to denounce the acts that infringe this right and to claim reparation for the damage caused.*

*The State will guarantee, will defend and will preserve this right. The Law will determine the responsibilities and corresponding sanctions.*

## 3.5 Human Rights Mechanisms

Regarding the constitutional protection mechanisms arising from constitutional rights, redress may in certain circumstances be possible through regional human rights courts and commissions. Although the practical use of human rights instruments may be limited in recovering corruption damages, the impact of human rights law on legislative developments in other fields must not be neglected. As Roht-Arriaza observes:

*Human rights groups and the networks of family members of those killed and forcibly disappeared during the 1970s and 1980s under authoritarian regimes and during civil wars have changed the legal landscape for anticorruption campaigners. They were one of the driving forces behind developing international law on the right of victims to participate as right-bearers in criminal processes on an equal footing with defendants.<sup>15</sup>*

Human rights norms and the judgments issued by regional human rights courts and commissions can themselves be important to the anticorruption agenda, particularly in setting standards that simultaneously influence multiple countries within a region.

Moreover, regional human rights courts and commissions, as well as UN bodies, have started to explicitly refer to corruption and the rights of its victims as an element of analysis in some of their reports or decisions (including Fact Finding Missions of the Human Rights Council, reports of the Office of the United Nations High Commissioner for Human Rights [OHCHR], sentences, hearings, and so on).<sup>16</sup> For example, the United Nations Human Rights Council established the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela in 2019. Although the mission's mandate was limited to the investigation of gross violations of human rights, the mission made references to corruption in its reports, including corruption in the judiciary.<sup>17</sup>

More significantly, in *SERAP v. the Federal Republic of Nigeria*, a collective damages case concerning environmental damages caused by oil spills in the Niger Delta, the Economic Community of West African States (ECOWAS) Court of Justice (ECCJ) established that legal standing can be granted to communities who seek redress.<sup>18</sup> Also, when human rights violations affect an indeterminate number of victims, the compensation must take the form of a "collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes."<sup>19</sup>

*114. The court acknowledges that the continuous environmental degradation in the Niger Delta Region produced [a]devastating impact on the livelihood[s] of the population; it may have forced some people to leave their area of residence in search ... [of] better living conditions and may even have caused health problems to many. But in its application and through the whole proceedings, the Plaintiff failed to identify a single victim to whom the requested pecuniary compensation could be awarded.*

*115. In any case, if the pecuniary compensation was to be granted to individual victims, a serious problem could arise in terms of justice, morality and equity: within a very large population, what would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbour? Based on which criteria should be determined the amount each victim would receive? Who would manage that one billion dollars?*

*116. The meaning of this set of questions is to leave clear the impracticability of that solution. In case of human rights violations that affect [an] indeterminate ... number of victims or a very large population, as in the instant case, the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes.*

*117. Based on the above reasons, the prayer for monetary compensation of one billion US dollars to the victims is dismissed.*

*118. The Court is, however, mindful that its function in terms of protection does not stop at taking note of human rights violation[s]. If it were to end in merely taking note of human rights violations, the exercise of such a function would be of no practical interest for the victims, who, in the final analysis, are to be protected and provided with relief. Now, the obligation of granting relief for the violation of human rights is a universally accepted principle. The Court acts indeed within the limits of its prerogatives when it indicates for every case brought before it, the reparation it deems appropriate.*

*119. In the instant case, in making orders for reparation, the Court is ensuring that measures are indicated to guide the Federal Republic of Nigeria to achieve the objectives sought by Article 24 of the Charter, namely, to maintain a general satisfactory environment favourable to development.*

## DECISION

*For these reasons, and without the need to adjudicate on the other alleged violations and requests,*

### 120. THE COURT,

- *Adjudicating in a public session, after hearing both parties, and after deliberating;*
- *Adjudges that it has jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;*
- *Adjudges that SERAP has locus standi in the instant case;*
- *Adjudges that the report by Amnesty International is admissible;*
- *Adjudges that the Federal Republic of Nigeria has violated Articles 1 and 24 of the African Charter on Human and Peoples' Rights;*

### CONSEQUENTLY,

#### 121. Orders the Federal Republic of Nigeria to:

- i. *Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;*
- ii. *Take all measures that are necessary to prevent the occurrence of damage to the environment;*
- iii. *Take all measures to hold the perpetrators of the environmental damage accountable;*

[...]

Although cases like the SERAP v. The Federal Republic of Nigeria case establish important precedent for the addressing of collective harms, the availability of international and regional human rights avenues—including their use to provide redress for the damages caused by corruption—should not be overstated. First, the existing mechanisms are subsidiary to the domestic legal processes, meaning that they are only available once domestic remedies have been exhausted. Second, despite its focus on the victim, the human rights framework still requires the establishment of state responsibility, meaning that the State must be found liable for the violation of the right(s) in question through an act or a failure to act. Thirdly, consideration must be given to the type of orders these human rights courts and commissions can make, as they inevitably lack the enforcement powers possessed by a constitutional court or other domestic courts.

## 3.6 Administrative Procedures

Finally, in some jurisdictions, agencies can use administrative procedures to recover embezzled or mismanaged funds from those directly involved in the schemes. Rather than constituting recovery in the sense of compensating the victims harmed by the acts, such administrative procedures serve as corrective measures. As such, they are aimed at ensuring that the public administration is not penalized for the action(s) of its staff. Since the administrative agencies of some countries publish such information as funds that have been recovered, it is important to distinguish such modes of recovery from cases of reparation of damages.

### 3.7 Reparation funds

The harm caused by corruption exists independently of the identification of those liable for it, and reparation on the basis of culpability and liability is at the core of criminal and civil procedures. With litigation being an imperfect avenue to address the damages arising from corruption in view of the difficulty of ensuring full reparation even when the perpetrators are prosecuted, countries are starting to consider reparation funds that set money aside to enable coverage for those damages. As in the case of reparation programs created for serious human rights violations, such funds may be administered by the government or by an independent commission.

Whereas countries such as Australia, Canada and the United States have established general victims' funds financed by penalties and fines from criminal offenders, Colombia passed a law for the establishment of a fund dedicated to corruption victims in 2022 (see box 3.3).

Despite the apparent multitude of avenues available to recover damages, the current state of law and policy in many jurisdictions could be further enhanced to ensure that these avenues are effectively accessible to victims of corruption. Although challenges exist in relation to all judicial avenues, including practical and financial hurdles that will be briefly covered in the next chapter, the most evident shortfalls pertain to the limited opportunities for victims to actively participate in criminal proceedings even when they have legal standing. More specifically such gaps include the following:

- The absence of an opportunity for victims to contribute evidence during the pre-trial investigation stage or to request the prosecution to gather such evidence.
- In countries where victims can join proceedings as a civil party, the failure to systematically inform individuals that might reasonably be considered potential victims of investigations and proceedings of their right to do so.
- The inability of victims to claim damages for breaches of a public contract in which they were the beneficiaries.<sup>20</sup>
- The lack of an independent review, including by victims, of a decision not to prosecute a corruption crime.
- The lack of consultation of victims to participate in the negotiation of non-trial resolutions, and to be represented in the decision-making process concerning the allocation of compensation of reparations, as well as in the oversight of the disbursement of the funds.

#### Box 3.3. Enabling Collective Rights

In Colombia, Law 2195 of 2022 foresees the establishment of a fund to enable officials to issue reparations while trials and judicial efforts are still ongoing. The *Fondo para la Defensa de los Derechos e Intereses Colectivos* (Fund for the Defense of Collective Rights and Interests) or *Fondo para la reparación de los Afectados por Actos de Corrupción* (Fund for the Reparation of those Affected by Corruption) are foreseen as funds to be used for the reparation of collective rights. They are administered by the *Procuraduría General de la Nación* (Attorney General's Office), which in Colombia is charged with enforcing disciplinary action, while also holding a prevention mandate. The law foresees that individual and collective victims of corruption can file a claim with the *Procuraduría* to be considered for reparation. At the time of drafting this publication, the Fund had not yet been established.



## Notes

- 1 More information concerning civil lawsuits to recover stolen assets can be found in the StAR's publication, *Public Wrongs, Private Actions at Public Wrongs* (World Bank, [worldbank.org](http://worldbank.org), 2014) <https://star.worldbank.org/publications/public-wrongs-private-actions>
- 2 Jean-Pierre Brun and others, *Public Wrongs, Private Actions*, pp. 68–69. Crime victims are not treated as parties to a criminal case in common law countries. As comparativists say, it is “unknown” to common law; hence, there is no accepted English translation of the concept. “Civil party” is used here to refer to *partie civile* (civil party), *partie plaignante* (complainant party), or *action civile* (civil action) in French; *antragsteller* (applicant) or *privatkläger* (private plaintiff) in German; *assistente* (assistant), *ofendido* (offended), or *lesado* (injured) in Portuguese; *acusador particular* (private accuser) in Spain; and *acción civil resarcitoria* (civil action for compensation) in Costa Rica. As explained in the text, it should be emphasized that the rights of a civil party differ from jurisdiction to jurisdiction.
- 3 Johanna Göhler, “Victim Rights in Civil Law Jurisdictions,” in D. Brown, J. Turner, and B. Weisser, eds., *The Oxford Handbook of Criminal Process* (Oxford, Oxford University Press, 2019), pp. 267–288.
- 4 StAR's *Public Wrongs, Private Actions*. <https://star.worldbank.org/publications/public-wrongs-private-actions>.
- 5 The evolution of this right is discussed in Marie Manikis, “Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition,” in Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process*, Oxford Handbooks (2019; online edn, Oxford Academic, 11 Feb. 2019), <https://doi.org/10.1093/oxfordhb/9780190659837.013.14>, accessed 30 Oct. 2023.
- 6 Transparency International, *Exporting Corruption Report of 2021*. <https://files.transparencycdn.org/images/2022-Report-Slim-version-Exporting-Corruption-EN.pdf>.
- 7 See UNODC Secretariat report CAC/COSP/2021/14, titled “Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return” at [V2107439\\_E.pdf \(unodc.org\)](https://www.unodc.org/documents/cac/cosp/2021/14/V2107439_E.pdf).
- 8 More information concerning this matter can be found in a report prepared by the UNODC entitled, [“Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return.”](https://www.unodc.org/documents/cac/cosp/2021/14/V2107439_E.pdf)
- 9 See: “Structured Settlements for Corruption Offences Towards Global Standards?” IBA Anti-Corruption Committee: Structured Criminal Settlements Subcommittee found at [IBA-Structured-Settlements-Report-2018.pdf \(oecd.org\)](https://www.iba-anti-corruption.com/structured-settlements-report-2018.pdf).
- 10 See OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*. [www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm](https://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm)
- 11 See <https://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/guia-pratico-acordo-leniencia/>
- 12 See [“Plea discussions in cases of serious or complex fraud.” GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438883/DPA-COP.pdf)
- 13 [DPA-COP.pdf \(cps.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438883/DPA-COP.pdf).
- 14 Randall Kuhn and others individually and on behalf of all others similarly situated v. Commonwealth Edison Company, Case No. 2020CH05138, Circuit Court of Cook County, July 27, 2020, <https://dicellolevitt.com/wp-content/uploads/2020/07/COMED-RATEPAYER-CLASS-COMPLAINT.pdf>.
- 15 Naomi Roht-Arriaza, “Empowering Victims of Grand Corruption: an emerging trend?”, University of Connecticut page 33
- 16 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; and Rules of Procedure of the Inter-American Court of Human Rights.
- 17 <https://www.ohchr.org/en/hr-bodies/hrc/ffmv/index>.
- 18 Muhammed Tawfiq Ladan, “The Prospect of Public Rights Litigation before the ECOWAS Court Of Justice.” Presentation made at the Nigerian Bar Association Conference held at Owerri, Imo State. August 24–29, 2014.
- 19 See *SERAP v. The Federal Republic of Nigeria*, Dec. 14, 2012. ECW/CCJ/JUD/18/12 ECW/CCJ/APP/08/09 <https://ihrda.uwazi.io/api/files/1650956721947oath9e3rph8.pdf>. An issue also discussed in Olaya Garcia, Juanita, *Dealing With the Consequences: Repairing the Social Damage Caused by Corruption* (January 15, 2016). Available at SSRN: <https://ssrn.com/abstract=3475453> or <http://dx.doi.org/10.2139/ssrn.3475453>.
- 20 Abiola Makinwa, “Empowering the Victims of Corruption: The Potential of Sleeping Third-Party Beneficiary Clauses,” in *Open Society Foundations, Legal Remedies for Grand Corruption: The Role of Civil Society* (New York, OSF, 2019) pp. 121–129.

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# 4 Legal Standing and Victim Status

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Having introduced the judicial avenues available, chapter four explores how and to whom such avenues are available. It also details the different conditions applicable for each of these avenues. The chapter is divided into sections as follows:

The first part discusses legal standing in connection with the main proceedings available for victims, namely:

- Legal standing in civil proceedings
- Legal standing in criminal proceedings
- Legal standing in class actions and representative actions.

The second part analyses the types of victims recognized by different jurisdictions including:

- Public entities, including foreign governments
- (Non-public) legal persons
- Individual natural persons
- Collective victims.

The chapter concludes with a short section concerning issues of access to justice related to the practical challenges preventing victims from making damage claims, particularly in view of the costs involved in such actions.

## 4.1 Legal standing across jurisdictions

Legal standing is commonly determined by the general rules about the types of natural or legal persons that are generally recognized in civil or criminal courts. Furthermore, in many countries, the general rules are complemented by virtue of the person's recognition as a victim, or in other words as having been harmed by the act in question.

Regarding the latter, the party bringing the claim must generally demonstrate:

1. Harm: The party has suffered a harm.
2. Causation: The harm is caused by the actions of the defendant, and it would not have occurred if the defendant had acted differently.
3. Redressability: The court can provide a remedy that will address the injury suffered by the party bringing the claim.

As provided in a landmark ruling of the United States Supreme Court case, *Baker v. Carr*, 369 U.S. 186 (1962), the "gist of the question of standing" is whether the party

seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions”. Similarly, in overturning the decision of the investigating chamber of France’s Court of Appeal denying a NGO’s legal standing in the *Biens mal acquis* (wrongfully acquired property) case (see item 4.3 below), the French Court of Cassation held that “for a civil claim to be admissible before the investigating court, it is sufficient that the circumstances on which it is based enable the judge to accept as possible the existence of the alleged damage and its direct relationship with a criminal offence.” In ensuring that only parties who have a sufficient connection to a dispute and have been harmed (or are at risk of being harmed) can bring a claim to court, the efficient use of the court system is protected. Thus, the courts address disputes between parties who have a real interest in the outcome.

In countries that provide for a definition of victims, the definition is generally centered around a natural or legal person having suffered damage, which is understood as an injury, loss or harm. However, in the context of corruption proceedings, many countries do not recognize natural or legal persons as victims of corruption. Rather, they only recognize States or public entities as legitimate for such capacity in criminal or civil proceedings. In several countries, the criminal action is exclusively delegated to the

prosecutorial authority. In jurisdictions that do not foresee the participation of a civil party in criminal proceedings, victims’ legal standing is systematically precluded.

However, the responses to the questionnaires showed that in several jurisdictions, the State, public companies, stakeholders, competitors, NGOs and other persons or entities can be granted victim status.

In line with the general principles of legal standing presented above, in most jurisdictions, such recognition is contingent on their demonstration of having been directly or, in limited cases, indirectly harmed by the crime. Although it is common for remedy systems to grant legal standing to individual victims who may be individual community members, individual public officials, individual public

entities or individual companies or NGOs, such standing is less universal for collective victims. The responses indicate that in half of the surveyed countries, a group or entire population can be admitted as a plaintiff if it has been harmed directly as a consequence of the crime.

The responses to the questionnaires revealed that the surveyed countries provided more or less evenly for the possibility for State and non-State actors to participate in proceedings for recovery. However, significant differences were noted between the law governing recovery by governments and government agencies on the one hand, and the law governing recovery by individuals, private companies, and other non-governmental entities on the other hand.

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“In the context of corruption proceedings, many countries do not recognize natural or legal persons as victims of corruption. Rather, they only recognize States or public entities as legitimate.”

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## 4.2 Legal standing in civil proceedings

Legal standing in civil proceedings varies less than in criminal proceedings, with the requirements for compensation being broadly similar across jurisdictions.<sup>1</sup> The basic principle remains that anyone causing harm to another when at fault must compensate the injured party. Since most of the issues arising in civil proceedings relate less to legal standing than to establishing the damages to allow for the granting of victim status, these elements are explored under chapter 5.

## 4.3 Legal standing in criminal proceedings

To recover damages through the prosecution of a corruption offence, those injured must be a “victim of crime” as defined by national law. In criminal proceedings, legal standing refers to whether a person or entity has the legal right to bring a criminal charge or to participate in the criminal trial, as well as the granting of other procedural rights depending on the jurisdiction. As addressed in chapter 3, depending on the jurisdiction, this status may allow the victim: (i) to be called as a witness; (ii) to provide evidence in the case; (iii) to obtain access to the criminal file; (iv) to present an opinion concerning the charges, the punishment and the damage set out in the charges and the civil action; (v) to make a statement during sentencing; (vi) to receive notification about the progress of the case; (vii) to participate in plea bargaining negotiations; and (viii) to give or refuse consent to settlement proceedings or plea bargains.

In many civil law countries, the granting of civil party status in a criminal case allows for active involvement during the investigations and trial. For example, under French law, although the prosecutor has the discretion to decide whether to pursue a criminal investigation, a civil party has the right to appeal this decision to a higher court within three months of the prosecutor’s decision. In 2012, the European Union adopted a directive concerning the rights of victims of crime. It requires EU Member States to provide certain rights and protections to victims of crime, including the right to appeal a decision not to investigate a crime.<sup>2</sup>

In countries including Mexico and Peru, NGOs have legal standing to participate in criminal corruption proceedings as parties by virtue of their statutory purpose, which systematically grants them victim status. In the jurisdictions applying this model, it is sufficient for NGOs to demonstrate that their organization’s purpose is the fight against corruption and that they were incorporated prior to the crime being committed. The *Biens mal acquis* case in France (see box 4.1) similarly prompted the passage of legislation granting anticorruption-oriented NGOs the right to represent corruption victims as a civil party.<sup>3</sup>

In Spain, based on the principle that the protection of the law is a shared interest of society, the concept of “popular prosecution” allows any Spanish citizen to act as a civil party in a criminal proceeding. To initiate a popular prosecution in Spain, a citizen must file a written request with the court and provide evidence of the crime they believe has been committed. If the court accepts the request, the citizen is granted the status of “popular prosecutor” and the citizen can then participate in the pre-trial investigations and proceedings alongside the official prosecutor, including through the presenting of evidence, as well as the right to appeal any decision made by the court. In practice, this avenue is typically reserved for cases of significant public interest. One such corruption case has been adjudicated (see box 4.2 concerning the Gürtel case).

In some countries, legal standing on behalf of the victims is granted to public authorities. For example, Article 38 of the Costa Rican Code of Criminal Procedure provides that the Public State Attorney’s Office (*Procuraduría*) can bring a civil action “for social damage [...] in the case of punishable acts that affect collective or diffuse interests.” (see section on collective victims).

### 4.3.1 States as sole victims in criminal proceedings

In some jurisdictions, States are the only entities recognized as victims in criminal corruption proceedings, with individuals and non-governmental entities systematically denied the possibility of such recognition.<sup>4</sup> In some of these countries, this exclusion is due to the criminal law defining certain corrupt acts as crimes against the State or its agencies. In such cases, the law distinguishes between crimes against the State and those against private persons.

Italian law, for example, expressly provides that corruption is a crime against the public administration (*pubblica amministrazione*). With the exception of extortion, only the

#### Box 4.1. Civil Society and Asset Recovery

Civil society organizations in Benin, Chile, Honduras, and Mexico have also succeeded in being recognized as civil parties in corruption prosecutions in their respective jurisdictions.<sup>a</sup>

In 2008, two NGOs, Transparency International (TI) France and Sherpa filed a civil party complaint against two heads of state of the Republic of Congo and Gabon, targeting their acquisition of significant real estate and movable assets in France. French judges completed the investigation of the Gabonese part of the case in August 2017. The investigation into the French assets of the Congolese case is still ongoing.

In 2010, in a case commonly known as the "*Biens mal acquis*," case, the Criminal Chamber of the *Cour de Cassation* (Court of Cassation) granted Transparency International France (TI-France) the status as a civil party, enabling it to seek damages in a corruption prosecution. The court justified this status upon the NGO having committed all of its resources to the global fight against corruption, with corruption therefore amounting to "a personal, economic, and direct" loss. Following an investigation, the first defendant was convicted, and TI-France was awarded damages.

Against the backdrop of these cases in France, in May 2019, the French Senate adopted, on first reading, a "draft law on the allocation of assets derived from transnational corruption"<sup>b</sup> aimed at enabling assets to be returned directly to their victims. The bill is aimed at addressing the current state of law which results in the proceeds of confiscations being allocated to the French State budget, rather than to the victims of the crime. As noted by the Paris Criminal Court in its judgement of the 2017 case: "it appears morally unjustified for the State pronouncing confiscation to benefit from [the assets] independent of the consequences of the offence." Furthermore, "it seems reasonable in this context that the French confiscation penalty regime should be brought to evolve with a view to adopting a legislative framework adapted to the restitution of illicit assets". At the time of drafting this publication, the bill was under examination by the National Assembly's Committee on Finance, the General Economy and Budgetary Control.

a Teodorin Obiang, Vice President of Equatorial Guinea was suspected of having built up considerable assets in France with public money diverted from his home country. See <https://transparency-france.org/aider-victimes-de-corruption/biens-mal-acquis/#.YqhjfJDP3L4>. Cass. crim., 9 nov. 2010, n° 09-88.272. Among others, see Maud Perdriol-Vaissière, "La Poursuite des Faits de Corruption à la Lumière de l'Affaire des « Biens Mal Acquis »," *Recueil Dalloz* 2011 p. 112; Xavier Salvat, "Recevabilité de la Constitution de Partie Civile d'une Association non Habilitée pour Agir en Défense d'un Intérêt Collectif," *Revue de science criminelle* 2012 p. 858; Chantal Cutajar, "Affaire des Biens Mal Acquis : la Chambre Criminelle Ordonne le Retour de la Procédure au Juge d'Instruction," *La Semaine Juridique Edition Générale* n° 48, 29 Novembre 2010, p. 1174. (Cass. Crim., Nov. 9, 2010, no. 09-88.272. See aAmong others, see Maud Perdriol-Vaissière, "The Prosecution of Acts of Corruption in the Light of the 'Ill-Gotten Goods' Affair," *Recueil Dalloz* 2011 p. 112; Xavier Salvat, "Admissibility of the Constitution of Civil Party of an Association not Authorized to Act in Defense of a Collective Interest," *Revue de science scientifique* 2012 p. 858; Chantal Cutajar, "Ill-Gotten Goods Case : the Criminal Chamber Orders the Return of the Procedure to the Investigating Judge," *La Semaine Juridique General Edition* n° 48, November 29, 2010, p. 1174).

b [Proposition de loi n°1921, adoptée par le Sénat, relative à l'affectation des avoirs issus de la corruption transnationale \(assemblee-nationale.fr\)](https://www.assemblee-nationale.fr/14/la-proposition-de-loi-no-1921). (Proposal for law no. 1921, adopted by the Senate, relating to the allocation of assets resulting from transnational corruption (assemblee-nationale.fr).

State can be granted victim status in the prosecution of corruption offenses.<sup>5</sup> Granting victim status to private individuals in Italy would, as one commentator explains, “amount to acknowledging that the state, which by its nature acts for the protection of the public interest, is ineffective in pursuing it on behalf of its citizens.”<sup>6</sup>

Recent decisions by Switzerland’s highest courts have denied individuals and privately-owned corporations the right to serve as a civil party in bribery cases because they were not considered to be “victims” of corruption crimes. As in Italy, the courts justified this decision based on the premise that only the government can be a victim of bribery, and public sector bribery is sanctioned to protect the state’s impartiality.<sup>7</sup>

## 4.4 Legal standing in class actions and representative actions

As noted in chapter 3, a wide array of countries has established mechanisms for collective redress, thereby permitting a large number, or “class” of individuals, to combine claims arising from the same event into a single suit.<sup>8</sup> If the suit is successful, all class members are entitled to damages. This enables procedural status for a wider range of stakeholders to be represented in court, either through their active engagement (as in class actions) or indirectly through representation by NGOs, associations or public entities.

Under collective mechanisms, an individual, association, or government agency may seek damages for the infringement of collective rights. Citizens of Brazil, Chile, Colombia, and Costa Rica all enjoy the collective right to be free from corruption. In Brazil, Colombia, and Costa Rica, the national prosecution office, as a representative of the citizenry, has either claimed or recovered damages from those responsible for corruption.<sup>9</sup> In Chile, the *Consejo de Defensa del Estado* (State Defense Council), an independent state agency, and NGOs can both seek damages for collective damages from corruption.<sup>10</sup>

## 4.5 Types of victims

Following the concept of legal standing in various types of proceedings outlined above, this second part of the chapter considers how jurisdictions have granted legal standing to public entities, foreign governments, non-public legal persons, individual natural persons, and collective victims.

### 4.5.1 Public entities

In many jurisdictions, the public administration is considered a victim in most cases of public corruption. This occurs when public resources are diverted after the resources have been deposited in the State’s treasury. In bribery cases, the agency that employed the bribe-taker is often considered a victim. As noted, government agencies will systematically be considered individual victims of corruption, even where the harmful effects

### Box 4.2. The Gürtel case<sup>a</sup>

The Gürtel case is one of the largest corruption cases in Spain. It involved a network of businessmen and politicians of a political organization who were accused of embezzling public funds. The investigation was initiated by “popular prosecution” when a former councilman of the political party submitted to the court 18 hours of recorded conversations revealing that the Gürtel network had bribed politicians in exchange for public contracts. This was done by using shell companies and offshore accounts to launder money.

In analysing the evidence, the judge discovered that the companies under investigation had obtained substantial financial resources from public funds allocated to the regions. At least 34 individuals involved in the case were convicted of various offenses, including fraud, embezzlement, document forgery, illicit association, money laundering, influence peddling, misappropriation, and scamming, among other charges. As a result of the verdict, a motion of censure was brought against the president, marking the first successful motion of its kind in Spanish history.

a Edwards, Sam. Spain’s Watergate: inside the corruption scandal that changed a nation. *The Guardian*. March 01, 2019. <https://www.theguardian.com/news/2019/mar/01/spain-watergate-corruption-scandal-politics-gurtel-case>. Accessed October 30, 2023.

of the corrupt conduct go beyond the harms to the institution involved or the cost of the enforcement action.

Responses to the questionnaires from the Netherlands and Canada indicated that government agencies that issue drivers' licenses have recovered damages for bribery. In a case in the Netherlands, the bribe-taker was ordered to pay the licensing agency €11,153 (US\$ 11,978.03 in today's exchange rate). This was the equivalent of what it had cost the agency to uncover the bribery scheme and to prosecute the corrupt conduct.

The Canadian damage award was more involved. Because the Canadian agency not only issued drivers' licenses, but also sold automobile accident insurance, several individuals who secured a license through bribery were later responsible for motor vehicle accidents for which the agency paid a claim. The Canadian courts ruled that the agency was entitled to recover what it paid on those claims.

The offenders convicted of public corruption are frequently ordered to pay a fine. In some cases, rather than ordering a separate damage award, damages may have been included in the fine or altogether excluded. The cases reported by countries in response to the questionnaires do, nonetheless, suggest the range of government victims that have recovered damages, including: ministries, permit-issuing authorities, national development funds, state and provincial governments, the armed forces and state schools.

### **Box 4.3. Switzerland**

Swiss courts have admitted both Guinea and Tunisia as civil parties in criminal proceedings of defendants alleged to have laundered the proceeds of corrupt acts committed in the two countries in Switzerland. In the case concerning Tunisia, criminal proceedings were opened in Switzerland against Tunisia's former President, his family, sons-in-law and other associates for money laundering and participation in a criminal organization. In 2012, the Federal Criminal Court rejected an appeal lodged against Tunisia's request to be admitted as a civil party to the proceedings. This status granted Tunisia access to the case file and bank documents, which enabled it to detect international financial transactions carried out via Swiss bank accounts.

In another case in Switzerland, investigations by the Examining Magistrate's Office IV of the Canton of Zurich revealed that funds amounting to US\$49.5 million belonging to former Peruvian Secret Service Chief, Vladimiro Montesinos, had originated from bribes paid for preferential treatment granted with regard to the purchase of arms and planes, among other corrupt acts. In June 2002, Swiss courts ordered the transfer of the assets to Peru.

Source: Public Wrongs Private Actions

## **4.5.2 Foreign governments**

In line with the UNCAC Article 53, paragraph 2, some States have empowered their courts to award compensation to foreign governments that have been victims of acts of corruption.

In 1982, American federal courts were given the discretion to award damages to crime victims upon the conviction of the perpetrators. Since 1996, the award has been mandatory.<sup>11</sup> Pursuant to these statutes, some foreign governments have received damages for corruption. In four cases, damages were recovered upon the defendant's conviction for bribing a foreign public official in violation of the Foreign Corrupt Practices Act (FCPA). In another case, the intermediary in a FCPA bribery scheme in Haiti was convicted of laundering his fee in the United States, The Haitian government was awarded damages. Trinidad and Tobago recovered damages in the settlement of a civil suit it had brought against those involved in corruption in the construction of an airport there.<sup>12</sup>

Boxes 4.3–4.5 lay out cases in Switzerland, the United Kingdom and the United States.

Table 4.1 lists seven examples of cases in which foreign governments sought to recover damages for corruption in US courts.

## **4.5.3 Legal persons**

Private legal persons and non-profit organizations may be considered individual victims of corruption. Particularly in the context of public tenders, companies that are not awarded the tender may argue that they have lost business opportunities because their competitor gained the contract through corrupt means (box 4.6).

### Box 4.4. United Kingdom

In a case in the United Kingdom, British companies bribed officials in Chad, Kenya, Tanzania, and a fourth country that was not identified. This was done in order to win contracts for infrastructure projects. Following the prosecution by the Serious Fraud Office (SFO) of the individuals and firms, the countries were awarded damages as an offshoot of the case. As part of the prosecution, the SFO worked with the governments of the affected countries to recover any assets that had been obtained through the corrupt conduct. The governments of Chad, Kenya, and Tanzania were awarded a total of £16.8 million (roughly US\$21,655,200 at the 2017 exchange rate) in damages. The fourth, unidentified country also received a portion of the damages, although the specific amount was not disclosed. The damages awarded to these countries were intended to compensate them for the losses that they had suffered because of the bribery scheme. The funds were to be used to support development projects and initiatives that would benefit their respective citizens.<sup>a</sup>

- a Arrêt du 17 Octobre 2017, Guinea ([https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight\\_docid=aza%3A%2F%2F17-10-2017-1B\\_261-2017&lang=fr&type=show\\_document&zoom=YES&](https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F17-10-2017-1B_261-2017&lang=fr&type=show_document&zoom=YES&)); ATF 129 IV 322 c. 2.2.4, Tunisia (

### Box 4.5. United States

A United States case leading to the recovery of damages by the Kyrgyz government shows the reach and flexibility of the American crime victim compensation law. U.S. citizen Eugene Gourevitch was convicted of defrauding the son of a former Kyrgyz President by deceiving him into sending Gourevitch US\$6 million to buy Apple stock. Damages in the amount of the fraud were about to be returned to the son when the Kyrgyz government intervened and objected. The government produced evidence that the US\$6 million came from money the son had embezzled from the government. As a result, an order was entered returning the funds to the government instead.<sup>a</sup>

- a In fact, the return was a two-step process. After the Kyrgyz government presented the evidence that was stolen from it, the court directed the funds be returned to the Department of Justice for further proceedings. *U.S. v. Eugene Gourevitch*, U.S. District Court for the Eastern District of New York, September 23, 2014. The government then successfully petitioned the Department to return them to it. *Petition of the Kyrgyz Republic to Adjudicate Interest in Property Pursuant to 21 U.S.C. Section 853(n)*.

German law provides for a competitor of a bribe payer to recover damages in a civil action under provisions of the Civil Code that protect an established and running business (*ingerichteter undausgeübter Gewerbebetrieb*) from intentionally damaging another party (*vorsätzliche sittenwidrige Schädigung*), contrary to public policy.<sup>13</sup> However, the requirements for establishing damages are strict, with the claimant having to prove that the bribe was the actual, factual cause of the loss—and that but for the bribe, it would have been awarded the contract. This is inevitably difficult to establish in cases where there are a large number of competitors. A 1999 analysis of German law found no case where a firm had recovered damages through this law.<sup>14</sup>

In Nigeria, in 2010, a civil society organization was admitted as having legal standing in a proceeding in which this organization demanded (unsuccessfully) compensation



**Table 4.1. Cases in which Governments have Recovered Damages in U.S. Courts**

Jurisdiction	Amount (US\$)	Date	Basis
<b>Cook Islands</b>	\$337,000	1979	FCPA conviction
<b>Germany</b>	\$160,00	1990	FCPA conviction
<b>Haiti</b>	\$73, 824	2009	Laundering bribe proceeds
<b>Kyrgyzstan</b>	\$6 million	2019	Embezzlement state funds
<b>Niger</b>	\$140,000	1989	FCPA conviction
<b>Thailand</b>	\$250, 000	2010	FCPA conviction
<b>Trinidad and Tobago</b>	\$4.5 million	2010	Settlement Florida state civil suit

Source: Richard E. Messick, "Legal Remedies for Victims of Grand Corruption Under U.S. Law." U.S Department of Justice, Justice Department Repatriates Forfeited Funds to the Government of the Kyrgyz Republic, February 26, 2019.

#### **Box 4.6. Bribery Investigations Using the FCPA**

In December 2019, the Swedish telecommunications giant, Ericsson, admitted to bribing officials in China, Djibouti, Indonesia, Kuwait and Vietnam to gain or maintain service contracts in the five countries. In May 2021, it announced it had settled a damage claim brought by its competitor, Nokia, for €80 million (US\$ 97,600,000). The only information available about the matter is an Ericsson press release indicating that the settlement had been prompted by FCPA violations in "five countries including in Djibouti." No case was filed, and the details about Nokia's claim, including the legal basis for its claim, are not publicly available.

In another case, Newmarket Corporation, an American manufacturer of gasoline additives, recovered US\$45 million in the settlement of a civil action it brought for losses incurred when a competitor bribed Indonesian officials to deny Newmarket a license to sell its additive in Indonesia. The suit was brought under federal and state laws that give competitors the right to damages if a competitor uses bribery or other "unfair methods of competition" to monopolize or attempt to monopolize a market. Newmarket's injury was directly attributable to the bribery. If not for the bribe, the company alleged that it would have been able to sell to the Indonesian gasoline additive market.<sup>a</sup>

a U.S. Department of Justice, "Ericsson Agrees to Pay Over \$1 Billion to Resolve FCPA Case," December 6, 2019; "Ericsson Announces Settlement with Impact in Second Quarter 2021," May 12, 2021, <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>; Hilary Russ, "Judge OKs Innospec's \$45M Deal to End Antitrust Suits," Law360, September 22, 2011, <http://www.law360.com/articles/273374/judge-oks-innospec-s-45m-deal-to-end-antitrust-suits>.

for the damage caused by corruption in the upper echelons of the State, in favor of a children's education programs.

#### 4.5.4 Individual natural persons

Citizens as users of public services may also suffer direct damage from corruption. In some countries, individual victims are excluded from possible reparation because the harms are considered "indirect" (see chapter 5). Moreover, several countries' responses to the questionnaires indicate that extortion victims are sometimes treated as criminals, guilty of paying a bribe (box 4.9).<sup>15</sup>

As indicated in the introduction of this publication, the primary focus here concerns the compensation of damages in complex cases or cases of grand corruption in which the victims are not necessarily individual natural persons, but rather collective groups of individuals or other entities.

#### 4.5.5 Collective victims

Mechanisms must be sought for the representation of the interests protected by rights in legal systems safeguarding collective rights, although the holder of collective rights is the society or any identifiable group therein. Since this entity is not corporeal –or, if it were, it would be too large to be able to take action. Since legal standing is not attributed by ownership of the right,<sup>16</sup> some jurisdictions grant the State this right to represent society, whereas others extend such standing to other entities and even to citizens themselves.

For example, in the case of Costa Rica, compensation for social damage is possible through civil action for compensation that could be part of the criminal proceeding. In accordance with Article 38 of the Code of Criminal Procedure,<sup>17</sup> this action may only be brought by the Attorney General's Office. Thus, the representation of society as a whole is exclusively granted to this authority that also holds, by legal imperative, the legal representation of the State.<sup>18</sup> The individual victims<sup>19</sup> nonetheless maintain the right to initiate civil action for compensation in criminal and contentious administrative proceedings. In two emblematic cases in Costa Rica (box 4.7), the Attorney General's Office of the Republic initiated the civil action for compensation in the criminal proceedings for social damage, together with other victims who demanded compensation for their individual damages.

The Costa Rican Constitutional Court had previously identified good public financial management as a collective interest that was subject to constitutional protection. On that basis, the prosecutor requested reparations for collective harms caused by corruption (bribery of a public official).<sup>20</sup> The Prosecutor in that case defined social damage as follows:

*(...) the Social Damage caused by the crime is the injury that as a consequence from a particular event or circumstance, is suffered by groups of people, sections of the community or associations; ultimately it is a grievance to the collective in its vital natural goods, property, assets or fundamental rights as a result of which the reparation of the damage caused results mandatory. The damage is immediate, caused by the crime to all individuals, affecting them not in their particular rights but as members of a community, of a Nation-State. The injury constitutes a damaging rupture to a conglomerate or a collective.<sup>21</sup>*

The settlement reached in this case provided for the reparation of the collective damage.

In Peru, the Constitution<sup>22</sup> grants the Public Prosecutor's Office the legal standing to represent society in judicial proceedings.

In Brazil, in cases of corruption, the Constitution<sup>23</sup> and Law 8.429/1992<sup>24</sup> determine the competence to initiate civil actions of administrative improbity. They provide that the Public Prosecutor's Office and other listed entities may initiate "public civil action" to claim full reparation of the damages caused by acts of improbity (box 4.8 and 4.9).<sup>25</sup>

## Box 4.7. Costa Rica

In the CCSS-Fischel case, the Fischel Corporation, an intermediary on behalf of the Finnish consortium, Instrumentarium Medko Medical, and the Costa Rican Social Security Fund (CCSS) reached an agreement in 2002 granting the latter a ten-year, interest-free loan under the National Hospital System Renovation Program. Irregularities including unfounded payments to high-level public officials and inconsistencies in the justification of the need and quantity of equipment to be acquired were identified, which led to an investigation by the Attorney General's Office of the Republic. The trial resulted in several convictions, including of a former President of the Republic. The Attorney General's Office demanded US\$89 million for the social damage caused by the corrupt conduct. The court accepted the principle of social damage, but considered the amount excessive, and only accepted a part of the claim resulting in a compensation in the amount of US\$ 639, 981.<sup>a</sup> The court recognized the part of the claims covering the social damage for prejudice to the national economy and the democratic system. However, it did not recognize the claims it considered outside the scope of social damage (for example, the cost of not taking advantage of a subsidy, interest not received, unclaimed equipment purchases, and overpricing). Two years after the judgment, in May 2011, and upon appeal by the parties involved, the Supreme Court of Justice upheld the conviction and lowered the sanctions—without affecting the civil compensation and the social damage.

In the Costa Rican Electricity Institute (ICE)-Alcatel case, the ICE awarded 400,000 cell phone lines to the Alcatel company in 2001, a transaction that was later proven to be irregular. The case led to several administrative, civil and criminal proceedings in Costa Rica, France and the United States. Over a decade of criminal proceedings led to the acquittals in the appeals court of all persons initially convicted. In the civil proceedings initiated by the Attorney General's Office and ICE in the first instance, damages totaling US\$ 52 million were sought by the Attorney General's Office and US\$ 20 million by ICE. The civil claim of the Attorney General's Office sought reparation for the social damage caused by the corrupt conduct to the people and the national budget of Costa Rica, as well as the degradation of the prestige of the nation of Costa Rica. The proceeding ended in a settlement in January 2010 under which Alcatel paid the Costa Rican Treasury US\$10 million compensation for the social harm caused by the corruption. Although the settlement and considerations that led to the determination of the sum are not public, the funds were paid and then allocated to the budget of the anti-corruption police and other public purposes.<sup>b</sup>

a Sentencia N° 370-2009 del Tribunal Penal de Hacienda del Segundo Circuito Judicial de San José (Sentence No. 370-2009 of the Criminal Treasury Court of the Second Judicial Circuit of San José), [http://www.aldia.cr/ad\\_ee/2009/noviembre/04/MMedia/0000009067.pdf](http://www.aldia.cr/ad_ee/2009/noviembre/04/MMedia/0000009067.pdf), Tribunal Penal de Hacienda de Costa Rica (Criminal Court of Finance of Costa Rica), Sentencia (Sentence) 167-2011, p. 762ss. En lo siguiente (In the following): "Sentencia de 2009".

b Juanita Olaya Garcia, Kodjo Attisso, and Anja Roth, "Repairing Social Damage Out of Corruption Cases: Opportunities and Challenges as Illustrated in the Alcatel Case in Costa Rica." (December 6, 2010). P. 11; Alcatel, Alcatel-Lucent—September 2010—A responsible behaviour—Controversies, September 2010, p. 1, available at [http://www.alcatel-lucent.com/csr/html/en/pdf/Controversies\\_Costa\\_Rica.pdf](http://www.alcatel-lucent.com/csr/html/en/pdf/Controversies_Costa_Rica.pdf).

### Box 4.8. The Lava Jato Case

Brazil's powerful meat processing company, JBS, owned by the J&F corporation, is the world's largest meat producer with a presence in 190 countries, employing 230,000 workers. In 2017, it agreed to pay US\$ 3.2 billion to the Brazilian government as a fine and minimum amount of restitution over a period of 25 years. The fine was imposed for a series of irregularities by the owners, the Joesly and Wesley Batista brothers. These included millions in bribe payments to 1,800 Brazilian politicians, as well as bribes paid to agricultural inspectors from the Ministry of Agriculture. The inspectors authorized the marketing of products that did not meet quality standards or that were expired or rotten. The corrupt practices uncovered by the Brazilian police included the repackaging of expired products, the substitution of meat for cheaper commodities such as soya and chicken, and the injection of potentially carcinogenic substances to disguise the poor state of food, including food intended for school lunches nationwide.

When the ordering of collective damages was imminent, a settlement with the authorities established that the entire amount of the fine would be allocated to reparation, divided between different entities. Approximately US\$ 700 million would also be allocated to purely social expenses, verified by civil society in areas such as education and health activities. This included support for human rights education, public oversight activities, training for entrepreneurs in communities in need, support for professional training courses for indigenous communities and economically disadvantaged groups.<sup>a</sup>

a Despacho Complementar. Acordo J&F. Referências: IC no 1.16.000.000393/2016-10 e PA de acompanhamento no 1.16.000.001755/2017-62.

### Box 4.9. Brazil

In the Brazilian Lava Jato (Car Wash) case, construction companies had paid public officials millions in bribes to approve contracts for refineries, processing plants, and other major works. The public contracts were subsequently priced far in excess of their actual cost and reasonable profit margin. To date, the Brazilian government has recovered US\$920 million in damages for the over-payments, both from those who took the bribes and those that paid them. Several cases are still outstanding.

Most of the assets were recovered through a cooperation mechanism or type of plea bargain called "*delação premiada*." The Brazilian prosecutors in charge of the investigations negotiated agreements with the defendants in which they recognized their responsibility in committing corrupt offenses. They also provided information about the facts and participation of other actors involved in the criminal activity. In exchange for the information received—which had to be relevant and useful for the recovery of assets or the identification of crimes and their authors—the prosecutors proposed to the judge the application of reduced sanctions, and in some cases, a total exemption from punishment. In most of the cases, the judge approved the agreements, thus acquiring the nature of a judicial sentence.

The American and Swiss governments, who investigated the laundering of Lava Jato proceeds in their own jurisdictions, also negotiated with the Brazilian offenders. On December 21, 2016, the U.S. Department of Justice signed the *Plea Agreement Cr. No. 16-643 (RJD), United States, Eastern District Court of New York, USA vs. Odebrecht SA*. The companies of the Odebrecht Group admitted to the payment of US\$ 788 million dollars in bribes in more than 100 projects in 12 countries, in turn obtaining US\$ 3.3 billion dollars of undue benefits. The US imposed a fine of US\$ 2.6 billion dollars that was distributed as follows: US\$ 2.391 million to Brazil; US\$ 116 million to Switzerland; and US\$ 93 million to the United States.

Despite these events, none of the recovered assets in the Lava Jato case reached the Brazilian people that suffered the consequences of this premeditated corruption scheme. Over 170,000 workers of Petrobras lost their jobs in 2014 and 2015, and the public trust in and credibility of Petrobras and the supervisory agencies in Brazil was harmed. In view of Petrobras' reach, this affected infrastructure projects not only in Brazil, but throughout Latin America.

## Notes

- 1 Mauro Bussani and Marta Infantino, "The Many Cultures of Tort Liability," *Comparative Tort Law: Global Perspectives*, M. Bussani and A. Sebok, eds., Cheltenham, Edward Elgar, 2017, pp. 11–38; James Gordley, "The Architecture of the Common and Civil Law of Torts: An Historical Survey," *idem*, pp. 173–200; John Bell and David Ibbetson, *European Legal Development: The Case of Tort*, (Cambridge, Cambridge University Press, 2012).
- 2 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.
- 3 LOI n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière. (LAW No. 2013-1117 of December 6, 2013 relating to the fight against tax fraud and serious economic and financial crime).
- 4 Countries include Austria, Bolivia, China, Indonesia, Italy, Poland, Romania, Russia, and Switzerland.
- 5 Decision of Milan Tribunal, July 9, 2009, <https://www.rivista231.it/Pagine/Stampa.asp?Id=568>; Dario Franzin, Crimes against Public Administration in Italy, n. d., [https://www.sippas.eu/wp-content/uploads/2019/07/bribery-and-corruption\\_DARIO-FRANZIN.pdf](https://www.sippas.eu/wp-content/uploads/2019/07/bribery-and-corruption_DARIO-FRANZIN.pdf).
- 6 Mjriana Visentin, "Corruption Victims: Law and Practice in Italy, Russia, other European States." *Global Anticorruption Blog*, March 24, 2021.
- 7 A notable example of a country with a strong Roman law heritage where the law was changed was in Portugal. Anyone harmed by corruption is entitled to be treated as an "offended person" in a criminal prosecution, and thus recover damages upon a conviction. See APV (*Apoio a Vítima*), *Para um Estatuto de Vítima em Portugal: Direitos Mínimos das Vítimas de Todos os Crimes*, June 2015, p. 17, cited in Mjriana Visentin, *ibid*.
- 8 The rules governing class actions in federal courts are set out in Rule 23 of the Federal Rules of Civil Procedure. States have their own versions for cases brought under state law. Thomas A. Dickerson, *Class Actions: The Law of 50 States* (Law Journal Seminars Press, New York, 1988).
- 9 Spanish law took from Roman law the right of any citizen to bring a "popular action" to secure recovery for harms the state suffered. Also, at independence, Latin American nations included the right in their laws. As part of the consolidation of state power in the 19th century, Latin American countries moved to grant public prosecutors (*Ministerio Público*) sole power to bring them. Thales Moraes da Costa, "As Ações Populares Previstas Pelo Código Civil e a Evolução do Direito Administrativo Colombiano [The Popular Actions Provided for in the Civil Code and the Evolution of Colombian Administrative Law]," *Revista Derecho del Estado* n.º 34, enero–junio de 2015, pp. 61–76. Popular actions are still permitted in Spain, although critics have suggested that, in light of what they say are abuses, they be curtailed. Javier Gómez De Liaño, "Uso y Abuso de la Acción Popular," ("Use and Abuse of Popular Action") *El Mundo*, October 29, 2014; Julio Pérez Gil, "La Acusación Popular, Memoria de Tesis para la Obtención del Grado de Doctor" ("The Popular Accusation, Thesis Report for Obtaining the Degree of Doctor"), Valladolid, 1997. The advantages and disadvantages to expanding those who can bring an action in court, or who have standing to do so, are examined in Matthew Stephenson, "Standing Doctrine and Anticorruption Litigation: A Survey," in Open Society Foundations, *Legal Remedies for Grand Corruption: The Role of Civil Society* (New York, OSF, 2019) pp. 38–52.
- 10 Mauricio Duce, Cristián Riego, Valentina Zagmutt y Bastián Martínez, *El Sistema de Justicia Penal Y Su Lucha Contra la Corrupción En América Latina: Informe de Chile* (The Criminal Justice System and Its Fight Against Corruption in Latin America: Report from Chile), Espacio Público, Santiago, 2019, pp. 86–93. The plethora of NGOs can sometimes hinder recovery. *Id.* pp. 90–91.
- 11 Richard E. Messick, "Legal Remedies for Victims of Grand Corruption Under U.S. Law," in Open Society Foundations, *Legal Remedies for Grand Corruption: The Role of Civil Society* (New York, OSF, 2019), p.103.
- 12 Mesick. *Ob. Cit.*
- 13 Matthias Weller, "Who Gets the Bribe?—The German Perspective on Civil Law Consequences of Corruption in International Contracts," in M.J. Bonell and O. Meyer, eds. *The Impact of Corruption on International Commercial Contracts*, *Ius Comparatum—Global Studies in Comparative Law*, Cham, (Switzerland, Springer International), 2015, pp.171–188.
- 14 Olaf Meyer, "Combating Corruption by Means of Private Law—The German Experience," in O. Myer, ed., *The Civil Law Consequences of Corruption*. (Nomos Verlagsgesellschaft GmbH & Co), 2009
- 15 Mjriana Visentin, *Corruption Victims: Law and Practice in Italy, Russia, other European States*, *Global Anticorruption Blog*, March 24, 2021.
- 16 In environmental matters: Judicial School of Costa Rica. *Judicial School of Costa Rica. Manual on valuation of environmental damage. Module 5: Economic valuation of the damage.* 2017, p. 43.
- 17 Art. 38 (Code of Criminal Procedure of Costa Rica): *Civil action for social damage Civil action may be brought by the Attorney General's Office, when it concerns punishable acts that affect collective or diffuse interests.*

- 18 Article 1 of the Organic Law of the Attorney General's Office.
- 19 Regarding the concept of victim, see Article 70 of the Costa Rican Code of Criminal Procedure, specifically paragraph d), which refers to crimes that affect collective or diffuse goods.
- 20 Res: 2001-8239. Sala Constitucional de la Corte Suprema de Justicia (Constitutional Chamber of the Supreme Court of Justice), de las 16:07 horas del 14 de agosto del 2001 and Res. No 2006-15960 SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA (CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF JUSTICE). San José, a las 14:53 horas del 1 de noviembre de 2006.
- 21 See Olaya Garcia Op. Cit. p.17
- 22 Art. 159.3 (Political Constitution of Peru): *Attributions of the Public Prosecutor's Office: (...) 3. To represent society in judicial proceedings.*
- 23 Paragraph 1 of Article 129 of the Federal Constitution of Brazil establishes that the standing of the Public Prosecutor's Office for the civil actions provided for in said article does not preclude that of third parties as provided by law.
- 24 Article 17, Law 8429.
- 25 STJ-RESP 510150-MA- 1 Turma- Rel.Min. Luiz Fux- DJU 29.03.2004-P. 00173.



# 5 Establishing Damages

Whereas the previous chapter addressed legal standing and victim status, this chapter examines issues relating to the proof of damages. It begins by briefly introducing the basic terms inherent in such a process, including:

- Direct and indirect damages
- Material and immaterial damages
- Proof of damage
- Measurement of damage.

As indicated in chapter 3, general principles of civil liability and tort law provide that to establish a claim for compensation, the claimant must prove:

- Harm (injury, loss, or damage that the claimant has suffered as a result of the defendant's actions).
- Causation (the relationship between the defendant's actions and the harm suffered by the claimant).
- Proximity (the closeness of the relationship between the defendant's actions and the harm suffered by the claimant).

## 5.1 Direct and indirect damages

Many jurisdictions recognize two types of damages: direct damages and indirect damages. Direct damages, also known as actual damages, are damages that result directly from the defendant's wrongful conduct. Indirect damages, also known as consequential damages, are damages that materialize indirectly from the defendant's wrongful conduct. The distinction is significant as most jurisdictions do not appear to render indirect damages recoverable. In those that do, the indirect damages must be a *foreseeable* consequence of the defendant's wrongful conduct.

A fictional case may demonstrate the distinction between the two concepts. In a case in which a supplier bribes a procurement officer at a public health clinic to accept adulterated pharmaceuticals, the clinic is the direct victim of the bribery, as it overpaid for the drugs. Any damages a patient suffered from taking the medicine were "indirect" or "secondary" effects of the bribe. Many European jurisdictions refer to the patient's injury as "ricochet damage" to capture the idea the harm bounced or ricocheted off the primary victim. This sort of damage is illustrated in box 5.1.

### Box 5.1. Ricochet Damage

A newspaper recounts an especially tragic example from Uganda. It shows how much harm even a small request for payment can cause. A woman experiencing problems in labor arrived at a local clinic for medical attention. Despite being entitled to free care under Ugandan law, the attending personnel refused to treat her until she paid 50,000 Ugandan shillings (about US\$15). Unable to pay, the mother was turned away and died with the baby thereafter.<sup>a</sup>

<sup>a</sup> U.S. v. McGee, 612 F.3d 627 (2010); Gladys Kalibala, "Her Mother's Death Could Have Been Prevented," New Vision, July 15, 2014.



Damages that are widespread and that affect a non-individualizable group of people are understood as collective damages. In the case of corruption, the term “social damage” is used by some jurisdictions interchangeably with that of collective damages. Collective rights have a different logic than individual rights, as the harms caused by collective damages are immediate, although not necessarily direct. For example, if the courts of a country are not functional because of corruption, this affects persons with cases currently before the courts, as well as persons whose cases could potentially be heard by the courts. The harm does not become nonexistent for those not making use of the courts; rather, it is a question of when they will need to make use of them. Therefore, the impact on the capacity of the institution to deliver justice affects a certain group of people, as well as the society as a whole. The victims, in this example, may not have suffered a *direct* loss due to an act of corruption, but society as a whole is prevented from enjoying the collective right of access to justice it would have otherwise had.

The extent to which liability should be attributed down the causal chain as a result of a wrongful act has been primarily left for the courts to determine in each specific case. In making a decision, various doctrines are drawn upon, with comparative law scholars having termed the concept of “control devices,” aimed at reasonably limiting liability. Thus, one of the basic control devices courts use is the “distance” between the act and the damage. Questions include how closely related in time and space to the wrongful act

the injury is determined to be, as well as how foreseeable it was that the defendant’s actions would injure the claimant. Where the court deems the act “remote” or “indirect” or not “foreseeable,” the courts hold the defendant not liable for damages, with compensation due only to those “directly” or “immediately” or “foreseeably” injured by the wrongful act.

These issues can be overcome through the use of criteria of modern criminal law that have been successfully incorporated in other criminal matters, in particular, the structure of “crimes of abstract danger” and the concept of “eventual malice,” including environmental offences, cybercrime, terrorism-related offences, the possession of dangerous materials, and traffic violations. Crimes of abstract

or potential danger refer to crimes that are criminalized in view of the *potential* harm posed by the conduct in question. Therefore, they are independent of any actual damage caused, but are aimed at preventing conduct that may pose a danger to society.<sup>1</sup>

Although such crimes are often subject to severe penalties, the prosecution is required to establish a causal connection between the defendant’s actions and the potential harm posed to the community. However, in recognizing that the harms of such crimes are by their nature not direct, the causal link can be established by other criteria than that traditionally used to determine culpability. The concept of “eventual malice” allows for defendants to be held accountable based on their mere awareness that their action was likely to result in harm. Thus, the systematic application of such concepts to corruption cases would permit the addressing of these challenges of a legal framework that is not adapted to the reality of the harms caused by corruption.

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“The extent to which liability should be attributed down the causal chain as a result of a wrongful act has been primarily left for the courts to determine.”

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## 5.2 Material and immaterial damages

Corruption generates different types of damage, that can be categorized as: (i) material (or pecuniary) damages, which can be accounted for in monetary terms; and (ii) immaterial (or non-pecuniary) damage, referring to losses that do not have a material form or are not easily (or arguably at all) convertible into monetary form. Many jurisdictions foresee reparation for both types of damage in principle, although the establishment of proof and the quantification can be more challenging for the recovery of immaterial damages.

### 5.2.1 Material damages

One of the most apparent and conspicuous types of damage is pecuniary damage, which can be quantified in financial terms. It can be assessed using tangible indicators, such as the amount of money that has been misappropriated or lost, or the value of any infrastructure or projects that have been impacted.

Jurisdictions differ over whether such damages include profits that would have been earned but for the defendant's wrongdoing.<sup>2</sup> Lost profits are one form of what many countries label "pure economic loss." The laws governing recovery vary considerably from those in the United States where they are recoverable so long as a reasonable estimate is presented; to those provided in countries like Germany, where "pure economic losses" are not recoverable, and France where these can only be recovered in limited circumstances.<sup>3</sup> Other countries have laws in which this will depend on the circumstances giving rise to the loss.<sup>4</sup> An academic proposal concerning the harmonization of European tort law offers a consensus approach to the issue by recommending that lost profits and other "pure economic damages" be recoverable, but only in cases in which the wrongdoer was "aware of the fact" that his or her action would cause damage.<sup>5</sup> Profits lost due to corruption would seem to readily meet this test.

A lost profits claim was the basis of the previously mentioned gasoline additive manufacturer Newmarket's US\$45 million recovery. The argument was that Newark would have made profits on the sale of its additives had the competitor not blocked its entry into the Indonesian market. The amount of the profit could of course never be precisely determined. Under American law, however, if a claimant has established the defendant caused the injury, the claimant can then recover lost profits, provided it produces a reasonable estimate of the amount.<sup>6</sup>

### 5.2.2 Immaterial damages

Corruption can have intangible effects that extend beyond financial losses. These effects may include the non-enjoyment of basic socioeconomic rights, such as access to education and healthcare. Corruption can have significant non-monetary impacts that are closely tied to the role of the state. These impacts include weakened institutions, a loss of legitimacy, and a decline in the ability of public bodies to fulfill their mandates, such as providing impartial justice, preventing impunity, and maintaining electoral systems.

Despite the nature of immaterial damages, it is common practice for courts to assign a monetary value to intangible concepts, such as emotional impact and suffering. In such cases, the courts attempt to quantify the value of non-monetary losses in a process without objective standards for assessing the financial value of such harms.

Since the 1990s, the Court of Cassation in France has paved the way for public legal entities to be compensated for moral damages (box 5.2).<sup>7</sup>

Non-pecuniary compensation may include an acknowledgment of wrongdoing, an order for the defendant to undertake specific actions to rectify the harm caused, and the provision of non-monetary resources or services. No instances of corruption cases providing non-pecuniary compensation have been found.

## Box 5.2. Moral Damages

In France, the Court of Cassation upheld a judgment<sup>a</sup> in 2004 in which the Court of Appeal had awarded the State compensation for moral damages resulting from the contempt that these crimes cast on the entire public service and the consequent weakening of the State's authority:

*...on the grounds that the State is entitled to claim compensation for the non-material damage it has suffered as a result of the influence peddling and favoritism committed by these agents in the performance of their duties, insofar as these acts, which are detachable from the function in which they were committed, discredit the civil service as a whole, weaken the authority of the State in the eyes of public opinion and cause it direct personal damage.*

*...on the grounds that the damage to the material interests of the State (...) is constituted by the value of the advantages improperly paid and accepted and the additional financial cost resulting from the integration of this value in the price of goods and services provided by the beneficiaries of the public order and the payment of supplies and work not carried out or over-invoiced, without however that the sums claimed for this over-invoicing can be fully retained by the Court in the state of the documents in the file and the uncertainty of the bases of calculation taken into account by the civil party to quantify the amount of this over-invoicing; the systematic and widespread influence-peddling between the parties, and the associated offences of favouritism, fraud, forgery and use of false documents, which necessarily distorted competition and the best use of public funds.*

a Cour de Cassation, Chambre criminelle, 10 mars 2004, 02-85.285 (<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007071292>, last accessed 6 July, 2023).

## 5.3 Proof and measurement of damages

In addition to establishing the elements of harm, causation, and proximity, the plaintiff must also be able to provide proof or evidence concerning the quantification of the loss. In most jurisdictions, the type of evidence required to show the extent of the loss is left to the court's discretion, with legislation providing general guidance in some cases. Although it may be within the court's discretion to conclude whether there is sufficient evidence in a given case, the standard of proof remains the same regardless of the type of entities serving as plaintiffs. Thus, in civil cases, the standard of proof required to establish the proof is the balance of probabilities, meaning that the plaintiff's claim is found to be more likely than not to be true based on the evidence presented.

Although it is possible to determine the existence of harm through proof of damages, it may not always be feasible to measure or quantify its scale.

Jurisdictions appear to take different approaches with guidance typically issued in the form of a statute or a supreme court decision, as a broadly worded directive that the figure cannot be purely speculative or that it must be based on a credible showing.<sup>8</sup> Other countries request that the exact figure of damages be shown or a "clear and precise" basis for the estimate be provided, as in the Spanish criminal procedure code. By contrast, an American appeals court has ruled that a town seeking damages from its sheriff for taking bribes need only provide "rough approximation" of the harm suffered (box 5.3).<sup>9</sup>

Damages that are immaterial or those that relate to the claimant's financial interests often cannot be accurately measured. For example, in such cases, it is necessary to estimate the cost of a product or service or the potential earnings of a losing bidder. However, in the majority of corruption cases, it is not possible to determine the exact extent of damage caused. As provided by the South African High Court, all that can be expected of the plaintiff is "to place the best available evidence before the court on the

issue of quantification. Once it has done so, the court will do the best it can to quantify its loss.”<sup>10</sup>

Similarly, in rejecting a defendant’s argument that damages they caused cannot be precisely specified, the United States Supreme Court ruled that a defendant has no standing to object that a damage estimate lacks “the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.”<sup>11</sup>

What the South African High Court termed the “best available evidence” still leaves much room for judgment, and in making that judgment guidance should direct the courts to take account of the time and cost involved in making the calculations and on their actual use (box 5.4).

An interesting practice is illustrated by another line of American cases involving bribery damages. As with French law, U.S. law recognizes that bribery causes non-pecuniary damages as well as economic damages. Under U.S. law, the damage arises from the bribed employee’s betrayal of the employer’s trust and confidence. That betrayal, that breach of an employee’s duty to provide honest services, is separate and apart from any overcharge the bribe caused. The issue is how to quantify it. The method the courts have settled on is to require the dishonest employee to refund some percentage of his or her salary, reasoning that for some percentage of time during employment they were not rendering honest services (box 5.5).

Finally, it is important to distinguish the measurement of the damage from the amount of the reparation, as they do not necessarily coincide. In cases involving bribery, some jurisdictions limit the amount of the damages to the amount of the bribe. Although this provides a simple quantification of reparations, it is based on the erroneous assumption that the amount of the bribe is systematically equal to the amount of the damage (box 18).

The main challenge in establishing damages in corruption cases relates to the nature of such damages, which, in most cases, do not have individual and direct victims with a traditional causality nexus. Instead, the (often) collective victims suffer harm in less direct ways, and not only in the form of pecuniary damages.

### Box 5.3. Existence of Harm through Proof of Damages

A rough approximation may still need some precision, as was demonstrated in a case in the U.S in which a government agency failed to provide a “rough approximation,” following the conviction of the mayor of the city of Detroit, Michigan, who was an accomplice of an act of bribery. The mayor and a local construction company unlawfully demanded that any other firm wanting a city contract had to hire the local company as a subcontractor. Multiple contracts were affected; for some, the company actually had carried out the work it was contracted to do, whereas in other cases, it either did no work or substandard work. The average profit margin on city construction contracts was ten percent. Applying this figure to the earnings of the local firm from the subcontracts, Detroit argued, was sufficient evidence of the damages, “a reasoned approximation of the amount of money [it] was unknowingly forced to spend for contracts obtained through fraud and deceit.” While the trial court agreed, the appellate court held the city would have had to present contract-by-contract evidence of its losses.

Source: United States v. Kilpatrick, 798 F.3d 365 (6th Cir. 2015).

### Box 5.4. Moral Damages

A case in France demonstrates that quantifying the damages caused by corruption can sometimes be straightforward. Following the conviction of the mayor of the French city of Cannes for taking bribes in return for reducing a company’s taxes, the city was awarded €2.6 million, or the exact amount of taxes that went uncollected because of the bribery. However, the lost tax revenue was not the only injury the city sustained. As host of the famous international film festival, the notoriety from the bribery injured the city in a way not measurable in monetary terms. For this non-pecuniary harm, termed *préjudice morale* (“moral damages”) in French law, the court awarded the city €250,000.<sup>a</sup>

a (Cass. Crim No. 05-80.488, 8 février 2006.).

### Box 5.5. Non-Pecuniary Damages

In Illinois, a police chief, during his tenure from 1990 to 1994, received some US\$500 a month from an organized crime group to protect illegal gambling in the town's bars and restaurants. His conviction was based on conducting an enterprise through a pattern of racketeering. This was in violation of a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) Statute and led to his sentencing to 88 months in prison, as well as a requirement to pay restitution to Northlake equal to a year's salary as police chief. His appeal was based on contesting the estimated costs associated with his crimes and the gambling activities he supported.<sup>a</sup>

Another case relates to procurement corruption by the Chief of the Commodity Procurement Section within the United Nations' Procurement Division from 1998 to 2003. He violated United Nations rules by "providing [a friend's family] with inside information on the bidding process for contracts; convincing U.N. employees that [the family's] companies' bids did not raise concerns; counseling [the family] on how to win contracts; and assisting in the preparation of documentation to the U.N., without disclosing to the U.N.". The district court ordered the offender to reimburse the U.N. for US\$846,067.03 worth of legal fees incurred in bringing this case, as well as the US\$86,098.36 in salary he was paid while he was suspended following the indictment, after depriving "his former employer, of its intangible right to his honest services."<sup>b</sup>

a U.S. v. Sapoznik and U.S., 1998.

b Bahel, 662 F.3d 610 (2d Cir. 2011).

### Box 5.6. Quantification of Reparations

In the case of the *Programa de Alimentación Escolar-PAE* (School Feeding Program) cartels in Colombia,<sup>a</sup> companies undertook widespread bribery, kickbacks and collusive agreements to split the bids for contracts to supply schools with meals for the children. After noticing companies were not complying with quality, quantity and nourishment standards, the corruption scheme was discovered. Beyond the contracting value of the meals and the overpricing involved in the schemes, the right to food for these school children was affected, as were their levels nourishment. Reparation in this case could have taken the form of complementary nourishment and additional health and cognitive support to try to mitigate the impacts. These may cost less than the actual damage inflicted, which could include the lifetime impact of years of poor nourishment.<sup>b</sup>

a <https://www.elespectador.com/judicial/el-programa-de-alimentacion-escolar-es-una-mercancia-para-la-corrupcion-fiscalia-article-809171/>.

b There were also major reforms introduced after this case, some of which have worked effectively. See <https://medium.com/open-contracting-stories/the-deals-behind-the-meals-c4592e9466a2>.

## Notes

- 1 See Duff, Robin Antony and Marshall, S. E., "Abstract Endangerment, Two Harm Principles, and Two Routes to Criminalization." (July 24, 2015). Minnesota Legal Studies Research Paper No. 15–19, Available at SSRN: <https://ssrn.com/abstract=2635589> or <http://dx.doi.org/10.2139/ssrn.2635589>.
- 2 See StAR's [Public Wrongs, Private Actions](#) (Public Wrongs, Private Actions | Stolen Asset Recovery Initiative (StAR) (worldbank.org)).
- 3 Helmut Koziol, "Recovery for Economic Loss in the European Union," *Arizona Law Review*, Volume 48, 2006, pp. 871–895.
- 4 Mauro Bussani, Vernon Palmer, and Francesco Parisi, "The Comparative Law and Economics of Pure Economic Loss," in G. De Geest and C. Nagel, eds., *Economics of Comparative Law*, (Cheltenham, Edward Elgar 2009).
- 5 Helmut Koziol, "Recovery for Economic Loss in the European Union," p. 894.
- 6 (*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).)
- 7 « *L'action civile des personnes publiques dans le process penal* » (« Civil action by public persons in the criminal process »), *CJASS* January/February 2012.
- 8 The different verbal formulae EU Member States' laws use to express this idea is compiled in Denis Waelbroeck, Donald Slater, and Gil Even-Shoshan, *Study on the Conditions of Claims for damages in Case of Infringement of EC Competition Rules*, Ashurst, August 2004.
- 9 *U.S. v. Sapoznik*, 161 F.3d 1117 (7th Cir. 1998).
- 10 *Stephen Malcolm Gore V. Minister of Finance and others*, High Court, Transvaal Provincial Division, Case No: 11190/99, October 30, 2008.
- 11 *Story Parchment*, p. 563.



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# 6 Conclusion and Reflections for the Future

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This publication was aimed at presenting an overview of the current, existing international legal frameworks allowing victims to recover corruption damages, as well as the judicial and non-judicial challenges involved in their use. Rather than promoting specific regulatory solutions, and given the trade-offs involved in any change of law and policy, including the constraints regarding practical implementation, this brief concluding chapter, invites legislators, prosecutors, law enforcement officials and indeed the general public to explore a range of different measures aimed at better enabling victims to recover (individual, as well as collective) corruption damages.

## 6.1 Enabling the participation of victims in criminal proceedings

In legal systems governed by civil law principles, individuals who have suffered harm can request the status of a “civil party” in a criminal prosecution. Upon approval by the court and upon establishing proof of damages, these individuals may be entitled to seek compensation in the event of a conviction. Depending on the specific laws of the country, those granted civil party status may also be granted various rights, such as access to the prosecution’s evidence, involvement in the pre-trial investigation, the ability to pursue separate investigative leads, and the opportunity to present evidence during the trial.

In certain countries, individuals with civil party status even have the right to challenge prosecutorial decisions to not initiate a case or to dismiss it before a judgment is rendered. While traditionally this approach has been more prevalent in civil law jurisdictions, common law nations have increasingly introduced legislation that either permits or mandates their criminal courts to order individuals convicted of crimes to provide compensation to their victims, while also developing sentencing and settlement guidelines. The recommendations provided below are intended to promote the development of mechanisms in all legal systems that facilitate the recovery of damages by victims through criminal proceedings.

- Legislators of countries that do not enable victims to intervene as parties to criminal proceedings should consider enacting legislation enabling such interventions.
- Policymakers and prosecutors should consider adopting measures to ensure that individuals and groups of individuals who might reasonably be considered potential victims, are informed of investigations and proceedings, as well as their right to join the proceedings as a civil party.
- Legislators should consider granting victims the right: (i) to participate in the pre-trial investigation; (ii) to contribute evidence and present it at trial; (iii) to request the prosecution to gather such evidence, and gain access to it; and (iv) to pursue separate and independent lines of inquiry. Such measures could be adopted without breaching



the secrecy of pre-trial investigations or creating an additional burden law for enforcement authorities.

- Legislators should consider enabling an independent review (including by victims) of a decision not to prosecute a corruption crime.
- Legislators and policymakers should consider ways of limiting the litigation costs for victims, such as by foreseeing mechanisms for donor funding and prohibiting excessive charges for public interest litigation.

## 6.2 Enabling the participation of victims in non-trial resolutions

Non-trial resolutions offer a quicker way to address complicated cases and demand fewer resources compared to the process of securing a conviction. However, such settlements usually take place through discussions between the prosecuting authorities and the

accused, thus excluding the potential victims from direct involvement, as it is assumed that the authorities will safeguard the victims' interests. The confidential nature of these agreements leaves victims reliant on information provided by law enforcement agencies. The absence of established procedures that consider the interests of victims in corruption settlements poses a challenge in ensuring their proper representation and, ultimately, in securing full compensation. Therefore, it is recommended that countries address these challenges by ensuring that their legislation and policy address the interests of victims in the context of non-trial resolutions. In this regard, it is recommended that:

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“Legislators should legislatively foresee the participation of victims in the negotiation of non-trial resolutions.”

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- Legislators should legislatively foresee the participation of victims in the negotiation of non-trial resolutions, and their representation in the decision-making process concerning the allocation of compensation of reparations, as well as in the oversight of the disbursement of the funds. Policymakers should develop guidelines to ensure that the interests of victims are represented in the course of these processes and in practice.

## 6.3 Accounting for the nature of corruption damages

Corruption damages, particularly in cases of grand corruption, are generally widespread and affect a non-individualizable group of people or the entire society as a whole. In some countries, government agencies, non-governmental organizations, or any individual, can initiate legal action. This can be achieved through class actions or representative actions to recover such social, diffuse, and collective damages on behalf of a group or even the entire population of the nation. The following recommendations are aimed at encouraging all countries—independent of their legal tradition—to find ways of legislatively and practically accounting for the nature of corruption:

- Legislators, prosecutors and judges may consider ways of extending the ability to recover damages to collective victims, including by legislative reform, where

necessary. Compensation for damages should not be limited to individuals who were directly damaged by a corruption act, following the traditional causality nexus.

- Legislators should consider the trade-offs of amending restrictive legislation on standing so as to allow individuals and NGOs to make claims for collective (as well as individual) reparation.
- Legislators should consider enabling victims to claim damages for breaches of a public contract in which they were the beneficiaries, while also taking account of the potential commercial implications of such a measure.
- Legislators and judicial officials should consider expanding the reparation of the damages to non-pecuniary damages.

## 6.4 Enabling the recovery of damages through reparation funds

The harms of corruption persist independently of the ability to bring to justice those liable for those harms. Given the imperfections of litigation in fully compensating for the harms resulting from corruption, even when the offenders are brought to justice, countries are invited to explore the establishment of reparation funds designed to allocate resources for addressing these damages.

- Thus, policymakers should consider ways of establishing state reparation funds to cover material and immaterial damages in cases for which reparation cannot be accomplished through other means.

## 6.5 Measures beyond legislative and policy frameworks: Access to information, research and participation of civil society, academia and victims of corruption

Finally, when comparing the dearth of cases with the internationally existing substantive and procedural laws, it appears that in some cases, the legal frameworks are not necessarily too restrictive. Rather, the avenues are not exploited due to insufficient precedent and knowledge or financial capacities. Thus, countries should consider taking measures to enhance access to data, continued research, and the active involvement of civil society, academia, and victims of corruption in efforts towards recovering corruption damages as follows:

- Administrative authorities, policymakers and the judiciary should monitor and publicly report on instances of reparation for corruption.
- Researchers and legal scholars are encouraged to closely follow and study the jurisprudence and conduct surveys of practitioners and victims to continuously identify ways of addressing the numerous challenges in the legislation, court doctrine, and/or practice.
- NGOs are encouraged to actively intervene as parties to criminal and civil proceedings in cases affecting collective or diffuse rights and interests.



Corruption harms communities and impacts the global economy. It discourages business opportunities, hinders foreign aid and investment, and exacerbates inequality. It victimizes society's most vulnerable and marginalized individuals by affecting their ability to meet their basic needs, as well as reducing their chances of overcoming poverty and exclusion.

As such, anti-corruption efforts would be incomplete if damages arising from corrupt acts remain unaddressed. This publication aims at stimulating further research and exchange on the matter by providing an overview of the current state of law and practice regarding the recovery of corruption damages; outlining the different types of legal frameworks and avenues available in different legal systems; and the respective legal barriers and other challenges that may arise.

