

RESTORING THE RIGHTS OF VICTIMS OF CORRUPTION

A STUDY OF LESSONS FROM GOOD PRACTICES GLOBALLY



Restoring the Rights of Victims of Corruption:

A Study of Lessons from Good Practices Globally



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1 INTRODUCTION

Although efforts to eradicate corruption have been on the global political agenda for the past few decades, both repressive and preventive approaches to corruption are considered inadequate. This approach is important because corruption also has a big impact on individuals who are in the most vulnerable and marginalized positions. This is because corruption limits their access to basic needs and reduces the chances of vulnerable groups to escape poverty and social isolation. (Ambraseys & Bilham, 2011)

In the construction and health service sectors, for example, corrupt practices can even take lives. This misappropriation of public funds also contributes to the decline in the quality and availability of essential services such as education and environmental protection. When corruption is committed by criminal groups connected to influential economic and political actors, the risk of instability and violence increases, which ultimately threatens international peace and security. (Mackey, 2016) (Rose-Ackerman & Palifka, 2016)(Chayes, 2017)

In recent years, there has been an increase in recognition of the link between corruption and human rights violations, as reflected in two UN Human Rights Council resolutions in 2021¹. Explicitly, it is said that corruption impacts economic, social, and cultural rights by affecting the availability and quality of public goods and services. At the same time, corruption erodes civil and political rights by weakening the functioning of state institutions, undermining the rule of law, and undermining the legitimacy of government. (Hava, 2016)

Although this understanding is growing and a number of studies have been conducted, the impact of corruption is still difficult to quantitatively measure, especially due to its hidden nature. As in environmental crimes, victims of corruption are not always easy to identify, and often they are not even aware that they have been harmed. (United Kingdom's Department for International Development, 2015) (Skinnider, 2013)

Recovery of losses (reparations) itself is a universally recognized legal principle. In the legal system *common law* And *Civil Law*, reparations are understood as an attempt to restore the victim's condition to its pre-legal condition (*restitutio ad integrum*). Terms such as (Elizabeth Oger-Gross & André, 2018)*recovery, restitution, reparation, compensation, remedy, and Redress* It is often used interchangeably in different jurisdictions, although it can have different meanings and scopes.

Furthermore, the recovery of losses in the context of corruption can generally be reviewed through two conceptual frameworks, namely the anti-corruption approach and the human rights-based approach. Human rights are defined as the internationally

¹ Resolution adopted by the Human Rights Council No. A/HRC/RES/46/11 dated 26 March 2021 on the negative impact of non-return of funds derived from criminal acts (funds of illegal origin) to the country of origin on the fulfillment of human rights, as well as the importance of enhancing international cooperation; and Resolution A/HRC/RES/47/7 dated July 26, 2021 concerning the negative impact of corruption on the fulfillment of human rights.

guaranteed legal rights of individuals against the state. In this context, the human rights-based approach emphasizes the victim's right to seek recovery, both individually and collectively. This approach differs from repressive strategies that focus on prosecuting perpetrators and enforcing accountability, although both are rooted in the principle of the rule of law that underlines that all people and institutions, public and private, are subject to laws that are enforced in a fair and transparent manner. (Kälin & Künzli, 2022) (Bingham, 2011)

Meanwhile, the UN Convention Against Corruption (UNCAC), as the only legally binding international anti-corruption instrument, has set out provisions that support a national legal framework in enabling victims to claim recovery of losses and assets obtained through corruption. Chapter V of the UNCAC, which regulates asset recovery, has reflected the expansion of the anti-corruption paradigm from just cracking down on perpetrators to returning assets to their rightful owners, including the country of origin.

The inclusion of a clause on compensation for victims, while limited, demonstrates the potential synergies between anti-corruption regimes and human rights-based approaches. However, the integration of the concept of "victim" in the anti-corruption agreement requires a shift in focus from simply accountability and impunity prevention to a more holistic goal. This is important to ensure that there is a mechanism for recovering losses experienced by victims, both individuals, affected communities, and the state.

Although there is an international consensus as stated in various international and regional instruments and declarations, until now there has been no systematic study of the mechanism for reparations for victims of corruption. Findings from existing studies, both from academics, civil society, and UNODC, indicate that only a small percentage of countries have compensated victims of corruption. Even in many cases of asset recovery, there is no information on whether the victim received reparations, or even no involvement of the victim at all. (Transparency International, 2020)

This gap was brought to the attention of the 6th Session of the UNCAC Conference of the States Parties (COSP) in 2015, which resulted in a resolution to encourage the development of best practices in identifying victims and setting compensation parameters². The discussion continued in subsequent sessions in 2017 and 2019, with additional resolutions emphasizing the importance of strengthening efforts to identify and restore victims³ rights.

² See 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>).

³ See Resolution 8/9, *Eighth 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 UNCAC* (<https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V1708295E.pdf>).

2. INTERNATIONAL STANDARDS



Provisions and references on the recovery of losses due to corruption are contained in a number of international and regional anti-corruption treaties, other international standards derived from human rights instruments, and soft law declarations.

Through standards developed in recent decades, countries have agreed on common principles and mechanisms aimed at ensuring that their legal frameworks provide victims with the means to recover losses caused by corruption.

Therefore, this chapter is intended to provide a brief overview of the relevant international obligations and commitments that have been agreed upon by the countries, namely:

- United Nations Convention Against Corruption (UNCAC)
- Political Declarations adopted at the Special Session of the UN General Assembly
- Council of Europe Civil Law Convention on Corruption
- Council of Europe Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and the Financing of Terrorism
- EU Directive 2014/42/EU on the freezing and seizure of tools and proceeds of crime
- Human Rights Treaties that establish the right to restoration
- Global Forum for Asset Recovery (GFAR) principles on the Placement and Transfer of Assets Seized from Corruption
- Relevant recommendations from the Financial Action Task Force (FATF)

2.1 United Nations Convention Against Corruption (UNCAC)

UNCAC, which was adopted by the UN General Assembly in 2003 and entered into force in 2005. This instrument is the only universal, legally binding anti-corruption framework. The Convention sets out the obligations and standards to be met by 190 States Parties. Four of the five relevant provisions cited below contain language that is mandatory (UNODC, 2017) *Mandatory language*), thus imposing an obligation on all States Parties to adopt such measures.

Another unique aspect of the Convention is the existence of the *Implementation Review Mechanism* (IRM), which is a process of review by fellow states to support the implementation of all substantive provisions of the Convention. This mechanism allows States Parties to identify challenges, good practices and needs for technical assistance. This mechanism also allows for the identification of implementation trends among the broader community of anti-corruption practitioners and academics.

2.1.1 Provisions in Chapter III on Criminalization and Law Enforcement

The first provision relevant to the issue of victim compensation is contained in Article 32 regarding the protection of witnesses, experts, and victims. In addition to talking about

protection measures, the provisions in this chapter also require States Parties to allow the views and concerns of victims to be taken into account in criminal proceedings.

About 10 per cent of the 174 States Parties reviewed accepted the recommendations related to this article, indicating that most countries already have provisions in place to consider the views of victims in criminal proceedings. Good practices identified include the passage of special laws on victims and the use of *victim impact statements* in corruption criminal trials.

Article 34 on "consequences of corruption" requires States Parties to take measures to address the consequences of certain acts of corruption. The article also encourages states to consider corruption as "a relevant factor in the legal process for cancelling or revoking contracts." About a quarter of the 174 States Parties have accepted a recommendation on this provision, indicating that the reviewers have interpreted the language of Article 34 as broad and not specifically defined.

Article 35 is more relevant in the context of victim compensation, as it obliges States Parties to take steps to provide legal standing to "entities and persons who suffer losses as a result of acts of corruption." This allows these entities to file lawsuits "against the parties responsible for obtaining compensation." Although the UNCAC does not provide a definition of a victim, the *Travaux Préparatoires* document includes *interpretative notes* that the term "entities and persons" includes both individuals and legal entities, including states. The UNCAC also does not define or exclude any type of loss.

Approximately 10 per cent of the 174 States Parties that have completed their first cycle of reviews accept recommendations related to this article. The recommendations vary from general to ensure the existence of adequate measures to very specific ones. As mentioned in the "State of Implementation of the UNCAC," there is generally no specific legal provision that provides a basis for lawsuits based on losses due to corruption. These cases are handled through the general principles of civil law (contracts or unlawful acts). Therefore, the reviewers consider that the general principles of civil law are sufficient to satisfy the obligations of Article 35.

2.1.2 Provisions in Chapter V on Asset Recovery

Chapter V of the UNCAC regulates the steps to recover assets. Article 51 states that the return of assets is a fundamental principle of the Convention. Meanwhile, Articles 54 and 55 cover mutual *legal assistance* for asset confiscation. Article 57 deals with the return and disposition of assets seized through such requests. Finally, Article 53 regulates the measures that allow the home country to be directly involved in civil proceedings to recover assets and express an opinion when the court considers a seizure.

Article 53 includes "*direct recovery*" with the aim of allowing the country of origin to file a civil lawsuit to establish ownership of the assets, recover losses, and recognize their claims in the country where the assets are located. The most relevant in the context of recovering damages due to corruption is Article 53(b), which requires a State Party to authorize a court to order corrupt offenders to pay compensation to another aggrieved State Party.

Meanwhile, Article 57 paragraph 3(c) on the return and disposition of assets states that the confiscated property must be given top priority to be returned to the requesting State

Party, or to the previous rightful owner, or used as compensation for the victims of the crime.

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

In June 2021, United Nations member states and UNCAC States Parties adopted a political declaration titled *"Our shared commitment to effectively address challenges and implement measures to prevent and combat corruption and strengthen international cooperation"*. This declaration was taken during a special session of the UN General Assembly on the eradication of corruption.

In this declaration, states reaffirm their commitment to implement the provisions of Chapter V of the UNCAC on asset recovery, in particular paragraphs 46 and 49. Although the term "victim" appears in only three parts (once in the preamble, once in the context of protection from retaliation, and once in the context of compensation), the declaration includes a commitment to establish a legal framework that allows states to make claims of ownership of assets.

The declaration also states the need to consider models of management and disposition of seized assets, including the allocation of assets for funds that can be used to compensate victims or benefit communities.

Paragraph 49:

"We [...] shall consider various models of disposition and management of the proceeds of crime as set out in the Convention, including, where possible, allocating such proceeds to state revenue or state treasury, reinvesting for special purposes, and compensating victims of corruption, including through the social use of assets for the benefit of communities."

2.3 The Council of Europe Civil Law Convention on Corruption

The Convention was adopted by the Council of Europe countries in 1999 and entered into force in 2003. The agreement taken is the first attempt to establish general international rules in the field of civil law and corruption. This convention was developed on the basis of the recognition that: (Council of Europe, 2003)

"[...] Civil law is directly related to criminal law and administrative law. If an act such as corruption is prohibited by criminal law, then a lawsuit for damages can be filed based on the criminal act."

The declaration recognizes that civil law needs to provide an effective redress mechanism for those whose rights and interests have been affected by corruption. The Convention includes provisions on:

- Compensation for losses
- Responsibility (including state responsibility for the actions of public officials)
- Negligence that also causes losses and affects the amount of compensation
- Validity of the contract
- Protection against whistleblowers

- Accounting and audit transparency
- Collection of evidence
- Court order to maintain assets for the implementation of the final judgment
- International cooperation

The most relevant articles related to compensation for losses:

- Article 1: The State shall provide effective remedies for victims of corruption, including compensation.
- Article 3: The victim has the right to file a lawsuit to obtain full compensation, including for immaterial damages.
- Article 4: Establishes general conditions for compensation: (1) the perpetrator commits or fails to prevent acts of corruption, (2) the victim suffers losses, and (3) there is a cause-and-effect relationship between the two.
- Article 5: Requires the state to allow victims to sue the state for losses due to acts of corruption by their officials.

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

Also known as *the Warsaw Convention* or CETS 198, the Convention was adopted in 2005. Its purpose is to facilitate international cooperation and mutual legal assistance in investigating crimes and tracing and seizing the proceeds of crime.

Article 25, while non-mandatory, is very similar to Article 57(3)(c) of the UNCAC, which states that the requested state "shall give priority to return the confiscated property to the requesting country so that it can be used as compensation for the victim or returned to its rightful owner."

2.5 EU Directive 2014/42/EU on the Freeze and Forfeiture of Tools and Proceeds of Crime

This directive aims to facilitate the confiscation and recovery of the proceeds of crime in the European Union. In its opening section, it is stated that the confiscated property can be used for "social purposes."

Specifically, Article 8 states that member states must ensure that confiscation does not deter victims from filing compensation claims. This directive encourages states to consider the use of confiscated proceeds to:

- Law enforcement and crime prevention projects
- Public interest and social utility projects
- Compensation for victims of crime

2.6 Victims in International and Regional Human Rights Treaties and Standards

Human rights standards are relevant because they provide a definition of victims and establish the right to redress for human rights violations. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly Resolution 40/34, 1985) defines victims as:

*"Individuals or groups who suffer losses, whether physical, mental, emotional distress, economic loss, or disruption of basic rights, as a result of acts or omissions that violate criminal law."*⁴

Victims' rights including these standards include access to justice mechanisms, prompt and fair recovery of damages, and efficient, low-cost, and accessible administrative and judicial mechanisms. These principles are reaffirmed in various international human rights treaties, including the Universal Declaration of Human Rights (Article 8); the International Covenant on Civil and Political Rights (Article 2); and the Basic Principles and Guidelines for the Right to Restoration for Victims of Gross Human Rights Violations (UN Resolution 60/147).⁵ Regional human rights conventions such as the European, Inter-American Conventions, and the African Charter also provide for the right to recovery.

2.7 Aarhus Convention

The Aarhus Convention (1998) was ratified by the United Nations European Economic Commission (UNECE) to strengthen public access to justice in environmental issues. This convention became the basis for the development of class *actions* in Europe, including for corruption cases. The European Parliament in 2012 passed a resolution "Towards a Coherent Approach to Collective Claims"⁶ which encourages the horizontal application of these principles across the European Union.

The European Commission also published a Recommendation in 2013 that linked the legal standing to the type of loss and whether or not victims constitute an identifiable group. However, a 2018 report shows that its implementation is still inconsistent across Europe. (Olaya Garcia, 2016)

⁴ See in 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>.

⁵ See 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, 2005 <https://www.ohchr.org/en/professionalinterest/pages/remedy-and-reparation.aspx>.

⁶ See in EU Parliament Initiative 2011/2089 8INI, Towards a coherent European approach to collective Recovery, 2011.

2.8 Other International Commitments

2.8.1 GFAR Principles for the Placement and Transfer of Seized Assets

The Global Forum for Asset Recovery (GFAR) is a platform of the StAR (UNODC–World Bank) initiative that supports the tracing and return of assets by prosecutors and investigators. The ten principles of the GFAR,⁷ adopted in 2017, state that "Stolen assets recovered from corrupt officials shall be used for the benefit of the people of the aggrieved country." This principle also encourages the participation of civil society and victims in the asset return process.

2.8.2 Recommendations from the Financial Action Task Force (FATF)

The FATF is an intergovernmental body that sets international standards to combat money laundering and terrorist financing. The FATF's recommendations include temporary foreclosure measures; cross-border cooperation; and the authority of national authorities. The FATF 2012 best-practices states that asset-sharing agreements "must be consistent with compensation for victims."



⁷ See in the GFAR Principles <https://star.worldbank.org/gfar-principles>

3. AVENUES OF REPARATION

After examining existing international and regional standards for compensation for victims of corruption, this chapter aims to present the various key judicial avenues available in various jurisdictions around the world including:

- Civil proceedings
- Criminal proceedings (including in foreign jurisdictions)
- Out-of-court settlement
- *Class action* and *representative action*
- Constitutional protection mechanisms
- International and regional human rights mechanisms
- Repair fund

3.1 Civil Proceedings

Civil proceedings are the most common and direct route to claiming recovery of damages. In a civil lawsuit, a person (either an individual or a legal entity) can demand compensation from the other party for the losses caused by their actions. The victim's ability to recover damages resulting from acts of corruption depends on the applicable material laws, as well as the procedures available to enforce them.

In countries with a civil law system, these principles are contained in the Civil Code. Meanwhile, in common law countries, public liability is based on the doctrine of unlawful acts that evolve from court precedents.

The advantage of this civil process over criminal proceedings is that the civil plaintiff can sue anyone believed to be involved, including high-ranking officials or foreign investors and the burden of proof is lower where it is only necessary to prove that it is more likely to be true than not (the "*preponderance of evidence*" standard).

However, civil plaintiffs bear a high burden of proof and costs, including for the investigation and proof of a causal relationship between the action and the loss. If they win, some countries require the defendant to reimburse court costs. However, if they lose, the plaintiff often has to reimburse the defendant's costs, which is a deterrent factor. (StAR Worldbank, 2014)

3.2 Criminal proceedings

In criminal cases, the court may order the defendant to pay restitution to the victim as part of his sentence. The goal is to compensate for the losses caused by the criminal act.

In countries with systems *Civil Law*, the victim can become a civil party in a criminal proceeding. If the court approves and the loss is proven, the victim can get compensation. In some legal systems, civil parties have the right to access evidence, participate in investigations, and present evidence. (Göhler, 2019)

Although initially this approach was more widely used in the country *Civil Law*, now several countries *common law* also adopt it. Currently in Botswana, Ghana, and Sri Lanka, courts can order payment of damages after a defendant is found guilty. (Manikis, 2019)

3.2.1 Criminal Proceedings in Foreign Jurisdictions

In contexts where the institution of the courts is inadequate due to institutional weakness or corruption in the judicial system, although there may be criminal or civil remedies available to the victim, in such cases, the victim may seek reparations in courts in a foreign jurisdiction.

Because corruption is often cross-border, many countries have extra-territorial jurisdiction. For example, the US has had the Foreign Corrupt Practices Act (FCPA) since 1977. Other countries such as Australia, Brazil, Canada, France, and the United Kingdom also followed. This jurisdiction can be based on the nationality of the perpetrator, the place of the crime, the location of the asset, or where the company is registered. For example, companies listed on the U.S. Stock Exchange could be subject to the FCPA.

However, the use of foreign criminal channels for recovery is still rare and generally limited to the US and Switzerland, as well as some other countries such as Australia, Brazil, France, Germany, Israel, Italy, Norway, Portugal, Spain, Sweden, and the United Kingdom with medium-scale enforcement levels. (Transparency International, 2020)

3.2.2 Non-trial Resolutions

Some corruption cases are resolved through non-litigation mechanisms such as *plea agreements*, *deferred prosecution agreements* (DPA), or *non-prosecution agreements* (NPA).⁸ This settlement allows for the application of sanctions, the return of illegally obtained profits (*disgorgement*), and compliance provisions without a lengthy trial process.

Report *International Bar Association* noted that 57 out of 66 countries use this form of settlement for international corruption cases. The OECD reports that 78% of foreign bribery cases are resolved without trial. Although efficient, this mechanism generally does not involve victims. The negotiation process is closed between the prosecutor and the defendant, and there is no obligation to consider the rights or interests of the victim. (IBA, 2018) (OECD, 2019)

For example, in the case of *Lava Jato*⁹, the settlement agreement between the U.S. Department of Justice and Odebrecht did not involve victim representation. The FCPA does not have procedures in place to accommodate victim claims. However, Brazil and the United Kingdom began to arrange for this kind of settlement to include reparation provisions. In the UK, the *Deferred Prosecution Agreements Code of Practice*¹⁰ requires prosecutors to consider "that a settlement includes measures to provide redress for victims, such as compensation orders."

⁸ See the UNODC report "[Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return.](#)"

⁹ See in <https://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/guia-pratico-acordo-leniencia/>.

¹⁰ See in *Plea discussions in cases of serious or complex fraud* (www.gov.uk).

3.3 Class Actions and Representative Actions

In addition to civil or criminal lawsuits, now many collective lawsuit efforts for corruption cases are starting to be used. The two main forms of collective action include:

- **Class action:** victims with similar losses combine their claims in a single lawsuit.
- **Representative action:** representatives (can be NGOs, prosecutors, or citizens) sue on behalf of the victim's group.

In order for a *class action* to proceed, the court must certify that the victims meet such requirements as the sheer number, similarity of events, and typicality of the claim. In some jurisdictions, the losses don't have to be exactly the same. For example, two *class actions* in the U.S. came after executives of power company ComEd admitted to bribing Illinois legislative officials. Victims (4.5 million subscribers) sued because their payments were inflated due to laws resulting from bribes¹¹.

Meanwhile, in a representative lawsuit, the decision only applies to those who actively participate. This mechanism is suitable for social, diffuse, or collective harm. In many Latin American countries such as Argentina, Brazil, Costa Rica, and Peru, the constitution guarantees the right to collective lawsuits for damages due to corruption.

3.4 Constitutional Protection Mechanism

Many countries now have mechanisms in place that allow for immediate redress for violations of constitutional rights. Residents can directly sue the Constitutional Court or administrative bodies to demand compensation. The focus of this effort is not only on corruption, but on the state's obligation to protect constitutional rights. Argentina, Brazil, and Costa Rica explicitly include collective rights and the right to restoration in their constitutions.

3.5 Human Rights Mechanism

In addition to national constitutional protection, complaints can be filed with regional human rights institutions such as Inter-American or European human rights courts¹². Although not yet commonly used for corruption cases, human rights law can influence legislation that allows reparations. For example, a 2019 Inter-American Commission on Human Rights report stated that states must ensure victims and whistleblowers of corruption access to effective grievance and redress mechanisms. In this context, the State is also obliged to identify victims, including affected social groups. (Roht-Arriaza, 2020)

3.6 Administrative Procedures

Some countries have allowed victims of corruption to file lawsuits through administrative channels, rather than through civil or criminal courts. This route is faster and less expensive, and reduces formal barriers and legal costs. A number of related examples

¹¹ See in *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>

¹² See the 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.

include lawsuits to the ombudsman or anti-corruption commission, establishing a complaint mechanism in the public service system, or administrative decisions that can be sued for compensation. (Tawfiq Ladan, 2014)

In these countries, administrative complaints can result in a decision to compensate, restore rights, or impose sanctions on guilty public officials. However, this procedure generally has a limitation on the amount of compensation and does not cover moral or indirect damages.

3.7 Reparation Fund

Some countries and jurisdictions have established special funds allocated for compensation of victims of crime in general or for specific purposes of corruption reparations. This fund can collect money from the confiscation of corrupt assets, allocated directly by the state, or managed by independent institutions or public institutions. (Makinwa, 2019)

For example, Switzerland returns confiscated funds to the country of origin through the "Billion Dollar Fund" and the "Asset Return Initiative" mechanisms. Peru has created a "Fondo de Reparaciones" for victims of state crimes, including corruption, which is administered nationally. In the UK, his government has set aside part of the proceeds of corruption settlements for development projects in the victim countries through the "Conflict, Stability and Security Fund" program.

However, the existence of a fund allocation alone is not enough if there is no transparent and participatory mechanism to ensure that the assets returned actually reach the victims and affected communities. As described in the UNODC and World Bank reports, civil society involvement and public transparency in the use of these funds are key to preventing the recurrence of corruption in the recovery process.



4. LEGAL STATUS AND STATUS OF THE VICTIM

This section discusses how and for whom the lines are accessible, and also details the conditions that apply to each of them.

4.1 Legal status in various jurisdictions

Legal standing is generally determined by general rules regarding the type of natural person or legal entity that is generally recognized in civil or criminal courts. In addition, in many countries, the general rule is complemented by the recognition of a person as a victim, or in other words as a party aggrieved by the act in question.

In this case, the claimant must generally show:

1. **Loss:** The party has suffered a loss.
2. **Causality:** The loss was caused by the defendant's actions, and would not have occurred if the defendant had acted differently.
3. **Redressability:** The court can provide a remedy that can overcome the losses suffered by the claimant.

As stated in the landmark decision of the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962),¹³ the "crux of the question of legal standing" is whether the party seeking damages has "asserted a personal interest in the outcome of the controversy, such as to ensure the existence of a concrete conflict that sharpens the presentation of the issues that are indispensable for the courts to clarify the issue constitutional complex."

Similarly, when overturning the decision of the investigation chamber of the French Court of Appeal that rejected the legal standing of an NGO in a case *III-Acquired Property* (assets acquired illegally), the French Court of Cassation stated that "in order for a civil claim to be admissible before a court of inquiry, it is sufficient that the circumstances on which it is based allow the judge to accept the possibility of the loss claimed and its direct connection to a criminal act." (Transparency International, 2010)

By ensuring that only parties who have sufficient connection to a dispute and who have been aggrieved (or at risk of harm) can bring claims to court, the efficiency of the court system can be maintained. Thus, the court handles disputes between parties who have a real interest in the outcome.

In countries that provide a definition for a victim, it generally centers on an individual or legal entity that has suffered damage, which is understood as an injury, loss, or danger. However, in the context of corruption, many countries do not recognize individuals or legal entities as victims of corruption. Instead, they only recognize the state or public entity as a legitimate party in that capacity, whether in criminal or civil proceedings. In some countries, criminal acts are exclusively delegated to the prosecuting authorities. Meanwhile, in jurisdictions that do not allow the participation of civil parties in criminal proceedings, the legal standing of victims is systematically eliminated. (StAR, 2023)

¹³ See in *Baker v. Carr* <https://supreme.justia.com/cases/federal/us/369/186/>

In accordance with the general principles of legal standing presented above, in most jurisdictions such recognition depends on their ability to show that victims have been harmed directly or, in certain cases, indirectly by the crime. While it is common for the recovery system to grant legal standing to individual victims, such recognition is less universal for collective victims.

4.2 Legal position in civil proceedings

Legal standing in civil proceedings tends to vary less than in criminal proceedings, with compensation requirements generally similar in different jurisdictions. The basic principle remains that anyone who causes harm to the other party because of his or her fault must compensate the aggrieved party. (Bussani & Infantino, *The Many Cultures of Tort Liability*, 2012)

4.3 Legal standing in criminal proceedings

To obtain compensation through the prosecution of corruption crimes, the aggrieved party must be a "victim of a crime" as defined in national law. In criminal proceedings, legal standing generally refers to whether a person or an entity has the legal right to bring criminal charges or to participate in a criminal trial, as well as the granting of other procedural rights depending on the jurisdiction. (StAR, 2023)

As explained in the previous chapter, depending on the jurisdiction, this status can allow the victim:

- (i) called as a witness; (ii) provide evidence in the case; (iii) obtain access to criminal case files; (iv) express opinions regarding the indictments, penalties, and damages described in the indictment and civil lawsuit; (v) make a statement during the sentencing stage;
- (vi) receive notifications of the progress of the case; (vii) participate in settlement negotiations through *plea bargaining* agreements; and (viii) granting or withholding consent to the settlement process or *plea bargain*.

In many countries with civil legal systems, the granting of civil party status in criminal cases allows for active involvement during the investigation and trial stages. For example, in French law, although the prosecutor has the discretion to decide whether to proceed with a criminal investigation, the civil party has the right to appeal the decision to a higher court within three months of the prosecutor's decision. In 2012, the European Union adopted a directive on the rights of victims of crime. This directive requires EU Member States to provide certain rights and protections to victims of crime, including the right to appeal against decisions not to investigate a crime¹⁴.

In countries such as Mexico and Peru, NGOs have the legal standing to participate in corruption criminal proceedings as parties based on their institutional objectives, which systematically give them victim status. In jurisdictions that apply this model, NGOs can simply demonstrate that their organization's goal is to fight corruption and that they have been registered before the crime occurs. Case *III-Acquired Property* in France it also

¹⁴ See 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.

pushed for the enactment of a law that gives anti-corruption NGOs the right to represent victims of corruption as civil parties. (Transparency International, 2023)

While in Spain, based on the principle that legal protection is the common interest of society, the concept of "*popular prosecution*" allows any Spanish citizen to act as a civil party in criminal proceedings. In initiating a popular prosecution in Spain, a citizen must submit a written application to the court and include evidence of the crime they believe has occurred.

If the court accepts the application, the citizen is granted the status of a "popular prosecutor" (*Popular Prosecutor*) and may participate in pre-trial investigations and trial proceedings together with authorized prosecutors, including through the submission of evidence and the right to appeal against court decisions. In practice, this line is usually used for cases that are of great public interest. One of the corruption cases that has been tried using this channel is the *Gürtel* (The Guardian, 2019).

In some other countries, legal standing on behalf of victims is given 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 file a civil lawsuit "for social damages [...] in the case of criminal acts affecting the collective or diffuse interests" (see section on collective victims).

4.3.1 The State as the sole victim in the criminal process

In a number of jurisdictions, the state is the only entity recognized as a victim in the criminal process of corruption. These countries include for example Austria, Bolivia, China, Indonesia, Italy, Poland, Romania, Russia, and Switzerland. While individuals and non-governmental entities are systematically denied the possibility of obtaining such recognition. In a number of these countries, the exception occurs because the criminal law defines certain corrupt acts as crimes against the state or its institutions.

Italian law, for example, explicitly stipulates that corruption is a crime against public administration (*Pubblica amministrazione*). With the exception for extortion, only the state can be granted victim status in the prosecution of corruption crimes¹⁵. Granting victim status to private individuals in Italy, as one observer explained, "is tantamount to acknowledging that a state that by its nature acts to protect the public interest, is ineffective in fighting for those interests on behalf of its citizens." (Visentin, 2021)

Recent rulings from Switzerland's highest court have rejected requests for privately owned individuals and companies to be civil parties in bribery cases because they are not considered "victims" of corruption crimes. As in Italy, the court based this decision on the assumption that only the government can be a victim of the crime of bribery, and that the criminalization of bribery in the public sector is intended to protect the neutrality of the state¹⁶.

¹⁵ See 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.

¹⁶ One notable example of a country with a strong Roman legal legacy where the law has been changed is Portugal. Anyone harmed by corruption has the right to be treated as an "offended person" in criminal proceedings, and thus has the right to compensation after a guilty verdict. See in APV (Support for Victims), *Para um Estatuto de Vítima em Portugal: Direitos Mínimos das Vítimas de Todos os Crimes*, June 2015, p. 17, cited in Mjriana Visentin, *ibid*.

4.4 Legal standing in class actions and representative actions

As noted in the previous chapter, various countries have established mechanisms for *collective redress*, which allow a large number of individuals or a "class" of plaintiffs to combine claims arising from the same event into a single lawsuit¹⁷.

Some jurisdictions have provided for that mechanism in class *actions* or *representative actions*, which allow a single individual or organization to file a claim on behalf of a broader group of victims. This mechanism is particularly useful in cases of corruption where victims are difficult to identify individually, but suffer losses collectively.

Class actions are generally found in the common law system (*common law*), such as the United States and Canada. In these jurisdictions, a plaintiff can represent a group of people who have similar legal claims against the defendant. Once the court agrees that the lawsuit qualifies as a class action, the outcome of the case will be binding on all members of the class, unless they explicitly choose to leave the group. While in civil legal systems such as France, Italy, or Brazil, collective legal action is more often carried out by organizations that are legally recognized as having legitimacy to represent a particular public interest or group. For example, in France, some NGOs may file lawsuits on behalf of certain victims if they have been authorized by the state to do so. (Stephenson, 2019)

In a collective mechanism, individuals, associations, or government agencies can claim compensation for violations of collective rights. Citizens of Brazil, Chile, Colombia, and Costa Rica all have a collective right to be free from corruption. In Brazil, Colombia, and Costa Rica, the national prosecutor's office, as a representative of citizens, has filed claims or successfully recovered losses from parties responsible for corruption¹⁸. While in Chile, *State Defense Council* (The State Defense Council), which is an independent state agency, as well as non-governmental organizations (NGOs), can both file claims for collective losses due to corruption. (Cristián Riego & dkk, 2019)

From these experiences, in order for a class action or representative action to be successful, the plaintiff must show that:

- There is sufficient similarity of facts and law among the victims;
- The plaintiff is able and qualified to represent the class, and
- This legal process will be more efficient and fair than filing individual claims.

However, access to this mechanism is not universal. There are still many jurisdictions that have not adopted a class action system or placed strict restrictions on who can file claims on behalf of a class. In these jurisdictions, victims of widespread corruption continue to struggle to obtain collective recovery.

4.5 Classification of Victims

4.5.1 Public entities

¹⁷ See Thomas A. Dickerson, *Class Actions: The Law of 50 States* (Law Journal Seminars Press, New York, 1988).

¹⁸ Spanish law adopted from Roman law the right of every citizen to file a "popular action" to demand recovery for the losses suffered by the state. After independence, Latin American countries also incorporated this right into their legal systems. However, as part of the consolidation of state power in the 19th century, Latin American countries later transferred the authority exclusively to public prosecutors (*Ministerio Público*) to file such lawsuits. *Actio popularis* is a type of lawsuit that can be filed by an ordinary citizen, not because he is personally harmed, but in order to protect the public interest or public rights that are violated. Originating in Roman law, this mechanism was revived in some continental European legal systems, particularly in Spain.

In corruption cases, public entities such as ministries, government agencies, or state-owned companies, are often the most directly harmed. For example, if a public contract is awarded through bribery or manipulation, then the agency that should receive services with reasonable quality or price becomes a victim of such actions.

In many jurisdictions, public entities can file a civil claim on behalf of the state to recover financial losses. Some jurisdictions also allow public entities to act as civil parties in criminal proceedings. However, in a system where only the state has legal legitimacy, public entities may need to act through state attorneys or other state legal entities.

A striking example is found in the case *Lava Jato*¹⁹ in Brazil, where these state-owned companies fell victim to systemic bribery schemes. In those cases, Petrobras filed a civil claim, cooperated with legal authorities, and received the recovery of some assets previously lost to corruption. (Transparency International, 2015)

4.5.2 Legal entity (non-public) as a victim

Private companies, foundations, or NGOs can also become victims of corruption, for example when they lose a tender because a competitor bribes public officials²⁰. However, the recognition of this institution as a victim is not always legally guaranteed.

Some jurisdictions allow non-public legal entities to file a claim for compensation for losses suffered. Elsewhere, the legal system considers that corruption is detrimental to the public interest as a whole, so that only the state is considered a legitimate victim. Meanwhile, in countries that are more open to claims from the private sector, companies can use civil or arbitration to claim damages due to the corrupt actions of their competitors. In the procurement sector, for example, this can be important in ensuring market integrity and competitive fairness. (Weller, 2015)

German law, for example, allows a competitor of the bribe party to claim damages through a civil lawsuit under the provisions of the Civil Code (*Bürgerliches Gesetzbuch/BGB*) that protects a business that has been established and run from actions that deliberately harm other parties immorally, which is contrary to public policy. However, the requirements to prove the existence of losses are very strict. The plaintiff must be able to prove that the bribe was a direct factual cause of the loss suffered and that if there was no bribe, the contract should have been awarded to him.

In Nigeria, in 2010, a civil society organization was recognized as having legal standing in a legal proceeding in which it demanded (albeit unsuccessfully) compensation for losses

¹⁹ In the case of *Lava Jato (Car Wash)* in Brazil, a number of construction companies paid bribes in the amount of millions of dollars to public officials to obtain approval for contracts for the construction of oil refineries, processing plants and other large projects. These public contracts are then priced well above their actual costs and reasonable profit margins. To date, the Brazilian government has recovered US\$920 million in damages for overpayments, both from the bribe recipient and from the payer. A number of cases are still unresolved. Despite the asset recoveries that have been made, none of the assets that have been successfully returned in this case have actually reached the Brazilian people who bear the brunt of this systematically designed corruption scheme. More than 170,000 Petrobras workers lost their jobs in 2014 and 2015, and the public trust and credibility of Petrobras and its regulatory agencies in Brazil were tarnished. Given the breadth of Petrobras' operations, the impact of this case affects not only infrastructure projects in Brazil, but also throughout the Latin American region.

²⁰ In December 2019, Swedish telecommunications giant Ericsson admitted to bribing officials in China, Djibouti, Indonesia, Kuwait, and Vietnam to obtain or maintain service contracts in the five countries. In May 2021, Ericsson announced that it had settled a lawsuit for damages filed by its competitor, Nokia, by paying €80 million (equivalent to US\$ 97,600,000). (U.S. Department of Justice, 2021)

due to corruption occurring in the country's elite circles, in the interest of children's education programs.

4.5.3 Foreign governments

In line with Article 53 paragraph (2) of the UN Convention Against Corruption (UNCAC), some countries have given their courts the authority to compensate foreign governments who are victims of corruption.

In 1982, a United States federal court was given discretion to award damages to victims of crime after the perpetrator was sentenced. Since 1996, the provision of compensation has become an obligation. Based on this provision, a number of foreign governments have received compensation for corruption cases. (Messick, 2019)

In four cases, damages were recovered after the defendant was found guilty of bribing a foreign public official, in violation of the *Foreign Corrupt Practices Act* (FCPA). In another case, an intermediary in an FCPA bribery scheme in Haiti was convicted of laundering bribes in the United States, and the Haitian government was awarded damages. Trinidad and Tobago also succeeded in recovering damages through the settlement of civil lawsuits against parties involved in corruption in the country's airport construction projects.

4.5.4 Individual individuals as victims

Corruption often has a direct impact on individuals, for example citizens who have to pay bribes to access public services. In this context, individuals suffer financial, psychological, or even physical losses. However, not all jurisdictions recognize individuals as legitimate victims in corruption cases. Some legal systems even consider that individuals have no legal standing because the impact experienced is too "general" or not direct enough. (Visentin, 2021)

In some progressive jurisdictions, individuals who have suffered direct losses due to corruption can file a claim for damages in civil proceedings or participate in criminal proceedings as a civil party. This recognition is essential to provide justice to direct victims and strengthen the role of citizens in the legal system.

4.5.4 Collective casualties

Mechanisms should be developed to represent the interests protected by rights in the legal system that guarantees collective rights, even if the holders of those collective rights are specific societies or groups that can be identified within them. Because these entities are intangible—or even if they are tangible, they are too large to act on their own—and because legal status is not conferred on the basis of ownership of those rights, some jurisdictions grant the state the right of representation to represent the community, while others extend the legal status to other entities, even to the citizens themselves.

For example, in Costa Rica, compensation for social harm is possible through a civil lawsuit that can be filed as part of criminal proceedings. In accordance with the Criminal Procedure Code, this lawsuit can only be filed by the Attorney General's Office²¹. Thus,

²¹ See in 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."

representation of society as a whole is exclusively given to this authority, which under the provisions of the law also holds the legal power to represent the state. However, individual victims still have the right to file a civil lawsuit for compensation, both in criminal proceedings and in disputed administrative proceedings (*Contentious Administrative Proceedings*). (Ramasastry, 2017)

However, recognition of these "collective victims" is still rarely recognized in formal jurisdictions. However, some legal systems are beginning to open up space for this approach, especially in the context of human rights violations, environmental crimes, and corruption that have systemic impacts. In some other countries, civil society organizations or ombudsmen may represent collective victims to file claims against the state or company. However, proving in collective cases is often complex and requires a data-driven approach and evidence of broad socio-economic impacts.

From a number of classifications and experiences in various jurisdictions, it shows that although legally victims can have the right to file claims, in practice there are still many obstacles. Victims of corruption also often lack the information, capacity, or resources to understand their rights or navigate the legal system. In some countries, a slow, inindependent, or corrupt court system has also worsened the situation.

Legal standing and recognition of the victim's status greatly determine who can demand justice in corruption cases. Although many jurisdictions are beginning to recognize the diversity of types of victims, whether countries, individuals, organizations, or groups, the challenge of access to justice remains a major obstacle.





5. DETERMINING THE LOSS OF CORRUPTION

In determining the parameters of losses from corrupt practices, globally there are a number of approaches that are inherent in the process of determining losses from corrupt practices, which include: (Robin Antony & S.E., 2015)

- Direct and indirect losses
- Material and immaterial losses
- Loss measurement

The above approaches relate to the general principle of tort liability that in order to bring a claim for damages, the plaintiff must prove the existence of harm such as the existence of injury, loss, or damage suffered by the plaintiff as a result of the defendant's actions; *causation*) such as the existence of a causal relationship between the defendant's actions and the losses suffered by the plaintiff, as well as *proximity*, which is the level of connection or proximity between the defendant's actions and the losses suffered by the plaintiff.

5.1 Direct and indirect losses

Many jurisdictions recognize two types of losses, namely direct losses and indirect losses. Direct disadvantages, also known as *actual damages*, is a loss that arises directly due to the unlawful acts of the defendant. While Indirect losses, also known as *consequential damages*, is a loss that arises indirectly as a result of the action. (StAR, 2023)

However, most jurisdictions do not seem to recognize indirect harm as something that can be claimed for damages. However, in the jurisdiction that recognizes it, such indirect loss must be an foreseeable consequence of the unlawful act by the defendant.

An illustration of the difference between these two concepts is reflected in a case where a supplier bribes a hospital official to receive contaminated medicines, and the clinic becomes a direct victim of the bribery because it has paid too much for the medicine. Any loss suffered by the patient as a result of taking the drug is considered an indirect or secondary loss from the bribe.

To bridge this, many jurisdictions in Europe refer to these patient injury cases as "*ricochet damage*" to illustrate the idea that the loss bounces off the main victim. In this example, a newspaper in Uganda recounted a very heartbreaking tragedy. A woman who was experiencing problems in the delivery process came to a local clinic for medical treatment.

Although she was entitled to free health care under Ugandan law, the medical personnel on duty refused to treat her until she paid 50,000 Ugandan shillings (about US\$15). Because she was unable to pay, the woman was rejected and later died with her baby²².

These losses that are widespread and affect a group of people who cannot be individually identified are generally understood as collective losses. In the context of corruption, the term "social disadvantage" is also used by some jurisdictions interchangeably with collective disadvantage.

Understanding this concept of collective rights is important because it has a different logic from individual rights, since the harm caused by corruption to society at large is difficult to attribute to one particular individual. For example, if a country's court system is dysfunctional due to corruption, this can affect people who are currently undergoing legal proceedings, as well as those who potentially need access to justice in the future. In this example, the victims may not have suffered direct harm as a result of a criminal act of corruption, but society as a whole is harmed by being prevented from enjoying the collective right to access justice that they should be able to enjoy.

Some jurisdictions allow the filing of claims for such collective damages, primarily by government agencies such as state attorneys, or by civil society organizations. In a country like Costa Rica, collective losses are explicitly referred to as grounds for civil action by the State. But in making decisions, the court referred to a variety of doctrines, which comparative law experts call "*control devices*," principles used to reasonably limit the scope of liability. One of the basic control devices used by the court is the "distance" between the act and the harm caused.

Questions generally asked include how close the relationship is between the time and place between the unlawful act and the loss that occurred, as well as how *foreseeable* that the defendant's actions will harm the plaintiff. If the court considers that the act is too remote, indirect, or unforeseeable, then the court can declare that the defendant is not liable for the loss. In this case, compensation is only given to parties who directly, immediately, or reasonably can be expected to suffer losses due to the unlawful acts.

However, in many countries there is no formal mechanism to deal with collective losses due to corruption. In these places, compensation for the wider community is highly dependent on the state's decision to file claims or formulate administrative and public policy solutions.

5.2 Material and immaterial losses

Most jurisdictions distinguish between material losses and immaterial losses. Pecuniary damages *generally* refer to financially measurable economic losses, such as loss of money, assets, or business opportunities. Meanwhile, non-pecuniary damages include intangible but significant impacts, such as emotional suffering, loss of reputation, psychological stress, and loss of trust in public institutions.

Material losses on the one hand are one of the most real and measurable forms of corruption impact. In many cases, these losses can be calculated directly through the amount of misappropriated public funds or the inflated value of the project due to bribery

²² See *U.S. v. McGee*, 612 F.3d 627 (2010); Gladys Kalibala, "Her Mother's Death Could Have Been Prevented," *New Vision*, July 15, 2014

practices. However, beyond that, there are also more complex forms of loss, such as the loss of potential profits (*lost profits*) that should have been obtained by the aggrieved party. This kind of disadvantage is known as *Pure economic loss*, and the legal treatment varies from country to country. In the United States, for example, these losses are compensable as long as the plaintiff is able to prove a cause-and-effect relationship and present a reasonable estimate. In contrast, in Germany, this form of loss is not recognized, and in France it can only be claimed under limited conditions. (Bussani, Palmer, & Parisi, *The Comparative Law and Economics of Pure Economic Loss*, 2009)

In the context of corruption, claims on *lost profits* often qualifies because the perpetrator knowingly commits an act that harms the other party for their own benefit. An example can be seen in the case of gasoline additive companies *Newmarket* which managed to get compensation of US\$45 million after it was proven that its competitors unlawfully blocked access to the Indonesian market. This case shows that the economic impact of corruption is not only felt by the state and society in general, but also by business actors who lose opportunities due to unfair competition.(Koziol, 2006)

On the other hand, corruption not only causes financial losses, but also impacts basic socio-economic rights that cannot be directly assessed with money, such as access to education, health services, and fair justice. This immaterial impact is closely related to the function of the state, where corruption can weaken public institutions, undermine the legitimacy of the government, and hinder the ability of state institutions to carry out their mandates, such as preventing impunity, maintaining a clean electoral system, and ensuring neutral public services. In this context, the wider community becomes an invisible victim of a corrupt order.

Although damages are immaterial, legal practice in many jurisdictions allows courts to award compensation for non-economic suffering, such as emotional burden or loss of justice. In France²³, for example, since the 1990s, the Court of Cassation has paved the way for public legal entities to receive compensation for moral damages. Forms of non-financial compensation can be in the form of an acknowledgment of wrongdoing, an order for the perpetrator to repair the damage caused, or the provision of certain public services.

In the context of corruption, recognition of immaterial losses is still very limited. Some jurisdictions are beginning to open up space to assess the non-economic impact of corruption, especially when it comes to human rights violations, discrimination, or exploitation. However, in practice, courts often require strong and quantitative evidence to link immaterial losses to acts of corruption. Therefore, the recognition of immaterial losses is often still symbolic and rarely compensated in the form of financial equivalents.

²³ See in Cour de Cassation, Chambre Criminelle <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007071292>)

5.3 Proof of loss

In addition to having to prove the elements of loss, causality, and proximity of the relationship, the plaintiff must also be able to present evidence or documents that support the calculation of the amount of loss. In most jurisdictions, the type of evidence required to show the extent of the loss is left to the discretion of the court, although in some cases there are general guidelines set forth in the statutes and regulations.

Although the final decision regarding the sufficiency of the evidence is at the discretion of the court, the standard of proof remains the same, regardless of the type of entity acting as the plaintiff. In civil cases, the standard of proof used is a "*balance of probabilities*," which means that the plaintiff's claim is found proven when, based on the evidence presented, the claim is more likely to be true than not.

To obtain compensation, the victim must prove that they actually suffered a loss. This burden of proof is often a formidable challenge in the context of corruption, due to a number of things such as:

- The perpetrator attempts to hide evidence or manipulate documents;
- The victim does not have access to relevant information;
- Losses occur indirectly or spread among many people.

Once the loss is proven, the next step is to determine the amount of loss that can be compensated. In many jurisdictions, there is no standard method for calculating losses due to corruption. However, some common approaches include:

- **Market price comparison:** For example, comparing the price of a corrupt contract with the price of a legitimate similar contract.
- **Loss of opportunity:** Calculating the value of benefits that victims should have gotten if corruption did not occur.
- **Social and economic impact:** In a collective case, estimate losses based on long-term impacts on society.

However, immaterial losses are often not measurable. In this kind of case, the calculation of losses can usually only be done through estimates. For example, by calculating the cost of a product or service, or the potential lost profits of the losing party in a tender process. In other jurisdictions, courts demand very high standards of proof, which ultimately closes the opportunity for many victims to obtain compensation²⁴.

²⁴ In the case of the Programa de Alimentación Escolar (PAE) cartel or School Meal Program in Colombia, a number of companies engaged in bribery, illicit commissions, and conspiracies to distribute tenders for the procurement of food for school children. This corruption scheme was revealed after it was discovered that the companies did not meet quality, quantity, and nutritional content standards. Beyond the contract value and price mark-up that occurred, the food rights of school children were also violated, as well as their nutritional conditions were directly affected. In these cases, the form of reparation should not be limited to state reimbursement, but may also include additional nutrition, health services, and cognitive support for affected children to mitigate the long-term effects. The cost for this kind of repair may be less than the actual value of the loss, but the value of the damage caused can include the lifetime impact of malnutrition during the growth and development period. This case shows the importance of a victim-based recovery approach in corruption cases that have an impact on basic rights. Read more: <https://www.elspectador.com/judicial/el-programa-de-alimentacion-escolar-es-una-mercancia-para-la-corrupcion-fiscalia-article-809171/>, and <https://medium.com/open-contracting-stories/the-deals-behind-the-meals-c4592e9466a2>.

However, in the majority of corruption cases, the extent of the damage or loss caused is difficult to determine accurately. The High Court of South Africa affirmed that all that could be expected of the plaintiff was to present the best evidence (*best available evidence*) available in connection with the calculation of losses. After that, the court will do its best to estimate the amount of the loss. (Waelbroeck & Even-Shoshan, 2004)

In line with that, the United States Supreme Court rejected the defendant's argument that the amount of loss could not be determined precisely. The court stated that the defendant did not have the right to sue for the uncertainty of the estimated loss, especially when the uncertainty was caused by his own unlawful actions. In other words, the inaccuracy of the value of losses is not a reason to absolve the perpetrators of corruption, as long as there is a reasonable and proportionate evidence basis to assess it.



6. STRENGTHEN ACCESS TO RECOVERY

Corruption inflicts double suffering on those who are most vulnerable and marginalized and struggle to meet their basic needs, as well as have fewer chances of breaking out of the cycle of poverty and social exclusion.

Therefore, efforts to eradicate corruption will not be complete if the damage caused by corruption is not repaired. This publication aims to encourage further research and exchange of ideas by presenting an overview of the current legal and practice situation in recovering losses due to corruption, as well as the accompanying legal and non-legal challenges.

This study aims to present an overview of the various developments of the international legal framework and legal solutions that enable victims to recover losses due to corruption. Given the various considerations and limitations in legal changes and their implementation on the ground, this final section is intended as an exploration of the steps that the State has and can take in strengthening victims' ability to obtain recovery.

6.1 Encouraging Victim Participation in Criminal Proceedings

In a legal system based on the *civil law tradition*, individuals who have suffered losses can apply to be recognized as a civil party in criminal proceedings. Once the status is approved by the court and the losses are proven, this individual can obtain compensation. Depending on the respective national law, this civil party status may also provide a variety of additional rights, such as access to evidence in the possession of the public prosecutor, participation in pre-trial investigations, the right to investigate the course of evidence on its own, and the opportunity to present evidence in trial.

In some countries, civil parties even have the right to challenge the prosecutor's decision if the case is not continued or stopped before a verdict is made. Although this approach has traditionally been more common in *civil law* jurisdictions, *common law* countries have also begun to adopt regulations that allow or require criminal courts to order perpetrators to pay compensation to their victims. Some countries have even developed guidelines for sentencing and case settlement that include aspects of compensation to victims as part of the criminal justice process.

Recommendations:

a. Granting of Participation Rights

Policymakers in countries that have not yet regulated the victim's right to be a party to criminal proceedings need to consider the passage of laws and regulations that allow victims to intervene in criminal cases.

b. Notice to Potential Victims

Policymakers and public prosecutors should ensure that individuals or groups who could reasonably be considered victims are given:

- Information about ongoing investigations and legal proceedings;
- Explanation of their right to join the process as a *civil party*.

c. Substantive Rights of Victims in Legal Proceedings

Policymakers are advised to provide the following rights to victims:

- Participate in pre-trial investigations;
- Submit and submit evidence at trial;

- Asking prosecutors to collect certain evidence and gain access to it;
 - Conduct independent investigations separately.
- Note:* These rights can be exercised without violating the principle of investigative confidentiality or burdening law enforcement officials.
- d. **Review of Decisions Not to Prosecute**
Policymakers should open up space for victims or independent entities to request a review of the decision of prosecutors who choose not to prosecute corruption cases.
 - e. **Reducing the Burden of Litigation Costs for Victims**
 - Encourage funding mechanisms from donors or the state to support victims' lawsuits.
 - Restrictions on excessive collection of fees in litigation in the public interest.

6.2 Encouraging Victim Participation in Civil Proceedings

Out-of-court settlement (such as *settlement* or *deferred prosecution*) is often used to handle complex corruption cases because it is faster and more resource-efficient than regular judicial proceedings. However, this approach is often carried out only between the prosecutor and the defendant, without directly involving the victim. As a result, victims' rights and interests are often ignored, the process is closed and not transparent, and there is no mechanism that guarantees victims to receive proper compensation.

Recommendations:

- a. **Involving Victims in Negotiations**
Policymakers need to regulate legally so that victims can participate in the process of negotiating settlement of cases out of court.
- b. **Providing Victim Representation Rights**
Victims must be represented in decision-making related to compensation or reparations, as well as in supervising the distribution of compensation funds.
- c. **Compiling Implementation Guidelines**
Policymakers need to develop guidelines that ensure the interests of victims are truly considered and implemented in their implementation.

6.3 Considering the Nature of Losses Due to Corruption

Losses due to corruption, especially in the case of *grand corruption*, are generally widespread and have an impact on groups of people who cannot be identified individually, or even on the entire society as a whole.

In some countries, government agencies, non-governmental organizations, or individuals may file legal action. This can be done through class action or representative action to claim compensation for social, diffuse, and collective harm on behalf of a group or even the entire population of the country.

Recommendations:

a. Expanding the Right to Collective Compensation for Victims

Policymakers, prosecutors, and judges need to consider ways to expand the right to compensation for collective victims, including through legal reforms if necessary. Damages should not be limited to the individual victims who are directly affected, as set out in the traditional causality approach.

b. Relaxing Legal Standing Rules

Policymakers should review legal rules that are too restrictive on the issue of legal standing, so that individuals and NGOs can file collective and individual reparation claims.

c. Allowing Victims to Claim Public Contract Violations

Victims who are beneficiaries of public contracts or public procurement need to be given the legal right to claim damages if the contract is violated due to corruption, also considering the potential impact on business actors.

d. Acknowledging Non-Material Damages

Policymakers are also advised to expand the scope of claims from *pecuniary damages* to non-pecuniary *damages*, such as social suffering, tarnished honor, or other psychological impacts.

6.4 Opening a Loss Recovery Room through the Reparation Fund

Losses due to corruption continue and have an impact even though the perpetrators have not or cannot be brought to justice. Even if the judicial process succeeds in punishing the perpetrators, the litigation system is not always able to fully compensate for all the losses resulting from corruption. Therefore, countries are encouraged to explore the establishment of reparations funds, which are designed to channel resources to address these various forms of damage, including both material and immaterial damages.

Recommendations:

- a. Policymakers should consider ways to establish a state reparation fund to cover losses that cannot be repaired through other mechanisms. These funds can serve to distribute reparations to individuals, communities, or groups that are victims of corruption, without having to rely entirely on the outcome of court or other legal proceedings.

6.5 Strengthening Access to Information and Civil Society Participation

In addition to legal and policy reforms, there is a need to support access to recovery through systemic approaches that include information, knowledge, and community participation.

Recommendations:

a. Public Monitoring and Reporting

Administrative authorities, policymakers, and judicial institutions need to monitor and publicly report on any case of reparations for losses due to corruption.

b. Legal Research and Studies

Legal researchers and academics are encouraged to actively monitor jurisprudence and conduct surveys of practitioners and victims. This will help identify legislative, doctrinal, and practice challenges in recovering losses due to corruption, and find ways to address them in a sustainable manner.

c. Active Participation of NGOs

NGOs and civil society organizations are encouraged to actively participate in legal processes, especially in cases involving collective or *diffuse rights and interests*. The role of NGOs is crucial in ensuring that victims' voices are heard and fairly represented.

REFERENCE

- Ambraseys, N., & Bilham, R. (2011). Corruption Kills. *Nature*, Issue 469, pp. 153–156. Retrieved from *Nature*, Issue 469, (2011): pp. 153–156.
- Bingham, L. (2011). *The Rule of Law*. Penguin UK.
- Bussani, M., & Infantino, M. (2012). The Many Cultures of Tort Liability. In J. Gordley, *The Architecture of the Common and Civil Law of Torts: An Historical Survey* (pp. 11–38). Cambridge: Cambridge University Press.
- Bussani, M., Palmer, V., & Parisi, F. (2009). The Comparative Law and Economics of Pure Economic Loss. In G. De Geest, & C. Nagel, *Economics of Comparative Law*. Edward Elgar.
- Chayes, S. (2017). *When Corruption is the Operating System: The case of Honduras*. Washington, DC: Carnegie Endowment for International Peace pp. 112–114.
- Council of Europe. (2003). *Civil Law Convention on Corruption (ETS No. 174)*. Retrieved from <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=174>
- Cristián Riego, M., & dkk. (2019). *The Criminal Justice System and Its Fight Against Corruption in Latin America: Report from Chile*. Santiago: Espacio Público.
- Elizabeth Oger-Gross, C., & André, A. (2018). Compensatory Damages Principles in Civil and Common Law Jurisdictions: Requirements, Underlying Principles and Limits. In T. John, *The Guide to Damages in International Arbitration* (p. 7).
- Göhler, J. (2019). Victim Rights in Civil Law Jurisdictions. In J. Broqn, & W. B., *The Oxford Handbook of Criminal Process* (pp. 267–288). Oxford: Oxford University Press.
- Hava, E. (2016). *Gran corrupción: estrategias para evitar su impunidad internacional*. Nuevo Foro Penal, Volume 12, Issue 8, pages 60–98.
- IBA. (2018). *Structured Settlements for Corruption Offences Towards Global Standards?* IBA Anticorruption Subcommittee.
- Kälin, & Künzli. (2022). *The Law of International Human Rights Protection*. Oxford University Press, Second Edition.
- Koziol, H. (2006). Recovery for Economic Loss in the European Union,. *Arizona Law Review*, Volume 48, 871–895.
- Mackey, T. K. (2016). *The Disease of Corruption: Views on How to Fight Corruption to Advance 21st Century Global Health Goals*. BMC Medicine Issue 14 pp. 149–165 (See also K. Hussmann Health sector corruption. (Bergen: U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, 2020), page 10.).
- Makinwa, A. (2019). *Empowering the Victims of Corruption: The Potential of Sleeping Third-Party Beneficiary Clauses*. New York: Open Society Foundations, Legal Remedies for Grand Corruption: The Role of Civil Society .
- Manikis, M. (2019). Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition. In D. Brown, *The Oxford Handbook of Criminal Process*. Oxford: Oxford Handbook.
- Messick, R. (2019). Legal Remedies for Victims of Grand Corruption Under U.S. Law. In O. S. Foundations, *Legal Remedies for Grand Corruption: The Role of Civil Society* (p. 103). New York: OSF.
- Meyer, O. (2009). Combatting Corruption by Means of Private Law—The German Experience. In O. Myer, & ed., *The Civil Law Consequences of Corruption*.
- OECD. (2019). *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*.
- Olaya Garcia, J. (2016). *Dealing with the Consequences: Repairing the Social Damage Caused by Corruption*. Retrieved from <https://ssrn.com/abstract=3475453> or <http://dx.doi.org/10.2139/ssrn.3475453>

- Ramasasthy, A. (2017). *Is There a Right to Be Free from Corruption?* University of Washington. Retrieved from <https://digitalcommons.law.uw.edu/faculty-articles/733/>
- Robin Antony, D., & S.E., M. (2015). *Abstract Endangerment,' Two Harm Principles, and Two Routes to Criminalization*. Minnesota Legal Studies Research Paper.
- Roht-Arriaza, N. (2020). Empowering Victims of Grand Corruption: an emerging trend?
- Rose-Ackerman, R., & Palifka, B. (2016). *Corruption and Government: Causes, Consequences, and Reform*. Cambridge, Cambridge University Press 2nd edition pp. 27–36.
- Skinninger, E. (2013). *Effect, Issues and Challenges for Victims of Crimes that have a Significant Impact on the Environment*.
- StAR Worldbank. (2014). *Public Wrongs, Private Actions at Public Wrongs*. Retrieved from Public Wrongs, Private Actions at Public Wrongs (World Bank, worldbank.org, 2014) <https://star.worldbank.org/publications/public-wrongs-private-actions>
- StAR. (2023). *Victim of Corruption: Back for Payback*. Stolen Asset Recovery Initiative & World Bank.
- Stephenson, M. (2019). Standing Doctrine and Anticorruption Litigation: A Survey. In O. S. Foundation, *Legal Remedies for Grand Corruption: The Role of Civil Society* (pp. 28-52). New York: OSF.
- Tawfiq Ladan, M. (2014). The Prospect of Public Rights Litigation before the ECOWAS Court Of Justice.
- The Guardian. (2019, March 1). *Spain's Watergate: inside the corruption scandal that changed a nation*. Retrieved from <https://www.theguardian.com/news/2019/mar/01/spain-watergate-corruption-scandal-politics-gurtel-case>
- Transparency International. (2010). « *BIENS MAL ACQUIS* » CASE: FRENCH SUPREME COURT OVERRULES COURT OF APPEAL'S DECISION. Retrieved from <https://www.transparency.org/en/press/20101109-biens-mal-acquis-case-french-supreme-court-overrules-court-of-appeal>
- Transparency International. (2015). *TRANSPARENCY INTERNATIONAL SCRUTINISES LATIN AMERICAN UNITS OF COMPANIES LINKED TO PETROBRAS SCANDAL*. Retrieved from <https://www.transparency.org/en/press/transparency-international-scrutinises-latin-american-operations-of-companies-linked-to-petrobras-scandal>
- Transparency International. (2020). *Exporting Corruption: Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention*. Berlin: Transparency International.
- Transparency International. (2023). *Alternative pathways to address impunity in grand corruption cases*. Retrieved from <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Alternative-pathways-to-address-impunity-in-grand-corruption-cases.pdf>
- U.S. Department of Justice. (2021, May 12). *Ericsson Agrees to Pay Over \$1 Billion to Resolve FCPA Case*. Retrieved from <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>
- United Kingdom's Department for International Development. (2015). *Why corruption matters: understanding causes, effects and how to address them*. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf
- UNODC. (2017). *State of implementation of the United Nations Convention against Corruption*. Retrieved from https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf

- Visentin, M. (2021, March 24). *Corruption Victims: Law and Practice in Italy, Russia, other European States*. Retrieved from Global Anticorruption Blog.
- Waelbroeck, D., & Even-Shoshan, G. (2004). *Study on the Conditions of Claims for damages in Case of Infringement of EC Competition Rules*. Ashurst.
- Weller, M. (2015). Who Gets the Bribe?—The German Perspective on Civil Law Consequences of Corruption in International Contracts. In M. Bonell, & O. Meyer, *The Impact of Corruption on International Commercial Contracts* (pp. 171-188). Switzerland: Global Studies in Comparative Law.



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