

THE PARTICIPATION OF VICTIMS AND CIVIL SOCIETY ORGANIZATIONS IN CRIMINAL PROCEEDINGS AGAINST ACTS OF CORRUPTION

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1. Background

Due to the fact that crimes of corruption are typified in the section relating to crimes against the property of the State or the public function in the penal codes of the region, they are defined as “crimes without victims”, so that damage generally affects public agencies, but nevertheless is identified with its direct individual or collective victims, in other words, those who suffer the consequences.

The NNUU Convention against Corruption, in its article 32-5, establishes that: *Each State Party will allow, subject to its internal decision, presenting and considering the opinions and concerns of the victims in appropriate stages of criminal proceedings.* Accordingly, article 35 allows for the possibility for these victims to claim compensation for damages and losses suffered as a result of an act of corruption. On the other hand, article 57 establishes that, at the time of defining the disposition and restitution of confiscated gifts, priority consideration *will be given to restitution of these benefits to their previous legitimate owners or to compensation for the victims of the offense.*

On the other hand, article 35 of the **NNUU Convention against Corruption** establishes that any damages and losses suffered as a consequence of an act of corruption can open legal proceedings against those responsible so as to obtain compensation, and article 57 states that when the product of acts of corruption has been recovered, priority is given to "*compensating the victims of the crime*". However, the Convention fails to give an express solution to the problem of how to determine who is a victim of corruption or how to determine damages.

The **Declaration on the Fundamental Principles of Justice for Victims of Crimes and Abuse of Power** adopted by the General Assembly of NNUU in its resolution 40/34, dated November 29, 1985, defines victims as: *persons that, individually or collectively, have suffered damage, including physical or mental injuries, emotional distress, financial loss, and substantial undermining of fundamental rights, as a result of actions or omissions that violate the current penal legislation, including that which proscribes the abuse of power, and sets forth that such persons will have access to the mechanisms of justice and a prompt repair of the damage that has been suffered, according to the provisions of national legislation.* As a result, the completion of the reparation of the victims of corruption has to be developed through internal regulations, in particular criminal proceedings, which is why it is necessary to compile information on the regulation and practice at the domestic level in order to identify good practices and the criteria used to contribute to the development of inter-American guidelines or parameters in this matter.

Although the **Inter-American Convention against Corruption** does not directly address the issue of the procedural participation of the victims, it establishes the obligation of the States to promote the development and harmonization of national legislation to achieve their objectives, one of which is the adoption of mechanisms to encourage the participation of civil society and non-government organizations in efforts against corruption (article III-11); one of these forms of participation is by representing the collective victims of such acts of corruption.

The possibility of addressing the phenomenon of corruption through civil-law measures can also be an approach that reinforces the instruments of fighting against corruption. The

Council of Europe adopted on November 6, 1997 Resolution (97) 24 on **Guiding Principles of the Fight against Corruption**. Principle 17 specifically indicates that the States must guarantee that civil law meets the need to fight against corruption and in particular to provide effective resources for those rights and interests that are affected by corruption. Thus, the Council of Europe approved the **Civil Law Convention on Corruption** on November 4, 1999, article 3-1 of which states that: *each Party will provide in its internal law that persons who have suffered damages resulting from an act of corruption have the right to initiate actions in order to obtain full compensation for damages.*

As for the Inter-American Commission on Human Rights, its **Report on Corruption and Human Rights: Inter-American standards** of 2019 establishes among other recommendations that when *there is evident social damage caused by corruption, the obligation of the States is to make every effort to identify the direct victims so that they are fully compensated, as well as the social sectors affected, in this way prioritizing the satisfaction of their rights.*

In the region there is no uniform practice of legislating in criminal procedural codes so that direct victims of corruption may enjoy full legitimacy in legal proceedings. Some countries have established that civil associations may participate as plaintiffs or claimants in legal proceedings where the vulnerability of collective benefits or diffuse interests is claimed, but it is not always clear whether corruption offenses are in this category. Thus, for example, among the countries that have followed the line of recognition of the procedural capacity for civil associations in cases of public interest, namely **Bolivia, Ecuador, Peru, Chile, El Salvador and Costa Rica**, the latter also expressly provides for collective dispute in cases of corruption. Mexico approved a **General Law on Victims** in 2003, which provides: *to guarantee the rights of victims of crime and violations of human rights, in particular the right to assistance, protection, attention, truth, justice, integral reparation*, thus acknowledging the participation of groups of casualties and civil-society organizations. Another special case is that of **Brazil**, which provides for a private action in crimes of public action only when this has not been entered by the Prosecutor's Office within the legal term.

Another central element is the lack of clarity on the best mechanisms to ensure that victims of corruption have access to comprehensive reparation, that is, who and how they should request reparations and if criminal proceedings are the most appropriate way for this purpose. There is a need to strengthen the legal capacity of criminal judges, so that when providing reparations to victims of corruption crimes, they use the standards developed by international law, the result being that the reparation provided is effectively comprehensive (restitution, rehabilitation, compensation, measures of satisfaction and guarantees of non-repetition) in its individual, collective, material, moral or symbolic dimensions.

2. Objective, scope of work and methodology

The objective of this work is to contribute to the process of progressive development of inter-American standards and guidelines on the procedural participation of civil associations and direct victims of acts of corruption, either individual or collective, as well as on their rights to comprehensive reparation, to promote the harmonization of the regional criminal procedural legislation on this matter.

To this end, this process will begin with the compilation and systematization of national practice in this matter, both at the normative and jurisprudential level, to contribute with inputs for the preparation of a regional analytical and comparative report on the state-of-the-art in these topics.

This work seeks, through the development of inter-American guidelines, to increase compliance with the objectives of the **Inter-American Convention against Corruption** set in 1997, which contribute to bringing this instrument into tune with the standards established by the **United Nations Convention against Corruption**, and current discussions at the global level, promoting the recognition of the rights of direct victims of corruption -both individual and collective (communities or associations without legal personality) - as well as to initiate and participate in extensive corruption proceedings, as this has more social impact on human rights,

including the procedural legitimacy of civil society organizations to represent collective or diffuse rights, as well as the need to develop parameters for the identification of damage and comprehensive reparation of victims or of those who have suffered damages in cases of corruption.

The **Pro-Bono Network of the Americas**, in collaboration with the **Due Process Foundation (DPLF)**, in support of the **Inter-American Juridical Committee of the Organization of American States (CJI/OAS)**, through its members in the 34 countries of the region will proceed to compile and systematize information on national regulations and emblematic cases of jurisprudence in the countries of the Americas on the recognition of the legitimacy of victims in corruption procedures, as well as on the capacity or role of the organizations of civil society to represent the victims, in addition to the development of comprehensive reparation mechanisms in these types of cases. The results of this work will be presented to the CJI/OAS during the March 22 Regular Session and will be disclosed to the public to contribute to the debate and advancement of this matter in the region.

The following form requires information about the legislation and national practice in the country where you carry out your duties. Please cite the sources in each one of your answers.

a. General information	
Name and Surname(s): Organization/Law Office	
E-mail address: Telephone No.:	
Country, Village or City	
Date on which this form has been completed	

b. Victims

1. *Who are the persons that the criminal legislation considers victims of the crime?*

- ___ The people directly offended or damaged by the crime.
- ___ The spouse or partner, members of the family in crimes resulting in the death of the offended person;
- ___ The legal persons in crimes impacting them; and,
- ___ The organizations of civil society that are legally established, in the case of crimes that affect collective or diffuse interests.
- ___ Collective entities or associations without legal/corporate personality or *de facto* associations
- ___ Other (please identify) _____

Please describe, if any, the legal definition of the victim:

Source:

2. *Which is the legal capacity of the victims according to the criminal legislation in your country?*

- ___ Complainant
- ___ Plaintiff (criminal)

- Private accuser
- Assistant to the Public Prosecution Office
- Other (please identify) _____

Source:

3. *Who can file a civil action seeking indemnification or remedy/relief in case of damages caused by the crime?*

- Only the person who suffered the damage
- All the victims defined in question # 1 in this form.
- Public Prosecutor / District Attorney
- Other (please identify) _____

Can this action be filed within the criminal proceeding? Or within the civil proceeding? On both, as per choice of the victim?

Source:

4. *Legally established civil society organizations, in crimes affecting collective or diffuse interests, have legal capacity to:*

- Prosecute in criminal matters
- File a civil action
- File constitutional actions
- Other (please identify) _____

Source:

5. *Do the organizations of civil society have legal standing for filing suit in corruption procedures in your country?*

- Yes,
- No
- If the response is “no”, only the Public Prosecutor, the state Attorney General or the state entity or public institution affected or damaged.

Source:

6. *Do you have any notice about an emblematic case where civil society organizations have exercised procedural capacity in corruption cases in your country? Which one?*

Source:

7. *Is there any judicial decision or jurisprudence in your country recognizing or making any statement on the role and legal capacity of civil society organizations in the fight against corruption in your country? Which one?*

Source:

c. Repair of damages.

8. *Please indicate the legislation applicable for demanding remediation, compensation, or indemnification in case of damages caused by corruption activities. How is the magnitude of the damage caused calculated and how is the amount of the indemnification determined? Which remediation/relief measures are employed (restitution, rehabilitation, indemnification, gratification measures and guarantees of non-repetition)?*

Source:

9. *Is there any jurisprudential development in the field of remediation/relief, compensation or indemnification for damages caused directly to private persons or collective entities by corruption activities?*

Source

10. *Do civil society organizations in your country enjoy legal capacity to file suit for the relief/remediation of damages caused in corruption cases?*

- Yes,
- No

Source:

11. *Is there any additional relevant information on this issue that you may provide?*

Additional comments:

How the real damage caused to the victim is established in corruption criminal proceedings?

Does the legal national framework establish any concept on social damage? Is a complaint for indemnification of damages caused to the public interest admitted?

Which are the juridical/procedural alternatives available for the involvement of the victim and/or the OSC in processes that determine the recovery/repatriation and/or confiscation/seizure of assets in corruption situations/cases?

Does your country recognize, at the constitutional or legal levels, the right to a corruption-free environment or something similar?

Source:

Thank you very much!