

ANTI-CORRUPTION HELPDESK

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COUNTRY EXPERIENCES WITH REPARATION FOR SOCIAL DAMAGES

QUERY

Please provide an overview of recent debates and country experiences with reparation for social damage in corruption cases.

PURPOSE

To inform discussions on incorporating reparations for social damage in corruption cases in Colombia's legal framework.

CONTENT

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SUMMARY

The concept of “social damage” is an emerging concept in the anti-corruption movement, which seeks to identify, quantify, and repair the impact and consequences of corruption on ordinary citizens. It applies to individuals as members of a community, and/or identifiable groups affecting specific rights, rather than any individual in particular.

The United Nations Convention against Corruption (UNCAC) provides a useful starting point for the development of national legal frameworks for reparations in the context of damage caused by corruption. At the practical level, mechanisms which may be employed to seek reparations for social damages include: explicit reparation mechanisms for collective damage; class actions or other public interest litigation mechanisms; civil law mechanisms; criminal procedures; and the use of constitutional and administrative law. At the same time, there are increasing attempts to use recovered assets for repairing social damage from corruption through a number of budgetary channels including enhanced country systems, autonomous funds and management by third parties.

Country experiences demonstrate how such mechanisms have been used successfully to date. One example that stands out is that of Costa Rica where the government formally presented the legal concept of social damage to the 4th Conference of State Parties (CoSP) to the UNCAC in 2011. The

Costa Rican legal framework offers numerous opportunities to pursue social damages for corruption thanks to the constitutional right of citizens to enjoy an environment free of corruption, coupled with the attorney general's power to launch civil action in cases of damage to collective or diffuse interests and the recognition of organisations as victims in such cases.

Despite these successes, numerous challenges remain, not least with regard to identifying the victims and establishing legal standing of complainants, calculating the scale of the damages to be repaired and using monetary sanctions from foreign bribery cases to finance reparations for social damages.

1 RECENT DEBATES ON REPARATIONS FOR SOCIAL DAMAGE IN CORRUPTION CASES

Definitions and concepts

Reparations

The concept of reparations is most often associated with human rights law and in particular transitional justice mechanisms. The UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power notes that "states should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support" (UN 1985).

The International Center for Transitional Justice (Magarrell 2007), meanwhile, provides a definition of reparations under five categories in line with the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of Human Rights Law (UNOHCHR 2005). Although this definition relates primarily to international human rights law, it nevertheless provides, – at least in part, – a useful framework to also understand reparations in the context of corruption cases. The five categories can be summarised as follows:

1. Restitution: measures which serve to restore the victim to the original situation before the gross violations occurred
2. Damages compensation: the provision of compensation for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case. Such compensation may take both monetary and non-monetary forms
3. Rehabilitation: medical, psychological, social services, and legal assistance
4. Satisfaction: various measures which include the cessation of violations and abuses, truth-seeking, searches for the disappeared, recovery and reburial of remains, judicial and administrative sanctions, public apologies, commemoration, and memorialisation
5. Guarantees of non-repetition: reforms ensuring the prevention of future abuses

In the case of corruption, it is fair to say that the focus of discussions to date has been on the second category (damages compensation), although, as discussed below, other measures are increasingly being considered.

Social damage

The concept of "social damage" is an emerging concept in the anti-corruption movement, which seeks to identify, quantify, and repair the impact and consequences of corruption on ordinary citizens (Panth 2010). Social damage can be described as "the loss experienced in aspects and dimensions of the collective or the community relevant to the law (thus legally protected)" (Olaya 2015). It affects individuals as members of a community, and/or identifiable groups affecting specific rights, but not an individual in particular. The damage caused by corruption may be material or immaterial and may include waste, lost opportunities and financial loss, as well as loss of trust and credibility in institutions (Olaya 2015).

Current legal status under UNCAC

The United Nations Convention against Corruption (UNCAC) includes at least three articles with both direct and indirect relevance to reparations for social damage in corruption cases.

UNCAC Article 35

Article 35 (Compensation for damage) states that:

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation (UN 2003).

A 2015 UNODC report notes that all but seven of the reviewed state parties have adopted measures to fully or partly implement Article 35: "... as a rule, national legal systems provide procedures allowing persons or entities to seek compensation for damages (material or immaterial), or any detrimental consequence suffered as a result of acts of corruption" (UNODC 2015).

However, it is rare to find specific legal provisions that provide a cause of action based on damages due to corrupt activities. Such cases are most commonly dealt with under the general principles of civil law (see approaches below). Moreover, as noted by Olaya (2015) most countries have not made any changes to their legislation to conform with Article 35, instead simply asserting that such mechanisms generally exist under their civil law procedures, their criminal law or both. One notable exception is the legal concept of social damage presented by the Costa Rican government during the 4th CoSP (Government of Costa Rica 2011)

To address this gap, Transparency International, at the 6th CoSP to the UNCAC in November 2015 requested the UNODC to prepare an in-depth study on the implementation of UNCAC Article 35 and to provide more guidance on private prosecutions (Olaya 2015b). The study is still pending.

UNCAC Articles 53 and 57

Article 53(b) (measures for direct recovery of property) states that:

Each State Party shall, in accordance with its domestic law: ... [t]ake such measures as may be necessary to permit its courts to order those who

have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences

Article 53(b) is of relevance here insofar as it relates (even if indirectly) to how recovered assets may be used for reparations for social damages in the country where the harm occurred.

Article 57(3c) (return and disposal of assets) meanwhile, states, among other things, that: *[T]he requested State Party shall: [...] give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.*

In addition, the 6th CoSP to the UNCAC in November 2015 adopted Resolution 6/2 on "facilitating international cooperation in asset recovery and the return of proceeds of crime". Among other things, the resolution directs the Open-ended Intergovernmental Working Group on Asset Recovery to:

[I]nitiate the process of identifying best practices for identifying victims of corruption and the parameters for compensation; and [...] collect information regarding the use of settlements and other alternative mechanisms and analyze the factors that influence the differences in the amount realized in the settlements and the amounts returned to affected states. (UN 2015).

This represents an important step forward as it implies that: i) Article 53(b) should apply to any and all foreign bribery proceedings, including settlements; ii) that states where the harm was produced should be entitled to make claims for compensation (see discussion on settlements below); and (iii) that states should actively seek to identify the victims of such harm and consider how to compensate them.

Possible approaches for operationalising reparations

While the UNCAC provides a useful starting point for the development of national legal frameworks for reparations in the context of damage caused by

corruption, it does not cover the detailed mechanisms through which the provisions may be enacted, nor does it directly address the specific issue of social damage, as defined above.

Legal mechanisms for seeking reparations

Olaya (2015) provides a useful discussion of the range of mechanisms which may be (and in some cases have been) employed to seek reparations for social damages as a result of corruption. An important distinction is made between injunction mechanisms that seek to stop a damage-causing activity versus redress mechanisms that aim to compensate for damage already caused. Such mechanisms include:

- Explicit reparation mechanisms for collective damage: existing laws entitling victims, or victims' associations, organisations, prosecutors or other authorities to pursue redress in cases where the public interest is affected and collective or diffuse damages can be used to seek injunction and compensation. It is possible that such mechanisms could be used, even if they do not mention explicitly social damage per se (see, for example, Costa Rica country experience below).
- Class actions or other public interest litigation mechanisms could also potentially be used to channel petitions of reparation of social damage.
- Civil law mechanisms may present opportunities to seek redress whether linked to a criminal procedure or not. The basis for action is the existence of the damage. These mechanisms are more likely available for identifiable groups of victims.
- Criminal procedures in many countries envision not only imposing sanctions but also redress to the victims. They often entitle victims to take part in the proceedings to seek compensation. The use of this mechanism, however, requires prosecutors to proactively pursue collective damage cases and provide measurements for the damage caused. In Peru for example, an approach that is starting to be tested by prosecutors is to simply claim redress for social damages based on the existing laws and mechanisms and innovating on how to measure

the damage to provide for proper compensation in cases of corruption (Arbizu González and Arriagada Barrera no date).

- Constitutional law may also present a channel for both injunction and redress, as it defines the government's duties and sets priorities in the public interest and thus may be used as a basis for legal action and to frame the type of damage infringed through corruption. At the same time, constitutional law may be used to enforce constitutional rights when they have been violated.
- Administrative liability may be invoked to claim compensation for damages caused by the conduct of public official(s).

The country experiences below demonstrate how some of these mechanisms have been successfully applied.

Using recovered assets for reparations

While broader debates around asset recovery mechanisms are beyond the scope of the query (see, for example, [here](#) for further details), the means by which recovered assets are disposed of may be closely linked to reparations for social damage.

In most cases, returned assets are channelled through national public financial management systems and are thus not targeted towards repairing the specific damages caused by the initial corrupt act. However, there are cases where returned funds have been used in a more targeted way. Such cases offer examples of how returned assets can be used to finance activities in the broader public interest and to (re)build trust in institutions which was lost through corruption. Specifically, three closely related options have been documented (UNCAC Working Group on Asset Recovery 2015):

- Enhanced country systems: these build on the existing country system, but introduce adjustments to improve control systems. An example was the repatriation of more than US\$500 million from Switzerland to Nigeria in 2005 and 2006. The Nigerian state agreed to strengthen its public financial management capacity with support from the World Bank and local civil society and to ensure the use of the

- funds for incremental funding of activities related to the Millennium Development Goals.
- **Autonomous funds:** these are public entities with separate governance and management arrangements which ensure clear lines of accountability for the delivery of specific outputs or services. One example is the Special Fund for the Administration of Illicitly Obtained Money (FEDADOI) in Peru after the return of more than US\$130 million from the Cayman Islands, Switzerland and the United States. While the assets contained in the fund were managed through standard budget procedures, their use was determined by the governing board of FEDADOI composed of representatives of Peruvian government agencies involved in the fight against corruption.
 - **Management by third parties:** Foundations or civil society organisations have sometimes played a role in the return and disposal of assets. In the case of US\$116 million returned from the United States and Switzerland to Kazakhstan, an independent foundation, the BOTA Kazakh Child and Youth Development Foundation was created. The board of trustees of BOTA is composed of five Kazakh citizens and one representative each from the governments of the United States and Switzerland. The assets are deployed under the supervision of a consortium of two internationally recognised independent specialist organisations, with the advice of the World Bank (see Kazakhstan country experience below).

A related concept is the “social re-use” of confiscated assets. This approach has been adopted, in particular, in countries confronting organised crime to compensate communities and social groups that have disproportionately suffered the effects of such crimes. In these cases, recovered assets are used in such a way that ensure that they are rededicated to the benefit of the public and that the “culture of legality” and the legitimacy of the state and its institutions are seen to prevail (UNCAC Working Group on Asset Recovery 2014). The mechanisms of “social re-use” vary across countries and include:

- providing grants or assets to NGOs for socially viable programmes
- providing assets to law enforcement agencies, or to specialised asset management offices
- providing assets and start-up costs to economically viable initiatives that create employment opportunities and contribute to overall economic growth of otherwise poor communities.

Practical considerations and challenges in seeking reparations for social damages

Despite the range of potential mechanisms for seeking and making reparations for social damages outlined above, in practice, substantial challenges remain. Nevertheless, such challenges can be overcome as a number of country experiences demonstrate (see below).

Identifying the victims and establishing legal standing of complainants

One fundamental challenge is that corruption continues to be viewed largely as a victimless crime, partly because of the narrow conception of corruption, but also because of the legal and practical challenges to identifying victims or injured parties¹. Victims or groups of victims are therefore largely absent in the criminal process (Olaniyan 2015).

One possible suggested route is to link corruption offences more closely to human rights law and, where relevant, to transitional justice mechanisms. As noted by UNOHCHR: “Human rights (and corruption) are indivisible and interdependent, and the consequences of corrupt governance are multiple and touch on all human rights — civil, political, economic, social and cultural, as well as the right to development” (UNOHCHR no date).

Human rights law establishes both significant accountability mechanisms and normative standards for implementing long-term, durable, sustainable, and broad legal and institutional reforms against

¹ In some legal systems criminal law makes a distinction between injured parties (who directly suffer the harm) and victims (who

may suffer the harm either directly or indirectly, for example, the victim’s family).

corruption. Thus, it is argued, it can ensure a measure of justice, fairness and effective remedy to victims of corruption and can serve as a strong deterrent, and incentive for action (Olaniyan 2015). However, limited attention has been paid to this link to date (Freedom House 2014).

A related challenge in the context of private anti-corruption actions is the doctrine of “standing”. In most cases, courts will only accept lawsuits brought by complainants who are legally entitled to do so. This often involves determining whether the complaining party has a sufficiently direct and concrete interest in the subject of the lawsuit. If the court determines this not to be the case, it will not hear the complaint, no matter how plausible the allegations of unlawful conduct (Stephenson 2016).

While civil procedures are often restricted to individual victims or identifiable groups, constitutional mechanisms or class actions may enable a broader entitlement. In other cases, prosecutors may act as representatives of the public interest as long as there is recognition of the social damage.

Moreover, reparations for social damages do not necessarily need to take place exactly where the damage occurred. For example, measures for (re)establishing trust in institutions, or to foster collaboration and participation can be designed to benefit the broader public interest rather than a specific group of individuals (Olaya 2015).

In practice however, the reality remains that the usual redress mechanisms in corruption cases are more suited to dealing with individual damage than with social or collective damages. (Olaya 2015).

The upcoming UNCAC Implementation Review Group meeting, scheduled to take place in Vienna, in June 2016, will offer a forum to advance discussions on these issues. Specifically, a panel has been proposed at a briefing for NGOs on “giving voice to victims: in settlements, and asset repatriation and through civil actions for damages”.

The panel will focus on how victims can be identified, including the role of civil society in identifying victims, the process by which victims can be given a greater voice in settlements and court proceedings, and the

process by which victims can be compensated, including through public compensation agreements with companies and through funding anti-corruption activities in line with Article 62 of UNCAC. (UNCAC Coalition 2016).

Calculating the damages to be repaired

Measuring the damage caused by corruption is another important challenge, particularly when it comes to social damage. However, as Olaya (2015) argues, these challenges need not be insurmountable. Innovative means can and have been applied for measuring the value of reparations.

In Costa Rica (see Costa Rica country experience below), the approach taken by the prosecutors was to quantify the impact of the corruption case in question based on: i) an estimate of the loss in investment caused by a reduction in investors’ trust in the Costa Rican government; and ii) an estimate of the impact of corruption on the political system by tracing abstention levels in the 2006 elections as a proxy for the loss in reputation and trust in the government institutions.

In Peru, meanwhile, a methodology has been proposed, using a set of existing criteria, to classify cases according to their importance, relevance and impact. While it is unclear whether this methodology will actually be tested in trial, it represents another possible approach (Olaya 2015).

Monetary sanctions in foreign bribery cases

As noted above, the recently adopted UNCAC Resolution 6/2 on facilitating international cooperation in asset recovery and the return of proceeds of crime represents an important step forward as it enables states to make compensation claims for damage caused through foreign bribery cases.

However, practice shows that the widespread use of settlements in such cases is undermining their potential to contribute meaningfully to reparations in the countries affected. A report by the World Bank’s StAR initiative (2014) illustrates how little of the monetary sanctions collected by the countries of enforcement have actually been returned to the

countries affected. Of the nearly \$6 billion of imposed fines in the 395 settlement analysed between 1999 and mid-2012, only about US\$197 million, or 3.3 per cent, has been returned or ordered returned to the countries whose officials were bribed or allegedly bribed.

Furthermore, in the majority of settlements, the countries whose officials were allegedly bribed have not been involved in the settlements and have not found any other means to obtain redress.

2. SELECTED COUNTRY EXPERIENCES IN INSTITUTING REPARATIONS FOR SOCIAL DAMAGE IN CORRUPTION CASES

Costa Rica

The Office of Public Ethics in Costa Rica successfully applied the concept of social damage in the repatriation of US\$10 million from the French-American company Alcatel, for damage inflicted on the citizens of Costa Rica in a corruption case involving a US\$140 million contract. Alcatel was accused of paying bribes to the former president and officials of the state-run telecommunication company in exchange for a contract to install 400,000 cell phone lines in the country (Panth 2010).

To pursue the case, the attorney general's office invoked the Costa Rican constitution, which enshrines the right of citizens to enjoy a healthy environment, understood among other things to include good public financial management and the absence of corruption. Any violation of these rights places a constitutional obligation on the state to repair the damage repaired (Government of Costa Rica 2011).

It is also significant that under Article 38 of the Costa Rican Criminal Procedural Code (CPC), the attorney general is entitled to launch a civil action in cases of damage to collective or diffuse interests that result from criminal offences. Furthermore, Article 70 of the Costa Rican CPC recognises organisations (foundations, associations and other non-profit organisations) as victims in crimes committed against collective or diffuse interests as long as the

purpose of such organisations is related directly to such interests (Olaya 2015).

There are further examples in Costa Rica of reparations for social damages being paid. For example, in a case involving the National Institute of Education (Instituto Nacional de Aprendizaje), around US\$1 million was reclaimed. The government estimates that to date a total of around US\$22 million has been recovered through cases of social damage, a significant sum in a country whose GDP amounts to US\$11,400 per capita (Government of Costa Rica 2011).

Nigeria

In Nigeria, the NGO SERAP has been pursuing public interest litigation before the Economic Community of West African States (ECOWAS) and the Nigerian courts to seek recognition of the social and collective impact corruption has on education and other public goods (Olaya, 2015b).

SERAP argued before the ECOWAS regional court that the Universal Basic Education Fund's mismanagement of funds aimed at basic education amounted to a denial of rights to education guaranteed under two regional treaties to which the government was party. The court agreed, and in its judgment ordered the government to cover the losses from corruption "lest a section of the people should be denied a right to education." The group is pressuring the government to implement the judgment and is seeking to have those responsible for the losses prosecuted and the stolen funds recovered (Messick 2014).

Kazakhstan

In Kazakhstan, a case was brought against James Giffen, a US attorney who bribed officials in Kazakhstan on behalf of US oil companies. As a result of proceedings, the governments of Kazakhstan, Switzerland and the United States agreed to channel US\$84 million to Kazakhstan. The funds were used to establish the BOTA Foundation, whose purpose is to "improve the lives of children, youth and their families suffering from poverty in Kazakhstan through investment in their health, education, and social welfare". The fund's board of

trustees includes several Kazakhstani academics and professionals, as well as government representatives from the US and Switzerland (Spalding 2014; StAR Initiative no date).

France

In 2011, the French supreme court upheld a judicial investigation on complaints lodged by two NGOs (Transparency International France and SHERPA) against the presidents of the Republic of the Congo, Equatorial Guinea and Gabon and their relatives for their unexplained acquisition of significant amounts of property and luxury goods in France. The case was accepted on the premise of social damage since “the claims of the complaint directly harm its interests, namely in fighting corruption” (Panth 2010).

While the appeals court initially dismissed the action, on the grounds that, among other things, non-profits were not formally authorised to bring such actions by the French government, the court of cassation overturned the decision and ultimately ruled that Transparency International France did in fact have legal standing (Messick 2014).

Un-named state parties to UNCAC

The court of cassation of one state party to the UNCAC has recognised the standing of an enterprise as a civil party in a criminal procedure in cases where its bids are rejected as a result of corruption in public procurement tenders. Similarly, the court recognised that a third party can invoke material and moral damage caused by the resulting illegal contract. In one case, a public office of the social housing department brought a civil action during a prosecution for passive bribery of its director and secretary because of the damage to its reputation that had been caused by the actions of its employees. In the same state, a court of cassation decision allowed an NGO active in corruption prevention to bring a civil action in criminal proceedings related to a corruption offence.

One state party to the UNCAC has established a special compensation fund within the ministry of justice, which is responsible for the enforcement of the decisions of criminal courts regarding civil liability and compensation for damage. The fund is

empowered to collect the amounts due from the obligated persons (including through the seizure of salaries, wages and other income) and to transmit these to the victims. It also guarantees compensation in cases where the perpetrators do not meet their responsibilities by drawing on funds from other sources (UNODC 2015).

India

Over the past 20 years, the Indian supreme court has increasingly accepted public interest litigation petitions while at the same time relaxing the strict rules of standing, allowing representative actions as well as actions by concerned citizens for issues of public interest. While it has primarily focussed on cases related to social causes and human rights issues, corruption-related complaints have been on the rise. The kinds of reparations imposed in such cases have included, among other things (Sengupta 2016):

- orders of the court that seek to undertake a systemic overhaul of institutions to reduce the incidence of corruption
- judgments that mandate ongoing judicial oversight of the criminal prosecution pertaining to the alleged acts of corruption
- the quashing of executive actions, without any compensatory action being ordered.

Peru

In Peru, the 2002 Law on the Comptroller General (*Ley Orgánica del Sistema Nacional de Control y de*

la Contraloría General de la República) defines civil responsibility as the duties held by civil and public servants, whose neglect (including through acts of corruption) may cause economic harm to his or her office or to the state. Such neglect invokes a contractual obligation to compensate the state for the damage caused.

In recent years a number of cases have been brought under this and other relevant laws to seek repairs for damages caused in corruption cases, including passive bribery, embezzlement and favouritism. In each case the individuals were ordered to pay reparations directly to the state or the affected offices. (Espinosa 2014).

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